PRISON MEDICAL CARE AND DISABILITY ACCOMMODATION

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Introduction

In its 1996 opinion *Bryant v. Madigan*, the Seventh Circuit held that incarcerated plaintiffs could not challenge the prison's failure to provide medical care under the Americans with Disabilities Act (ADA). The court grounded the rule not in the text of the ADA, which contradicts it, but instead in the policy goals of the panel. Despite the opinion's methodological flaws, nearly every circuit has adopted its rule, often with little or no analysis, and district courts often expand their holdings to abrogate the ADA entirely as to incarcerated plaintiffs. In Part I, this Article explains *Bryant*, its flaws, and its consequences. In Part II, this Article attempts an explanation at *Bryant*'s influence, specifically how its invented rule allows courts to square prison ADA claims—which are difficult to resolve before trial—with their reflexive impulse to resolve prison claims at early stages carried over from constitutional claims. Finally, in Part III, this Article attempts to provide some guidelines that courts should use to faithfully apply the rule from *Bryant* for as long as courts are stuck with it rather than expanding it to abrogate disability law for people most reliant on it.

I. Bryant v. Madigan

A. The Opinion

Ronald Bryant was a prisoner with paraplegia in an Illinois state prison.[1] He suffered leg spasms and therefore requested guardrails for his bed to stop him from

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1. Opening Brief of Plaintiff-Appellant at 3, Bryant v. Madigan, 84 F.3d 246 (7th Cir. 1996) (No. 95-2349).

falling out of it during an episode.[2] The prison never responded.[3] Bryant started falling from his bed during spasms,[4] and after his third fall, he broke his leg.[5] He filed a lawsuit *pro se* challenging the failure to accommodate his disabilities under, *inter alia*, the ADA.[6]

The district court rejected his disability law claim and the Court of Appeals for the Seventh Circuit affirmed that rejection. The Seventh Circuit's 1996 decision, *Bryant v. Madigan*, does not have the trappings of a landmark opinion at the intersection of disability law and prison law. The opinion—from the Seventh Circuit, not the Supreme Court—takes up only three pages of the federal reporter and covers several different issues therein.[7] The appellant proceeded *pro se* and typed his briefs on a typewriter from a prison law library.[8] The panel did not hear oral argument and neither the district court nor the parties' briefs mention the rule that the *Bryant* court invented and which determined Bryant's fate.[9] This rule, however, which exempts medical treatment from the ADA,[10] has shaped and circumscribed prison disability law in the decades since.

The Seventh Circuit's treatment of Bryant's ADA claim begins by suggesting that Title II of the ADA, which applies to "public entities," likely does not apply to public prisons.[11] Judge Richard Posner, writing for the court, explained that many constitutional and statutory rights are limited in their application to incarcerated people, noting that "[j]udge-made exceptions . . . to laws of general applicability are justified to avoid absurdity."[12] While it technically left the question open, *Bryant* strongly hinted that the ADA does not cover prisons full-stop.[13]

The next two paragraphs are the origin of the doctrine considered in this Article, so they are worth considering in full. The court distinguished between medical care and disability accommodation, carving out the former from the ADA:

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2. *Id.* at 3–4.
3. *Id.* at 4.
4. *Id.*
5. *Id.*
6. Bryant v. Madigan, 84 F.3d 246, 248 (7th Cir. 1996).
7. *See generally id.*
8. The briefing in this case is from the Seventh Circuit archives and they are on file with the author.
9. *Id.*
10. *See Bryant*, 84 F.3d at 249.
11. *Id.* at 248.
12. *Id.* at 248–49.
13. *Id.* In a strange turn, the Northern District of Indiana cited *Bryant* in support of the conclusion that the ADA does not apply to state prisoners in *Crawford v. Indiana Department of Corrections*, only for the Seventh Circuit to reverse. 115 F.3d 481, 485–87 (7th Cir. 1997). In justifying its decision, the Seventh Circuit explained that it "doubt[ed]" that "Congress could speak much more clearly than it did" in the ADA and explained that it lacked confidence that applying the ADA to prisoners was "absurd," which "might enable [it] to exercise a creativity fairly describable as interpretive rather than legislative." *Id.* The author of *Crawford* was none other than Judge Posner, thirteen months after he wrote the opposite in *Bryant*, with no intervening precedent to explain his about-face. One plausible explanation for this U-turn is simply that *Crawford* was briefed and argued by an attorney, not a *pro se* prisoner.

> Even if there were (as we doubt) *some* domain of applicability of the [ADA] to prisoners, the Act would not be violated by a prison's simply failing to attend to the medical needs of its disabled prisoners. No discrimination is alleged; Bryant was not treated worse because he was disabled. His complaint is that he was not given special accommodation. Unlike the prisoner plaintiffs in [other cases], he is not complaining of being excluded from some prison service, program, or activity, for example an exercise program that his paraplegia would prevent him from taking part in without some modification of the program. He is complaining about incompetent treatment of his paraplegia. The ADA does not create a remedy for medical malpractice.
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> . . .
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> Sleeping in one's cell is not a "program" or "activity." Even apart from the prison setting it would be extremely odd to suppose that disabled persons whose disability is treated negligently have a federal malpractice claim by virtue of the Americans With Disabilities Act, whereas a sick or injured but not disabled person—a person suffering from an acute viral infection, perhaps, or who has broken his leg, or who has a hernia or an inflamed gall bladder—must be content with the remedy that the state law of medical malpractice provides. Moreover, the courts have labored mightily to prevent the transformation of the Eighth Amendment's cruel and unusual punishments clause into a medical malpractice statute for prisoners. We would be exceedingly surprised to discover that Congress had made an end run around these decisions in the Americans With Disabilities Act.[14]

