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PROTECTING PAROLEES UNDER THE ADA AND REHAB ACT

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Prisoners and parolees, their family members, and advocates have all seen that paroling authorities sometimes make decisions based on factors that can be considered disabilities under the Americans with Disabilities Act (ADA)[1] and Rehabilitation Act of 1973 (Rehab Act).[2] These conditions may include mental illness,[3] HIV status,[4] or a history of substance abuse.[5] A few years ago, in a case litigated by the University of the District of Columbia Prisoners Rights and Advocacy Clinic and the District of Columbia Prisoners' Legal Services Project (DCPLSP), the United States Parole Commission denied parole to a District of Columbia prisoner because she was HIV-positive and had worked as a prostitute.[6] "We really can't support a decision to knowingly parole a prisoner that we believe would deliberately infect other persons with a fatal disease," explained one Commission official.[7] In the face of a legal challenge and negative publicity, the Commission released the District of Columbia inmate in that case.[8]

Disability discrimination may also arise in situations affecting prisoners and parolees with mental illnesses. Paroling or supervising authorities may consider revoking parole if a parolee with a mental illness fails to comply with community services or a medication regime. In still other cases, paroling authorities may be reluctant to parole a prisoner with a mental illness. It is likely that many prisoners and parolees in these situations have not come to the attention of lawyers and journalists.

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1 The ADA defines "disability" with respect to an individual as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2)(A)-(C) (2000).

2 Under the Rehab Act, an "individual with a disability" means a person who "i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; ii) has a record of such impairment; or iii) is regarded as having such an impairment." 29 U.S.C. § 705(20)(B) (2000).

3 *See, e.g.*, Olmstead v. Zimring, 527 U.S. 581 (1999). *See also* 28 C.F.R. § 35.104 (2002).

4 Bragdon v. Abbott, 524 U.S. 624 (1998); School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987). *See also* 28 C.F.R. § 35.104 (2002).

5 28 C.F.R. § 35.104 (2002).

6 Tom Schoenberg, *Suddenly Free*, LEGAL TIMES, Sept. 10, 2001.

7 *Id.*

8 *Id.*

Two recent decisions from the Ninth Circuit, *Armstrong v. Davis*[9] and *Thompson v. Davis*,[10] make clear that paroling authorities violate Title II of the ADA and Section 504 of the Rehab Act when they discriminate against parolees with disabilities. The ADA and the Rehab Act provide important protection for prisoners and parolees, for whom few sources of relief exist apart from the minimum protections of the United States Constitution.

Title II of the ADA prohibits a "public entity" from discriminating against a "qualified individual with a disability" on account of that individual's disability.[11] A "public entity" is defined as any state or local government, any department, agency, special purpose district, or other instrumentality of a state or local government, the National Railroad Passenger Corporation or any commuter authority.[12] Section 504 of the Rehab Act provides in part that:

> no otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .[13]

Under both the ADA and the Rehab Act, claims and defenses "are virtually identical."[14]

Over four years ago, in *Pennsylvania Department of Corrections v. Yeskey*,[15] the Supreme Court concluded that the plain text of Title II covers state prisons.[16] In *Yeskey*, a prisoner with hypertension had been denied admission to a motivational boot camp that would have allowed him to be paroled in just six months.[17] Writing for the Court, Justice Scalia analyzed the text of the ADA and concluded that it "provides no basis for distinguishing [prison] programs, services, and activities from those provided by public entities that are not prisons."[18] The Court's decision in *Yeskey* confirmed that there is no "prisoner exception" to the ADA.

Prisoners and parolees and their advocates in California have used the ADA and the Rehab Act to challenge discriminatory actions of the California Board of Prison Terms (Board). Two recent decisions from the Ninth Circuit, *Armstrong v. Davis*[19] and *Thompson v. Davis*[20] make clear that paroling authorities violate

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9 275 F.3d 849 (9th Cir. 2001), *cert. denied*, 123 S. Ct. 72 (2002).
10 295 F.3d 890 (9th Cir. 2002), , *cert. denied*, 71 U.S.L.W. 3366 (March 24, 2003).
11 42 U.S.C. § 12131 *et seq.* (2000).
12 *Id.*
13 29 U.S.C. § 794 (2000).
14 Harrison v. Rubin, 174 F.3d 249 (D.C. Cir. 1999). *See also Armstrong*, 275 F.3d at 862 n.17.
15 524 U.S. 206 (1998).
16 *Id.* at 212.
17 *Id.* at 208.
18 *Id.* at 210.
19 275 F.3d 849 (9th Cir. 2001), *cert. denied*, 123 S. Ct. 72 (2002).

