

Michigan Law Review

Volume 124 | Issue 3

2025

Disability Rights on Probation and Parole

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Recommended Citation

Alexis Karteron, *Disability Rights on Probation and Parole*, 124 MICH. L. REV. 519 (2025).

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DISABILITY RIGHTS ON PROBATION AND PAROLE

Alexis Karteron

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DISABILITY RIGHTS ON PROBATION AND PAROLE

Alexis Karteron*

This Article addresses disability discrimination in community supervision programs, a large—but frequently overlooked—component of the criminal legal system and important contributor to America’s mass incarceration crisis. The long-standing concerns of legal scholars and advocates about disability discrimination in prisons and policing, particularly against people with mental health disabilities, apply with equal measure to probation and parole. This Article examines the experiences of people with intellectual/developmental, cognitive, and mental health disabilities to understand how disability discrimination manifests in probation and parole programs and identifies numerous policies and practices that likely run afoul of two major federal disability rights laws: the Americans with Disabilities Act and the Rehabilitation Act. In explaining why such disability discrimination goes seemingly unchecked, this Article identifies major jurisdictional barriers to enforcement in the federal courts: the Preiser-Heck bar on certain civil rights litigation, abstention doctrines that insulate state criminal court decisions from review, and Eleventh Amendment limits on damages actions against state entities. Given those barriers, this Article suggests that supervision programs ensure robust compliance with disability discrimination laws by utilizing a universal design approach, providing appropriate accommodations to supervisees, and eliminating discriminatory standards. It further argues that defense lawyers and other criminal justice actors should receive training about disability discrimination laws, so they are better able to recognize and remediate disability discrimination. Finally, it suggests the expansion of diversion programs for people with disabilities, particularly those who may struggle to comply with traditional probation programs.

INTRODUCTION

Today there is widespread understanding that American jails and prisons warehouse people with disabilities, but a key contributor to that dynamic is frequently overlooked: the policies and practices of community supervision programs, such as probation and parole, that discriminate on the basis of

* Professor of Law, New York University School of Law. For helpful comments and suggestions, I thank Bob Dinerstein, Janel George, Lea Johnston, Marisol Orihuela, Deborah Archer, Alina Das, Barry Friedman, and participants in faculty workshops at New York University School of Law, American University Washington College of Law, CrimFest!, the Lutie Lytle Faculty Workshop, and Clinical Law Review Workshop at NYU School of Law. Dennisse Calle provided excellent research assistance. I am grateful to the editors of the *Michigan Law Review* for their thoughtful suggestions and edits. All errors are mine.

disability. As a result, people with disabilities are regularly unable to gain release from incarceration or are returned to jail or prison for failure to comply with probation or parole conditions.

A recent ACLU case is illustrative. In *Mathis/Davis v. United States Parole Commission*, the plaintiffs, individuals on parole, allege that the United States Parole Commission refuses to modify ordinary parole conditions and requirements to accommodate the plaintiffs' disabilities and related health needs.¹ Plaintiff William Mathis, who was on lifetime parole, was a seventy-year-old veteran with congestive heart failure.² He had mobility limitations and was required to attend frequent medical appointments, but his Community Supervision Officer (CSO), who monitored his compliance with parole conditions, never modified Mr. Mathis's appointment times to ensure that he could both meet his medical needs and attend parole meetings.³ In late 2023, the Parole Commission required him to wear a GPS ankle monitor—even though Mr. Mathis's doctor explained that wearing an ankle monitor was dangerous to his health because it would restrict blood flow and cause swelling.⁴ In January 2024, he was arrested for violating several parole conditions, including missing appointments with his CSO on days when he was attending medical appointments.⁵ He spent over a week in jail.⁶ Even though a U.S. Parole Commission examiner recommended Mr. Mathis's release to ensure he could have a heart surgery scheduled to take place several days after his arrest, the U.S. Parole Commission required him to remain in jail. He missed the surgery.⁷

Plaintiff Kennedy Davis, who has mobility limitations, depression, anxiety, PTSD, chronic pain, and requires ongoing treatment for third-degree burns, encountered similar difficulties with parole supervision.⁸ His disabilities prevented him from maintaining contact with his CSO. For example, he missed a phone check-in with his CSO because he did not have his own phone, and the phone he received from a legal services organization had no minutes. Instead of finding another way to contact his CSO, he contacted the legal services provider.⁹ The Parole Commission then sought his arrest, revoked

1. *Davis v. U.S. Parole Comm'n*, No. 24-cv-01312, 2025 WL 457779, at *2 (D.D.C. Feb. 11, 2025). Mathis died while the case was pending, and the district court subsequently altered the caption to reflect the name of the new lead plaintiff, Kennedy Davis. *Id.* at 1. I refer to this case in text as "*Mathis/Davis*."

2. *Mathis v. U.S. Parole Comm'n*, 749 F. Supp. 3d 8, 13 (D.D.C. 2024).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Davis v. U.S. Parole Comm'n*, No. 24-cv-1312, 2025 WL 457779, at *2 (D.D.C. Feb. 11, 2025).

9. *Id.*

parole, and sentenced him to twelve months in jail for failing to attend his check-in.¹⁰ As a result, he missed a surgery for his burns.¹¹

The plaintiffs won a preliminary injunction, requiring the U.S. Parole Commission to identify the accommodations that would be required for the plaintiffs to have “an equal opportunity to succeed on supervision based on their individual disability-related needs” and to provide such accommodations.¹² And, as the litigation proceeded, the U.S. Parole Commission and a related agency admitted that they “lack[ed] a ‘written policy requiring assessment and accommodation of disabilities,’” and “d[id] not have any ‘formal process through which an individual may seek such accommodations.’”¹³ In their effort to combat this “systemic failure to assess and accommodate disabilities,” the plaintiffs later won class certification.¹⁴

Similar refusals to accommodate the needs of people with disabilities are also relatively easy to uncover in parole release proceedings, in which incarcerated people’s freedom is on the line. Take the case of W.M., a man incarcerated in New Jersey for over forty years. W.M. suffered a traumatic brain injury as a child, later developed schizoaffective disorder, and has an intellectual disability; he has been institutionalized for the purpose of receiving psychiatric care more than twenty times.¹⁵ He has averred that his cognitive and mental health disabilities make it impossible for him to navigate a parole hearing effectively.¹⁶ Yet he has never received any assistance, let alone legal representation, at his parole hearings.¹⁷ Instead, he has been left on his own to answer questions from the parole board about why he engaged in the behavior that led to his conviction, to address the conclusions of a psychological evaluation he never saw, to explain his prison disciplinary history, and to offer a plan for his future outside the prison where he has resided for decades.¹⁸ The New Jersey State Parole Board bars lawyers from appearing at parole hearings.¹⁹ It made no exception for W.M.²⁰

Although W.M. has been eligible for parole for over fifteen years, he has not been successful in his pursuit of freedom.²¹ W.M.’s lawyers alleged that the

10. *Id.*

11. *Id.*

12. *Mathis v. U.S. Parole Commission*, No. 24-cv-01312 (D.D.C. Sep. 5, 2024) (order granting preliminary injunction).

13. *Davis*, slip op. at 6 (internal citations omitted).

14. *Id.* at 7, 18.

15. Brief on Behalf of Plaintiff-Appellant at 2–3, *W.M. v. N.J. State Parole Bd.*, No. A-0072-19, 2022 WL 17420146 (N.J. Super. Ct. App. Div. Dec. 6, 2022).

16. *Id.* at 55–56.

17. *Id.* at 5–6.

18. *See id.*

19. *See infra* Section I.B.2.

20. Brief on Behalf of Plaintiff-Appellant at 5–6, *W.M. v. N.J. State Parole Bd.*, No. A-0072-19, 2022 WL 17420146 (N.J. App. Div. Dec. 6, 2022).

21. *Id.* at 5–7.

parole board discriminated against him by failing to modify the ordinary parole process to allow an attorney to assist W.M. at his parole hearing. They alleged also that the parole board discriminated against W.M. by failing to consider whether, if released, he could enroll in a “risk reduction program” that would reduce the likelihood of recidivism due to his mental disability. But the New Jersey Appellate Division rejected the argument, concluding that “there is nothing in the record to suggest W.M. was denied parole based on his intellectual disability.”²² It further observed that “[a] long line of precedent establishes there is no right to counsel at parole release proceedings,” without evaluating whether disability rights laws might require some modification of ordinary practice.²³ Despite the court’s refusal to entertain the claims seriously, W.M.’s treatment resembles textbook disability discrimination under federal disability rights laws.

These cases reflect the two primary forms of disability discrimination in community supervision programs: (1) outright exclusion due to discriminatory eligibility standards, and (2) a failure to offer modifications (otherwise known as accommodations) that ensure an opportunity to participate in such programs for people with disabilities. In either case, the result is usually more time behind bars. These practices disregard the needs and legal rights of people with disabilities and constitute both a moral and practical failure of the criminal legal system. Moreover, they add to substantial evidence that community supervision programs are not serving their articulated primary purposes: supporting rehabilitation and preventing recidivism.²⁴ There is growing recognition of the large role that community supervision programs play in contributing to mass incarceration.²⁵ This Article suggests that disability discrimination may be important to understanding that role.

In recent years, community supervision programs have reached new heights. For decades, roughly two million people have languished in American

22. W.M., 2022 WL 17420146, at *8.

23. *Id.*

24. See Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291 (2016); Cecilia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1061 (2013); Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 432 (2011). Emphasis on the rehabilitative function of community supervision is notable given the express move away from rehabilitation as a justification for incarceration. See Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515 (2021).

25. See, e.g., COUNCIL OF STATE GOV'TS JUST. CTR., *CONFINED AND COSTLY: HOW SUPERVISION VIOLATIONS ARE FILLING PRISONS AND BURDENING BUDGETS* (2019), <https://csgjusticecenter.org/wp-content/uploads/2020/01/confined-and-costly.pdf> [perma.cc/A3J9-G9QT] (finding that one quarter of admissions to state prisons resulted from technical violations of probation and parole conditions); HUM. RTS. WATCH & ACLU, *REVOKED: HOW PROBATION AND PAROLE FEED MASS INCARCERATION IN THE UNITED STATES* 5, 10 (2020), https://hrw.org/sites/default/files/media_2020/07/us_supervision0720_web_1.pdf [perma.cc/8DRN-CMJ5] (“In 20 states, more than half of all state prison admissions in 2017 stemmed from supervision violations.”).

jails and prisons annually.²⁶ In contrast, the population of people on community supervision peaked at 5.1 million in 2007 and settled at approximately four million in 2020.²⁷ For those who commit low-level offenses, and even some more serious ones, probation is likely part of their sentence. In recent years, the United States has entered an era of not just mass incarceration but also mass probation.²⁸ People on probation alone constitute around 60 percent of people under carceral control in the United States.²⁹ Parole is also common. In 2020, there were over 105,000 people serving indeterminate life sentences,³⁰ constituting just a subset of those eligible for parole. In the same year, nearly 400,000 people began parole supervision.³¹ Unsurprisingly, the racial disparities that exist throughout the criminal legal system are also present in community supervision programs; Black people are far more likely than others to be subject to probation and parole.³²

In the popular imagination, probation and parole are privileges reserved for people who have earned the opportunity to avoid or leave prison due to a confluence of factors, such as a relatively low level of criminal charges and good behavior in jail or prison.³³ Numerous scholars and advocates have demonstrated that the reality of access to probation and parole is different. In truth, once on probation, avoiding incarceration requires compliance with a long list of conditions—many unrelated to recidivism—which may be difficult to achieve due to insufficient resources.³⁴ Similarly, gaining freedom through a discretionary parole grant turns on a host of factors, such as access to counsel

26. NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 33 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

27. DANIELLE KAEBLE, BUREAU OF JUST. STAT., PROBATION AND PAROLE IN THE UNITED STATES, 2022, at 2 (2024) [hereinafter KAEBLE, PROBATION AND PAROLE 2022]; see also DANIELLE KAEBLE, BUREAU OF JUST. STATS., PROBATION AND PAROLE IN THE UNITED STATES, 2020 2 (Dec. 2021).

28. Michelle S. Phelps, *Mass Probation: Toward a More Robust Theory of State Variation in Punishment*, 19 PUNISHMENT & SOC'Y 53, 54, 60–63 (2017) (charting the rise of probation from the 1980s to 2000s and describing diversity in state uses of probation).

29. Michelle S. Phelps & Ebony L. Ruhland, *Governing Marginality: Coercion and Care in Probation*, 69 SOC. PROBS. 799, 799 (2022).

30. ASHLEY NELLIS, THE SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 10 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf> [perma.cc/9W3X-XPYN].

31. KAEBLE, PROBATION AND PAROLE 2022, *supra* note 27, at 18.

32. Jake Horowitz & Connie Utada, *Community Supervision Marked by Racial and Gender Disparities*, PEW CHARITABLE TRS. (Dec. 6, 2018), <https://pewtrusts.org/en/research-and-analysis/articles/2018/12/06/community-supervision-marked-by-racial-and-gender-disparities> [perma.cc/4WEK-KRR5] ("Black adults are about 3.5 times as likely as whites to be supervised, and although African-Americans make up 13 percent of the U.S. adult population, they account for 30 percent of those on probation or parole.").

33. See Doherty, *supra* note 24, at 334–35.

34. See *id.* at 345–46, 348–54; Phelps & Ruhland, *supra* note 29, at 801.

for parole proceedings, access to prison programming, and scores on a risk assessment tool that relies on immutable factors that may be out of an incarcerated person's control.³⁵

Disabled people face even more hurdles to access supervised-release "privileges." Without assistance, a person with an intellectual/developmental (I/DD), cognitive, or serious mental health disability³⁶ who is held in jail during the pendency of a criminal case, or who is seeking parole while serving a prison sentence, will likely be unable to develop a comprehensive plan involving access to the services that help prevent recidivism following release. And, as *Mathis/Davis* demonstrates, accommodations may be necessary for some people with disabilities to achieve success on probation or parole. Failure to receive these accommodations could therefore result in probation or parole revocation, both of which potentially lead to incarceration.³⁷

As people with disabilities are more likely than others to land in the criminal legal system, they are also more likely than others to be subject to community supervision. In a recent study, nearly 40 percent of incarcerated people reported having at least one disability—2.5 times the rate of the U.S. general population.³⁸ While approximately 1.5 percent of the general population has an I/DD, one study suggested that 4–10 percent of the incarcerated population does.³⁹ In addition, roughly 10–25 percent of people incarcerated in state and federal prisons have serious mental health issues.⁴⁰ Approximately 8.5 percent of the general population reports having experienced a traumatic brain injury (TBI), which can lead to cognitive disabilities. But the CDC reports that 25–87 percent of incarcerated people have suffered a TBI.⁴¹ It is unsurprising, then, that estimates of the percentage of people with disabilities subject to

35. See EBONY L. RUHLAND, EDWARD E. RHINE, JASON P. ROBEY & KELLY LYN MITCHELL, ROBINA INST. OF CRIM. L. & CRIM. JUST., *THE CONTINUING LEVERAGE OF RELEASING AUTHORITIES: FINDINGS FROM A NATIONAL SURVEY* 25–26 (2017); Kristen Bell, *A Stone of Hope: Legal and Empirical Analysis of California Juvenile Lifer Parole Decisions*, 54 HARV. C.R.-C.L. L. REV. 455, 459, 481–82 (2019) (reviewing parole proceedings of 426 juvenile lifers in California and identifying variables that contribute to success in gaining release).

36. For a discussion of the distinction between I/DD and mental health disabilities, see JOAN PETERSILIA, *DOING JUSTICE? CRIMINAL OFFENDERS WITH DEVELOPMENTAL DISABILITIES* 8 (2000).

37. See Doherty, *supra* note 24, at 323.

38. LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIEL ALPER, BUREAU OF JUST. STAT., *DISABILITIES REPORTED BY PRISONERS: SURVEY OF PRISON INMATES, 2016*, at 2 (2021).

39. Anna Scheyett, Jennie Vaughn, Melissa Taylor & Susan Parish, *Are We There Yet? Screening Processes for Intellectual and Development Disabilities in Jail Settings*, 47 INTELL. & DEVELOPMENTAL DISABILITIES 13, 14 (2009).

40. NAT'L RSCH. COUNCIL, *supra* note 26, at 205); DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUST. STAT., *MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES* 2 (2006).