Two puzzling threads emerge from these two paragraphs. First, the opinion takes as self-evident that its conclusion—"[t]he ADA does not create a remedy for medical malpractice"—bears on Bryant's case.[15] But it is not clear, or even reasonable to conclude, that guardrails for a bed constitute medical treatment. They do not "treat" paraplegia. Instead, they allow someone with a disability to access a service—here, sleeping—without risk of injury. Like a cane or a wheelchair, paradigmatic disability accommodations[16] only involve the permission or participation of a doctor (or anyone) to obtain in the unique context of a prison.

Second, there is no clear basis for the holding. The opinion throws out three rationales without suggesting which is decisive: (1) the ADA's statutory requirement of disparate treatment; (2) the ADA's statutory definition of "program, service, or activity"; and (3) a free-form pragmatic concern of how the ADA melds with existing statutory and constitutional law.[17]

The first two rationales are plainly wrong. First, although the district court had relied on the same basis, the ADA does not require disparate treatment for failure

14. *Bryant*, 84 F.3d at 249.

15. *See id.*

16. *See, e.g.*, EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561, 567, 569 (8th Cir. 2007) (describing wheelchairs and crutches as disability accommodations).

17. *See Bryant*, 84 F.3d at 248–49.

to accommodate claims.[18] Indeed, they rely on the opposite premise: that someone with a disability was treated the same despite requiring an accommodation. The Seventh Circuit is correct that Bryant "was not treated worse because he was disabled" but rather "that he was not given special accommodation."[19] This is true too of emblematic ADA claims, like someone in a wheelchair trying to access a public library with no ramp or a deaf defendant who cannot hear the criminal court proceedings against him without an ASL translator. That is to say, the lack of disparate treatment is the beginning of the reasonable accommodation inquiry, not the end of it.

The second explanation is no more defensible: a bed that one can access is clearly a "service" provided by a prison, as is virtually everything else inside a prison due to its inherent nature as an institution controlled by public staff where everything is provided to its wards. As federal courts have explained, "[b]ecause of the unique nature of correctional facilities, in which jail staff control nearly all aspects of inmates' daily lives, most everything provided to inmates is a public service, program or activity, including sleeping."[20] Other federal appellate courts have held that a safe place to sleep is a "service" provided by a public entity.[21] The Department of Justice (DOJ) regulations that implement Title II reinforce this interpretation, requiring that prisons "ensure that each inmate with a disability is housed in a cell with the accessible elements necessary to afford the inmate access to safe, appropriate housing."[22] DOJ explained in releasing these regulations that "[i]t is essential that corrections systems fulfill their nondiscrimination and program access obligations by adequately addressing the needs of prisoners with disabilities, which include, but are not limited to . . . devices such as a bed transfer . . . ."[23] Consider the alternative: an incarcerated person with quadriplegia could be placed on a top bunk with no assistance to get him there, leaving him to sleep collapsed in his chair, and he would have no remedy under the ADA for this textbook case of disability discrimination because a safe place to sleep is not a "service." And this would be so despite the fact that he *also* could not challenge his treatment as medical malpractice, even if the denial left the paraplegic prisoner vulnerable to injury or even death, because the officer who makes bunk decisions would almost certainly not be a medical official and would not be exercising medical judgment.[24]

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18. *See* Baughman v. Walt Disney World Co., 685 F.3d 1131, 1134–37 (9th Cir. 2012).

19. *See Bryant*, 84 F.3d at 249.

20. Hernandez v. County of Monterey, 110 F. Supp. 3d 929, 935–36 (N.D. Cal. 2015).

21. *See* Pierce v. County of Orange, 526 F.3d 1190, 1224 n.44 (9th Cir. 2008) (determining that "[p]roviding inmates with appropriate and adequate bedding . . . facilities are 'services' of the jail" for purposes of the ADA); *see also* Dinkins v. Corr. Med. Servs., 743 F.3d 633, 634–35 (8th Cir. 2014) ("[D]enials of . . . adequate housing by reason of [plaintiff's] disability can form the basis for viable ADA . . . claims.").

22. 28 C.F.R. § 35.152(b)(3) (2011).

23. 28 C.F.R. § 35, App. A. 85.

24. *See, e.g.*, D.C. CODE § 16-2802 (explaining in its notice provision of its medical malpractice statute that "[a]ny person who intends to file an action in the court alleging medical malpractice *against a healthcare provider*. . . ." (emphasis added)).

Bryant's flawed reasoning may obscure a more fundamental point: prison medical care is *itself* a "service" provided by a public entity. Were this not obvious by the broad text of the ADA, as prisons plainly provide medical care as a service to prisoners, the Supreme Court has noted that "the alleged deliberate refusal of prison officials to accommodate [the plaintiff's] disability-related needs in such fundamentals as mobility, hygiene, *medical care*, and virtually all other prison programs"[25] could "constitute[] 'exclu[sion] from participation in or . . . den[ial of] the benefits of' the prison's 'services, programs, or activities.'"[26] The very conduct excluded from the ADA by *Bryant* is inherently a service and therefore within its ambit.

