Stanford Law Review

Volume 69 January 2017

NOTE

Responsiveness to Difference: ADA Accommodations in the Course of an Arrest

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Abstract. When the Supreme Court heard argument in *City & County of San Francisco v. Sheehan* in the spring of 2015, it intended to resolve a circuit split. In granting certiorari, the Court planned to clarify whether individuals with disabilities can sue police officers under the ADA if an officer fails to accommodate a disability in the course of an arrest. However, because the petitioners failed to brief the Court on that question, the portion of the case involving the ADA was dismissed as improvidently granted. Justices Scalia and Kagan were so enraged by the failure to brief on the "certworthy" question that they issued a partial dissent, refusing to issue opinions on any of the attendant issues.

Nearly two years later, courts are still in tension, unable to agree on how to balance the statutory requirements for ADA compliance with the necessity of providing police the requisite leeway to keep both officers and the public safe. This Note provides an in-depth survey of existing jurisprudence, reorganizing the courts' differing tests along clear lines. It then posits a solution: a tripartite test to be applied on a sliding scale that would require officers to afford increased accommodations to individuals with disabilities as a situation becomes more secure. Given that under the current regime individuals with untreated mental illnesses are *sixteen times* more likely than other citizens to be killed by police officers when stopped, a new sliding scale test would hopefully engender reforms in police departments throughout the country that could decrease the incidence of violent confrontations.

* Thank you to the *Stanford Law Review* editing team for working tirelessly on each iteration of this Note. A special thanks to Tierney O'Rourke for finding WiFi in the middle of nowhere just to send a draft back. Thank you to David Alan Sklansky for taking a chance on supervising my work and challenging me to make every part of this scholarship more thorough. Thank you to Mari Newman, David Lane, and Darold Killmer at Killmer, Lane & Newman LLP for trusting me with the case file and investigation that inspired this Note in the first place. Thank you to Evan Chesler at Cravath, Swaine & Moore LLP for helping me to reexamine my approach to argumentation—working with you pushed me to rewrite the Note almost entirely. Thank you to Hank Robinson, Suzy Schwartzmann, and David Schwartzmann—I wouldn't be in law school without you. But most of all, thank you to my Dad, Brad Levin, for all of your insights and edits on this Note, as well as every other paper I've written since third grade.

Table of Contents

Introduction

I first became interested in the relationship between the ADA and arrests during a summer internship. During that time, I assisted on a case that involved a woman with disabilities. She lived in a group home. One afternoon, a fellow patient at her group home became convinced that the woman was going to commit suicide. The supervisor at her home alerted the police, who arrived shortly thereafter. As it turned out, the woman had no interest in committing suicide. When the police arrived at her door, she was naked, just stepping into her bathtub. She did not even hear the knocks over the running water. The police soon broke down her door. Angry, scared, and naked, the woman began screaming, begging the strange men to leave her room. Instead, they attempted to subdue her with force. Ultimately, they arrested her for resisting arrest. They carried her by her hands and feet to the police car. Although they had thrown a blanket over her still nude body, her thrashing bucked off the cover halfway to the car. At the station, they refused to clothe her—she remained naked for the duration of her two-day stay.

This case came to my firm one week after the Supreme Court issued its opinion in *City & County of San Francisco v. Sheehan*.[1] *Sheehan* involved the 2008 shooting of Teresa Sheehan, a woman with mental disabilities.[2] Although Teresa was shot by the police, she was not a criminal. Like the case I considered in my summer job, officers had been called to Teresa's group home because a therapist believed she was suicidal and hoped police would place her on a psychiatric hold.[3] Instead, when Teresa refused to open her bedroom door, officers barged into her room and shot her at least three times.[4] Teresa ultimately survived and went on to sue the City of San Francisco. Her case, which is discussed in more detail below, brought the issue of police violence against individuals with disabilities—and the rights afforded to those individuals—to the Supreme Court. Unfortunately, the Supreme Court failed to resolve the issue, thereby stranding the nation's disabled community in a web of fractured and complex jurisprudence.

This confused jurisprudence is particularly problematic given the dismal and dangerous relationship between police and people with disabilities in America. Although data on police fatalities are limited, a recent report by the Treatment Advocacy Center found that "the risk of being killed during a police incident is *16 times greater* for individuals with untreated mental illness than

1. 135 S. Ct. 1765 (2015).

2. *Id.* at 1771.

3. *Id.* at 1770.

4. *Id.* at 1771.

for other civilians approached or stopped by officers."[5] Other studies estimate that at least half of all fatal police encounters involve people with psychiatric disorders.[6] Despite these alarming statistics, courts have failed to cohesively clarify how the primary statutory protection for people with disabilities—the Americans with Disabilities Act (ADA)[7]—applies to interactions between police and individuals with disabilities during the course of an arrest.[8] Circuit courts have split over the issue and have applied different tests and understandings of the law,[9] thereby generating a splintered and confusing jurisprudence.

Claims regarding police compliance with the ADA are a relatively new development,[10] and little scholarship has addressed—or even compiled a record of—the rapidly evolving doctrine.[11] Plaintiffs bringing arrest-related ADA claims must conform to a series of judicially crafted standards and tests, but these tests vary widely between circuits—with the effect that plaintiffs bringing arrest-related ADA claims in some circuits are practically barred from

5. Doris A. Fuller et al., Treatment Advocacy Ctr., Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters 1, 12 (2015) (emphasis added), http://TACReports.org/overlooked-undercounted.

6. *See, e.g.*, Kelley Bouchard, *Across Nation, Unsettling Acceptance When Mentally Ill in Crisis Are Killed*, PORTLAND PRESS HERALD (Dec. 9, 2012), http://www.pressherald.com/?p=228592 ("[A] review of available reports indicates that at least half of the estimated 375 to 500 people shot and killed by police each year in this country have mental health problems."); *see also* Alex Emslie & Rachael Bale, *More than Half of Those Killed by San Francisco Police Are Mentally Ill*, KQED NEWS (Sept. 30, 2014), http://ww2.kqed.org/news/2014/09/30/half-of-those-killed-by-san-francisco-police-are-mentally-ill ("[A] KQED review of 51 San Francisco officer-involved shootings between 2005 and 2013 found that 58 percent—or 11 people—of the 19 individuals killed by police had a mental illness that was a contributing factor in the incident.").

7. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 337 (codified as amended at 42 U.S.C. §§ 12101-12213 (2015)).

8. *See Sheehan*, 135 S. Ct. at 1778 (Scalia, J., concurring in part and dissenting in part) (explaining that the Supreme Court granted certiorari after the petitioners accurately pointed to a circuit split on this issue).

9. *See id.* (explaining that the Court granted certiorari after petitioners argued that the Ninth Circuit's "'holding that the ADA's reasonable accommodation requirement applies to officers facing violent circumstances' [is] a conclusion that was 'in direct conflict with the categorical prohibition on such claims adopted by the Fifth and Sixth Circuits'" (quoting Petitioners' Brief at 18, *Sheehan*, 135 S. Ct. 1765 (No. 13-1412))).

10. *See infra* Part I.C.1 (explaining that the Supreme Court's decision in Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998), opened the door to claims against police departments for ADA violations in the context of an arrest).

11. For an example of the scholarship that does exist, see James C. Harrington, *The ADA and Section 1983: Walking Hand in Hand*, 19 REV. LITIG. 435 (2000), which discusses how the ADA can overcome some of the barriers left by § 1983 jurisprudence. For a compilation of case law on the topic, see Michael A. Rosenhouse, Annotation, *Application of Title II of Americans with Disabilities Act (42 U.S.C.A. § 12132), Prohibiting Discrimination in Public Services, to Police Investigations*, 72 A.L.R. Fed. 2d 503 (2013).

asserting claims that are viable in other circuits.[12] This Note explores the circuit split by surveying the jurisprudence in each circuit that has considered the question of ADA applicability to arrests. It then posits three ways in which courts can apply the statute to reconcile the circuits' varied applications while still upholding legislative intent.

As noted above, the Supreme Court attempted to clarify this issue when it granted certiorari in *Sheehan* with respect to the question "[w]hether Title II of [the ADA] requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody."[13] However, San Francisco thwarted the Court's efforts when it submitted briefs that did not actually address the question.[14] In fact, the brief raised an entirely different ADA-related argument that the city had not raised below.[15] Accordingly, the Court dismissed the first question as improvidently granted,[16] leaving the circuits split on whether and how the ADA should be applied to police conduct during arrests. This ongoing confusion perpetuates the continued mistreatment of a group whose rights are not clearly explicated at the federal level.

Justice Scalia, in a scathing partial dissent joined by Justice Kagan, refused to answer even the non-ADA-related question in *Sheehan* and reprimanded the petitioners.[17] He accused them of facilitating a "bait-and-switch," in which they petitioned for certiorari with the promise of resolving a circuit split but then asked the Court to decide only an attendant, less controversial, and less "certworthy" question.[18] Justices Scalia and Kagan refused to answer the second question "to avoid being snookered, and to deter future snookering."[19]

As Justice Scalia's partial dissent makes clear, the Court believed the question of ADA applicability to arrests is "certworthy." Even beyond that, the issue's salience is evident. Because the United States lacks a comprehensive infrastructure for housing and treating people with disabilities,[20] "[t]he police

12. *See infra* Part II.B.

13. *Sheehan*, 135 S. Ct. at 1778 (Scalia, J., concurring in part and dissenting in part) (quoting Petitioners' Brief, *supra* note 9, at i). The second question was a tangentially related—and for the purposes of this Note, irrelevant—Fourth Amendment question. *Id.* at 1774-75 (majority opinion).

14. *Id.* at 1772-73 (majority opinion).

15. *Id.*

16. *Id.* at 1774.

17. *Id.* at 1778-80 (Scalia, J., concurring in part and dissenting in part).

18. *Id.* at 1779.

19. *Id.* at 1780.

20. *See* E. FULLER TORREY, OUT OF THE SHADOWS: CONFRONTING AMERICA'S MENTAL ILLNESS CRISIS 10 (1997) (explaining that most public psychiatric hospitals did not replace or reopen any beds after instituting deinstitutionalization); H. Richard Lamb, *Deinstitutionalization and the Homeless Mentally Ill*, 35 HOSP. & COMMUNITY PSYCHIATRY

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are typically the first and often the sole community resource called on to respond to urgent situations involving persons with mental illness."[21] Yet police are often woefully undertrained in dealing with individuals with disabilities.[22] Accordingly, police conduct in the course of an arrest is sometimes dictated by animus, fear, apathetic attitudes, or stereotyping of the disabled rather than reasoned judgment or individualized inquiries. This leads to violent and oftentimes fatal misunderstandings.[23] And when the victims of these misunderstandings attempt to vindicate their rights judicially, they are faced with a murky set of nonuniform standards.

Since no comprehensive study of circuit courts' attitudes toward arrest-related ADA claims currently exists, this Note surveys divergent applications of the ADA. It then seeks to unite them in accordance with both legislative intent and applicable legal theory.

To place this issue in its proper context, Part I examines the history of the ADA as civil rights legislation, focusing specifically on Title II of the ADA and underscoring the ADA's broad-reaching mandate.

Part II then surveys ADA jurisprudence throughout the country, providing a comprehensive picture of when, why, and how the ADA applies to arrests. This survey is the first comprehensive treatment of courts' divergent stances on the ADA in the context of police behavior during an arrest. It first expounds on two foundational cases, *Pennsylvania Department of Corrections v. Yeskey*[24] and *Gorman v. Bartch*.[25] It then explains the circuit courts' alternative applications of two different theories—wrongful arrest theory and reasonable accommodation theory—in this context. It also examines how circuits weigh exigent circumstances in ADA cases. Finally, it reviews the ways in which circuit courts use reasonable accommodation theory in failure-to-train claims.

Part III contends that courts should apply ADA protections—and all of their attendant remedies—to arrests. This Note advances three distinct ways that liability can be imposed to enhance officer and arrestee safety without undermining police discretion in the course of an arrest. Each test applies to a distinct point of an arrest. Such an approach affords police officers flexibility as

899, 899 (1984) (arguing that the way in which states implemented deinstitutionalization contributed to increased rates of homelessness for the mentally ill, as well as criminalization of the mentally ill).

21. H. Richard Lamb et al., *The Police and Mental Health*, 53 PSYCHIATRIC SERVS. 1266, 1266 (2002).

22. *Id.* at 1266-67, 1269; *see also infra* Part III.A.

23. For examples of cases in which officers used force that critically injured or killed a person with disabilities, see *Sheehan*, 135 S. Ct. at 1771; Hainze v. Richards, 207 F.3d 795, 797 (5th Cir. 2000); and Gohier v. Enright, 186 F.3d 1216, 1218 (10th Cir. 1999).

24. 524 U.S. 206 (1998).

25. 152 F.3d 907 (8th Cir. 1998).

an arrest progresses: their obligation to accommodate individuals with disabilities may ebb as an arrest becomes more dangerous. Under these three tests, officers would be subject to the most stringent ADA-mandated duty to adjust procedure to account for disabilities during low-risk situations such as police training, but they would be subject to a lower standard of accommodation in high-risk situations such as dangerous arrest-related altercations.

Before moving into Part I, I proffer two disclaimers. First, this Note assumes that police are clearly aware of and stipulate to knowing about an existing disability. Of course, developing a standard to determine whether an officer knew or should have known about a disability is a complicated question, but an answer is not necessary for the purpose of this Note. Second, while the general principles mentioned herein apply to any disability, some of the arguments and observations are directed toward the most complex area in question: a police officer's statutory obligation to protect those with mental disabilities.

I. The ADA as Civil Rights Legislation

Reports have labeled the ADA "a watershed in the history of disability rights."[26] The four key titles of the Act both established and expanded protections for disabled persons in (I) employment;[27] (II) state services, programs, and activities;[28] (III) public accommodations;[29] and (IV) a variety of other areas, such as telecommunications.[30] Around the time of its passage in 1990, disability rights advocates saw the ADA as "the single most far-reaching legislation ever enacted against discrimination on the basis of disability."[31] In fact, upon signing, President George H.W. Bush declared that the Act "promise[d] to open up all aspects of American life to individuals with disabilities" and "signal[ed] the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life."[32] Congress likewise explained that the Act established a "national mandate" to end discrimination against Americans with disabilities and "ensure[d] that the Federal Government play[ed] a central role" in protecting those with

26. OFFICE OF TECH. ASSESSMENT, U.S. CONG., PSYCHIATRIC DISABILITIES, EMPLOYMENT, AND THE AMERICANS WITH DISABILITIES ACT 1 (1994).