41. CDC, *TRAUMATIC BRAIN INJURY IN PRISONS AND JAILS: AN UNRECOGNIZED PROBLEM* 1 (2007), https://stacks.cdc.gov/view/cdc/11668/cdc_11668_DS1.pdf [perma.cc/L7ZF5SCC].

probation supervision are also high—roughly 500,000 people with serious mental illnesses are on probation.⁴²

Explanations for the overrepresentation of people with disabilities in the criminal legal system are complex. Of course, some people with disabilities engage in behavior deemed criminal for all the reasons people without disabilities do. But there are also factors that make people with certain disabilities uniquely vulnerable to arrest. For some, behavior deemed criminal may be a manifestation of their disability.⁴³ For others, the use of illegal drugs is a form of self-medication that can lead to a wide variety of criminal charges.⁴⁴ In addition, people with I/DD, cognitive, or mental health disabilities are uniquely vulnerable to arrests for low-level offenses. When police interpret the behavior of people with disabilities as criminal—even when the behavior is a manifestation of one or more disabilities—arrests for offenses like disorderly conduct and trespassing often follow.⁴⁵ This is particularly true for people interacting with police departments that embrace order-maintenance policing strategies and use misdemeanor arrests as a tool of social control.⁴⁶

Although the Americans with Disabilities Act (ADA) and Rehabilitation Act have barred discrimination on the basis of disability for decades, the reality of enforcing their right to be free from discrimination in the context of community supervision programs is extremely challenging—and frequently impossible—for people with disabilities. While the challenges that incarcerated people face in enforcing their rights through legal actions are well known,⁴⁷ the barriers that prevent people with disabilities from vindicating their rights

42. Nancy Wolff, Matthew Epperson, Jing Shi, Jessica Huening, Brooke E. Schumann & Irene Robinson Sullivan, *Mental Health Specialized Probation Caseloads: Are They Effective?*, 37 INT'L J.L. & PSYCHIATRY 464, 464 (2014).

43. JASON SCHNITTKER, MICHAEL MASSOGLIA & CHRISTOPHER UGGEN, PRISONS AND HEALTH IN THE AGE OF MASS INCARCERATION 57–60 (2022) (collecting studies on the link between mental illness and crime and concluding that the relationship is “multifaceted,” and that “mental illness per se is only the tip of the iceberg”).

44. See *id.*; CDC, *supra* note 41, at 2.

45. Jamelia N. Morgan, *An Abolitionist Critique of Quality-of-Life Policing*, 69 UCLA L. REV. 1624, 1627–29 (2023) (arguing that “[p]olicing ‘disability in public’ ” constitutes “coerced compliance with norms for appearing, walking, talking, thinking, or otherwise existing, [which] render[s] disabled people more vulnerable to citation, arrests, or imprisonment even where such conduct is linked to, or caused by, disabilities”); see also SARAH LIEBOWITZ, PETER J. ELIASBERG, IRA A. BURNIM & EMILY B. READ, ACLU OF S. CAL. & BAZELON CTR. FOR MENTAL HEALTH L., A WAY FORWARD: DIVERTING PEOPLE WITH MENTAL ILLNESS AWAY FROM INHUMANE AND EXPENSIVE JAILS INTO COMMUNITY-BASED TREATMENT THAT WORKS 1 (2014), https://bazonel.org/wp-content/uploads/2017/11/A-Way-Forward_July-2014.pdf [perma.cc/NR7A-FEZW] (describing the connection between mental illness and police attention).

46. See Jamelia Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489, 511 (2022); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1367–68 (2012).

47. For thorough descriptions of the limits on litigation imposed by the Prison Litigation Reform Act, such as requirements regarding exhaustion and a showing of physical injury if seeking damages for mental or emotional injury, see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003), and Margo Schlanger, *Trends in Prison Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015).

in the community supervision context are unique. As this Article describes, there are both potential statutory constraints on applying the ADA and Rehabilitation Act to community supervision programs and severe limits on the federal-court access required to enforce these laws.

Given the practical barriers to success in litigation, this Article argues that states should take steps to affirmatively address the disability discrimination that likely exists within their community supervision programs. Instead of boilerplate policies banning disability discrimination, supervision programs should utilize universal design principles that help ensure people with disabilities have meaningful opportunities for success. In addition, criminal justice actors—particularly defense lawyers, judges, and revocation hearing officers—should receive training on state and federal disability discrimination laws, so they understand the application of those laws to supervision programs.

Of course, providing accommodations within a criminal legal system that sustains mass incarceration and mass probation will be a limited victory. Disability discrimination is just one of the many problems afflicting contemporary probation and parole programs.⁴⁸ But, by recognizing such discrimination, the Article aims to support calls for greater diversion-program utilization, particularly for people with mental health disabilities, that move people out of the criminal legal system entirely.

The needs of people with disabilities involved in community supervision programs have received scant attention from legal scholars.⁴⁹ In contrast, numerous legal scholars and advocates have confronted how people with disabilities are treated in other parts of the criminal legal system, particularly jails and prisons, and argue that disability rights laws may provide redress.⁵⁰ The

48. See, e.g., sources cited *supra* note 24; Tonja Jacobi, Song Richardson & Gregory Barr, *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887 (2014).

49. See Giovanna Shay, *Protecting Parolees Under the ADA and Rehab Act*, 7 UDC/DCSL L. REV. 181 (2003) (providing a brief overview of some disability discrimination issues that arise in the parole context).

50. See, e.g., Rabia Belt, *The Fat Prisoners' Dilemma: Slow Violence, Intersectionality, and a Disability Rights Framework for the Future*, 110 GEO. L.J. 785 (2022) (critiquing the framework of federal disability rights laws as inadequate to address the disability-related harms of prison systems); Prianka Nair, *The ADA Constrained: How Federal Courts Dilute the Reach of the ADA in Prison Cases*, 71 SYRACUSE L. REV. 791 (2021) (criticizing the interpretation of federal disability rights laws in cases brought by incarcerated plaintiffs); Margo Schlanger, Elizabeth Jordan & Roxana Moussavian, *Ending the Discriminatory Pretrial Incarceration of People with Disabilities: Liability Under the Americans with Disabilities Act and Rehabilitation Act*, 17 HARV. L. & POL'Y REV. 231 (2022) (arguing that given the harms of pretrial detention to certain people with disabilities, disability rights laws may require release); Robert D. Dinerstein & Shira Wakschlag, *Using the ADA's "Integration Mandate" to Disrupt Mass Incarceration*, 96 DENV. L. REV. 917 (2019) (describing the application of ADA's requirement that people with disabilities be integrated in community settings in cases concerning, *inter alia*, release planning for incarcerated people with serious mental illnesses, treatment for people deemed incompetent to stand trial, and the creation of community-based health services for people with mental illnesses or I/DD to help them avoid incarceration); REBECCA VALLAS, CTR. FOR AM. PROGRESS, *DISABLED BEHIND BARS: THE MASS INCARCERATION OF PEOPLE WITH DISABILITIES IN AMERICA'S JAILS AND PRISONS* (2016), <https://www.americanprogress.org/wp->

rights of people with disabilities in their interactions with the criminal legal system are also gaining attention.⁵¹ In light of their outsized role, probation and parole should occupy a more central part of the scholarly conversation around the experiences of people with disabilities in the criminal legal system.

This Article proceeds in four parts. Part I provides an overview of community supervision programs with a focus on probation and parole. Using the experiences of people with I/DD, cognitive, and mental health disabilities as a lens into the manifestation of disability discrimination in community supervision programs, it also offers examples of supervision policies and practices that have negative implications for those looking to realize their rights under federal laws. Part II describes the major federal statutory protections against discrimination on the basis of disability and the limited protection they offer to people on probation and parole. Part III explains how limits on federal jurisdiction—including the bar on certain civil rights litigation under *Preiser v. Rodriguez* and *Heck v. Humphrey*,⁵² abstention doctrines, and sovereign immunity—operate to close the federal courts to people with disabilities who seek redress for disability discrimination in community supervision programs. Part IV identifies potential reforms, accounting for the limited tools available to enforce federal disability rights laws in community supervision programs.

I. EXPERIENCES ON PROBATION AND PAROLE

This Part provides an overview of probation and parole,⁵³ the two largest components of community supervision in the United States, at the state level.⁵⁴

content/uploads/sites/2/2016/07/2CriminalJusticeDisability-report.pdf [perma.cc/VKT9-BUXG] (documenting overrepresentation of people with disabilities in jails and prisons and making policy recommendations).

51. See, e.g., Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401 (2021); Carly A. Myers, *Police Violence Against People with Disabilities: The Immutable Duty Under the ADA to Reasonably Accommodate During Arrest*, 70 VAND. L. REV. 1393 (2017); Jennifer Fischer, *The Americans with Disabilities Act: Correcting Discrimination of Persons with Mental Disabilities in the Arrest, Post-Arrest, and Pretrial Processes*, 23 L. & INEQ. 157 (2005).

52. *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Heck v. Humphrey*, 512 U.S. 477 (1994).

53. The names used for these programs vary. As used throughout this Article, the term “probation” refers to a criminal sentence that requires adherence to conditions and a community supervision, usually for a fixed period. “Parole” refers to the discretionary process by which incarcerated people are released from prison before the period of incarceration to which they have been sentenced expires. Other examples of community supervision programs include “fine-based programs, community service, pre-trial supervision and court-based monitoring, specialized court programs, day reporting centers, half-way houses, and even local jails.” Michelle S. Phelps & Caitlin Curry, *Supervision in the Community: Probation and Parole*, OXFORD RSCH. ENCYCLOPEDIAS: CRIMINOLOGY & CRIM. JUST. (Apr. 26, 2017), <http://doi.org/10.1093/acrefore/9780190264079.013.239>.

54. See KAEBLE, *PAROLE AND PROBATION 2022*, *supra* note 27, at 19 (reporting that 117,220 people were enrolled in federal community supervision programs in 2022, out of roughly 3.7 million nationally). This Part focuses on practices at the state level due to both the relatively small number of people on federal supervised release as compared to those in state systems and the effective elimination of federal parole. Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 959–60 (2013).

To illustrate how disability status affects experiences with community supervision programs, it also explores the challenges and impediments to success that people with I/DD, cognitive, and mental health disabilities often encounter in navigating probation and parole.

A. Overview of Probation and Parole

American states have utilized parole since the late nineteenth century.⁵⁵ Introduced at Elmira Reformatory in New York in 1876, parole was “part of the general nineteenth-century trend in criminology from punishment to reformation.”⁵⁶ Although there has always been great diversity in parole practices,⁵⁷ the basic concept is that a parole board⁵⁸ considers whether a person serving an indeterminate prison sentence (e.g., twenty-five years to life) should be released from prison before the expiration of their sentence.⁵⁹ Parole is best understood as a form of “back-end sentencing,” in that parole boards, rather than courts, arbitrate the actual length of prison terms.⁶⁰

Throughout the nineteenth century, jurisdictions widely adopted indeterminate sentencing schemes that allowed for the possibility of parole.⁶¹ Withering political attacks in late 1970s and early 1980s⁶² pushed forty-two states to reduce or eliminate the use of parole.⁶³ That said, it continues to play a significant, although largely hidden, role in the American criminal legal system. Roughly two-thirds of states continue to maintain parole systems that “hold the lion’s share of legal authority over the ultimate durations of most prison sentences.”⁶⁴ In 2016, two-thirds of prison sentences were subject to review by parole boards.⁶⁵

55. Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 487–88 (1999).

56. *Id.*

57. *Id.* at 489–90.

58. States use a variety of names and structures for parole releasing authorities. RUHLAND ET AL., *supra* note 35, at 17. This Article uses the term “parole board” to refer to state administrative agencies or boards charged with making discretionary parole release decisions.

59. NEIL P. COHEN, *THE LAW OF PROBATION AND PAROLE* § 1:21 (2d ed. 2024).

60. Jeremy Travis & Kirsten Christiansen, *Failed Reentry: The Challenges of Back-End Sentencing*, 13 GEO. J. ON POVERTY L. & POL’Y 249, 250–51 (2006). The administration of prison good-time credits is another form of back-end sentencing. See James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217 (1982).

61. Doherty, *supra* note 54, at 963–68 (describing the history of indeterminate sentencing).

62. Petersilia, *supra* note 55, at 492.

63. JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 65 (2003).

64. Kevin R. Reitz, *Prison-Release Reform and American Decarceration*, 104 MINN. L. REV. 2741, 2742 (2020).

65. Kevin R. Reitz & Edward E. Rhine, *Parole Release and Supervision: Critical Drivers of American Prison Policy*, 3 ANN. REV. CRIMINOLOGY 281, 283 (2020).

There is no single standard used to make parole release determinations. The parole inquiry does, however, have a common focus: the risk of recidivism by the parole applicant.⁶⁶ There is striking uniformity in the factors parole boards consider in making release decisions. In a recent survey of state parole boards, at least thirty-five out of forty-five respondents indicated that they consider the following factors, among others: the nature of the applicant's offense, the applicant's criminal record, participation in prison programs, psychological evaluations, the applicant's disciplinary record, a risk assessment, the applicant's disposition or demeanor at the hearing, the applicant's testimony, prosecutor input, and the applicant's "case plan as prepared by institutional staff."⁶⁷ Parole boards offer little to no clarity about the relative weight assigned to each factor.⁶⁸ Parole decisions are particularly likely to occur in the shadows, since they are usually made by obscure administrative agencies rather than courts.⁶⁹

Probation also has a long history in the American criminal legal system. The birth of probation is commonly traced to an 1830 case in Massachusetts.⁷⁰ Over the next roughly one hundred years, probation moved into the mainstream through codification in all states.⁷¹ In contrast to parole, where courts usually have no role in release decisions, a criminal court typically determines whether a criminal defendant receives a probation term as part of their sentence.⁷² After sentencing, a wide variety of supervisory bodies oversee probation supervision. In some states, a single state agency holds that role, while in others, the responsibility rests at the local level.⁷³ Consequently, probation practices vary considerably.

Once supervision commences, the experiences of people subject to probation and parole are highly similar. Both require adherence to a series of standard conditions that are often onerous.⁷⁴ Although there is diversity

66. COHEN, *supra* note 59, § 4.30.

67. RUHLAND ET AL., *supra* note 35, at 26.

68. Parole systems around the country have been subject to extensive criticism due to the poor articulation of standards associated with discretionary parole release. See, e.g., Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567 (1994); Kimberly Thomas & Paul Reingold, *From Grace to Grids: Rethinking Due Process Protection for Parole*, 107 J. CRIM. L. & CRIMINOLOGY 213 (2017).

69. See RUHLAND ET AL., *supra* note 35, at 17.

70. Fiona Doherty, *Testing Periods and Outcome Determination in Criminal Cases*, 103 MINN. L. REV. 1699, 1707, 1707 n.23 (2019).

71. *Id.* at 1711–12.

72. COHEN, *supra* note 59, § 1.1. Most states impose a term of probation as part of a sentence, but others use the "on-file" method, under which a defendant pleads guilty and the criminal case is put "on file" for a period of time during which they comply with conditions. Doherty, *supra* note 70, at 1707–15.

73. See Phelps & Curry, *supra* note 53 ("To illustrate the chaos, there were 460 separate state, county, or court probation agencies that reported data to the Bureau of Justice Statistics in 2015.").

74. *Id.*

among required conditions throughout the United States, there are some consistent themes. Standard probation conditions typically demand that probationers commit no crime, attend regular meetings with their probation officers, seek or maintain employment, pay fines and fees, refrain from drug use, avoid contact with people who have criminal records or are engaged in criminal activity, and participate in programming.⁷⁵ Fiona Doherty's study summarizes probation conditions in fifteen states and the federal criminal system as follows: "[P]robationers must be good people, in addition to being law-abiding people. . . . [M]oving beyond the requirements of law, probation systems also include conditions that instruct probationers to conduct themselves properly or to remain on good behavior."⁷⁶ Standard parole conditions mirror these requirements.⁷⁷

Probation and parole officers have substantial surveillance powers that facilitate their monitoring of supervisees' compliance with conditions. For example, standard supervision conditions demand that probationers report to their probation officer, but probation and parole officers typically have wide discretion as to the frequency and format of the visits.⁷⁸ Standard probation conditions also typically allow probation officers to make unannounced visits to probationers' homes and places of employment.⁷⁹ In recent years, the widespread use of electronic surveillance has also increased supervision officers' ability to detect failures to comply.⁸⁰ Standard conditions involve "easy-to-prove conduct," such as "attending a weekly treatment session; reporting to the probation office on a certain day at a certain time; calling into a daily hotline as part of a drug testing program; and/or testing negative for drugs."⁸¹ Upon failure to comply, a supervisee usually has no defense.⁸²

In both probation and parole programs, supervision officers have substantial discretion in how they respond to condition violations. Some approach their supervision duties with a focus on surveillance and control, while others emphasize support and treatment, and still others blend both approaches—labeled by criminologists as a "synthetic" approach.⁸³ Responses to

75. Doherty, *supra* note 24, at 301–14.

76. *Id.* at 295.

77. RUHLAND ET AL., *supra* note 35, at 35–36. For a comprehensive accounting of probation, parole, and electronic monitoring conditions in all fifty states, see Kate Weisburd, *Carceral Control: A Nationwide Survey of Criminal Court Supervision Rules*, 58 HARV. C.R.-C.L. L. REV. 1 (2023).

78. Doherty, *supra* note 24, at 316.

79. *Id.* at 317.

80. Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 180–81 (2022).

81. Doherty, *supra* note 24, at 1729.

82. *Id.*

83. Elijah P. Ricks & Jennifer Eno Loudon, *The Relationship Between Officer Orientation and Supervision Strategies in Community Corrections*, 39 LAW & HUM. BEHAV. 130, 130 (2015). But see Joel Miller, *Contemporary Modes of Probation Officer Supervision: The Triumph of the "Synthetic" Officer?*, 32 JUST. Q. 314, 329 (2015) (arguing that the common labels assigned to supervision modes do not match officers' actual practices).

supervision-condition violations range from simple warnings to ordering a supervisee to jail.⁸⁴ The difference in approach may turn on the policies or culture of the agency or simply the whims of the officer.⁸⁵

Given the usual low standard of proof for supervision violations (preponderance of the evidence), supervisees are highly susceptible to probation or parole revocation,⁸⁶ which typically triggers jail time or a return to prison.⁸⁷ The positive link between some states' probation use and their incarceration rates⁸⁸ is, therefore, unsurprising.

