Vanderbilt Law Review

Volume 70
Issue 4 *Issue 4 - May 2017*

Article 6

5-2017

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Carly A. Myers

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INTRODUCTION

Teresa Sheehan was a fifty-six-year-old woman with a schizoaffective disorder.[1] She lived in a cooperative housing program for adults with mental illness, and, in August 2008, a social worker began to worry about her health.[2] Heath Hodge grew concerned when Teresa refused to eat, take her medication, or speak with her psychologist.[3] When Heath entered her second-floor room without her permission, Teresa screamed: "Get out of here! You don't have a warrant! I have a knife, and I'll kill you if I have to."[4] Believing she required professional evaluation, Heath left the room and completed an application for Teresa's temporary detention at a psychiatric facility.[5] He then called the police and asked for help to safely escort her there.[6]

When two law enforcement officers arrived at Teresa's residence, Heath detailed her history of mental disability and violent threats.[7] Using a key from the facility, the officers unlocked her door and entered her room.[8] Teresa picked up a kitchen knife and exclaimed: "I am going to kill you. I don't need help. Get out."[9] The officers retreated from the room, drew their service weapons, and called for backup.[10] However, instead of waiting for reinforcements or taking actions to de-escalate the situation, they swiftly forced their way back into Teresa's room and shot her several times.[11] The officers later explained that, with the door closed, they grew concerned that Teresa could escape through her second-story window or gather more weapons.[12] The officers never paused to consider whether or how to accommodate Teresa's mental illness.[13] They acted—without consideration of her known disability—and the results were devastating.

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1. City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1769 (2015); Nadja Popovich, *Police Shooting of Mentally Ill Woman Reaches US Supreme Court. Why Did It Happen at All?*, GUARDIAN (Mar. 23, 2015), https://www.theguardian.com/us-news/2015/mar/23/police-shooting-mentally-ill-teresa-sheehan-supreme-court [https://perma.cc/24RP-32UN].
2. *Sheehan*, 135 S. Ct. at 1769.
3. *Id.*
4. *Id.* at 1769–70.
5. *Id.* at 1770.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 1771.
12. *Id.*
13. *Id.*

The circumstances of Teresa's police encounter are, tragically, not unusual. Although she survived her arrest, people with severe mental illness are at least sixteen times more likely to be killed during a police encounter than other individuals.[14] Given the documented role of mental illness in fatal police shootings,[15] amending police response tactics and increasing mental health training is critical.

A high arrest rate and lack of appropriate police procedures contribute to the disproportionate injury and death of people with mental illness during arrest.[16] Roughly ten percent of police calls involve a person with mental illness,[17] and such individuals are seven times more likely to be arrested than the general population.[18] Misperceptions of mental illness, greater incidences of homelessness and substance abuse, along with inadequate police training, community support, and affordable mental health treatment, result in this comparatively high arrest rate.[19] Additionally, there are numerous barriers inhibiting proper police response, including a lack of sufficient training to identify and accommodate mental disabilities, resource and time constraints, and the widespread misperception that "persons with

14. Doris A. Fuller et al., *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters*, TREATMENT ADVOC. CTR. 1, 12 (2015), http://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf [https://perma.cc/5QTG-86MF] ("By all accounts—official and unofficial—a minimum of 1 in 4 fatal police encounters ends the life of an individual with severe mental illness . . . . [I]n one U.S. city and several other Western countries—the findings indicate that mental health disorders are a factor in as many as 1 in 2 fatal law enforcement encounters.").

15. Fuller et al., *supra* note 14, at 1–3, 12.

16. 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, 169–72 (2005); *see also* Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 264–65 (2003) (describing the high incidence of police encounters with people with mental illness and how "in some of these situations, police officers shoot and seriously injure or kill the disturbed person"); Fuller et al., *supra* note 14 (quantifying the higher incidence of injury and death of people with mental illness).

17. *See* Avery, *supra* note 16, at 262–63 (discussing a study that estimates that seven to ten percent of police calls involve an individual with mental illness); Randy Borum et al., *Police Perspectives on Responding to Mentally Ill People in Crisis: Perceptions of Program Effectiveness*, 16 BEHAV. SCI. & L. 393, 393–94 (1998) (same); Fuller et al., *supra* note 14, at 1 ("[I]ndividuals with severe mental illness generate no less than 1 in 10 calls for police service.").

18. *See* Fischer, *supra* note 16, at 165–66 (citing Jeffrey Draine et al., *Role of Social Disadvantage in Crime, Joblessness, and Homelessness Among Persons with Serious Mental Illness*, 53 PSYCHIATRIC SERVS. 565, 566 (2002)); Linda Teplin, *Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill*, 39 AM. PSYCHOLOGIST 794, 794 (1984) ("[F]or similar offenses, mentally disordered citizens had a significantly greater chance of being arrested than non-mentally disordered persons."); *see also* Borum et al., *supra* note 17, at 394 ("[M]ost people with severe mental illness will experience at least one arrest and many will be arrested more than once.").

19. Fischer, *supra* note 16, at 165–74.

a mental illness are more prone to violence."[20] These factors—coupled with an untreated illness—can and do lead to heartbreaking results for everyone involved.

Police mistreatment of people with mental disabilities has provoked numerous lawsuits.[21] Traditionally, plaintiffs have brought claims under 42 U.S.C. § 1983, the federal civil rights statute.[22] However, there are a number of obstacles to a § 1983 claim. Most notably, the doctrine is inconsistent and underinclusive,[23] and police officers are often immunized from liability.[24] These barriers have made it progressively more difficult for someone mistreated during arrest to succeed in a § 1983 claim. Over the past fifteen years, however, alternative claims under the Americans with Disabilities Act[25] ("ADA") and the Rehabilitation Act[26] ("Rehab Act") have become increasingly viable.[27]

This Note examines the feasibility of a police discrimination claim for individuals with mental disabilities under the ADA. Specifically, it analyzes whether Title II of the ADA requires law enforcement officers to accommodate a person's mental illness during the course of arrest, and if it does, what the proper standard is for evaluating the legality of police conduct. Part I analyzes the text and purpose of the ADA. It emphasizes the statute's broad protections and focuses on Title II, which prohibits a public entity from discriminating

20. *Id.* at 169–71.

21. *See, e.g.*, Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 172–73 (4th Cir. 2009) (ADA claim brought when a woman with mental illness was shot and killed by police, who were called to her home when a friend had not heard from her in several days); Thompson v. Williamson County, 219 F.3d 555, 556 (6th Cir. 2000) (father of an individual with mental illness brought suit under § 1983, the Rehab Act, and the ADA after his son was shot and fatally wounded by police after another family member called 911 for help transporting him to a hospital); Hainze v. Richards, 207 F.3d 795, 797 (5th Cir. 2000) (Section 1983, Rehab Act, and ADA claims brought when an individual with mental illness was shot and killed by police, who were called to the scene after the man threatened suicide).

22. Avery, *supra* note 16, at 265. A majority of these cases claim violation of the Fourth Amendment right against unreasonable seizures. *Id.*

23. *Id.* at 266 ("As a result of this inconsistent doctrine, judges and juries, without giving adequate consideration to all relevant factors, have found police shootings of emotionally disturbed people to be reasonable.").

24. The doctrines of qualified, municipal, and sovereign immunity, as well as interlocutory appeal, limit § 1983's applicability in the context of arrest. James C. Harrington, *The ADA and Section 1983: Walking Hand in Hand*, 19 REV. LITIG. 435, 436–40 (2000).

25. 42 U.S.C. §§ 12101–12213 (2012).

26. 29 U.S.C. § 794 (2012).

27. *See* Harrington, *supra* note 24, at 437, 440–63 (detailing how the ADA and Rehab Act have, in part, filled the void left by § 1983 decisional law).

against an individual with a disability[28] and requires "reasonable modifications in policies, practices, or procedures."[29]

Part II analyzes the multiple and incongruous approaches that the U.S. Courts of Appeals have adopted to evaluate whether people with mental disabilities are entitled to reasonable accommodations during arrest. Section II.A analyzes the preliminary question of whether Title II applies to police conduct during arrest. Assuming that it does, Section II.B analyzes the competing standards and exceptions for evaluating whether police conduct is illegally discriminatory. It examines the wrongful arrest and reasonable accommodation theories, as well as two potential exceptions to the latter theory: exigent circumstances and direct threats.

Part III proposes a solution to the circuit split. It concludes that Title II of the ADA requires reasonable accommodation during arrest for people with mental disabilities. This conclusion, supported by a majority of the circuit courts, gives effect to the plain language, broad purpose, and policy considerations of the ADA. In a departure from the majority, however, this Note also proposes limiting the scope of the exigencies and direct threat exceptions and outlines suggested modifications to the investigation and arrest of people with mental illness.

I. THE ADA: A REVOLUTIONARY PROMISE TO PEOPLE WITH MENTAL DISABILITIES

The ADA is the most significant and comprehensive legislation ever enacted to prohibit discrimination against and provide accommodations for Americans with physical and mental disabilities.[30] Section I.A discusses the Act's widespread impact and purpose, highlighting congressional intent to reach all public contexts. Section I.B focuses on Title II of the ADA—the provision that arguably provides a remedy for individuals with mental illness who are unjustly harmed during arrest. It analyzes Title II's text, implementing regulations, and judicial interpretations.

28. 42 U.S.C. § 12132 (2012).

29. 28 C.F.R. § 35.130(b)(7) (2016).

30. Martin Schiff, *The Americans with Disabilities Act, Its Antecedents, and Its Impact On Law Enforcement Employment*, 58 MO. L. REV. 869, 869 (1993).