Disposing with the first two rationales leaves one to conclude that *Bryant* held that—despite the ADA's text—courts should not allow incarcerated plaintiffs to bring claims for unreasonable accommodations in the provision of medical services because it is not sensible. State law medical malpractice claims already exist. So too do federal constitutional claims for deliberate indifference to serious medical needs, one that "courts have labored mightily" to stop from turning "into a medical malpractice statute for prisoners."[27] *Bryant* therefore concludes that Congress, in passing Title II of the ADA, did not mean to disrupt the equilibrium of common law and constitutional law regulation of prisons by permitting a powerful federal cause of action for overlapping conduct.[28]

B. Bryant as Anti-Textualist

Whether or not harmonizing the ADA with federal constitutional law and state common law is sensible, the opinion is divorced both from the text of the ADA and from accepted methods of statutory interpretation altogether. The text announcing this rule cites no opinions from the Supreme Court or any federal appeals courts, nor the statute's legislative history.[29] This is not the honest work of harmonizing one federal statute with another. Indeed, had *Bryant* looked to the federal code for guidance, it would have found that the Rehabilitation Act, the ADA's sister statute predating it by sixteen years, applied to prisons without excepting medical care.[30] Federal statutes are supposed to preempt preexisting common law principles, not the other way around.[31] And while federal constitutional law has indeed always been wary of overregulating prisons through constitutional interpretation, it often does so by invoking separation of powers concerns that do not intervene too

25. United States v. Georgia, 546 U.S. 151, 157 (2006) (emphasis added).

26. *Id.* (alterations in original) (citations omitted).

27. Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996).

28. *Id.*

29. *See id.* at 247–49.

30. *See* Bonner v. Lewis, 857 F.2d 559, 562 (9th Cir. 1988) (holding Rehabilitation Act applicable to prisons receiving federal financial assistance); Harris v. Thigpen, 941 F.2d 1495, 1522 n.41 (11th Cir. 1991) (same); Gates v. Rowland, 39 F.3d 1439, 1446 (9th Cir. 1994) (same).

31. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992).

strongly in prison administration without approval from Congress.[32] The ADA provides such approval via its plain text.[33]

Judge Richard Posner is an unsurprising author of an opinion entirely removed from traditional methods of statutory interpretation. As Sixth Circuit judge and critic of Judge Posner's methodologies Amul Thapar explains, former-Judge Posner "advocat[es] outcome-driven statutory interpretation" to achieve "socially beneficial effects,"[34] dismisses legal texts as "putty in the hands" of judges,[35] and believes that judges "should instead work to improve society by determining the most sensible resolution of a dispute, so long as it's not unavoidably blocked by an authoritative precedent."[36] Posner, Thapar adds, "celebrates a consequentialist liberation from time-worn tools of interpretation."[37]

The subsequent years have not been kind to this method (or lack thereof) of statutory interpretation, including its application to the ADA. Two years after *Bryant* "doubt[ed]" that the ADA applied to prisons at all, the Supreme Court held the opposite in *Pennsylvania Department of Corrections v. Yeskey*, a unanimous, textualist opinion written by Justice Scalia.[38] He explained that "prisons provide inmates with many recreational 'activities,' *medical* '*services*,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners (and any of which disabled prisoners could be 'excluded from participation in')."[39] Eight years later, in another unanimous and textualist opinion from Justice Scalia, the Court took up Title II of the ADA in the prison context again and wrote:

> [I]t is quite plausible that the alleged deliberate refusal of prison officials to accommodate [plaintiff's] disability-related needs in such fundamentals as mobility, hygiene, medical care, and virtually all other prison programs constituted 'exclu[sion] from participation in or . . . deni[al of] the benefits of' the prison's 'services, programs, or activities.'[40]

This is part of a larger trend turning against the freewheeling method of statutory interpretation employed in *Bryant*. In *Bostock v. Clayton County*, the U.S. Supreme Court rejected this kind of pragmatic exception-making, writing,

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32. *See Gates*, 39 F.3d at 1446 (noting that "constitutional rights of prisoners must be considered in light of the reasonable requirements of effective prison administration").

33. "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." Turner v. Safley, 482 U.S. 78, 84–85 (1987). Accordingly, prison administration is "a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint." *Id.*

34. Amul R. Thapar, *The Pragmatism of Interpretation: A Review of Richard A. Posner,* The Federal Judiciary, 116 MICH. L. REV. 819, 823 (2018).

35. *Id.*

36. *Id.*

37. *Id.*

38. 524 U.S. 206, 209 (1998).

39. *Id.* at 210 (emphasis added).

40. United States v. Georgia, 546 U.S. 151, 157 (2006) (alterations in original) (citations omitted).

> Nor is there any such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.[41]

In a 2018 case, the Court similarly wrote, "[i]t is not our function to 'rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have' intended."[42] In 2010, the Court wrote that it "cannot replace the actual text with speculation as to Congress' intent."[43]

Nowadays, "[c]ourts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences."[44]

C. Spreading Throughout the Circuits

Despite the shakiness of *Bryant*'s reasoning and the prompt abrogation of its main holding and methodology in *Yeskey*, other lower courts have treated *Bryant*'s holding excepting prison medical treatment from the ADA more like binding authority than the persuasive authority that it is. Nine other federal appellate courts have cited to *Bryant* to adopt its same holding, several without analysis beyond invoking *Bryant*'s authority.[45] Of the two that have not, the Eighth Circuit adopted the rule from *Bryant* by citing two other circuit court opinions which, in turn, relied on *Bryant*.[46] The D.C. Circuit, which hears the fewest prison cases of any federal appellate court,[47] has not adopted *Bryant* but has also not adopted a contrary rule and its district court has relied on *Bryant*.[48]

