PRIVATE PRISON HEALTHCARE AS PUBLIC ACCOMMODATION: LEVERAGING FEDERAL AND STATE PUBLIC ACCOMMODATIONS LAW IN PRISON DISABILITY LITIGATION

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The growth of private companies in the realm of carceral healthcare services has significant implications for plaintiffs seeking to challenge disability discrimination perpetrated during their incarceration. As the face of disability discrimination changes in carceral facilities, so should the legal remedies that hold them to account. This Note outlines the current scope of disability antidiscrimination litigation in prisons, jails, and detention centers as well as this framework's shortcomings in confronting the rise of privatized carceral healthcare services (referred to as "prison healthcare companies"). This Note then proposes a public accommodations theory of disability antidiscrimination law, under which incarcerated plaintiffs can utilize Title III of the Americans with Disabilities Act and state public accommodations law to seek both injunctive and monetary relief for disability discrimination they suffer under a privatized healthcare regime.

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INTRODUCTION

Though his jailers did not know it, Andrew Abraham had spent his entire life living with disabilities.[1] Abraham was born deaf, and his primary language was American Sign Language ("ASL").[2] Like many deaf people, Abraham preferred using videoconferencing software when he needed to communicate with nondeaf people.[3] These facts were lost on staff at the Clackamas County Jail who, on October 23, 2015, conducted a mental health evaluation on Abraham without an ASL interpreter.[4] In a screening conducted entirely in spoken English, which bears little resemblance to

1. Plaintiff-Appellant's Opening Brief at 3, Abraham v. Corizon Health, Inc., 985 F.3d 1198 (9th Cir. 2021) (No. 19-36077), 2020 WL 3621048. Abraham passed away at the age of fifty-five while his lawsuit was still pending. See Zane Sparling, Oregon Supreme Court Orders Private Companies Operating in Jails to Follow Anti-Discrimination Laws, OregonLive (June 8, 2022), https://www.oregonlive.com/crime/2022/06/oregon-supreme-court-orders-private-companies-in-jails-to-follow-anti-discrimination-laws.html (on file with the *Columbia Law Review*).

2. Plaintiff-Appellant's Opening Brief, supra note 1, at 3.

3. See id.

4. Id. at 4.

ASL,[5] the deputy in charge concluded that Abraham was suicidal.[6] Jail staff proceeded to strip Abraham and place him on suicide watch.[7]

Abraham spent three days in isolation without any means of communication.[8] Without an interpreter, he was unable to explain to medical staff that he was not only deaf but also diabetic, and he needed insulin to manage his disease.[9] Staff, on the other hand, repeatedly interpreted his lack of communication as a refusal of his insulin and his meals.[10] As a result, Abraham ended up spending days trapped without any means to get his medication.[11] When Abraham was finally released from jail, he filed a class action lawsuit seeking both injunctive and monetary relief for the discrimination he experienced on account of his multiple disabilities.[12]

The facts of Abraham's case are tragically commonplace in prisons and jails across the United States.[13] Disabled people are overrepresented in the U.S. incarcerated population, with roughly 40% of all incarcerated people reporting at least one disability.[14] These demographic realities

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5. American Sign Language, R.I. Comm'n on Deaf & Hard of Hearing, https://cdhh.ri.gov/information-referral/american-sign-language.php [https://perma.cc/YTE5-YMNA] (last visited Feb. 9, 2025) ("Contrary to popular belief, ASL is not representative of English nor is it some sort of imitation of spoken English that we use on a day-to-day basis. For many, it will come as a great surprise that ASL has more similarities to spoken Japanese and Navajo than to English.").

6. Plaintiff-Appellant's Opening Brief, supra note 1, at 4.

7. Id.

8. Id.

9. See id.

10. Id.

11. Id.

12. Abraham v. Corizon Health, Inc., No. 3:16-cv-01877-PK, 2017 WL 11718376, at *1 (D. Or. Apr. 10, 2017).

13. See, e.g., Lippert v. Godinez, No. 10 C 4603, 2015 WL 3777551, at *1 (N.D. Ill. June 16, 2015) (considering a diabetic plaintiff who lost consciousness after prison staff denied him a dose of his insulin); Catlett v. Jefferson Cnty. Corr. Dep't, No. 3:00CV-340-S, 2000 WL 35547524, at *1 (W.D. Ky. Nov. 3, 2000) (considering a deaf plaintiff who was unable to access high blood pressure medication because she could not communicate with any prison staff); see also Brief of Amicus Curiae Disability Rights Oregon et al. in Support of Plaintiff-Appellant Andrew Abraham at 26–49, Abraham v. Corizon Health, Inc., 511 P.3d 1083 (Or. 2022) (No. S068265), 2021 WL 4812511 (sharing stories of suffering disabled people have endured in correctional settings—stories that "were not selected because they are, in any way, exceptional; rather, they were selected because they exemplify the routine failures" baked into the system).

14. Laura M. Maruschak, Jennifer Bronson & Mariel Alper, DOJ, Survey of Prison Inmates, 2016: Disabilities Reported by Prisoners 2 (2021) https://bjs.ojp.gov/content/pub/pdf/drpspi16st.pdf [https://perma.cc/M825-85SY] ("State and federal prisoners (38%) were about two and a half times more likely to report a disability than adults in the U.S. general population (15%) . . . ."). Disturbingly, there is no reliable data on the prevalence of disabilities among immigrants in the United States, many of whom are sent to prison-like detention facilities while they await their deportation hearings. See Trinh Q. Truong, Emily DiMatteo & Mia Ives-Rublee, Crossing the Border: How Disability Civil Rights Protections Can Include Disabled Asylum-Seekers, Ctr. for Am. Progress (Aug. 24, 2022), https://www.americanprogress.org/article/crossing-the-border-how-disability-civil-rights-

reflect in part the fact that people targeted by the criminal legal system are far poorer and less able to access healthcare than their nonincarcerated counterparts.[15] Incarceration itself also takes a significant toll on disabled people, often exacerbating their disabilities or generating new ones altogether.[16] When a prison's policies serve to subordinate incarcerated people on account of their disabilities, individuals have turned to legal tools like the Americans with Disabilities Act ("ADA") and section 504 of the Rehabilitation Act ("section 504") to sue federal, state, and local governments in charge of carceral facilities.[17]

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protections-can-include-disabled-asylum-seekers/ [https://perma.cc/T5HK-87HN] ("An estimated 12 million people with disabilities were forcibly displaced worldwide in 2020 alone. The actual number is likely even higher, but because data collection instruments tend to ignore disabled status or are not accessible to all disabled people, there are no inclusive, reliable data about this . . . population." (footnotes omitted)).

15. See Leah Wang, Chronic Punishment: The Unmet Health Needs of People in State Prisons, Prison Pol'y Initiative (June 2022), https://www.prisonpolicy.org/reports/chronicpunishment.html#disability [https://perma.cc/HU2R-B6ZS] ("[H]alf (50%) of people in state prisons lacked health insurance at the time of their arrest. That's a devastating rate of uninsured people compared to the overall population: Between 2008 and 2016, the highest rate of uninsured people in the U.S. was just 15.5%." (emphasis omitted)). The study also notes that 32% of incarcerated people who received healthcare relied on Medicaid. Id.

16. See Jamelia Morgan, ACLU, Caged in: Solitary Confinement's Devastating Harm on Prisoners With Physical Disabilities 26–27 (2017), https://www.aclu.org/wp-content/uploads/publications/010916-aclu-solitarydisabilityreport-single.pdf [https://perma.cc/T9AF-4FSM] [hereinafter Morgan, Caged in] (noting that people with physical disabilities are "particularly susceptible to worsening physical" and mental health while they are incarcerated); see also Jill S. Levenson & Gwenda M. Willis, Implementing Trauma-Informed Care in Correctional Treatment and Supervision, 28 J. Aggression, Maltreatment & Trauma 481, 485–87 (2018) ("Time spent in correctional facilities produces a set of traumagenic experiences for most people."); Benjamin C. Hattem, Note, Carceral Trauma and Disability Law, 72 Stan. L. Rev. 995, 1003–04 (2020) (discussing "sexual violence; nonsexual violence; and isolation, especially prolonged segregation" as traumatizing carceral experiences).

17. See, e.g., Lewis v. Cain, No. 3:15-CV-318, 2021 WL 1219988, at *3 (M.D. La. Mar. 31, 2021) (considering section 504 and ADA claims against the Louisiana State Penitentiary); Fraihat v. U.S. Immigr. & Customs Enf't, 445 F. Supp. 3d. 709, 718–34 (C.D. Cal. 2020) (considering a section 504 claim for lack of COVID-19 safeguards in federal immigration detention), rev'd on other grounds, 16 F.4th 613 (9th Cir. 2021); Sid Garcia, LASD Settles Lawsuit to Make Jails More Accessible for Disabled, ABC7 Eyewitness News (Mar. 23, 2015), https://abc7.com/los-angeles-county-sheriffs-department-american-disabilities-act-lasd-civil-liberties-union/570303/ [https://perma.cc/UC8T-WS6V] (discussing a legal settlement to make Los Angeles County jails compliant with the ADA, including by purchasing "hundreds of new wheelchairs and provid[ing] physical therapy on site for disabled inmates").

What is *uncommon* about Abraham's lawsuit (and has resulted in its pendency before the Ninth Circuit) is the case's nongovernmental defendant, Corizon Health. Corizon (now known as YesCare[18]) is one of the country's largest private prison[19] healthcare companies and manages the medical care of roughly 116,000 incarcerated people throughout the United States.[20] Though Abraham experienced discrimination at a publicly run jail, the actual medical staff who placed Abraham in isolation and refused to provide him with his insulin were Corizon employees.[21] Using Oregon's state public accommodations law, Abraham argued that the mistreatment he suffered at the hands of Corizon employees amounted to disability discrimination in a commercial enterprise.[22]

The rise of private prison healthcare companies like Corizon in U.S. prisons, jails, and immigration detention centers has been deadly for disabled people.[23] It has also confounded efforts at legal redress: Title II of the ADA, which sets forth the primary disability discrimination claim brought

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18. Beth Schwartzapfel, A Prison Medical Company Faced Lawsuits From Incarcerated People. Then It Went 'Bankrupt.', Marshall Project (Sept. 19, 2023), https://www.themarshallproject.org/2023/09/19/corizon-yescare-private-prison-healthcare-bankruptcy [https://perma.cc/H6Z3-FTPA].

19. This Note will use the adjectival term "prison" as a shorthand encompassing facilities used to incarcerate people before a criminal trial, after a criminal sentence, or during the pendency of their immigration proceedings.

20. Jason Szep, Ned Parker, Linda So, Peter Eisler & Grant Smith, Special Report: U.S. Jails Are Outsourcing Medical Care—And the Death Toll Is Rising, Reuters (Oct. 26, 2020), https://www.reuters.com/article/us-usa-jails-privatization-special-repor/special-report-u-s-jails-are-outsourcing-medical-care-and-the-death-toll-is-rising-idUSKBN27B1DH[https://perma.cc/2FSS-U8QP].

21. Plaintiff-Appellant's Opening Brief, supra note 1, at 4–5.

22. See id. at 12–14.

23. See Eunice Hyunhye Cho & Tessa Wilson, ACLU, Am. Oversight & Physicians for Hum. Rts., Deadly Failures: Preventable Deaths in U.S. Immigration Detention 17, 26–53 (2024), https://assets.aclu.org/live/uploads/2024/06/2024-07-01-ICE-Detainee-Deaths.pdf [https://perma.cc/F3KU-WJXF] (sharing the stories of the fifty-two people who died in immigration detention between 2017 and 2021, the majority of whom were disabled and incarcerated within private detention centers); Jessica L. Adler & Weiwei Chen, Jail Conditions and Mortality: Death Rates Associated With Turnover, Jail Size, and Population Characteristics, 42 Health Affs. 849, 855 (2023) ("Our results indicate that health care in jail that is overseen by a public provider, as opposed to a private provider or a hybrid of the two, is related to lower mortality due to suicide."); Szep et al., supra note 20 ("A Reuters review of deaths in more than 500 jails found that, from 2016 to 2018, those relying on one of the five leading jail healthcare contractors had higher death rates than facilities where medical services are run by government agencies."); see also Brad Branan, California For-Profit Company Faces Allegations of Inadequate Inmate Care, Sacramento Bee (Jan. 17, 2015), https://www.sacbee.com/news/investigations/the-public-eye/article7249637.html (on file with the *Columbia Law Review*) (detailing how the practices of California's largest for-profit correctional healthcare company contributed to ninety-two deaths by suicide in the jails where it operated).

by disabled individuals in state and local custody,[24] only applies to public entities.[25] Courts have found this definition does not extend to private corporations, even if they are contracting with a governmental entity.[26] For those seeking to bring a disability discrimination claim from federal custody, the consensus view among circuits is that a plaintiff can only sue a private company under section 504 if the company receives "federal financial assistance," or subsidies from the federal government that go beyond mere compensation.[27] These statutory barriers in both the ADA and section 504 prevent disabled plaintiffs from bringing discrimination lawsuits against the companies that, as in the case of Abraham and countless others, perpetrate—and often profit off—their mistreatment.

As the face of disability discrimination changes in carceral facilities, so should the legal remedies that hold them to account. This Note therefore seeks to build the case that incarcerated individuals with disabilities can utilize Title III of the ADA and state public accommodations laws to bring disability discrimination claims against private medical corporations. Part I outlines the current remedial framework for disability discrimination claims and its application to the carceral context. Part II discusses the shortcomings of this framework in responding to the increasing privatization of prison healthcare. Against this legal backdrop, Part III proposes a framework for disability discrimination claims against prison healthcare companies. It surveys potential challenges to Title III's applicability to prisons and, using both federal and state antidiscrimination law, outlines the affirmative case for a public accommodations theory of private prison healthcare, as well as the advantages of such an approach.

I. DISABILITY LAW IN PRISON

When bringing a claim of disability discrimination, incarcerated plaintiffs can draw on a variety of state and federal remedies that form a patchwork of protections across varying settings. The current disability antidiscrimination framework for incarcerated individuals relies on Title II of the ADA and section 504, which allow claims against the state and local governments that run most prisons and jails.[28] This Part surveys the field of statutes that form the basis for U.S. disability law and how they have

24. See Margo Schlanger, Prisoners With Disabilities, *in* 4 Reforming Criminal Justice: Punishment, Incarceration, and Release 295, 301–10 (Erik Luna ed., 2017) (describing Title II of the ADA as one of "the two principal federal disability anti-discrimination statutes").

25. 42 U.S.C. § 12131 (2018).

26. See, e.g., Edison v. Douberly, 604 F.3d 1307, 1310 (11th Cir. 2010).

27. See Shotz v. Am. Airlines, Inc., 420 F.3d 1332, 1335 (11th Cir. 2005); DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1382 (10th Cir. 1990); Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1210 (9th Cir. 1984).

28. Americans with Disabilities Act, 42 U.S.C. §§ 12131–12134; Rehabilitation Act of 1973, 29 U.S.C. § 701 (2018); see also Colum. Hum. Rts. L. Rev., A Jailhouse Lawyer's Manual 994 (13th ed. 2024) (listing Title II of the ADA and section 504 of the Rehabilitation Act as "the two major federal laws against disability discrimination").

been applied to carceral contexts. It then concludes by considering other legal avenues for addressing medical harm in prison and underlines the unique role that the current framework plays for disabled people in prison.

A. *The Disability Antidiscrimination Framework*

1. *Title II of the ADA.* — The ADA has served as a cornerstone of disability antidiscrimination in prison. The ADA was passed in 1990 as an attempt to "end[] discrimination against disabled people across all facets of society."[29] In the Act's opening provisions, Congress laid out findings of discrimination disabled people face across various sectors and social metrics in the United States.[30] It also laid out specific manifestations of discrimination, including society's "tend[ency] to isolate and segregate individuals with disabilities."[31] Although the Supreme Court circumscribed the 1990 Act's protections in a series of cases,[32] Congress rejected the Court's narrow reading in the 2008 ADA Amendments Act and instead reemphasized the Act's "broad scope of protection."[33] Reviewing courts have also emphasized the wide applicability of the ADA "to nearly all facets of life, including 'in situations not expressly anticipated by Congress.'"[34]

Incarcerated communities have primarily relied on Title II of the ADA to vindicate their rights.[35] Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity."[36] The Act defines "public entity" as "any [s]tate or local government" or "any department, agency, or instrumentality" of such a

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29. Robyn M. Powell, Beyond Disability Rights: A Way Forward After the 2020 Election, 15 St. Louis U. J. Health L. & Pol'y 391, 402 (2022).

30. See 42 U.S.C. § 12101.

31. Id.

32. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3553 ("[T]he holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA . . . ."); id. ("[T]he holding of . . . Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA . . . .").

33. Id. at 3553–54.

34. Powell, supra note 29, at 404 (quoting Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998)).

35. See Colum. Hum. Rts. L. Rev., supra note 28, at 994–96 (listing Title II of the ADA as the one of the primary means by which an incarcerated person can make out a disability discrimination claim).