For many supervisees, the experience of being on community supervision is, to put it mildly, a struggle. As two commenters have described, some "participants experienc[e] probation as torture."⁸⁹ Financial and time constraints, as well as poor treatment by probation officers,⁹⁰ make compliance with probation conditions exceedingly stressful; consequently, a significant number of criminal defendants choose short jail sentences over extended probation terms.⁹¹ It is common for people with I/DD, cognitive, and mental disabilities to face even greater challenges while on community supervision.

B. *Case Study: Issues Navigating Community Supervision for People with I/DD, Cognitive, and Mental Health Disabilities*

This Section describes three major categories of barriers to success that people with I/DD, cognitive, and mental health disabilities often encounter while participating in community supervision programs. The first two types of barriers concern parole, and the last category implicates both probation and parole. First, at parole release hearings, parole boards use eligibility standards

84. See Mark Jones & John J. Kerbs, *Probation and Parole Officers and Discretionary Decision-Making: Responses to Technical and Criminal Violations*, FED. PROB., June 2007, at 9, 15 tbl. 2; Todd R. Clear & Edward J. Latessa, *Probation Officers' Roles in Intensive Supervision: Surveillance Versus Treatment*, 10 JUST. Q. 441 (1993).

85. See Jones & Kerbs, *supra* note 84, at 9–10; Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL'Y 51, 59 (2013) ("Probation departments vary in who makes these decisions (probation officers, probation supervisors, or judges) and how much the decisions are structured by department guidelines.").

86. Doherty, *supra* note 24, at 323 (finding that fourteen out of fifteen states in study of probation conditions utilize preponderance of the evidence standard for probation revocation); Ronald P. Corbett, Jr. & Kevin R. Reitz, Introduction, in *Profiles in PROBATION REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN 21 STATES* 3, 6 (Kelly Lyn Mitchell & Kevin R. Reitz eds., 2014) (noting that "a handful" of states require additional findings beyond a probation violation to justify revocation).

87. Corbett & Reitz, *supra* note 86, at 7 (finding, in twenty-one-state study, that probation revocation "results in a resentencing of the defendant, so that any penalty that could have been imposed at the original sentencing can be used as a revocation sanction," while others "require that a previously suspended sentence be executed without alteration").

88. Phelps, *supra* note 85, at 69.

89. Phelps & Ruhland, *supra* note 29, at 812.

90. See *id.* at 807–10.

91. Klingele, *supra* note 24, at 1059.

that discriminate against people with certain disabilities, and proceedings are effectively inaccessible to people with disabilities who cannot prepare appropriately or advocate effectively on their own behalf. Second, incarcerated people with certain disabilities are often unable to access the prison programs or health services that would improve their suitability for parole. Further, without assistance, making plans for care upon release is virtually impossible for incarcerated people with I/DD, cognitive, and mental health disabilities. Finally, probation and parole agencies frequently fail to offer modifications to supervision conditions, despite such modifications often being necessary to ensure compliance with the myriad conditions that govern the lives of people with disabilities under community supervision.

Given the great diversity among probation and parole programs throughout the United States, it is impossible to offer a definitive account of how these issues play out in every state. But, taken together, the examples provided below paint an unmistakable picture of exclusion from community supervision programs on the basis of disability, particularly for people with I/DD, cognitive, and certain mental health disabilities.

1. Inquiries Underlying the Parole Release Standard

Underlying the release standard used by most parole boards—whether a parole applicant is likely to recidivate upon release—are inquiries that frequently operate to seriously disadvantage people with I/DD, cognitive, and certain mental health disabilities. Two are addressed here: (1) the question of whether a parole applicant has “insight” into the criminal conduct that sent them to prison, and (2) the applicant’s prison record, including their disciplinary history and participation in prison programs.

Insight. It is common for parole boards around the United States to question whether an incarcerated person has “insight” into why they committed the criminal behavior that landed them in prison. A study of parole board members’ perspectives on the parole process identified “insight into the causes of past criminal conduct” as one of the “most important factors in the decision to grant parole.”⁹² Remarkably, parole boards confidently declare that parole applicants lack insight—and deny parole on that basis—even though “insight” does not have a fixed definition in psychological and psychiatric research and practice.⁹³ The parole board’s consideration of insight seemingly stems from

92. Ronald Burns, Patrick Kinkade, Matthew C. Leone & Scott Phillips, *Perspectives on Parole: The Board Members’ Viewpoint*, FED. PROB., June 1999, at 16, 19 (1999). Court cases from around the United States confirm that lack of insight is a frequent justification for the decision to deny parole. See, e.g., *In re Shaputis*, 190 P.3d 573, 580 (Cal. 2008); *Acoli v. N.J. State Parole Bd.*, 273 A.3d 426 (N.J. 2022); *In re Parole of Haeger*, 813 N.W.2d 313 (Mich. Ct. App. 2011).

93. Simone Jennissen, Julia Huber, Johannes C. Ehrenthal, Henning Schauenburg & Ulrike Dinger, *Association Between Insight and Outcome of Psychotherapy: Systematic Review and Meta-Analysis*, 175 AM. J. PSYCHIATRY 961, 961 (2018). The dominant definition of insight appears to be “clinical insight” (i.e., a person’s cognizance that they are experiencing a mental illness and its impact on them). L.S.C. Van Camp, B.G.C. Sabbe & J.F.E. Oldenburg, *Cognitive Insight: A Systematic Review*, 55 CLINICAL PSYCH. REV. 12 (2017).

the notion that feeling guilt and shame are an important part of rehabilitation, and a lack of those feelings may be associated with antisocial or psychopathic behavior, making recidivism more likely.⁹⁴ Given the limited research on this topic, parole boards' focus on insight appears to be a misguided attempt to apply empirical psychological research without appropriate understanding of its limitations.⁹⁵

For example, California's parole board, the nation's busiest, considers insight—even though it is not among the factors included in the regulatory guidelines and the parole board “admit[ted] that psychologists are incapable of assessing” insight.⁹⁶ Even though the parole board offers no clear definition of insight, the California Supreme Court has affirmed the parole board's right to consider it and labeled insight “a significant factor in determining whether there is a ‘rational nexus’ between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety.”⁹⁷ It reached this curious conclusion despite at least one justice's acknowledgement that empirical evidence fails to demonstrate that “lack of insight . . . is itself a reliable predictor of [recidivism.]”⁹⁸

The demand for a demonstration of insight as a parole-release condition appears to be particularly problematic when people with I/DD, cognitive, and certain mental health disabilities seek parole. For them, insight may simply be impossible to articulate in a way that will satisfy a parole board. Further, lack of insight may have no bearing on recidivism. For example, if a person's mental health disability manifests in the form of engaging in impulsive behavior, and that impulsive behavior constituted a criminal act that led to conviction, appropriate insight may not involve the articulation of remorse and shame a parole board seeks. Yet such a person may successfully avoid such impulsive behavior when they receive treatment for their mental illness and be able to

94. See *In re Shaputis*, 265 P.3d 253, 277 (Cal. 2011) (Liu, J., concurring); Lilliana Paratore, “Insight” into Life Crimes: The Rhetoric of Remorse and Rehabilitation in California Parole Precedent and Practice, BERKELEY J. CRIM. L., Spring 2016, at 95, 116–19 (reviewing limited psychological research on the role of guilt and shame in rehabilitation).

95. See Avani Mehta Sood, *Applying Empirical Psychology to Inform Courtroom Adjudication—Potential Contributions and Challenges*, 130 HARV. L. REV. F. 301 (2017).

96. Keith Wattley, *Insight into California's Life Sentences*, 25 FED. SENT'G REP. 271, 273 (2013); *In re Shaputis*, 265 P.3d at 270 (noting that “insight” does not appear among regulatory guidelines).

97. *In re Shaputis*, 265 P.3d at 270.

98. *Id.* at 277 (Liu, J., concurring). Justice Liu also warned that claiming a parole applicant lacks insight risks becoming “a new talisman with the potential to render almost all life inmates unsuitable for parole.” *Id.* at 278. Unfortunately, there is evidence that this has come to pass. The ACLU recently filed a habeas petition on behalf of several parole applicants to challenge reversals of their parole grants by the Governor of California due to a supposed lack of insight. See *Petition for Writ of Habeas Corpus and Memorandum of Points and Authorities*, Velasquez v. Neuschmid (Cal. Super. Ct. May 13, 2022).

avoid recidivating upon release from prison. Similarly, a person with I/DD or cognitive disabilities may lack the capacity to articulate insight.⁹⁹

Prison Records. Parole boards typically look to an incarcerated person's record of participation in prison programming and work histories when making a release decision.¹⁰⁰ Participation in work and educational programs, job training, and anger management classes are arguably indicative of whether an incarcerated person is committed to rehabilitation and leaving a life of crime behind. Some states also impose minimal education requirements, such as obtaining a high school diploma or GED, as a precondition of parole.¹⁰¹ But access to prison programming and education is far from universal. Some variation may be attributed to a facility's security level, with fewer opportunities available in more secure prisons. Disability status may also be an important variable. For example, people with I/DD or cognitive disabilities may be excluded from certain training programs or prison jobs that limit access through educational attainment level.¹⁰² A lack of disability accommodations may also lead to exclusion.¹⁰³ Moreover, even when people with I/DD or cognitive disabilities gain access to job opportunities, they may struggle to succeed due to limited attention spans, processing issues, and limitations on executive functioning.¹⁰⁴

Some prisons have specialized units where people with diagnoses of serious mental illnesses reside.¹⁰⁵ This evidence-backed intervention improves safety and access to care.¹⁰⁶ But in practical terms, people in such units may be

99. Amber Heron, *An Impossible Standard: The California Parole Board Process for Inmates with Cognitive Impairments*, 91 S. CAL. L. REV. 989, 1018 (2018) (arguing that California's parole board should place less emphasis on the articulation of insight, as it "requires the ability to process ideas abstractly—in a way certain inmates are incapable of doing").

100. RUHLAND ET AL., *supra* note 35, at 26.

101. Victoria Hay, *Educational Requirements as Barriers to Release for Incarcerated People with Cognitive Disabilities*, 5 COLUM. HUM. RTS. L. REV. ONLINE 225, 233–34 (2021).

102. See PETERSILIA, *supra* note 36, at 6 ("In most prison systems, only inmates who score above 6th grade intelligence are enrolled in vocational training programs."); Katie Kronick, *Left Behind, Again: Intellectual Disability and the Resentencing Movement*, 101 N.C. L. REV. 959, 1009–10 (2023) (noting certain Federal Bureau of Prisons drug programs require an eighth grade education level, which "many individuals with intellectual disability will never attain").

103. See Nancy Cowardin, *Disorganized Crime: Learning Disability and the Criminal Justice System*, CRIM. JUST. Summer 1998, at 10, 16 (noting that incarcerated people with learning disabilities are disadvantaged when they seek parole if they have not had access to special education); Diane Smith Howard & Shira Wakschlag, *Prisons as Institutions: An Overview of Challenges Facing Prisoners with I/DD and Proposed Solutions Under the ADA and Other Disability Rights Laws*, IMPACT, Spring 2017, <https://thearc.org/resource/prisons-as-institutions-an-overview-of-challenges-facing-prisoners-with-i-dd-and-proposed-solutions-under-the-ada-and-other-disability-rights-laws-university-of-minnesota-impact-magazine-2017> [perma.cc/3C8D-QF38].

104. Hay, *supra* note 101, at 248–50.

105. HOLLY HILLS, CHRISTINE SIEGFRIED & ALAN ICKOWITZ, *EFFECTIVE PRISON MENTAL HEALTH SERVICES: GUIDELINES TO EXPAND AND IMPROVE TREATMENT* 9 (2004).

106. See *id.* at 10.

separated from the rest of the prison and sometimes lose access to the programming a parole board values when making a release decision.¹⁰⁷

More perniciously, despite clear legal obligations to provide health care, including mental health care, to incarcerated people, many prison systems spectacularly fail to do so.¹⁰⁸ For example, Alabama has been embroiled in litigation around its failure to provide adequate mental healthcare for over eight years.¹⁰⁹ And Alabama is far from alone. In recent years, prisons and statewide correctional systems in numerous states have faced class action lawsuits over the failure to provide mental health care.¹¹⁰

The harms of failing to provide adequate mental health care or incarcerating people with serious mental illnesses in conditions that cause them to decompensate are obvious. But beyond the danger of self-harm,¹¹¹ which is particularly high for people with serious mental illnesses placed in solitary confinement,¹¹² it is extremely challenging for people suffering from certain mental illnesses to endure the rigid restrictions of prison life.¹¹³ The same is often true of people with I/DD or cognitive disabilities.¹¹⁴ Consequently, when a prison fails to provide adequate mental healthcare or other supports, disciplinary infractions can pile up,¹¹⁵ along with punishments like solitary

107. See Shama B. Chaiken & Catherine Prudhomme, *Creating Wellness Through Collaborative Mental Health Interventions*, in HANDBOOK OF CORRECTIONAL MENTAL HEALTH 345, 368 (Charles L. Scott ed., 2d ed. 2010).

108. JAMES & GLAZE, *supra* note 40, at 9 (reporting that only one third of people with mental health problems incarcerated in state prisons received treatment in prison); Jennifer M. Reingle Gonzalez & Nadine M. Connell, *Mental Health of Prisoners: Identifying Barriers to Mental Health Treatment and Medication Continuity*, 104 AM. J. PUB. HEALTH 2328 (2014) (reporting survey results finding that more than half of incarcerated people who received medication for mental health conditions when admitted to prison did not receive such medication in prison).

109. See *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1245, 1252 (M.D. Ala. 2017).

110. See, e.g., *Jensen v. Shinn*, 609 F. Supp. 3d 789 (D. Ariz. 2022); *Sabata v. Neb. Dep't of Corr. Servs.*, 337 F.R.D. 215, 262, 271 (D. Neb. 2020); *Dockery v. Hall*, 443 F. Supp. 3d 726 (S.D. Miss. 2019).

111. NAT'L RSCH. COUNCIL, *supra* note 26, at 223 (collecting studies documenting the high rates of suicide among incarcerated people).

112. Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 142 (2003).

113. JAMES & GLAZE, *supra* note 40, at 10 (finding that incarcerated people "who had a mental health problem were more likely than those without to have been charged with breaking facility rules since admission"); Maureen L. O'Keefe & Marissa J. Schnell, *Offenders with Mental Illness in the Correctional System*, J. OFFENDER REHAB., 2007, at 81, 86–87 (describing circumstances in prison that may lead incarcerated people with mental health disabilities to incur disciplinary infractions, such as environmental factors and "[t]he abrasive atmosphere in correctional facilities"); Richard B. Felson, Eric Silver & Brianna Remster, *Mental Disorder and Offending in Prison*, 39 CRIM. JUST. & BEHAV. 125, 140 (2012) (finding that incarcerated people experiencing depression and psychosis are "much more likely to engage in verbal and physical aggression against the staff and against other inmates").

114. PETERSILIA, *supra* note 36, at 24.

115. NAT'L RSCH. COUNCIL, *supra* note 26, at 223; JAMES & GLAZE, *supra* note 40, at 1 tbl. (finding that incarcerated people with psychiatric disorders were more likely than those without

confinement that compound psychological harm.¹¹⁶ It is uncommon for prison disciplinary policies to account for mental health status as a mitigating factor.¹¹⁷ And, unsurprisingly, a disciplinary record typically counts against an inmate pursuing discretionary parole.¹¹⁸

Similarly, numerous state prison systems have failed to comply with the demands for special education services. The Individuals with Disabilities Education Act (IDEA) requires states to provide services to people entitled to receive special education until they graduate from high school or until age twenty-one—even while incarcerated—as long as they were identified as having a disability and had an individualized education plan before incarceration.¹¹⁹ Numerous incarcerated people have prevailed on their claims against state correctional systems regarding the failure to provide educational services in accordance with the IDEA.¹²⁰ For incarcerated people with I/DD or cognitive disabilities, the inability to access special education may have a long term impact on their ability to participate in prison programs that would benefit them in their parole pursuit.

2. Conduct of Parole Hearings

Parole hearings or interviews are particularly difficult to manage for people with I/DD, cognitive, or mental health disabilities. As described above, the primary inquiry of parole boards is whether an incarcerated person is likely to recidivate upon release from prison.¹²¹ While that inquiry appears relatively simple on its face, parole boards utilize a variety of methods to answer that question. Some of those methods systemically disadvantage people with I/DD, cognitive, or mental health disabilities.

to have been charged with a rule violation); Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 399 (2006) (reviewing fifty-state survey of prison systems and finding that prison officials expressed concerns about considering mental health status in disciplinary hearings).