The opinions explicitly adopting *Bryant* fall into three categories, although these categories can vacillate from case to case within the same circuit. First, there is the pragmatism that drove the outcome in *Bryant*. The First Circuit cited to *Bryant* to adopt its rule, holding that "it is more appropriate" for the patient to turn to "state medical malpractice law, not" disability law.[49] The Second Circuit, citing to *Bryant*, held that allowing prisoners "to litigate in federal court virtually every medical malpractice claim arising in a custodial setting under the auspices of the ADA" would be "entirely at odds with the statutory language of Title II and its

41. 590 U.S. 644, 669 (2020).

42. Wis. Cent. Ltd. v. United States, 585 U.S. 274, 282 (2018) (citation omitted).

43. Magwood v. Patterson, 561 U.S. 320, 334 (2010).

44. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 374 (2024).

45. *See infra* notes 49–58 and accompanying text.

46. Burger v. Bloomberg, 418 F.3d 882, 883 (8th Cir. 2005) ("agree[ing] with two other circuits that have recently concluded a lawsuit under the Rehab Act or the Americans with Disabilities Act (ADA) cannot be based on medical treatment decisions," both of which in turn cite *Bryant*).

47. *See, e.g.*, *U.S. Court of Appeals Federal Judicial Caseload Statistics 2022*, U.S. COURTS (Mar. 31, 2022) https://www.uscourts.gov/statistics/table/b-7/federal-judicial-caseload-statistics/2022/03/31 (showing recent data over a twelve-month period that in the D.C. Circuit, two prison conditions cases commenced, in the First Circuit, one did, and for every other circuit court the number ranged between 3 and 47).

48. *See* Smith v. Bowser, No. 21-cv-878, 2022 WL 4598664, at *4 (D.D.C. Sept. 30, 2022).

49. Kiman v. N.H. Dep't of Corr., 451 F.3d 274, 285 (1st Cir. 2006) (citation omitted).

purpose."[50] The Second Circuit here both nods to *Bryant*'s pragmatism and, without further explanation, to the ADA's text, the latter reference being one the court did not and could not justify.[51] The Sixth Circuit in citing to *Bryant* explained that "dissatisfaction" with medical treatment "necessarily sounds in medical malpractice" law and not disability law.[52] The Tenth Circuit held that disability law is meant to "afford disabled persons legal rights regarding access to programs and activities enjoyed by all, not a general federal cause of action for challenging the medical treatment of their underlying disabilities."[53]

Second, like *Bryant* itself, courts have adopted the Seventh Circuit's holding by invoking principles plainly inconsistent with how Title II reasonable accommodation claims operate. In multiple unpublished cases, the Fourth Circuit has held, citing *Bryant*, that prisoners cannot bring ADA claims for failure to provide medical care when they fail to allege discriminatory intent, which is unnecessary in an ADA claim.[54]

Finally, some courts have cited *Bryant* like they would a Supreme Court opinion, stating its conclusion as decisive without explanation. The Fifth Circuit simply asserted that "[t]he ADA does not set out a standard of care for medical treatment."[55] The Ninth Circuit wrote that "[t]he ADA prohibits discrimination because of disability, not inadequate treatment for disability."[56] The Eleventh Circuit declared that "failure to provide adequate medical treatment (the substance of [plaintiff's] claims) does not violate the ADA or Rehabilitation Act."[57] From its humble beginnings and shaky foundations, the rule from *Bryant* has become binding law across virtually the entire country.

If the circuit courts have adopted the rule from *Bryant*, district courts have expanded its holding. Like *Bryant* itself, they have applied its rule not just to medical care but to essentially every archetypical disability accommodation, using it not only to shield prisons from a category of disability claims but shielding the prison from disability law entirely. There is essentially no textbook disability accommodation that a district court has not deemed medical care and therefore outside the scope of the ADA behind bars.[58]

50. Tardif v. City of New York, 991 F.3d 394, 405 (2d Cir. 2021).

51. *See id.* at 406–07.

52. Powell v. Columbus Med. Enters., LLC, No. 21-3351, 2021 WL 8053886, at *2 (6th Cir. Dec. 13, 2021). As noted above, justifications can vary from opinion to opinion within a circuit; seven years before *Powell*, the Sixth Circuit held that a prisoner could not state a claim under the ADA because he "did not allege that he was denied treatment *because* of his disability," which fits into the second category cited below. Centaurs v. Haslam, No. 14-5348, 2014 WL 12972238, at *1 (6th Cir. Oct. 2, 2014).

53. Moore v. Prison Health Servs., Inc., No. 98-3310, 1999 WL 1079848, at *1 (10th Cir. Dec. 1, 1999) (citations omitted).

54. *See* Miller v. Hinton, 288 F. App'x 901, 903 (4th Cir. 2008); Spencer v. Easter, 109 F. App'x 571, 573 (4th Cir. 2004); *see supra* Part I.B.

55. Walls v. Tex. Dep't of Crim. Just., 270 F. App'x 358, 359 (5th Cir. 2008).

56. Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011, 1022 (9th Cir. 2010).