27. 42 U.S.C. §§ 12111-12117 (2015).

28. *Id.* §§ 12131-12165.

29. *Id.* §§ 12181-12189.

30. *Id.* §§ 12201-12213.

31. OFFICE OF TECH. ASSESSMENT, *supra* note 26, at 1.

32. Presidential Statement on Signing the Americans with Disabilities Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1165, 1165-66 (July 30, 1990).

disabilities.[33] In that context, this Part provides a brief primer on the historical development of the ADA as civil rights legislation.

A. Why Congress Created the ADA

The movement calling for civil rights legislation to protect the rights of people with disabilities predates the ADA by nearly twenty years.[34] Starting in the 1970s, disability rights advocates followed in the footsteps of other civil rights movements in protesting, marching, and suing for equal protection under the law.[35] In response, Congress undertook a piecemeal approach to disability rights, passing various legislative acts to establish fair standards for housing, education, and access to support for individuals with developmental disabilities, amid other things.[36]

Among those early disability rights statutes, the most important piece of disability legislation was the Rehabilitation Act of 1973.[37] The key provision of the currently codified version—section 504—declares that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[38] Section 504 applies exclusively to programs that receive federal financial assistance.[39]

Yet despite the sporadic legislative measures (like the Rehabilitation Act), studies conducted in the 1980s showed that Americans with disabilities were still uniquely disadvantaged, both economically and socially. In 1987, the president of Louis Harris and Associates reported to the U.S. Senate the findings of a poll that studied people with disabilities in the United States.[40] The poll concluded that widespread discrimination against people with disabilities had resulted in an isolated population that was more likely to

33. 42 U.S.C. § 12101(b).

34. *See* Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 426-28 (1991).

35. *See id.* at 427-28. For an extensive collection of litigation initiated in pursuit of civil rights for people with disabilities, see THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES, MATERIALS, AND TEXT (Robert L. Burgdorf, Jr. ed., 1980).

36. Burgdorf, *supra* note 34, at 428. In 1983, a report from the United States Commission on Civil Rights identified twenty-nine different federal laws prohibiting discrimination against people with disabilities. U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES app. B at 169-72 (1983).

37. Pub. L. No. 93-122, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701-797 (2015)); Burgdorf, *supra* note 34, at 428.

38. 29 U.S.C. § 794(a).

39. *Id.*

40. Burgdorf, *supra* note 34, at 415-16.

experience "poverty, joblessness, lack of education and failure to participate in social life, shopping and recreation."[41] In the wake of this report, there were four years of congressional hearings and debates, which ultimately culminated in the ADA's passage.[42]

B. Section 504 Broadened to Title II

Title II of the ADA[43] is almost identical to section 504 of the Rehabilitation Act (which remains good law).[44] Specifically, Title II states that "[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[45]

However, Title II is different from section 504 in one significant respect. Whereas section 504 applies *exclusively* to federally funded entities and programs,[46] Title II covers state and local governments, as well as state bar

41. *Id.* at 416.

42. Many scholars note that the legislature conducted extensive debates and hearings prior to passing the ADA. *See, e.g.*, RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 22-23 (2005) ("The ADA is *not* a piece of legislation in which members of Congress tried to sneak in language and hide its true meaning. Instead, it was legislation created as part of a careful and deliberate debate in which nearly everyone generally agreed about the meaning of the statute."); Burgdorf, *supra* note 34, at 429-40 (examining the linguistic proposals and ensuing debates that surrounded the ADA's passage and summarizing key portions of the enacted law).

43. This Note focuses on the limited question of the ADA's application to arrests and accordingly does not delve into the Supreme Court's complex treatment of congressional abrogation of state sovereign immunity under the ADA. For the Court's treatment of that issue, see Tennessee v. Lane, 541 U.S. 509 (2004).

44. *Compare* 42 U.S.C. § 12132 (2015) (stating that under the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity"), *with* 29 U.S.C. § 794(a) (indicating that under the Rehabilitation Act, "[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service"). Due to overlap between the Rehabilitation Act's section 504 and the ADA's Title II, claims may be brought under both statutes. For examples of cases in which plaintiffs sued under both, see Seremeth v. Bd. of Cty. Comm'rs, 673 F.3d 333, 336 (4th Cir. 2012); Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 173 (4th Cir. 2009); and Hainze v. Richards, 207 F.3d 795, 797 (5th Cir. 2000). This Note is exclusively focused on Title II of the ADA.

45. 42 U.S.C. § 12132.

46. 29 U.S.C. § 794(a).

associations, athletic associations, state licensing agencies, voter registration boards, and municipal zoning boards.[47] By applying Title II to a broader range of actors than section 504,[48] Congress reaffirmed its intent to widen the scope of protection for people with disabilities.[49]

C. Foundational Cases: The Two Decisions That Sparked Debate over Police Conduct and the ADA

Two cases are central to understanding how courts evaluate police conduct generally as it relates to the ADA's broad mandate: *Pennsylvania Department of Corrections v. Yeskey*[50] and *Gorman v. Bartch*.[51] As discussed below, these cases jointly established ADA liability within the criminal justice system and opened up the possibility of making arrest-related claims under the ADA.

1. *Pennsylvania Department of Corrections v. Yeskey*

Currently, the relationship between Title II and the criminal justice system is largely defined by the Supreme Court's decision in *Yeskey*, which involved a Pennsylvania prisoner sentenced to serve between eighteen and thirty-six months in a state correctional facility.[52] The sentencing court gave Yeskey the alternative option to complete a motivational boot camp, which would have led to release on parole after only six months.[53] However, due to his medical history of hypertension, Yeskey was refused admission to the program.[54] He filed suit under the ADA, arguing that state prisons and prisoners are covered

47. SUSAN GLUCK MEZEY, DISABLING INTERPRETATIONS: THE AMERICANS WITH DISABILITIES ACT IN FEDERAL COURT 72 (2005).

48. *See id.* (discussing legislative incorporation of section 504 into Title II).

49. The interlocking relationship between the Rehabilitation Act of 1973 and Title II is also significant when considering enforcement. Instead of specifically listing available remedies when public entities fail to comply with Title II, Title II incorporates the remedies of the Rehabilitation Act. 42 U.S.C. § 12133 ("The remedies, procedures, and rights set forth in [section 504 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of . . . this title."). The Rehabilitation Act, in turn, incorporates the remedies of the Civil Rights Act of 1964. 29 U.S.C. § 794a(a)(2) ("The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title."); *see also* 42 U.S.C. §§ 2000d to 2000d-7.

50. 524 U.S. 206 (1998).

51. 152 F.3d 907 (8th Cir. 1998).

52. 524 U.S. at 208.

53. *Id.*

54. *Id.*

by Title II and, accordingly, his disability could not bar him from such a drastic sentence reduction.[55]

In an opinion written by Justice Scalia, the Court concluded that "the ADA plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt."[56] The Court rejected the argument that a prison does not involve the "benefits of the services, programs, or activities of a public entity."[57] The Court also rejected the state's argument that ADA eligibility requires the disabled person to be a voluntary participant in a state program and determined that mandatory state programs—like drug treatment programs for people who are found guilty of possession—still need to be ADA compliant.[58] Finally, the Court addressed the state's contention that the ADA did not specifically apply to state criminal justice systems because the statute did not specifically mention prisons and prisoners.[59] The Court rejected that argument, explaining that "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"[60]

Thus, the Court in *Yeskey* opened the door to ADA litigation in the context of arrests by clarifying that compliance with the statute is required in a criminal justice context and that a program or service does not need to be voluntary, traditional, or mentioned by name in order to fall under the auspices of the ADA.

2. *Gorman v. Bartch*

Three months after the Supreme Court held that prisons are subject to the ADA, the Eighth Circuit decided *Gorman v. Bartch*. Gorman was a wheelchair-bound paraplegic arrested for criminal trespass.[61] The court noted that, before entering the police van, Gorman asked to use the bathroom so that he could empty his urine bag.[62] The police denied his request.[63] Further, the van was not equipped for the wheelchair-bound Gorman to ride in it.[64] Thus, police lifted Gorman from his chair and "tied him with his belt to a mesh wall behind the

55. *See id.*

56. *Id.* at 209.

57. *Id.* at 210 (quoting 42 U.S.C. § 12132).

58. *Id.* at 211.

59. *Id.*

60. *Id.* at 212 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)).

61. Gorman v. Bartch, 152 F.3d 907, 909 (8th Cir. 1998).

62. *Id.*

63. *Id.*

64. *Id.*

bench and also fastened a seatbelt around him" so that he would remain seated.[65] This proved insufficient. During the drive to the police station, the restraints came loose, and Gorman fell to the floor, injuring his shoulders and back so severely that he later required surgery.[66] The fall also broke Gorman's urine bag, "leaving him soaked in his own urine."[67]

Deciding the case right on the heels of *Yeskey*, the Eighth Circuit allowed Gorman's ADA claims. The court explained that involuntary government programs may be subject to ADA liability and that "[a] local police department falls 'squarely within the statutory definition of "public entity,"' just like a state prison."[68] The court further delved into the regulations promulgated alongside the ADA and cited language specifically identifying law enforcement agencies as intended targets of the ADA.[69] It also emphasized a U.S. Department of Justice (DOJ) clarification that a "'program' includes 'the operations of the agency or organizational unit of government receiving or substantially benefitting from the Federal assistance awarded, e.g., *a police department or department of corrections*.'"[70] Both the Eighth Circuit's holding and its legislative-intent-based rationale signaled to potential plaintiffs the possibility that discrimination during the course of an arrest could be grounds for a successful ADA claim.[71]

II. Status of the Law Applying Title II to Arrests

As discussed above, Congress intended for the ADA to broadly protect individuals with disabilities from discriminatory action.[72] The Supreme Court recognized the breadth of that legislative mandate when it found that the criminal justice system is subject to ADA requirements.[73] Yet some courts have

65. *Id.* at 909-10.

66. *Id.* at 910.

67. *Id.*

68. *Id.* at 912 (citation omitted) (quoting Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 210 (1998)).

69. *Id.* at 913 ("[T]he general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities." (quoting 28 C.F.R. § 35 app. A)).

70. *Id.* (emphasis added) (quoting 28 C.F.R. § 42.540(h)).

71. For a discussion of the potential ramifications of *Gorman v. Bartch* written shortly before the Eighth Circuit's opinion issued, see James D. Johnson, Note, *Does the Americans with Disabilities Act Apply to the Conduct of Law Enforcement Officers Pursuant to Arrests?: A Survey of* Gorman v. Bartch, 14 GA. ST. U. L. REV. 901 (1998), which explains that there exists ample evidence to find that the ADA applies to arrests.

72. *See supra* Part I.A-B.

73. *See supra* Part I.C.1.

found that there can be no ADA liability for large chunks of arrest-related conduct. Others apply the ADA to arrests more broadly but use differing tests and rationales in so doing.[74] This Part examines exactly how and why police conduct is subject to the ADA under current jurisprudence.[75]

A. The Importance of Remedies

Before delving right into the jurisprudential development of the ADA, it is important to understand why ADA remedies are so significant in the arrest context. In fact, some readers may wonder why the application of the ADA matters at all, given that the Fourth Amendment requires police to be reasonable in conducting searches and seizures[76] and § 1983 creates a private cause of action to vindicate federal rights.[77]

As James C. Harrington explains in his article on how the ADA can fill in gaps left by § 1983 and constitutional litigation, "[i]n a real sense, the ADA [is] the most comprehensive civil rights law passed by Congress [that] provides relief in a great number of situations in which § 1983 does not."[78] Harrington further writes that a number of barriers exist for plaintiffs attempting to bring

74. *See infra* Part II.B.2.

75. When considering whether Title II of the ADA applies to arrests, some ancillary questions arise. First, courts considering the ADA's reach often consider whether the officers involved are entitled to qualified immunity. *See, e.g.*, *Gorman*, 152 F.3d at 914-16 (affirming the lower court's finding that the lack of clarity regarding ADA applicability to transportation of arrestees meant the officers involved were entitled to qualified immunity in their individual capacities). Additionally, plaintiffs may hope to apply the ADA in a variety of postarrest and pretrial circumstances, including at booking, in signing consent forms, and in pretrial detainment. While these issues are fruitful areas for discussion, this Note is specifically focused on ADA applicability during on-the-street encounters. Other issues will be discussed only where they substantially influence the precedent for on-the-street encounters.

76. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

77. 42 U.S.C. § 1983 (2015) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .").

78. Harrington, *supra* note 11, at 437; *see also* Rachel E. Brodin, Comment, *Remedying a Particularized Form of Discrimination: Why Disabled Plaintiffs Can and Should Bring Claims for Police Misconduct Under the Americans with Disabilities Act*, 154 U. PA. L. REV. 157, 177-94 (2005) (arguing that plaintiffs should bring complementary § 1983 and ADA claims because the elements of each claim are sufficiently different and the ADA may be a way to avoid the procedural barriers that exist in § 1983 litigation).

§ 1983 claims.[79] Those barriers include, but are not limited to, qualified immunity for officers, defendants' rights to interlocutory appeals that can significantly lengthen the litigation process, municipal immunity, and sovereign immunity.[80] Without the weight of the same "court-created doctrines and decisional law" that is attached to § 1983 litigation,[81] the ADA may provide relief that would otherwise be hindered by procedural roadblocks.

B. Two Theories for ADA Claims

As discussed in Part I.C.2 above, *Gorman* established that police departments may be liable under the ADA for conduct in the course of an arrest. After *Gorman*, courts began using two predominant approaches to determine whether discrimination occurred during an arrest: the wrongful arrest theory and the reasonable accommodation theory.[82] The reasonable accommodation theory almost always incorporates analysis of a third concept—exigent circumstances[83]—and also accounts for failure-to-train claims. This Subpart discusses these various theories and their applications.

1. Wrongful arrest theory

The wrongful arrest theory generally applies when a police officer arrests a person with a disability because the officer misperceives the effects of the disability as criminal conduct.[84] To fit within the wrongful arrest theory, an arrestee must be engaged in otherwise lawful conduct at the time of arrest.[85] The three paradigmatic cases that consider the wrongful arrest theory are *Lewis v. Truitt*,[86] *Jackson v. Inhabitants of Sanford*,[87] and *Gohier v. Enright*.[88]

79. *See* Harrington, *supra* note 11, at 436; *see also* Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537, 537-38, 542 (2003) (providing a detailed analysis of the increasing difficulty of bringing plaintiffs'-side civil rights claims, including but not limited to § 1983 cases).

80. Harrington, *supra* note 11, at 436.

81. *Id.* at 464.