116. SCHNITTKER, MASSOGLIA & UGGEN, *supra* note 43, at 63 (“In principle, those who suffer from an active psychiatric disorder should not be placed in solitary confinement. Yet having a psychiatric disorder is positively related to the likelihood of solitary confinement, in large part because psychiatric disorders are associated with disciplinary infractions.”).

117. *Id.* at 55.

118. RUHLAND ET AL., *supra* note 35, at 25–26 (finding that parole board chairs ranked a person’s disciplinary record as the fifth most important factor on average).

119. Dear Colleague Letter from Melody Musgrave, Director, Off. of Special Educ. Programs, and Michael K. Yudin, Acting Assistant Sec’y, at 5 (Dec. 5, 2014), <https://www.ed.gov/sites/ed/files/policy/gen/guid/correctional-education/idea-letter.pdf> [perma.cc/542T-NPAL].

120. See, e.g., *Adam X. v. N.J. Dep’t of Corr.*, No. 17-00188, 2022 WL 621089 (D.N.J. Mar. 3, 2022) (approving class settlement of claims under IDEA about provision of special education services in New Jersey prisons); *J.S. v. N.Y. Dep’t of Corr.*, 76 F.4th 32 (2d Cir. 2023) (noting appellant’s successful IDEA claim against New York’s corrections department due to the department’s failure to provide special education services).

121. See *supra* Section I.B.1.

Parole hearings are usually high-pressure affairs involving appearances before one or more members of a parole board.¹²² They typically “require[] an inmate to ascertain nuanced expectations, engage in rigorous self-analysis, interpret varied circumstances, and articulate persuasive reasoning all under extreme pressure.”¹²³ As one court described, a parole hearing “involves complex and multifaceted issues that require the potential marshalling, presentation, and rebuttal of information derived from many sources.”¹²⁴ These tasks can be particularly challenging if processing disorders or memory issues are at play.¹²⁵ Given that the vast majority of parole boards consider a parole applicant’s testimony, as well as their disposition or demeanor at their parole hearing,¹²⁶ the impact of I/DD, cognitive, or mental health disabilities may be significant.

All these concerns are compounded when parole hearings, although not technically adversarial, take on an adversarial air. Prosecutors’ opposition to release can contribute to that sense. In a majority of states, a representative from the office that prosecuted the parole applicant is present and permitted to argue against parole.¹²⁷ Some prosecutors even publicize their opposition to parole for certain offenders, amplifying the adversarial atmosphere.¹²⁸ In any case where a prosecutor opposes parole, parole applicants must overcome the arguments offered by well-resourced and respected institutions. This challenge is daunting for all, but especially so for people with I/DD, cognitive, or mental health disabilities.¹²⁹

Consequently, some parole applicants may require assistance so they can meaningfully participate in parole hearings. Although parole hearings are often complex proceedings that bear a striking resemblance to trials or immigration court proceedings, legal assistance is rare. Only a few states—and usually only in a subset of cases—offer guaranteed counsel to people facing parole-release proceedings.¹³⁰ Even then, providing counsel does not guarantee zealous representation. For example, in California, where people serving

122. Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 400–01 (2014).

123. NATHANIEL HSIEH, LEFT BEHIND: DEVELOPMENTAL DISABILITY AND THE PURSUIT OF PAROLE, 10 (2018), <https://law.stanford.edu/wp-content/uploads/2018/11/Nathaniel-Hsieh-Left-Behind-Developmental-Disability-and-the-Pursuit-of-Parole.pdf> [perma.cc/PKL3-EU66].

124. *Diatchenko v. Dist. Att’y*, 27 N.E.3d 349, 360 (Mass. 2015).

125. Heron, *supra* note 99, at 999.

126. RUHLAND ET AL., *supra* note 35, at 26.

127. Russell, *supra* note 122, at 403–04.

128. R. Michael Cassidy, *Undue Influence: A Prosecutor’s Role in Parole Proceedings*, 16 OHIO ST. J. CRIM. L. 293, 296–97 (2019) (recounting examples of prosecutors making public pledges to oppose parole in cases prosecuted by their offices).

129. *Diatchenko*, 27 N.E.3d at 360–61.

130. Russell, *supra* note 122, at 403 & n.196 (finding that California and Massachusetts provide a right to counsel for people serving life sentences and that Ohio appoints public defenders to represent parole applicants before the full parole board following an objection by the prosecutor, victim, or court to a parole panel’s recommendation of release).

life sentences have a right to counsel at parole hearings,¹³¹ juvenile lifers were found to be significantly more successful in securing parole with privately retained counsel.¹³² While most states permit attorneys to appear at hearings,¹³³ few legal service providers offer services before parole boards.¹³⁴ In the vast majority of cases, hiring private counsel is the only option for securing legal assistance. Therefore, most people facing a parole board do so alone.

The paucity of lawyers making appearances at parole hearings rests largely on the limited due process protection accorded to parole applicants. In *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, the Supreme Court held that there is not a per se protected liberty interest in parole release.¹³⁵ The question of whether a liberty interest exists, and what protection the Due Process Clause demands for that interest, therefore, depends on state law.¹³⁶

Fourteen states go so far as to ban attorneys from participating in parole hearings.¹³⁷ New Jersey is a prime example.¹³⁸ Instead of allowing attorney participation, the New Jersey State Parole Board “may” pursue a court order to appoint a guardian ad litem to work with parole applicants who are not “competen[t]” to participate in parole interviews and hearings.¹³⁹ The competency standard is equivalent to that used to determine whether a criminal defendant is fit to stand trial: whether they “lack[] capacity to understand the proceedings against them.”¹⁴⁰ But, of course, criminal defendants facing serious

131. *Id.*

132. See Bell, *supra* note 35, at 505; Russell, *supra* note 122, at 425 (noting that attorneys representing parole applicants sentenced to life in prison in California were paid only \$400 per case).

133. Russell, *supra* note 122, at 402.

134. A small number of programs through which law students and other non-lawyer volunteers offer assistance also exist, including the Parole Preparation Project (New York), Redemption Earned, Inc. (Alabama), UnCommon Law (California), and Parole Project (Louisiana). See *About Us*, PAROLE PREPARATION PROJECT, <https://paroleprepny.org/about> [perma.cc/33XW-3NCA]; *What We Do & Who We Serve*, REDEMPTION EARNED, <https://redemptionearned.org/what-who/#legalrep> [perma.cc/MS7S-UP67]; *Trauma Informed Legal Representation*, UNCOMMON L., <https://uncommonlaw.org/trauma-informed-legal-services> [perma.cc/9PPK-8MZD]; PAROLE PROJECT, <https://paroleproject.org> [perma.cc/AZV3-73TN].

135. *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979).

136. *Id.* at 12. Kimberly Thomas and Paul Reingold have compellingly argued that courts should rethink their approach to the question of whether there’s a protected liberty interest in parole release. See Thomas & Reingold, *supra* note 68, at 213.

137. Russell, *supra* note 122, at 402 & n.191.

138. N.J. STATE PAROLE BD., THE PAROLE BOOK 16 (7th ed. 2023), <https://state.nj.us/parole/docs/AdultParoleHandbook.pdf> [perma.cc/TM5E-CTEP] (“No one is permitted in the room during your hearing except Board staff and correction officers. . . . You cannot have an attorney present. . . .”).

139. N.J. ADMIN. CODE § 10A:71-3.12 (2025).

140. N.J. STAT. ANN. § 2C:4-4(a) (West 2025). New Jersey’s standard for competency to stand trial reflects the near-universal standard used in American criminal cases. See MICHAEL L. PERLIN, A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW 111–12 (2016) (explaining that the common law competency standard—and as

charges have a right to counsel regardless of competency.¹⁴¹ In stark contrast, a parole applicant who can merely understand the proceedings—and is therefore deemed competent—faces the parole board alone. As such, parole applicants with serious disabilities that negatively impact their ability to navigate the parole process lack a meaningful opportunity to participate. Although a parole proceeding is effectively back-end sentencing, parole applicants usually face their sentencing authority without counsel.

As described in the introduction, W.M., who has schizoaffective disorder and has been institutionalized more than twenty times due to his mental health disabilities, requires assistance to meaningfully participate in parole proceedings.¹⁴² Yet the New Jersey State Parole Board has never offered him any assistance in his many appearances before the board, and it denied his request for an attorney to appear with him.¹⁴³ There are likely many more people with disabilities like W.M. who are left to confront parole boards without legal assistance.

3. Resistance to Modifications and Discriminatory Attitudes

Compliance with the myriad conditions imposed by probation and parole agencies is challenging for virtually all supervisees, but qualitative research reveals that it is often particularly challenging for people with I/DD, cognitive, or serious mental health disabilities. For example, people with serious mental illnesses reportedly have an employment rate of under 20 percent,¹⁴⁴ and employment rates for people with I/DD are around 34 percent.¹⁴⁵ But maintaining employment or demonstrating efforts to seek employment, and requiring the payment of fees, are typical supervision conditions.¹⁴⁶ Compliance will pose an obvious challenge to many supervisees with I/DD, cognitive, or mental health disabilities.¹⁴⁷ Other conditions present similar challenges for people

modified by the Supreme Court in *Dusky v. United States*, 362 U.S. 402 (1960)—is used by “virtually every jurisdiction” in the United States).

141. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

142. W.M.’s background and efforts to secure counsel for his parole proceedings are described *supra* in the Introduction.

143. See Brief on Behalf of Plaintiff-Appellant at 5–6, *W.M. v. N.J. State Parole Bd.*, No. A-0072-19, 2022 WL 17420146 (N.J. Super. Ct. App. Div. Dec. 10, 2021).

144. NAT’L ALL. ON MENTAL ILLNESS, ROAD TO RECOVERY: EMPLOYMENT AND MENTAL ILLNESS 4 (2014), <https://nami.org/Support-Education/Publications-Reports/Public-Policy-Reports/RoadtoRecovery> [perma.cc/K9LL-KQFX]. In general, people with disabilities are employed at a much lower rate than people without disabilities. See U.S. BUREAU OF LAB. STAT., U.S. DEP’T OF LAB., PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS—2024, (2025), <https://bls.gov/news.release/pdf/disabl.pdf> [perma.cc/X827-SHJV].

145. Gary N. Siperstein, Robin C. Parker & Max Drascher, *National Snapshot of Adults with Intellectual Disabilities in the Labor Force*, 39 J. VOCATIONAL REHAB. 157, 161 (2013).

146. Doherty, *supra* note 24, at 310–12; RUHLAND ET AL., *supra* note 35, at 36.

147. Jennifer L. Skeem & Jennifer Eno Loudon, *Toward Evidence-Based Practice for Probationers and Parolees Mandated to Mental Health Treatment*, 57 PSYCHIATRIC SERVS. 333, 333–35 (2006) (“[M]ental illness may also be associated with functional impairment that renders a

whose disabilities affect executive function, memory, and time management.¹⁴⁸ For some, attending a meeting or calling a probation or parole officer at the same time every week is an insurmountable challenge. Yet probation or parole officers may or may not offer appropriate modifications in these circumstances.

As there are hundreds of agencies that operate probation and parole supervision programs,¹⁴⁹ it would be impossible to offer definitive conclusions about access to accommodations for people under community supervision. But qualitative research provides some insight into the supervision experiences of people with I/DD, cognitive, and mental health disabilities. Findings suggest that at least some supervision agencies do not modify, as part of their standard practice, supervision programs in response to the needs of people with I/DD, cognitive, and mental health disabilities.¹⁵⁰ Instead, probation officers frequently rely on punitive sanctions, like short-term jail stays, in response to failures to comply with conditions. Remarkably and at least partly a result of bias against people with mental health disabilities, this appears to be true even of officers who supervise probationers on specialized mental health dockets.

One study that compared the experiences of probation officers in two departments in large cities—one that utilized a specialized mental health docket and another that did not—offers useful insights into the treatment of probationers with serious mental illnesses.¹⁵¹ While the probation officers who handled the mental health dockets focused on promoting access to treatment, the traditional probation officers emphasized probation’s traditional law enforcement focus and condition compliance.¹⁵² It further found that probation officers using a traditional approach regarded people with serious mental illnesses as “problem cases” who created public safety risks.¹⁵³ To ensure compliance with conditions, officers relied primarily on threats of incarceration, which operated, in combination with other sanctions, to incapacitate probationers for the bulk of their time under supervision.¹⁵⁴ Unsurprisingly, it was

probationer of [sic] parolee unable to comply with such standard conditions as maintaining employment, paying supervision fees, or completing community service.”).

148. See Kim A. Gorgens, Laura Meyer, Judy Dettmer, Molly Standeven, Emily Goodwin, Cory Marchi & Hollis Lyman, *Traumatic Brain Injury in Community Corrections: Prevalence and Differences in Compliance and Long-Term Outcomes Among Men and Women on Probation*, 48 CRIM. JUST. & BEHAV. 1679, 1680 (2021).

149. KAELE, PROBATION AND PAROLE 2022, *supra* note 27, at 9.

150. Jennifer Eno Loudon, Jennifer L. Skeem, Jacqueline Camp & Elizabeth Christensen, *Supervising Probationers with Mental Disorder: How Do Agencies Respond to Violations?*, 35 CRIM. JUST. & BEHAV. 832, 833 (2008).

151. *Id.*

152. Jennifer L. Skeem, John Encandela & Jennifer Eno Loudon, *Perspectives on Probation and Mandated Mental Health Treatment in Specialized and Traditional Probation Departments*, 21 BEHAV. SCIS. & L. 429, 443 (2003).

153. *Id.* at 441.

154. *Id.* at 451–52.

very unusual for those traditional probation officers to modify probation conditions.¹⁵⁵ A study of a larger sample of probation agencies also found that negative attitudes toward probationers with mental illnesses were common.¹⁵⁶

Additional research has confirmed the punitive approach of traditional probation agencies toward probationers with mental disabilities. Following surveys of probation supervisors in seventy-four probation agencies, fifty-four with specialized mental health dockets and twenty traditional, researchers concluded that traditional probation officers tend to focus on law enforcement objectives and are quicker to turn to harsher compliance strategies, like short-term jail stays, to ensure compliance with conditions.¹⁵⁷ Yet another study specifically found that stigma against probationers with mental health disabilities drove probation officers to utilize harsher sanctions.¹⁵⁸

Even probation departments with specialized mental health programs are not necessarily free of disability discrimination. In a study of the Maricopa County, Arizona Probation Department's mental health caseload, researchers found that probation officers had a greater ability to offer accommodations to probationers on their caseload than other probationers.¹⁵⁹ For example, one probation officer indicated that he had previously used his discretion to eliminate probation fees for probationers on the mental health caseload—an option not available for people on standard probation.¹⁶⁰ But this promising effort was available to less than 30 percent of all probationers with mental disabilities, leaving many who might have benefitted from this accommodation without access to it.¹⁶¹ In addition, placement on the mental health caseload did not necessarily improve the likelihood of avoiding jail time. More than one probation officer on the mental health caseload described their “use of jail as a ‘shock sanction’” to gain compliance.¹⁶² One reported that he used jail stays “in order to reprimand the individual, as well as let them ‘cool out’ for a few

155. *Id.* at 452.

156. See Jennifer Eno Loudén & Jennifer L. Skeem, *How Do Probation Officers Assess and Manage Recidivism and Violence Risk for Probationers with Mental Disorder? An Experimental Investigation*, 37 LAW & HUM. BEHAV. 22 (2013).

157. Loudén et al., *supra* note 150, at 832, 845 (2008).

158. Jennifer Eno Loudén, Sarah M. Manchak, Elijah P. Ricks, Patrick J. Kennealy, *The Role of Stigma Toward Mental Illness in Probation Officers' Perceptions of Risk and Case Management Decisions*, 45 CRIM. JUST. & BEHAV. 573, 586 (2018) (“[A]s someone with mental illness is perceived as higher risk, they also are more likely to be given a violation report when non compliant with the rules of probation.”).

159. See Brice Terpstra & Philip Mulvey, *Specialty Probation Officers as Street-Level Bureaucrats: Exploring How Discretion Is Perceived and Employed on a Mental Health Caseload*, 66 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 670, 688 (2022).

160. *Id.* at 679.

161. *Id.* at 681 (reporting that a probation officer reported there were “as many as 2,500 people on probation [that] might have ‘mental health terms,’” but only 680 spots on the probation department's mental health caseload).

162. *Id.* at 687.

days and get them back on track.”¹⁶³ These statements appear to reflect discriminatory attitudes toward people with mental disabilities by even the probation officers assigned to a specialized mental health docket.

Taken together, this research suggests it is not uncommon for probationers with mental health disabilities to face discrimination from probation agencies. Traditional probation officers often view probationers with mental health disabilities as problem cases and risks to public safety; these officers rely on punitive tools to warehouse these in jail rather than offering accommodations that might support successful completion of their probation terms.¹⁶⁴ Even probation agencies with specialized mental health dockets subject people with mental disabilities to greater scrutiny and sometimes embrace incarceration as an answer to a failure to comply with conditions. As in *Mathis/Davis*, supervision agencies appear simply to be ill-equipped to provide accommodations to people with disabilities.¹⁶⁵ This review leaves the unmistakable impression that many probationers are unable to obtain accommodations on the basis of mental health disabilities.