A. The ADA's Sweeping Nondiscrimination Protections

"[A] breathtaking promise";[31] the "Emancipation Proclamation for [people] with disabilities";[32] an act that "[enables] the shameful wall of exclusion [to] finally come tumbling down"[33]—these are a few of the phrases used to describe the ADA. Enacted in 1990, the ADA affords broad protections to individuals with disabilities by prohibiting discrimination in employment;[34] public services that state and local governments, departments, and agencies provide;[35] all public accommodations, including certain private entities that operate public services;[36] and all telecommunications.[37] In particular, Congress emphasized the importance of eliminating discrimination in the "critical areas" of "employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."[38]

The breadth and purpose of the ADA reveal congressional intent to eliminate widespread societal discrimination against people with disabilities. Indeed, the ADA's express purpose is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[39] Moreover, in its findings, Congress recognized the prevalent societal disadvantage that people with disabilities face: "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[40] Its concerns are also evidenced in its definition of a qualified individual with a disability,[41] which highlights the need for "reasonable modifications to rules, policies, or practices [and] the removal of architectural, communication, or transportation barriers."[42]

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31. Fischer, *supra* note 16, at 177 (citing MICHAEL L. PERLIN, THE HIDDEN PREJUDICE 175 (2000) (quoting disability rights advocates)).

32. *Id.*

33. Statement on Signing the Americans with Disabilities Act of 1990, PUB. PAPERS (July 26, 1990).

34. Title I, 42 U.S.C. §§ 12111–12117 (2012).

35. Title II, 42 U.S.C. §§ 12131–12165 (2012).

36. Title III, 42 U.S.C. §§ 12181–12189 (2012).

37. Title IV, 47 U.S.C. § 225 (2012).

38. 42 U.S.C. § 12101(a)(3) (2012).

39. 42 U.S.C. § 12101(b).

40. 42 U.S.C. § 12101(a)(2).

41. *See infra* Section I.B.

42. 42 U.S.C. § 12131(2) (2012); *see* Fischer, *supra* note 16, at 179 ("The language of the ADA shows an understanding by Congress that the environment society has constructed through its

Congress specifically intended to eliminate discrimination against people with mental disabilities by all public entities. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[43] This mandate contains no statutory exceptions.[44]

B. Title II: Discrimination by a Public Entity

In order succeed in a Title II claim, a plaintiff must prove: (1) she is a qualified individual with a disability; (2) a public entity excluded her from participation in or denied her the benefits of its services, programs, or activities, or otherwise discriminated against her; and (3) such exclusion, denial, or discrimination was by reason of her disability.[45]

First, a plaintiff must demonstrate that she is disabled and qualified.[46] The ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities of such individual."[47] An individual is "qualified" if, with or without reasonable modifications, she is otherwise qualified to participate in or receive the benefit of the services of a public entity.[48] As the Supreme Court held in *Pennsylvania Department of Corrections v. Yeskey*, a person with a disability is not disqualified from ADA protection because of imprisonment, suspected criminal behavior, or involuntary participation in an activity.[49]

Second, a plaintiff must demonstrate exclusion, denial, or discrimination by a public entity.[50] A "public entity" encompasses "any State or local government" or "any department, agency, special purpose

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policies, practices, and structures often excludes those with disabilities and is thus a form of discrimination.").

43. 42 U.S.C. § 12132 (2012).

44. *See id.*

45. *Id.*; *see* Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014) (defining the Title II standard); Bircoll v. Miami-Dade County, 480 F.3d 1072, 1083 (11th Cir. 2007) (same); Gohier v. Enright, 186 F.3d 1216, 1219 (10th Cir. 1999) (same).

46. 42 U.S.C. § 12132.

47. 42 U.S.C. § 12102(1) (2012) (defining "disability" as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment").

48. 42 U.S.C. § 12131(2) (2012) (defining a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications, . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity").

49. 524 U.S. 206, 210–11 (1998) (finding that the ADA protects inmates in state prisons).

50. 42 U.S.C. § 12132.

district, or other instrumentality of a State or States or local government."[51] There is no statutory exception to this definition, and the Supreme Court has held that Title II can "appl[y] in situations not expressly anticipated by Congress."[52] As the Court stated, "[Title II] plainly covers state institutions *without any exception*."[53]

Additionally, although the statute does not define "services, programs, or activities" or "benefits," these terms have been interpreted broadly by many sources. Section 504 of the Rehab Act, which is coextensive with Title II for these purposes,[54] defines "programs and activities" to include "*all* of the operations of [a public entity]."[55] Moreover, a Department of Justice ("DOJ") regulation provides that Title II "applies to *all* services, programs, and activities provided or made available by public entities."[56] The "benefit" requirement is also broad—the Supreme Court interpreted it to include any "theoretical benefit," even to individuals who are involuntarily confined.[57]

Unlawful discrimination, pursuant to a DOJ regulation, includes a failure to make "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability."[58] Whether an accommodation is reasonable and necessary is a question of fact determined on a case-by-case basis.[59] Generally, the modification must be proportional and congruent to the circumstances, must be efficacious, and must feasibly enhance access to or benefit from the public entity's activities.[60] However, a public entity need not "employ any and all means" of

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51. 42 U.S.C. § 12131(1)(B).

52. *Yeskey*, 524 U.S. at 212 (stating that even if Congress "did not 'envisio[n] that the ADA would be applied to state prisoners,' " this would demonstrate the breadth of Title II, rather than its ambiguity).

53. *Id.* at 209.

54. 42 U.S.C. §§ 12134(b), 12201(a) (2012); *see also* Penn. Dep't of Corr. v. Yeskey, 118 F.3d 168, 170 (3d Cir. 1997), *cert. granted*, 524 U.S. 206 (1998) ("Congress has directed that Title II of the ADA be interpreted in a manner consistent with Section 504, 42 U.S.C. § 12134(b), 12201(a) . . . ." (emphasis omitted)).

55. 29 U.S.C. § 794(b) (2012) (emphasis added); *see also* Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. pt. 35, app. B (2016) ("The scope of title II's coverage of public entities is comparable to . . . section 504 . . . in that title II applies to anything a public entity does.").

56. 28 C.F.R. § 35.102(a) (2012) (emphasis added).

57. *See Yeskey*, 524 U.S. at 210 ("Modern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners.").

58. 28 C.F.R. § 35.130(b)(7) (2016).

59. Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014); Fulton v. Goord, 591 F.3d 37, 44 (2d Cir. 2009); Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 175 (4th Cir. 2009); Bircoll v. Miami-Dade County, 480 F.3d 1072, 1085–86 (11th Cir. 2007); Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002).

60. *Oconomowoc*, 300 F.3d at 784.

accommodation.[61] Indeed, a modification is unreasonable if it would "fundamentally alter the nature of the service, program, or activity"[62] or impose an "undue financial or administrative burden."[63] The Supreme Court has interpreted this provision to allow a temporary delay in modification if a public entity demonstrates that "immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities."[64]

Congress likely intended the ADA's nondiscrimination mandate to apply to arrest. A House Judiciary Committee report[65] and a transcript from a congressional debate[66] directly address Title II's application in this context. The Committee report suggests that proper police training can satisfy the reasonable modification requirement:

> In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. . . . [P]ersons who have [disabilities] are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for [their disability]. . . . Such discriminatory treatment based on disability can be avoided by proper training.[67]

A subsequent DOJ guidance document echoes the Judiciary Committee's statement: "[L]aw enforcement [is obligated] to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities."[68]

Finally, a plaintiff must prove that the public entity's exclusion, denial, or discrimination was "by reason" of her disability.[69] While not defined in the statute, courts have interpreted this element to require some sort of nexus between the plaintiff's disability and the public

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61. Tennessee v. Lane, 541 U.S. 509, 531–32 (2004).

62. 28 C.F.R. § 35.130(b)(7); *Lane*, 541 U.S. at 531–32.

63. *Lane*, 541 U.S. at 531–32. Notably, neither Title II nor its implementing regulations expressly impose an "undue burden" limitation. *See* 42 U.S.C. § 12132 (2012); 28 C.F.R. § 35.130(b)(7). This is in contrast to Title I and Title III. *See* 42 U.S.C. § 12112(b)(5)(A) (2012); 42 U.S.C. § 12182(b)(2)(A)(iii) (2012).

64. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 604–06 (1999).

65. H.R. REP. NO. 101-485, pt. III, at 50 (1990).

66. 136 CONG. REC. H2599-01, H2633-01 (daily ed. May 22, 1990) (statement of Rep. Levine):

> One area that should be specifically addressed by the ADA's regulations should be the issue of nondiscrimination by police. Regretfully, it is not rare for persons with disabilities to be mistreated by the police. Sometimes this is due to persistent myths and stereotypes about disabled people. At other times, it is actually due to mistaken conclusions dawn [sic] by the police officer witnessing a disabled person's behavior. . . . [T]hese mistakes are avoidable and should be considered illegal under the [ADA].

67. H.R. REP. NO. 101-485, pt. III, at 50.

68. Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. pt. 35, app. B (2016).

69. 42 U.S.C. § 12132 (2012).

entity's discrimination or the requested accommodation.[70] Courts have applied varying standards, ranging from "but for" causation[71] to deferring to a plaintiff's own judgment on what modifications are related to and necessary for her disability.[72]

II. THE CONTEXT OF ARREST: MULTIPLE INTERPRETATIONS OF TITLE II OF THE ADA

People with mental disabilities are substantially more likely to be injured or killed during a police encounter than the general population.[73] Despite this alarming trend, some courts contest whether these individuals are entitled to reasonable accommodations during arrest.[74] In particular, the circuit courts disagree as to whether Title II applies in this context.[75]

It is not disputed that mental illness is a qualifying disability under Title II[76] or that a police department and its officers are public entities.[77] Likewise, there is general agreement that police have a duty to reasonably accommodate a disability *after arrest* and during transportation to a police station or mental health facility.[78] However,

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70. *See* Note, *Three Formulations of the Nexus Requirement in Reasonable Accommodations Law*, 126 HARV. L. REV. 1392, 1392–94 (2013) (analyzing the numerous causation standards courts have adopted in the context of reasonable accommodation claims).