57. Finn v. Haddock, 459 F. App'x 833, 837–38 (11th Cir. 2012) (citations omitted).

58. *See* Barker v. Osemwingie, No. 20-15503, 20-15840, 2021 WL 5564625, at *1 (9th Cir. Nov. 29, 2021) (holding that the inability to transfer from a wheelchair to a cell toilet was medical treatment and therefore outside the scope of the ADA); Morris v. California, No 21-16059, 2022 WL 2901730, at *1 (9th Cir. July 22,

In summary, *Bryant* carved out a significant chunk of the ADA using an archaic method of statutory interpretation. These meager two paragraphs of analysis nonetheless spread throughout the country without much further analysis and now limit disability rights behind bars for most incarcerated plaintiffs. We now turn to why this might have happened.

II. TENSION BETWEEN THE ADA AND THE REGULATION OF PRISONS THROUGH LITIGATION

A. *How Courts and Congress Dam the Flood*

Part I presents something of a mystery—a cynical, legal realist take on *Bryant*'s analysis and influence is simply that the ADA is a broad and powerful remedial statute and courts will reverse-engineer the doctrine they need to prevent the full reach of it from extending to a class of plaintiffs they find uniquely distasteful. What can look on the surface of prison law like incoherence often sits atop a deeper coherence: prisons win, prisoners lose.[59]

A more nuanced and less cynical answer complements the above, though without replacing it. There is a deep tension between how Title II of the ADA operates and how courts, Congress, and prisons have dealt with individual conditions of confinement lawsuits. The ADA is a powerful remedial statute, meant to be read broadly and require individualized consideration of circumstances.[60] The central preoccupation of courts in managing prison litigation, however, is to dispose of cases in favor of defendants as quickly as possible so as to not burden defendants and the courts.[61]

Coincidentally, this tension mirrors the one that exists between disability accommodation and prison administration itself, as both clashes occur when a requirement of individualization intrudes on a system that insists on standardization. While disability law mandates individualized consideration of limitation and accommodation,

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2022) (holding that the failure to provide a wheelchair was medical care); Starr v. Bland, No. 21-2476, 2022 WL 711304, at *1 (8th Cir. Mar. 10, 2022) (holding that a shower chair and a wheelchair were medical treatments); Muniz v. United States, Civ. No. 22-0816, 2023 WL 8469510, at *1 (D.N.J. Dec. 7, 2023) (holding that a pass permitting soft shoes and a lower bunk pass were medical treatment); Kinard v. Fla. Dep't of Corr., No. 3:22-cv-897, 2024 WL 229410, at *8 (M.D. Fla. Jan. 22, 2024) (holding that an order permitting bed rest; a lay-in order excusing the plaintiff from work, a cast, and a lower-bunk pass were all medical treatments). These opinions may strike the reader as corrected outliers rather than examples of how broadly district courts read *Madigan* because several were reversed on appeal. Too much optimism here is not warranted. The author is aware of these cases by having tracked them in real time and representing the former *pro se* plaintiffs on appeal to obtain reversal. In the hundreds of uses of the *Bryant* doctrine to dismiss prison ADA claims, he is aware of only one reversal for its misapplication litigated by anyone other than himself and his colleagues and partners: the Third Circuit's opinion in *Furgess v. Pa. Dep't of Corr.*, 933 F.3d 285, 291 (3d Cir. 2019).

59. *See* Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. 302, 302 (2022) (responding to other scholars' description of prison law as "incoherent," explaining that courts in prison cases are "consistently and predictably pro-state, highly deferential to prison officials' decisionmaking, and largely insensitive to the harms people experience while incarcerated").

60. Noel v. N.Y.C. Taxi & Limousine Comm'n, 687 F.3d 63, 68 (2d Cir. 2012); Steger v. Franco, Inc., 228 F.3d 889, 894 (8th Cir. 2000).

61. *See* Dolovich, *supra* note 59, at 313.

Margo Schlanger has explained, "individualization does not come easily to prisons and jails. Rules behind bars tend to be inflexible. Prisons and jails are mass institutions, and it's easier for them to implement simple rules, without either case-by-case or more formalized exceptions."[62] As a result, when incarcerated people with disabilities point to routine accommodations, prisons often deny them by simply pointing to the general rule.[63]

Courts are used to dealing with constitutional rather than statutory prison litigation, the substantive law of which is both defendant-friendly and unusually preoccupied with "floodgates," or docket management, concerns.[64] In addressing procedural due process claims, for instance, the Supreme Court overruled a past, more plaintiff-friendly standard by explaining that it "led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone."[65] When the Supreme Court rejected a reasonable expectation of privacy in a prison cell, full stop, Justice Stevens wrote for four justices dissenting in part that he could not "help but think that the Court's holding is influenced by an unstated fear that if it recognizes that prisoners have any Fourth Amendment protection this will lead to a flood of frivolous lawsuits."[66]

Additionally, unlike with the ADA, the defense of qualified immunity applies to constitutional damages claims. The Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation."[67] Qualified immunity is protection from suit and its burdens and not merely liability.[68] As a result, the "'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims' against government officials [will] be resolved prior to discovery."[69] Qualified immunity applies to individuals, however, and not public entities, and it is the latter that are the proper defendants in ADA cases,[70] making qualified immunity irrelevant.