II. FEDERAL STATUTORY PROTECTIONS FOR SUPERVISEES

The ADA and Rehabilitation Act are the core federal statutes that provide protections against disability discrimination in the United States. This Part describes the scope of those protections—including key limitations, possible defenses, and practical barriers to enforcement—in the context of community supervision programs.¹⁶⁶

A. Scope of Protection

Title II of the ADA prohibits discrimination on the basis of disability by state and local public entities.¹⁶⁷ This protection is accorded to any “qualified

163. *Id.*

164. It is also noteworthy that even when a probation agency emphasizes treatment, the greater scrutiny triggers more jail time. See Phyllis Solomon, Jeffrey Draine & Steven C. Marcus, *Predicting Incarceration of Clients of a Psychiatric Probation and Parole Service*, 53 PSYCHIATRIC SERVS. 50 (2002) (finding that the involvement of mental health care providers in supervision led to greater monitoring of compliance with supervision conditions and triggered incarceration for violations).

165. *Davis v. U.S. Parole Comm’n*, No. 24-cv-01312, 2025 WL 457779, at *3 (D.D.C. Feb. 11, 2025) (noting that U.S. Parole Commission and related supervision agency did not have a “written policy requiring assessment and accommodation of disabilities,” or “any ‘formal process through which an individual may seek such accommodations’”).

166. Given the limited constitutional protection for disability discrimination, this Part does not address federal constitutional standards. Disability discrimination triggers rational basis review, rather than heightened scrutiny under the Equal Protection Clause. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985); see also Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527 (2014) (arguing for heightened scrutiny of disability discrimination).

167. Title II states as follows: “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services,

individual.”¹⁶⁸ A person with a disability under the ADA is someone with “a physical or mental impairment that substantially limits one or more major life activities.”¹⁶⁹ At bottom, a public entity must “operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.”¹⁷⁰ The Rehabilitation Act creates a similar prohibition on discrimination against people with disabilities by recipients of federal funding.¹⁷¹ Pursuant to the ADA regulations, this protection takes two major forms that are relevant to people with disabilities in the context of community supervision programs: the ban on disparate treatment of people with disabilities and the requirement of “reasonable modifications” where they are necessary for the participation of qualified people with disabilities.¹⁷²

programs, or activities of a public entity. . . .” 42 U.S.C. § 12132. The statute further defines “public entity” to include, in relevant part, “any State or local government,” and “any department, agency, special purpose district, or other instrumentality of a State or States or local government.” *Id.* § 12131(1)(A)–(B). Although the Supreme Court has never directly addressed the question of whether probation and parole agencies provide covered “services, programs, or activities,” there is little room to argue that they do not. The Supreme Court held that prisons, far more restrictive institutions than community supervision agencies, are “unmistakably include[d]” within the statute’s coverage. *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 209 (1998). Courts that have addressed whether parole agencies are covered by the ADA appear to have uniformly answered in the affirmative. *See, e.g., Thompson v. Davis*, 295 F.3d 890 (9th Cir. 2002); *Crowell v. Mass. Parole Bd.*, 74 N.E.3d 618 (Mass. 2017).

168. 42 U.S.C. § 12132; *id.* § 12131(2) (“[A]n individual with a disability who . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”).

169. *Id.* § 12102(1). A person meets this definition pursuant to three paths: (1) having an actual disability, (2) having a record of a disability, or (3) being “regarded as” having a disability. 28 C.F.R. § 35.108(a)(1) (2024).

170. 28 C.F.R. § 35.150 (2024).

171. 29 U.S.C. § 794(a). Federal funding of state criminal legal systems is widespread. *See* Lauren-Brooke Eisen, *The Federal Funding that Fuels Mass Incarceration*, BRENNAN CTR. FOR JUST., (June 7, 2021), <https://brennancenter.org/our-work/analysis-opinion/federal-funding-fuels-mass-incarceration> [perma.cc/2D2Z-JBH2]. Although regulations for the ADA and Rehabilitation Act differ somewhat, courts typically interpret the scope of protection under both statutes as identical. *See* Betsy Ginsberg, *Out with the New, In with the Old: The Importance of Section 504 of the Rehabilitation Act to Prisoners with Disabilities*, 36 FORDHAM URB. L.J. 713, 739–40 (2009) (citing Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1109–12 (1995)); Katie Eyer, *Rehabilitation Act Redux*, 23 YALE L. & POL’Y REV. 271, 304 (2005).

172. The ADA’s integration mandate—that public entities “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities,” 28 C.F.R. § 35.130(d) (2024)—can also play a significant role in protecting the rights of people with disabilities ensnared in the criminal legal system. In *Olmstead v. L.C.*, the Supreme Court considered whether a state could confine two women with I/DD, as well as mental health disabilities, in a hospital psychiatric unit, rather than in a community-based setting. *Olmstead v. L.C.*, 527 U.S. 581, 593 (1999). The Court held that “[u]njustified isolation . . . is properly regarded as discrimination based on disability.” *Id.* at 597. Although the Department of Justice has signaled its support for application of the integration mandate to certain components of the

Pursuant to the ban on disparate treatment of people with disabilities, public entities must provide equal access to community supervision programs.¹⁷³ Probation and parole agencies may not, therefore, refuse participation in their programs simply because a person has a disability. For example, the Ninth Circuit held that plaintiffs who challenged the categorical exclusion of people with substance abuse histories from parole consideration stated a claim under Title II.¹⁷⁴ In guidance produced for state and local criminal justice entities, the U.S. Department of Justice endorsed efforts to eliminate disability discrimination of this kind by “develop[ing] non-discriminatory eligibility criteria” for probation and parole programs.¹⁷⁵

The requirement to adopt “reasonable modifications” is an affirmative obligation requiring individualized assessment, or individuation.¹⁷⁶ It is similar to the ADA’s better-known requirement that employers adopt “reasonable accommodations” to avoid employment discrimination on the basis of disability.¹⁷⁷ In that context, the requirement has aptly been described as “level[ing] uneven playing fields that historically have been presumed unbiased, but operate from baselines that reflect cultural prejudice and result in workplace exclusion.”¹⁷⁸ A similar rationale underlies Title II of the ADA and the Rehabilitation Act, and the individuation requirement follows.¹⁷⁹ The requirement “rests not just on a negative duty not to exclude, but at times, on a positive duty to take affirmative steps.”¹⁸⁰ Assessing whether a reasonable modification is required therefore does not typically require a comparison between the treatment of people with disabilities and people without disabilities.

criminal legal system, it has not yet successfully been applied in the probation or parole context. A complete explanation of how it could apply is beyond the scope of this paper. For a helpful overview of other contexts in which the integration mandate has been used to challenge mass incarceration, see Dinerstein & Wakschlag, *supra* note 50, at 931–50.

173. See 28 C.F.R. § 35.130(b)(1)(i), (iii) (2024); C.R. DIV., U.S. DEP’T OF JUST., EXAMPLES AND RESOURCES TO SUPPORT CRIMINAL JUSTICE ENTITIES IN COMPLIANCE WITH TITLE II OF THE AMERICANS WITH DISABILITIES ACT 2 (2017) (“Under Title II, state and local government entities must . . . [e]nsure that people with mental health disabilities or I/DD have an equal opportunity to participate in and benefit from the entities’ programs, services, and activities.”).

174. *Thompson v. Davis*, 295 F.3d 890 (9th Cir. 2002).

175. C.R. DIV., *supra* note 173, at 3.

176. 28 C.F.R. § 35.130(b)(7) (2024); 45 C.F.R. § 84.12(a) (2024).

177. 42 U.S.C. §§ 12111(8)–(9), 42 U.S.C. § 12112(a), (b)(5)(A).

178. Michael Ashely Stein, Anita Silvers, Bradley A. Arehart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 698 (2014); see also Rabia Belt & Doron Dorfman, *Reweighing Medical Civil Rights*, 72 STAN. L. REV. ONLINE 176, 182 (2020) (“[Accommodations] are intended to be tailor-made to individual needs and, although they often can be suited to others, they are not one-size-fits-all.”).

179. Margo Schlanger, *Prisoners with Disabilities: Law and Policy*, in PUBLIC HEALTH BEHIND BARS: FROM PRISONS TO COMMUNITIES 43, 48 (Robert B. Greifinger ed., 2d ed. 2021) (noting the requirement of “individuation” in the context of incarcerated people with disabilities seek modifications (citing *Wright v. N.Y. State Dep’t of Corr.*, 831 F.3d 64, 78 (2d Cir. 2016))).

180. Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1849 (2005).

That said, without good explanation, courts frequently invoke such comparisons in ADA cases involving incarcerated plaintiffs.¹⁸¹

In the context of parole or probation, reasonable modifications might include changes to the criteria, processes, or procedures used to determine eligibility; alternatives to the conditions that supervisees typically abide by; or the provision of supportive programs or housing that ensure a supervisee's ability to comply with program rules and conditions. The U.S. Department of Justice has pointed to the practice in some jurisdictions in which "court staff . . . explore reasonable modifications to allow qualified individuals with these disabilities to participate in diversion and probation programs and specialty courts."¹⁸² For example, the plaintiffs in *Mathis/Davis* sought parole-supervision accommodations that would allow them to attend medical appointments they would ordinarily miss due to supervision check-ins.¹⁸³

The Supreme Judicial Court of Massachusetts's decision in *Crowell v. Massachusetts Parole Board* also provides a useful illustration of this concept.¹⁸⁴ There, the parole applicant had "'cognitive functioning [and] emotional functioning deficits,' resulting in uncooperative behavior."¹⁸⁵ When the parole board considered his case, one member noted that the plaintiff's condition was chronic and potentially deteriorating, such that he would require placement in a "setting where [he] could be managed and cooperate with people forever."¹⁸⁶ The court held that the parole board failed to adequately apply the ADA.¹⁸⁷ It observed that the Massachusetts Parole Board "should make reasonable modifications to its policy . . . by providing an expert or other assistance to help the prisoner identify appropriate postrelease programming."¹⁸⁸ In addition, the provision of legal assistance to people with certain disabilities in parole hearings, where lawyers are a rare sighting, may constitute a "reasonable modification."¹⁸⁹

181. Prianka Nair has documented a trend in cases involving incarcerated plaintiffs who challenge prison conditions, identifying numerous cases in which federal courts have rejected claims in which incarcerated plaintiffs sought modifications of prison programs or practices because the plaintiff failed to demonstrate the differential treatment of disabled and nondisabled people. See Nair, *supra* note 50, at 816–20. I have not identified any cases in which courts have taken the same approach in challenges to community supervision programs, but given the frequent creep of analytical questions from prison cases to community supervision cases, it is plausible that courts might take such a turn. See Alexis Karteron, *Family Separation Conditions*, 122 COLUM. L. REV. 649, 682–83 (2022) (noting the trend of courts applying deferential standards typically used in prison cases to assess the constitutionality of supervision conditions).

182. C.R. DIV., *supra* note 173, at 3.

183. *Mathis v. U.S. Parole Comm'n*, 749 F. Supp. 3d 8, 11 (D.D.C. 2024).

184. *Crowell v. Mass. Parole Bd.*, 74 N.E.3d 618 (Mass. 2017).

185. *Id.* at 620–21 (alteration in original).

186. *Id.* at 621 (alteration in original).

187. *Id.* at 623.

188. *Id.* at 624 (first citing 28 C.F.R. § 35.130(b)(7) (2024); and then citing 28 C.F.R. § 35.130(b)(8)) (2024).

189. See *Franco-Gonzalez v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010) (granting injunction requiring federal government to provide counsel to detained immigrants unable to

B. Limits on Liability

There are several doctrinal limits on liability under the ADA and Rehabilitation Act that may be particularly relevant to probation and parole. These limits stem from two related issues: whether people with disabilities are “qualified individuals” and whether modifications to programs sought by people with disabilities go so far as to “fundamentally alter the nature of the service [provided].”¹⁹⁰ Additionally, corrections officials may attempt to extend application of *Turner v. Safley*, which requires deference to corrections officials in cases concerning prisons,¹⁹¹ into the realm of supervision programs by arguing that “legitimate penological objectives” override an incarcerated person with disabilities’ need for reasonable modifications.¹⁹²

1. “Qualified Individuals” and “Fundamental Alteration”

As noted above, the ADA and Rehabilitation Act’s protections apply only to “qualified individual[s]” who “meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”¹⁹³ The question of whether a person meets this standard is fraught with uncertainty.¹⁹⁴ The leading case on the question is *Southeastern Community College v. Davis*, where the Supreme Court held that a person who is “able to meet all of a program’s requirements in spite of his handicap,” meets this definition.¹⁹⁵ There, a woman with a significant hearing impairment sought admission to a nursing program.¹⁹⁶ Completion of the program would have required that the college provide her with accommodations, such as “individual supervision by faculty members whenever she attend[ed]

understand their removal proceedings pursuant to the Rehabilitation Act); Leslie Wolf, *After Franco-Gonzalez v. Holder: The Implications of Locating a Right to Counsel Under the Rehabilitation Act*, 23 S. CAL. REV. L. & SOC. JUST. 329 (2014).

190. 28 C.F.R. § 35.130(b)(7) (2024).

191. *Turner v. Safley*, 482 U.S. 78 (1987).

192. Without question, this list does not capture all doctrinal barriers to recovery for a plaintiff who is a supervisee with a disability. For example, people who challenge disability discrimination often face thorny questions around ADA and Rehabilitation Act intent requirements. See Laurence Paradis, *Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act: Making Programs, Services, and Activities Accessible to All*, 14 STAN. L. & POL’Y REV. 389, 392 (2003) (describing the hurdles of proving discriminatory intent under Title II, particularly for plaintiffs who seek damages); Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417 (2015) (describing intent requirements under the ADA and Rehabilitation Act for claims and arguing for their revision). This discussion simply focuses on the issues most salient in the context of enforcing disability rights laws in probation and parole programs.

193. 42 U.S.C. § 12131(2) (ADA); 29 U.S.C. § 794 (Rehabilitation Act).

194. Paradis, *supra* note 192, at 402.

195. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979).

196. *Id.*

patients directly.”¹⁹⁷ The Court effectively merged the question of whether she met the essential eligibility requirements with whether the accommodations she sought were too burdensome, such that they would “fundamentally alter” the program,¹⁹⁸ to conclude that the plaintiff did not meet essential eligibility requirements.¹⁹⁹

People with disabilities who seek probation and parole may encounter similar arguments. For example, for people with I/DD or cognitive disabilities that affect executive functioning, attending check-ins with probation or parole officers at fixed, rigid appointment times may pose challenges—they may not be able to consistently complete tasks like recalling appointment times and taking all necessary steps to ensure on-time arrival, such as coordinating transportation. Accommodations such as appointment reminders and flexibility in appointment times may be necessary for them to succeed. But if a supervision agency were to adopt the nursing program’s stance in *Southeastern Community College v. Davis*, it could argue someone with these challenges is not actually a “qualified individual” who meets the eligibility requirements for the program or that such accommodations constitute a “fundamental alteration” of the program.

These arguments are most likely to be salient when a person is not yet under supervision. For example, a parole board may doubt that an incarcerated parole applicant will successfully reenter free society if they live with a disability that implicates their ability to meet traditional measures of success, such as maintaining employment and securing housing.²⁰⁰ It is more difficult for a supervision agency to deploy this argument when a parole board has already favorably assessed a person’s fitness for release or a court has approved a probation term for a criminal defendant. For example, in *Mathis/Davis*, the supervision agencies defending themselves against allegations of disability discrimination did not contest that the plaintiffs were “qualified individuals” because they had been free on parole for many years and were already “subject to its terms.”²⁰¹ Similarly, those years of success on parole before the need for accommodations arose would undermine any potential argument that the accommodations they sought would constitute a “fundamental alteration” of supervision. Although the court did not directly address this question, its finding that the government could not “credibly claim that an injunction w[ould] injure it,” suggests that it would not have found such an argument compelling.²⁰²

197. *Id.* at 407.

198. 28 C.F.R. § 35.130(b)(7) (2024).

199. Numerous courts have adopted this mode of analysis. *See, e.g.,* *Paradis*, *supra* note 192, at 406–07 (collecting cases).

200. Similar concerns appear to have been at issue in *Crowell v. Massachusetts Parole Board*, where the plaintiff challenged his denial of parole on the basis of disability discrimination. 74 N.E.3d 618 (Mass. 2017).

201. *Mathis v. U.S. Parole Comm’n*, 749 F. Supp. 3d 8, 15–16 (D.D.C. 2024); *see Davis v. U.S. Parole Comm’n*, No. 24-cv01312, 2025 WL 457779, at *2 (D.D.C. Feb. 11, 2025).

202. *Mathis*, 749 F. Supp. 3d at 25.

But a person who seeks modifications to supervision conditions without a track record of success will likely face stronger resistance to the notion that their requested modifications are reasonable. At bottom, the question—for which there is little guidance—is when a proposed modification to business-as-usual in a supervision program transforms from a reasonable accommodation into a fundamental alteration.