82. *E.g.*, Gohier v. Enright, 186 F.3d 1216, 1221-22 (10th Cir. 1999) (acknowledging both theories).

83. *E.g.*, Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000). Black's Law Dictionary defines "exigent-circumstances doctrine" as "[t]he rule that emergency conditions may justify a warrantless search and seizure, esp. when there is probable cause to believe that evidence will be removed or destroyed before a warrant can be obtained." *Exigent-Circumstances Doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014).

84. *Gohier*, 186 F.3d at 1221.

85. *See Hainze*, 207 F.3d at 800-01.

86. 960 F. Supp. 175, 179 (S.D. Ind. 1997).

87. Civ. No. 94-12-P-H, 1994 WL 589617, at *6 (D. Me. Sept. 23, 1994).

88. 186 F.3d at 1221.

In *Lewis*, a case in the Southern District of Indiana, police officers arrested a deaf plaintiff for resisting arrest when he did not comply with verbal commands.[89] There, the district court partially denied the police department's motion for summary judgment because there was an issue of material fact about whether the "[d]efendants knew Charles Lewis was deaf but refused to take steps to communicate with him and then arrested him because he did not respond to them appropriately."[90] That is, although the officers realized the plaintiff was deaf, they allegedly treated the effects of his disability as criminal conduct.

In *Jackson*, a case in the District of Maine, an officer arrested the plaintiff for drunk driving, even though the plaintiff informed the police officer that his symptoms were the result of a brain aneurism.[91] The district court denied the police department's motion for summary judgment, noting that, based on the ADA's legislative history, "Congress was concerned with unjustified arrests of disabled persons such as Jackson alleges here."[92]

While the third case, *Gohier v. Enright*, did not explicitly endorse the wrongful arrest theory, the Tenth Circuit left open the possibility that the theory may be a valid basis for ADA claims.[93] In *Gohier*, a police officer saw the schizophrenic victim walking in the street and directed him to stop.[94] The victim continued approaching the officer with his hand behind his back and then allegedly began making slashing motions.[95] The officer shot the victim twice, killing him.[96] The Tenth Circuit held that the wrongful arrest theory was inapplicable to the facts because the officer acted in self-defense and did not misperceive lawful conduct as criminal activity.[97] However, the court also suggested that the wrongful arrest theory might be pursued as a valid basis for liability under the ADA, writing that, although the wrongful arrest theory "does not apply to the facts of *this* case, and Gohier has expressly declined to invoke the [reasonable accommodation theory,] . . . a broad rule categorically excluding arrests from the scope of Title II . . . is not the law."[98]

89. 960 F. Supp at 176-77.

90. *Id.* at 178-79.

91. 1994 WL 589167, at *1.

92. *Id.* at *6.

93. 186 F.3d at 1221 (noting that the court did not need to analyze a wrongful arrest theory of liability as it "d[id] not apply to the facts of this case").

94. *Id.* at 1217-18.

95. *Id.* at 1218.

96. *Id.*

97. *See id.* at 1221.

98. *Id.* (emphasis added).

Finally, there is the case of *Anthony v. City of New York*.[99] Although *Anthony* never uses the term "wrongful arrest" and applies a standard that has not been widely adopted, this case merits brief discussion in this Subpart. In *Anthony*, the Second Circuit considered a case where the police entered the home of an adult woman with Down syndrome without a warrant and proceeded to seize her and involuntarily commit her to a hospital overnight.[100] Although the case primarily focuses on qualified immunity and § 1983 claims in light of the officers' warrantless entry into a private residence, the court, in an opinion written by then-Judge Sotomayor, briefly implied that a discriminatory intent standard applied to the plaintiff's ADA claims.[101] Although "[t]he officers admitted that they perceived [Anthony] as disabled, and that they arrested her simply because they thought there was something wrong with her," the court affirmed summary judgment for the city because "[t]here [was] no evidence . . . that the seizure and hospitalization were motivated by discrimination against individuals with disabilities."[102] The court added that "[i]f, as Anthony claims, the seizure and hospitalization were motivated by the officers' discrimination against individuals with disabilities, she would presumably have a claim that she was 'subjected to discrimination' by a public entity in violation of Title II."[103]

Thus, the *Anthony* court suggested an alternative standard, discriminatory intent.[104] Unlike the wrongful arrest theory, the discriminatory intent standard includes a mens rea component. Whereas the wrongful arrest theory only requires plaintiffs to show that a police officer mistook a disability for a criminal act, the discriminatory intent standard requires plaintiffs to show that "discriminatory intent was a motivating factor in [an officer's] decision" to seize the plaintiff.[105] At least one subsequent decision within the Second Circuit has considered the wrongful arrest and reasonable accommodation theories, in addition to the discriminatory intent standard.[106]

In sum, there are relatively few published opinions applying the wrongful arrest theory. But those that have applied it suggest wrongful arrest claims are

99. 339 F.3d 129 (2d Cir. 2003).

100. *Id.* at 131.

101. *See id.* at 141.

102. *Id.* (first and second alterations in original).

103. *Id.* (quoting 42 U.S.C. § 12132).

104. *Id.*

105. *Id.*

106. *See* Ryan v. Vt. State Police, 667 F. Supp. 2d 378, 386-89 (D. Vt. 2009) (recognizing that the Second Circuit had not yet determined whether the ADA applies to arrests and finding that there were no material facts in dispute to satisfy the discriminatory intent standard or support the wrongful arrest theory before granting summary judgment for the defendants).

largely uncontroversial. This is likely because the *only* basis for liability in a wrongful arrest case is the misperception of a disability as criminal activity.

2. Reasonable accommodation and on-the-street encounters

As discussed above, the wrongful arrest theory makes ADA compliance contingent on a plaintiff's otherwise lawful conduct. The reasonable accommodation theory, conversely, accounts for discrimination against people with disabilities who were not acting lawfully at the time of their arrest. The reasonable accommodation theory applies where police officers "properly investigated and arrested a person with a disability for a crime unrelated to that disability, [but] they failed to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees."[107]

The reasonable accommodation theory covers claims of improper treatment during arrest, improper treatment during postarrest detainment, and inadequate police training.[108] This Note is limited to issues arising out of improper treatment during arrest, yet even that part of the law is complicated by the sheer number of slightly divergent interpretations of each general rule. Nonetheless, reasonable accommodation standards can generally be divided into three buckets: a separate exigent circumstance standard, an integrated exigent circumstance standard, and a failure-to-train standard.

a. The judicially evaluated separate exigent circumstances test

As noted above, plaintiffs in reasonable accommodation cases are usually engaged in unlawful conduct. As such, plaintiffs hoping to succeed on a "reasonable accommodation" claim must override the court's concern about underlying criminal behavior. It follows that plaintiffs often attempt to convince the court that a specific accommodation or modification should have been made *despite the fact that an arrest was otherwise justified* and show that the requested accommodation or modification would have been reasonable given the circumstances.

For this reason, many courts faced with reasonable accommodation claims consider whether the requested accommodations were made unreasonable by the exigent circumstances at the scene of a crime. Such cases include *Hainze v.*

107. Gohier v. Enright, 186 F.3d 1216, 1220-21 (10th Cir. 1999).

108. *Cf. id.* at 1222 ("Under *Gorman*'s rationale, Gohier might have argued that Title II required Colorado Springs to better train its police officers to recognize reported disturbances that are likely to involve persons with mental disabilities, and to investigate and arrest such persons in a manner reasonably accommodating their disability.").

Richards, where the plaintiff was armed with a knife,[109] and *City & County of San Francisco v. Sheehan*, where the plaintiff had barricaded herself in her room with a knife (both discussed in more detail below).[110] In such situations, some courts apply a separate exigent circumstances test in which the court first examines the record, then separates the exigent circumstances from the rest of the fact pattern. It then determines if those circumstances, standing alone, constitute a threat to human safety. If so, the court makes a finding of law based on whether that threat to human safety makes a requested accommodation or modification unreasonable.[111] This separate exigent circumstances test, in use in two circuits, often makes exigent circumstances the determining factor of the validity of plaintiffs' claims.

The Fifth Circuit employs the separate exigent circumstances test, and it treats exigent circumstances as a complete bar to ADA claims. *Hainze v. Richards* set that precedent. *Hainze* involved a mentally ill plaintiff holding a knife; when the plaintiff walked toward the officer despite verbal commands to stop, that officer fired two shots into the plaintiff's chest.[112] The Fifth Circuit held that "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life."[113] Thus, under the *Hainze* standard, reasonable accommodation of an individual's disabilities is not required until "the area [is] secure and there [is] no threat to human safety."[114] In the wake of this decision, lower courts often deny reasonable accommodation claims whenever exigent circumstances arise.[115]

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109. 207 F.3d 795, 801 (5th Cir. 2000).

110. 135 S. Ct. 1765, 1770 (2015).

111. *See infra* text accompanying notes 112-20 (discussing *Hainze*, 207 F.3d 795, and Bircoll v. Miami-Dade County, 480 F.3d 1072 (11th Cir. 2007), which apply different versions of a separate exigent circumstances test).

112. 207 F.3d at 797.

113. *Id.* at 801.

114. *Id.* at 802.

115. *See, e.g.*, Robertson v. City of Bastrop, No. A-14-CV-0839-SS, 2015 WL 6686473, at *8 (W.D. Tex. Oct. 29, 2015) (granting defendants summary judgment on Title II issues because, under *Hainze*, reasonable accommodations are only required after the scene is secure); Schmidt v. Texas, No. H-08-cv-01696, 2009 WL 7808952, at *4 (S.D. Tex. Jan. 12, 2009) (denying plaintiff's ADA claims for accommodation during a DWI investigation because "DWI stops are the type of pre-arrest investigation that the Fifth Circuit envisioned when it articulated the [*Hainze*] rule"); Joseph v. Port of New Orleans, No. CIV. A. 99-1622, 2002 WL 342424, at *10 (E.D. La. Mar. 4, 2002) (granting summary judgment for municipal entities sued under Title II, citing *Hainze* as well as the lack of unique injury), *aff'd per curiam sub nom.* Joseph v. Bd. of Comm'rs, 55 F. App'x 717 (5th Cir. 2002). *But see* Hobart v. City of Stafford, No. 4:09-cv-3332, 2010 WL 3894112, at *10-11 (S.D. Tex. Sept. 29, 2010) (denying defendants' motion to dismiss and distinguishing
footnote continued on next page

The Eleventh Circuit likewise performs a separate exigent circumstances evaluation when faced with reasonable accommodation claims. But unlike the Fifth Circuit, that court does not treat exigent circumstances as a full bar to ADA claims, meaning that the mere existence of exigent circumstances cannot automatically render accommodations unreasonable. *Bircoll v. Miami-Dade County* set that precedent. There, a deaf arrestee who had approximately 20% hearing capacity when wearing a hearing aid was pulled over under suspicion of drunk driving.[116] The plaintiff alleged that he could not fully understand the officer's directions during the field sobriety test due to his hearing loss.[117] The Eleventh Circuit held that "[t]he ADA's 'reasonable modification' principle . . . does not require a public entity to employ any and all means to make auxiliary aids and services accessible to persons with disabilities, but only to make 'reasonable modifications.'"[118] Based on this understanding, the Eleventh Circuit affirmed the district court's grant of summary judgment on the field sobriety claims because "[t]he exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance" and "waiting for an oral interpreter before taking field sobriety tests is not a reasonable modification of police procedures given the exigent circumstances of a DUI stop on the side of a highway."[119] Thus, the Eleventh Circuit suggested that the ADA applies to arrests generally, while also holding that the court should separate out and evaluate alleged exigent circumstances to determine whether the requested modifications and accommodations are unreasonable.[120]

In sum, both the Fifth and Eleventh Circuits use a separate exigent circumstances test. Both circuits consider the exigencies apart from the facts, then determine whether ADA compliance was required based on the extent (or existence) of those exigencies. But the tests employed yield vastly different results. When exigent circumstances arise in the Fifth Circuit, police are not required to reasonably accommodate disabilities until the scene is secure.

Hainze on factual grounds, which included the "well-pleaded fact[]" that the plaintiff in *Hobart* "was not an immediate threat to . . . anyone in the vicinity").

116. 480 F.3d at 1075-76.

117. *Id.* at 1077.

118. *Id.* at 1082 (quoting Tennessee v. Lane, 541 U.S. 509, 531 (2004)).

119. *Id.* at 1085-86.

120. The Eleventh Circuit's finding was also supported by a policy argument. The court wrote that Bircoll's argument that he should have had an interpreter on the scene for the field sobriety tests "would force police to arrest deaf DUI suspects before even ascertaining if the suspect could communicate . . . and understand the field sobriety tests. This would penalize deaf DUI suspects and not afford them the opportunity to perform the field tests and show their sobriety." *Id.* at 1086.

When exigent circumstances arise in the Eleventh Circuit, however, those circumstances are used to evaluate the reasonableness of the requested accommodation or modification.

b. Integrating exigent circumstances with a reasonableness test

While the above circuits consider exigent circumstances—particularly a threat to human safety—as the sole determinant of whether a requested accommodation is reasonable, other circuits consider a larger set of factors. While these circuits do not eschew exigent circumstance considerations entirely, they tend to view exigencies as one factor in a broader calculation. As this Subpart will demonstrate, the way exigencies are factored into the reasonableness calculation varies. Still, the circuits discussed below are united by the way they *integrate* the exigencies into a broader scheme rather than separate them out and make a decision based entirely upon the existence or extent of exigent circumstances.

The Fourth Circuit—where arrest-related ADA jurisprudence has changed drastically over the last twenty years—has adopted a prime example of an integrated exigent circumstances test. The Fourth Circuit first considered the ADA's reasonable accommodation requirements in the oft-cited, but outdated, *Rosen v. Montgomery County*.[121] In that pre-*Yeskey* case, the Fourth Circuit strongly suggested that the ADA did not apply to arrests at all.[122] The case involved a DUI, and the court primarily relied on the argument that defining an arrest for drunk driving as the benefit of a program or service appeared to be "a stretch of the statutory language."[123] Although *Yeskey* apparently contravened this logic, numerous courts outside of the Fourth Circuit have cited *Rosen*'s "stretch of the statutory language" holding.[124]

The Fourth Circuit departed from *Rosen*-based precedent in the years after the Supreme Court decided *Yeskey*. In *Waller ex rel. Estate of Hunt v. City of Danville*, the Fourth Circuit left open the question whether ADA compliance is required during the course of an arrest.[125] The court explained that, even if a duty to accommodate does exist, it would be tempered by exigent circumstanc-

121. 121 F.3d 154 (4th Cir. 1997).