36. 42 U.S.C. § 12132.

government.[37] Reviewing courts have construed this definition broadly[38] but for the most part have refused to extend it to private contractors.[39]

Also of special importance to this Note is Title III of the ADA.[40] Under Title III, "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."[41] Title III defines "public accommodation" by example and offers a list of qualifying locales including places of recreation, lodging, education, and—notably—hospitals and health care providers.[42] Title III does not apply to "private clubs or establishments" exempt from coverage under Title II of the Civil Rights Act of 1964.[43] The Supreme Court has nonetheless held that the definition of "public accommodation" "'should be construed liberally' to afford people with disabilities 'equal access' to the wide variety of establishments available to the nondisabled."[44]

Titles II and III of the ADA require local and state governmental entities and public accommodations respectively to be accessible to disabled people.[45] This means that both settings must allow plaintiffs with qualifying disabilities access to auxiliary aids,[46] removal of physical barriers,[47] and the reasonable modification of the operator's policies and practices.[48]

2. *Section 504 of the Rehabilitation Act.* — While neither Title II or III of the ADA apply to the federal government,[49] Congress had previously

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37. Id. § 12131(1).

38. See *Yeskey*, 524 U.S. at 209 (noting that, unlike the Age Discrimination in Employment Act, "the ADA plainly covers state institutions *without* any exception").

39. See Matthews v. Pa. Dep't of Corr., 613 F. App'x 163, 170 (3d Cir. 2015) (holding that a prison healthcare company is not a public entity under Title II); Johnson v. Neiman, 504 F. App'x 543, 545 (8th Cir. 2013) (per curiam) (same); Phillips v. Tiona, 508 F. App'x 737, 754 (10th Cir. 2013) ("[W]e join the Eleventh Circuit and the overwhelming majority of other courts that have spoken directly on the issue, and hold that Title II of the ADA does not generally apply to private corporations that operate prisons."); Edison v. Douberly, 604 F.3d 1307, 1310 (11th Cir. 2010) ("[A] private corporation is not a public entity merely because it contracts with a public entity to provide some service."); Green v. City of New York, 465 F.3d 65, 79 (2d Cir. 2006) (holding that an "instrumentality" of the state within the meaning of Title II only reaches "a creature of a state or municipality," not a private contractor).

40. 42 U.S.C. § 12182.

41. Id.

42. See id. § 12181(7).

43. Id. § 12187.

44. PGA Tour, Inc. v. Martin, 532 U.S. 661, 676–77 (2001) (first quoting S. Rep. No. 101-116, at 59 (1989); then quoting H.R. Rep. No. 101-485, pt. 2, at 100 (1990)).

45. 28 C.F.R. §§ 35.150(a), 36.301(a) (2024).

46. Id. §§ 35.160(b)(1) (Title II), 36.303 (Title III).

47. Id. §§ 35.150(b)(1) (Title II), 36.304 (Title III).

48. Id. §§ 35.130(b)(7) (Title II), 36.302(a) (Title III).

49. 42 U.S.C. § 12131(1) (2018) (limiting Title II's definition of "public entity" to state and local governments); id. § 12181(7) (defining "public accommodations" to only encompass private entities).

passed section 504 of the Rehabilitation Act in 1973 to protect disabled people from discrimination in federally conducted or assisted activities.[50] Using language similar to the ADA, section 504 states: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[51] This protection extends to both federally run programs along with entities that receive federal funding.[52]

Courts have found an implied cause of action within section 504.[53] As a result, plaintiffs can bring a claim under the Rehabilitation Act itself, the Administrative Procedure Act, or both.[54] Courts analyze section 504's cause of action in roughly the same fashion as Title II of the ADA.[55]

3. *State Antidiscrimination Laws.* — Another rarely utilized avenue for disabled people in prison is state antidiscrimination laws. All but three states have laws prohibiting discrimination on the basis of disability status in places of public accommodation.[56] Unlike Title III of the ADA, which only offers injunctive relief to plaintiffs,[57] a majority of these state provisions include a damages remedy.[58] Some states also assess criminal liability for individuals found to have engaged in such discrimination.[59]

States differ in their statutory definition of "public accommodation." Some states define public accommodations using a limited set of business types.[60] California's antidiscrimination statute, on the other hand, "has one of the broadest definitions of what constitutes a public accommoda-

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50. See 29 U.S.C. § 794 (2018).

51. Id. § 794(a).

52. See Emerson v. Thiel Coll., 296 F.3d 184, 190 (3d Cir. 2002) (per curiam) ("Section 504 applies to federal financial assistance recipients." (citing U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605–06 (1986))).

53. See Margo Schlanger, Elizabeth Jordan & Roxana Moussavian, Ending the Discriminatory Pretrial Incarceration of People With Disabilities: Liability Under the Americans With Disabilities Act and the Rehabilitation Act, 17 Harv. L. & Pol'y Rev. 231, 273 n.181 (2022) (listing decisions that have favored the Administrative Procedure Act's standard for a disability discrimination claim under section 504).

54. See, e.g., Mendez v. Gearan, 947 F. Supp. 1364, 1366–68 (N.D. Cal. 1996) (finding that section 504 and the Administrative Procedure Act "provide overlapping rights of action for injunctive relief for plaintiffs alleging discrimination on the basis of a disability by a federal agency" (citing J.L. v. Soc. Sec. Admin., 971 F.2d 260, 264 (9th Cir. 1992))).

55. ACLU Nat'l Prison Project, Know Your Rights: Legal Rights of Disabled Prisoners 1, https://www.aclu.org/sites/default/files/field_document/know_your_rights_–_disability_november_2012.pdf [perma.cc/X577-2DYV] (last updated 2012).

56. See infra Appendix (listing state disability antidiscrimination laws).

57. 42 U.S.C. § 12188 (2018).

58. See infra Appendix.

59. See, e.g., Ga. Code Ann. § 30-4-4 (2025); Utah Code § 26B-6-805 (2023).

60. See, e.g., Fla. Stat. Ann. § 760.02(11) (West 2025) (narrowly defining a public accommodation to include transient lodging, food vendors, and "places of exhibition or entertainment").

tion, encompassing 'all business establishments of every kind whatsoever.'"[61] Reviewing courts have looked to other states' public accommodations laws as persuasive precedent in interpreting their own state laws, while also noting differences in statutory construction.[62]

States have also connected the application of their public accommodations laws to Title III of the ADA. Many states have done so in the statute's construction or statement of purpose.[63] California's Unruh Civil Rights Act again goes the furthest, making any violation of the ADA an automatic violation of the California state statute.[64] While Title III only offers injunctive relief, an incarcerated plaintiff could collect damages using their state's public accommodations law.

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61. David Brody & Sean Bickford, Laws.' Comm. for C.R. Under L., Discriminatory Denial of Service: Applying State Public Accommodations Laws to Online Commerce 10 (2020), https://lawyerscommittee.org/wp-content/uploads/2019/12/Online-Public-Accommodations-Report.pdf [https://perma.cc/78L2-SC8C] (quoting Cal. Civ. Code § 51 (2025)).

62. See, e.g., CHRO ex rel. Vargas v. State Dep't of Corr., No. HHBCV136019521S, 2014 WL 564478, at *7–8 (Conn. Super. Ct. Jan. 10, 2014) (finding Arizona, Maine, Pennsylvania, and West Virginia courts' interpretations of their states' public accommodations laws persuasive, but declining to apply the logic of Vermont's public accommodations law).

63. See, e.g., Idaho Code § 67-5901 (2025) ("The general purposes of this chapter are: (1) To provide for execution within the state of the policies embodied in . . . Titles I and III of the Americans with Disabilities Act."); Iowa Code § 216C.1 (2025) ("[I]t is the policy of this state to ensure compliance with federal requirements concerning persons with disabilities."); Ky. Rev. Stat. Ann. § 344.020 (West 2025) ("The general purposes of this chapter are: (a) To provide for execution within the state of the policies embodied in . . . the Americans with Disabilities Act of 1990 . . . ."); Vt. Stat. Ann. tit. 9, § 4500 (2025) ("The provisions of this chapter establishing legal standards, duties, and requirements with respect to persons with disabilities in places of public accommodation. . . are intended to implement and to be construed so as to be consistent with the Americans with Disabilities Act . . . ."); Wyo. Stat. Ann. § 35-13-205(a)(vi) (2025) (linking the state statute's definition of public accommodation to federal Title III regulations); Tate v. Dart, 51 F.4th 789, 793 (7th Cir. 2022) ("Illinois courts analyze [Illinois Human Rights Act] claims under a framework that is practically indistinguishable from the ADA framework . . . ."); Segal v. Metro. Council, 29 F.4th 399, 403–04 (8th Cir. 2022) ("Because '[c]laims arising under the [Minnesota Human Rights Act] are analyzed using the same standard applied to ADA claims,' we review the claims simultaneously." (first alteration in original) (quoting Brunckhorst v. City of Oak Park Heights, 914 F.3d 1177, 1182 (8th Cir. 2019))); Duty v. Norton-Alcoa Proppants, 293 F.3d 481, 490 (8th Cir. 2002) (noting that reviewing courts analyze disability claims under the Arkansas Civil Rights Act using the ADA framework); see also West v. Alaska Airlines, Inc., No. 3:18-cv-00102-JMK, 2020 WL 8175608, at *6 (D. Alaska Nov. 19, 2020) ("The Supreme Court of Alaska often looks to the federal Americans with Disabilities Act (ADA) to inform its interpretation of the [Alaska Human Rights Act]."); Wolff v. Beauty Basics, Inc., 887 F. Supp. 2d 74, 77 (D.D.C. 2012) (noting that cases interpreting the ADA and the District of Columbia Human Rights Act are interchangeable in certain contexts); Colo. Code Regs § 708-1:60.1 (2025) ("The Law concerning handicap and/or disability is substantially equivalent to Federal law, as set forth in the [ADA] . . . .").

64. Cal. Civ. Code § 51(f).

B. *Applying Disability Law to Prison*

1. *Disability Discrimination in Prison.* — Disabled people are overrepresented in U.S. prisons.[65] Approximately 40% of people in U.S. prisons are disabled, compared to only 15% of the U.S. adult population.[66] Incarcerated people in state prisons are more than twice as likely than the average U.S. adult to have a hearing disability, almost five times more likely to have a cognitive disability, and six times as likely to have a vision-related disability.[67] The staggering number of incarcerated people suffering from psychiatric disabilities has led researchers to conclude "that jails and prisons have become America's mental hospitals."[68]

This disturbing trend is the result of a centuries-old U.S. socio-legal infrastructure that has branded disability as disorderly and dangerous. Beginning in the late nineteenth century, cities across the country began passing so-called "ugly laws": ordinances that turned those who presented as disabled into a criminal class.[69] The convergence of disability and criminality gained further traction during the eugenics movement, which penned a host of laws prohibiting the procreation, marriage, and immigration of people who were believed to be "morally, physically, and mentally deviant."[70] Using vague concepts like "feeblemindedness" or "defectiveness" to connect disability with notions of immorality, criminality, sexual promiscuity, and nonwhiteness,[71] eugenicist lawmakers constructed

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65. See supra note 14 and accompanying text.

66. See Maruschak et al., supra note 14, at 2.

67. See Wang, supra note 15 (presenting a figure showing the rates for hearing, vision, cognitive, and ambulatory disabilities for people in state prisons compared to the U.S. population overall).

68. E. Fuller Torrey, Aaron D. Kennard, Don Eslinger, Richard Lamb & James Pavle, Treatment Advoc. Ctr. & Nat'l Sheriffs' Ass'n, More Mentally Ill Persons Are in Jails and Prisons than Hospitals: A Survey of the States 8–9 (2010), https://static.prisonpolicy.org/scans/treatment/final_jails_v_hospitals_study.pdf [https://perma.cc/J7YZ-PNUB].

69. See Susan M. Schweik, The Ugly Laws: Disability in Public 24–36 (2009).

70. Jamelia N. Morgan, Policing Under Disability Law, 73 Stan. L. Rev. 1401, 1413–14 (2021) [hereinafter Morgan, Policing Under Disability Law]; see also Mark A. Largent, Breeding Contempt: The History of Coerced Sterilization in the United States 64–65 (2008) (tracing the spread of marriage regulation laws, beginning in 1895 with Connecticut's law that criminalized "marriage or intercourse where either man or woman is epileptic, imbecile, or feebleminded" (internal quotation marks omitted) (quoting Albert Gray, Notes on the State Legislation of America in 1895, 1 J. Soc'y Compar. Legis. 232, 233 (1896–1897))); Douglas C. Baynton, Defectives in the Land: Disability and American Immigration Policy, 1882–1924, 24 J. Am. Ethnic Hist. 31, 33–34 (2005) (noting how, beginning in 1882, immigration laws prohibited entry or imposed conditions upon entry for immigrants deemed to be a "lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge" (internal quotation marks omitted) (quoting An Act to Regulate Immigration, ch. 376, §2, 22 Stat. 214, 214 (1882))).

71. See Jamelia Morgan, On the Relationship Between Race and Disability, 58 Harv. C.R.–C.L. L. Rev. 663, 699, 707, 708 n.245 (2023) ("Like sterilization laws, anti-miscegenation laws passed in the early twentieth century were animated by an underlying goal of avoiding so-called degenerate offspring." (citing Paul A. Lombardo, Miscegenation,

disability as "a social contagion or pathology to be contained through policing and carceral control."[72]

The criminalization of disability, combined with the failure to invest in community-based alternatives to psychiatric institutions, has rendered disabled individuals vulnerable to underinsurance,[73] homelessness,[74] and—ultimately—incarceration.[75] For people with psychiatric disabilities, this "mental-distress-to-arrest pipeline"[76] is facilitated through low-level

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Eugenics, and Racism: Historical Footnotes to *Loving v. Virginia*, 21 U.C. Davis L. Rev. 421, 423 (1988))); Morgan, Policing Under Disability Law, supra note 70, at 1414 ("[E]ugenicists' 'greatest target was the "feebleminded," a loose designation that included people who were mentally [disabled], women considered to be excessively interested in sex, and various other categories of individuals who offended the middle-class sensibilities of judges and social workers.'" (second alteration in original) (quoting Adam Cohen, Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck 6 (2016))); see also Laura I. Appleman, Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration, 68 Duke L.J. 417, 445 (2018) ("In eugenic science, feeblemindedness was closely linked to promiscuity, criminality, and social dependency."); Christian B. Sundquist, The Meaning of Race in the DNA Era: Science, History and the Law, 27 Temp. J. Sci., Tech & Env't L. 231, 247 (2008) (noting eugenicists' use of IQ tests on Ellis Island to confirm their "pre-existing racial beliefs that the vast majority of southern and eastern European immigrants were 'feebleminded' and thus deportable" (citing William H. Tucker, The Science and Politics of Racial Research 78, 81 (1994))); Mark C. Weber, Opening the Golden Door: Disability and the Law of Immigration, 8 J. Gender, Race & Just. 153, 159 (2004) (observing immigration policymakers' fear "that mentally defective immigrants . . . contribute largely to the criminal classes and that they may leave feeble minded descendants and so start vicious strains leading to misery and loss in future generations" (quoting William Williams, Immigration and Insanity (Nov. 14, 1912), *in* Nat'l Comm. for Mental Hygiene & State Charities Aid Ass'n, Proceedings of the Mental Hygiene Conference and Exhibit 175, 180 (1912))).

72. See Morgan, Policing Under Disability Law, supra note 70, at 1414.

73. See Wang, supra note 15 ("The number of health problems reported by incarcerated people may be partially explained by their difficulty accessing healthcare before incarceration: half (50%) of people in state prisons lacked health insurance at the time of their arrest. That's a devastating rate of uninsured people compared to the overall population . . . ." (emphasis omitted)).

74. See Sarah Radcliffe, Disability Rts. Or., The "Unwanteds": Looking for Help, Landing in Jail 10, 14 (2019), https://static1.squarespace.com/static/6387d767fc8a755e41aa5844/t/646d9ab012826a77153a68d4/1684904640240/Report-The-Unwanteds-Looking-for-Help-Landing-in-Jail-2019-June18.pdf [https://perma.cc/DA3M-FMHT] (reviewing arrests for trespass at Portland-area hospitals and finding that 72% of arrests involved people who identified as homeless or transient); Heidi Schultheis, Lack of Housing and Mental Health Disabilities Exacerbate One Another, Ctr. for Am. Progress (Nov. 20, 2018), https://www.americanprogress.org/article/lack-housing-mental-health-disabilities-exacerbate-one-another/ (on file with the *Columbia Law Review*) (noting how the failure of deinstitutionalization and the growing affordable housing crisis "means that people with mental health disabilities and people experiencing homelessness are overcriminalized and overincarcerated").

75. See Morgan, Policing Under Disability Law, supra note 70, at 1416 ("Decades-long failures to invest in community-based mental-health treatment have rendered disabled people particularly vulnerable to criminalization in private and public spaces and even in the places charged with providing medical and mental-health care.").