Title II of the ADA and Section 504 of the Rehab Act when they discriminate against parolees with disabilities. In *Armstrong*, a class of prisoners and parolees with mobility, sight, hearing, learning, and developmental disabilities claimed that the Board had failed to make accommodations as required by the ADA and Rehab Act.[21] This failure caused prisoners and parolees with disabilities to forfeit their rights to parole hearings. Other class members were unable to represent themselves effectively.[22] The district court found for the plaintiffs, and the Ninth Circuit affirmed. The Court of Appeals stated, "As a consequence of the Board's unlawful discrimination, plaintiffs were unable to comprehend various parts of the parole and parole revocation process or denied the opportunity to attend the required hearings, and may even have been wrongfully incarcerated or denied parole."[23] Significantly, the Ninth Circuit noted that the state had waived any possible claim of sovereign immunity by failing to raise it, and thus the Court was not called upon to decide whether Congress had properly abrogated the state's Eleventh Amendment immunity in passing Title II.[24] The Supreme Court denied the government's petition for a writ of certiorari.[25]

Another recent Ninth Circuit decision, *Thompson v. Davis*,[26] is in some ways an even greater victory for the prisoners. Several prisoners with a history of substance abuse claimed that the Board violated the ADA by denying them parole based on their histories of substance abuse. The district court dismissed the complaint, reasoning that the ADA did not apply to substantive decisions by paroling authorities.[27] The Ninth Circuit reversed and remanded for further proceedings, concluding that the Board would violate the ADA if it considered prisoners' histories of substance abuse in making parole decisions.[28] The Court stated that "[d]rug addiction that substantially limits one or more major life activities is a recognized disability under the ADA."[29] "While the term 'qualified individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, the ADA does protect individuals who have successfully completed or are participating in a supervised drug rehabilitation program and are no longer using illegal drugs."[30]

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20 295 F.3d 890 (9th Cir. 2002), *cert. denied*, 71 U.S.L.W. 3366 (Mar. 24, 2003).

21 275 F.3d at 856-57.

22 275 F.3d 849.

23 275 F.3d at 864.

24 *Id.* at 877-78.

25 Davis v. Armstrong, 123 S. Ct. 72 (2002).

26 295 F.3d at 894-95

27 *Id.* at 894.

28 In Bogovich v. Sandoval, 189 F.3d 999, 1003-04 (9th Cir. 1999), the Ninth Circuit concluded that the prisoners were not restricted to bringing their challenge in habeas corpus, because they were not necessarily challenging the fact or duration of their confinement.

29 *Thompson*, 295 F.3d at 896.

30 *Thompson*, 295 F.3d at 896.

The Court of Appeals' decision was particularly striking because parole decisions are largely committed to agency discretion.[31] However, just as a parole board cannot discriminate on the basis of race, the Ninth Circuit reasoned, it cannot discriminate on the basis of disability:[32]

> Since a parole board may not categorically exclude African-Americans from consideration for parole because of their race, and since Congress thinks that discriminating against a disabled person is like discriminating against an African-American, the parole board may not categorically exclude a class of disabled people from consideration for parole because of their disabilities.[33]

The Ninth Circuit concluded, "The fact that considering a prisoner for parole is a substantive criminal law decision does not license the decision-maker to discriminate on impermissible grounds."[34] The Supreme Court denied the government's petition for a writ of certiorari.[35]

DISTRICT OF COLUMBIA PRISONERS' AND PAROLEES' UNIQUE SITUATION

District of Columbia prisoners and parolees can raise claims of disability discrimination, but their situation is somewhat different from prisoners in other jurisdictions. The National Capital Area Revitalization Act (Revitalization Act) transferred certain local District of Columbia criminal justice functions to federal officials.[36] As a result, District of Columbia sentenced felons are now in the custody of the Bureau of Prisons (BOP),[37] and their parole matters are decided by the United States Parole Commission (Commission).[38] District of Columbia prisoners challenging federal actors must bring their claims under the Rehab Act,[39] which covers programs and activities of executive agencies.[40] Title II of the ADA

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31 *See, e.g.,* Duckett v. Quick, 282 F.3d 844, 847 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 247 (2002) (decision of a paroling authority will be upheld unless it is "either totally lacking in evidentiary support or so irrational as to be fundamentally unfair."); *see also* Hackett v. United States Parole Com'n, 851 F.2d 127, 129 (6th Cir. 1987) (decisions to grant or deny parole are committed to agency discretion); Turner v. Henman, 829 F.2d 612, 614 (7th Cir. 1987) (parole decisions of the U.S. Parole Commission are committed to agency discretion for purposes of the Administrative Procedure Act (APA)); Edmundson v. Turner, 954 F.2d 510 (8th Cir. 1992) (parole decisions are committed to the discretion of the U.S. Parole Commission).