122. *Id.* at 157 ("The most obvious problem [with the plaintiff's ADA claims] is fitting an arrest into the ADA at all.").

123. *Id.*

124. *See, e.g.*, Bircoll v. Miami-Dade County, 410 F. Supp. 2d 1280, 1283-84 (S.D. Fla. 2006) ("[T]he ADA does not apply to on-the-street DUI arrest[s] . . . ." (citing *Rosen*, 121 F.3d at 156-58)), *aff'd*, 480 F.3d 1072. For an example of citations to *Rosen*'s statutory and injury-based arguments, see Tucker v. Tennessee, 539 F.3d 526, 534-35 (6th Cir. 2008).

125. 556 F.3d 171, 175 (4th Cir. 2009) (stating that the court "shall assume for purposes of argument that a duty of reasonable accommodation existed" without establishing whether it did, in fact, exist).

es.[126] Thus, in order to determine whether an officer acted reasonably, *Waller* explains, courts should consider exigent circumstances using an all-inclusive approach because

> [r]easonableness in law is generally assessed in light of the totality of the circumstances, and exigency is one circumstance that bears materially on the inquiry into reasonableness under the ADA. Accommodations that might be expected when time is of no matter become unreasonable to expect when time is of the essence.[127]

This approach contrasts with other courts that perform a separate exigent circumstance evaluation. As discussed above, decisions like *Hainze* and *Bircoll*—which are controlling precedent in the Fifth and Eleventh Circuits, respectively—parse out exigent circumstances, then decide whether a requested accommodation is reasonable based solely on those circumstances.[128] *Waller* casts a wider net, treating exigency as one element of a more flexible totality of the circumstances consideration—although it does not spell out exactly *which* other factors should be considered.[129]

A later Fourth Circuit decision, *Seremeth v. Board of County Commissioners*,[130] illustrates the significance of abolishing separate consideration of exigent circumstances. There, the plaintiff was a deaf man accused of domestic violence.[131] The police failed to use American Sign Language (ASL) or provide any auxiliary aids throughout his arrest.[132] Although an interpreter arrived forty-five minutes after the police entered the home and handcuffed the plaintiff, she lacked fluency and was accordingly unable to communicate with the plaintiff.[133] This allegedly resulted in emotional issues stemming from a violation of the plaintiff's right to communicate.[134] The Fourth Circuit ultimately held that "police investigations are subject to the ADA's framework, [although] the exigent circumstances involved in [the currently considered] suspected domestic violence situation render the accommodations provided reasonable under the ADA."[135] Nonetheless, the Fourth Circuit made clear that exigent circumstances do not *always* exempt police from all reasonable accommodation requirements:

126. *Id.*

127. *Id.*

128. *See supra* Part II.B.2.a.

129. 556 F.3d at 175.

130. 673 F.3d 333 (4th Cir. 2012).

131. *Id.* at 335.

132. *Id.* at 335-36.

133. *Id.*

134. *Id.* at 336.

135. *Id.* at 337.

> We find that while there is no separate exigent-circumstances inquiry, the consideration of exigent circumstances is included in the determination of the reasonableness of the accommodation. Most importantly, *nothing in the text of the ADA suggests that a separate exigent-circumstances inquiry is appropriate*. Furthermore, this view of the ADA has the ancillary benefit of encouraging the provision of accommodations during exigent circumstances.[136]

The court's commentary about the "ancillary benefit" of applying the ADA is notable because it recognizes the policy benefit of encouraging reasonable accommodations in the course of an arrest.

By refusing to splice exigent circumstance considerations from the larger reasonableness inquiry, the Fourth Circuit shifted the significance of exigencies in arrest-related ADA claims in *Seremeth* and *Waller*. Instead of treating exigencies and on-the-scene danger as an exception to compliance, the new tests take a more expansive view, allowing judges and juries to make a holistic determination about police conduct in light of all the facts.

The Ninth Circuit established a similar totality of the circumstances test in *Sheehan v. City & County of San Francisco*, the case that made it all the way to the Supreme Court.[137] As discussed above, that case involved a plaintiff with a mental illness living in a group home.[138] When the plaintiff, Teresa, began acting erratically and making violent threats, her in-house program supervisor filled out a "5150 form," which would permit police to intervene and bring Teresa to a secure facility.[139] When officers arrived at the home, they went to Teresa's room, knocked, and then unlocked the door using the program supervisor's key.[140] When the officers entered, Teresa began screaming and came toward them with a knife.[141] She forced the officers to retreat under threat and slammed the door shut.[142] The officers called for backup assistance.[143] Although backup arrived almost immediately, the first two officers did not wait for the assisting officers to enter the building and help the mentally ill woman.[144] Instead, the two officers forced their way into Teresa's room for a second time, guns drawn.[145]

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136. *Id.* at 339 (emphasis added).

137. 743 F.3d 1211 (9th Cir. 2014), *rev'd in part, cert. dismissed as improvidently granted in part, and remanded*, 135 S. Ct. 1765 (2015).

138. *Id.* at 1215.

139. Petitioners' Brief, *supra* note 9, at 3.

140. *Id.* at 5.

141. *Id.*

142. Brief in Opposition at 5, *Sheehan*, 135 S. Ct. 1765 (No. 13-1412).

143. *Id.*

144. *Id.* at 5-6.

145. *Id.*

When the officers reentered the room, they found Teresa standing inside, holding her knife.[146] One of the officers responded by shooting pepper spray in Teresa's face.[147] Then both officers discharged their guns, shooting Teresa in her torso and left arm.[148] They did not stop shooting after Teresa fell to the ground; indeed, officer testimony showed that she was shot in the face after she was already on the floor.[149] Teresa—who miraculously survived—brought claims under the reasonable accommodation theory, alleging that she would not have reacted so violently if the officers had attempted to accommodate her disability by employing tactics to de-escalate the situation.[150]

In response, the Ninth Circuit held that the ADA does apply to arrests.[151] In its decision, the court acknowledged both the wrongful arrest and reasonable accommodation theories as valid grounds for ADA claims.[152] The decision largely focuses on the reasonable accommodation theory because the plaintiff raised a reasonable accommodation claim.[153]

In addressing the ADA claims, the court explained that it "agree[d] with the Eleventh and Fourth Circuits that exigent circumstances inform the reasonableness analysis under the ADA, just as they inform the distinct reasonableness analysis under the Fourth Amendment."[154] The analogy to the Fourth Circuit's *Waller* test places the Ninth Circuit firmly in the integrated exigent circumstance camp. Thus, in the Ninth Circuit, exigencies inform but do not define a reasonableness analysis.

In addition to its exigent circumstances holding, the *Sheehan* court clarified two significant points in the reasonable accommodation theory: burden of proof and summary judgment standards.[155] With regard to the burden of proof, the court explained that the plaintiff in a reasonable accommodation case "bears the initial burden of producing evidence of the existence of a reasonable accommodation."[156] One way a public entity may defeat a plaintiff's

146. *Id.* at 6.

147. *Id.*

148. *Id.*

149. *Id.*

150. *See* Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part, cert. dismissed as improvidently granted in part, and remanded*, 135 S. Ct. 1765 (2015).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 1233.

156. *Id.*

reasonable accommodation claim is to show "that making the modifications would fundamentally alter the nature of the service, program, or activity."[157]

In terms of summary judgment standards, the court's decision suggested that a judge should not personally perform the reasonableness analysis.[158] Instead, the court analyzed whether a "reasonable jury . . . could find that the situation had been defused sufficiently, following the initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics, including the accommodations that Sheehan asserts were necessary."[159] And because "the reasonableness of an accommodation is ordinarily a question of fact," the court determined that the city was not entitled to summary judgment and that the jury should decide whether the requested accommodation was reasonable given the exigent circumstances.[160] It is significant that the *Sheehan* court explicitly removed the reasonableness analysis from the hands of a judge and pushed those claims toward the courtroom. Regardless of one's faith in the discerning power of the jury, pushing arrest-related ADA claims toward trial at least gives plaintiffs the potential opportunity to vindicate their statutory rights.

As discussed above, the Supreme Court eventually granted certiorari on the question whether the Ninth Circuit should have applied the ADA to arrests.[161] Then the Court dismissed that question as improvidently granted.[162] Thus, the *Sheehan* ADA finding remains good law in the Ninth Circuit.

The Southern District of New York's recent decision in *Williams v. City of New York*[163] is, in many ways, similar to *Sheehan*. Before digging into its reasoning, it is important to note two things. As discussed below, *Williams* does not discuss the discriminatory intent standard of *Anthony*, but it does consider both the wrongful arrest and reasonable accommodation theories. Because its reasonable accommodation treatment is more thorough, it has been placed in the reasonable accommodation Subpart to minimize confusion.

In *Williams*, the New York City Police Department arrested a deaf woman and detained her overnight, despite inadequate attempts at communication at the scene of the arrest.[164] In its decision, the court explained that there was a genuine question of fact as to whether the police had probable cause to arrest

157. *Id.* (quoting 28 C.F.R. § 35.130(b)(7)).

158. *Id.*

159. *Id.*

160. *Id.*

161. City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1772 (2015).

162. *Id.* at 1774.

163. 121 F. Supp. 3d 354 (S.D.N.Y. 2015).

164. *Id.* at 359-60.

the deaf plaintiff in the first place.[165] Whether they had probable cause, the court explained, would determine whether the case was treated as a wrongful arrest or reasonable accommodation case.[166] So if the jury found that the police arrested the deaf woman without probable cause, then the case could proceed under a wrongful arrest theory because the plaintiff may have been arrested based on her disability.[167] Perhaps the discriminatory intent standard would have been applied if the jury found that it was a case of wrongful arrest, but the decision does not discuss that.

In the alternative, if the jury found that the police did have probable cause to arrest the deaf woman, the defendants could still be held liable under the reasonable accommodation theory.[168] The court explained that, if a jury found that the police had probable cause to arrest the plaintiff, "the City must establish that providing her an accommodation during the police officers' 'investigation' would have been 'unreasonable' to rebut Plaintiff's *prima facie* case that an accommodation was available."[169] Essentially, the case unfolded like a choose-your-own-adventure book: first, the jury would determine if the police had probable cause. If the police did not have cause, the jury could proceed under a wrongful arrest theory. If the police did have probable cause, the jury could *still* find the officers liable if they violated the ADA's reasonable accommodation requirements.

After the *Williams* court discussed the reasonable accommodation versus wrongful arrest divide, it turned to the exigent circumstances consideration. The city urged the court to adopt a separate exigent circumstances test similar to the one used in *Hainze*.[170] The city argued that arresting a woman without an ASL interpreter was reasonable given the exigencies involved in securing the scene.[171] The court rejected this argument.[172] It cited *Waller* for the proposition that exigent circumstances are only relevant insofar as they bear on "whether the officers' accommodations were reasonable under the circumstances."[173] Although the court assumed that "the City would be entitled to summary judgment if the record *unequivocally* demonstrated that providing

165. *Id.* at 368.

166. *See id.* at 369.

167. *See id.*

168. *Id.*

169. *Id.*

170. Defendant's Memorandum of Law in Support of Motion for Partial Summary Judgment at 11-12, *Williams*, 121 F. Supp. 3d 354 (No. 12-CV-6805).

171. *Williams*, 121 F. Supp. 3d at 368.

172. *Id.*

173. *Id.* (citing Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 175 (4th Cir. 2009)).

an accommodation before making the arrest would have posed an *unjustifiable risk to public safety*," it did not believe such an unjustifiable risk clearly existed in the case before it.[174]

Like the courts in *Sheehan* and *Seremeth*, the *Williams* court refused to reduce the reasonableness analysis to a separate exigencies consideration. But this district court decision is even more remarkable because of its insistence on deference to the jury. The court not only permitted the jury to determine whether the reasonable accommodation or wrongful arrest theory applied to the facts by determining if probable cause for the arrest existed, it also assumed a very high threshold for granting summary judgment in favor of the police when exigent circumstances exist: an unequivocal demonstration of "unjustifiable risk to public safety."[175]

In summary, the difference between courts' approaches to the application of reasonable accommodation theory turns on two primary features: (1) whether exigent circumstances should be considered in the context of a more holistic totality of the circumstances evaluation and (2) whether what constitutes a reasonable accommodation in any given case should be decided by a judge through summary judgment or passed on to the jury.

3. Reasonable accommodation and police training

While the cases above deal almost exclusively with claims of discriminatory police conduct during the heat of the moment, effective officer training prior to those on-the-street encounters can also constitute a reasonable accommodation for individuals with disabilities. In order for police officers to make reasonable accommodations in the course of an arrest, they may be required to undergo training in proper procedure for handling encounters with people who have disabilities. If an officer acts unreasonably—but only because she was inadequately trained—plaintiffs may attempt to bring a failure-to-train claim against state entities. Because proper training would provide officers with the tools necessary to accommodate disabilities, failure-to-train claims are typically analyzed under the reasonable accommodation theory. This Subpart considers the ADA's mandate for proper training, considering both legislative history and jurisprudence.

a. Legislative intent to enhance police training

Both the ADA's legislative history and regulatory requirements indicate that adequate police training is part of the ADA's mandate. In 1990, the House Judiciary Committee found that

174. *Id.* (emphasis added).

175. *Id.*

> [i]n order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures. . . . Such discriminatory treatment based on disability can be avoided by proper training.[176]

The regulations promulgated pursuant to the ADA also emphasize police training. Shortly after the ADA's enactment, the DOJ published accompanying regulations.[177] Those regulations require public entities to perform self-evaluations of their disability accommodations.[178] The regulations also include an appendix that provides guidance on that subject. Consistent with the concerns voiced by the House Judiciary Committee, the appendix says "it would be appropriate" for public entities doing their self-evaluation "to evaluate training efforts because . . . lack of training leads to discriminatory practices, even when the policies in place are nondiscriminatory."[179] The appendix encourages public entities to evaluate their police training regimes, but it notes that the regulations do not have a specific provision that requires police training to deal with individuals with disabilities.[180] According to the DOJ, there is no training regulation because the necessity of training is self-evident: "[d]iscriminatory arrests and brutal treatment are already unlawful police activities. The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities."[181] These statements, taken together, underscore both legislative and executive intent to apply the ADA to police training.

b. Failure-to-train jurisprudence

Several courts acknowledge that law enforcement can violate reasonable accommodation requirements by inadequately training officers in how to interact with people with disabilities. In *Gohier*, the Tenth Circuit suggested that the plaintiff might have had a valid claim based on the department's failure to train its officers.[182] Because the plaintiff did not present this issue on appeal,

176. H.R. REP. NO. 101-485, pt. 3, at 50 (1990).

177. *See* Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 35,694 (July 26, 1991) (codified as amended at 28 C.F.R. pt. 35 (2016)).