76. Id. at 1418.

criminal charges like trespass, disorderly conduct, and violation of probation.[77] And when disabled people are in a crisis (or are perceived as such by an outside observer), it is often police officers who are first on the scene to provide crisis services,[78] notwithstanding their lack of training on disability recognition.[79] The result is that disabled people are significantly more likely to face arrest and incarceration than their nondisabled counterparts.[80]

At the same time, the prevalence of disability behind bars reflects not only the criminalization of disability but also the disabling effects of the U.S. carceral system.[81] Incarceration is bad for people's health.[82] Conditions like prison violence, substandard food quality, inadequate healthcare, and stress can both exacerbate existing disabilities and create

77. See Radcliffe, supra note 74, at 3 ("Many of the people who suffer most profoundly in jail have serious mental health concerns and are arrested on low-level charges related to their disability—trespass, disorderly conduct, misuse of 911, or violation of probation terms that they were never equipped to meet."); see also Robert Bernstein, Ira Burnim & Mark J. Murphy, Judge David L. Bazelon Ctr. for Mental Health L., Diversion, Not Discrimination: How Implementing the Americans With Disabilities Act Can Help Reduce the Number of People With Mental Illness in Jails 20 (2017), https://www.bazelon.org/wp-content/uploads/2018/07/MacArthur-White-Paper-re-Diversion-and-ADA.pdf [https://perma.cc/9ZJA-6ELP] ("The offenses with which [people with psychiatric disabilities] are charged are commonly low-level, nonviolent offenses.").

78. Jamelia N. Morgan, Psychiatric Holds and the Fourth Amendment, 124 Colum. L. Rev. 1363, 1374–75 (2024) (surveying the use of law enforcement in the provision of crisis services in the United States).

79. Lily Robin & Evelyn F. McCoy, Policing Is Killing Black Disabled People. Centering Intersectionality Is Critical to Reducing Harm., Urban Inst. (Nov. 15, 2021), https://www.urban.org/urban-wire/policing-killing-black-disabled-people-centering-intersectionality-critical-reducing-harm [https://perma.cc/2QJF-NZQU] (noting that police officers often have no training to support disabled people in crisis and instead deploy "'command and control' tactics" in response to perceived noncompliance); Vilissa Thompson, Understanding the Policing of Black, Disabled Bodies, Ctr. for Am. Progress (Feb. 10, 2021), https://www.americanprogress.org/article/understanding-policing-black-disabled-bodies/ (on file with the *Columbia Law Review*) ("[A] police officer's failure to consider someone's disability can lead to escalation or the use of excessive force, such as unnecessarily using pepper spray, tasing, or initiating an arrest.").

80. See Radcliffe, supra note 74, at 16 ("Despite the fact that the vast majority of [hospital arrests] involved non-violent, passive resistance to leaving a hospital, almost every one of these individuals ended up in jail."); Erin J. McCauley, The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender, 107 Am. J. Pub. Health 1977, 1980 (2017) ("The cumulative probability of arrest was significantly higher for those with disabilities . . . than for those without disabilities . . . .").

81. See Laurin Bixby, Stacey Bevan & Courtney Boen, The Links Between Disability, Incarceration, and Social Exclusion, 41 Health Affs. 1460, 1467 (2022) ("In addition to the high risks of incarceration experienced by disabled people, being incarcerated can increase disablement and exacerbate existing disability.").

82. Rabia Belt, The Fat Prisoners' Dilemma: Slow Violence, Intersectionality, and a Disability Rights Framework for the Future, 110 Geo. L.J. 785, 803 (2022).

new ones altogether.[83] And, more fundamentally, the nature of incarceration itself—of separating a person from their family, community, and everyday life—can create a sense of meaninglessness and disconnection that contributes to psychiatric disabilities like anxiety and depression.[84]

Of special mention in this analysis is solitary confinement. It is well-established that "solitary confinement inflicts devastating mental and physical harms on human beings."[85] Roughly half of all suicides in prison are completed by the 5–6% of incarcerated people who are held in solitary confinement.[86] On top of the deleterious psychological toll solitary confinement inflicts,[87] it presents even more challenges to individuals with preexisting disabilities. These include architectural challenges of tiny isolation cells (to wheelchair users, for example), limited access to medical care, minimal physical activity, and a diminished ability to care for oneself.[88] Solitary confinement can also have a particularly pronounced

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83. See Amy Smith, Nat'l Rsch. Council & Inst. of Med. of the Nat'l Acads., Health and Incarceration: A Workshop Summary 7–8 (2013), https://nap.nationalacademies.org/read/18372/chapter/1 (on file with the *Columbia Law Review*) ("Poor ventilation, overcrowding, and stress [in prisons] may exacerbate chronic health conditions."); Rebecca Vallas, Ctr. for Am. Progress, Disabled Behind Bars: The Mass Incarceration of People With Disabilities in America's Jails and Prisons 10–11 (2016), https://www.americanprogress.org/wp-content/uploads/sites/2/2016/07/2CriminalJustice Disability-report.pdf [https:// perma.cc/N652-3BHA] ("[P]oor conditions ranging from lack of access to health care to inadequate nutrition create an environment in which existing physical and mental health conditions can be exacerbated—and even developed where they did not previously exist.); Belt, supra note 82, at 797–803 (noting how conditions like stress, low-quality food, and limited opportunities for exercise and movement "make incarcerated people particularly vulnerable to the elements that cause and maintain fatness"); see also Hattem, supra note 16, at 1004–14 (discussing the negative effects that sexual and nonsexual violence, solitary confinement, and witnessing violence have on incarcerated individuals).

84. See Katie Rose Quandt & Alexi Jones, Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health, Prison Pol'y Initiative (May 13, 2021), https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/ [https://perma.cc/RPE9-9FBS] (summarizing the ways in which incarceration itself can impact a person's mental health through family disconnection, loss of autonomy, and unpredictability).

85. Morgan, Caged in, supra note 16, at 24; see also Andrea Fenster, New Data: Solitary Confinement Increases Risk of Premature Death After Release, Prison Pol'y Initiative (Oct. 13, 2020), https://www.prisonpolicy.org/blog/2020/10/13/solitary_mortality_risk/ [https: //perma.cc/2YB4-CJCC] ("A 2007 study found that the risk of death in these first two weeks [upon release from solitary confinement] can be up to 12 times higher than that of the general population.").

86. Morgan, Caged in, supra note 16, at 25.

87. See, e.g., Jessica Sandoval, How Solitary Confinement Contributes to the Mental Health Crisis, Nat'l All. on Mental Illness (Mar. 17, 2023), https://www.nami.org/Blogs/NAMI-Blog/March-2023/How-Solitary-Confinement-Contributes-to-the-Mental-Health-Crisis [https://perma.cc/Y587-5MW9] ("Among many other mental health experts, Dr. Stuart Grassian, a psychiatrist, observed the devastating mental health consequences of the practice. Solitary confinement, he found, caused either (1) the exacerbation or recurrence of preexisting mental health issues, or (2) the onset of an acute mental illness.").

88. See Morgan, Caged in, supra note 16, at 26–31.

psychological effect on individuals with sensory disabilities who may not have access to any form of conversation with other people (for those with hearing impairments) or access to recreational activities like reading, writing, and crafts (for those with vision impairments).[89]

Correctional staff also frequently weaponize solitary confinement against disabled people, sometimes under the guise of medical isolation.[90] Solitary is commonly used for individuals whom officials believe to be experiencing suicidal thoughts[91] and was deployed as quarantine protocol during the COVID-19 pandemic.[92] Researchers and advocates have also documented solitary's use as a protective measure for individuals with psychiatric disabilities[93] or a control mechanism for individuals with cognitive disabilities who do not adhere to a facility's rules.[94] Disabled individuals have argued that this weaponization of solitary confinement amounts to a form of social control and a way to discourage people from seeking help for their disabilities.[95]

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89. See id. at 32–35.

90. See id. at 41–42.

91. Id.

92. See David H. Cloud, Cyrus Ahalt, Dallas Augustine, David Sears & Brie Williams, Medical Isolation and Solitary Confinement: Balancing Health and Humanity in US Jails and Prisons During COVID-19, 35 J. Gen. Internal Med. 2738, 2738–40 (2020) ("In many correctional facilities, the only available spaces for implementing quarantine or medical isolation are those typically used for punishing people with solitary confinement. . . . Repurposing solitary confinement units . . . runs the risk of corrections officials falling back on policies that subject people to living conditions known to harm their health.").

93. See Spencer Woodman, ICE Detainees Are Asking to Be Put in Solitary Confinement for Their Own Safety, The Verge (Mar. 10, 2017), https://www.theverge.com/2017/3/10/14873244/ice-immigrant-detention-solitary-trump-corecivic-geo [https://perma.cc/G29D-5WQD] (reporting that individuals with psychiatric disabilities were placed in isolation on 160 occasions across three immigration detention centers in 2016).

94. See Jamelia N. Morgan, The Paradox of Inclusion: Applying *Olmstead*'s Integration Mandate in Prisons, 27 Geo. J. on Poverty L. & Pol'y 305, 310 (2020) [hereinafter Morgan, The Paradox of Inclusion] ("Incarcerated people with disabilities can be disciplined for rule violations due to difficulties comprehending strict prison rules, and often such rule violations lead to stints in solitary confinement." (footnote omitted)).

95. See Letter from Am. Immigr. Council, Nat'l Immigr. Project & Rocky Mountain Immigrant Advoc. Network, to Shoba Sivaprasad Wadhia, Off. for C.R. & C.L., DHS; Daniel Gersten, Off. of the Immigr. Detention Ombudsman, DHS; Matthew Klein, Off. of Pro. Resp., ICE & Joseph V. Cuffari, Off. of the Inspector Gen., DHS 2, 8–11 (July 13, 2023), https://static1.squarespace.com/static/57f6bd842e69cf55d8158641/t/64b04e1c58a77f267f9c274a/1689275933856/Solitary+Confinement+Complaint+-+FINAL+7.13.23.pdf [https://perma.cc/2CRY-NV47] ("[T]he Aurora [immigration detention center] uses solitary confinement as a tool to control behavior that would unlikely occur if safety were truly the primary focus."). Lauren, one individual detained at the Aurora facility, reported that a medical provider "told her to not cut herself again, or else she would be sent back to solitary confinement, this time for medical segregation. . . . '[T]he idea of being placed back there, even if it was supposedly for my well-being, made me feel even worse.'" Id. at 10 (quoting Lauren).

2. Yeskey *and the Rise of Prisoner Antidiscrimination Litigation.* — To address instances of disability discrimination, incarcerated people principally turn to Title II of the ADA and the Rehabilitation Act to enforce their legal rights.[96] Before the passage of the ADA, disabled plaintiffs could bring section 504 claims against a prison by demonstrating that it was federally administered or was the recipient of federal financial assistance.[97] The ADA's applicability to prisons remained unclear until the Supreme Court's decision in *Pennsylvania Department of Corrections v. Yeskey*.[98]

In *Yeskey*, the Court affirmed that "[s]tate prisons fall squarely within [Title II of the ADA's] definition of 'public entity.'"[99] Defendants contended that Congress did not intend for the ADA to cover incarcerated people, but the Court responded by reiterating the ADA's broad mandate: "As we have said before, the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"[100] The Court also cited Congress's explicit inclusion of "institutionalization" in the ADA's statement of purpose as inclusive of "penal institutions."[101] The Court's 1998 decision proceeded to pave the way for decades of litigation under the ADA and section 504 directed at prisons and jails.

The Court's approval of federal disability liability against jails and prisons also created space for creative decarceral legal strategies. One example is *Olmstead v. L.C. ex rel. Zimring*, a case that involved two plaintiffs' placement in medical isolation at a state-run mental institution.[102] The Court looked to the Attorney General's implementation of Title II, which states that a public entity must administer services "in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[103] Using this reading of the ADA's statutory language, the Supreme Court held that "[u]njustified isolation . . . is properly regarded

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96. See ACLU Nat'l Prison Project, supra note 55, at 1 ("Two major statutes exist to protect the rights of disabled prisoners: Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 . . . .").

97. See, e.g., Bonner v. Lewis, 857 F.2d 559, 561–62 (9th Cir. 1988) (holding as a matter of first impression that section 504 applies to state correctional facilities).

98. 524 U.S. 206 (1998); see also Kaufman v. Carter, 952 F. Supp. 520, 528 (W.D. Mich. 1996) (surveying pre-*Yeskey* decisions concluding that the Rehabilitation Act applied to prisons); Sandra J. Carnahan, The Americans With Disabilities Act in State Correctional Institutions, 27 Cap. U. L. Rev. 291, 299–310 (1999) (chronicling the pre-*Yeskey* circuit split over the ADA's applicability to state prisons).

99. *Yeskey*, 524 U.S. at 210.

100. Id. at 212 (internal quotation marks omitted) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)).

101. Id. at 211–12 (internal quotation marks omitted) (quoting 42 U.S.C. § 12101(a)(3) (1994)).

102. 527 U.S. 581, 593 (1999).

103. Id. at 596 (internal quotation marks omitted) (quoting 28 C.F.R. § 35.130(d) (1998)).

as discrimination based on disability."[104] Though the facts did not involve a prison environment, a "limited, but burgeoning" line of cases have extended *Olmstead*'s integration mandate to solitary confinement and the denial of prison programming in carceral institutions.[105]

Disability law also serves as a critical tool for incarcerated people as reviewing courts erode access to other forms of relief for healthcare-related harm. Eighth Amendment jurisprudence, for example, rarely holds that solitary confinement constitutes cruel and unusual punishment, even if an individual has a psychiatric disability.[106] Reviewing courts have also set a high bar for a plaintiff to claim that medical neglect rises to the level of unconstitutionality.[107] Meanwhile, state-level tort reform movements[108] and prison privatization[109] have curbed the efficacy of tort-based remedies like medical malpractice. These shortcomings—while certainly not exhaustive nor intended to compare the merits of fundamentally distinct frameworks[110]—underline the importance of a disability

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104. Id. at 597.

105. See Morgan, The Paradox of Inclusion, supra note 94, at 308–09.

106. See, e.g, Hill v. Pugh, 75 F. App'x 715, 721 (10th Cir. 2003) (holding that a mentally ill individual's solitary confinement did not violate the Eighth Amendment because he had access to "minimal physical requirements—food, shelter, clothing and warmth" (internal quotation marks omitted) (quoting the record)); see also Jessica Knowles, Note, "The Shameful Wall of Exclusion": How Solitary Confinement for Inmates With Mental Illness Violates the Americans With Disabilities Act, 90 Wash. L. Rev. 893, 912–23 (2015) (describing the "minority position" of courts that have held the incarceration of individuals with preexisting psychiatric disabilities to constitute an Eighth Amendment violation).

107. See Estelle v. Gamble, 429 U.S. 97, 104 (1976) (establishing "deliberate indifference to serious medical needs of [incarcerated people]" as a violation of the Eighth Amendment); Marcella Alsan, Crystal S. Yang, James R. Jolin, Lucy Tu & Josiah D. Rich, Health Care in U.S. Correctional Facilities—A Limited and Threatened Constitutional Right, 388 New Eng. J. Med. 847, 848 (2023) ("Federal courts have stated that to constitute deliberate indifference [for medical care under the Eighth Amendment], 'treatment must be so grossly incompetent, inadequate, or excessive as to *shock the conscience* or to be intolerable to fundamental fairness' . . . ." (emphasis added by Alsan et al.) (quoting Miltier v. Beorn, 896 F.2d 848, 851 (4th Cir. 1990))).

108. See Holger Sonntag, Comment, Medicine Behind Bars: Regulating and Litigating Prison Healthcare Under State Law Forty Years After *Estelle v. Gamble*, 68 Case W. Res. L. Rev. 603, 627–28 (2017) (discussing how state tort reform movements have curtailed lawsuits by incarcerated individuals).

109. See Danielle C. Jefferis, Delegating Care, Evading Review: The Federal Tort Claims Act and Access to Medical Care in Federal Private Prisons, 80 La. L. Rev. 37, 55 (2019) [hereinafter Jefferis, Delegating Care] ("As the federal government relies more and more on for-profit prison operators, this exception to the FTCA has resulted increasingly in the government's evasion of liability for harms suffered by people in its custody.").

110. Indeed, disability law is certainly no panacea for prison healthcare litigation. A few potential shortcomings are worth mentioning. First, the ADA includes a "direct threat" exception, which Eighth Amendment jurisprudence lacks, that allows entities to discriminate on the basis of disability if the individual poses a "direct threat to the health or safety of others." See 28 C.F.R. § 35.139 (2024) (Title II); id. § 36.208 (Title III). Second, an entity qualifies for an exception if the discriminatory activity is to "impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities." Id.

antidiscrimination framework to help ensure incarcerated people with disabilities can seek relief for harm they suffer in a healthcare context.

II. PRIVATIZED DISCRIMINATION

The current disability discrimination framework provided by Title II of the ADA for state and local prisons and the Rehabilitation Act for federal prisons and detention centers offers a critical tool for vindicating the rights of incarcerated people with disabilities. This framework, however, does not reflect the changing face of disability discrimination in prison. This Part traces the rise of privatization in prison administration, especially as it relates to prison healthcare. In light of this new norm, it proceeds to consider how the current disability discrimination framework fails to address the increasingly privatized face of prison healthcare. Finally, it underlines the need for a more robust remedial toolbox for disabled plaintiffs to address the framework's shortcomings.

A. *The Rise of Private Prison Healthcare*

Cases like *Abraham v. Corizon Health, Inc.*[111] are the product of a broader trend towards privatization in prison healthcare. Correctional departments had originally managed healthcare either by employing their own medical staff or by contracting their services out to nonprofit organizations.[112] This pattern began to shift in the 1970s when racist rhetoric and "tough on crime" policies began fueling mass incarceration in the United States.[113] During this time, the Supreme Court also handed down *Estelle v. Gamble*, the landmark Eighth Amendment case that provided a baseline standard of medical care for incarcerated people.[114] As a rapidly growing and aging incarcerated population[115] exercised its constitutional right to

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§ 35.130(h) (Title II); id. § 36.104 (Title III). Scholarship has also pointed to stigma around disability as well as the relative difficulty of class certification across disabilities as other potential drawbacks of the disability framework. See Knowles, supra note 106, at 921–22.