2. Deference to Supervision Officials Under *Turner v. Safley*

Probation or parole agencies facing disability discrimination claims based on a failure to make a reasonable modification may try to import an argument that has been somewhat successful in cases involving disability discrimination by prison officials: Their failure to provide an accommodation rests on “legitimate penological interests.”²⁰³ This argument relies on importation of the standard announced in *Turner v. Safley* regarding the constitutional rights of incarcerated people.²⁰⁴ There, the Court held that a prison policy or practice “is valid if it is reasonably related to legitimate penological interests.”²⁰⁵

Increasingly, federal courts are applying *Turner* to assess disability discrimination claims brought by incarcerated people.²⁰⁶ California has argued to extend this standard in at least two cases involving challenges to parole practices.²⁰⁷ Therefore, it seems plausible that supervision officials will attempt to rely on a *Turner*-like argument again. As noted above, it is not uncommon for courts to consider doctrines developed in the prison context in cases involving supervision.²⁰⁸

If a plaintiff is able to overcome these limitations, they *may* establish liability through private rights of action under the ADA and Rehabilitation Act.²⁰⁹ Damages and injunctive relief are available under both statutes.²¹⁰

203. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

204. *Id.*

205. *Id.* For a thorough critique of *Turner*’s deferential standard, see Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT’G RPTR. 245 (2012).

206. See *Nair*, *supra* note 50, at 821–26.

207. *Thompson v. Davis*, 295 F.3d 890, 898 (9th Cir. 2002) (noting that “the parole board might show that legitimate penological interests justify consideration of an inmate’s disability status beyond that appropriate in other settings”); *Armstrong v. Davis*, 275 F.3d 849, 874 (9th Cir. 2001) (declining to decide whether *Turner* applied, and assuming that it did, holding that the California Board of Prison Terms, then the parole agency, did not provide any justification for policy at issue), *abrogated on other grounds by*, *Johnson v. California*, 543 U.S. 499 (2005).

208. See *Karteron*, *supra* note 181, at 682–83.

209. 29 U.S.C. § 794a(2) (providing that remedies available under Title VI of the Civil Rights Act of 1964 are available for Rehabilitation Act claims); 42 U.S.C. § 12133 (providing that the remedies set out in the Rehabilitation Act are available under Title II of the ADA); *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (acknowledging that the implied private right of action available under Title VI of the Civil Rights Act of 1964 is also available under the Rehabilitation Act and Title II of the ADA).

210. *Barnes*, 536 U.S. at 185; *Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003). Punitive damages are not available under the ADA or Rehabilitation Act. *Barnes*, 536 U.S. at 189.

C. Practical Limits on Enforcement

There are also practical barriers and social dynamics that limit access to the federal protections against disability discrimination. The ADA and Rehabilitation Act largely rest on a medical model of disability that can make it difficult for many people to claim disability status.²¹¹ Further, as Ruth Colker has explained, “[b]y making people claim disability status to receive an accommodation, we must assume they are aware of the disability itself, are willing to disclose that disability to others, and have the cultural, political, and economic capital to take advantage of this legal recourse.”²¹² Accordingly, the needs of many people with disabilities are completely disregarded and never remedied.

There are additional limitations on redress for disability discrimination for people enrolled in or seeking access to community supervision programs. The largely impoverished population of people on probation and parole often do not have meaningful access to counsel or experts who may assist them in asserting disability rights arguments. Parolees typically gain access to counsel only after a formal decision to seek parole revocation, as there is typically no right to counsel for people seeking parole release. It is also exceedingly difficult for incarcerated people to access counsel.²¹³ Similarly, expert assistance may be critical to demonstrating the existence of a plaintiff’s disability and establishing disability rights claims.²¹⁴ Although the ADA Amendments Act of 2008 attempted to lower the burden of proving disability, jurisdictions inconsistently acknowledge that significant change.²¹⁵

Social dynamics in jails and prisons, including vulnerability to violence, may also dissuade people from claiming disability status.²¹⁶ Fear of the

Additionally, following *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022), emotional distress damages are unavailable under the Rehabilitation Act.

211. See Belt & Dorfman, *supra* note 178, at 180–84 (critiquing the limits of the medical model of disability recognized under federal disability law and arguing for a more expansive social model); Natalie M. Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683 (2021) (same).

212. Ruth Colker, *The Americans with Disabilities Act’s Unreasonable Focus on the Individual*, 170 U. PA. L. REV. 1813, 1818 (2022).

213. See *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979) (holding that the extent of federal due process protections at parole release proceedings, including the appointment of counsel, depend, in part, on whether parole release is discretionary under state law); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (holding that parolees and probationers have a due process right to counsel in revocation proceedings in certain circumstances); Belt, *supra* note 50, at 805 (recounting challenges in accessing counsel by incarcerated people).

214. See Ginsberg, *supra* note 171, at 727–28 (noting that “Expert witness presentation is crucial to the success of civil rights cases”); John Parry, *Disability Discrimination in Correctional Facilities*, CRIM. JUST., Summer 2009, at 20, 27–29.

215. Nicole Buonocore Porter, *Explaining “Not Disabled” Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL’Y 383, 385 (2019).

216. See Parry, *supra* note 214, at 21, 27–29; Peter Blanck, *Disability in Prison*, 26 S. CAL. INTERDISC. L.J. 309, 314 (2017) (“Inmates with disabilities have higher rates of injuries from violence and unintentional causes as compared to the general population of inmates without disabilities.”).

“disability con” and the perception that claiming disability status creates “special treatment” are widespread and likely to be particularly salient in a carceral context.²¹⁷

III. BARRIERS TO JUDICIAL REVIEW

In addition to the doctrinal, practical, and social barriers to protection against disability discrimination, supervisees encounter significant obstacles that impede judicial review when bringing disability discrimination claims. Three jurisdictional doctrines effectively close federal courthouse doors to a substantial portion of people seeking to challenge disability discrimination in community supervision programs: (1) the *Preiser-Heck* bar on civil rights litigation where the ultimate relief sought is release from jail or prison, (2) abstention doctrines that bar federal court intervention in ongoing state criminal cases and federal review of state court decisions, and (3) Eleventh-Amendment-immunity limits on the availability of damages in ADA cases involving state defendants. Each is discussed below.

A. *The Preiser-Heck Bar on Civil Rights Litigation*

1. Habeas Review Required When Release Is a Potential Remedy

The Supreme Court’s decisions in *Preiser v. Rodriguez* and *Heck v. Humphrey* bar incarcerated plaintiffs’ constitutional claims in federal court that could, if successful, result in release from prison or jail.²¹⁸ In *Preiser*, incarcerated plaintiffs argued that procedural defects in a prison system’s disciplinary process violated federal due process standards.²¹⁹ They sought an injunction to restore their good-time credits, which had been reduced as result of the allegedly faulty disciplinary hearings.²²⁰ The relief sought by the plaintiffs would, therefore, hasten their release from prison.²²¹ The Court considered whether the plaintiffs had properly brought their claims under Section 1983 or whether they should have brought them under the federal habeas corpus statute.²²² Of major practical import was the federal habeas statute’s exhaustion requirement,²²³ a hurdle that does not exist for Section 1983 plaintiffs.²²⁴ In the Court’s view, the exhaustion requirement “[wa]s rooted in

217. See Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC’Y REV. 1051, 1055 (2019).

218. *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Heck v. Humphrey*, 512 U.S. 477 (1994).

219. *Preiser*, 411 U.S. at 476–78.

220. *Id.* at 476.

221. *Id.* at 482.

222. *Id.*

223. *Id.* at 489–92 (citing 42 U.S.C. § 2254(b)(1)).

224. *Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982) (“[W]e conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983.”).

considerations of federal-state comity²²⁵ that apply even when the decisions at issue are made by state administrative agencies, like corrections departments, rather than state courts.²²⁶ Observing that “the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody,”²²⁷ the Court concluded that habeas was the appropriate vehicle for the claims.²²⁸

In *Heck v. Humphrey*, the Court extended *Preiser*’s bar on civil rights litigation from claims where relief would result in “immediate or speedier release” from prison to damages actions brought by incarcerated people that, if successful, “would render a conviction or sentence invalid.”²²⁹ There, an incarcerated plaintiff brought a Section 1983 action against prosecutors and a state police investigator, alleging they violated constitutional standards in his criminal case. He sought damages but neither injunctive relief nor release from custody.²³⁰ The Court held that a Section 1983 damages action was not available to the incarcerated plaintiff.²³¹ Although the relief sought would not result in release and, therefore, did not implicate the core function of habeas, a successful claim would “necessarily imply that the plaintiff’s criminal conviction was wrongful.”²³² After *Heck*, a Section 1983 plaintiff “must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.”²³³

Taken together, these cases stand for the proposition that the *Preiser-Heck* bar on civil rights litigation applies whenever a winning result for the plaintiff would implicate the core habeas release function or when, without a showing of favorable termination, success would “necessarily imply the invalidity of”

225. *Preiser*, 411 U.S. at 491.

226. *Id.* (citing *Morrissey v. Brewer*, 408 U.S. 471 (1972) (challenge by state prisoner to revocation of parole by state agency)).

227. *Id.* at 484.

228. *Id.* at 500. The Court reiterated this holding in *Wolff v. McDonnell*, another challenge to prison disciplinary procedures, where it confirmed that incarcerated plaintiffs could not seek an injunction to restore good-time credits, but could seek a declaratory judgment regarding the validity of disciplinary procedures. *Wolff v. McDonnell*, 418 U.S. 539, 554–55 (1974).

229. *Heck v. Humphrey*, 512 U.S. 477, 481, 486 (1994).

230. *Id.* at 478–79.

231. *Id.* at 486–87.

232. *Id.* at 486 n.6. The Court followed this principle in *Edwards v. Balisok* to hold that an incarcerated plaintiff could not challenge procedures used to decide disciplinary infractions that resulted in deprivation of good time credits because “[t]he principal procedural defect complained of by respondent would, if established, necessarily imply the invalidity of the deprivation of his good-time credits.” *Edwards v. Balisok*, 520 U.S. 641, 646 (1997).

233. *Heck*, 512 U.S. at 486–87.

the underlying proceeding.²³⁴ Thus, although habeas is popularly conceived as applying to the review of criminal convictions and sentences, habeas is actually the proper vehicle for many “sentence-administration claims”: “challenge[s] to a state administrative decision that affects how much of a sentence a prisoner must actually serve in custody.”²³⁵

The Supreme Court directly confronted the appropriate vehicle for challenging parole board procedures in *Wilkinson v. Dotson*.²³⁶ There, incarcerated plaintiffs challenged the constitutionality of the Ohio parole board’s eligibility standards and procedures under the Ex Post Facto Clause and the Due Process Clause.²³⁷ They sought declaratory and injunctive relief that would have resulted in new parole hearings with procedures that conformed to constitutional standards.²³⁸ The Court held that the *Preiser-Heck* bar on Section 1983 claims did not apply because the plaintiffs’ requested relief would not invalidate “the state procedures used to deny parole eligibility . . . and parole suitability.”²³⁹ Nor did they seek injunctive relief that would have necessarily hastened their release from prison or invalidated their conviction.²⁴⁰ Victory would simply “speed consideration of a new parole application,” and result in “a new parole hearing at which . . . parole authorities [could], in their discretion, decline to shorten his prison term.”²⁴¹

For a person who has been reincarcerated following revocation of parole or who seeks to challenge a parole denial on the basis of disability discrimination, these rules are of great import. Although the *Preiser-Heck* line of cases dealt exclusively with attempts to bring Section 1983 claims, multiple federal courts have concluded that the same standards apply when incarcerated plaintiffs seek to vindicate their rights under the ADA or Rehabilitation Act. For example, in *Heath v. Hanks*, an incarcerated plaintiff sought release from prison via an injunction under the ADA, arguing that the ADA entitled him to confinement in a hospital instead.²⁴² The district court found that the *Preiser-*

234. *Edwards*, 520 U.S. at 646. For example, in *Skinner v. Switzer*, 562 U.S. 521 (2011), the Court held that the incarcerated plaintiff could use Section 1983 action to seek DNA testing of crime-scene evidence because such testing would not “necessarily impl[y] the unlawfulness of the State’s custody,” as the results “might prove inconclusive or they might further incriminate [the plaintiff].” *Id.* at 525, 534 (alteration in original) (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005)).

235. Nancy J. King & Suzanna Sherry, *Habeas Corpus and State Sentencing Reform: A Story of Unintended Consequences*, 58 DUKE L.J. 1, 5 (2008).

236. *Wilkinson v. Dotson*, 544 U.S. 74 (2005).

237. *Id.* at 77.

238. *Id.*

239. *Id.* at 82.

240. *Id.*

241. *Id.*

242. *Heath v. Hanks*, 433 F. Supp. 3d 221, 226 (D.N.H. 2019).

Heck doctrine barred his claims.²⁴³ Thus, an incarcerated person who challenges a parole denial, or revocation of probation or parole, on the basis of disability discrimination will almost certainly be required to proceed via habeas.²⁴⁴ In contrast, as *Wilkinson* confirms, a prospective challenge to the standards or procedures used to make parole release decisions need not be litigated via habeas.²⁴⁵ For example, before *Wilkinson*, the Ninth Circuit reached this conclusion in an ADA case challenging the California Board of Prison Terms's refusal to consider granting parole to people with histories of substance abuse.²⁴⁶

2. The Uncertainties of Habeas Review

While the habeas requirement does not necessarily mean that a person challenging a supervision revocation or parole decision will fail, they will face significant barriers to judicial review on the merits of their claims. As Nancy J. King and Suzanna Sherry have observed, there is a significant mismatch between the federal habeas statute and review of these administrative decisions.²⁴⁷ As a result, there is substantial confusion around its application, including the most basic question of whether to apply the habeas provisions concerning attacks on state court convictions (28 U.S.C. § 2254) or the more general habeas provisions (28 U.S.C. § 2241).²⁴⁸

More importantly, restrictions that apply in habeas cases likely thwart successful invocation of federal disability discrimination protections in the context of supervision release and revocation decisions—regardless of the merits. First and foremost, it is unclear whether claims concerning the proper application of federal laws, such as the ADA and Rehabilitation Act, are

243. *Id.* A district court reached the same conclusion in another case where the plaintiff brought both the ADA and Rehabilitation Act claims. *See* *Beam v. Madigan*, No. 16-CV-1211, 2017 WL 679950, at *5–6 (S.D. Ill. Feb. 21, 2017).

244. *See, e.g.,* *Leatherwood v. Allbaugh*, 861 F.3d 1034 (10th Cir. 2017) (reviewing probation revocation under federal habeas statute); *Williams v. Consovoy*, 453 F.3d 173 (3d Cir. 2006) (reviewing parole revocation under federal habeas statute); *Butterfield v. Bail*, 120 F.3d 1023, 1024 (9th Cir. 1997) (holding that challenge to parole denial had to proceed via habeas and observing “[f]ew things implicate the validity of continued confinement more directly than the allegedly improper denial of parole”).

245. *Wilkinson*, 544 U.S. at 81.

246. *Bogovich v. Sandoval*, 189 F.3d 999, 1001, 1004 (9th Cir. 1999) (“Not all challenges to a parole board’s policy implicate the invalidity of continued confinement; appellants’ ADA claim does not raise such an implication here.”).

247. King & Sherry, *supra* note 235, at 37 (explaining that the habeas statute “was designed to provide limited collateral review of state court decisions, not direct review of state administrative decisions”).

248. A majority of courts that have considered the issue have concluded that Section 2254 is the appropriate vehicle rather than Section 2241. *Compare, e.g., In re Wright*, 826 F.3d 774, 778–79 (4th Cir. 2016) (applying Section 2254), and *Cook v. N.Y. State Div. of Parole*, 321 F.3d 274, 278 (2d Cir. 2003) (same), with *Hamm v. Saffle*, 300 F.3d 1213, 1216 (10th Cir. 2002) (applying Section 2241). The remainder of the discussion proceeds on the assumption that Section 2254 applies to the sentence-administration claims at issue.

cognizable under the federal habeas statute. The plain text of the statute supports the extension of habeas review that involves federal statutes.²⁴⁹ But in challenges to state court convictions, the Supreme Court has held that such claims are cognizable only where the statutory violation constitutes “a fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure.”²⁵⁰ Given the narrow circumstances under which the federal courts have found these standards satisfied,²⁵¹ it is quite plausible that a person asserting disability discrimination with regard to probation or parole revocation would struggle to overcome this hurdle.

Assuming a statutory disability discrimination claim is cognizable, there are also several procedural restrictions on habeas practice that will likely impede judicial review on the merits of a supervisee’s disability. They include the habeas statute’s exhaustion requirement, mandated deferential standard of review, limit on discovery, and restrictions on successive petitions.

First, Section 2254—the habeas provision usually used to challenge state court convictions—requires detainees to exhaust their state-level claims.²⁵² The requirement demands time-consuming state court litigation, which sometimes involves its own prerequisites—such as an administrative appeal to a parole board regarding a release or revocation decision.²⁵³ Exceptions may apply. One requirement—that the state review process is effectively unavailable—may be particularly salient with regard to parole release decisions because some parole appeal processes will never lead to release.²⁵⁴ But even when an exception applies, litigating application of the exhaustion requirement is, at best, a time-consuming enterprise that delays judicial review of a claim’s merits.