178. 28 C.F.R. § 35.105(a).

179. *Id.* pt. 35 app. B (explaining the self-evaluation requirement).

180. *Id.* (explaining the general prohibitions against discrimination).

181. *Id.*

182. *See* Gohier v. Enright, 186 F.3d 1216, 1222 (10th Cir. 1999) ("Under *Gorman*'s rationale, Gohier might have argued that Title II required Colorado Springs to better train its

footnote continued on next page

the court did not weigh in on the subject.[183] In *Ulibarri v. City & County of Denver*, three deaf plaintiffs alleged that Denver police officers discriminated against them during the course of an arrest.[184] The District of Colorado allowed the plaintiffs to seek compensatory damages for the ADA arrest claims because "[a]lthough it appear[ed] that Denver ma[de] efforts to train its deputies and staff on disability issues, including those affecting deaf individuals, there [was] evidence sufficient for a jury to find that [those] efforts [were] insufficient."[185] And although the Third Circuit has not yet addressed the question of ADA applicability to arrests, a district court has dismissed municipal entities' motions for summary judgment on failure-to-train claims because "modifying police practices to accommodate subjects of the warrants are included in 'programs, services, or activities of a public entity' under . . . the ADA."[186] And in *Jackson v. Inhabitants of Sanford*—discussed above—the District of Maine acknowledged that failure to train was a valid source of ADA liability.[187]

At least two courts have gone beyond the legislative history in justifying the validity of failure-to-train claims, and those courts relied on a temporal theory. In *Buben v. City of Lone Tree*, the District of Colorado pointed to a Pennsylvania district court decision for the proposition that

> [t]he *Hainze* rationale for disallowing ADA claims when the challenged conduct occurred during 'exigent circumstances' does not apply here . . . . Plaintiffs have

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police officers to recognize reported disturbances that are likely to involve persons with mental disabilities, and to investigate and arrest such persons in a manner reasonably accommodating their disability. Gohier, however, did not make any such argument under the ADA below and, on appeal, affirmatively disclaimed reliance on the theory advanced by the plaintiff in *Gorman*.").

183. *Id.*

184. 742 F. Supp. 2d 1192, 1197 (D. Colo. 2010).

185. *Id.* at 1217.

186. Schorr v. Borough of Lemoyne, 243 F. Supp. 2d 232, 238-39 (M.D. Pa. 2003) (quoting 42 U.S.C. § 12132).

187. Civ. No. 94-12-P-H, 1994 WL 589617, at *6 (D. Me. Sept. 23, 1994) (granting summary judgment for the defendants on several claims, but denying summary judgment for the defendants on the claim that "the Town failed to train its police officers to recognize symptoms of disabilities and failed to modify police policies, practices and procedures to prevent discriminatory treatment of the disabled, as required by the anti-discrimination regulations promulgated pursuant to [the ADA]"). Significantly, both *Lewis* and *Jackson* predate *Gohier*, which is the first case articulating the split between the wrongful arrest theory and the reasonable accommodation theory. *Gohier*, 186 F.3d at 1221. However, *Gohier* cites both cases as examples of wrongful arrest theory cases. *Id.* (citing Lewis v. Truitt, 960 F. Supp. 175 (S.D. Ind. 1997); and *Jackson*, 1994 WL 589617). They have been included under the ambit of reasonable accommodation theory cases in this Note because the way in which the opinions address police training is more appropriate under a reasonable accommodation claim, and they likely would have been categorized as such had the cases been decided after the circuit split arose.

> brought their ADA claim against the Commission for failing to properly train those officers . . . . The alleged non-compliance with the training requirements of the ADA did not occur the day that the officers shot [the plaintiff]; it occurred well before that day, when the Defendant policymakers failed to institute policies to accommodate disabled individuals such as [the plaintiff] by giving the officers the tools and resources to handle the situation peacefully.[188]

The *Buben* logic is intuitive. The dangers of exigent circumstances often shield officers from liability;[189] yet at the time officers are being trained, those dangers do not exist. Accordingly, even courts that bar reasonable accommodation claims when exigent circumstances arise can still find police departments liable for their failure to train officers in properly engaging individuals with disabilities. Because there is no immediate risk to human health or safety at the time the officers should be trained, departments cannot claim that their failure to train is exempted by exigent circumstances.

Despite that logic, at least one court does not treat failure to train as grounds for a reasonable accommodation claim. In *Hainze v. Richards*—the Fifth Circuit case that proscribed ADA liability whenever there is an active risk to human health or safety—the court dismissed a failure-to-train claim. In doing so, the court explained that "[d]uring the course of their regular training, all officers [were] required to undergo some measure of mental health instruction."[190] Although the court noted that the officer in question had completed "at least sixteen hours of such [disability] training," it made no inquiry into the adequacy or efficacy of the training programs in place.[191] Additionally, it found that the plaintiff's injury was due to his own criminal activity *rather than* the county's failure to perform a self-evaluation of the training program.[192] Accordingly, the court seemed to imply that even if the police training were inadequate, it did not constitute a basis for relief.[193]

While they have not been recognized in every federal circuit, failure-to-train claims seem to be more widely accepted than other theories of police

188. No. 08-cv-00127-WYD-MEH, 2010 WL 3894185, at *12 (D. Colo. Sept. 30, 2010) (quoting *Schorr*, 243 F. Supp. 2d at 238).

189. *See supra* Part II.B.2.

190. 207 F.3d 795, 802 (5th Cir. 2000). The court's commentary about the existing training measures feeds into a larger finding about causation; specifically, the Fifth Circuit emphasized that the plaintiff's injuries stemmed from his own criminal actions, rather than the defendants' failure to train or self-evaluate. *See id.*

191. *Id.* (discussing the fact that the specific officer in question had some form of training without examining what that training entailed or how it equipped the officer to handle encounters with individuals with disabilities).

192. *Id.*; *see also* Sanders v. City of Minneapolis, 474 F.3d 523, 527-28 (8th Cir. 2007) (citing *Hainze* for the proposition that shooting a mentally unstable arrestee was not the result of the city's failure to train officers but rather the result of the arrestee's threatening conduct).

193. *See Hainze*, 207 F.3d at 802.

obligations during arrests. There are two likely reasons. First, the ADA's legislative history clearly requires adequate police training.[194] Second, there is no need to balance officer and civilian safety against individual rights—a consideration that many find critical in any jurisprudence related to police conduct—because officers in training are not in immediate danger.

C. Summary of the Law

When considering ADA liability arising from police conduct during an arrest, the first question is whether the ADA is applicable to such conduct at all. The legislative intent discussed above,[195] coupled with the *Yeskey* precedent that broadened ADA applicability to nonvoluntary state programs,[196] indicates that the ADA applies to arrest-related conduct. Decisions to the contrary cut against the ADA's mandate.[197]

Given that the ADA *does* apply to arrests, the more complex question is *how* it should be applied. Given the way arrest situations evolve from the initial call to the first encounter to the actual arrest, it is clear that officers require more discretion during certain parts of an arrest. But are the stages of an arrest discrete? And if they are, can liability apply during an initial encounter and ebb as the situation escalates? That is, can the ADA be applied selectively to certain parts of the arrest process? And can it be applied differently, using disparate tests for each stage of an arrest?

The preceding survey of cases shows that the circuit courts have applied different tests to different points of an arrest.[198] In large part, courts have found the ADA applicable where a plaintiff was acting lawfully but her disability caused officers to mistakenly believe that she was engaged in criminal conduct.[199] However, where the plaintiff was acting unlawfully, the attendant dangers of her unlawful conduct become part of a complex calculus. While the Fifth Circuit has proscribed *all* ADA liability when exigent circumstances arise, the Eleventh Circuit performs a separate exigent

194. *See supra* Part II.B.3.a.

195. *See supra* Part II.B.3.a.

196. *See* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 213 (1998).

197. 42 U.S.C. § 12101(b)(2) (2015) (stating that the statute's purpose is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities").

198. *See supra* Part II.

199. *See, e.g.*, Lewis v. Truitt, 960 F. Supp. 175, 179 (S.D. Ind. 1997) (denying defendants' summary judgment motion where police arrested a deaf man for not properly responding to their inquiries); Jackson v. Inhabitants of Sanford, Civ. No. 94-12-P-H, 1994 WL 589617, at *6 (D. Me. Sept. 23, 1994) (denying defendants' summary judgment motion where police arrested a man for drunk driving over his objections that he was suffering from the symptoms of a brain aneurysm).

circumstances test before determining whether accommodations were required based on the extent of the exigencies. The Second and Fourth Circuits employ different tests that weigh the dangers of a situation against the reasonableness of the plaintiff's requested accommodation or modification. As discussed above, the Southern District of New York is remarkable because it has set a high bar for exigent circumstances, discouraging courts from granting summary judgment without an unequivocal demonstration of safety hazards. The Ninth Circuit applies an exigent circumstances test in which a jury determines what constitutes a reasonable accommodation given the totality of the circumstances. The Tenth Circuit has not yet decided how a reasonable accommodation test should be applied in light of exigent circumstances.

Given this legal landscape, there appears to be a sliding scale of police obligation to accommodate under the ADA, making the duty to accommodate more stringent as the scene becomes more secure. And regardless of which test they use, the majority of courts have divided arrests into the same series of component parts: the police training prior to the arrest,[200] the initial police-arrestee interaction,[201] the arrest itself,[202] the postarrest transportation,[203] and the pretrial detainment.[204] Courts that employ the reasonable accommodation and wrongful arrest theories tend to apply the ADA differently at each of those stages of an arrest. This temporal model is sensible. Each stage of an arrest yields different hazards and difficulties, and what constitutes reasonable action during a potentially violent confrontation can be quite different from what constitutes reasonable action during a controlled interview at the station house.

Most courts that divide arrests into different parts have rejected or seriously tempered the reasonable accommodation requirement during the on-the-street encounter.[205] To an extent, this is understandable. As courts have

200. *See, e.g.*, Buben v. City of Lone Tree, No. 08-cv-00127-WYD-MEH, 2010 WL 3894185, at *12 (D. Colo. Sept. 30, 2010) (asserting that the city's noncompliance with the ADA occurred "well before" the day of the arrest (quoting Schorr v. Borough of Lemoyne, 243 F. Supp. 2d 232, 238 (M.D. Pa. 2003))).

201. *See, e.g.*, Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1233 (9th Cir. 2014) (considering whether the police's second entry into the plaintiff's apartment prior to her seizure showed reasonable accommodation of the plaintiff's disability), *rev'd in part, cert. dismissed as improvidently granted in part, and remanded*, 135 S. Ct. 1765 (2015).

202. *See, e.g.*, Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000) (finding that the danger inherent in an on-the-street encounter makes reasonable accommodation during an arrest an unnecessary risk to safety).

203. *See id.* at 802 (suggesting that a duty to reasonably accommodate *may* exist once the scene is secured).

204. *See* Bircoll v. Miami-Dade County, 480 F.3d 1072, 1087 (11th Cir. 2007) (finding that "the exigencies of the situation were greatly reduced" after Bircoll was arrested and brought to the police station, requiring the officer to accommodate Bircoll's disability).

205. *See id.* at 1085, 1087.

long recognized, some allowances must be made for police officers given the dangers inherent in an arrest situation.[206] In terms of precedent, this logic manifests itself in two ways: First, it appears in decisions that expansively apply the exigent circumstances exception and use that exception to preclude all ADA liability prior to the moment an officer secures the scene.[207] Second, it is apparent that courts use exigent circumstances considerations in a way that will always tip the balance in favor of the police.[208] Both rationales stem from the same fear of placing excessive burdens on police. Both rationales also yield the same result: police conduct that arguably discriminates against individuals with disabilities is essentially nonactionable under the ADA.

III. Application of the ADA to Arrests

To date, courts applying the ADA to arrests have wrongly applied the statute by excessively exempting on-the-street encounters from ADA liability. This cuts against the core principles of the ADA itself. In fact, by excluding actions taken in the initial period of an arrest from the protections of the ADA, courts actually encourage dangerous police conduct and forgive improper training that discriminates against, and endangers the lives of, people with disabilities. Consistent with the ADA's statutory mandate to protect individuals with disabilities through clear guidelines and standards, reasonable accommodations should be made throughout the *entire* arrest process. Otherwise, courts essentially endorse a policy that excuses officers from providing adequate protection for individuals with disabilities, regardless of how unreasonable and discriminatory the police conduct may be. This Part explores how reasonable accommodations can be practicably required without excessively burdening police officers or unduly minimizing safety considerations.

As some courts have found, the ADA's mandate to accommodate individuals with disabilities should be applied along an inverse bell curve, with the duty to accommodate (shown on the *y*-axis in Figure 1) decreasing as an arrest unfolds and becomes more dangerous.[209] But that curve—and attendant officer obligations—should *never* reach zero; officers should *never* be permitted to discriminate against and harm individuals with disabilities based solely on that disability. A standard that accounts for the careful balance between protecting

206. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 396-97 (1989) (explaining, in the context of a Fourth Amendment claim, that arrest-related jurisprudence requires the court to carefully balance the individual rights and governmental interests at stake).

207. *See supra* Part II.B.2.a.

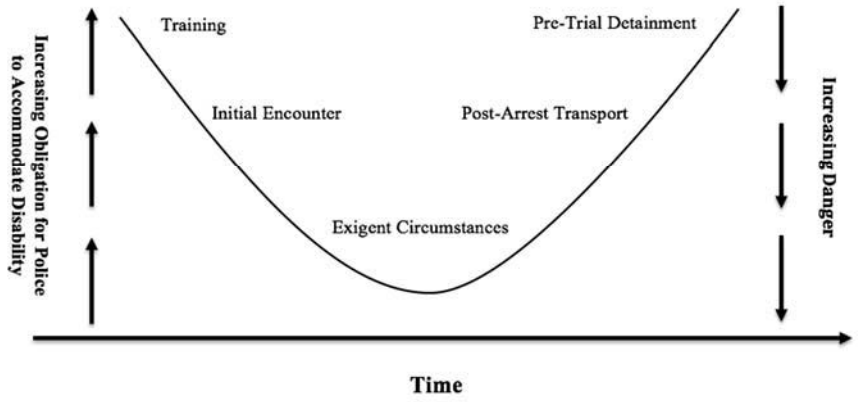
208. *See supra* Part II.B.2.a.