111. See supra notes 1–16 and accompanying text.

112. See Micaela Gelman, Note, Mismanaged Care: Exploring the Costs and Benefits of Private vs. Public Healthcare in Correctional Facilities, 95 N.Y.U. L. Rev. 1386, 1392–95 (2020) ("In the 1970s, prior to the spike in the incarcerated population, correctional facilities were largely administering their own healthcare in what has been termed the 'direct service' period." (quoting Noga Shalev, From Public to Private Care: The Historical Trajectory of Medical Services in a New York City Jail, 99 Am. J. Pub. Health 988, 989 (2009))).

113. See James Cullen, The History of Mass Incarceration, Brennan Ctr. for Just. (July 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration [https://perma.cc/652D-KG42] ("The prison population began to grow in the 1970s, when politicians from both parties used fear and thinly veiled racial rhetoric to push increasingly punitive policies.").

114. See 429 U.S. 97, 103–05 (1976).

115. See Dan Weiss, Note, Privatization and Its Discontents: The Troubling Record of Privatized Prison Health Care, 86 U. Colo. L. Rev. 725, 744 (2015) ("The swelling of the

medical care, the cost of healthcare—and litigation surrounding it—began to spike by the turn of the decade.[116] In keeping with the neoliberal policies[117] that would define the Reagan era,[118] prison administrators turned to private healthcare companies in the hopes that, under the logic of the free market, they could bring the cost of healthcare down while improving its quality.[119]

Neoliberal policies now serve as the new norm for carceral administration in the United States. According to one estimate, "more than half of all state and local prisons and jails have outsourced" their medical care.[120] In addition, the overwhelming majority of federal immigration detention centers, which serve more than half of the detained immigrant population in the United States, contract out their medical services.[121] This turn towards privatization has been a financial boon to the budding prison healthcare industry. Prison healthcare giants Corizon and Wellpath made approximately $1 billion and $1.5 billion in revenue in 2017.[122] GEO Group and CoreCivic, the two "primary players" in the immigration

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prison population and the lengthening of sentences combined to cause a rapid aging of the American prison population.").

116. See Chad Kinsella, Council of State Gov'ts, Corrections Health Care Costs 6 (2004), https://www.prisonpolicy.org/scans/csg/Corrections+Health+Care+Costs+1-21-04.pdf [https://perma.cc/9PTV-NHYQ] (tying enforcement of *Estelle* to rising prison healthcare costs); Szep et al., supra note 20 (noting that, after *Estelle*, "[i]nmates began suing, and in the 1980s the correctional healthcare industry emerged").

117. "Neoliberalism 'can be defined as a social and economic system' under which '[g]overnments are less willing to interfere with the free operation of market forces,'" and is often characterized by government deregulation and privatization. Gelman, supra note 112, at 1395 (alteration in original) (quoting Callum Williams & Mahiben Maruthappu, "Healthconomic Crises": Public Health and Neoliberal Economic Crises, 103 Am. J. Pub. Health 7, 7 (2013)).

118. The Reagan administration even proposed privatizing the federal prison system as part of a strategy to reduce the size of government. See Michal Laurie Tingle, Privatization and the Reagan Administration: Ideology and Application, 6 Yale L. & Pol'y Rev. 229, 230 & n.4 (1988).

119. See Douglas C. McDonald, Medical Care in Prisons, 26 Crime & Just. 427, 470 (1999) ("With the rise of interest in privatization during the 1980s, some state legislatures and executives no doubt began considering contracting for the purpose of controlling costs better."); Gelman, supra note 112, at 1395–96 (tracing prison healthcare companies' move to "fill the need for improved, cheaper care").

120. Rupert Neate, Welcome to Jail Inc: How Private Companies Make Money off US Prisons, The Guardian (June 16, 2016), https://www.theguardian.com/us-news/2016/jun/16/us-prisons-jail-private-healthcare-companies-profit [https://perma.cc/XP8D-ZWFK].

121. See U.S. Gov't Accountability Off., GAO-16-231, Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Detainee Medical Care 5–10 (2016), https://www.gao.gov/assets/gao-16-231.pdf [https://perma.cc/2E33-NYHZ] (noting that ICE directly provides medical care at about 48% of immigration detention centers).

122. Marsha McLeod, The Private Option, The Atlantic (Sept. 12, 2019), https://www.theatlantic.com/politics/archive/2019/09/private-equitys-grip-on-jail-healthcare/597871/ (on file with the *Columbia Law Review*).

detention space, have contracts with ICE totaling roughly $2 billion each year.[123]

Corporations have been able to create a multibillion-dollar business of carceral healthcare by exploiting "what is literally a captive market."[124] Detained populations have no choice but to patronize the company providing medical care, thereby insulating companies from the element of consumer choice typically present in an open market.[125] Governments too are limited in their decisionmaking due to the small number of competitors in the carceral healthcare market.[126] The result is the opposite of what neoliberal champions proclaimed; instead of subjection to free market forces, prison healthcare has become an oligopoly under which a handful of companies can cut the costs of care while facing little to no consequences.[127]

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123. Danielle C. Jefferis, Constitutionally Unaccountable: Privatized Immigration Detention, 95 Ind. L.J. 145, 162–64 (2020) [hereinafter Jefferis, Constitutionally Unaccountable].

124. Steve Coll, The Jail Health-Care Crisis, New Yorker (Feb. 25, 2019), https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting David Fathi, Dir., ACLU Nat'l Prison Project).

125. See id. ("Market forces don't operate in the prison context for the reason that prisoners have absolutely no consumer choice." (internal quotation marks omitted) (quoting David Fathi, Dir., ACLU Nat'l Prison Project)).

126. See Michael Fenne, Privatized Prison Healthcare Seeks Profit at Patients' Expense, Priv. Equity Stakeholder Project (Oct. 17, 2023), https://pestakeholder.org/news/privatized-prison-healthcare-seeks-profit-at-patients-expense/ [https://perma.cc/49EV-WP2T] ("Significant market concentration by PE-owned companies leaves local governments with few choices in who administers healthcare services at correctional facilities; for example, some counties have alternated between Wellpath and YesCare in states including California, Georgia, Florida, Michigan, and Texas." (footnotes omitted)); Last Week Tonight, Prison Health Care: Last Week Tonight With John Oliver (HBO), YouTube, at 15:19 (Oct. 2, 2023), https://youtu.be/82QYlbiawJI?feature=shared ("In so many places, states end up just rotating among a small handful of awful [prison healthcare] providers."); see also McLeod, supra note 122 (concluding after contacting 150 sheriff's offices nationwide that "[j]ust a handful of [prison healthcare] firms serve the nation's largest jails"). Though there is less literature on the identities of private healthcare providers in immigration detention, reporting suggests that similar patterns occur. See Ken Silverstein, Leading For-Profit Prison and Immigration Detention Medical Company Sued at Least 1,395 Times, Yahoo News (Oct. 29, 2018), https://www.yahoo.com/news/leading-profit-prison-immigration-detention-medical-company-sued-least-1395-times-100026407.html [https://perma.cc/RM8Z-HL9F] (finding that, as of 2017, Correct Care Solutions (now Wellpath) and its subsidiaries "provide[d] medical care at dozens of sites that hold immigrant detainees").

127. See Mary Small, Dawy Rkasnuam & Silky Shah, Det. Watch Network, A Toxic Relationship: Private Prisons and U.S. Immigration Detention 12 (2016), https://www.detentionwatchnetwork.org/sites/default/files/reports/A%20Toxic%20Relationship_DWN.pdf [https://perma.cc/K5WV-N7S8] ("With 73 percent of detention facilities operated by private prison companies, and the remaining facilities subcontracting out for services like . . . medical care, any threat of significant financial penalties or large scale termination is undermined by the companies' awareness of how much ICE . . . needs them."); McLeod, supra note 122 (detailing how Wellpath, despite overseeing the deaths of

This lack of accountability is written into healthcare companies' contracts. The vast majority of prison healthcare contracts operate on a capitation-based model through which contractors receive payment for each patient they encounter[128] or, in the case of immigration detention, each person detained.[129] It is also rare for contracts to enforce any meaningful performance-based standard on prison healthcare companies.[130] In other words, companies' contractual incentives are primarily concerned with the number of people detained or needing healthcare services—not the quality of care itself. With the money paid up front and no contractual consequences for underperformance,[131]companies' overwhelming incentive becomes clear: Keep healthcare costs as low as possible to maximize profits for shareholders.[132]

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two people jailed in Forsyth County over twenty-four days, still won the county's contract because "Forsyth's commissioners had exactly zero alternatives").

128. See Pew Charitable Trs., Prison Health Care: Costs and Quality 12 (2017), https://www.pewtrusts.org/-/media/assets/2017/10/sfh_prison_health_care_costs_and_quality_final.pdf [https://perma.cc/Y4XB-23JB] (finding that of the twenty-eight state departments of correction that contracted out at least some of their healthcare services, all but nine used a capitation-based contract model); Coll, supra note 124 ("Often, the [prison healthcare] companies receive a per-diem, per-individual rate, so profits depend on holding costs below that amount.").

129. See Clara Long & Grace Meng, Hum. Rts. Watch & Cmty. Initiatives for Visiting Immigrants in Confinement, Systemic Indifference: Dangerous & Substandard Medical Care in US Immigration Detention 23 (2017), https://www.hrw.org/sites/default/files/report_pdf/usimmigration0517_web_0.pdf [https://perma.cc/U68V-9UVC] (noting that on-site medical costs in immigration detention are usually included in the per-diem paid to a facility per person detained).

130. See Cho & Wilson, supra note 23, at 15–16 ("Although [ICE Health Service Corps] has promulgated directives regarding the provision of medical and mental health care at the 19 facilities in which it directly provides care, these directives are not binding on the vast majority of the ICE detention system."); Leonard Lopate Show, Why Some Privately Run Prisons Get Away With Inmate Abuse, WNYC, at 11:25 (Feb. 8, 2016), https://www.wnyc.org/story/look-inside-americas-private-prison-system/ (on file with the *Columbia Law Review*) (outlining how in the Federal Bureau of Prisons system, private medical companies are exempt from the more rigorous prison management standards set by the government, leading to care being provided by lower-level medical workers).

131. In fact, there can sometimes be contractual bonuses for underperformance. See Coll, supra note 124 ("Sometimes contracts include provisions that increase a company's potential profit if it holds down transfers to hospitals or to other outside providers.").

132. See McLeod, supra note 122 ("[Jail administrators] forget the private [prison healthcare] company doesn't have a fiduciary responsibility to the sheriff—they have a fiduciary responsibility to their shareholders . . . ." (internal quotation marks omitted) (quoting Marc Stern, Professor, Univ. of Wash. Sch. of Pub. Health)); The Perils of Private Prison Health Care, CBS News, at 12:18 (Oct. 4, 2019), https://www.cbsnews.com/news/private-prison-health-care-perils-cbsn-originals/ (on file with the *Columbia Law Review*) ("There are the incentives that the contract builds in and creates for the private prison provider. . . . [T]he more money you spend on providing healthcare, the less profit you make. So, this creates a powerful, indeed overwhelming incentive to deny care." (statement of David Fathi, Dir., ACLU Nat'l Prison Project)); see also Fenne, supra note 126 (outlining cost-cutting mechanisms prison healthcare companies utilize, such as intentional understaffing and assigning workers to do tasks beyond their pay grade); Leonard Lopate Show, supra note

The privatization of medical care has had disastrous consequences for people incarcerated in jails,[133] prisons,[134] and detention centers.[135] These cost-cutting tactics have resulted in reams of lawsuits to hold companies accountable and obtain much-needed relief for plaintiffs.[136] Litigation also serves an additional purpose: Because private prisons are sheltered from open records laws, civil discovery is often the only way to obtain information on company practices.[137] As a result, with the private prison industry otherwise insulated from accountability by a dominant market position and significant political lobbying,[138] litigation offers a critical avenue for holding companies accountable where other mechanisms have failed.

130, at 13:50 (detailing methods by which prison companies keep healthcare costs down, such as by reducing the number of people sent to the emergency room and hiring licensed vocational nurses instead of registered nurses).

133. See McLeod, supra note 122 ("[O]ver a 10-year period ending in 2014, people in custody at California county jails serviced by one private contractor died of suicide or drug overdose at a rate about 50 percent higher than at other county jails when adjusted for population." (citing Branan, supra note 23)); Szep et al., supra note 20 (finding that, among large U.S. jails between 2016 and 2018, jails using private healthcare services had a higher death rate than those using public care).

134. See Kelly Bedard & H.E. Frech III, Prison Health Care: Is Contracting Out Healthy?, 18 Health Econ. 1248, 1258–59 (2009) (surveying data from state and federal correctional facilities and finding a positive correlation between inmate mortality and contracting out healthcare); Seth Freed Wessler, Private Prison Operator Sued Over Death at Immigrant Facility, Reveal (Mar. 15, 2016), https://revealnews.org/article/private-prison-operator-sued-over-death-at-immigrant-facilities/ [https://perma.cc/4VF9-K8D9] (summarizing a recent review of 103 deaths within privately run Bureau of Prisons facilities and finding that in twenty-five cases, inadequate medical care "likely contributed" to individuals' premature deaths); see also Livia Luan, Profiting From Enforcement: The Role of Private Prisons in U.S. Immigration Detention, Migration Pol'y Inst. (May 2, 2018), https://www.migrationpolicy.org/article/profiting-enforcement-role-private-prisons-us-immigration-detention [https://perma.cc/4Y6J-WZUZ] ("A 2014 investigation of five of the nation's 13 Criminal Alien Requirement prisons, which are privately managed, found that the companies not only placed excessive numbers of prisoners in isolation, but also overcrowded the prisons, reduced medical staff, and withheld medical treatment.").

135. See generally Cho & Wilson, supra note 23, at 6, 15 (reporting on the seventy deaths that have occurred in ICE custody, where 73% of people are held in detention centers in which on-site medical care is provided by non–ICE Health Service Corps staff).

136. See Silverstein, supra note 126 (noting that, since Correct Care Solutions/Wellpath's founding in 2003, the company admitted to being sued 1,395 times in federal court alone—a number that civil rights attorneys who have sued Wellpath say is likely an undercount); see also, e.g., Jensen v. Shinn, 609 F. Supp. 3d 789, 912–13 (D. Ariz. 2022) (finding the Arizona Department of Corrections, which uses a private medical contractor, to have systematically perpetrated multiple violations of the plaintiff class's Eighth Amendment right to medical care). The sheer volume of prison litigation was also instrumental in Corizon's recent bankruptcy. Schwartzapfel, supra note 18.

137. Jefferis, Constitutionally Unaccountable, supra note 123, at 180 ("[U]nlike government-run prisons, open records laws do not apply to private prisons.").

138. See Fenne, supra note 126 (detailing Corizon's and Wellpath's lobbying efforts).

B. *Limits of the Current Antidiscrimination Framework*

To successfully win relief from prison healthcare companies in court, disabled plaintiffs face a number of legal obstacles. While the Eighth Amendment allows plaintiffs to sue a prison healthcare company directly, the administrative barriers and high legal standard make successful claims increasingly rare.[139] Under the current disability framework, however, obtaining relief from a private company is practically impossible.[140] This section considers how these legal shortcomings impact an incarcerated individual's ability to directly sue a prison healthcare company for disability discrimination and to obtain adequate relief for the harm they have suffered.

1. *Privatized Prison Healthcare: An Invisible Perpetrator.* — For people held in state and local prisons (amounting to more than three-quarters of the entire U.S. incarcerated population[141]), the current disability antidiscrimination framework renders prison healthcare companies immune from legal action. Using this framework, disabled people must rely on Title II of the ADA to vindicate their rights. Multiple circuits, however, have held that Title II's protection against discrimination from "public entities" does not include private contractors.[142] The benchmark case on this point is *Edison v. Douberly*.[143] The plaintiff in that case was incarcerated in a state prison and sought to sue employees of GEO Group, the private company operating the prison, under Title II of the ADA.[144] The

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139. See supra section I.B.3.

140. Privatized incarceration not only undermines causes of action under disability law but also other areas of civil rights litigation on which incarcerated people rely. See Jefferis, Constitutionally Unaccountable, supra note 123, at 168–73 (discussing the unavailability of constitutional tort remedies in federal for-profit prisons); Jefferis, Delegating Care, supra note 109, at 55 ("As the federal government relies more and more on for-profit prison operators, this exception to the FTCA has resulted increasingly in the government's evasion of liability for harms suffered by people in its custody.").

141. Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2025, Prison Pol'y Initiative (Mar. 11, 2025), https://www.prisonpolicy.org/reports/pie2025.html [https://perma.cc/A99A-THR4].