Second, for those incarcerated people who have managed to exhaust state remedies, federal courts considering their habeas petitions are arguably compelled to defer to the state court adjudication, in accordance with Section 2254. This statute denies relief unless the state court’s decision violated “clearly

249. See 28 U.S.C. § 2254(a) (allowing petitioner to seek habeas relief “on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States” (emphasis added)).

250. *Reed v. Farley*, 512 U.S. 339, 348 (1994) (alteration in original) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

251. See RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE* § 9.1 (7th ed. 2024) (identifying five categories of cases where federal courts have been willing to review compliance with federal law in habeas cases).

252. 28 U.S.C. § 2254(b)(1); *Woodford v. Ngo*, 548 U.S. 81, 92 (2006).

253. See, e.g., *Boddie v. N.Y. State Div. of Parole*, 740 N.Y.S.2d 247 (N.Y. App. Div. 2002) (rejecting challenge to parole denial because petitioner had failed to exhaust administrative remedies).

254. See 28 U.S.C. § 2254(b)(1)(B); *Defino v. Thomas*, No. 02 Civ. 7413, 2003 WL 40502, at *3 (S.D.N.Y. Jan. 2, 2003) (describing arguments about futility of state review of parole decisions as “potentially powerful” in light of New York rule that relief in state court challenge to parole decision will never result in release).

established Federal law,” or the decision relied on an “unreasonable determination of the facts.”²⁵⁵ The habeas statute also requires deference to factual determinations and can only be rebutted by a showing of “clear and convincing evidence.”²⁵⁶ For example, in *Hunterson v. DiSabato*, the Third Circuit held that the federal district court had failed to apply Section 2254’s deferential review standard to an incarcerated person’s due process challenge to an adverse parole board decision.²⁵⁷ Noting the collateral nature of habeas review, it observed: “While one might second-guess the Parole Board’s decision, and state court’s approval of it, it is not the role of the federal courts to do so.”²⁵⁸

Third, access to discovery in habeas proceedings is severely limited.²⁵⁹ In contrast to the liberal discovery standards of the Federal Rules of Civil Procedure, the Rules Governing § 2254 Cases allow discovery only when there is “good cause.”²⁶⁰ In cases alleging disability discrimination, particularly if intent is at issue, discovery may be especially valuable but practically unavailable.

Fourth, the limits on successive petitions may thwart access to judicial review—particularly for an incarcerated person who has been considered for parole more than once. The habeas statute bars “second or successive” habeas petitions without judicial approval.²⁶¹ The Fourth Circuit applied this rule to bar a successive petition in which an incarcerated person argued, following his third trip to the parole board, that the parole board violated due process standards by failing to consider him for parole at the intervals demanded by state law.²⁶² As the nature of the alleged error had not changed between his first and third appearance before the parole board, the court held that he could have

255. 28 U.S.C. § 2254(d).

256. *Id.* § 2254(e)(1).

257. *Hunterson v. DiSabato*, 308 F.3d 236, 246 (3d Cir. 2002).

258. *Id.* at 244.

259. See *Bracy v. Gramley*, 520 U.S. 899, 904 (1997).

260. U.S. Courts, Rules Governing Section 2254 Cases in the United States District Courts, Rule 6(a) (2010); *Defino v. Thomas*, No. 02 CIV. 7413, 2003 WL 40502, at *4 (S.D.N.Y. Jan. 2, 2003) (providing that good cause “turns on whether the petition has set forth specific allegations that provide reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief” (internal quotation marks and citation omitted)).

261. 28 U.S.C. § 2244(b)(1)–(2). Courts do not read the text literally. Instead, the phrase “second or successive” “must be interpreted with respect to the judgment challenged.” *Magwood v. Patterson*, 561 U.S. 320, 333 (2010). Accordingly, courts often apply “abuse-of-the-writ” principles that predate the Antiterrorism and Effective Death Penalty Act’s (AEDPA) substantial amendments to the federal habeas statute. See *Banister v. Davis*, 590 U.S. 504, 512 (2020) (“The phrase ‘second or successive application,’ . . . is ‘given substance in our prior habeas corpus cases,’ including those ‘predating [AEDPA’s] enactment.’” (second alteration in original) (first quoting *Slack v. McDaniel*, 529 U.S. 473, 486 (2000); and then quoting *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007))); *HERTZ & LIEBMAN*, *supra* note 251, § 28.3.

262. *In re Wright*, 826 F.3d 774, 784–85 (4th Cir. 2016).

made the same complaint in an earlier habeas petition challenging the first parole decision.²⁶³ It therefore rejected the petition.²⁶⁴

B. Abstention Doctrines

Abstention doctrines also create barriers to federal judicial review of disability discrimination claims brought by people under community supervision. Two kinds of abstention are key. First, federal courts are likely required to abstain from considering disability discrimination claims brought by people with open criminal cases—including most people on probation—pursuant to *Younger v. Harris*.²⁶⁵ Second, if a criminal defendant loses a challenge to alleged disability discrimination in state court, *Rooker-Feldman* abstention bars a federal court from reviewing or reconsidering the state court's decision.²⁶⁶

1. *Younger* Abstention

Although federal rights are frequently at issue in state criminal cases, federal courts almost always refuse to issue injunctions to address potential federal-rights violations in state criminal cases while they are pending. The Supreme Court ushered in this result in *Younger v. Harris*, a 1971 case in which a California man alleged that the state criminal statute under which he was charged violated the First Amendment.²⁶⁷ There, the Court held that federal courts should generally abstain from hearing cases where an injunction would interfere with a pending state criminal case.²⁶⁸ The same rule applies to cases in which a plaintiff seeks only declaratory relief.²⁶⁹ *Younger* left open the possibility that federal court intervention could be appropriate if “great and immediate harm” were at stake.²⁷⁰

In reality, federal courts are often reluctant to find the kind of harm that would permit them to hear a case.²⁷¹ *Younger* abstention therefore operates to close federal courthouse doors to people suffering violations of their federal

263. *Id.* at 785. The Court technically applied “abuse-of-the-writ” principles rather than the statutory standard to reach this conclusion. *Id.*

264. *Id.*

265. See *Younger v. Harris*, 401 U.S. 37 (1971).

266. *Rooker v. Fid. Tr. Co.*, 263 U.S. 413 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983).

267. *Younger*, 401 U.S. at 37.

268. *Id.* at 53.

269. *Samuels v. Mackell*, 401 U.S. 66, 68–69 (1971).

270. See *Younger*, 401 U.S. at 46, 53–54.

271. See Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2287 (2018) (collecting cases in which federal courts have invoked *Younger* to abstain from hearing challenges to criminal justice practices); Anne Rachel Traum, *Distributed Federalism: The Transformation of Younger*, 106 CORNELL L. REV. 1759, 1761–62 (2021) (same); John Harland Giammatteo, *The New Comity Abstention*, 111 CALIF. L. REV. 1705, 1721–22 (2023) (explaining that federal courts frequently invoke *Younger*, among other doctrines, to abstain “from hearing litigation that would alter state court proceedings or state court procedure”).

rights in ongoing state criminal proceedings—including federal rights against disability discrimination. Anne Rachel Traum aptly described the costs as follows: “As a practical matter, *Younger* abstention denies federal plaintiffs the kinds of relief available in a civil rights litigation: preliminary injunctive relief, prospective relief, class relief, and attorney’s fees. *Younger* ‘close[s] the door to federal injunctive relief’ because such relief is simply not available in a criminal case.”²⁷²

A Massachusetts case provides a good example. In *Burnham v. Commonwealth*, a pretrial detainee alleged that he had been subjected to disability discrimination by state court officials during his criminal case and sought to enjoin the prosecution.²⁷³ Citing *Younger*, the federal district court abstained from hearing the case shortly after it was filed.²⁷⁴ The court reasoned that *Younger* abstention applies “as long as the federal claims can be ‘raised and resolved somewhere in the state process.’”²⁷⁵ Although the plaintiff invoked *Younger*’s requirement that a party have a “meaningful opportunity to present his arguments in state court” for abstention to apply,²⁷⁶ the district court focused simply on the plaintiff’s ability to present his arguments in state courts, without exploring whether that opportunity was a “meaningful” one.²⁷⁷

People who allege disability discrimination while they have state criminal cases pending will almost always face the same result: an inability to access a federal forum to hear their federal disability discrimination claims. This inaccessibility will extend to virtually all people on probation whose criminal cases remain open for the duration of their probation term.²⁷⁸ Thus, although many people on probation may be entitled to accommodations, they will have a practical inability to enforce their rights in federal courts.

Probationers are also unlikely to have recourse in state criminal court. It is atypical for criminal defense lawyers and courts to actively monitor compliance with probation conditions and the potential need for accommodations.²⁷⁹ Instead, lawyers and judges usually examine the probation experience

272. Traum, *supra* note 271, at 1779 (alteration in original) (quoting Owen M. Fiss, *Dom-browski*, 86 YALE L.J. 1103, 1118 (1977)).

273. *Burnham v. Commonwealth*, 279 F. Supp. 3d 368, 369 (D. Mass. 2018).

274. *Id.* at 369.

275. *Id.* at 369–70 (quoting *Maymó-Meléndez v. Álvarez-Ramírez*, 364 F.3d 27, 36 (1st Cir. 2004)).

276. *Id.* at 370 (emphasis added).

277. *Id.*

278. This description applies to most people on probation in the United States. See Doherty, *supra* note 70, at 1707–12; CORBETT & REITZ, *supra* note 86, at 6 (finding, in survey of twenty-one states, that “[i]n a majority of states . . . probation is understood to be a component of a suspended (or stayed) prison sentence,” and when probation is revoked, states vary in allowing courts to impose only the suspended sentence or some other sanction).

279. KELLY LYN MITCHELL & EBONY L. RUHLAND, ROBINA INST. OF CRIM. L. & CRIM. JUST., UNDERSTANDING HOW SUPERVISION CONDITIONS ARE SET FOR PEOPLE ON PAROLE AND PROBATION 25 (2024) (finding, in study of several parole and probation systems, that there are

only when revocation proceedings are initiated. Therefore, even though probationers may be entitled to accommodations long before an attempt at revocation—and appropriate accommodations would, in some cases, obviate the basis for revocation and potential incarceration—they will likely encounter difficulty securing them in state criminal court.

2. *Rooker-Feldman* Abstention

If a person on supervision manages to raise a disability discrimination claim in a state criminal court proceeding and loses, they are not entitled to challenge that judgment in federal court. *Rooker-Feldman* abstention bars federal courts from hearing “cases brought by state-court losers” who seek federal court review of state court judgments.²⁸⁰ It further requires federal courts to abstain from hearing claims that are “inextricably intertwined” with state court judgments.²⁸¹

Rooker-Feldman has thus thwarted attempts to seek relief under federal disability rights laws in federal court after unsuccessful efforts in state courts. Examples include cases in which a criminal defendant argued that he was entitled to a reader to help him understand court documents;²⁸² a probate court litigant who sought to bring her service dog to court proceedings;²⁸³ and a parent with a TBI, cognitive disorders, and other disabilities, who sought a note taker and other accommodations during their custody case.²⁸⁴

Like *Younger* abstention, *Rooker-Feldman* abstention makes it particularly difficult for probationers to challenge disability discrimination. While some probationers certainly lose such challenges on the merits, state court conditions make it difficult to succeed even on meritorious claims. Criminal defense lawyers and judges in state criminal courts may not be well-versed in federal disability discrimination laws. Although defense lawyers may perceive that a client is facing a disability-related injustice, such lawyers are unlikely to have had adequate training or have access to resources on federal disability discrimination laws in state court criminal proceedings. The U.S. Department of Justice appears to have issued just one lone guidance on the topic.²⁸⁵ Moreover, while every state has courts of general jurisdiction, many courts that adjudicate criminal cases have limited jurisdiction, which means they are unable to

inadequate feedback loops between courts and supervision agencies regarding compliance with conditions).

280. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005); *see Rooker v. Fid. Tr. Co.*, 263 U.S. 413 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983).

281. *Sykes v. Cook Cnty. Cir. Ct. Prob. Div.*, 837 F.3d 736, 742 (7th Cir. 2016).

282. *Wimer v. Greene Cnty. Gen. Cir. Ct.*, No. 3:19CV00021, 2019 WL 5580961, at *1, *3 (W.D. Va. Oct. 29, 2019), *aff'd*, 806 F. App'x 193 (4th Cir. 2020).

283. *Sykes*, 837 F.3d at 739, 741–43 (affirming district court's decision to abstain in case where probate court had denied litigant's request to attend court with service dog).

284. *Fishman v. Off. of Ct. Admin. N.Y. State Cts.*, No. 18-cv-282, 2020 WL 1082560, at *1, *9 (S.D.N.Y. Mar. 5, 2020), *aff'd*, No. 20-1300, 2021 WL 4434698 (2d Cir. Sep. 28, 2021).

285. *See C.R. Div.*, *supra* note 173, at 1.

hear federal claims. In practice, this means redress is likely only available through special actions, such as mandamus.²⁸⁶

C. Sovereign Immunity

Supervisees seeking damages for disability discrimination under Title II of the ADA or Section 504 of the Rehabilitation Act also face numerous hurdles. Most circuits require proof of intentional discrimination—a failure to provide reasonable accommodations will not suffice.²⁸⁷ Further, punitive damages and damages for emotional distress are unavailable to Section 504 claimants.²⁸⁸ But perhaps the greatest limitation is sovereign immunity, which narrows the scope of redressable discrimination by limiting liability for state entities.

As Title II of the ADA regulates state behavior, federal courts' ability to enforce Title II is limited by the Eleventh Amendment's grant of sovereign immunity to states.²⁸⁹ Congress may enact legislation in contravention of the Eleventh Amendment when it uses its Fourteenth Amendment enforcement power to abrogate sovereign immunity.²⁹⁰ It did so when it passed the ADA.²⁹¹ But there are limits.²⁹²

The Supreme Court has repeatedly affirmed that Congress may abrogate states' sovereign immunity when it creates remedial schemes that address constitutional violations.²⁹³ However, when Congress attempts to regulate state violations of constitutional rights through prophylactic legislation, it is subject to greater scrutiny. To be a valid prophylactic measure, rather than a "substantive redefinition," Section 5 legislation must "exhibit[] 'a congruence and proportionality between the injury to be prevented or remedied and the means

286. See *Sykes*, 837 F.3d at 741 (suggesting that probate litigant could have brought a mandamus action against probate court that refused to allow a service dog).

287. E.g., *Silberman v. Mia. Dade Transit*, 927 F.3d 1123, 1134 (11th Cir. 2019); *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 275 (2d Cir. 2009); *Nieves-Márquez v. Puerto Rico*, 353 F.3d 108, 126 (1st Cir. 2003); *Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998). For a detailed critique of this limitation, see generally Weber, *supra* note 192.

288. *Barnes v. Gorman*, 536 U.S. 181, 189 (2002); *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1572 (2022).

289. U.S. CONST. amend. XI.

290. *Tennessee v. Lane*, 541 U.S. 509, 517 (2004) (explaining that a determination as to whether Congress has abrogated a state's sovereign immunity requires a court to "resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority" (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000))).

291. 42 U.S.C. §§ 12101(b)(4), § 12202 ("A State shall not be immune under the eleventh amendment . . . from an action in [a] Federal or State court . . . for a violation of this chapter." (footnote omitted)).

292. Notably, Katie Eyer and Karen Tani have observed that the Supreme Court has set many of these boundaries in disability law cases. See generally Katie Eyer & Karen M. Tani, *Disability and the Ongoing Federalism Revolution*, 133 YALE L.J. 839 (2024).

293. *United States v. Georgia*, 546 U.S. 151, 158 (2006).

adopted to that end.’”²⁹⁴ Whether the Court will find that Congress has satisfied the congruence and proportionality test is not always easy to predict.²⁹⁵

United States v. Georgia effectively illustrates the thorny questions surrounding the scope of sovereign immunity and Title II protection. There, Goodman, a paraplegic wheelchair user, brought numerous claims concerning his treatment in a Georgia prison.²⁹⁶ He alleged that he was confined twenty-three to twenty-four hours per day in a cell around the size of a parking space.²⁹⁷ Among his most serious claims were that he could not turn his wheelchair around and could not access a shower or the toilet without assistance—causing him to suffer numerous injuries, including broken bones, when attempting to transfer himself to the toilet.²⁹⁸ He further alleged that at some point he was not able to shower for more than two years.²⁹⁹ He sought redress for the harm he suffered via constitutional and Title II claims.³⁰⁰

In defense, Georgia argued that Congress did not validly abrogate sovereign immunity when it created Title II to allow claims like Goodman’s.³⁰¹ The Court rejected this argument to the extent that Goodman’s Title II claims covered unconstitutional conduct.³⁰² It remanded for further proceedings to determine whether Goodman’s claims concerned “misconduct [that] violated Title II but did not violate the Fourteenth Amendment,” and tasked the lower court with determining “whether Congress’s purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.”³⁰³

United States v. Georgia leaves Title II plaintiffs in a precarious position. When their claims challenge conduct that violates both constitutional standards and Title II, they stand on relatively firm ground. But constitutional protections against disability discrimination are relatively weak, due in part to the application of rational basis review under the Equal Protection Clause.³⁰⁴ Thus, if the alleged discrimination violates Title II but does not run afoul of the Constitution, their harms may go unremedied.