209. *See supra* Part II.B.3.b.

individual rights and larger safety concerns would have to account for changes in circumstances during an arrest.

This Part establishes a malleable standard that ebbs and flows throughout an arrest. First, the police duty to accommodate reaches its zenith in failure-to-train claims. Holding police departments liable for failing to train officers is consistent with legislative intent[210] and would greatly enhance both officer and arrestee safety. Second, police conduct that creates exigencies in an initial encounter is also subject to the ADA. That complies with legislative and regulatory provisions and ensures that bad police conduct is not incentivized by providing exemptions for officers who improperly escalate a situation. Finally, a totality of the circumstances test applies in the face of exigent circumstances, which would be consistent with like inquiries used throughout other parts of the law.

Figure 1

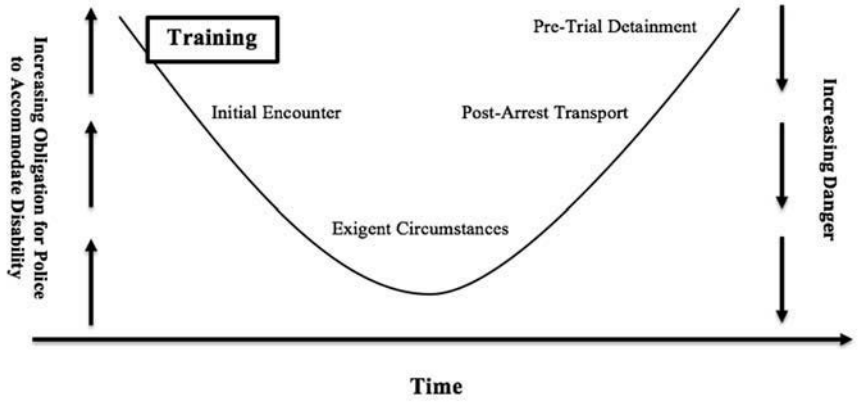


This diagram demonstrates how courts considering ADA claims should impose obligations on police officers to accommodate individuals with disabilities along an inverse bell curve. The bottom arrow represents time, as the arrest proceeds from the initial training through pretrial detainment. Each significant event in the life cycle of an arrest falls along the curve. As the danger decreases prior to and following the arrest (represented by the arrows on the right), police obligations to accommodate individuals with disabilities will increase (represented by the arrows on the left).

210. *See supra* Part II.B.3.a.

A. When Police Are Inadequately Trained

Figure 2



Training is the first phase on the inverse bell curve. It occurs long before any initial encounter. It occurs in the safety of a training facility. The officer's life is not threatened during training, and she should not be in harm's way. Since danger is at its lowest point, the obligation to accommodate disabilities is at its peak.

ADA duties to accommodate should be at their peak in failure-to-train claims. Even in cases where the plaintiff's claims are based entirely on a dangerous, on-the-street encounter (for example, where a police shooting occurs during the initial encounter and the scene is never secured), failure-to-train claims should not be immediately dismissed due to exigent circumstances. As the *Buben* court explains, exigent circumstances—and the attendant concerns about undue burdens in dangerous situations—are irrelevant to the training an officer receives prior to an arrest:

> The alleged non-compliance with the training requirements of the ADA did not occur the day that the officers shot [the plaintiff]; it occurred well before that day, when the Defendant policymakers failed to institute policies to accommodate disabled individuals such as [the plaintiff] by giving the officers the tools and resources to handle the situation peacefully.[211]

Regardless of the attendant dangers during an arrest, there is no direct threat to officer or public safety during prearrest training sessions.

211. *See* Buben v. City of Lone Tree, No. 08-cv-00127-WYD-MEH, 2010 WL 3894185, at *12 (D. Colo. Sept. 30, 2010) (quoting Schorr v. Borough of Lemoyne, 243 F. Supp. 2d 232, 238 (M.D. Pa. 2003)).

Courts that reject the existence of ADA obligations in the course of an arrest tend to rely on the argument that they do not want to add any unnecessary risks to the already-dangerous task of police investigation.[212] But as the *Buben* court contemplated, penalizing departments that inadequately train officers would not burden the split-second decisionmaking required in an arrest.[213] In fact, it would enhance the safety of officers and arrestees by providing a valuable framework for evaluating and handling potentially dangerous situations. Accordingly, courts presented with failure-to-train claims should determine whether officers had any training in dealing with individuals with disabilities and closely scrutinize the content and adequacy of that training. Where a court finds inadequate training, it should also find a failure to reasonably accommodate.

1. The necessity and practicality of de-escalation training

Giving officers the tools to handle situations in which they must accommodate disabilities is essential to protecting individuals with disabilities. Police officers nationwide are legally obligated to respond to all calls and provide all necessary services.[214] Oftentimes those calls involve mental health concerns. While 7-8% of the general population will have contact with the police in their lifetime, studies estimate that 42-50% of people with mental illness will be arrested at some point in their lives.[215] A recent study notes that the police have been thrust "into the role of primary gatekeepers who determine whether the mental health or the criminal justice system can best meet the needs of the individual with acute psychiatric problems."[216] As the "primary gatekeepers" for the nation's disabled community, it is unacceptable for police departments to underprepare officers for encounters with individuals with disabilities.

The dearth of adequate police training in this country has had dangerous results. As noted above, the Treatment Advocacy Center has found that "the risk of being killed during a police incident is *16 times greater* for individuals with untreated mental illness than for other civilians approached or stopped

212. *See, e.g.*, Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000) ("To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents.").

213. *Buben*, 2010 WL 394185, at *12.

214. Lamb et al., *supra* note 21, at 1266.

215. Jennifer Fischer, *The Americans with Disabilities Act: Correcting Discrimination of Persons with Mental Disabilities in the Arrest, Post-Arrest, and Pretrial Processes*, 23 LAW & INEQ. 157, 165 & n.65, 166 & n.66 (2005) (gathering sources).

216. Lamb et al., *supra* note 21, at 1266.

by officers."[217] And other studies estimate that "at least half" of all fatal police encounters involve persons with psychiatric disorders.[218]

Training programs geared toward de-escalating police encounters with individuals with disabilities would not unduly burden police officers or departments. In fact, many officers would likely appreciate the training given that calls involving individuals with mental illness consume a disproportionate amount of officers' patrol time, and inadequate responses may potentially overload correctional facilities with nonserious offenders.[219] Studies show that "[t]he police themselves think that they lack adequate training to manage this segment of the population. They want to know how to recognize mental illness, how to deal with psychotic behavior, [and] how to handle violence or potential violence among these persons . . . ."[220] And although most law enforcement agencies offer *some form* of training related to mental illness, research suggests that "there is good reason to believe that [most training programs] are not sufficient to fundamentally change the nature of police encounters with mentally ill people in crisis."[221]

Modification of police protocols to accommodate individuals with disabilities should focus on safe forms of de-escalation and communication. Such training prepares officers to peaceably confront individuals with physical, intellectual, and psychiatric disorders. H. Richard Lamb, a leading scholar in the field of police training and mental illness, suggests that adequate training ought to include

> becoming familiar with the general classification of mental disorders used by mental health professionals; learning and demonstrating skills in managing persons with mental illness, including crisis intervention; knowing how to gain access to meaningful resources less restrictive than hospitalization; and learning the laws pertaining to persons with mental illness, in particular the criteria specified for involuntary psychiatric evaluation and treatment. In addition, considerable emphasis should be placed on deescalating situations that might lead to the use of deadly force on persons with mental illness.[222]

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217. Fuller et al., *supra* note 5, at 1.

218. Bouchard, *supra* note 6 ("[A] review of available reports indicates that at least half of the estimated 375 to 500 people shot and killed by police each year in this country have mental health problems.").

219. Judy Hails & Randy Borum, *Police Training and Specialized Approaches for Responding to People with Mental Illness*, 49 CRIME & DELINQ. 52, 52 (2003).

220. Lamb et al., *supra* note 21, at 1269.

221. Hails & Borum, *supra* note 219, at 53 (quoting Randy Borum, *Improving High Risk Encounters Between People with Mental Illness and the Police*, 28 J. AM. ACAD. PSYCHIATRY & L. 332, 333 (2000)).

222. Lamb et al., *supra* note 21, at 1269.

As Lamb suggests, effective training would help prepare officers for encounters with people with disabilities and aid officers in understanding how to de-escalate otherwise dangerous situations.

Some police departments have already implemented de-escalation training programs with great success. The crisis intervention training (CIT) model has been particularly well received.[223] As of 2013, studies estimated that CIT programs were in place where approximately half the U.S. population lives.[224] Under the CIT model, police officers are intensely trained in "mental illness conditions, symptoms, treatments and de-escalation tactics, including proven techniques to communicate with and calm agitated individuals in acute psychiatric crisis."[225] When an apparent mental health-related incident arises, a specialized CIT unit is dispatched to the scene.[226] CIT and other forms of de-escalation training have proven effective, resulting in "decreased likelihood of arrest, an increased likelihood the individual will receive treatment and 'significantly' greater likelihood that verbal engagement or negotiation will be the highest level of force used in encounters between law enforcement and individuals in psychiatric crisis."[227]

Courts may not be inclined to require a highly specific variety of officer training, and this Note does not advocate courts mandating any specific school of thought. In fact, some scholars doubt the effectiveness of the CIT model, believing that no model can be successful without stronger community relations and increased education for officers.[228]

2. Policy incentives for proper training

Adequate training would not only enhance officer and arrestee safety, but it would also enhance public trust in police officers. Many of the arrests that generate ADA claims occur when officers are carrying out their community

223. Fuller et al., *supra* note 5, at 10-11; *see also* LEW ET AL., CAL. MENTAL HEALTH SERVS. AUTH., AN OUNCE OF PREVENTION: LAW ENFORCEMENT TRAINING AND MENTAL HEALTH CRISIS INTERVENTION 11 (2014), http://www.disabilityrightsca.org/pubs/CM5101.pdf (reviewing the benefits of CIT with an intent to implement the program in California police departments).

224. Fuller et al., *supra* note 5, at 10.

225. *Id.*

226. Brian Stettin et al., Treatment Advocacy Ctr., Mental Health Diversion Practices: A Survey of the States 5-6 (2013), http://www.treatmentadvocacycenter.org/storage/documents/2013-diversion-study.pdf.

227. Fuller et al., *supra* note 5, at 10-11.

228. Interview with Claudia Center, Senior Staff Att'y, ACLU Disability Rights Program (July 5, 2016) (transcript on file with author) (discussing use-of-force policies, reform leadership, community engagement and oversight, dispatch training and procedures, and coordination with and capacity of community-based mental health resources).

caretaking responsibilities rather than their criminal justice obligations.[229] The Supreme Court first recognized the police "community caretaking function[]" in *Cady v. Dombrowski*, where it addressed police conduct that may be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."[230] The community caretaking function is oftentimes crucial in situations involving people with intellectual and psychiatric disabilities—especially where an individual is threatening to commit suicide. In such situations, it is imperative that the public trust police officers and their capacity to assist (rather than harm) those in danger, particularly given the fragmentation and inadequacy of America's mental health infrastructure.[231]

Accordingly, both courts and legislatures should take care to avoid policies that discourage individuals with disabilities from seeking help. If courts allow officers to remain ill equipped to handle the unique issues that may arise in interactions with individuals with disabilities, they will thereby endorse a system that discourages people from picking up the phone and dialing 9-1-1 when a person with a disability is in danger. Such a result would directly contravene the ADA's underlying goal to "eliminat[e] . . . discrimination against individuals with disabilities."[232] Although this situation may not involve discriminatory intent, it is untenable to endorse a situation in which people with disabilities—and their families or caretakers—fear that accessing a common social safety net will result in unjust arrests, violence, or even fatalities.

As discussed above, effective training programs are available and in use in some jurisdictions.[233] If courts establish more stringent ADA training

229. In the wake of deinstitutionalization, which "is the name given to the policy of moving severely mentally ill people out of large state institutions and then closing part or all of those institutions," there has been a strong correlation between mental illness, homelessness, and incarceration. TORREY, *supra* note 20, at 8, 10-11; *see also* Lamb, *supra* note 20, at 899 (arguing that the way in which states implemented deinstitutionalization contributed to increased rates of homelessness for the mentally ill, as well as criminalization of the mentally ill). Police stations, jailhouses, and prisons have since replaced the previous mental health system, meaning that police often exercise care for people with disabilities, even those who are not engaged in criminal activity. For a more thorough discussion, see Lamb et al., *supra* note 21, which provides an in-depth analysis of the relationship between police officers and the mental health community.

230. 413 U.S. 433, 441 (1973).

231. *See* Lamb et al., *supra* note 21, at 1266 ("The police are typically the first and often the sole community resource called on to respond to urgent situations involving persons with mental illness. They are responsible for either recognizing the need for treatment for an individual with mental illness and connecting the person with the proper treatment resources or making the determination that the individual's illegal activity is the primary concern and that the person should be arrested." (citations omitted)).

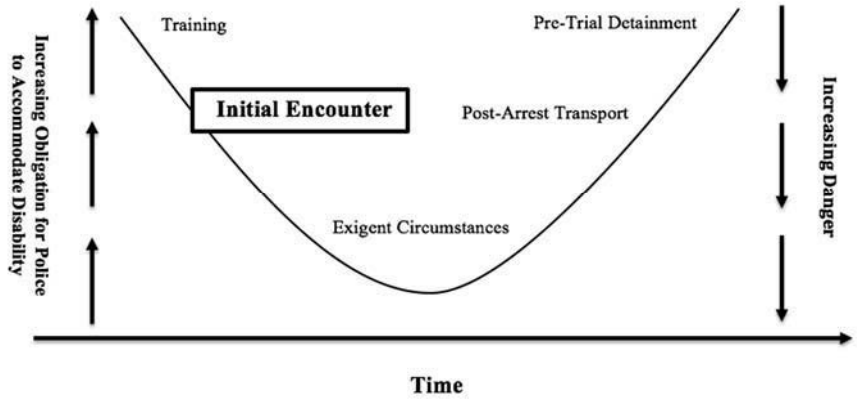
232. 42 U.S.C. § 12101(b)(1) (2015).

233. *See supra* Part III.A.1 (describing the necessity and practicality of proper training).

obligations and more closely scrutinize the adequacy of police departments' training in relation to recommended protocols, more police departments around the country would likely institute CIT and other de-escalation models. This shift would help reify the congressional intent to eradicate discrimination in arrests through "proper training."[234]

B. When Police Contribute to the Creation of Exigent Circumstances

Figure 3



The initial encounter is the second phase of the inverse bell curve. It occurs right when officers arrive on the scene and pertains to the period when officers first come into contact with the individual with disabilities. This period is more dangerous than the training period because officers are no longer in the sanitized environment of the training facility. Accordingly, the duty to accommodate disabilities is slightly less stringent during the initial encounter than it is during training.