142. See Matthews v. Pa. Dep't of Corr., 613 F. App'x 163, 170 (3d Cir. 2015); Johnson v. Neiman, 504 F. App'x 543, 545 (8th Cir. 2013) (per curiam); Phillips v. Tiona, 508 F. App'x 737, 754 (10th Cir. 2013); Edison v. Douberly, 604 F.3d 1307, 1310 (11th Cir. 2010); Green v. City of New York, 465 F.3d 65, 79 (2d Cir. 2006); see also Jeter v. Palmetto Health Internal Med. Ctr., No. 3:10-2832-CMC-SVH, 2012 WL 6521454, at *3–*4 (D.S.C. Dec. 14, 2012) ("Several courts have found that private entities are not transformed into 'instrumentalities of the state' under Title II of the ADA based upon contracts with state or local governments to provide services, even in areas of service which are traditionally under exclusive governmental control."), aff'd sub nom. Jeter v. Palmetto Health, 515 F. App'x 234 (4th Cir. 2013). But see McNally v. Prison Health Servs., 46 F. Supp. 2d 49, 58 (D. Me. 1999) (finding that a jail healthcare company's "prescription service and the disposition of HIV-positive prisoners' requests for their medication is a program or service" within the meaning of Title II).

143. 604 F.3d 1307.

144. Id. at 1308.

plaintiff contended that GEO Group was an "instrumentality of a state," one of the terms used in the Act to define a public entity.[145] The Eleventh Circuit disagreed; looking to the text of the ADA, it determined that all other definitions of "public entity" under the statute referred to a governmental entity.[146] Finding "instrumentality" to similarly refer exclusively to a government entity, the court held that "a private corporation is not a public entity merely because it contracts with a public entity to provide some service."[147] As a result, the *Edison* court and the many jurisdictions that have since followed its holding have precluded a Title II challenge against any private contractors.

In federal prisons and immigration detention centers, the path to relief under the current disability framework is similarly daunting. The Rehabilitation Act extends liability to "any program or activity receiving Federal financial assistance."[148] While a disabled plaintiff could argue that prison healthcare corporations like Corizon receive federal financial assistance as contractors, multiple circuits have rejected this argument.[149] Courts have instead construed "federal financial assistance" to mean the government's provision of a subsidy to a contractor, which is distinct from services offered merely in exchange for compensation.[150] A reviewing court determines whether financial support is in fact a "subsidy" by looking to government intent.[151] Especially without access to discovery proceedings,[152] a disabled plaintiff would be hard-pressed to prove federal intent to subsidize a private contractor.[153]

Despite the prison healthcare industry's pervasiveness and its documented record of poorer health outcomes for incarcerated people, the current disability antidiscrimination framework is unable to identify

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145. Id. (internal quotation marks omitted) (quoting 42 U.S.C. 12131(1)(B) (2006)).

146. Id. at 1309.

147. Id. at 1310.

148. 29 U.S.C. § 794(a) (2018).

149. See, e.g., Shotz v. Am. Airlines, Inc., 420 F.3d 1332, 1335 (11th Cir. 2005) (construing "federal financial assistance" to require the provision of a subsidy rather than compensation for services (internal quotation marks omitted)); DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1382 (10th Cir. 1990) (same); Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1210 (9th Cir. 1984) (same).

150. See *Jacobson*, 742 F.2d at 1210.

151. See *DeVargas*, 911 F.2d at 1382.

152. See Fatma E. Marouf, Alternatives to Immigration Detention, 38 Cardozo L. Rev. 2141, 2181 (2017) ("At a minimum, courts should permit discovery to obtain evidence that would help show the government's intent to subsidize the company.").

153. See Youngers v. Mgmt. & Training Corp., No. 20-465 JAP/JHR, 2021 WL 5994878, at *2–3 (D.N.M. Apr. 19, 2021) (finding that the plaintiff did not establish a plausible claim that private immigration detention contractors received a federal subsidy); Hines v. GEO Grp., Inc., No. 5:08-CT-3056-D, 2008 WL 9015758, at *5 (E.D.N.C. Dec. 23, 2008) ("[T]he contract between GEO and the [Federal Bureau of Prisons] does not create rights in plaintiff under the Rehabilitation Act."). But see Romero-Garcia v. CoreCivic, Inc., No. 4:20-CV-158 (CDL), 2021 WL 2910571, at *4 (M.D. Ga. June 25, 2021) (finding that the plaintiff's theory of federal subsidization plausibly stated a claim under section 504).

prison healthcare companies as viable defendants. This erasure ends up denying disabled plaintiffs an additional defendant and source of relief. It also disserves the corrective aims that help to form the principled foundation of federal disability law.[154] A corrective framework is concerned not only with *whether* a victim's loss is repaired but also *who* carries the duty to repair the loss.[155] The impunity of prison healthcare highlights the point: Even if a disabled plaintiff successfully sues a government actor under Title II or section 504 for the actions of a private contractor,[156] the reality of the prison healthcare industry makes it doubtful that such litigation will translate into meaningful penalties against the company.[157] The result is that disabled people remain unable to hold accountable the companies directly responsible for the harm they have suffered.

2. *Holes in the Rehabilitation Act.* — The current disability framework also suffers from what Professor Margo Schlanger terms the "remedial gap" in federal disability litigation.[158] The Supreme Court created this gap in *Lane v. Pena*, in which the Court held that the Rehabilitation Act did not waive the federal government's sovereign immunity against monetary damages.[159] This holding precludes a disabled plaintiff in federal custody from claiming compensatory damages from the federal government for claims under section 504.

Professor Schlanger argues for a novel reading of section 504 establishing that a plaintiff can partially address this remedial gap by seeking monetary relief from federal contractors.[160] This theory's application in court, however, has revealed additional problems implicit in relying upon the Rehabilitation Act for relief. In *Youngers v. Management & Training*

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154. See Sharona Hoffman, Corrective Justice and Title I of the ADA, 52 Am. U. L. Rev. 1213, 1222 (2003) ("The goal of corrective justice is inherent in the civil rights model in general and the ADA in particular.").

155. See Jules Coleman, The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory 15 (2001) ("That principle [of corrective justice] states that individuals who are responsible for the wrongful losses of others have a duty to repair the losses." (emphasis omitted)); Erik Encarnacion, Corrective Justice as Making Amends, 62 Buff. L. Rev. 451, 473 (2014) ("[C]orrective justice is not primarily about repairing or annulling losses—it is about private parties getting even with each other, and failing that, '[giving] people who have been wronged an opportunity to get even' by invoking a nonviolent system able to impose evenness on them." (second alteration in original) (quoting Scott Hershovitz, Corrective Justice for Civil Recourse Theorists, 39 Fla. St. U. L. Rev. 107, 127 (2011))).

156. See Castle v. Eurofresh, Inc., 731 F.3d 901, 910 (9th Cir. 2013) ("State Defendants are obligated to ensure that Eurofresh—like all other State contractors—complies with federal laws prohibiting discrimination on the basis of disability.").

157. See supra notes 124–132 and accompanying text.

158. Margo Schlanger, Narrowing the Remedial Gap: Damages for Disability Discrimination in Outsourced Federal Programs, U. Chi. L. Rev. Online (2021), https://lawreviewblog.uchicago.edu/2021/03/05/schlanger-detention/ [https://perma.cc/LB7R-NFV5] [hereinafter Schlanger, Narrowing the Remedial Gap].

159. 518 U.S. 187, 200 (1996).

160. Schlanger, Narrowing the Remedial Gap, supra note 158.

Corporation, the plaintiff explicitly invoked Professor Schlanger's theory as part of a Rehabilitation Act claim against a private federal prison contractor.[161] While the court found Professor Schlanger's theory compelling, it nonetheless declined to consider the argument because the Rehabilitation Act's plain text "makes no mention of a private right of action or remedy based on discrimination under the Executive agency prong."[162] This holding reflects a small but consequential line of jurisprudence arguing that the Rehabilitation Act contains no private right of action against executive agencies.[163]

In this minority view, some reviewing courts have found that while the Rehabilitation Act offers an explicit private right of action to "any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under [section 504],"[164] no comparable right of action exists for those harmed by an agency itself.[165] In the absence of clear congressional intent, courts will instead review the executive action in question under the more onerous standard offered by the Administrative Procedure Act, which requires plaintiffs to exhaust administrative remedies before bringing suit.[166] This argument threatens to categorically undermine disabled people's ability to vindicate their rights when they have suffered discrimination by a federal agency.

There are strong arguments in favor of protecting the right of incarcerated people in federal custody to bring a cause of action under the Rehabilitation Act that is analogous to the ADA.[167] In the meantime, however, this line of jurisprudence presents a problem for disability advocates

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161. See No. 20-cv-00465-WJ-JHR, 2021 WL 5881998, at *5 (D.N.M. Dec. 13, 2021) (summarizing the plaintiff's argument that, under Professor Schlanger's theory, the immigration contractor's work "was 'conducted' by ICE" within the meaning of the Rehabilitation Act, so the contractor remained liable for discrimination under the statute, even if the agency was protected).

162. Id. at *6.

163. See Schlanger et al., supra note 53, at 273 n.181.

164. 29 U.S.C. § 794a(a)(2) (2018).

165. See Moya v. U.S. Dep't of Homeland Sec., 975 F.3d 120, 128 (2d Cir. 2020) ("The text of the Rehabilitation Act does not evince a 'clear manifestation of congressional intent' to create a private right of action against executive agencies acting in their regulatory capacity." (quoting Lopez v. Jet Blue Airways, 662 F.3d 593, 596 (2d Cir. 2011))).

166. See Mendez v. Gearan, 947 F. Supp. 1364, 1366 (N.D. Cal. 1996) (outlining the differences between filing suit under the Rehabilitation Act and the APA).

167. See id. at 1367 (discussing the Ninth Circuit's finding that the Supreme Court's *Lane v. Pena* decision only abrogated monetary relief under the Rehabilitation Act, so an implied right to sue a federal agency for equitable relief remains); see also Ann M. Madden, Note, *Lane v. Pena*: How Federal Governmental Agencies Can Discriminate and Not Be Held Accountable, 7 Widener J. Pub. L. 143, 170 (1997) (arguing that the Rehabilitation Act's legislative history favors finding an implied right).

because it creates legal uncertainty that may discourage district courts from finding an implied right.[168]

III. A NEW FRAMEWORK: PUBLIC ACCOMMODATIONS LAW AND PRISON HEALTHCARE

Because neither Title II of the ADA nor the Rehabilitation Act offers an effective remedy against private healthcare contractors, a new approach is necessary in the modern landscape of increasingly privatized prisons and healthcare services. U.S. public accommodations law, including Title III of the ADA and forty-seven state antidiscrimination laws, presents a potential response to the shortcomings of the prevailing disability antidiscrimination framework in the field of prison healthcare. Seven court decisions have considered whether Title III applies to prison healthcare companies, with five finding that it does.[169] Two courts have reached the same conclusion regarding their respective states' antidiscrimination laws.[170] Two other decisions involving state-level laws have gone further to find that prisons generally constitute places of public accommodation for the purpose of

168. See Youngers v. Mgmt. & Training Corp., No. 20-cv-00465-WJ-JHR, 2021 WL 5881998, at *5 (D.N.M. Dec. 13, 2021) (deferring to the plain text of section 504 because the Tenth Circuit had not yet ruled on whether an implied right of action exists).

169. See Doe v. Ga. Dep't of Corr., 730 F. Supp. 3d 1327, 1346 (N.D. Ga. 2024) (finding that the plaintiff had sufficiently stated a claim that a prison healthcare company was a public accommodation under Title III); Bernard v. Ill. Dep't of Corr., No. 3:20-cv-50412, 2022 WL 17338154, at *8 (N.D. Ill. Nov. 30, 2022) (same); Stafford v. Wexford of Ind., LLC, No. 1:17-cv-00289-JMS-MJD, 2017 WL 4517506, at *3 (S.D. Ind. Oct. 10, 2017) (same); Hernandez v. County of Monterey, 70 F. Supp. 3d 963, 978 (N.D. Cal. 2014) (same); Saldana v. Crane, No. 12-573 (DWF/TNL), 2013 WL 4747961, at *9 (D. Minn. Sept. 4, 2013) (same); see also Whitehurst v. Lackawanna County, No. 3:17-cv-00903, 2020 WL 6106616, at *11 n.9 (M.D. Pa. Mar. 5, 2020) ("Parenthetically, we note that, as an independent contractor providing health care services to inmates at a local jail, CCI is the operator of a public place of accommodation subject to the provisions of Title III of the ADA." (emphasis omitted)). But see Gladu v. Me. Dep't of Corr., No. 1:20-cv-00449-JDL, 2022 WL 2068245, at *5 (D. Me. June 8, 2022) ("Prison medical facilities and services are not, by definition, open to the public and, as such, are not subject to suit under Title III."); Gross v. Landry, No. 2:17-cv-00297-LEW, 2019 WL 1270922, at *10 (D. Me. Mar. 19, 2019) ("The weight of authority suggests that prisons and prison medical facilities are not 'public accommodations' within the meaning of the ADA.").

170. See Wilkins-Jones v. County of Alameda, 859 F. Supp. 2d 1039, 1049, 1054 (N.D. Cal. 2012) (finding that public accommodation claims under the California Disabled Persons Act and the Unruh Civil Rights Act both apply to prison healthcare companies); Abraham v. Corizon Health, Inc., 511 P.3d 1083, 1097 (Or. 2022) ("A private contractor providing healthcare services at a county jail is a 'place of public accommodation' within the meaning of ORS 659A.400 and can be subject to liability under ORS 659A.142.").

state antidiscrimination laws,[171] though this is the minority position among state laws.[172]

Given the movement of multiple jurisdictions toward applying public accommodations law to prison healthcare companies, this Part surveys the key challenges surrounding the claim and makes the affirmative case for a public accommodations theory of prison healthcare. This argument includes an analysis of how federal jurisprudence supports bringing a Title III claim in prison.[173] It also explores how plaintiffs could use state public accommodations law to potentially obtain monetary relief and solve the remedial gap. Though this Part draws in part on state public accommodations laws in its analysis, it does so to illuminate arguments regarding Title III's applicability to prison healthcare companies.[174]

A. *The Contours of the Claim*

At first blush, prison healthcare companies meet at least some of the qualifications to identify as a public accommodation. Title III of the ADA prohibits discrimination by anyone who "owns, leases[,] . . . or operates a place of public accommodation," which the statute defines as any private entity whose operations affect interstate commerce.[175] Prison healthcare companies are private entities by definition, and their location within a public prison does not change the fact that they "operate" the medical facility within the meaning of Title III.[176] Nor do courts seem to dispute

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171. Freeman v. McDonnell, No. 18-7802 (BRM) (ZNQ), 2021 WL 395875, at *3 (D.N.J. Feb. 4, 2021) ("New Jersey district courts have repeatedly found that correctional facilities are places of public accommodation under the [New Jersey Law Against Discrimination]."); Dep't of Corr. v. Hum. Rts. Comm'n, 917 A.2d 451, 452 (Vt. 2006) (finding that state antidiscrimination law applies to state prisons).

172. See State ex rel. Naugles v. Mo. Comm'n on Hum. Rts., 561 S.W.3d 48, 54 n.5 (Mo. Ct. App. 2018) (collecting cases from Connecticut, Maine, Pennsylvania, Texas, Washington, and West Virginia that found prisons not to be public accommodations under their respective antidiscrimination laws).

173. This analysis focuses exclusively on whether a prison healthcare company qualifies as a place of public accommodation under Title III; demonstrating that an individual was "discriminated against on the basis of disability" is beyond the scope of this Note. 42 U.S.C. § 12182(a) (2018); see also *Bernard*, 2022 WL 17338154, at *7 (laying out the Seventh Circuit's three-step formulation to state a claim under the ADA and section 504).

174. An in-depth analysis of individual states' public accommodations laws, though important to build scholarship around this issue, is also beyond the scope of this Note.

175. 42 U.S.C. §§ 12181(7), 12182(a).

176. See Disabled Rts. Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 872–78 (9th Cir. 2004) (finding that "the purposes and history of Title III, the DOJ's implementing regulations, and the Supreme Court's guidance" favor applying Title III to a private operator that "exercise[s] sufficient control over" a publicly owned facility); Fiedler v. Am. Multi-Cinema, Inc., 871 F. Supp. 35, 37 (D.D.C. 1994) (finding a movie theater to be a privately operated place of public accommodation, notwithstanding its location within a federal building); see also PGA Tour, Inc. v. Martin, 532 U.S. 661, 679 (2001) ("[Title III of the ADA] prohibit[s] public accommodations from discriminating against a disabled 'individual or class of individuals' . . . either directly or indirectly through contractual arrangements

that their operations affect interstate commerce.[177]

Where reviewing courts often hesitate is over whether the provision of healthcare within a carceral facility falls outside the bounds of Title III. Courts' analyses implicate two interrelated elements of a Title III claim: the requirement that an entity fall under one of the statute's enumerated categories and Title III's exemption for private clubs and establishments not open to the public. This section confronts both elements, first surveying the caselaw around prison healthcare companies' enumeration within Title III and then, given the lack of federal precedent surrounding the private club exemption, drawing on state public accommodations law to propose an argument for rejecting a company's claim that the exemption applies.