32 295 F.3d at 898.

33 *Id.*

34 *Thompson*, 295 F.3d at 898.

35 Davis v. Thompson, 71 U.S.L.W. 3366 (March 24, 2003).

36 Pub. L. 105-33 (1997)

37 D.C. Code § 24-101 (2002) (formerly codified as D.C. Code § 24-1201).

38 D.C. Code § 24-131 (2002) (formerly codified as D.C. Code § 24-1231).

39 Alternatively, D.C. prisoners could consider arguing that the federal government has assumed the responsibilities of a state or local entity under the Revitalization Act.

40 29 U.S.C. § 794 (2000).

covers only state and local entities.[41] In contrast, detainees and misdemeanants who remain at the District of Columbia Central Detention Facility and are challenging the actions of D.C. officials may bring their claims under the ADA, because D.C. is considered a state or local entity for ADA purposes.[42] Since claims and defenses under the two statutes are largely interchangeable,[43] D.C. prisoners should enjoy materially similar protections.

Potential Obstacles to Litigation

Although *Yeskey*, *Armstrong*, and *Thompson* provide cause for celebration, there are some barriers to litigation. One of these barriers is the Prison Litigation Reform Act (PLRA).[44] The PLRA bars recovery for mental or emotional injury without a prior physical injury.[45] In *Davis v. District of Columbia*,[46] the D.C. Circuit concluded that this provision bars damages awards for violations of the ADA and Rehab Act without physical injury.[47] The Seventh Circuit reached the same conclusion in an ADA case, *Cassidy v. Indiana Dep't of Corrections*.[48] The PLRA "precludes claims for emotional injury without any prior physical injury," reasoned the *Davis* court, "regardless of the statutory or constitutional basis of the legal wrong."[49] The PLRA also requires that incarcerated people exhaust institutional grievance systems before filing suit.[50] The Supreme Court has interpreted this exhaustion requirement broadly,[51] and incarcerated people bringing claims under the ADA and the Rehab Act should make every effort to exhaust all available administrative remedies.

It is important to keep in mind, however, that some provisions of the PLRA, such as the limitation on recovery for mental and emotional injuries and the ex-

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41 42 U.S.C. § 12131 (2000).

42 Miller v. District of Columbia, 983 F. Supp. 205 (D.D.C. 1997) (concluding that District of Columbia violated Title II of the ADA and Section 504 of the Rehabilitation Act by failing to provide 911 TDD service for deaf citizens); Galloway v. D.C. Superior Court, 816 F. Supp. 12, 19 (D.D.C. 1993) ("it is . . . obvious that the Superior Court system falls within the parameters of the ADA").

43 *See Galloway*, 816 F. Supp. at 12 n.14.

44 Pub. L. 104-134, 110 Stat. 1321 (codified in scattered sections of 18 U.S.C.)

45 42 U.S.C. § 1997e(e) (2000).

46 158 F.3d 1342 (D.C. Cir. 1998).

47 However, in the case of a wrongful denial of parole, some advocates have argued that the resultant period of incarceration can constitute a "physical injury" within the meaning of the PLRA.

48 199 F.3d 374 (7th Cir. 2000).

49 158 F.3d at 1348-49.

50 42 U.S.C. § 1997e(a) provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

51 Porter v. Nussle, 534 U.S. 516, 531 (2002) (holding "that the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."); Booth v. Churner, 532 U.S. 731, 741 (2001) (concluding that the PLRA exhaustion requirements apply to cases for money damages).

haustion requirement, apply only to "suits by prisoners."[52] These provisions of the Act do not apply to claims by ex-prisoners *after* they are released, even for incidents that happened during the period of their incarceration.[53] If there is no restriction by the statute of limitations, incarcerated people can consider waiting to file claims until after they are released.[54]

There are other barriers to recovering damages under the ADA and Rehab Act. Parolees suing federal actors for disabilities discrimination under the Rehab Act – probably most District of Columbia plaintiffs — cannot recover money damages. In *Lane v. Pena*,[55] the Supreme Court concluded that the United States did not waive its sovereign immunity under the Rehab Act.[56] Earlier this year, the Supreme Court also decided that punitive damages are not available under either the ADA or the Rehab Act.[57]

Whether any money damages are available against states under Title II of the ADA remains undecided. In *Yeskey*, the Supreme Court explicitly left open the question of whether Title II of the ADA was a constitutional exercise of Congress' authority under Section 5 of the Fourteenth Amendment.[58]. The circuits are split on the issue.[59] A number of appeals courts have applied the Supreme

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52 42 U.S.C. § 1997e(h) defines "prisoner" as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary programs."