Congressional regulation of prison litigation has also focused on limiting the burdens on courts and defendants of litigation, especially frivolous litigation. That is to say, Congress, in passing the Prison Litigation Reform Act (PLRA), tried to ensure that defendants who would win their cases anyway won them faster and cheaper, damming up the purported flood in several respects.[71] First, the PLRA

62. Margo Schlanger, *Prisoners with Disabilities*, *in* REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 295, 304 (Erik Luna ed., 2017).

63. *Id.* at 306–07.

64. Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1049–53 (2013).

65. Sandin v. Conner, 515 U.S. 472, 482 (1995).

66. Hudson v. Palmer, 468 U.S. 517, 554 n.30 (1984) (Stevens, J., concurring in part and dissenting in part).

67. Pearson v. Callahan, 555 U.S. 223, 232 (2009) (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam)).

68. Mitchell v. Forsyth, 472 U.S. 511, 526–27 (1985).

69. *Pearson*, 555 U.S. at 231 (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987)).

70. Kentucky v. Graham, 473 U.S. 159, 166–68 (1985).

71. *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134 (codified as amended in scattered titles and sections of the U.S.C.).

imposed pre-service screening requirements, which make district courts evaluate complaints for frivolity, malice, or simply failing to state a claim before permitting service on the defendants which, in other federal litigation, occurs immediately.[72] Although freeing defendants from answering complaints that allege a constitutional violation for cold coffee or name the Pope as the defendant may be sensible, because the PLRA relies on the Rule 12 standard for failure to state a claim rather than frivolity, constitutional prison law standards are demanding, and courts make their evaluation without briefing from any party, courts routinely err by screening out meritorious claims.[73]

The PLRA also imposed an exhaustion requirement that requires plaintiffs in prison cases to exhaust their administrative remedies before bringing suit.[74] Exhaustion is an affirmative defense and, barring the rare plaintiff who admits to failing to exhaust available remedies in their complaint, will virtually always require discovery beyond the face of the complaint to evaluate what grievances the plaintiff filed at what times and what remedies were practically available.[75] Even though exhaustion often derails prison cases, one could imagine that it does not do so before summary judgment. Not so. Courts have determined that exhaustion should be "typically decided at the outset of the litigation" and crafted special rules to permit for discovery into exhaustion before consideration of the merits.[76]

The PLRA also changed the rules governing *in forma pauperis* status for incarcerated plaintiffs, pushing financial cost onto indigent plaintiffs to try to dissuade frivolous lawsuits.[77] Even plaintiffs who are indigent are obligated to pay off the cost of filing fees over time rather than have the court waive the fees.[78] Second, if a plaintiff has had three cases dismissed as frivolous or even for failure to state a claim, they may not obtain *in forma pauperis* status unless they are "under imminent danger of serious physical injury."[79]

B. Disability Law's Clash with the Floodgates Concern

ADA prison claims are not amenable to resolution at early stages of litigation, especially once Congress rebuked the courts for narrowing the definition of a

72. 28 U.S.C. § 1915(e)(2)(B); *Id.* § 1915A; 42 U.S.C. § 1997e(c)(1).

73. For example, although the screening requirement is purportedly for patently meritless claims, the author regularly gets courts of appeals to reverse screening dismissals because the claims actually pass the standard of Rule 12. *See, e.g.*, Epley v. Gonzalez, 860 F. App'x 310 (5th Cir. 2021); Whitall v. Cal. Dep't of Corr. & Rehab., 854 F. App'x 219 (9th Cir. 2021); Dunsmore v. California, 854 F. App'x 913 (9th Cir. 2021); Rivera v. Sheppard, 859 F. App'x 218 (9th Cir. 2021); Williams v. Ogbuehi, No. 21-15661, 2021 WL 5276013 (9th Cir. Nov. 12, 2021).

74. 42 U.S.C. § 1997e(a).

75. Jones v. Bock, 549 U.S. 199, 212–16 (2007).

76. Albino v. Baca, 747 F.3d 1162, 1170 (9th Cir. 2014) (describing the Ninth Circuit's process in detail and explaining that many other circuit courts use analogous methods).

77. 28 U.S.C. § 1915.

78. *Id.* § 1915(b)(1).

79. *Id.* § 1915(g).

disability. The substance of disability law therefore clashes with the impulse of courts to resolve prison claims quickly.

To bring a failure to accommodate claim under the ADA, a plaintiff must show that they qualified as disabled and that because of the prison's failure to provide a reasonable accommodation, they lacked meaningful access to a prison's program, service, or activity.[80] The definition of disability is lenient, far more so than the layman's definition of "disabled." It must merely be "a physical or mental impairment that substantially limits one or more major life activities of [an] individual" with a rule of construction that the definition of disability "shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter."[81] As described above, virtually everything inside a prison or jail is a program, service, or activity.[82] This leaves the plaintiff to show that the accommodation he sought was reasonable. In a desert of standards like "malicious and sadistic for the very purpose of causing harm" and "unnecessary and wanton infliction of pain," "reasonable" is an oasis for a prison plaintiff.[83] Instead of a constitutional floor, the ADA is a broad remedial statute that should be interpreted as such.[84] Just as importantly, like other "reasonableness" inquiries, the reasonableness of an accommodation is inherently fact and context-specific.[85] Consideration of reasonableness is therefore a poor fit for pre-service screening, motions to dismiss, or even summary judgment. After all, most considerations of reasonableness are left to factfinders.[86]

In the early days of ADA litigation, defendants and courts narrowed who qualified as disabled under the statute to more efficiently dispose of disability litigation at early stages. Following the enactment of the ADA, the Supreme Court in two decisions denied relief to ADA plaintiffs (in non-prison cases) on the basis that they were not sufficiently limited in their major life activities to qualify as disabled. First, in *Sutton v. United Air Lines, Inc.*, the Court held that two plaintiffs who suffered from severe myopia without corrective aids but had perfect vision with them did not qualify as disabled.[87] The Court based its holding in large part on its reading of "substantially limits" to "suggest[]'considerable' or 'specified to a large degree.'"[88]

Three years later, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court denied relief to a plaintiff with carpal tunnel syndrome who worked in an

80. 42 U.S.C. § 12132.