1. *Title III's Enumerated Categories.* — In order for an entity to be liable under Title III of the ADA, it must fall under one of the statute's twelve enumerated categories.[178] The Supreme Court has found that these "extensive" categories "'should be construed liberally' to afford people with disabilities 'equal access' to the wide variety of establishments available to the nondisabled."[179] This list of covered entities is exhaustive, so facilities outside its ambit are not subject to liability under Title III.[180]

No reviewing court has affirmatively held that privately-operated prisons as a whole are public accommodations for the purposes of Title III. Of the reviewing courts that have offered a rationale for their decisions, almost all have cited Title III's enumerated categories (or cases that in turn rely on those categories) as their sole justification.[181] The implication of

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with other entities. Those clauses make clear . . . that their prohibitions cannot be avoided by means of contract . . . ." (quoting 42 U.S.C. § 12182(b)(1)(A) (2000))); Esparza v. Univ. Med. Ctr. Mgmt. Corp., No. 17-4803, 2017 WL 4791185, at *2, *18 (E.D. La. Oct. 24, 2017) (upholding a plaintiff's Title III claim against a company that operated a publicly owned medical facility). The DOJ, the agency charged with releasing technical assistance manuals to entities with "rights or duties" under Title III, 42 U.S.C. § 12206(c)(2)–(3), reaches a similar conclusion by way of example. See C.R. Div., DOJ, ADA Title III Technical Assistance Manual, ADA.gov, https://www.ada.gov/resources/title-iii-manual/ [https://perma.cc/UT5G-Q5EB] (last updated Nov. 1, 1993) ("A State department of parks provides a restaurant in one of its State parks. The restaurant is operated by X Corporation . . . . As a public accommodation, X Corporation is subject to title III of the ADA. The State department of parks, a public entity, is subject to title II.").

177. See *Bernard*, 2022 WL 17338154, at *6 (finding that a prison healthcare company's actions affect interstate commerce); cf. Rainbow Health Care Ctr., Inc. v. Crutcher, No. 07-CV-194-JHP, 2008 WL 268321, at *5 (N.D. Okla. Jan. 29, 2008) (finding that the "food, medicine, and durable medical supplies provided and used" by the defendant nursing home sufficiently established an interstate commerce nexus).

178. See 42 U.S.C. § 12181(7).

179. *PGA Tour*, 532 U.S. at 676–77 (first quoting S. Rep. No. 101-116, at 59 (1989); then quoting H.R. Rep. No. 101-485, pt. 2, at 100 (1990)).

180. See C.R. Div., DOJ, supra note 176 ("[T]he 12 categories [of public accommodations] are an exhaustive list.").

181. See Maringo v. Warden, Corr. Corp. of Am., 283 F. App'x 205, 206 (5th Cir. 2008) (per curiam) (finding that Title III does not apply to private prison operators and citing 42

this argument is that, because prisons are not enumerated within the twelve exhaustive categories of public accommodations, a company that operates a prison similarly "does not fit easily into a cause of action under Title III of the ADA."[182]

While the broader operation of a prison may not fall neatly within any of the ADA's twelve categories, courts have found that the services of a healthcare provider do. One of Title III's twelve categories includes a "professional office of a health care provider, hospital or other service establishment."[183] Almost all decisions that have extended liability to prison healthcare companies have cited this provision of the ADA as part of their reasoning.[184] *Hernandez v. County of Monterey*, the decision with the most in-depth analysis on the issue, cited the ADA's "expansive purpose" to bolster its conclusion.[185] The court noted that within the section of the ADA regarding Congress's findings and purpose, Congress stated its intent to "reach all 'critical areas' of society where persons with disabilities face discrimination, two of which [institutionalization and health services] are involved in the instant case."[186] Considered in light of courts' reluctance to extend Title III liability to private prison contractors, this line of jurisprudence suggests that the existence of healthcare providers within Title III's enumerated categories make prison healthcare companies distinguishable from contractors charged with operating prisons.[187]

U.S.C. § 12181(7)); Maher v. Tennessee, No. 16-1314-JDT-cgc, 2018 WL 1404405, at *4 (W.D. Tenn. Mar. 20, 2018) (same); Valdovinos-Blanco v. Vaughn, No. CV 11-0436 MCA/WPL, 2012 WL 13076554, at *5 (D.N.M. Apr. 12, 2012) (same); Tester v. Hurm, No. 09–318–JBC, 2011 WL 6056407, at *3 (E.D. Ky. Dec. 6, 2011) (same); Collazo v. Corr. Corp. of Am., No. 4:11cv1424, 2011 WL 6012425, at *3 (N.D. Ohio Nov. 30, 2011) (same); Wattleton v. Doe, No. 10-11969-JGD, 2010 WL 5283287, at *2 (D. Mass. Dec. 14, 2010) ("Title III does not include the Bureau of Prisons, or any other federal entity, among its exhaustive list of public accommodations operated by private entities within the coverage of that Title." (citing 42 U.S.C. § 12181(7)(2010))); Hines v. GEO Grp., Inc., No. 5:08–CT–3056–D, 2008 WL 9015758, at *4 (E.D.N.C. Dec. 23, 2008) ("Under Title III, a 'public accommodation' does not include a prison.").

182. *Collazo*, 2011 WL 6012425, at *3.

183. 42 U.S.C. § 12181(7)(F).

184. See Bernard v. Ill. Dep't of Corr., No. 3:20-cv-50412, 2022 WL 17338154, at *5 (N.D. Ill. Nov. 30, 2022); Stafford v. Wexford of Ind., LLC, No. 1:17-cv-00289-JMS-MJD, 2017 WL 4517506, at *3 (S.D. Ind. Oct. 10, 2017); Hernandez v. County of Monterey, 70 F. Supp. 3d 963, 976–77 (N.D. Cal. 2014); Saldana v. Crane, No. 12-573 (DWF/TNL), 2013 WL 4747961, at *9 (D. Minn. Sept. 4, 2013).

185. 70 F. Supp. 3d at 977 (internal quotation marks omitted) (quoting PGA Tour, Inc. v. Martin, 532 U.S. 661, 680 (2001)).

186. Id. (quoting *PGA Tour*, 532 U.S. at 680).

187. At least one reviewing court has explicitly distinguished *Hernandez* to argue that a prison itself is not a place of public accommodation under Title III, even though a private medical provider within a prison can be categorized as such. See York v. Beard, No. 1:14-cv-01234-LJO-SKO (PC), 2015 WL 3488217, at *2 (E.D. Cal. June 2, 2015). The District of Minnesota has also issued holdings that appear to implicitly acknowledge this distinction. Compare *Saldana*, 2013 WL 4747961, at *9 ("Liberally construing Saldana's generic allegations of discrimination based on the provision of medical services, Saldana's claim . . . could

The two adverse decisions on the applicability of Title III to prison healthcare companies, both from the District of Maine, conversely argue that there is no distinction between prisons and prison healthcare companies.[188] In *Gross v. Landry*, the first case to approach the question, the court noted that "[p]risons and prison medical facilities are not listed among the [ADA's twelve] statutory examples."[189] It then concluded that "[t]he weight of authority suggests that prisons and prison medical facilities are not 'public accommodations' within the meaning of the ADA."[190] Notably, however, all the supportive sources cited in *Gross* only discuss private prison operators failing to qualify because they fall outside the twelve enumerated categories; they say nothing about prison healthcare companies.[191] In fact, the only cited case that concerns a prison healthcare company is *Hernandez*, in which the court reached the *opposite* conclusion.[192] Therefore, the "weight of authority" outlined in *Gross* and later cited by the District of Maine in *Gladu v. Maine Department of Corrections*[193] does not actually respond to the contention of *Hernandez* and other cases that prison medical facilities fall within Title III's enumerated category for healthcare providers, hospitals, and other service establishments.

With no precedent on which to rely, all that remains in *Gross*'s argument is whether a "prison medical facility" is sufficiently different from Title III's enumerated category for health care providers, hospitals, and other service establishments—a difficult argument to make, given the ADA's expansive construction.[194] Circuit courts' treatment of the term "service establishment" illustrates the point: In the words of the Tenth Circuit, a service establishment is a private or public entity "that, by its conduct or performance, assists or benefits someone or something or provides useful labor without producing a tangible good for a customer or client. . . . In other words, a service establishment is—unsurprisingly—an establishment that provides a service."[195] Prison healthcare companies'

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arguably fall under Title II, relating to the provision of medical services in a state prison, or Title III, concerning the services of a health care provider."), with Maxwell v. Olmsted County, No. 10-3668 (MJD/AJB), 2012 WL 466179, at *4 (D. Minn. Feb. 13, 2012) ("[S]tate and county correctional facilities are not covered by Title III.").

188. See Gladu v. Me. Dep't of Corr., No. 1:20-cv-00449-JDL, 2022 WL 2068245, at *5 (D. Me. June 8, 2022); Gross v. Landry, No. 2:17-cv-00297-LEW, 2019 WL 1270922, at *10 (D. Me. Mar. 19, 2019).

189. 2019 WL 1270922 at *9.

190. Id. at *10.

191. See supra note 181.

192. See supra notes 185–187 and accompanying text.

193. 2022 WL 2068245, at *4.

194. See PGA Tour, Inc. v. Martin, 532 U.S. 661, 674–75 (2001) (finding that Congress provided the ADA with a "broad mandate" to eliminate widespread discrimination against disabled individuals).

195. Levorsen v. Octapharma Plasma, Inc., 828 F.3d 1227, 1231 (10th Cir. 2016); see also Matheis v. CSL Plasma, Inc., 936 F.3d 171, 176–77 (3d Cir. 2019) (approving of the Tenth Circuit's broad reading of "service establishment"); Silguero v. CSL Plasma, Inc., 907

services undoubtedly fit within this expansive definition; in fact, the provision of the "useful labor" of medical services to incarcerated people is a constitutional requirement.[196] Given the ADA's broad mandate to root out disability discrimination and ensure equal access for disabled people in Title III's twelve enumerated categories,[197] advocates should have ample purchase to argue that a prison healthcare provider qualifies as a place of public accommodation.

2. *The Private Club Exemption.* — A disabled plaintiff's other challenge is the contention that a prison healthcare company is not sufficiently open to the public to qualify as a public accommodation. Title III excludes from its ambit any "private club[s] or establishment[s] not in fact open to the public."[198] If a plaintiff makes out a Title III claim, the private entity carries the burden of proof to establish that it qualifies for Title III's private club exemption.[199]

Few federal court decisions have explored applying this rationale to prisons for the purposes of Title III. Three district courts make these arguments in their rejection of Title III's applicability to prison healthcare companies, albeit briefly.[200] The Northern District of California's *Hernandez* decision holds the opposite, finding that a county jail is open to the public because it is sufficiently analogous to covered entities that "also restrict public access in certain times and circumstances but are nonetheless designed and intended to provide services, goods, privileges, and

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F.3d 323, 328–29 (5th Cir. 2018) ("[A] 'service establishment' is an establishment that performs some act or work for an individual who benefits from the act or work."); Illinois v. CSL Plasma, Inc., 635 F. Supp. 3d 645, 651 (N.D. Ill. 2022) (endorsing the Tenth Circuit's definition of "service establishment" (internal quotation marks omitted)).

196. See Estelle v. Gamble, 429 U.S. 97, 103 (1976) ("[E]lementary principles [of the Eighth Amendment] establish the government's obligation to provide medical care for those whom it is punishing by incarceration.").

197. See *PGA Tour*, 532 U.S. at 676–77 (emphasizing the liberal construction of Title III's enumerated categories).

198. 42 U.S.C. §§ 12187, 2000a(e) (2018).

199. Martin v. PGA Tour, Inc., 984 F. Supp. 1320, 1323 (D. Or. 1998), aff'd, 204 F.3d 994 (9th Cir. 2000), aff'd, 532 U.S. 661.

200. In *Gross*, the District of Maine notes only that "[c]ourts have contrasted 'public accommodations' that are 'open to the general public' with private clubs utilizing a 'limited guest policy.'" Gross v. Landry, No. 2:17-cv-00297-LEW, 2019 WL 1270922, at *10 (D. Me. Mar. 19, 2019) (quoting Jankey v. Twentieth Century Fox Film Corp., 14 F. Supp. 2d 1174, 1178–79 (C.D. Cal. 1998)). The court in *Gladu* in turn cites this distinction to conclude that prison medical facilities "are not, by definition, open to the public and, as such, are not subject to suit under Title III." Gladu v. Me. Dep't of Corr., No. 1:20-cv-00449-JDL, 2022 WL 2068245, at *5 (D. Me. June 8, 2022). Another case that concerned Arizona's state public accommodations law, which the court notes is to be construed in accordance with the ADA, held that the operations of a prison labor program were only open to the incarcerated population and therefore did not constitute a place of public accommodation. See Castle v. Eurofresh, Inc., 734 F. Supp. 2d 938, 945–46 (D. Ariz. 2010); see also White v. Secor, Inc., No. 7:10–cv–00428, 2010 WL 4630320, at *2 (W.D. Va. Nov. 5, 2010) (citing *Castle* in its rejection of an incarcerated person's Title III claim).

advantages to members of the public."[201] Advocates are thus left with the competing, though sparse, conceptions forwarded by district courts in the Title III context, which turn on whether carceral facilities are private by virtue of their restricted access or public by virtue of their membership that is drawn from the general populace.

Another authority to resolve the scope of the private club exemption is Title II of the Civil Rights Act ("CRA"). Title III of the ADA construes the definition of the private club exemption to be consistent with the CRA.[202] The DOJ, the agency charged with administering Title III of the ADA,[203] has also looked to Title II of the CRA to help to clarify the exception's scope.[204]

While no case has considered whether Title II of the CRA applies to prison healthcare companies, courts have uniformly rejected applying Title II to carceral facilities.[205] Notably, however, none of these decisions have cited Title II's private club exemption as their rationale. Instead, when they do cite to any statutory authority, these decisions cite to Title II's enumerated list of covered establishments.[206] Like Title III of the ADA, Title II of the CRA only covers an enumerated list of places of public accommodation and "in doing so excludes from its coverage those categories of establishments not listed."[207] Establishments may therefore be open

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201. *Hernandez*, 70 F. Supp. 3d 963, 978 (N.D. Cal. 2014) (quoting Wilkins-Jones v. County of Alameda, 859 F. Supp. 2d 1039, 1054–55 (N.D. Cal. 2012)).

202. 42 U.S.C. § 12187.

203. See Disabled Rts. Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 876 (9th Cir. 2004) ("As the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court, the Department [of Justice]'s views are entitled to deference." (alteration in original) (citations omitted) (internal quotation marks omitted) (quoting Bragdon v. Abbott, 524 U.S. 624, 646 (1998)) (citing 42 U.S.C. § 12188(b) (1998); id. § 12206(c))).

204. See 28 C.F.R. § 36.104 (2024) ("Private club means a private club or establishment exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000a(e)).").

205. See, e.g., Lutchey v. Wiley, No. 98-3760, 1999 WL 645951, at *2 (6th Cir. Aug. 13, 1999); Lawrence v. Wilson, No. 1:22-CV-P136-JHM, 2023 WL 3443255, at *3 (W.D. Ky. May 12, 2023); Nance v. Ryan, No. CV 15–0923–PHX–SMM (DKD), 2015 WL 4528909, at *4 (D. Ariz. July 27, 2015); Patterson v. W. Va. Reg'l Jail & Corr. Facility Auth., No. 3:11-cv-00943, 2012 WL 3308607, at *1 n.1 (S.D. W. Va. July 3, 2012); Douglas v. U.S. Att'y Gen., 404 F. Supp. 1314, 1315 (W.D. Okla. 1975).

206. See *Lutchey*, 1999 WL 645951, at *2 (citing 42 U.S.C. § 2000a(b)); *Lawrence*, 2023 WL 3443255, at *3 (same); *Nance*, 2015 WL 4528909, at *4 (same); *Patterson*, 2012 WL 3308607, at *1 n.1 (same).

207. *Patterson*, 2012 WL 3308607, at *1 n.1 (emphasis omitted) (internal quotation marks omitted) (quoting Denny v. Elizabeth Arden Salons, Inc., 456 F.3d 427, 431 (4th Cir. 2006)).

to the public for the purposes of the private club exemption but nonetheless fall outside of the purview of the CRA.[208] As a result, CRA jurisprudence on prisons does not address the question of whether a carceral facility meets the criteria for the private club exemption.

Even if CRA jurisprudence cannot answer whether prison healthcare companies are private clubs under Title III,[209] the DOJ has pointed to a number of factors used in CRA caselaw to determine whether a facility can claim the private club exemption. These include the entity's nonprofit status, the degree of public funding, the presence of substantial membership fees, the degree of member control over club operations, the selectivity of the membership process, the extent to which the facility is open to the public, and "whether the club was created specifically to avoid compliance with the [CRA]."[210]

Applying many of DOJ's factors to prison healthcare appears to favor including prison healthcare companies as public accommodations. By definition, prison healthcare companies operate on a for-profit basis. As local, state, and federal contractors, these companies are also heavily funded by the taxpaying public.[211] No "substantial membership fees" are charged to people who are incarcerated.[212] Nor can incarcerated people be considered to have control over the operations of a prison healthcare company—in fact, they have no choice regarding who provides their medical care.[213]

More unclear is whether a prison healthcare company is open to the public (and perhaps by extension the "selectivity of [its] membership selection process"[214]). In finding prisons not to be public accommodations, many reviewing courts find it to be an intuitive conclusion that prisons are "properly viewed as *the antithesis* of a . . . 'public accommodation.'"[215] After all, a carceral facility "does not accept or solicit the patronage of the general public," and people cannot simply walk into a jail or

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208. See *Denny*, 456 F.3d at 431 (distinguishing a hair salon from a recreational facility, one of the CRA's enumerated categories).