53 *See e.g.,* Greig v. Goord, 169 F.3d 165, 167 (2d Cir. 1999); Janes v. Hernandez, 215 F.3d 541, 543 (5th Cir. 2000); LaFontant v. I.N.S, 135 F.3d 158 (D.C. Cir. 1998) (petitioner ceased being a "prisoner" for PLRA purposes when he was paroled). Contrast Tucker v. Branker, 142 F.3d 1294 (D.C. Cir. 1998) (relief from prison does not relieve a prisoner of his past due obligations for PLRA filing fees that were incurred when he was a prisoner).

54 However, PLRA provisions governing the entry of injunctions and consent decrees in "civil actions with respect to prison conditions" arguably apply even after a named plaintiff is released. 18 U.S.C. § 3626(a) (2000).

55 518 U.S. 187 (1996)

56 *Id.* at 197.

57 Barnes v. Gorman, 122 S.Ct. 2097, 2103 (2002).

58 524 U.S. at 212.

59 *Compare* Hason v. Medical Bd. of California, 279 F.3d 1167 (9th Cir. 2002), *reh'g denied*, 294 F.3d 1166 (9th Cir. 2002), *with* Wessel v. Glendening, 306 F.3d 203, 214 (4th Cir. 2002) ("[W]e conclude that Congress did not validly abrogate the sovereign immunity of the states when it enacted Part A of Title II of the ADA"); Reickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001) ("Congress has not validly acted through its Fourteenth Amendment § 5 power to abrogate state sovereign immunity."); Erickson v. Board of Governors 207 F.3d 945 (7th Cir. 2000) (Eleventh Amendment bars private suits under Title II in federal court); Thompson v. Colorado, 278 F.3d 1020 (10th Cir. 2001) (Title II of ADA not a valid abrogation of state's Eleventh Amendment immunity). *See also* Kiman v. New Hampshire Dep't of Corrections, 311 F.3d 439 (1st Cir. 2002) (staying rehearing on the Title II sovereign immunity issue pending resolution of *Hason*); Garcia v. S.U.N.Y. Health Sciences Center, 280 F.3d 98 (2d Cir. 2001) (holding "that a private suit for money damages under Title II of the ADA may only be maintained against a state if the plaintiff can establish that the Title II violation was motivated by either discriminatory animus or will due to disability."); Popovich v. Cuyoga County Court of Common Pleas, 276 F.3d 808 (6th Cir. 2002) (Eleventh Amendment barred ADA claim to the extent

Court's decision in *Board of Trustees of the University of Alabama v. Garrett*,[60] which concluded that the provision of the ADA barring discrimination in employment (Title I) did not invalidate state employers' immunity to claims for money damages by their employees with disabilities.[61] It remains to be seen whether the Court will apply the reasoning of *Garrett* to non-employment cases involving public entities.

In November 2002, the Supreme Court granted certiorari in *Medical Board of California v. Hason*[62] to decide whether Congress improperly abrogated states' Eleventh Amendment sovereign immunity in enacting Title II of the ADA.[63] That case was removed from the oral argument calendar, however, in March 2003, because the petitioner filed a Motion to Dismiss that was under consideration by the Court at the time this article went to press. At press time, it was not clear whether the Supreme Court would decide this issue this term. Because it is a federal funding statute, the availability of damages under the Rehab Act is more secure, but this issue also has been the subject of recent litigation. Although *Pena* concluded that the federal government had not waived its sovereign immunity in the Rehab Act, compliance with the Rehab Act is a condition of a state accepting federal funds, so a state may waive its immunity by accepting funding.[64] After the Supreme Court in *Atascadero* concluded that Congress had not unmistakably expressed its intent to abrogate states' Eleventh Amendment immunity,[65] Congress amended the Rehab Act to speak more clearly.[66] A number of circuits have confirmed in recent years that acceptance of federal funds

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it relied on congressional enforcement of equal protection under § 5 of Fourteenth Amendment but not to the extent that it relied on congressional enforcement of due process)

60 531 U.S. 356 (2001).

61 *See* note 59 *supra*

62 123 S. Ct. 561 (2002).

63 Although the Supreme Court could conclude that Title II is not a valid exercise of the Supreme Court's power to abrogate state sovereign immunity under § 5 of the Fourteenth Amendment, the availability of the *Ex parte Young* fiction probably will ensure that avenues remain open for seeking prospective relief against a state official in their official capacity. *See* notes 73 and 74 *infra* and accompanying text.