If officers are trained in de-escalation tactics and adhere to proper procedures, dangerous and violent encounters with individuals with disabilities should arise significantly less often. Still, arrest situations can escalate and exigencies can arise. When they arise, many courts impose exigent circumstance considerations and exceptions, which are bound up with the

234. H.R. REP. NO. 101-485, pt. 3, at 50 (1990) ("In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid of seizures. . . . Such discriminatory treatment based on disability can be avoided by proper training.").

notion that police officers should not be burdened with ADA obligations when facing a potentially dangerous situation.[235] Yet oftentimes police conduct itself creates or exacerbates the danger. And where the officer's own behavior creates exigent circumstances, those circumstances should not exempt the officer from the obligation to accommodate. Instead, the officer's contribution to the exigent circumstances should be part of a holistic totality of the circumstances test.

1. State-created danger

As discussed above, some courts treat exigent circumstances as a practical bar to ADA claims, while others weigh the exigent circumstances against the requested accommodation in order to determine whether the plaintiff's requested accommodation is reasonable.[236] The courts that weigh exigencies against accommodations tend to find that ongoing criminal activity and the "already onerous tasks of police on the scene" greatly decrease—and oftentimes completely eliminate—the reasonableness of any requested modifications to police procedure.[237] This approach considers exigent circumstances in a vacuum by assuming that the moment police arrive on the scene of any arrest, there is a risk to officer and civilian safety.

That assumption is both irrational and dangerous. The facts of the cases surveyed above demonstrate that a scene may be calm, or at least nonviolent, when officers arrive.[238] Consider *Sheehan*, where the supervisor who called in the plaintiff's erratic behavior had time to fill out a full 5150 form, contact the police, explain the plaintiff's psychiatric history to the police, and work with the police to arrange a bed at a local hospital—all before the officers proceeded to confront the plaintiff.[239] Of course, these facts are not universal. Presumably, some police calls involving individuals with disabilities are dangerous from the moment police arrive on the scene. But in cases where exigencies arise long after the police arrive, it is irrational to assume the scene

235. *See supra* Part II.B.2.

236. *See supra* Part II.B.2.

237. *See, e.g.*, Bircoll v. Miami-Dade County, 480 F.3d 1072, 1085-86 (11th Cir. 2007).

238. *See, e.g.*, City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1770 (2015) (involving a plaintiff who was locked in her room when the police first arrived on the scene); *Bircoll*, 480 F.3d at 1076-78, 1086 (involving a plaintiff who was arrested for drunk driving and an officer who allegedly failed to adequately accommodate the plaintiff's deafness, although the plaintiff pulled over voluntarily for a traffic stop and there was no indication of threatening behavior); Jackson v. Inhabitants of Sanford, Civ. No. 94-12-P-H, 1994 WL 589617, at *1 (D. Me. Sept. 23, 1994) (involving a plaintiff who was arrested after the officer ignored the plaintiff's averment that his nonthreatening but erratic behavior was due to a brain aneurysm).

239. Petitioners' Brief, *supra* note 9, at 3-5.

was fraught with danger from the moment officers encountered the situation. Instead, courts should consider whether the officers themselves contributed to the exigencies and played a role in creating the danger.

Courts should consider how officer conduct may have contributed to those exigencies; otherwise they condone what is essentially a state-created danger. The state-created danger theory, which has been accepted by some lower courts, recognizes "a right to state protection where 'the state affirmatively places the individual in a position of danger the individual would not have otherwise faced.'"[240] When police officers engage individuals with disabilities and escalate the situation in a way that places the individual in harm's way, the officer's contribution to the exigent circumstances should not be shielded from liability.

2. Direct threat provisions

Those who crafted the ADA and its accompanying regulations anticipated the potential for state-created dangers; that is apparent from the direct threat provisions promulgated alongside the ADA. Under those provisions, the duty to accommodate may be nullified if accommodation would create a direct threat.[241] But the direct threat provisions are not all-encompassing. The

240. Perez v. Town of Cicero, No. 06 C 4981, 2011 WL 4626034, at *7 (N.D. Ill. Sept. 30, 2011) (quoting Estate of Stevens v. City of Green Bay, 105 F.3d 1169, 1174 (7th Cir. 1997)). This theory was notably limited by the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). There, the plaintiff was a child abuse victim; Winnebago County received multiple notifications of the child's ongoing abuse at the hands of his father and even temporarily removed him from his home at one point. *Id.* at 192-93. After the child's father beat him into a life-threatening coma, he and his mother sued Winnebago County for failing to intervene and prevent the risk it knew or should have known of. *Id.* at 193. The child and his mother argued that once the state undertook the task of protecting the child from danger ("which . . . the State played no part in creating"), it "acquired an affirmative 'duty' . . . to do so in a reasonably competent fashion" under the Due Process Clause. *Id.* at 197. The Court rejected this claim, finding that the Due Process Clause does not "confer [any] affirmative right to governmental aid," even if "by voluntarily undertaking to protect [the child] against a danger it . . . acquired a duty under state tort law to provide him with adequate protection." *Id.* at 196, 201-202. The *DeShaney* holding establishes that a state does not have an affirmative constitutional obligation to protect individuals, even in instances where the state acquires tort liability by setting up a system of reliance. Arrests of people entitled to ADA protection are differentiated in two ways: First, whereas the child in *DeShaney* was harmed by a private actor (his father), the plaintiffs in the relevant arrest litigation are harmed by state employees (police officers). This distinction is sufficient to differentiate the case, given that the *DeShaney* Court emphasized the fact that the child was injured by a private actor. Second, the state danger addressed in this Note does not hinge entirely on the implicit responsibilities engendered by a system of reliance; instead, the danger is affirmatively created by the state itself. Accordingly, *DeShaney* does not preclude a finding that the state is liable for affirmatively creating danger during an arrest.

241. *See* 42 U.S.C. §§ 12111(3), 12113(b), 12182(b)(3) (2015).

provisions explain that an individual with disabilities should not be legally considered a threat to human health or safety if any dangers posed by the individual can be *eliminated through reasonable modifications*.[242] Analyzing lawsuits related to arrests in the context of the direct threat provisions illustrates how courts should account for state-created dangers.

Consider, for example, *City & County of San Francisco v. Sheehan*.[243] There, the plaintiff threatened officers' lives and forced them out of her room when they responded to a welfare check call.[244] Once the officers left her room, they called for backup.[245] But before backup arrived, the officers reentered the plaintiff's room with their guns drawn.[246] In doing so, they acted antagonistically and escalated the already fraught situation. While the exigent circumstances—the plaintiff's prior threats to officers—certainly made the situation dangerous, the officers' unreasonable decision to further antagonize a woman with a psychiatric disability placed her in an even more dangerous circumstance. Prior to the officers' reentry, the plaintiff was alone in a barricaded room with no likely opportunity for escape.[247] After the officers reentered the plaintiff's room, she pulled out a kitchen knife, and the officers shot her multiple times.[248] It is helpful to keep this fact pattern in mind as one considers the nuances of the direct threat provisions.

a. The legislative direct threat provisions

Lawmakers wrote direct threat provisions into both Title I and Title III of the ADA.[249] Within these provisions, two things are evident. First, lawmakers foresaw situations in which a person with disabilities may be considered a threat, and they accordingly limited ADA liability using a direct threat provision. However, they also foresaw that in some situations the threat would be state-created, and they accordingly did not preclude liability where the state was responsible for the danger.

Title I of the ADA, which addresses employment discrimination, authorizes a "direct threat" defense to a charge of discrimination.[250] There, "[t]he term 'direct threat' means a significant risk to the health or safety of others that

242. *See id.* §§ 12111(3), 12182(b)(2)(A)(ii)-(iii).

243. 135 S. Ct. 1765.

244. *Id.* at 1769-71.

245. *Id.* at 1770.

246. *Id.* at 1771.

247. *Id.* at 1770.

248. *Id.* at 1771.

249. 42 U.S.C. §§ 12111(3), 12113(b), 12182(b)(3) (2015).

250. *Id.* § 12113(b).

cannot be eliminated by reasonable accommodation."[251] Title III, the section dealing with public accommodations, also contains a direct threat exception.[252] There, "'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services."[253] Under both provisions, no individual poses a "direct threat" if the covered entity can mitigate the perceived threat.

So what constitutes a direct threat? These provisions do not merely define a "direct threat" as a safety hazard. Instead, they explain that a direct threat is a hazard that "cannot be eliminated by" modification or accommodation.[254] Thus, under the provisions, an alleged threat does not exist in a vacuum. This nuance is extremely significant, as it conveys a legislative understanding that unmodified policies, practices, and procedures may actually *generate* a threat where it would not otherwise exist. It also suggests that situations that may be perceived as threatening can be moderated by reasonable modifications to preexisting systems.

Unlike Titles I and III, Title II of the ADA contains no "direct threat" provision.[255] This notable absence suggests congressional intent to maximize public entity liability where there is discrimination against individuals with disabilities. Yet despite the absence of a direct threat provision, some lower courts have specifically declared that Title II does not apply to officer conduct where there is a "threat to human life."[256] In other words, they have crafted their own direct threat provision. Given the unique dangers at play during an arrest, the judicially crafted exception in this specific context is not wholly problematic. But in light of the legislative choice not to include a direct threat provision in Title II, the exception should be narrowly applied. In other words, courts should not *broadly* exempt the police from the ADA-imposed obligation to accommodate whenever an individual with disabilities may pose a threat.

b. The regulatory direct threat provisions

While there is no Title II direct threat provision in the ADA, the DOJ regulations accompanying the statute do incorporate one. The Title II "direct

251. *Id.* § 12111(3).

252. *Id.* § 12182(b)(3).

253. *Id.*

254. *Id.*

255. There is an executive regulation that applies the direct threat exception to Title II, discussed in Part III.B.2.b below.

256. *See, e.g.*, Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000).

threat" regulation—which is modeled on the Title III provision[257]—states that public entities do not need to accommodate an individual with disabilities when "that individual poses a direct threat to the health or safety of others."[258] The regulation continues:

> In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; *and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk*.[259]

The regulation is clear: there are exceptions to ADA requirements where an individual poses a direct threat to others. But threats that can be mitigated by "reasonable modifications of policies, practices, or procedures" are *not* exempted, and the duty to accommodate remains intact.[260]

In assessing possible applications of the ADA in the arrest context, most courts do not consider how exigent circumstances could be avoided if police make reasonable accommodations or modifications. Indeed, some courts have determined that direct threats and exigent circumstances abrogate officers' obligations any time the scene is not secure, regardless of whether the officers themselves contributed to those threats and circumstances.[261] Courts that *do* weigh exigent circumstances against the reasonableness of proposed accommodations never consider the way officer conduct escalated the circumstances. This means that officers are absolved of any responsibility for placing individuals with disabilities in unnecessarily dangerous—and potentially fatal—situations.

c. Proposed consideration for state-created danger

Courts' failure to consider how officer conduct precipitates exigent circumstances makes little sense. First, it condones what is essentially a state-created danger, incentivizing officers to cause danger in order to evade

257. "Appendix A of the [DOJ]'s 1991 title II regulation . . . included a detailed discussion of 'direct threat' that, among other things, explained that 'the principles established in § 36.208 of the [DOJ]'s [title III] regulation' were 'applicable' as well to title II, insofar as 'questions of safety are involved.'" 28 C.F.R. pt. 35 app. A (2016) (fourth alteration in original) (quoting 28 C.F.R pt. 35 app. A (2009)). In the final rule, *id.* § 35.104, the DOJ inserted an explicit definition of "direct threat" that parallels the definition laid out in Title III of the ADA, 42 U.S.C. § 12182(b)(3).

258. 28 C.F.R § 35.139(a).

259. *Id.* § 35.139(b) (emphasis added).

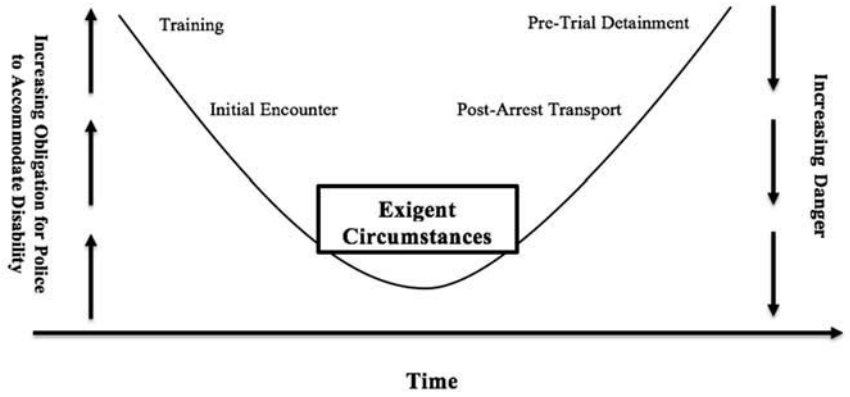
260. *Id.*

261. *See supra* Part II.B.2.a.

liability. Second, it ignores the intent of the ADA's direct threat provisions. Those provisions—both statutory and regulatory—clearly indicate that the threat posed by an individual with disabilities should not be considered in a vacuum; it should be assessed alongside the potential modifications of policies, practices, or procedures that could have mitigated the risk. Thus, if an officer encounters a suicidal individual experiencing a psychotic crisis and the officer begins yelling or otherwise escalating the situation, any ensuing violence should be weighed against the officer's unreasonable conduct. In cases where an officer actually creates or enhances the danger in an interaction, courts should consider the plaintiff's requested accommodations to be more reasonable than they would be otherwise. If not, courts will continue to perpetuate precedent that excuses violent police conduct.

C. When Exigent Circumstances Arise

Figure 4



The third step of the inverse bell curve is the exigent circumstances phase. Exigencies exist during this time period, meaning that danger is at its highest point. Because dangers are high and officers will be focused on diffusing any threats, the obligations for police to accommodate disabilities are at their lowest point. Notably, the bell curve never actually hits zero, meaning that the obligation to accommodate never disappears entirely, regardless of how dangerous the situation may become.