209. See supra section III.A.3.

210. 28 C.F.R. pt. 36, app. C (2025).

211. See Fenne, supra note 126 (noting that healthcare contracts in prisons and jails are made between private companies and the government).

212. See 28 C.F.R pt. 36, app. C (listing "whether substantial membership fees are charged" as a factor courts have considered when deciding whether an entity is a "private club" within the meaning of the statute). Some commentators have noted the rise of "pay-to-stay" fees, which many states charge incarcerated people to reside in carceral facilities. See Lauren-Brooke Eisen, America's Dystopian Incarceration System of Pay to Stay Behind Bars, Brennan Ctr. for Just. (Apr. 19, 2023), https://www.brennancenter.org/our-work/analysis-opinion/americas-dystopian-incarceration-system-pay-stay-behind-bars [https://perma.cc/U9KW-MEFV].

213. Fenne, supra note 126.

214. 28 C.F.R. pt. 36, app. C.

215. In re Letray v. N.Y. State Div. of Hum. Rts., 121 N.Y.S. 3d 481, 483 (N.Y. App. Div. 2020) (alteration in original) (internal quotation marks omitted) (quoting State ex rel. Naugles v. Mo. Comm'n on Hum. Rts., 561 S.W.3d 48, 54 (Mo. Ct. App. 2018)).

prison to patronize its services.[216] Instead, it is open only to individuals who meet specific criteria (e.g., a criminal conviction) and are screened upon entry.[217] One reviewing court succinctly states this theory of carceral facilities as private clubs: "[B]y establishing its criminal laws, [the government] has defined a class of exclusivity and selectivity of persons, i.e., those convicted, to be members of our penal institutions. Thus, the argument would be that [carceral facilities] are the functional equivalent of private clubs and excluded from [public accommodations law]."[218]

Using this logic to argue that an incarcerated population cannot be considered part of the general public, however, is overinclusive. As an initial matter, limiting access to a subset of the populace does not automatically make a facility selective within the meaning of the private club exemption. Courts have defined a club's selectivity to mean screening members "based upon social, moral, spiritual, or philosophical beliefs, or any other criteria used to protect freedom of association values which are at the core of the private club exemption."[219] The legislative history of the of the CRA's private club exemption counsels the same conclusion: The House Judiciary Committee found that in situations "where freedom of association might logically come into play as in cases of private organizations, [T]itle II [of the CRA] quite properly exempts bona fide private clubs and other establishments."[220] Statements from the bill's sponsors in both the House and the Senate similarly indicate that the private club exemption was not aimed to protect all selective organizational practices but specifically the freedom of fraternal organizations to expressive association based on their shared values.[221]

Reviewing courts have similarly refused the private club exemption to organizations whose selective practices lack an expressive dimension. In *Tillman v. Wheaton-Haven Recreation Ass'n*, the Supreme Court held that a club with membership restricted to 325 families and a three-quarter-mile geographical radius did not meet the private club exemption under Title

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216. Blizzard v. Floyd, 613 A.2d 619, 621 (Pa. Commw. Ct. 1992).

217. See Skaff v. W.V. Hum. Rts. Comm'n, 444 S.E.2d 39, 42 (W. Va. 1994).

218. Id. at 42 n.9.

219. Martin v. PGA Tour, Inc., 984 F. Supp. 1320, 1323 (D. Or. 1998), aff'd, 204 F.3d 994 (9th Cir. 2000), aff'd, 532 U.S. 661 (2001).

220. H.R. Rep. No. 88-914, pt. 2, at 9 (1963). While the "bona fide" language initially in H.R. 7152 was later eliminated by amendment, notes from the Senate floor indicate that the change was intended only to "tighten[] up the language, and make[] it mean what we said it meant." 110 Cong. Rec. 13697 (1964) (statement of Sen. Humphrey).

221. See, e.g., Civil Rights: Hearings on H.R. 7152 Before the H. Comm. on Rules, 88th Cong. 196–97 (1964) ("[A] private club that does not cater to the public, that you could not go in there off the street and get a meal or use the facilities[,] . . . and they have a roster of members, there are initiation fees, membership dues; that is a bona fide club." (statement of Rep. Celler)); 110 Cong. Rec. 6008 (1964) ("A private club is a fraternal, civic body. It has a purpose for existing. It has a charter, it has bylaws, and its members agree to live up to those bylaws." (statement of Sen. Humphrey)).

II of the CRA.[222] The Oregon Supreme Court extended this logic to Abraham's case described in this Note's introduction, finding that Corizon's restriction of services to individuals in custody at the Clackamas County Jail similarly "lack[s] the element of selectivity necessary to qualify as distinctly private."[223] Thus, while a prison healthcare company limiting the scope of its service to incarcerated people in a given geographical area may be selective in the everyday sense of the word, it does not fit the meaning of the private club exemption.

Furthermore, Title III (along with many state public accommodations laws) includes within its scope institutions like schools, hospitals, and social service establishments like halfway houses.[224] These facilities restrict entry to only a prescreened subset of the populace (e.g., students, sick people), but such groups are nonetheless drawn from the general public.[225] The DOJ's inclusion of halfway houses within Title III's enumerated categories is particularly instructive, given that "absent a criminal sentence, members of the public cannot get accommodation in such facilities."[226] Using a facility's insularity to exclude incarcerated populations from the benefits of public accommodations law should therefore be considered an insufficient basis for claiming the private club exemption.

Nor is this conclusion affected by the fact that most carceral facilities are residential. Though they are generally excluded from coverage, residential facilities can fall within the scope of the ADA if a portion of the facility is devoted to a covered establishment under Title III.[227] The DOJ finds that if even a portion of such a facility "can appropriately be categorized as a service establishment or as a social service establishment," then that portion is a covered place of public accommodation under the

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222. 410 U.S. 431, 433, 438 (1973).

223. Abraham v. Corizon Health, Inc., 511 P.3d 1083, 1094 (Or. 2022).

224. 42 U.S.C. § 12181(7)(F), (J)–(K) (2018); 28 C.F.R. pt. 36, app. C (2025).

225. See Wilkins-Jones v. County of Alameda, 859 F. Supp. 2d 1039, 1054 (N.D. Cal. 2012) ("[A] jail is more like schools and hospitals contemplated under the ADA, which also restrict public access in certain times and circumstances but are nonetheless 'designed and intended to provide services, goods, privileges, and advantages to members of the public.'" (quoting Carolyn v. Orange Park Cmty. Ass'n, 99 Cal. Rptr. 3d 699, 710 (Cal. Ct. App. 2009))); cf. Illinois v. CSL Plasma, Inc., 635 F. Supp. 3d 645, 652 (N.D. Ill. 2022) ("The [ADA] does not contain language precluding a business from being a service establishment where it lawfully bars certain members of the public from using its services. This Court will not read an element into the statute that does not exist in its actual text." (citing Dean v. United States, 556 U.S. 568, 572 (2009))).

226. Abdus-Sabur v. Hope Village, Inc., 221 F. Supp. 3d 3, 18 (D.D.C. 2016) (internal quotation marks omitted) (quoting Vega v. United States, No. C11-632-RSM, 2012 WL 5384735, at *12 (W.D. Wash. Nov. 1, 2012)). In both *Abdus-Sabur* and *Vega*, the court found that halfway houses were not places of public accommodation under their states' respective antidiscrimination laws. See id. at 18; *Vega*, 2012 WL 5384735 at *11–12.

227. See 28 C.F.R. pt. 36, app. C ("Many facilities, however, are mixed use facilities. For example, in a large hotel that has a separate residential apartment wing, ... [t]he separate nonresidential accommodations in the rest of the hotel would be a place of lodging, and thus a public accommodation subject to the requirements of this final rule.").

ADA.[228] Multiple courts have likewise held that other residential facilities like nursing homes and retirement communities qualify as a healthcare provider or a social service provider under Title III.[229] Such facilities are akin to prisons because "residents' rooms are not open to the public."[230] Nonetheless, if a section of those facilities offers healthcare services, that section qualifies as a public accommodation within the meaning of the ADA.[231] Prison healthcare companies likewise should be subject to Title III regardless of their location in a residential facility.

Beyond appealing to a prison's insularity, some state courts seem to suggest carceral facilities are singularly outside the scope of public accommodations laws by virtue of their population's criminality. Some decisions question whether individuals are "invited" to a carceral facility or receive "privileges" within the meaning of Title III,[232] but this argument is significantly weaker when the defendant is a prison healthcare service provider rather than a prison itself.[233] The other, more disturbing claim is that imprisonment is an act in which the government "separate[s] the general public from the individuals who are compelled by our penal system to be confined there."[234] In other words, being sent to a prison, jail, or detention

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228. Id.

229. See Reckley v. Goodman Grp., No. CV 19-119-M-KLD, 2020 WL 5893844, at *6 (D. Mont. Oct. 5, 2020) (collecting cases); Montano v. Bonnie Brae Convalescent Hosp., Inc., 79 F. Supp. 3d 1120, 1129 (C.D. Cal. 2015) ("Defendant is a nursing home that is a covered entity under Title III of the ADA and was subject to it at all relevant times, as it is a health care provider and thus a place of public accommodation."); Herriot v. Channing House, No. C 06–6323 JF (RS), 2009 WL 225418, at *1, *6 (N.D. Cal. Jan. 29, 2009) (finding it to be "undisputed" that a "continuing care retirement community" is covered by Title III).

230. *Reckley*, 2020 WL 5893844, at *5.

231. See id. at *6.

232. See CHRO ex rel. Vargas v. State Dep't of Corr., No. HHBCV136019521S, 2014 WL 564478, at *4 (Conn. Super. Ct. Jan. 10, 2014). Even this claim is questionable with respect to the operation of carceral facilities, given the services they regularly provide to incarcerated people. See Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 210 (1998) ("Modern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners (and any of which disabled prisoners could be 'excluded from participation in')."); Model Penal Code § 1.02 (Am. L. Inst. 2023) (listing correction and rehabilitation as general purposes of the Code's provisions). This remains true even if incarcerated people do not wish to participate in such services. See Dep't of Corr. v. Hum. Rts. Comm'n, 917 A.2d 451, 458 n.2 (Vt. 2006) ("State prisons, like many hospitals or even schools, are places where people do not necessarily want to go, but any member of the public meeting certain criteria may be 'invited'—and is entitled—to participate in their programs and receive their benefits.").

233. See supra notes 194–196 and accompanying text. One recent report also finds that forty states and the federal prison system charge incarcerated people medical copays, further underlining the customer–service provider relationship between incarcerated people and prison healthcare companies. See Eisen, supra note 212.

234. *CHRO ex rel. Vargas*, 2014 WL 564478, at *4.

center is a form of civil death,[235] in which an incarcerated individual is severed from the general public.

Reading an unspoken, prison-specific carveout into Title III defies the ADA's broad construction.[236] Just as the Oregon Supreme Court found in *Abraham* with regard to Oregon's public accommodation law,[237] there is no evidence that either the ADA or the CRA was intended to deprive a person of their statutory remedies upon their incarceration. Nor does the Prison Litigation Reform Act, which limits the federal civil remedies incarcerated people can access,[238] make such a far-reaching statement.

Courts should therefore refuse to single out incarcerated people as intrinsically segregated from the public and focus instead on whether a given facility's actions are selective within the meaning of Title III. This is the course the Oregon Supreme Court took in *Abraham*. Citing the state's civil death ban, the court rejected the assumption that incarcerated people are implicitly excluded from the public and instead posed the question as a matter of how broadly a service must be offered before it must be considered public.[239] Such an approach remains faithful to ADA and CRA jurisprudence rather than differentiating incarcerated people by their criminality alone.

Incarcerated people can thus argue that pursuant to the DOJ's guiding inquiries on whether a facility is truly private, a prison healthcare company cannot carry its burden to qualify for Title III's private club exemption.

B. *Developing a Public Accommodations Theory of Private Prison Healthcare*

Using public accommodations law, incarcerated individuals can more fully hold accountable the companies responsible for the harm they have

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235. "Civil death" has historically referred to the termination of an individual's civil rights upon conviction of a crime, though Professor Gabriel J. Chin has argued that the term should additionally apply to the "network of collateral consequences" incarcerated people face upon conviction. Gabriel J. Chin, The New Civil Death: Rethinking Punishment in the Era of Mass Conviction, 160 U. Pa. L. Rev. 1789, 1790 (2012). Under Roman law, individuals subjected to civil death were "condemned to exile . . . sentenced to be deported to an island, or . . . condemned to the mines"—a practice of banishment that sounds in incarcerated individuals' severance from the general public. James Michael Kovach, Life and Civil Death in the Ocean State: Resurrecting Life-Prisoners' Right to Access Courts in Rhode Island, 24 Roger Williams U. L. Rev. 400, 400–01 (2019) (alterations in original) (internal quotation marks omitted) (quoting Charles Phineas Sherman, Roman Law in the Modern World 40 (1917)).

236. See PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001) (noting the ADA's "sweeping purpose" and comprehensive nature); *Yeskey*, 524 U.S. at 212 ("[T]he fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985))).

237. 511 P.3d 1083, 1089 (Or. 2022).

238. See 42 U.S.C. § 1997e(e) (2018).

239. *Abraham*, 511 P.3d at 1089.

suffered.[240] Doing so satisfies the corrective aims of federal disability law and acknowledges the increasingly privatized nature of prison healthcare.[241] It also offers broader remedial opportunities, which this section discusses. Section III.B.1 argues that Title III and state public accommodation law can solve the remedial gap in disability lawsuits by offering the potential for monetary relief under state public accommodations law. Section III.B.2 concludes by considering other litigation strategies that could be made available by a public accommodations theorization of private prison healthcare.

1. *Addressing the Remedial Gap.* — Though Title III does not include a damages remedy,[242] one advantage of theorizing a prison healthcare company as a public accommodation is the opportunity to assess damages liability using state public accommodations laws. Thirty-six states and the District of Columbia have laws that offer a damages remedy to those who face disability discrimination in places of public accommodation.[243] This means that in most states, incarcerated plaintiffs have an opportunity to obtain both monetary and injunctive relief for disability discrimination perpetrated by a private healthcare company. This approach could therefore provide at least a partial answer to the Rehabilitation Act's "remedial gap"[244] in federal prisons and detention centers by offering a state-level damages remedy to individuals in federal custody.

Because each state's public accommodations law varies in scope and legislative history, a full analysis of their applicability to prison healthcare companies is beyond the scope of this Note.[245] Some states, however, have extended liability under their public accommodations laws to prison healthcare companies,[246] while others have gone even further and extended liability to prison operations generally.[247] States have also tied their state public accommodations laws to Title III of the ADA,[248] which

240. In most cases, advocates should deploy public accommodations law in addition to—rather than instead of—government-facing causes of action like Title II of the ADA and section 504 of the Rehabilitation Act. As cases like Abraham's demonstrate, both government and private actors can be responsible for disability discrimination against incarcerated people. See Plaintiff-Appellant's Opening Brief, supra note 1, at 4–5 ("This conclusion [that Abraham was suicidal] was based on the inaccurate statements of the screening officer, the confused and ineffective communications with Abraham by [Corizon] staff, and the false belief that Abraham was refusing meals and insulin."). Utilizing both avenues can therefore assure that plaintiffs obtain a more complete form of relief.

241. See supra notes 154–157 and accompanying text.

242. See 42 U.S.C. § 12188(a).

243. See infra Appendix.

244. See supra notes 158–159 and accompanying text.

245. See, e.g., State ex rel. Naugles v. Mo. Comm'n on Hum. Rts., 561 S.W.3d 48, 55 (Mo. Ct. App. 2018) (distinguishing Vermont's public accommodations law from Missouri's based on their distinct legislative histories).

246. See supra note 170.

247. See supra note 171.

248. See supra notes 63–64 and accompanying text.

means that advocates can use Title III arguments to build a cause of action under their state's public accommodations law.

California's Unruh Civil Rights Act provides the clearest example of using Title III to obtain a damages remedy. Under California law, any Title III violation automatically constitutes a violation of the Unruh Act, which contains a damages remedy.[249] By bringing claims under Title III and the Unruh Act, a plaintiff's remedies can therefore include "a maximum of three times the amount of actual damages, no less than $4,000 in statutory damages, and any attorney's fees determined by the court" through the Unruh Act.[250] As a result, so long as the healthcare provider is a private entity, a public accommodations theory would effectively solve the remedial gap issue posed by Professor Schlanger,[251] at least in the area of privatized prison healthcare in California.[252]

Given the varying strength of state-level public accommodations laws, however, this approach will almost certainly be an imperfect solution to the remedial gap.[253] Nonetheless, for those states that connect their laws to Title III or offer a sufficiently capacious definition of public accommodation, utilizing state antidiscrimination law can enable disabled plaintiffs to obtain much-needed compensation that in many cases would be otherwise unavailable. It also accords with the broader strategy of protecting civil rights in the midst of the second Trump Administration, during which

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249. Cal. Civ. Code §§ 51(f), 52(a)–52(b) (2025).

250. Julian Schoen, Note, Patching Procedural Potholes in Supplemental Jurisdiction Claims Involving ADA & Unruh Act Litigation in California Federal Courts, 55 Loy. L.A. L. Rev. 1107, 1114 (2022) (citing Cal. Civ. Code § 51(f)).