81. *Id.* §§ 12102(1), (4)(A).

82. *See supra* Part 1.A.

83. *See generally* Hudson v. McMillian, 503 U.S. 1, 5–6 (1992).

84. *See, e.g.*, Steger v. Franco, Inc., 228 F.3d 889, 894 (8th Cir. 2000) ("[T]he ADA is a remedial statute . . . and should be broadly construed to effectuate its purpose." (citations omitted)).

85. Pierce v. County of Orange, 526 F.3d 1190, 1217 (9th Cir. 2008) (explaining in the prison context that "determining whether a modification or accommodation is reasonable always requires a fact-specific, context-specific inquiry," one that weighs the needs of disabled inmates against the prison's interest in security and administrability).

86. *See, e.g.*, Matter of Coston, 991 F.2d 257, 260–61 (5th Cir. 1993).

87. 527 U.S. 471, 494 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553.

88. *Id.* at 491.

automotive plant.[89] The lower court had held that the plaintiff's inability to do many manual tasks, including those required by her job, qualified as a substantial limitation on a major life activity.[90] The Court reversed, holding that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[91]

Sutton and *Toyota Motor* gave prisons and jails an opportunity to win disability claims before proceeding to a factfinder. In *Atwell v. Hart County, Kentucky*, for example, the Sixth Circuit held that a man with paranoid schizophrenia and acute psychosis arrested for trespassing could not sue the jail that pepper sprayed him and left him in solitary confinement while he suffered from paranoid delusions because he could not prove that his mental illnesses were "permanent or long-term" or that medication could not mitigate it.[92] This holding relies on the holding of both *Toyota Motor* (and its rule requiring permanent or long-term disability) and of *Sutton* (which held that disability must be defined after corrective measures have taken effect, not before).[93] In *Carter v. Taylor*, the District of Delaware held that a prisoner with AIDS failed to create a fact issue on whether he had a disability, citing *Toyota Motor* and its demanding definition of "substantially limits."[94] Critically, courts could rule for prisons before trial or even discovery because they were able to find a statutory element in the definition of disability that the plaintiff could not meet rather than having to deem the prison's response as reasonable as a matter of law.

Congress then intervened, however, disagreeing with the high bar the Supreme Court had imposed on qualifying disabilities under the ADA and "restor[ing] the intent and protections of" the ADA through superseding legislation.[95] In 2008, Congress responded to *Toyota Motor* and *Sutton* by passing the ADA Amendments Act (ADAAA), which amended the ADA by broadening its definition of disability.[96] Congress explicitly found that *Toyota Motor* and *Sutton* were incorrectly decided, stating that "as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities."[97]

Congress further elaborated under the "Purposes" section of the Act that a primary aim was:

> (5) to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v.

89. 534 U.S. 184, 187 (2002).
90. *Id.* at 192.
91. *Id.* at 198.
92. 122 F. App'x 215, 219 (6th Cir. 2005).
93. *Id.*
94. 540 F. Supp. 2d 522, 528 (D. Del. 2008).
95. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.
96. *Id.*
97. *Id.* § 2(a)(6).

> Williams, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.[98]

In summary, there is a profound tension between how courts have traditionally resolved most constitutional prison civil rights claims and how—under a fair reading of the ADA—they should resolve disability law claims. While they are used to ruling for defendants quickly and without much process, the elements of disability claims on behalf of prisoners are easily met pending the resolution of whether defendants acted "reasonably" in their accommodation or lack thereof, traditionally a task for a factfinder. The pre-ADAAA definition of "disability" gave courts one route to reject cases on the pleadings, but its revision's insistence that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations" walled it back off.[99] The invention of the rule from *Bryant* may therefore be best seen as a way to seal off disability law from a large amount of prison conduct as a matter of law to end cases in favor of defendants and do so at an early stage.

III. IF THE RULE MUST EXIST

Although Part I explained the lack of justification for *Bryant*'s rule, for the present, virtually every circuit court is stuck with it. Disability accommodations in prison are actionable under disability law but medical treatment is not. Given this distinction, which has resulted in courts dismissing hundreds of cases for being outside the scope of the ADA, one might expect a robust caselaw determining when actionable accommodation ends and treatment begins. None exists. While a handful of cases have reversed district courts for incorrectly applying the *Bryant* rule to a disability accommodation, they have done so conclusorily, without explaining the distinction between accommodation and treatment.[100] In the absence of guidance from higher courts, and given the mismatch in resources between prisons and incarcerated plaintiffs, as explained above, district courts have expanded the rule from *Bryant* to swallow disability claims whole.

This final Part therefore attempts to argue what a practical distinction could look like. It begins with a simple delineation: medical treatments treat and accommodations

98. *Id.* § 2(b)(5).