64 *Armstrong*, 275 F.3d at 878. *See also* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686-87 (1999) ("Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and . . . acceptance of the funds entails an agreement to the actions.").

65 "Section 1003 [codified at 42 U.S.C. § 2000d-7a (a)] was enacted in response to our decision in Atascadero State Hosp. v. Scanlon, [473 U.S. 234 (1985)], where we held that Congress had not unmistakably expressed its intent to abrogate the States' Eleventh Amendment immunity in the Rehabilitation Act, and that the States accordingly were not subject to suit in federal court by litigants seeking retroactive monetary relief." *Lane*, 518 U.S. at 198 (internal quotation marks omitted).

66 *See* 42 U.S.C. § 2000d-7a (a) ("A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973.").

constitutes a waiver of a state's immunity under the Rehab Act.[67] However, the Second Circuit has concluded that, despite Congress' clear intent to abrogate state sovereign immunity under the Rehab Act, New York did not waive its immunity by accepting federal funds because it was not clear that the state had intentionally relinquished a "*known* right or privilege."[68] At the time that New York accepted federal funding, the *Garcia* court reasoned, it was believed that Title II of the ADA abrogated a state's sovereign immunity.[69] The state could not have understood the significance of accepting funds and waiving its immunity under the Rehab Act, the court wrote, because, at the time, it appeared that its immunity already had been lost under the ADA.[70]

There are a number of ways that parolees suing state agencies under the ADA and Rehab Act can avoid Eleventh Amendment problems. Litigants could make use of the *Ex parte Young* fiction to sue paroling officials for injunctive relief in their official capacities.[71] Under this doctrine, federal courts can enter prospective relief against state officials in their official capacities, in order to force them to comply with federal law.[72] The Supreme Court suggests this route in *Garrett*,[73] as does the Ninth Circuit in *Armstrong*.[74] The Seventh Circuit has concluded, however, that the *Ex parte Young* fiction is not available under the ADA, because the statute covers "entities" and not "persons."[75] Suits against states and state agencies under the ADA could proceed in state court without presenting Eleventh Amendment problems.[76] Of course, D.C. litigants suing local D.C. agencies

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67 Nihiser v. Ohio Environmental Protection Agency, 269 F.3d 626, 628 (6th Cir. 2001); Jim C. v. United States, 235 F.3d 1079, 1081-82 (8th Cir. 2000); Douglas v. California Department of Youth Authority, 271 F.3d 812, 820-21 (9th Cir. 2001).

68 Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn, 280 F.3d 98, 113-15 (2d Cir. 2001) (emphasis in the original).

69 *Id.* at 114.

70 *Id.*

71 209 U.S. 123, 155-56 (1908). *See* Randolph v. Rodgers, 253 F.3d 342, 349 (8th Cir. 2001) ("We believe that the District Court did not err by holding that [the plaintiff] may proceed under *Ex parte Young* to seek prospective injunctive relief on his ADA and Rehabilitation Act claims against [a state official] in her official capacity.")

72 Martin A. Schwartz, Section 1983 Claims and Defenses § 8.2 at 151 (3d ed. 1997).

73 531 U.S. at 374 n.9.

74 275 F.3d at 877-78.

75 Walker v. Snyder, 213 F.3d 344, 347 (7th Cir. 2000) ("We held above that the only proper defendant in an action under the provisions of the ADA at issue here is the public body as an entity. A suit resting on the *Young* approach is not a suit against the public body and therefore cannot support relief.").

76 *See Walker*, 213 F.3d at 347; *Erickson*, 207 F.3d at 952. The Supreme Court recently has concluded that a state waives its Eleventh Amendment immunity when it voluntarily removes a case from state court to federal court. Lapides v. Board of Regents of the University System of Georgia, 535 U.S. 613 (2002). However, the holding in *Lapides* may be limited, because the Court concluded that the only valid remaining claims against the state were state law claims.

will not encounter Eleventh Amendment problems, because D.C. is not considered a "state" for Eleventh Amendment purposes.[77]

Armstrong and *Thompson* demonstrate that the ADA and the Rehab Act can provide important sources of protection in the parole context, a setting in which there are minimal protections. In light of the PLRA and sovereign immunity issues, it is fair to say that there are greater obstacles to recovering damages under the ADA and Rehab Act than to using the statutes for institutional reform litigation. Given the many issues involved, there is sure to be substantial future litigation nationwide as prisoners and parolees seek relief under the disabilities-rights statutes.

77 LaShawn v. Barry, 87 F.3d 1389, 1393 n.4 (D.C. Cir. 1996).