251. See supra notes 158–159 and accompanying text.

252. See Wilkins-Jones v. County of Alameda, 859 F. Supp. 2d 1039, 1050 (N.D. Cal. 2012) (finding that the Unruh Act covers a healthcare company's services provided within a county jail). It is worth noting that one recent decision regarding the provision of medical services in an immigration detention center has reached a different result. In *Ahn v. GEO Group, Inc.*, a federal district judge held that the plaintiff failed to state a claim under the Unruh Act in a case involving a disabled immigrant who committed suicide while locked in solitary confinement. No. 1:22-cv-00586-CDB, 2024 WL 1258428, at *1–5 (E.D. Cal. Mar. 25, 2024). The court argued that the relationship between Ahn and GEO Group, which operated both the detention center and its healthcare services, was more akin to an inmate and a jailer than a patient and a physician. See id. at *5. While the holding seems to disclaim GEO acting as a healthcare provider in this situation, the fact that the plaintiff's arguments contemplated the company acting at least in part as Ahn's healthcare provider could present an obstacle for future litigation under the Unruh Act. See Memorandum in Opposition to Defendant GEO Group's Motion to Dismiss Plaintiff's Second Amended Complaint at 4, *Ahn*, 2023 WL 8275615 ("Plaintiff has also pleaded that Defendant's mental health services are provided to detainees such as Ahn."). But cf. supra notes 227–231 and accompanying text (demonstrating that, at least in the Title III context, a portion of a facility (i.e., the "physician") can be properly considered a place of public accommodation while the remainder of the facility (i.e., the "jailer") can fall outside the statute's coverage).

253. Florida's public accommodations law, for example, defines "public accommodation" so narrowly that only transient lodging, recreational facilities, and food-service companies qualify. Fla. Stat. Ann. § 760.02(11) (2025).

positive federal reform is unlikely.[254] No state has specifically held that prison healthcare companies are not public accommodations under its respective antidiscrimination law.[255] Disabled plaintiffs therefore have room to use creative argumentation rooted in their respective state's legislation and jurisprudence to secure relief.

2. *Future Directions.* — In addition to addressing the remedial gap in disability litigation, a public accommodations theory of healthcare offers advocates the chance to open up new avenues for creative lawyering. Within federal disability jurisprudence, one such path is bringing *Olmstead* challenges under Title III, allowing individuals to challenge solitary confinement perpetrated by a prison healthcare company. As already mentioned, the Supreme Court's reasoning behind *Olmstead*'s integration mandate relied on the ADA's statutory goals and the regulations implementing Title II.[256] A reviewing court may be able to make an analogous argument for Title III: After all, it is the product of the same legislative history the Court favorably cites,[257] and its implementing regulations similarly demand that a public accommodation's goods and services "be afforded to an individual with a disability in the most integrated setting

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254. See How to Take Action on Inauguration Day and Beyond, ACLU (Jan. 17, 2025), https://www.aclu.org/news/civil-liberties/how-to-take-action-on-inauguration-day-and-beyond [https://perma.cc/QV4G-BP2Q] (highlighting the importance of state legislatures and state supreme courts "to provide broader protections for civil rights and civil liberties than the U.S. Supreme Court or federal law"). A bill introduced in the New York state legislature in 2023 took this approach, proposing an amendment to the state's human rights law that would have categorized police, prisons, and jails as public accommodations. S. 6611, 2023–24 Leg., Reg. Sess. (N.Y. 2023).

255. See, e.g., Estate of Mejia v. Archambeault, No. 20-cv-2454-MMA (KSC), 2021 WL 4428990, at *4 (S.D. Cal. Sept. 27, 2021) (suit against ICE Health Service Corps, a public healthcare provider); Brown v. King Cnty. Dep't of Adult Corr., No. C97–1909W, 1998 WL 1120381, at *2 (W.D. Wash. Dec. 9, 1998) (suit against a county department of corrections regarding the deaf plaintiff's phone and visitation access); CHRO ex rel. Vargas v. State Dep't of Corr., No. HHBCV136019521S, 2014 WL 564478, at *2 (Conn. Super. Ct. Jan. 10, 2014) (suit against a state department of corrections for refusing to allow breastfeeding in the visitation room); Napier v. State, No. CV-00-042, 2002 WL 32068249, at *1 (Me. Super. Ct. Nov. 18, 2002) (suit against the state department of corrections regarding shower access); State ex rel. Naugles v. Mo. Comm'n on Hum. Rts., 561 S.W.3d 48, 50 (Mo. Ct. App. 2018) (suit against the state department of corrections regarding accessible dining, worship, recreation, and education facilities); In re Letray v. N.Y. State Div. of Hum. Rts., 121 N.Y.S.3d 481, 483 (N.Y. App. Div. 2020) (suit against a county sheriff's office regarding discrimination); Blizzard v. Floyd, 613 A.2d 619, 620 (Pa. Commw. Ct. 1992) (suit against the state Human Relations Commission regarding age discrimination); Beeman v. Livingston, 468 S.W. 3d 534, 536 (Tex. 2015) (suit against the executive director of the Texas Department of Criminal Justice regarding accommodations for a deaf plaintiff); Skaff v. W. Va. Hum. Rts. Comm'n, 444 S.E.2d 39, 40 (W. Va. 1994) (suit against a state prison for the administration's refusal to protect Black incarcerated people from white supremacist violence).

256. See supra notes 102–103 and accompanying text.

257. See Olmstead v. L.C. ex. rel. Zimring, 527 U.S. 581, 588–89 (1999) (outlining how, with the passage of the ADA, Congress sought to address the isolation and segregation of disabled people).

appropriate to the needs of the individual."[258] Incarcerated individuals could therefore use *Olmstead*'s integration mandate to check governments and companies that weaponize solitary confinement against disabled populations.

On the state level, the potential of a public accommodations theory of prison healthcare resides in the exceptional number of classes protected under public accommodations law.[259] Of particular note are protections for LGBTQ communities: Twenty-five states include antidiscrimination provisions on the basis of sexual orientation, and twenty-four of those states additionally cover gender identity.[260] Their application to prison healthcare companies could prove critical: 85% of incarcerated LGBTQ people report being placed in solitary confinement.[261] Trans people also regularly face barriers to gender-affirming care while incarcerated,[262] and reviewing courts have frequently upheld those denials under the Eighth Amendment's *Estelle* standard.[263] Where constitutional remedies fall short

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258. 42 U.S.C. § 12182(b)(B) (2018). Compare *Olmstead*, 527 U.S. at 596 ("A public entity shall administer services . . . in the most integrated setting appropriate to the needs of qualified individuals with disabilities." (alteration in original) (internal quotation marks omitted) (quoting 28 C.F.R. § 35.130(d) (1998))), with 28 C.F.R. § 36.203(a) (2024) ("A public accommodation shall afford goods, services, facilities, privileges, advantages, and accommodations to an individual with a disability in the most integrated setting appropriate to the needs of the individual.").

259. For one expansive example, see 775 Ill. Comp. Stat. Ann. 5/1-102(A) (West 2025) (securing "freedom from discrimination based on race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, pregnancy, reproductive health decisions, or unfavorable discharge from military service").

260. See State Public Accommodation Laws, Nat'l Conf. of State Legislatures, https://www.ncsl.org/civil-and-criminal-justice/state-public-accommodation-laws (on file with the *Columbia Law Review*) (last updated May 16, 2025) (listing California; Colorado; Connecticut; Delaware; Hawaii; Illinois; Iowa; Maine; Maryland; Massachusetts; Michigan; Minnesota; Nevada; New Hampshire; New Jersey; New Mexico; New York; Oregon; Pennsylvania; Rhode Island; Vermont; Virginia; Washington; Washington, D.C.; and Wisconsin as having antidiscrimination laws based on sexual orientation—all but Wisconsin also cover gender identity).

261. Wanda Bertram, 6 Facts About the Mass Incarceration of LGBTQ+ People, Prison Pol'y Initiative (June 4, 2024), https://www.prisonpolicy.org/blog/2024/06/04/lgbt_incarceration/ [https://perma.cc/8T57-PUZA].

262. See Erin McCauley, Kristen Eckstrand, Bethlehem Desta, Ben Bouvier, Brad Brockmann & Lauren Brinkley-Rubinstein, Exploring Healthcare Experiences for Incarcerated Individuals Who Identify as Transgender in a Southern Jail, 3 Transgender Health 34, 35 (2018) (reporting that a quarter of transgender incarcerated people report being denied access to healthcare while imprisoned (citing Sari L. Reisner, Zinzi Bailey & Jae Sevelius, Racial/Ethnic Disparities in History of Incarceration, Experiences of Victimization, and Associated Health Indicators Among Transgender Women in the U.S., 54 Women & Health 750, 758 (2014))).

263. See Lindsey Ruff, Note, Trans-cending the Medicalization of Gender: Improving Legal Protections for People Who Are Transgender and Incarcerated, 28 Cornell J.L. & Pub. Pol'y 127, 142–49 (2018) (discussing the difficulties the Eighth Amendment poses for incarcerated trans people).

and private healthcare companies are responsible, public accommodations law could offer LGBTQ plaintiffs another chance at relief.[264]

CONCLUSION

By including private prison healthcare companies within the ADA's scope of liability, disability law can begin to identify and confront the increasingly privatized nature of prison administration. As a practical matter, a public accommodations theorization of prison healthcare offers disabled plaintiffs new causes of actions while filling holes in the law's current remedial framework. It also stands for the more fundamental normative proposition that perpetrators should pay. This corrective impulse is particularly apt in the case of the prison healthcare industry, which has shirked other mechanisms of economic and political accountability while underwriting significant harm against disabled and nondisabled people alike. Although the attachment of liability cannot fix a carceral system that has become dependent on market forces for medical services, it can nonetheless serve as another tool to vindicate the rights of a disproportionately disabled population while holding profiteers to account.

264. A disability framework may additionally offer a path to relief specifically for trans individuals. See Williams v. Kincaid, 45 F.4th 759, 769 (4th Cir. 2022) (holding that gender dysphoria qualifies as a disability under the ADA), cert. denied, 143 S. Ct. 2414 (2023) (mem.); see also Doe v. Ga. Dep't of Corr., 730 F. Supp. 3d 1327, 1346–49 (N.D. Ga. 2024) (applying *Kincaid* to prison healthcare companies under Title III).

APPENDIX: STATE DISABILITY ANTIDISCRIMINATION LAWS IN PUBLIC ACCOMMODATIONS

State	Disability Antidiscrimination Law for Public Accommodations?	Damages Remedy Available?
Alabama	No	No
Alaska	Alaska Stat. § 18.80.230 (2024)	No
Arizona	Ariz. Rev. Stat. Ann. § 41-1442 (2025)	Ariz. Rev. Stat. Ann. § 41-1472 (2025)
Arkansas	Ark. Code Ann. § 16-123-107(a) (2025)	Ark. Code Ann. § 16-123-107(b) (2025)
California	Cal. Civ. Code § 51 (2025)	Cal. Civ. Code § 52 (2025)
Colorado	Colo. Rev. Stat. § 24-34-601 (2025)	Colo. Rev. Stat. § 24-34-602 (2025)
Connecticut	Conn. Gen Stat. Ann. § 46a-64 (West 2025)	No
Delaware	Del. Code tit. 6, § 4504 (2025)	Del. Code tit. 6, § 4508 (2025)
Florida	Fla. Stat. Ann. § 760.08 (West 2025)	Fla. Stat. Ann. § 760.11(5) (West 2025)
Georgia	Ga. Code Ann. § 30-4-2 (2025)	No
Hawaii	Haw. Rev. Stat. Ann. § 489-3 (West 2025)	Haw. Rev. Stat. Ann. § 489-7.5 (West 2025)
Idaho	Idaho Code § 67-5909 (2025)	Idaho Code § 67-5907 (2025)
Illinois	775 Ill. Comp. Stat. Ann. 5/5-102 (West 2025)	775 Ill. Comp. Stat. Ann. 5/8A-104 (West 2025)
Indiana	Ind. Code Ann. § 22-9-1-2 (West 2025)	Ind. Code Ann. § 22-9-1-17 (West 2025)
Iowa	Iowa Code § 216.7 (2025)	Iowa Code § 216.15 (2025)
Kansas	Kan. Stat. Ann. § 44-1001 (West 2025)	Kan. Stat. Ann § 44-1005 (West 2025)
Kentucky	Ky. Rev. Stat. Ann § 344.120 (West 2025)	Ky. Rev. Stat. Ann § 344.450 (West 2025)
Louisiana	La. Stat. Ann. § 51:2247 (2024)	La. Stat. Ann. § 51:2264 (2024)
Maine	Me. Rev. Stat. Ann. tit. 5, § 4592 (West 2025)	Me. Rev. Stat. Ann. tit. 5, § 4622 (West 2025)

Maryland	Md. Code Ann., State Gov't § 20-304 (West 2025)	No
Massachusetts	Mass. Gen. Laws Ann. ch. 272, § 98 (West 2024)	Mass. Gen. Laws Ann. ch. 272, § 98 (West 2024)
Michigan	Mich. Comp. Laws § 37.1302 (2025)	Mich. Comp. Laws § 37.1606 (2025)
Minnesota	Minn. Stat. § 363A.11 (2024)	Minn. Stat. § 363A.29(4) (2024)
Mississippi	Miss. Code. Ann. § 43-6-3 (2024)	No
Missouri	Mo. Ann. Stat. § 213.065 (2024)	Mo. Ann. Stat. § 213.111 (2024)
Montana	Mont. Code Ann. § 49-2-304 (2023)	Mont. Code Ann. § 49-2-506 (2023)
Nebraska	Neb. Rev. Stat. § 20-134 (2024)	Neb. Rev. Stat. § 20-148 (2024)[265]
Nevada	Nev. Rev. Stat. § 651.070 (2024)	Nev. Rev. Stat. § 651.090 (2024)
New Hampshire	N.H. Rev. Stat. Ann. § 354-A:17 (West 2024)	N.H. Rev. Stat. Ann. § 354-A:21 (West 2024)
New Jersey	N.J. Stat. Ann. § 10:5-12 (West 2025)	N.J. Stat. Ann. § 10:5-13 (West 2025)
New Mexico	N.M. Stat. Ann. § 28-1-7 (2025)	N.M. Stat. Ann. § 28-1-11 (2025)
New York	N.Y. Exec. Law § 296(2) (McKinney 2025)	N.Y. Exec. Law § 297 (McKinney 2025)
North Carolina	N.C. Gen. Stat. § 168A-6 (2025)	N.C. Gen. Stat. § 168A-11 (2025)
North Dakota	N.D. Cent. Code § 14-02.4-14 (2023)	No
Ohio	Ohio Rev. Code Ann. § 4112.02 (2025)	No
Oklahoma	Okla. Stat. tit. 25, § 1402 (2024)	No
Oregon	Or. Rev. Stat. § 659A.142 (2025)	Or. Rev. Stat. § 659A.885(3) (2025)

265. Though the Nebraska statute does not explicitly mention a damages remedy, reviewing courts have interpreted the statute's remedies to extend to damages. See, e.g., Ashford v. Hendrix, No. 8:20-CV-36, 2020 WL 4365481, at *5 (D. Neb. July 30, 2020) ("Similar to section 1983 providing a procedural mechanism for pursuing damages for violations of constitutional rights, Neb. Rev. Stat. § 20-148 provides 'an immediate and expeditious civil remedy to any person in Nebraska whose constitutional or statutory rights have been violated.'" (quoting Adkins v. Burlington N. Santa Fe R.R. Co., 615 N.W.2d 469, 472 (Neb. 2000))).

Pennsylvania	43 Pa. Stat. and Cons. Stat. Ann. § 953 (2025)	43 Pa. Stat. and Cons. Stat. Ann. § 962(c) (2025)
Rhode Island	11 R.I. Gen. Laws § 11-24-2 (2025)	11 R.I. Gen. Laws § 11-24-4 (2025); 28 R.I. Gen. Laws § 28-5-24 (2025)
South Carolina	No	No
South Dakota	S.D. Codified Laws § 20-13-23 (2025)	S.D. Codified Laws § 20-13-42 (2025)
Tennessee	No	No
Texas	Tex. Hum. Res. Code Ann. § 121.003 (West 2025)	Tex. Hum. Res. Code Ann. § 121.004 (West 2025)
Utah	Utah Code § 26B-6-802 (2025)	No
Vermont	Vt. Stat. Ann. tit. 9, § 4502 (2025)	Vt. Stat. Ann. tit. 9, § 4506(a) (2025)
Virginia	Va. Code § 2.2-3904 (2024)	Va. Code § 2.2-3908 (2024)
Washington	Wash. Rev. Code § 49.60.215 (2024)	Wash. Rev. Code § 49.60.340 (2024)
Washington, D.C.	D.C. Code § 2-1402.31 (2025)	D.C. Code § 2-1403.16 (2025)
West Virginia	W. Va. Code § 5-11-9(6) (2025)	W. Va. Code § 5-11-13(c) (2025)
Wisconsin	Wis. Stat. & Ann. § 106.52(3) (2025)	Wis. Stat. & Ann. § 106.52(4)(e) (2025)
Wyoming	Wyo. Stat. Ann. § 35-13-201(a) (2025)	No