99. *Id.*

100. *See generally* Furgess v. Pa. Dep't of Corr., 933 F.3d 285, 291 (3d Cir. 2019); Munoz v. Cal. Dep't of Corr. & Rehab., 842 F. App'x 59, 61 (9th Cir. 2021); Starr v. Bland, No. 21-2476, 2022 WL 711304 (8th Cir. Mar. 10, 2022).

accommodate. Medical treatments attempt to heal a medical problem or prevent it from getting worse.[101] Disability accommodations, by contrast, attempt to allow someone with a limitation to access the same services of the prison as someone lacking it. An incarcerated plaintiff with a serious ankle injury who was denied surgery would have a claim sounding in medical malpractice; the same plaintiff who was denied crutches, making it difficult for them to walk to a meal hall or visitation room, would have a disability claim.

The distinction is messy. Crutches may accommodate the imprisoned plaintiff and allow them to access a visitation room, but the crutches may also successfully prevent the injury from getting worse just as many surgeries and medications do. Inversely, surgery might be the most effective way for the incarcerated plaintiff to eventually access the meal hall or visitation room, whether or not it eliminates their problem entirely. That is to say, treatment tends to accommodate, and accommodation tends to treat. Nonetheless, the primary purpose of a prison's action is normally discernible and can function as a good default. Under this default, prison actions that often trip up courts under *Bryant* can be categorically thought of as accommodations: a lower bunk bed; wheelchair; crutches; hearing aids; eyeglasses; ASL interpreters and videophones for the deaf; mobility guides for the blind.

A few other guidelines would help supplement this primary, textual delineation. First, the *Bryant* exception should apply only to actions taken by medical officials. Medical malpractice claims are brought, by definition, against medical officials.[102] The primary legal inquiry is whether the medical official failed to meet the standard of care in their treatment. Plaintiffs do not bring medical malpractice claims against a landlord, a boss, a police officer, a plumber, or a bus driver. When incarcerated plaintiffs sue for the failures of the prison in occupying these roles, they cannot possibly be bringing malpractice claims.

Note that this guideline may have a lesser effect on some prison systems than might be imagined. While ADA coordinators inside prisons are not medical officials, many prison systems, sensibly enough, leave accommodation decisions to medical providers. In *Munoz v. California Department of Corrections & Rehabilitation*, defendants who had won summary judgment on a plainly incorrect ground below—the district court had applied the pre-ADAAA definition of disability—argued on appeal for an alternative affirmance on the grounds that their decision to deny the plaintiff an upper bunk was made by a physician and therefore fell under *Bryant*.[103] The Ninth Circuit noted that the "record shows that *all* disability accommodations are verified by a doctor at Valley State Prison" and therefore to "accept Defendants'

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101. *Treatment*, AM. HERITAGE DICTIONARY, https://ahdictionary.com/word/search.html?q=treatment (last visited Mar. 9, 2025) ("The use of an agent, procedure, or regimen, such as a drug, surgery, or exercise, in an attempt to cure or mitigate a disease, condition, or injury.").

102. *See, e.g.*, D.C. CODE ANN. § 16-2802 (explaining in its notice provision of its medical malpractice statute that "[a]ny person who intends to file an action in the court alleging medical malpractice *against a healthcare provider*. . . ." (emphasis added)).

103. *Munoz*, 842 F. App'x at 61–62.

position that the involvement of a doctor removes all prison accommodations decisions from the ADA's reach would undermine the Supreme Court's recognition that Title II of the ADA applies to prisons."[104] This guideline would do little work in prisons like the one in *Munoz* as to systemic accommodations like registration for an upper bunk, though still would matter for one-off incidents.

Second, courts should not confuse the rule from *Bryant* with the alternative conclusion that medical care is not a "service" provided by public entities under the ADA. First, and as previously discussed, medical care is considered a service that prisons provide incarcerated people and is the most costly and one of the most important ones. Second, the Supreme Court has explicitly observed as much in two cases following *Bryant*. *Bryant* is an atextual rule exempting medical malpractice claims, not a textual rule defining medical care out of the definition of "services."

The distinction matters. Take an incarcerated plaintiff with bad knees who has to wait in a pill call line for an hour every day to receive their psychiatric medication or climb three flights of stairs through excruciating pain to reach their group therapy. Even if anti-depressants and group therapy are deemed medical care for mental health, the prison's failures are not with the medical treatments themselves but instead the failure to accommodate the plaintiff's disabilities in their access to them as services. The accommodations would not be different medication or therapy, but pills brought to the plaintiff's cell or access to an elevator. The same result would hold, of course, if the treatment the plaintiff sought was directly related to knee pain rather than being for unrelated mental health problems. Courts cannot therefore merely look at the service provided as medical care and invoke *Bryant* but instead must check to see if the accommodation sounds in medical malpractice.

Finally, in cases of genuine ambiguity about whether a prison service primarily functions to treat or accommodate, courts should resolve such uncertainty in favor of the written statute and not the unwritten exception. The same trends in statutory interpretation described above that undermine *Bryant* in its entirety argue even more strongly against its aggressive interpretation. The Supreme Court may eventually undo *Bryant*'s rule by once again applying a modern and textual approach to the ADA; until then, courts should attempt to apply the law of the ADA rather than the imagined exception of *Bryant v. Madigan*.

104. *Id.* at 62.