71. *See, e.g.*, Wis. Cmty. Servs. v. Milwaukee, 465 F.3d 737, 752 (7th Cir. 2006) (" '[B]ut for' his disability, he would have been able to access the services or benefits desired."); Alboniga v. Sch. Bd., 87 F. Supp. 3d 1319, 1338 (S.D. Fla. 2015) ("The ADA imposes only a 'but-for' causation standard for liability.").

72. *See* Note, *supra* note 70, at 1406–07 (citing Henrietta D. v. Bloomberg, 331 F.3d 261 (2d Cir. 2003), a Title II case that "deferred to the expansive notion of disability and its effects that the plaintiffs presented").

73. *See supra* notes 14–20 and accompanying text.

74. *See, e.g.*, Hainze v. Richards, 207 F.3d 795, 799 (5th Cir. 2000) (finding that Title II does not apply to arrest).

75. *Compare Hainze*, 207 F.3d at 799 (finding that Title II does not apply to arrest), *with* Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014) (finding that Title II does apply to arrest), Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 175 (4th Cir. 2009) (same), Bircoll v. Miami-Dade County, 480 F.3d 1072, 1085 (11th Cir. 2007) (same), *and* Gohier v. Enright, 186 F.3d 1216, 1221 (10th Cir. 1999) (same).

76. The ADA explicitly recognizes mental impairment as a qualifying disability. 42 U.S.C. § 12102(1) (2012).

77. *See Hainze*, 207 F.3d at 799 (finding these elements undisputed and that "[t]he broad language of the statute and the absence of any stated exceptions has occasioned the courts' application of Title II protections into areas involving law enforcement").

78. *See, e.g.*, *Hainze*, 207 F.3d at 802:

> Once the area was secure and there was no threat to human safety, [the police officers are] under a duty to reasonably accommodate [an individual's] disability in handling and transporting him to a mental health facility. [This situation is] squarely within the holdings of [*Yeskey*] and the cases that have followed.;

Gorman v. Bartch, 152 F.3d 907, 909 (8th Cir. 1998) (allowing a Title II claim to proceed when a paraplegic man was injured during transport after his arrest); *see also* Roberts v. City of Omaha,

courts do not agree on whether Title II affords protection to people with disabilities *immediately before and during arrest*.[79] Moreover, assuming that Title II covers arrest, there is further divergence over how to properly evaluate police actions and the sufficiency of accommodations, especially when the individual is mentally ill and violent.[80] This Part analyzes the multiple and incongruous approaches courts have adopted to evaluate whether Title II applies to the context of arrest, and if it does, what the proper standard is for evaluating the legality of police conduct.

A. Does Title II Apply to the Context of Arrest?

People with mental disabilities are entitled to reasonable accommodations during arrest only if Title II applies to the police officer's conduct during arrest. The scope of Title II is particularly contentious when an arrestee is perceived as violent and dangerous.[81] In such instances, some courts have held Title II inapplicable, as competing safety concerns excuse the officers from any duty to modify their practices and policies.[82] However, other courts find this interpretation contrary to the plain language and purpose of the ADA.[83] This Section analyzes the two competing approaches.

1. The Fifth Circuit Approach

The U.S. Court of Appeals for the Fifth Circuit has held that Title II does not apply to the arrest of a person with mental illness.[84] In *Hainze v. Richards*, the Fifth Circuit evaluated a police officer's Title II

723 F.3d 966, 973 (8th Cir. 2013) ("[T]he ADA . . . appl[ies] to law enforcement officers taking disabled suspects into custody."); Seremeth v. Bd. of Cty. Comm'rs, 673 F.3d 333, 338 (4th Cir. 2012) (finding that the ADA applies to police detentions and interrogations).

79. *Compare Hainze*, 207 F.3d at 799 (finding that Title II does not apply to arrest), *with Sheehan*, 743 F.3d at 1232 (finding that Title II does apply to arrest), *Waller*, 556 F.3d at 175 (same), *Bircoll*, 480 F.3d at 1085 (same), *and Gohier*, 186 F.3d at 1221 (same).

80. *Compare Gohier*, 186 F.3d at 1221 (finding that Title II applies to arrest, but declining to evaluate the viability of a claim under a "reasonable accommodation" theory), *with Sheehan*, 743 F.3d at 1232 (recognizing the viability of a "reasonable accommodation" theory), *Waller*, 556 F.3d at 175 (same), *and Bircoll*, 480 F.3d at 1085 (same).

81. *Compare Hainze*, 207 F.3d at 799 (finding that Title II does not apply when an arrestee is perceived as violent and dangerous), *with Sheehan*, 743 F.3d at 1232 (finding that Title II applies to the context of arrest, regardless of whether the arrestee is violent and dangerous), *Waller*, 556 F.3d at 175 (same), *Bircoll*, 480 F.3d at 1085 (same), *and Gohier*, 186 F.3d at 1221 (same).

82. *See, e.g.*, *Hainze*, 207 F.3d at 801 (recognizing an exigent circumstances exception to Title II); Rosen v. Montgomery County, 121 F.3d 154, 157 (4th Cir. 1997) (expressing doubt about "fitting an arrest into the ADA at all").

83. *See Sheehan*, 743 F.3d at 1232 (disagreeing with the Fifth Circuit approach); *Waller*, 556 F.3d at 175 (same); *Bircoll*, 480 F.3d at 1085 (same); *Gohier*, 186 F.3d at 1221 (same).

84. *Hainze*, 207 F.3d at 800.

liability after he shot and injured Kim Hainze, a man with a history of depression who was acting erratically.[85] In this incident, a family member called 911 when Kim threatened suicide or "suicide by cop" in the parking lot of a convenience store.[86] When the police arrived, Kim was holding a knife and talking with two unidentified individuals in a nearby vehicle.[87] The officer immediately exited his patrol car, pointed his firearm at Kim, and instructed him to step away from the vehicle.[88] When Kim instead yelled profanities and walked towards the officer, the police shot him multiple times in the chest.[89] The entire encounter lasted twenty seconds.[90]

Kim Hainze, who narrowly survived, brought a claim against the police for a failure to provide reasonable accommodations under Title II.[91] He argued that, under the circumstances, the officer should have "engaged him in conversation to calm him," attempted to "give him space by backing away," or used other less deadly tactics "to defuse the situation."[92] In addition to these on-the-scene modifications, he argued that the police department should have adequately trained its officers to protect people experiencing a mental health crisis.[93] Instead, he claimed, the police treated his crisis "identical to [a] criminal response call[ ]."[94]

The Fifth Circuit dismissed Kim Hainze's claim, finding 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 officers securing the scene and ensuring that there is no threat to human life."[95] The court justified its holding by highlighting the exigencies that can arise during arrest, in what courts and commentators later deemed the "exigent circumstances exception" to Title II.[96] This categorical

85. *Id.* at 801.

86. *Id.* at 797. " 'Suicide by cop' refers to an instance in which a person attempts to commit suicide by provoking the police to use deadly force." *Id.* at 797 n.1.

87. *Id.* at 797.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 800–01.

92. *Id.*

93. *Id.* at 801.

94. *Id.*

95. *Id.*

96. *See, e.g.*, Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1216 (9th Cir. 2014) (discussing the "exigent circumstances exception"); Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 175 (4th Cir. 2009) (same); Fischer, *supra* note 16, at 194–95 (same); Steven E. Rau & Gregory G. Brooker, *The Americans with Disabilities Act and Public Emergencies: Is There an "Exigent Circumstances" Exception to the Act?*, FED. LAW., Sept. 2010, at 38, 39–41 (same).

exception, which has no textual support in the ADA, permits an officer to discriminate against an individual with a disability when there is a perceived safety risk to the police or general public.[97] The Fifth Circuit explains:

> Law 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. 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.[98]

In sum, police and public safety is the priority and, as the court suggests, a police officer should not be forced to take the "unnecessary risk" of evaluating whether his or her actions discriminate against individuals with disabilities.[99]

The Fifth Circuit's approach has been followed by a few other courts. In *Rosen v. Montgomery County Maryland*, the Fourth Circuit expressed skepticism towards "fitting an arrest into the ADA at all."[100] However, more recent decisions from the Fourth Circuit,[101] as well as the Supreme Court,[102] call into question *Rosen*'s precedential value. Additionally, in *Patrice v. Murphy*, the Western District of Washington held that "an arrest is not the type of service, program, or activity from which a disabled person could be excluded or denied the benefits."[103] However, the Ninth Circuit abrogated this decision in 2014, when it held in *Sheehan v. City and County of San Francisco* that Title II applies to arrest.[104]

2. The Majority Approach

In contrast to the Fifth Circuit's approach, the Fourth, Ninth, Tenth, and Eleventh Circuits agree that arrests are within the scope of

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97. *See Hainze*, 207 F.3d at 801 (describing its safety justification).

98. *Id.*

99. *Id.*

100. 121 F.3d 154, 157 (4th Cir. 1997).

101. *See* Seremeth v. Bd. of Cty. Comm'rs, 673 F.3d 333, 338 (4th Cir. 2012) (concluding that the ADA applies to police investigations of criminal conduct that do not result in arrest, thus narrowing *Rosen*); *Waller*, 556 F.3d at 175 (suggesting that Title II does apply to the context of arrest).

102. *See* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 210–11 (1998) (finding that an individual with a disability is not disqualified from ADA protection by reason of imprisonment or suspected criminal behavior, nor because participation in the activity is involuntary, thus calling into question the basic assumptions in *Rosen*).

103. 43 F. Supp. 2d 1156, 1160 (W.D. Wash. 1999).

104. 743 F.3d 1211, 1232 (9th Cir. 2014).

Title II.[105] In *Gohier v. Enright*, the Tenth Circuit held that "a broad rule categorically excluding arrests from the scope of Title II . . . is not the law."[106] In *Bircoll v. Miami-Dade County*, the Eleventh Circuit concurred, finding the plain language and express purpose of Title II to support the inclusion of arrest.[107] It rejected the Fifth Circuit's approach in *Hainze*, explaining:

> [T]he question is not so much one of the applicability of the ADA because Title II prohibits discrimination by a public entity by reason of [an individual's] disability. The exigent circumstances presented by criminal activity . . . go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance.[108]

In *Waller ex rel. Estate of Hunt v. City of Danville*, the Fourth Circuit reserved judgment on *Hainze*[109] but nonetheless analyzed a Title II reasonable accommodation claim in the context of arrest.[110] Like the Eleventh Circuit, it held that exigencies bear "on the inquiry into reasonableness under the ADA."[111] Finally, in *Sheehan*, the Ninth Circuit "agree[d] with the majority of circuits to have addressed the question that Title II applies to arrests."[112] Looking to precedent and the plain text of the statute, it held that Title II applies to "anything a public entity does," including arrest.[113]

While in agreement that Title II extends to arrest, the courts disagree on the textual reasoning.[114] Title II provides that no qualified individual with a disability shall "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public

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105. *Id.*; *Waller*, 556 F.3d at 175; Bircoll v. Miami-Dade County, 480 F.3d 1072, 1085 (11th Cir. 2007); Gohier v. Enright, 186 F.3d 1216, 1221 (10th Cir. 1999).

106. 186 F.3d at 1221. Because *Gohier* predated *Hainze*, it did not comment on the Fifth Circuit's approach. *See id.* at 1219–21 (surveying the case law on the issue without mentioning *Hainze*).

107. 480 F.3d at 1085.

108. *Id.*

109. 556 F.3d at 175 (noting that an evaluation of the Fifth Circuit's holding "is a broader proposition than is needed to decide this case").

110. *Id.*

111. *Id.*

112. Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part on other grounds*, 135 S. Ct. 1765 (2015). The Supreme Court granted certiorari on *Sheehan* in 2015, however, before evaluating the merits of the Title II question, dismissed it as being improvidently granted. Sheehan v. City & County of San Francisco, 135 S. Ct. 1765, 1773–74 (2015).

113. 743 F.3d at 1232 (quoting Barden v. City of Sacramento, 292 F.3d 1073, 1076 (9th Cir. 2002)).

114. *See id.* (emphasizing the first clause of Title II); Bircoll v. Miami-Dade County, 480 F.3d 1072, 1084–85 (11th Cir. 2007) (emphasizing the second clause of Title II); Gohier v. Enright, 186 F.3d 1216, 1220 (10th Cir. 1999) (same); *see also Sheehan*, 135 S. Ct. at 1773–74 (recognizing these two relevant provisions, but declining to comment on their applicability because the question was improvidently granted).

entity, *or* be subjected to discrimination by any such entity."[115] The disjunctive "or" has caused debate over whether Title II reaches only the "services, programs, or activities" of a public entity or whether the latter clause "or be subjected to discrimination" extends Title II's protection to *anything* a public entity does.[116] Further, assuming the clauses are independent, the courts disagree over which properly encompasses police conduct during arrest.[117]

The Tenth and Eleventh Circuits agree that there are two separate textual bases for a Title II claim—either (1) a person is excluded from or denied the benefits of services, programs, or activities; or (2) a person is otherwise subjected to discrimination by the public entity.[118] In *Gohier*, the Tenth Circuit found it unnecessary to evaluate whether safety during arrest is a "benefit" of police "services, programs, or activities" because there is a "second basis for a Title II claim."[119] The court held that a plaintiff could be "subjected to discrimination" during the course of arrest and thus that Title II applies.[120] Similarly, in *Bircoll*, the Eleventh Circuit declined to analyze whether police conduct during arrest is a service, program, or activity.[121] The court held that the "final clause in Title II [ ] 'is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.' "[122]

The Ninth Circuit has held the first clause of Title II to apply to police conduct during arrest.[123] In *Sheehan*, the Ninth Circuit interpreted "programs, services, or activities" to broadly encompass "anything a public entity does," including arrest.[124] In support for its holding, the court cited *Barden v. City of Sacramento*, a Title II case involving the city's failure to maintain accessible sidewalks.[125] In *Barden*, the Ninth Circuit looked to the broad language of Title II, its express purpose to provide a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," and legislative history supporting its extension to "all

115. 42 U.S.C. § 12132 (2012) (emphasis added).

116. *See Bircoll*, 480 F.3d at 1084–85 (recognizing the circuits' debate and emphasizing the disjunctive language); *Gohier*, 186 F.3d at 1220 (emphasizing the disjunctive language).

117. *Compare Sheehan*, 743 F.3d at 1232 (first clause), *with Bircoll*, 480 F.3d at 1084–85 (second clause), *and Gohier*, 186 F.3d at 1220 (second clause).

118. *See Bircoll*, 480 F.3d at 1084–85 (recognizing the two textual bases); *Gohier*, 186 F.3d at 1220 (same).

119. 186 F.3d at 1220.

120. *Id.*

121. 480 F.3d at 1084.

122. *Id.* at 1085 (quoting Bledsoe v. Palm Beach Cty. Soil & Water Conservation Dist., 133 F.3d 816, 822 (11th Cir. 1998)).

123. Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014).

124. *Id.*

125. *Id.* (citing Barden v. City of Sacramento, 292 F.3d 1073, 1074–75 (9th Cir. 2002)).

actions" of public entities.[126] The Ninth Circuit did not address the disjunctive clause in Title II.[127] Because the first clause encompassed arrest, it was presumably unnecessary.

The Fourth Circuit has not addressed its textual theory of why Title II applies to arrest.[128] In *Waller*, the Fourth Circuit analyzed a reasonable accommodation claim involving arrest, but it declined to engage in meaningful textual analysis.[129] Instead, it held that "any duty of reasonable accommodation that might have existed was satisfied" under the facts of the case.[130] It deferred the broader Title II question to another day.[131]

B. If Title II Applies to Arrest, What Is the Proper Standard for Evaluating Police Conduct?

Assuming that Title II applies to the context of arrest, as a majority of courts conclude, the next question is how to properly evaluate whether police conduct violates its nondiscrimination mandate. There are two types of Title II claims that courts recognize in the context of arrest: wrongful arrest and reasonable accommodation.[132] Each apply in distinct factual circumstances.[133] This Section analyzes both claims as applied to the arrest of a person with mental illness. Moreover, it examines two potential limitations on the reasonable accommodation theory: exigent circumstances[134] and direct threats.[135]

1. Wrongful Arrest Theory

An individual with a disability may have a Title II claim under a theory of wrongful arrest if the police erroneously perceived the lawful

126. 292 F.3d at 1076–77.

127. *See Sheehan*, 743 F.3d at 1232.

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

129. *Id.* at 174–75.

130. *Id.* at 176.

131. *Id.* at 175 ("[It] is a broader proposition than is needed to decide this case.").

132. *See Sheehan*, 743 F.3d at 1232; *Waller*, 556 F.3d at 174; Gohier v. Enright, 186 F.3d 1216, 1220–21 (10th Cir. 1999).

133. *See Sheehan*, 743 F.3d at 1232; *Waller*, 556 F.3d at 174; *Gohier*, 186 F.3d at 1220–21.

134. *See Sheehan*, 743 F.3d at 1232 (finding that exigent circumstances inform the reasonableness analysis); *Waller*, 556 F.3d at 175 (same); Bircoll v. Miami-Dade County, 480 F.3d 1072, 1085 (11th Cir. 2007) (same).

135. *See* 28 C.F.R. § 35.139(a) (2016) ("[A] public entity [is not required] to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others."); Petitioners' Brief at 17, City & County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015) (No. 13-1412) (arguing the applicability of this regulation to the context of arrest).

effects of her disability as illegal activity.[136] For example, in *Lewis v. Truitt*, a man who was deaf brought a Title II claim after he was beaten and arrested for failing to follow police commands.[137] In fact, he simply could not hear the officers—an effect of his disability.[138] Similarly, in *Jackson v. Town of Sanford*, a man who had suffered a stroke in the past was arrested for suspicion of driving while intoxicated.[139] In fact, his unsteadiness and slurred speech stemmed from his stroke—again, effects of his disability.[140] In both cases, the courts allowed the Title II claim to proceed, finding that Congress intended the ADA to apply to these factual circumstances.[141]

Courts have resisted the application of the wrongful arrest theory to the context of arresting a person with mental illness.[142] While there are limited situations where it could apply, the circumstances of the arrest often do not align with the theory. Importantly, a wrongful arrest claim can only succeed if the effects of the person's disability were lawful in fact and only *misperceived* as criminal.[143] If the actions precipitating the arrest were actually unlawful, the claim will fail.[144] In a majority of the Title II cases brought by people with mental illness, the actions precipitating arrest are unlawful.[145] For example, in *Sheehan*, a woman threatened the police and approached them with a knife;[146] in *Waller*, a man held his girlfriend hostage in their apartment;[147] and, in *Gohier*, an individual used "assaultive conduct" towards the police.[148] Thus, this claim is often precluded by the circumstances of the arrest—creating a need for an alternative theory,

136. *Sheehan*, 743 F.3d at 1232; *Waller*, 556 F.3d at 174; *Gohier*, 186 F.3d at 1220.

137. 960 F. Supp. 175, 176–77 (S.D. Ind. 1997).

138. *Id.*

139. Civ. No. 94–12–P–H, 1994 WL 589617, at *1 (D. Me. Sept. 23, 1994).

140. *Id.*

141. *Lewis*, 960 F. Supp. at 178 (citing a House Judiciary Committee report contemplating a need to avoid erroneous arrest); *Jackson*, 1994 WL 589617, at *6 n.12 (same); *see also supra* note 67 and accompanying text (quoting the same House Judiciary Committee report).

142. *See, e.g.*, Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1233 (9th Cir. 2014) (recognizing both theories, but only analyzing under a reasonable accommodation theory); Gohier v. Enright, 186 F.3d 1216, 1221–22 (10th Cir. 1999) (declining to find the wrongful arrest theory applicable to the facts of the case).

143. *See Lewis*, 960 F. Supp. at 178 (allowing apply a wrongful arrest claim to proceed because the actions precipitating the arrest were in fact lawful); *Jackson*, 1994 WL 589617, at *6 n.12 (same).

144. *See, e.g.*, *Sheehan*, 743 F.3d at 1233 (declining to apply the wrongful arrest theory because the actions precipitating the arrest were unlawful); *Gohier*, 186 F.3d at 1221–22 (same).

145. *See, e.g.*, *Sheehan*, 743 F.3d at 1218–20; Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 172–73 (4th Cir. 2009); *Gohier*, 186 F.3d at 1221–22.

146. 743 F.3d at 1218–20.

147. 556 F.3d at 172–73.

148. 186 F.3d at 1221.

one that requires accommodation even when the individual's conduct is criminal.

2. Reasonable Accommodation Theory

A person with a disability may have a Title II claim under a theory of reasonable accommodation if the police "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."[149] This claim is usually framed as a failure to provide modifications, adopt policies and procedures, or adequately train police officers to safely interact with people with mental illness and particularly those experiencing crisis.[150]

Of the circuit courts that have concluded that Title II encompasses arrest, all but one have also adopted the reasonable accommodation theory. The outlier is the Tenth Circuit, which simply declined to evaluate the theory on procedural grounds.[151] In *Gohier*, the Tenth Circuit evaluated a Title II claim alleging a failure to "treat and protect" a man with paranoid schizophrenia when the police shot and killed him.[152] While the court held that Title II applied to the police encounter, it declined to evaluate the reasonable accommodation theory because the plaintiff affirmatively disclaimed reliance on it.[153] Instead, the court evaluated the claim under the wrongful arrest theory,[154] finding that the plaintiff's "assaultive conduct" was unlawful and thus precluded the claim.[155]

The Fourth, Ninth, and Eleventh Circuits have recognized the reasonable accommodation theory in the context of arrest.[156] In support of their position, the Ninth and Eleventh Circuits cited a DOJ regulation mandating "reasonable modifications in policies, practices,

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149. *Id.* at 1220–21.

150. *See, e.g.*, *Sheehan*, 743 F.3d at 1232 (claiming "the officers failed to reasonably accommodate [the plaintiff's] disability by forcing their way back into her room without taking her mental illness into account and without employing tactics that would have been likely to resolve the situation without injury to herself or others"); *Waller*, 556 F.3d at 173 (claiming that the city was guilty of "failing to properly train officers in dealing with the disabled").

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

152. *Id.* at 1217–18.

153. *Id.* at 1222.

154. *Id.* at 1221–22; *see also supra* Section II.B.1 (explaining the wrongful arrest theory).

155. *Gohier*, 186 F.3d at 1218, 1221–22 (denying the plaintiff "leave to amend her complaint to allege a claim under the ADA" because the proposed amendment would be "futile" and "subject to dismissal").

156. Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014); Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 175 (4th Cir. 2009); Bircoll v. Miami-Dade County, 480 F.3d 1072, 1085 (11th Cir. 2007).

or procedures when the modifications are necessary to avoid discrimination on the basis of disability."[157] Additionally, the Fourth Circuit, while not mentioning the Title II regulation, pointed to the definitions section of Title I of the ADA, which defines "discrimination" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."[158]

The Fourth, Ninth, and Eleventh Circuits have framed the reasonableness analysis as a fact-specific inquiry that depends on the totality of the circumstances.[159] Such circumstances may include the nature and history of a person's mental illness; the officer's knowledge of the individual's disability; the physical setting and conditions giving rise to the incident; and the presence, degree, and immediacy of danger to the person with a disability, the officers, or the general public. Exigent circumstances are particularly salient to the reasonableness analysis[160] and thus are further examined in Section II.B.3.

Reasonable accommodations for a person with a mental disability are ordinarily a question of fact[161] and may include modifications to police activities, policies, and training. For example, in *Sheehan* (described in the Introduction), the Ninth Circuit held that reasonable accommodations could include employing "non-threatening communications" and "less confrontational tactics," allowing "the passage of time to defuse the situation," or waiting for backup.[162] It acknowledged, however, that this was ultimately a question for the jury.[163]

In practice, disability rights and mental health advocates support close coordination between the police and mental health professionals in order to effectively accommodate people with disabilities.[164] Many communities have developed specialized programs

157. *Sheehan*, 743 F.3d at 1233 (citing 28 C.F.R. § 35.130(b)(7) (2012)); *Bircoll*, 480 F.3d at 1082 (same).

158. *Waller*, 556 F.3d at 174 (citing 42 U.S.C. § 12112(b)(5)(A) (2006)).

159. *Sheehan*, 743 F.3d at 1232; *Waller*, 556 F.3d at 175 ("Reasonableness in law is generally assessed in light of the totality of the circumstances . . . ."); *Bircoll*, 480 F.3d at 1085–86 (commenting that the reasonable accommodation is highly fact-specific inquiry and that reasonableness must be decided "case-by-case based on numerous factors").

160. *Sheehan*, 743 F.3d at 1232; *Waller*, 556 F.3d at 175; *Bircoll*, 480 F.3d at 1085.

161. *See supra* notes 59–64, 159 and accompanying text (providing cases that assert that what constitutes reasonable accommodation is a fact-intensive inquiry).

162. 743 F.3d at 1233, *rev'd in part on other grounds*, 135 S. Ct. 1765, 1776 (2015) (finding that a reasonable jury could conclude these accommodations were reasonable).

163. *Id.*

164. *See* H. Richard Lamb et al., *The Police and Mental Health*, 53 PSYCHIATRIC SERVS. 1266, 1268 (2002); Pamila Lew et al., *An Ounce of Prevention: Law Enforcement Training and Mental*

to facilitate this relationship.[165] Some police departments hire mental health professionals to provide on-site or telephone consultations to officers in the field.[166] Other departments contract with professionals, who then directly respond to the crisis.[167] Still others have mental health providers and advocates that provide specialized training to all or most of their officers.[168]

The most common method of safely accommodating people with mental disabilities is through the use of a Crisis Intervention Team ("CIT") or Mobile Crisis Team ("MCT").[169] CITs and MCTs are programs that extensively train a small, specialized unit of police officers in mental illness and non-violent communications and tactics, with the goal of always having a team "on call" and ready to respond appropriately.[170] These programs rely on close community partnerships among police, mental health professionals, advocacy coalitions, and people with disabilities to identify and implement safe police practices.[171] These arrangements have been shown to reduce the incidence of arrest of people with mental illness by as much as nineteen percent.[172]

These are just a few of the methods that police have adopted to guarantee consistent observation of Title II's nondiscrimination mandate. Notably, these programs focus not only on modifications to police activity during arrest, but also to department policies and training before the arrest.[173] Because the reasonable accommodation theory is a viable claim for people who are mentally ill and mistreated during arrest, such programs are essential to Title II compliance.

Health Crisis Intervention, DISABILITY RTS. CAL. 10–14 (Aug. 2014), http://www.disabilityrightsca.org/pubs/CM5101.pdf [https://perma.cc/BD6Z-J37K].

165. *See* Judy Hails & Randy Borum, *Police Training and Specialized Approaches to Respond to People with Mental Illnesses*, 49 CRIME & DELINQ. 52, 54 (2003); Lamb et al., *supra* note 164, at 1268; Lew et al., *supra* note 164, at 10–14.

166. Hails & Borum, *supra* note 165, at 54; Lamb et al., *supra* note 164, at 1268.

167. Hails & Borum, *supra* note 165, at 54; Lamb et al., *supra* note 164, at 1268.

168. Hails & Borum, *supra* note 165, at 54; Lamb et al., *supra* note 164, at 1268.

169. *See* Hails & Borum, *supra* note 165, at 58–60; Lamb et al., *supra* note 164, at 1268–69; Lew et al., *supra* note 164, at 12–16.

170. Hails & Borum, *supra* note 165, at 58–60; Lamb et al., *supra* note 164, at 1268–69; Lew et al., *supra* note 164, at 12–16.

171. Hails & Borum, *supra* note 165, at 58–60; Lamb et al., *supra* note 164, at 1268–69; Lew et al., *supra* note 164, at 12–16.

172. Lamb et al., *supra* note 164, at 1268 ("Studies that have evaluated such [mobile crisis] teams found that they had arrest rates ranging from 2 to 13 percent (with an average of less than 7 percent) . . . , in contrast to an arrest rate of 21 percent for contacts between non-specialized police officers and persons who were apparently mentally ill.").

173. *See infra* Sections III.B–C (arguing that this distinction is important to analyzing the role of exigencies in the reasonable accommodation theory).

However, as examined next, the presence of exigencies may limit a plaintiff's ability to recover under this theory.[174]

3. The Role of Exigent Circumstances

Exigent circumstances, for the purpose of this analysis, exist when there is a perceived danger to a police officer or the public that is, at least in part, caused by a person's unlawful activity. Such circumstances can and have arisen during mental health crises. For example, in *Hainze*, an exigency arose when Kim Hainze threatened suicide and approached the police with a knife;[175] and in *Sheehan*, an exigency arose when Teresa Sheehan, who was refusing to take her medication or speak with a psychologist, threatened to kill a social worker and the police.[176] Whether and how exigencies impact the Title II analysis is integral—it can mean the difference between holding the police accountable for the injury or death of a person in crisis and allowing needless harm to continue.

All of the circuit courts that have evaluated Title II's applicability to arrest find a significant role for exigencies in the analysis.[177] The courts take one of two approaches: either an exigency *exempts* a police officer from a duty to reasonably accommodate in the first instance, thus removing the analysis from Title II altogether;[178] or the exigency *informs* the content of the accommodation, that is, what is "reasonable" under the circumstances.[179]

The Fifth Circuit has held that exigencies during the course of arrest exempt a police officer from a Title II duty.[180] As detailed in Section II.A.1, there is no textual support in the ADA for this categorical exception.[181] Neither the statute nor its implementing regulations address it.[182] Likewise, the DOJ's reasonable accommodation regulation does not mention exigencies.[183]

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174. *See infra* Section II.B.3 (discussing the role of exigent circumstances).

175. 207 F.3d 795, 797 (5th Cir. 2000); *see supra* notes 85–90 and accompanying text (describing the facts of the case in more detail).

176. 743 F.3d 1211, 1217–20 (9th Cir. 2014); *see supra* notes 1–13 and accompanying text (describing the facts of the case in more detail).

177. *Sheehan*, 743 F.3d at 1232; Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 175 (4th Cir. 2009); Bircoll v. Miami-Dade County, 480 F.3d 1072, 1085 (11th Cir. 2007); *Hainze*, 207 F.3d at 799.

178. *See Hainze*, 207 F.3d at 801; *see supra* Section II.A.1.

179. *See Sheehan*, 743 F.3d at 1232; *Waller*, 556 F.3d at 175; *Bircoll*, 480 F.3d at 1085.

180. *See Hainze*, 207 F.3d at 801; *see supra* Section II.A.1.

181. Rau & Brooker, *supra* note 96, at 41 ("This exception is broad and has no statutory textual support in the ADA.").

182. *See* 42 U.S.C. §§ 12131–12165 (2012); Rau & Brooker, *supra* note 96, at 41.

183. *See* 28 C.F.R. § 35.130(b)(7) (2016).

The other circuits disagree with the Fifth Circuit's approach; however, they still recognize some role of exigent circumstances in the Title II analysis.[184] The Fourth, Ninth, and Eleventh Circuits treat exigencies as one of a totality of circumstances that inform the reasonableness analysis under the reasonable accommodation theory.[185] Significantly, each has held that the existence of an exigency may render *any* accommodation unreasonable.[186] The Eleventh Circuit explains: "[T]he question is whether, given criminal activity and safety concerns, any modification of police procedures is reasonable before the police physically arrest a criminal suspect, secure the scene, and ensure that there is no threat to the public or officer's safety."[187]

For example, it may be unreasonable to provide any accommodation to an individual who is holding people hostage.[188] In *Waller*, the Fourth Circuit found all accommodations unreasonable under Title II because of the exigencies created when Rennie Hunt refused to let his girlfriend leave their apartment.[189] In this incident, a concerned friend called 911 to report the situation and Rennie's history of mental illness.[190] The police and a hostage specialist attempted negotiations, however, when Rennie verbally threatened the police, an Emergency Response Team forced their way into the house.[191] The team shot and killed Rennie.[192] The plaintiff, Rennie's surviving sister, alleged that the police failed to reasonably accommodate Rennie's disability when they agitated him by yelling and banging on the door, never attempted to contact a mental health professional or family member, and never considered administering medication.[193] The court rejected the claim, explaining: "Accommodations that might be expected when time is of no matter become unreasonable to expect when time is

184. *See Sheehan*, 743 F.3d at 1232; *Waller*, 556 F.3d at 175; *Bircoll*, 480 F.3d at 1085; *see also supra* Section II.A.2. (discussing these cases in more detail).

185. *See Sheehan*, 743 F.3d at 1232 ("[E]xigent circumstances inform the reasonableness analysis under the ADA, just as they inform the distinct reasonableness analysis under the Fourth Amendment."); *Waller*, 556 F.3d at 175 ("[I]t is clear that exigency is not irrelevant. Reasonableness 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."); *Bircoll*, 480 F.3d at 1085 ("[E]xigent circumstances . . . go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance.").

186. *See Sheehan*, 743 F.3d at 1232; *Waller*, 556 F.3d at 175; *Bircoll*, 480 F.3d at 1085.

187. *Bircoll*, 480 F.3d at 1085.

188. *See Waller*, 556 F.3d at 172–73, 175.

189. *Id.* at 172–73.

190. *Id.*

191. *Id.*

192. *Id.* at 173.

193. *Id.* at 175.

of the essence."[194] Thus, exigent circumstances may limit the scope of expected modifications under the reasonable accommodation theory.

4. The Direct Threat Exception

The existence of a "direct threat" may also place a limit on the reasonable accommodation theory.[195] In defining a "qualified individual," a DOJ regulation states that the ADA "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a *direct threat* to the health or safety of others."[196] On appeal to the Supreme Court in 2015, the Petitioners in *Sheehan* argued that this regulation exempted police officers from providing any accommodation to Teresa Sheehan.[197] They reasoned that, because Teresa posed a significant safety risk to others, she was not "qualified" to "participate in or benefit from" her arrest.[198]

Respondents countered that the direct threat regulation does not apply to a Title II reasonable accommodation claim.[199] They emphasized that this regulation is based on the ADA's "safety principle," a statutory exception to Title I and Title III that contains substantially similar language to the regulation.[200] Congress, however, did not incorporate this principle, or any other statutory exceptions, into Title II.[201] Thus, as Respondents suggested, it is questionable whether the direct threat regulation should apply here. Moreover, even if it were applicable, Respondents argued that its extension to the context of arrest would make no sense.[202] Unlike a situation where a person "wanted to ride a city bus or attend a public meeting for reasons unrelated to [his or her] disability," here, the "activity was *involuntary* and the *very reason* for providing the service relates *specifically* to the individual's disability."[203] They explain:

194. *Id.*

195. *See* Petitioners' Brief, *supra* note 135, at 17 (arguing that the direct threat exception disqualifies the plaintiff from Title II protection).

196. 28 C.F.R. § 35.139(a) (2016) (emphasis added). A "direct threat" is defined as a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures." 28 C.F.R. § 35.104 (2016).

197. Petitioners' Brief, *supra* note 135, at 17.

198. *Id.* at 17, 22.

199. Brief for Respondent at 26–29, City & County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015) (No. 13-1412).

200. *Id.* at 26–27.

201. *Id.*

202. *Id.* at 27–29.

203. *Id.* at 27.

> It makes no sense to provide [a] service to mentally disabled individuals because they are disabled but then conclude that the same illness that causes them to be disabled—whether dementia, Alzheimer's, epilepsy, schizophrenia, autism, depression, diabetic hypoglycemia, or any other illness that can sometimes cause erratic, irrational, or seemingly uncooperative behavior—also triggers an exception to the ADA's non-discrimination mandate.[204]

The Supreme Court declined to evaluate the direct threat exception in *Sheehan*, dismissing the Title II question as improvidently granted.[205] Likewise, lower courts have yet to take up the question. Therefore, the pertinence of the direct threat exception, as it relates to the reasonable accommodation theory, is still unclear.

III. THE LOGICAL AND ETHICAL SOLUTION: TITLE II REQUIRES REASONABLE ACCOMMODATION DURING ARREST—WITHOUT EXCEPTION

The solution to this multilayered circuit split is to apply Title II of the ADA to the context of arrest and require police officers and departments to provide reasonable accommodations to people with mental disabilities during the course of investigation and arrest. Specifically, reasonable accommodations should include modifications both to the police officer's arrest tactics and to the police department's policies and training. Moreover, exigent circumstances should be closely scrutinized before relieving police of their Title II duty. This approach gives effect to the plain language and broad purposes of the ADA, while also promoting the safety of all parties to a police encounter.

A. Title II Applies to the Context of Arrest

Title II of the ADA applies to police officer conduct during the course of arrest of a person with mental illness. The plain language of the statute, its interpretations by the Supreme Court and DOJ, its express purposes, and its legislative history all support this conclusion.[206] Additionally, a majority of the circuit courts support this interpretation.[207] The Fifth Circuit's opposing view, while reasonably

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204. *Id.* at 27–28.

205. City & County of San Francisco v. Sheehan, 135 S. Ct. at 1772–74. The Petitioners made a fundamentally different argument in the Ninth Circuit and changed it only after certiorari was granted. *See id.* at 1772–74, 1779. As a result, the Court dismissed the Title II question as improvidently granted and harshly criticized the Petitioners' "bait-and-switch tactics." *Id.* The Court declined to comment on both the ADA's applicability to the context of arrest and the direct threat regulation. *Id.*

206. *See supra* Section II.A.2.

207. *See supra* Section II.A.2.

concerned with police and public safety, is unsupported by the statute and contrary to congressional intent.[208]

The text of the ADA supports its application to the arrest of a person with mental illness. A successful Title II claim must contain three elements: (1) the plaintiff is qualified and disabled; (2) a public entity excluded her from participation in or denied her the benefits of its services, programs, or activities, or otherwise discriminated against her; and (3) such exclusion, denial, or discrimination was by reason of her disability.[209] The first and third elements are not at issue here. The first element is easily met, as mental illness is an explicitly recognized disability[210] and, with the exception of the direct threat regulation (the applicability of which is disputed in Section III.D), there is no reason to believe individuals with mental illness are not "otherwise qualified."[211] Criminal behavior or involuntary participation in an activity cannot disqualify an individual from ADA protection.[212] Likewise, the third element is not problematic—it only requires a showing of a nexus between the requested accommodation and the person's mental disability.[213]

The second element logically includes police conduct during the course of arrest. First, a police department and its officers undisputedly qualify as "public entities" because they are a "department . . . or other instrumentality of a State . . . or local government."[214] There is no statutory exception to this definition,[215] and even the Fifth Circuit has conceded that police are public entities.[216] Second, arrest can plainly be considered an "activity" of the police officer, the "benefits" of which are denied when reasonable accommodations are not provided. In addition to the clear textual argument that arrest is a police "activity," Section 504 of the Rehab Act, a DOJ regulation, and a DOJ guidance document all support this interpretation. Section 504, which is coextensive with Title II, defines "program or activity" to include "*all* of the operations" of a public entity.[217] Likewise, a DOJ regulation explains that Title II "applies to *all* services, programs, and activities provided or made

208. *See supra* Section II.A.

209. 42 U.S.C. § 12132 (2012); *see supra* Section I.B (describing these elements in further detail).

210. 42 U.S.C. § 12102(1) (2012).

211. *See supra* notes 47–48 and accompanying text.

212. *See supra* note 49 and accompanying text.

213. *See supra* notes 69–72 and accompanying text.

214. *See* 42 U.S.C. § 12131(1)(B) (2012) (defining a public entity).

215. *See supra* notes 51–53 and accompanying text.

216. *See* Hainze v. Richards, 207 F.3d 795, 799 (5th Cir. 2000).

217. 29 U.S.C. § 794(b) (2012) (emphasis added).

available by public entities."[218] Moreover, a guidance document from the same agency expressly discusses its application to arrest.[219]

However, it has been argued that police do not provide arrestees with the "benefits" of that activity, at least as those terms are ordinarily understood.[220] Yet, the Supreme Court has interpreted the benefit requirement quite broadly, positing that it may include any "theoretical benefit," even to individuals who are involuntarily confined.[221] Here, a benefit could include the protections police normally afford arrestees, such as proper police training and not being subjected to excessive force. Alternatively, it may not even be necessary to prove an individual has been denied the benefits of arrest because the disjunctive in the statute indicates a second independent claim—that the plaintiff was otherwise "subjected to discrimination."[222] This phrase is not qualified with an "activity" or "benefit" requirement. As discussed in Section III.B, discrimination should include a failure to provide reasonable accommodation to an individual with mental illness.

Moreover, applying the ADA to the context of arrest is necessary to effectuate the broad purpose of the ADA. The statute's express goal is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[223] Additionally, in numerous provisions, the ADA's text references the elimination of widespread societal disadvantage.[224] This broad mandate, which is also exhibited by the breadth of the ADA's provisions,[225] demonstrates congressional intent to eliminate discrimination in all facets of society. It would be absurd to apply the ADA to all public entities, in an attempt to eliminate widespread discrimination, and yet exempt its application to a crucial public context—one that disproportionately results in injury and death to the

218. 28 C.F.R. § 35.102(a) (2016) (emphasis added).

219. Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. pt. 35, app. B (2016) ("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.").

220. *See, e.g.*, Gohier v. Enright, 186 F.3d 1216, 1220 (10th Cir. 1999) (referencing the lower court's ruling that "police protection is not an individualized benefit of a public entity's 'services, programs, or activities,' as required by the ADA"); Patrice v. Murphy, 43 F. Supp. 2d 1156, 1160 (W.D. Wash. 1999), *abrogated by* Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014) (holding that "an arrest is not the type of service, program, or activity from which a disabled person could be excluded or denied the benefits").

221. *See supra* note 57 and accompanying text.

222. *See supra* notes 115–122 and accompanying text.

223. 42 U.S.C. § 12101(b) (2012).

224. *See supra* notes 40–42 and accompanying text.

225. *See supra* notes 34–38 and accompanying text.

protected class.[226] Indeed, Congress even expressly contemplated Title II's application to discriminatory arrest, as evidenced in a House Judiciary Committee report[227] and a transcript from a congressional debate.[228]

Finally, the majority of circuit courts support Title II's application to police conduct during arrest.[229] The Fifth Circuit is an outlier, reading an exception into the ADA as it applies to arrest.[230] It justifies this categorical exemption by pointing to "exigent circumstances" that create a risk to officer and public safety.[231] These concerns warrant serious consideration and may have some place in the analysis. However, foreclosing Title II's application to arrest in the first instance is inconsistent with the ADA. It is completely unsupported by the text of the statute and its implementing regulations, which contain no exception for arrest and, indeed, do not even mention exigencies.[232] It is also contrary to the broad purposes of the Act and its legislative history, which support Title II's broad application to all activities by public entities.[233]

Most importantly, however, the Fifth Circuit's safety justification is misguided and underinclusive. In defending its exception as avoiding "unnecessary risk to innocents,"[234] the Fifth Circuit failed to acknowledge one other innocent: the individual experiencing a mental health crisis. Although not always the case, mental illness can be a contributing factor to the conduct precipitating arrest. The protection of the person with a disability should be valued just as highly as that of the police officers and general public. Indeed, is this equality of treatment not what the ADA was enacted to achieve?

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226. *See supra* Introduction.

227. 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. . . . [P]ersons who have [disabilities] are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for [their disability]. . . . Such discriminatory treatment based on disability can be avoided by proper training.

228. 136 CONG. REC. H2599-01, H2633-01 (daily ed. May 22, 1990) (statement of Rep. Levine):

> One area that should be specifically addressed by the ADA's regulations should be the issue of nondiscrimination by police. Regretfully, it is not rare for persons with disabilities to be mistreated by police. Sometimes this is due to persistent myths and stereotypes about disabled people. At other times, it is actually due to mistaken conclusions drawn by the police officer witnessing a disabled person's behavior. . . . [T]hese mistakes are avoidable and should be considered illegal under the [ADA].

229. *See supra* Section II.A.2.

230. *See supra* Section II.A.1.

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

232. *See supra* notes 181–182 and accompanying text.

233. *See supra* notes 34–42 and accompanying text.

234. *Hainze*, 207 F.3d at 801.

As such, the Fifth Circuit's approach is untenable; Title II should apply to the context of arrest.

B. The Reasonable Accommodation Theory Is a Logical Application of Title II and Mandates Modifications to Police Conduct and Training

The reasonable accommodation theory is a logical application of Title II and mandates modifications to a police officer's arrest tactics and the department's training policies. This theory, which is the most viable Title II claim for police mistreatment of individuals with mental illness,[235] is supported by a DOJ regulation and all circuit courts that both find Title II applicable to arrest and consider the merits of the theory.[236] As such, plaintiffs can and should bring a Title II claim for a failure to provide modifications, adopt policies and procedures, or adequately train police officers to safely interact with people with mental disabilities.

The reasonable accommodation theory is a legitimate application of Title II of the ADA, which prohibits discrimination by public entities.[237] Although discrimination is not defined within Title II, the DOJ and a majority of circuit courts that have recognized Title II's application to arrest have interpreted it to mandate reasonable modifications during arrest.[238] The only court that did not adopt it (the Tenth Circuit) did so only because the plaintiff affirmatively disclaimed reliance on it.[239] Thus, the court declined to evaluate the theory and did not reject it on its merits.[240]

In the context of arrest of an individual with mental illness, reasonable accommodations should include modifications both to the police officer's arrest tactics and to the police department's training policies. Although reasonableness is ordinarily a question of fact,[241] a failure to modify practice, policy, or procedure in both of these areas (to a proportional extent[242]) should be considered unreasonable in all circumstances. Indeed, Congress expressly contemplated modifications

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235. *See supra* Section II.B (analyzing the two substantive theories courts have applied to the context of arrest). Although the wrongful arrest theory is feasible, plaintiffs are often precluded from its application because their actions are unlawful. *See supra* Section II.B.1.

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

237. *See supra* Section I.B (detailing the elements of a Title II claim).

238. *See* 28 C.F.R. § 35.130(b)(7) (2016) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability."); *supra* Section II.B.2.

239. Gohier v. Enright, 186 F.3d 1216, 1221 (10th Cir. 1999).

240. *Id.*

241. *See supra* notes 59–64, 159 and accompanying text.

242. *See supra* note 60 and accompanying text.

to both police tactics during arrest[243] and police training before arrest[244] in creating ADA. Without this two-prong approach, the safety of the arrestee, officer, and public may be compromised and exigencies may be unnecessarily created.[245]

First, each police officer should modify her communication, investigation, and arrest tactics in accordance with each individual's mental disability, the officer's knowledge of that disability, and the circumstances surrounding the incident. To the extent possible, modifications should be individualized in accordance with the nature and history of a person's mental illness. Additionally, time permitting, officers should make an effort to learn about the person and her disability (perhaps from the emergency caller) in order to inform this individualization. Examples of modifications may include employing less confrontational tactics and nonthreatening communications or simply waiting for time to diffuse the situation.[246] If an officer is unsure of how to respond, they should call a mental health professional to the scene, consult with a professional over the phone, or call in a Crisis Intervention Team or Mobile Crisis Team.[247]

Second, it is objectively unreasonable for a police department to inadequately train their officers, or a specialized team, to identify and safely interact with individuals with mental disabilities. Police officers frequently encounter people with mental illness during the course of their duties,[248] and there are numerous police training approaches readily available.[249] It is manifestly irresponsible (and, as this Note argues, prohibited by the ADA) to improperly prepare officers to safely investigate and arrest people with mental disabilities. It creates danger not only to the arrestee, but also to the general public and the police officer. Proper training can enable safer interactions, prevent unnecessary exigencies,[250] and correct widespread misperceptions about mental disabilities.[251] As such, to qualify as "reasonable" under

243. *See supra* note 66 and accompanying text (discussing a transcript from a congressional debate that contemplates police mistreatment during arrest as a violation of the ADA).

244. *See supra* notes 65–67 and accompanying text (discussing a House Judiciary Committee report that suggests that "proper training" of police can satisfy the reasonable modification requirement).

245. *See infra* Section III.C.

246. *See supra* note 162 and accompanying text.

247. *See supra* notes 164–172 and accompanying text.

248. *See supra* notes 16–19 and accompanying text.

249. *See supra* notes 164–172 and accompanying text.

250. Elizabeth Hervey Osborn, Comment, *What Happened to "Paul's Law"?: Insights on Advocating for Better Training and Better Outcomes in Encounters Between Law Enforcement and Persons with Autism Spectrum Disorders*, 79 U. COLO. L. REV. 333, 354 (2008); *see infra* Section III.C.

251. *See supra* note 20 and accompanying text.

the reasonable accommodation theory, there should be modifications not only to police conduct *during the arrest*, but also to police training *before the arrest*.[252]

C. Exigent Circumstances Should Never Exempt Police from a Duty to Reasonably Accommodate and Should Have a Limited Role in the Reasonableness Analysis

Exigencies[253] should never categorically *exempt* a police officer from a Title II duty to reasonably accommodate during arrest. As argued in Section III.A., the Fifth Circuit's exception, which removes police conduct during an exigency from Title II altogether, is completely unsupported by the text of the statute and its implementing regulations and is contrary to congressional intent.[254] However, exigencies may have some role—albeit minor—in the Title II analysis.

The Fourth, Ninth, and Eleventh Circuits' treatment of exigencies is, in theory, the legal analysis that should be followed. These courts agree that exigent circumstances *inform* the reasonableness of an accommodation, as an exigency is one of many factors to be considered when assessing the totality of the circumstances.[255] This approach is consistent with the text of the statute and the DOJ's reasonable modification regulation, which has been consistently interpreted to require a fact-specific inquiry into all circumstances surrounding the arrest.[256] It also gives effect to practical concerns of officer and public safety—allowing the police enough flexibility to safely approach each encounter, while not exempting them from a Title II duty to make this assessment in the first instance, as the Fifth Circuit's approach invites.[257]

In practice, the Fourth, Ninth, and Eleventh Circuits' approach affords disproportionate weight to exigent circumstances. The courts purport the role of exigencies to be minor—it is just "one circumstance" among the totality. Of note, however, is that exigencies released the police from ADA liability in both *Bircoll*[258] and *Waller*,[259] while *Sheehan*

252. The distinction between modifications during and before the arrest is also relevant to the role of exigencies in the reasonableness analysis. As argued in Section III.C, while exigencies may render any accommodations unreasonable *during the arrest*, it should never release the police department from its responsibility to properly train its officers *before the arrest*.

253. For the purposes of this Note, an exigency is defined as a perceived danger to a police officer or the public that is, at least in part, caused by an individual's unlawful activity.

254. *See supra* Section III.A.

255. *See supra* Sections II.B.2, II.B.3.

256. *See supra* Sections II.B.2, II.B.3.

257. *See supra* Section II.B.3.

258. Bircoll v. Miami-Dade County, 480 F.3d 1072, 1086 (11th Cir. 2007).

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

is still on remand for further proceedings.[260] As they recognize, the existence of an exigency may render *any* accommodation unreasonable under the circumstances.[261] Given this trend, one has to question whether this "consideration" is, in practice, a reframing of the Fifth Circuit's exception.[262]

Exigent circumstances should have a limited role in the reasonableness analysis and should be closely scrutinized before relieving the police officer and department from liability. Specifically, although an exigency may render any accommodation unreasonable *during the arrest*, it should never release the police department from its responsibility to properly train its officers *before the arrest*. There is no threat to police or public safety before a crisis begins, and thus the reasoning behind affording exigencies a controlling weight in the reasonableness analysis does not apply to this context.[263] Further, as discussed in Section III.B, a failure to train police to identify and safely interact with individuals with mental disabilities is objectively unreasonable. In the context of exigencies, proper training is particularly crucial. When an individual is experiencing a mental health crisis, a situation can easily be mistaken for an exigency, or an untrained officer's actions can unnecessarily create an exigency.[264]

For example, there is a documented misperception among police officers that individuals with mental illness are more prone to violence.[265] This mistaken belief may cause an officer to approach a person more aggressively, thus escalating the situation and creating an exigency.[266] Likewise, an individual in crisis may not follow police commands—an inaction that may be a symptom of his or her disability.[267] This lack of response may cause an officer to attempt to physically restrain the person,[268] thus escalating the situation and creating an exigency.

These are just two examples from a long list of mitigating circumstances that can contribute to unnecessary exigencies during a police encounter. To be sure, there are certainly situations in which a person with a mental disability poses a real and imminent threat for

260. Sheehan v. City & County of San Francisco, 793 F.3d 1009, 1009 (9th Cir. 2015) (mem.).

261. *See Sheehan*, 743 F.3d at 1232; *Bircoll*, 480 F.3d at 1085; *Waller*, 556 F.3d at 175.

262. *See supra* Section II.A.1.

263. *See supra* Section II.B.3.

264. Osborn, *supra* note 250, at 354.

265. Fischer, *supra* note 16, at 171–72 (citing Amy Watson et al., *Police Officers' Attitudes Toward and Decisions About Persons with Mental Illness*, 55 PSYCHIATRIC SERVS. 49, 52 (2004)).

266. *Id.*

267. *See, e.g.*, City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1770–71 (2015) (describing the circumstances that led to the shooting of Teresa Sheehan).

268. *See id.*

which they are culpable. However, given the disproportionate amount of injury and death resulting from these encounters,[269] such situations at least warrant a close examination into the causal factors for the exigency and whether the police department adequately trained its officers. Thus, exigencies do have a role in informing the reasonableness analysis; however, that role should be closely analyzed before releasing an officer from liability under Title II.

D. The Direct Threat Exception Should Not Apply to the Reasonable Accommodation Theory

The direct threat exception cited by the Petitioners in *Sheehan* should not apply to the Title II reasonable accommodation theory. The plain language of the statute and the DOJ direct threat regulation support this conclusion.[270] Moreover, its application to the arrest of a person with a mental disability would produce absurd results and run contrary to the purpose of the ADA.[271]

The text of Title II of the ADA, in contrast to Title I and Title III, does not include a statutory exception for direct threats.[272] Despite this, the DOJ still promulgated a Title II direct threat regulation.[273] However, the regulation's text precludes its application to the arrest of a person with a mental disability. The regulation provides: "a public entity [is not required] to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat."[274] It would make no sense to apply this exception when the service or activity (the arrest) is involuntary and the individual's mental illness is the reason for the police encounter.[275]

First, the regulation only reaches situations where a public entity "permit[s]" an individual to participate in a service.[276] A police officer does not "permit" an individual to participate in an arrest; it is involuntarily forced upon him or her.[277] As explained by the Respondents in *Sheehan*, this is not a situation where, for example, a

269. *See supra* notes 14–20 and accompanying text.
270. *See supra* Section II.B.4.
271. *See supra* Section II.B.4.
272. *See supra* notes 200–201 and accompanying text.
273. *See* 28 C.F.R. § 35.139(a) (2016).
274. *Id.*
275. Brief for Respondent, *supra* note 199, at 27.
276. *See* 28 C.F.R. § 35.139(a).
277. *See* Brief for Respondent, *supra* note 199, at 27–28 (explaining that it makes no sense to apply the direct threat regulation to the context of arrest because participation is involuntary).

person with a disability chooses to ride a public bus.[278] Here, the "service" is being thrust upon the individual by reason of a disability.[279] Such a scenario does not fit within the plain language of the regulation.

Second, it would be absurd to apply this regulation when the same disability that qualifies an individual for ADA protection is also a contributing factor for the police encounter.[280] In effect, it would mean that an individual's mental disability simultaneously qualifies and disqualifies the person from ADA protection.[281] It would also mean that virtually no individual experiencing a mental health crisis that precipitated a police encounter would be protected under the ADA. This would produce absurd results[282] and run contrary to the broad purpose of the ADA.[283]

Moreover, even if the direct threat regulation did apply to the arrest of a person with mental illness, it notably only exempts a public entity from permitting an individual "*to participate in or benefit from the services, programs, or activities* of that public entity."[284] It does not mention the potential second textual basis for a Title II claim—when an individual is otherwise "subject[ed] to discrimination."[285] As such, the regulation may not apply if a claim can and does stem from this second, disjunctive Title II clause. Because the direct threat exception is unsupported by both the statute and implementing regulation, it should not apply to the Title II reasonable accommodation theory.

CONCLUSION

A person with a mental disability is substantially more likely to be injured or killed during a police encounter than other individuals.[286] Despite this disturbing trend, some courts dispute whether these individuals are entitled to reasonable accommodations during arrest under Title II of the ADA. In particular, the courts disagree on whether Title II applies to police conduct during arrest and, if so, what the proper standard is for evaluating that legality of that conduct.

278. *See id.* at 27.

279. *See id.*

280. *See id.* at 27–28.

281. *See id.* at 27.

282. *See id.*

283. *See supra* Section I.A. (detailing the express purpose of the ADA: to eliminate widespread discrimination against people with disabilities, including those with mental illness, in all activities of public entities).

284. 28 C.F.R. § 35.139(a) (2016) (emphasis added).

285. *See supra* notes 115–122 and accompanying text (detailing the potential two textual bases for a Title II claim).

286. *See supra* notes 14–20 and accompanying text.

The logical and ethical solution to this disagreement is to apply Title II to arrest and allow claims to proceed on a theory of reasonable accommodation—without exception for exigent circumstances or direct threats. From both a legal and moral perspective, a duty under Title II is immutable. People with mental disabilities continue to suffer from pervasive societal discrimination. This discrimination may take the form of explicit bias, unconscious misperceptions, or unaddressed ignorance. Regardless, during the course of arrest, it too often manifests through tangible injury. In an effort to combat this discrimination, not only do courts need to recognize a cause of action through Title II, but we, as a society, need to correct our misperceptions of mental illness and begin viewing all people—regardless of disability—with dignity and respect. Part of this change is to recognize when, where, and how accommodations are needed to ensure the safety and equality of people with mental disabilities.

*Carly A. Myers**

* J.D. Candidate, 2017, Vanderbilt University Law School; B.A., 2012, University of Florida. Thank you to my partner in life and love, Blake Matson, for being my strongest advocate; my parents, Kae Schwenk and Scott Myers, for their unwavering support; the attorneys at the Tennessee Justice Center and the Disability Rights Education & Defense Fund for the inspiration to fight for what is just; and the editors and staff of the *Vanderbilt Law Review* for their tireless work.

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