Given the relatively narrow scope of constitutional protection surrounding probation and parole, the risk of being left without a remedy is especially

294. *Lane*, 541 U.S. at 520 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

295. Compare *id.* at 531 (finding that Title II of the ADA was a valid exercise of Congress’s prophylactic power), with *id.* at 539 (Rehnquist, C.J., dissenting) (arguing that Title II “‘substantively redefine[s],’ rather than permissibly enforces,” Fourteenth Amendment rights (quoting *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 728 (2003))), and *Bd. of Trs. v. Garrett*, 531 U.S. 356, 372 (2001) (finding that Title I of the ADA was *not* a valid prophylactic measure).

296. *Georgia*, 546 U.S. at 151.

297. *Id.* at 155.

298. *Id.*; Brief for Petitioner Goodman at 2, *Georgia*, 546 U.S. 151 (No. 04-1236).

299. Brief for Petitioner Goodman, *supra* note 298, at 3.

300. *Georgia*, 546 U.S. at 154–55.

301. Brief for Respondents at 6–8, *Georgia*, 546 U.S. 151 (Nos. 04-1203, 04-1236).

302. *Georgia*, 546 U.S. at 159.

303. *Id.*

304. See Waterstone, *supra* note 166, at 540–42; Jasmine E. Harris, *The Frailty of Disability Rights*, 169 U. PA. L. REV. ONLINE 29, 59–61 (2020).

high for supervisees. *Luke v. Texas*, a case brought by a probationer alleging disability discrimination, provides a good example. There, the plaintiff, who was sentenced to probation following a conviction for marijuana possession, was deaf and primarily communicated using American Sign Language (ASL).³⁰⁵ But the state supervision agencies never hired ASL interpreters to ensure that his probation officers could communicate with him.³⁰⁶ Once his probation term ended, Luke brought a damages action that alleged the failure to provide ASL interpreters constituted disability discrimination in violation of Title II, among other claims.³⁰⁷ He argued that he lacked meaningful access to probation because he was not able to understand his legal rights or to communicate effectively with his probation officers.³⁰⁸

After the Fifth Circuit reversed the dismissal of Luke's Title II claims, the state defendants again argued that the Title II claims should be dismissed because the alleged disability discrimination did not violate constitutional standards.³⁰⁹ The district court agreed to some extent, finding that Luke failed to plead a violation of his Fourteenth Amendment due process right to receive fair warnings and that he failed to establish discriminatory treatment under the Equal Protection Clause.³¹⁰ Despite these conclusions, the district court also found that Congress had properly abrogated sovereign immunity with regard to claims like Luke's. Citing *Tennessee v. Lane*, in which the Supreme Court approved Congress's abrogation of sovereign immunity for Title II claims concerning court access, the *Luke* district court found that the supervision agencies' failure to provide ASL interpreters implicated Luke's right to access judicial services.³¹¹ Luke's Title II claims therefore survived.

Although Luke unquestionably experienced rank disability discrimination, the case might have turned out differently under slightly altered circumstances. For example, if Luke had been on parole rather than probation, the court may not have found that the discrimination implicated his right to access judicial services. Typically, probation agencies are closely tied to courts, whereas parole boards are not.³¹² In general, given the precarity of Title II's

305. *Luke v. Texas*, 46 F.4th 301, 304 (5th Cir. 2022). Although the plaintiff in *Luke* was deaf and his disability differed from the ones most frequently discussed in this Article, the questions concerning sovereign immunity would be essentially identical in any disability discrimination case.

306. *Id.*

307. *Id.*

308. *Id.* at 306.

309. *Luke v. Lee Cnty.*, No. 20-CV-00388, 2023 WL 4980943, at *3–5 (W.D. Tex. Aug. 3, 2023), *report and recommendation adopted*, No. 20-CV-388, 2023 WL 6141594 (W.D. Tex. Sep. 20, 2023), *appeal dismissed*, No. 23-50707, 2024 WL 4492059 (5th Cir. May 15, 2024) *see also* Rep. and Recommendation of the U.S. Magistrate Judge at 6–12, No. 20-CV-00388, 2023 WL 6141594 (W.D. Tex. Sep. 20, 2023), *appeal dismissed*, No. 23-50707, 2024 WL 4492059 (5th Cir. May 15, 2024).

310. *Id.* at *5.

311. *Id.* at *8 (citing *Tennessee v. Lane*, 541 U.S. 509, 527 (2004)).

312. *See supra* notes 70–73 and accompanying text.

abrogation of sovereign immunity, supervisees are vulnerable to disability discrimination, but redress in federal court may be unavailable.

* * *

The federal jurisdictional limits described above constitute significant obstacles to judicial review of supervision policies and practices that implicate federal protection against disability discrimination. Given that analogous state law protection is not universally available,³¹³ and that more than half of states severely limit judicial review of parole decisions,³¹⁴ the lack of federal remedies is all the more salient.

IV. POTENTIAL RESPONSES TO DISABILITY DISCRIMINATION IN SUPERVISION PROGRAMS

Given the limited federal court access to challenge disability discrimination in supervision programs, the most effective responses lie outside federal litigation. Options for combatting disability discrimination in both probation and parole programs are briefly described below.

A. *Universal Design and Improving Accessibility*

For those probation and parole agencies that are willing, there is much they can do to reduce disability discrimination in their midst. Although many agencies maintain official policies against disability discrimination, they can and should move beyond boilerplate language to realize the promise of the ADA and Rehabilitation Act by utilizing universal design principles. As Ruth Colker has explained, “‘Universal design’ is a concept first developed in architecture to describe constructing buildings in a way that anticipates a building’s use by a wide range of disabled people.”³¹⁵ Its application in other contexts can help “provide access as part of the built-in structure rather than on an as-requested basis.”³¹⁶ Thus, instead of forcing people with disabilities to seek accommodations, universal design embraces a disability justice framework that stops “othering” people with disabilities.³¹⁷ In the supervision context, universal design might involve parole and probation officers affirmatively taking stock of what supervisees need to meet supervision requirements rather than waiting for supervisees to make special requests. This approach bolsters the notion that the elimination of disability discrimination does not require a “fundamental alteration” of supervision programs. It also moves away from

313. See Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 648–53 (2004).

314. See Alexandra Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review*, 106 CORNELL L. REV. 1173, 1194–99 (2021).

315. Colker, *supra* note 212, at 1819 n.35.

316. *Id.*

317. *Id.* at 1819–20.

the use of specialized dockets, which may simply increase surveillance and amplify the punitive treatment of people with disabilities.³¹⁸

Short of adopting universal design, there are numerous paths to improve adherence to current legal requirements. For example, training on federal disability rights laws for criminal justice actors (e.g., defense attorneys, prosecutors, judges, and revocation hearing officers) would help kickstart a cultural shift toward recognizing disability discrimination and creating obligations to address it within the criminal legal system.

Training for defense attorneys is particularly important. Defense attorneys often continue to engage with clients while they complete probation; thus, defense attorneys may have opportunities to raise claims of noncompliance with disability rights laws when their clients encounter the need for accommodations, including informal advocacy with probation agencies. Attorneys can also formally raise disability rights concerns in probation and parole revocation proceedings.

Such advocacy will be better received by judges, prosecutors, and revocation hearing officers when those actors have a better understanding of disability rights laws. The recent decisions in the ACLU's *Mathis/Davis* case provide useful precedents.³¹⁹ The decision granting a preliminary injunction appears to be the first published federal judicial opinion mandating accommodations in a supervision program.

States, localities, and private entities should also create and fund programs to provide parolees access to counsel or other advocates. Parolees occasionally manage to bring pro se litigation challenging parole conditions, but there are few resources available to assist them before a parole agency attempts revocation.³²⁰ Although far from perfect, California's model of providing attorneys to parole applicants with life sentences is worth replicating.³²¹ As described in Section I.B, many parole applicants with I/DD, cognitive, or mental health disabilities may not be able to effectively represent themselves in parole board hearings. Lawyers may be able to help parole applicants with such disabilities navigate parole proceedings more effectively. Non-lawyer advocates may also offer valuable assistance. Following class action litigation against the

318. See *supra* notes 157–164 and accompanying text.

319. *Mathis v. U.S. Parole Comm'n*, 349 F. Supp. 3d 8 (D.D.C. 2024); *Davis v. U.S. Parole Comm'n*, No. 24-cv-01312, 2025 WL 457779 (D.D.C. Feb. 11, 2025).

320. A constitutional right to counsel typically attaches in the parole context only when a parolee faces revocation and a return to incarceration. See *Morrissey v. Brewer*, 408 U.S. 471 (1972).

321. See *supra* note 130. Implicit in this recommendation is that states, like New Jersey, that go so far as to ban attorneys at parole proceedings should dismantle such rules. See *supra* notes 138–139. The twenty-six jurisdictions that now provide a right to counsel in eviction cases also provide a helpful model. NAT'L COAL. FOR A CIV. RIGHT TO COUNS., THE RIGHT TO COUNSEL FOR TENANTS FACING EVICTION: ENACTED LEGISLATION (2025), https://civilrighttocounsel.org/wp-content/uploads/2023/11/RTC_Enacted_Legislation_in_Eviction_Proceedings_FINAL.pdf [perma.cc/M5CG-MYAY].

federal government under the Rehabilitation Act, detained immigrants who are, as a result of one or more of their disabilities, unable to understand their removal proceedings are now entitled to assistance from a “Qualified Representative.”³²² This model is also far from perfect.³²³ Yet, for many parole applicants, some assistance is almost certainly better than none.³²⁴

States could also adopt competency standards in parole hearings that reflect a person’s ability to represent themselves rather than to simply understand the proceedings. Many have done so for criminal cases following the Supreme Court’s decision in *Indiana v. Edwards*, which allowed states to bar criminal defendants from representing themselves—even if they were competent to stand trial—if they lacked competence to do so.³²⁵ In some states, the standard turns entirely on whether a defendant who seeks to represent himself has a mental disability; in other jurisdictions, the focus is on whether a defendant is able to communicate effectively.³²⁶

B. Diversion Programs

States should also consider expanding the use of diversion programs that provide treatment and support to people whose disabilities are connected to their involvement in the criminal legal system or whose disabilities are likely to make success on probation elusive. As recounted above, for many people with disabilities, compliance with the myriad conditions associated with probation is, at best, a challenge.³²⁷ For many, it is simply impossible, which leads to revocation and possible jail time. Even supervision programs with specialized mental health dockets do not appear to be reliable, nondiscriminatory service conveyers, and they sometimes enthusiastically use incarceration as a tool to ensure compliance with conditions.³²⁸ Thus, while the ADA and Rehabilitation Act may require accommodations in the form of condition modifications, modifications may not be sufficient to ensure that a supervision experience meaningfully advances its supposed chief goal: rehabilitation.

322. Amelia Wilson, Franco *I Loved: Reconciling the Two Halves of the Nation’s Only Government-Funded Public Defender Program for Immigrants*, 97 WASH. L. REV. ONLINE 21 (2022).

323. See *id.* (critiquing the National Qualified Representative Program).

324. For other contexts in which scholars have called for legal assistance as a disability accommodation, see, for example, Lisa Brodoff, Susan McClellan & Elizabeth Anderson, *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 SEATTLE J. FOR SOC. JUST. 609, 616–21 (2004) (arguing that Title II of the ADA requires civil courts to provide counsel for litigants who “do[] not understand proceedings and cannot meaningfully participate because of a disability”); Logan J. Gowdey, Note, *Disabling Discipline: Locating a Right to Representation of Students with Disabilities in the ADA*, 115 COLUM. L. REV. 2265 (2015) (arguing that the ADA may require the provision of legal assistance to certain students facing exclusionary disciplinary measures as a reasonable accommodation).

325. *Indiana v. Edwards*, 554 U.S. 164, 178 (2008).

326. E. Lea Johnston, *Communication and Competence for Self-Representation*, 84 FORDHAM L. REV. 2121, 2128–39 (2016).

327. See *supra* Section I.B.

328. See *supra* Section I.B.3.

Diversion from the criminal legal system is likely a better path for many people with disabilities for whom traditional probation models pose challenges.

States use a variety of approaches to achieve diversion. In recent years, more jurisdictions have adopted the use of co-response models through which behavioral health clinicians and police respond to calls concerning people experiencing mental health crises.³²⁹ The goal is for such teams to provide mental health care services to people in crisis instead of subjecting them to arrest, criminal prosecution, and jail time.³³⁰ Mental health courts and other specialized courts can also play a role, but whether they accomplish diversion is dependent on the approach they utilize.³³¹ For instance, one model emphasizes a therapeutic and rehabilitative approach to the criminal legal system, yet it often leads to longer periods of probation or other forms of supervision than traditional models.³³²

The Treatment Not Jail Act, proposed legislation in New York, offers a promising model.³³³ Three features are noteworthy. First, the bill would allow the diversion of people with any “functional impairment” that influences their behavior and may lead to criminal charges.³³⁴ Thus, it does not merely create “drug court” or “mental health court” but a court that is responsive to people with a range of disabilities, including people with I/DD and cognitive disabilities. Second, the bill would not limit participation in a diversion program to people charged with certain categories of crimes. At present, New York’s mental health courts allow only people charged with felonies to participate.³³⁵ Third, guilty pleas—which would present a significant barrier to entry—are not a requirement for participation.³³⁶

C. Improvements to Prison and Parole Practices

In the parole context, there are several promising strategies to address disability discrimination that focus on the parole board decisionmaking process. The provision of assistance to people with disabilities in preparation for parole

329. *Behavioral Health Crisis Alternatives*, VERA INST. OF JUST., (Nov. 2020), <https://vera.org/behavioral-health-crisis-alternatives> [perma.cc/7M5U-ZDF3].

330. *Id.*

331. See Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587 (2012) (creating typology of specialized criminal courts); Shanda K. Sibley, *The Unchosen: Procedural Fairness in Criminal Specialty Court Selection*, 43 CARDOZO L. REV. 2261, 2268–71 (2022) (describing different specialized court models).

332. See McLeod, *supra* note 331, at 1613–15; see also E. Lea Johnston & Conor P. Flynn, *Mental Health Courts and Sentencing Disparities*, 62 VILL. L. REV. 685 (2017).

333. S.B. 2881B, 2021–2022 Reg. Sess. (N.Y. 2021).

334. *Id.* at § 5 (“A functional impairment may include, but is not limited to, substance abuse or alcohol dependence, mental illness, developmental disability, intellectual disability, traumatic brain injury or other neurological disease, personality disorder, cognitive dysfunction, dementia, emotional disturbance or any other disability.”).

335. N.Y. CRIM. PROC. LAW § 216 (McKinney 2021).

336. *Id.* § 6.

board hearings or in the hearings themselves could be a particularly valuable accommodation. Pursuant to a consent decree in an ADA case, the California Department of Corrections and Rehabilitation must provide assistance to people with developmental disabilities as they prepare for parole hearings.³³⁷ In addition, the department must undertake comprehensive efforts to identify incarcerated people with developmental disabilities.³³⁸ Parole authorities should adopt these policies and practices to ensure that all incarcerated people with I/DD receive access to appropriate assistance.

Other improvements in the parole process for people with disabilities involve changes to the standards used for release decisions. As explained in Section I.B, parole boards utilize numerous factors that systematically disadvantage people with disabilities.³³⁹ The treatment of disciplinary infractions is one area likely ripe for reform in numerous states. Prison systems should modify their treatment of disciplinary infractions so that incarcerated people are not disciplined, or are disciplined less severely, for conduct that is the product of a disability. For example, following an investigation by the U.S. Department of Justice, the Pennsylvania Department of Corrections modified its disciplinary system so that people with serious mental illnesses or I/DD who are facing serious misconduct charges are eligible for “mitigated sanctions”; those facing non-violent misconduct charges receive informal sanctions; and those expressing self-injurious behavior are not punishable for such behavior.³⁴⁰ Given the importance of disciplinary records in parole decisions, reforms of this nature have the potential to meaningfully improve the ability of some people with disabilities to access parole release.

CONCLUSION

Disability discrimination is one of many challenges that some supervisees face while on probation or parole. Despite decades of federal statutory protection, supervision agencies appear largely unmoved by clear commands to discard discriminatory procedures and eligibility criteria and unwilling to offer modifications that level the playing field for people with disabilities. Supervisees’ practical inability to enforce those mandates, due to both resource constraints like lack of counsel and significant federal jurisdictional limits, likely plays a significant role in sustaining discriminatory policies and practices. Given the limited availability of litigation to achieve change, policy and training efforts are more likely to achieve success. Adoption of universal design principles, education of the criminal bench and bar about the applicability of laws banning disability discrimination, and diversion of people with

337. CAL. DEP’T OF CORR., *CLARK V. CALIFORNIA REMEDIAL PLAN* § II (2002).

338. *Id.*

339. See *supra* Section I.B.1.

340. Letter from Vanita Gupta, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Just., and David J. Hickerson, U.S. Att’y, to Tom Wolf (Apr. 14, 2016), <https://justice.gov/crt/file/850886/download> [perma.cc/34UQ-ZLKB].

disabilities away from the criminal legal system are likely necessary to address this widespread and intractable problem.