1. Problems with a full exigent circumstances exception

Regardless of which party creates the exigency, once exigent circumstances arise, officers should never be fully exempted from the requirement to make minimal reasonable accommodations. The primary problem with a full exigent

circumstances exception—and particularly the Fifth Circuit's logic in *Hainze v. Richards*[262]—is that it has no grounding in the legislative history or text of the ADA.[263]

In fact, when drafting Title II of the ADA, Congress clearly considered that it would sweep in police conduct.[264] Yet as Congress meticulously crafted the ADA, it did not create any exemptions in the law that would exclude on-the-street encounters. In fact, as discussed above, lawmakers did not even place a provision exempting state entities from obligations to accommodate in the face of a direct threat in Title II as they did in Titles I and III.[265] This demonstrates congressional intent to maximize public entity obligations under the ADA.

Even the executive "direct threat" regulation is not broad enough to exempt officers from ADA obligations every time exigent circumstances arise.[266] The appendix to the regulation itself is nuanced, stating that a direct threat assessment "may not be based on generalizations or stereotypes about the effects of a particular disability."[267] Instead,

> [i]t must be based on an individualized assessment . . . to achieve [the ADA's] goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks.[268]

The regulatory language demonstrates a concern that a broad direct threat provision might permit exclusion and discrimination based solely on

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262. 207 F.3d 795, 801 (5th Cir. 2000).

263. *See* Seremeth v. Bd. of Cty. Comm'rs, 673 F.3d 333, 339 (4th Cir. 2012) ("Most importantly, nothing in the text of the ADA suggests that a separate exigent-circumstances inquiry is appropriate.").

264. H.R. REP. NO. 101-485, pt. 2, at 84 (1990) (stating that Title II is intended to apply to "all actions of state and local governments"); *see also id.* pt. 3, at 50 ("[P]ersons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures.").

265. Recall that, unlike the direct threat provisions incorporated into Titles I and III, the Title II direct threat provision was added later as part of an executive regulation. *See* 28 C.F.R § 35.139. In *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), the Supreme Court held that regulations may use rights-creating language but only Congress can establish a private right of action. It is unclear whether this reasoning also means that regulations cannot create exceptions to existing private rights of action. But assuming that the reasoning does extend, then a direct threat defense to Title II liability would be unavailable regardless of the circumstances.

266. It is important to note that none of the lower courts surveyed in Part II above actually relied on the direct threat provision when denying ADA application in the course of an arrest. However, that is the only statutory or regulatory provision that could support a finding that danger to human health or safety reduces officers' liability under the ADA.

267. 28 C.F.R pt. 35 app. B (elaborating on the meaning of "direct threat").

268. *Id.*

"prejudice, stereotypes, or unfounded fear." When courts, like the Fifth Circuit, proscribe *all* ADA claims in the face of exigent circumstances, they thereby ignore the individualized assessment specifically required by this regulation.

2. Problems with a broad separate exigent circumstances test

Exigent circumstances tests are also inconsistent with other jurisprudence related to reasonable police conduct, which generally implements a totality of the circumstances test. In other parts of the law, the mere possibility of danger does not excuse officers' unreasonable behavior; instead, danger is part of a larger calculus that determines whether an officer acted reasonably. As the Fourth Circuit explained in *Waller ex rel. Estate of Hunt v. City of Danville*,

> [r]easonableness in law is generally assessed in light of the totality of the circumstances, and exigency is *one circumstance* that bears materially on the inquiry into reasonableness under the ADA. Accommodations that might be expected when time is of no matter become unreasonable to expect when time is of the essence.[269]

Under a totality of the circumstances test, exigent circumstances represent one factor in a holistic inquiry, instead of the inquiry's end altogether.

As the *Waller* court indicated, a totality of the circumstances test is the generally accepted method to assess reasonableness, particularly with regard to police conduct. In fact, reasonableness inquiries in Fourth Amendment excessive force cases provide a strong parallel to ADA police misconduct cases. In *Graham v. Connor*, the Supreme Court held that "claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard."[270] The Court recognized that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[271] The arguments behind *Graham*'s broad totality of the circumstances test also support a more narrowly tailored ADA totality of the circumstances test designed to address individuals with disabilities.

In *Graham*, the Court made clear that the necessity of split-second judgments in a potentially dangerous situation does not excuse unreasonable police

269. 556 F.3d 171, 175 (4th Cir. 2009) (emphasis added). As discussed in Part II.B.2.b above, the court in *Waller* avoided the question whether the Fourth Circuit would endorse an exigent circumstances exception. *Id.* ("Whether or when an 'exigent circumstances' constraint upon the ADA exists . . . is a broader proposition than is needed to decide this case.").

270. 490 U.S. 386, 395 (1989).

271. *Id.* at 396-97.

conduct.[272] Accordingly, the Court adopted a balancing test in which dangerous circumstances are weighed against the individual rights at stake.[273] The proper application of a Fourth Amendment reasonableness inquiry "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[274] The Court further indicated that "the question is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure.'"[275] While broad deference is given to police officers acting in dangerous circumstances, those circumstances are just one factor in determining whether they acted legally.

Although Fourth Amendment protections provide inadequate guarantees for individuals with disabilities, the logic of *Graham* still readily applies to reasonable accommodation claims under the ADA. Courts that exempt officers from ADA obligations in the face of exigent circumstances rely on the argument that "[l]aw enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations."[276] But *Graham* explains that it is not an excessively high burden to weigh the officer's need to make "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving" against a plaintiff's individual rights.[277] As *Graham* intimates, even when courts give deference to the need for officer discretion in dangerous situations, the countervailing interest—the plaintiff's individual rights—should never be forsaken by the judiciary.

Applying a totality of the circumstances test to ADA claims relating to arrests—as the Fourth and Eleventh Circuits do—would allow courts to factor more elements into their understanding of what constitutes reasonableness in a fact-specific situation. As discussed in Part II.B.2.b above, the Fourth Circuit in *Seremeth* weighed the exigencies involved in a suspected domestic violence situation against the requested accommodation that the police provide auxiliary hearing aids or communication.[278] In *Bircoll v. Miami-Dade County*,

272. *Id.*

273. *Id.* at 396 ("Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985))).

274. *Id.*

275. *Id.* (alterations in original) (quoting *Garner*, 471 U.S. at 8-9).

276. Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000).

277. *Graham*, 490 U.S. at 396-97.

278. Seremeth v. Bd. of Cty. Comm'rs, 673 F.3d 333, 335, 339, 340 (4th Cir. 2012).

the Eleventh Circuit weighed the exigencies of issuing a field sobriety test and gaining consent for a chemical blood alcohol test against the requested modification that the police use ASL or provide auxiliary aids.[279] Both courts found that the exigencies during the on-the-scene encounter rendered the requested accommodations unreasonable.[280] This result is typical of courts that balance only exigencies against the requested accommodation, without considering state-created dangers; threat levels; de-escalation tactics; and potential policy, practice, and protocol modifications involved in cases under the ADA.

The difference between existing balancing tests and the totality of the circumstances test proposed here is that a totality test would be significantly more flexible. When courts only consider two factors—whether danger existed and whether a disability should have been accommodated—it is very easy for slippery slope arguments about officer safety to overpower the vindication of individual rights. However, if courts are required to consider the totality of the circumstances—which would mean weighing the exigent circumstances against the proposed accommodation as well as third-party involvement, officer training, the ease with which an officer could have modified procedure, and any other factors that may be applicable—the reasonableness inquiry will be fairer, more balanced, and less susceptible to slippery slope arguments that may unduly enhance the court's perception of officer danger.

3. Question for the jury

The final problem with exigent circumstances exceptions is that they essentially require judges to make factual determinations under the guise of adjudicating questions of law. Conversely, a totality of the circumstances test would more often place the question of reasonableness where it belongs: in the hands of the jury.

With ADA claims relating to arrests, judges typically determine the reasonableness of police conduct in the context of summary judgment motions.[281] This, in turn, blurs the line between questions of fact and questions

279. 480 F.3d 1072, 1085-86 (11th Cir. 2007).

280. *Seremeth*, 673 F.3d at 339-40; *Bircoll*, 480 F.3d at 1086-87.

281. *See, e.g.*, Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1233-34 (9th Cir. 2014) (partially vacating the district court's grant of summary judgment for the defendants, based in part on a finding that "[a] reasonable jury . . . could find that the situation had been defused sufficiently . . . to afford the officers an opportunity to wait for backup and to employ less confrontational tactics, including the accommodations that Sheehan asserts were necessary"), *rev'd in part, cert. dismissed as improvidently granted in part, and remanded*, 135 S. Ct. 1765 (2015); *Seremeth*, 673 F.3d at 340-41 (recognizing that "[w]hat constitutes reasonable accommodations during a police investigation for a domestic disturbance is a question of fact" but still affirming the district court's grant of summary judgment for the defendants because "it was
footnote continued on next page

of law when discerning whether an officer's conduct violated the ADA. In circuits where exigent circumstances are a practical bar to ADA claims, a court must look to the record and determine whether the specific exigencies of the case at hand were sufficient to eliminate the duty to accommodate that would otherwise exist under the ADA.[282] Thus, even where a court finds that "[t]he exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance," it proceeds to make in-depth factual determinations in granting or denying summary judgment.[283]

But, as the Ninth Circuit in *Sheehan* stated, "the reasonableness of an accommodation is ordinarily a question of fact" that should accordingly be left to the trier of fact.[284] The full quotation is lengthy but instructive:

> We turn . . . to whether the city discriminated against Sheehan by failing to provide a reasonable accommodation during the second entry. Sheehan asserts that the city failed to provide a reasonable accommodation when the officers forced their way back into her room without taking her mental illness into account. . . . *We acknowledge that the officers were forced to make split-second decisions. A reasonable jury nevertheless could find that the situation had been defused sufficiently*, following the initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics, including the accommodations that Sheehan asserts were necessary. For the

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reasonable for the deputies to accommodate [the plaintiff's] disability" in the way that they did); Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 172, 176 (4th Cir. 2009) (affirming the district court's grant of summary judgment for the defendants in part because "any duty of reasonable accommodation that might have existed was satisfied in several ways"); *Bircoll*, 480 F.3d at 1080, 1086-87, 1089 (affirming the district court's grant of summary judgment for the defendants in part because "field sobriety tests in DUI arrests involve exigencies that necessitate prompt action for the protection of the public and make the provision of an oral interpreter to a driver who speaks English and can read lips per se not reasonable"). *But see Hainze*, 207 F.3d at 797, 801 (affirming the district court's grant of summary judgment for the defendants based on a finding that "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents," rather than a finding of reasonableness in the instant case).

282. *See, e.g.*, *Hainze*, 207 F.3d at 801-02 (considering the specific facts of the case—including the type of weapon the plaintiff allegedly carried, the amount of space between the officer and the plaintiff, and the amount of time between officers' arrival on the scene and the police shooting—before concluding that sufficient exigent circumstances existed).

283. *Bircoll*, 480 F.3d at 1085-87 (examining the record meticulously and reviewing each officer's action in light of the circumstances before concluding that the police made reasonable on-the-scene accommodations); *see also Seremeth*, 673 F.3d at 339-41 (holding that exigent circumstances are a factor in a larger reasonableness inquiry before examining the specific facts of the case and finding that the accommodations made were reasonable).

284. *Sheehan*, 743 F.3d at 1233.

> reasons stated here, and because the reasonableness of an accommodation is ordinarily a question of fact, we hold that the city is not entitled to judgment as a matter of law on Sheehan's ADA claim.[285]

As the *Sheehan* court suggests, courts should not be making complex factual determinations about what was reasonable in a specific situation by making reasonableness findings on summary judgment. Instead, courts should leave the facts to the jury so that it may determine whether an officer's failure to accommodate a disability was unreasonable in light of dangerous circumstances.

Conclusion

This Note serves two primary purposes: to provide an overview of the current jurisprudence applying the ADA to arrests and to suggest three areas in which the ADA can be applied to officer conduct during an arrest without undermining police safety.

The overview considers the various tests, exceptions, and exemptions that have been applied to ADA claims relating to arrests, as well as the legislative intent underlying Title II of the ADA. The survey finds that courts considering ADA obligations for police conduct generally analyze and apply the statute in ways premised on three theories: a wrongful arrest theory, a reasonable accommodation theory, and a failure-to-train theory. The wrongful arrest theory is largely uncontroversial because plaintiffs asserting the theory have not engaged in unlawful conduct. The reasonable accommodation theory is applied in varying ways and is oftentimes abrogated—either in part or in full—in light of exigent circumstances. Failure-to-train claims are also generally uncontroversial but may be undermined where courts find that *any* officer training in dealing with individuals with disabilities satisfies the ADA's nondiscrimination mandate, regardless of the training's effectiveness.

The second half of the Note posits that all arrests are potentially subject to the ADA. It argues that the ADA should apply to officer conduct where police departments fail to adequately train their officers, where officer conduct contributes to exigent circumstances, and where officers fail to act reasonably in light of exigent circumstances. The failure-to-train discussion in Part III.A shows that Congress intended to mandate adequate police training when drafting the ADA, that requiring adequate training does not undercut police safety, and that effective training models are available and widely in use. It also contends that enforcing heightened ADA obligations for departments that fail to adequately train officers would effect policy change, thereby enhancing officer and arrestee safety. The "creation of the exigencies" discussion in Part

285. *Id.* (emphasis added) (citation omitted).

III.B argues that officers should be held liable when they create or contribute to exigent circumstances that lead to a violation of individual rights because officers who contribute to exigent circumstances precipitate a state-created danger. It also explores legislative and regulatory direct threat provisions, finding that an individual with a disability should not be considered a direct threat if modified policies, practices, or procedures could have mitigated the risk to human health and safety. Finally, the "obligations in light of exigent circumstances" discussion in Part III.C argues that officers should be held liable for failure to provide reasonable accommodations in light of exigent circumstances, based on the requirements of the direct threat provision. Part III.C also rejects the two-part balancing test employed by many courts, replacing it with a totality of the circumstances test, which would be consistent with other police conduct jurisprudence and leave the reasonableness inquiry to the trier of the fact.

Ultimately, this Note demonstrates that applying the ADA to arrests is consistent with the statute's legislative mandate and does not unduly burden officer safety. As Justice Ginsburg wrote in her concurring opinion in *Tennessee v. Lane*, "[i]ncluding individuals with disabilities among people who count in composing 'We the People,' Congress understood in shaping the ADA, would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation."[286] Currently, individuals with disabilities are being harmed by police officers at an alarming rate. The solution to this problem is not new legislation. Legislation that bars the state from discriminating against individuals with disabilities already exists. It is up to the courts to recognize legislative intent and enforce the laws that Congress designed to protect one of our nation's most vulnerable populations. Paraphrasing Justice Ginsburg, the courts must treat disabled arrestees with accommodation rather than indifference.

286. 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring).