Notes

SAFEGUARDING THE ADA'S ANTIDISCRIMINATION MANDATE: SUBJECTING ARRESTS TO TITLE II COVERAGE

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ABSTRACT

The news has been peppered with tragic stories of individuals with disabilities who have been killed or injured following police encounters. In the aftermath of these incidents, as injured parties seek accountability, a question looms: Can arrest proceedings violate the Americans with Disabilities Act?

The ADA was enacted to prohibit disability discrimination. The law had an ambitious agenda, supported by broad statutory authority, to ensure equality in all areas of public life for individuals with disabilities. But while the ADA has fostered integration into many aspects of modern life, one area remains deeply contested: arrests.

If Congress envisioned that Americans with disabilities would enjoy lives free from discrimination, excluding arrests from ADA coverage undermines the law's broad promise of protection. In 2015, a Supreme Court opinion raised but failed to resolve this very issue, leaving an important question unanswered. This Note examines whether arrest proceedings must comply with the ADA and argues that they should. It then proposes comprehensive disability training as a tool to aid ADA compliance and avoid discriminatory arrest proceedings.

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INTRODUCTION

Robert Ethan Saylor, a young man with Down syndrome, was fascinated by police officers.[1] He frequently called the local dispatcher, eager to converse.[2] In a tragic irony, Saylor died at the hands of the very people he admired. On January 12, 2013, Saylor went to the movies with his aide, Mary Crosby, but grew distressed as the two prepared to leave.[3] While Crosby went to get the car, Saylor sneaked back to the theater for a second viewing.[4] When Crosby came looking for him, the theater manager demanded that Saylor buy a second ticket or leave.[5] Crosby told the manager that Saylor had Down syndrome and asked that everyone keep their distance, as she was best equipped to handle the situation.[6] Disregarding her advice, three off-duty deputies were dispatched to remove Saylor from the theater.[7] He was quietly sitting in his seat when they approached,[8] but a struggle then ensued. The officers tackled Saylor to the floor, fracturing his larynx in the process.[9] Saylor died from asphyxiation shortly thereafter.[10] He was twenty-six years old, with an IQ of forty, and presented features associated with Down syndrome.[11] Saylor's family filed a lawsuit including a claim for failure to train the police officers in violation of the Americans with Disabilities Act (ADA).[12]

Ethan Saylor's story is devastatingly common: it is the story of tragedy at the hands of law enforcement officers who fail to appropriately engage individuals with disabilities in arrest proceedings.[13] Cases that address injurious arrests of individuals with

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1. Theresa Vargas, *Md. Man with Down Syndrome Who Died in Police Custody Loved Law Enforcement*, WASH. POST (Feb. 19, 2013), https://www.washingtonpost.com/local/md-man-with-down-syndrome-who-died-in-police-custody-loved-law-enforcement/2013/02/19/10e09fe0-7ad5-11e2-82e8-61a46c2cde3d_story.html [https://perma.cc/M6XQ-YM6F].

2. *Id.*

3. Estate of Saylor v. Regal Cinemas, Inc., 54 F. Supp. 3d 409, 413 (D. Md. 2014).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 414.

10. *Id.*

11. *Id.* at 413.

12. *Id.* at 414–15.

13. Recently, a behavioral therapist and caretaker to a man with autism was shot when police officers responded to a call about a man allegedly threatening suicide. The officers drew their guns and shot the caretaker despite him telling the police officers that the man he was looking

disabilities generally draw on Title II of the ADA.[14] But the circuits are split on whether police officers' actions should be exempt from ADA coverage altogether, deferring to officers' decisions in the face of exigent circumstances.[15] A recent decision from the Ninth Circuit, *City of San Francisco v. Sheehan*,[16] requires police officers to accommodate an individual's disability in an arrest proceeding despite a potential exigency, accentuating the circuit split.

In August 2008, San Francisco police officers received a call from a social worker at a group home requesting that they check on a patient, Teresa Sheehan.[17] Sheehan, who suffered from schizophrenia, had been off her medication, and the group-home staff feared for her safety.[18] When the police approached Sheehan's room, she threatened them with a knife and insisted they leave her alone.[19] Sheehan was shot multiple times in her bedroom, but ultimately survived.[20] She filed suit against the city, claiming the police officers failed to reasonably accommodate her disability in violation of the ADA.[21] The Ninth Circuit agreed and held that officers are obliged to reasonably accommodate an individual's disability in the course of an arrest.[22] The city appealed the decision to the Supreme Court, which granted certiorari.[23]

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after had autism and was holding a toy truck. *See* Niraj Chokshi, *North Miami Police Officers Shoot Man Aiding Patient with Autism*, N.Y. TIMES (July 21, 2016), http://www.nytimes.com/2016/07/22/us/north-miami-police-officers-shoot-man-aiding-patient-with-autism.html [https://perma.cc/KA38-DM47].

14. *See, e.g.*, Schorr v. Borough of Lemoyne, 243 F. Supp. 2d 232, 234–35 (M.D. Pa. 2003) (recognizing the application of Title II of the ADA in a failure-to-train claim arising from an arrest proceeding).

15. *Compare id.* (recognizing the application of Title II to police officers' decisions), *with* Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000) ("Title II does not apply to an officer's on-the-street responses to reported disturbances . . . ."), *and* De Boise v. Taser Int'l, Inc., 760 F.3d 892, 899 (8th Cir. 2014) (acknowledging the relevance of Title II but noting that the inquiries are fact intensive and deference should be given to police discretion in exigent circumstances).

16. City of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015).

17. *Id.* at 1770.

18. *Id.* at 1769.

19. *Id.* at 1770–71.

20. *Id.* at 1771.

21. *Id.*

22. *See* Sheehan v. City of San Francisco, 743 F.3d 1211, 1233 (9th Cir. 2014), *rev'd in part and cert. dismissed in part by* 135 S. Ct. 1765 (2015) (denying judgment as a matter of law to the city by noting that a reasonable jury could find that the city failed to reasonably accommodate Sheehan and her disability).

23. *Sheehan*, 743 F.3d 1211, *cert. granted*, 135 S. Ct. 1765 (2015) (No. 13-1412).

In its initial brief, the city argued that law enforcement activity in the course of an arrest should be exempt from the ADA.[24] But in subsequent briefings and oral argument, the city agreed that the ADA applies to arrests[25] and shifted to a subsidiary question.[26] Frustrated with this pivot and consequently lacking sufficient information to issue an opinion, the Court dismissed the question of arrests under the ADA as improvidently granted.[27] Before doing so, however, the Court articulated an applicable analytic structure for such cases. Writing for the majority, Justice Alito presented a two-pronged framework to evaluate whether arrests are covered under the ADA: (1) Is an arrest a public activity? and (2) Does the treatment an individual receives in the course of an arrest constitute discrimination?[28] Although unable to provide an answer in this case, the Court recognized the importance of the question.[29] But as for Ethan Saylor and the nearly fifty-six million Americans with a disability,[30] the issue is not just important but potentially a matter of life and death.

This Note applies the two-part framework from *Sheehan* to argue that arrests are activities of a public entity and that the treatment some individuals with disabilities receive in the course of such arrests can constitute discrimination. Accordingly, arrests should be subject to the protections afforded by Title II of the ADA. To ensure ADA compliance, law enforcement officers should reasonably accommodate an individual's disability in the course of an arrest. Although courts generally recognize Title II as the relevant statute in such situations,

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24. *See* Petition for Writ of Certiorari at 18–28, City of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015) (No. 13-1412) (establishing the argument that law enforcement activity in the course of an arrest should be exempt from ADA compliance). The certiorari petition also included a question on qualified immunity for the law enforcement officers involved in the *Sheehan* case. *Id.* at 28–40.

25. It remains unknown why the petitioners in this case abandoned their primary argument. Political reasons may have been at play, as San Francisco is a predominately liberal jurisdiction and bringing an anti-civil rights lawsuit may have had negative political consequences for accountable officials, but this is mere speculation.

26. *See* Brief for Respondent at 25–26, City of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015) (No. 13-1412) (noting that petitioners changed their argument from one categorically excluding reasonable accommodations under the ADA to one focused on the specific exclusion of Sheehan as an individual subject to the ADA because her dangerous behavior stripped her of her status as a "qualified individual").

27. *Sheehan*, 135 S. Ct. at 1773–74.

28. *Id.* at 1773.

29. *Id.* (describing the question of arrests under the ADA as an "important question that would benefit from briefing and an adversary presentation").

30. MATTHEW W. BRAULT, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2010, at 5 (2012), http://www.census.gov/prod/2012pubs/p70-131.pdf [https://perma.cc/2XKK-EN7M].

some are reluctant to provide redress under the ADA given the dangerous nature of policing. But their reluctance fails to account for the relevant regulatory guidance as well as the fact that disability training occurs before an officer is on the scene, faced with potential exigencies. Finally, this Note asserts that ADA compliance requires that police officers receive comprehensive disability training. Such training can help avoid discriminatory conduct by bridging the communication gap, thus improving law enforcement officers' abilities to determine whether a perceived exigency presents a true threat or is merely innocuous disability-related behavior.

With this in mind, Part I begins by providing additional background on the ADA and thereafter illustrates the interactions between law enforcement and individuals with disabilities. Part I also describes how other courts have analyzed arrests under Title II of the ADA. Before concluding, Part I examines *Sheehan*. Based on the analytic structure provided by *Sheehan*, Part II analyzes how the ADA applies to arrests. Part III explains why some courts have failed to recognize discriminatory arrests under the ADA. Part IV advocates for police officer training as a necessary ADA-compliance mechanism to prevent discrimination and preserve the mandate of the law.

I. BACKGROUND

A. An Overview of the ADA

Approximately one in five Americans has a disability.[31] Within that group, around 15.2 million adults have limited cognitive, mental, or emotional functioning,[32] and an estimated 1.2 million adults have a diagnosed intellectual disability, such as Down syndrome.[33] Thus, the ADA protects a large group of Americans. It is a remedial statute intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[34] Indeed, the ADA is unprecedented among civil rights

31. *Id.* at 4. The ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102 (2012).

32. BRAULT, *supra* note 30, at 9.

33. *Id.*

34. 42 U.S.C. § 12101(b)(1); *see also* Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 426 (1991) (noting that pervasive discrimination present in many areas of social life presented "the factual underpinnings for the Americans with Disabilities Act").

statutes in the breadth of activities covered[35] and enforcement capacity granted to the Department of Justice (DOJ).[36]

Twenty-six years after its enactment, the disability community continues to benefit from the ADA's aggressive enforcement by both the DOJ and private attorneys.[37] Over this time period, the law has proven flexible by incorporating technological advancements and other aspects of modern life.[38] The degree of protection afforded under the ADA is due, in part, to a clear statutory purpose emphasizing an intentional breadth of coverage.[39] That individuals with disabilities deserve equal access to *all* aspects of American life is a consistent theme throughout the legislative history of the law,[40] highlighting the incongruity in allowing individuals with disabilities to integrate into some, but not all, aspects of community life. Thus, if Congress envisioned that Americans with disabilities would enjoy lives free from discrimination, categorically excluding arrests undermines the ADA's broad promise of protection.

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35. *See* Burgdorf, *supra* note 34, at 426.

36. *See id.* at 415 ("The ADA constitutes a second-generation civil rights statute that goes beyond the 'naked framework' of earlier statutes and adds much flesh and refinement to traditional nondiscrimination law.").

37. *See* Loretta E. Lynch, Attorney Gen., Remarks at Justice Department Event Commemorating the 25th Anniversary of the Americans with Disabilities Act (July 23, 2015), http://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-justice-department-event-commemorating [https://perma.cc/2J6V-BG9X] ("I am proud to say that the Department of Justice has been a leader in enforcing the ADA's protections.").

38. *See generally* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *Enforcement Activities*, ADA.GOV: INFO. AND TECHNICAL ASSISTANCE ON THE AM. WITH DISABILITIES ACT, http://www.ada.gov/enforce_activities.htm [https://perma.cc/C6PF-9STL] (providing information about enforcement actions against Uber and Netflix, among others).

39. *See* 42 U.S.C. §§ 12101(b)(2)–(4) (2012) ("It is the purpose [of the ADA] . . . to provide clear, strong, consistent, enforceable standards . . . to address the major areas of discrimination faced day-to-day by people with disabilities."); *see also* Burgdorf, *supra* note 34, at 453 ("The Americans with Disabilities Act has the broadest scope of coverage of any single civil rights measure enacted to date.").

40. *See, e.g.*, H.R. REP. NO. 101-485, pt. 3, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473 ("Separate-but-equal services do not accomplish this central goal and should be rejected."); *id.* at 49–50 *reprinted in* 1990 U.S.C.C.A.N. 445, 472–73 ("The purpose of [T]itle II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life.").

Other civil rights statutes narrowly define discrimination,[41] but the ADA remains exceptionally broad, and intentionally so.[42] Title II[43] was designed to eliminate discrimination by public entities.[44] Congress specified that Title II was enacted to extend the antidiscrimination mandate of Section 504 of the Rehabilitation Act of 1973 "to all actions of state and local governments."[45] But the troubling reality of police encounters with the disability community undermines the ADA's purpose.

B. Setting the Stage: Law Enforcement, the Disability Community, and the Title II Framework

Safe arrests depend on effective communication between law enforcement and individuals suspected of wrongdoing.[46] In fact, public entities, like city governments and local police departments, are already required to take steps to ensure effective communication with individuals with disabilities.[47] But unfortunately, miscommunication is likely to occur,[48] causing interactions to rapidly escalate and lead to

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41. For an explanation of earlier civil rights statutes, see Burgdorf, *supra* note 34, at 426–29.

42. *See* 42 U.S.C. § 12131(1)(A) (subjecting "any State or local government" to Title II coverage).

43. Title I covers employment-related matters and Title III covers public accommodations and services operated by private entities. *Id.* § 12111; *Id.* § 12181.

44. The antidiscrimination provision of Title II reads: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Id.* § 12132.

45. H.R. REP. NO. 101-485, pt. 2, at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367. The Rehabilitation Act of 1973 in many ways was the precursor to the ADA, but had a limited application to programs receiving federal funding. The ADA extended this by imposing an antidiscrimination mandate on all public entities, regardless of funding. *See id.* The House report notes:

> The first purpose [of the ADA] is to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973, to all programs, activities, and services . . . . Currently, [section 504] prohibits discrimination only by recipients of Federal financial assistance.

Id.

46. *See* Ellen C. Wertlieb, *Individuals with Disabilities in the Criminal Justice System*, 18 CRIM. JUST. & BEHAV. 332, 334 (1991) ("Discrediting a person's statements may lead to an inappropriate arrest or the dismissal of a potentially dangerous situation.").

47. 28 C.F.R. § 35.160(a)(1) (2016).

48. *See* ROBERT PERSKE, UNEQUAL JUSTICE? WHAT CAN HAPPEN WHEN PERSONS WITH RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES ENCOUNTER THE CRIMINAL JUSTICE SYSTEM 15–23 (1991) (listing common communication characteristics that can lead to misunderstanding).

injury, humiliation, or even death.[49] Researchers have found that people with intellectual disabilities represent up to 10 percent of the prison population, despite accounting for only 2–3 percent of the general population.[50] Furthermore, people with intellectual disabilities have the highest risk of violent victimization.[51] Thus, given the frequency of interaction between law enforcement and individuals with disabilities, the risk of discrimination and its harmful effects becomes all the more real. Because "the officer . . . is the first point of contact for citizens with disabilities who are arrested," it is particularly important to ensure police officers' procedures are ADA compliant.[52]

Title II of the ADA provides a source of liability when public entities and officials, such as police officers, engage in disability-based discrimination.[53] In so doing, the law incents proper antidiscriminatory behavior in public arenas. Title II reads in part, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[54] A discrimination claim under Title II generally arises when an individual with a disability is (1) excluded from a public activity or (2) receives disparate benefits or treatment in the provision of that activity.[55] Anchored by this statutory framework, courts addressing allegedly discriminatory arrests under Title II recognize two

49. *See* H. Richard Lamb, Linda E. Weinberger & Walter J. DeCuir, Jr., *The Police and Mental Health*, 53 AM. PSYCH. SERV. 1266, 1267, 1270 (2002) (noting that miscommunication is likely between individuals with disabilities and police officers and can lead to adverse results, such as death).

50. LEIGH ANN DAVIS, PEOPLE WITH INTELLECTUAL DISABILITIES IN THE CRIMINAL JUSTICE SYSTEM: VICTIMS & SUSPECTS 1 (2009), http://www.thearc.org/document.doc?id=3664 [https://perma.cc/PA5D-MT3D]; *see also id.* at 2 ("[T]hese individuals are less likely to receive probation or parole and tend to serve longer sentences . . . .").

51. *Id.*

52. James K. McAfee & Stephanie L. Musso, *Training Police Officers About Persons with Disabilities: A 50-State Policy Analysis*, 16 REMEDIAL & SPECIAL EDUC. 53, 53 (1995).

53. 42 U.S.C. § 12132 (2012).

54. *Id.*

55. *See* Gorman v. Bartch, 152 F.3d 907, 911 (8th Cir. 1998) ("[P]laintiff must demonstrate that: (1) he is a qualified individual with a disability; (2) he was denied the benefits of a program or activity of a public entity which receives federal funds, and (3) he was discriminated against based on his disability." (footnote omitted) (citing Rehabilitation Act of 1973 § 504(a)(1), 29 U.S.C. § 794(a)(1))).

categories: wrongful arrests and arrests that fail to provide a reasonable accommodation for the arrestee's disability.[56]

Wrongful arrests occur when an individual is arrested for noncriminal activity that is perceived as criminal because of innocuous disability-related behavior.[57] When police officers approached Charles Lewis's home to investigate a custody dispute, Lewis's friends told the officers that Lewis was deaf.[58] They asked that the officers communicate with Lewis through written questions.[59] The officers, however, issued verbal commands to Lewis and "proceeded to kick and hit him" when he failed to respond.[60] The officers were aware that Lewis would be unable to hear verbal commands, but nonetheless arrested him for criminal insubordination.[61] Lacking the requisite criminal intent, Lewis should never have been arrested.[62] The officers had reason to know Lewis would be unable to hear and comply with any verbal commands, not because he was criminally insubordinate, but because he was deaf.[63]

The second category results from a failure to reasonably accommodate an individual's disability, subjecting the individual to injury, humiliation, or indignity that someone without a disability would not face.[64] A reasonable accommodation in the context of an arrest is the modification of police procedures to accommodate the individual's disability.[65] Jeffrey Gorman, a paraplegic, was kicked out

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56. *See, e.g.*, Gohier v. Enright, 186 F.3d 1216, 1220 (10th Cir. 1999) (recognizing the two different theories courts have used to analyze arrests under Title II as wrongful arrests and failure to provide a reasonable accommodation); Estate of Saylor v. Regal Cinemas, Inc., 54 F. Supp. 3d 409, 425 (D. Md. 2014) ("Claims in the [arrest] context typically fall within two general categories.").

57. *See Gohier*, 186 F.3d at 1220 ("[P]olice wrongly arrested someone with a disability because they misperceived the effects of that disability as criminal activity.").

58. Lewis v. Truitt, 960 F. Supp. 175, 176 (S.D. Ind. 1997).

59. *Id.*

60. *Id.*

61. *Id.* at 176–77.

62. *See id.* at 179 (denying defendant's motion to dismiss because "[d]efendants have cited to no evidence to contradict" the fact that they had no reason to arrest Lewis).

63. *Id.* at 176–77.

64. *See* Gohier v. Enright, 186 F.3d 1216, 1220–21 ("[W]hile police properly investigated and arrested a person with a disability for a crime unrelated to that disability, they failed to reasonably accommodate the person's disability . . . causing the person to suffer greater injury or indignity in that process than other arrestees.").

65. *See id.* at 1222 (discussing the theory that "Title II required [the city] to better train its police officers to recognize reported disturbances that are likely to involve persons with mental disabilities, and to investigate and arrest such persons in a manner reasonably accommodating their disability").

of a bar in Kansas after the security guard banned his wheelchair from the dance floor.[66] Once outside the bar, Gorman angrily recounted the story to nearby police officers, hoping they would help.[67] The interaction quickly escalated and Gorman was arrested for trespassing.[68] A van lacking proper wheelchair accommodations was sent to transport Gorman to the police station.[69] Police officers lifted Gorman out of his wheelchair and fastened his torso to the seat of the van using a seatbelt and his own belt.[70] Unable to independently remain upright when the makeshift safety measures came loose, Gorman fell to the floor of the van.[71] The injuries he sustained required corrective surgery.[72] In the course of the fall, Gorman's urine bag was pierced, leaving him drenched in a puddle of his bodily waste for the remainder of the ride.[73]

This case is distinguishable from Lewis's case. Here, the police officers did have a legitimate reason to arrest Gorman. However, the provision of a van unequipped to accommodate Gorman's wheelchair constituted the failure to reasonably accommodate him.[74] As a result, Gorman suffered substantial physical injury and humiliation that an individual without a wheelchair would not have faced; therefore, the arrest proceeding was discriminatory.[75]

These two examples illustrate the importance of ensuring ADA-compliant arrests. Although Title II is generally accepted as the relevant statute,[76] courts are split on whether to recognize discriminatory arrests under the ADA.[77] Given the perilous nature of

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

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 910.

72. *Id.*

73. *Id.*

74. *See id.* at 913–14 (finding Gorman had a plausible ADA claim and remanding Gorman's case for factual development).

75. I am primarily using this fact pattern as an illustrative example. The court here found that the discrimination claim was contingent upon additional facts. *Id.* at 916.

76. *See* Waller v. City of Danville, 515 F. Supp. 2d 659, 662–63 (W.D. Va. 2007) (recognizing the general acceptance that Title II applies to police officers and their activities).

77. *See* Gohier v. Enright, 186 F.3d 1216, 1221 (10th Cir. 1999) ("[A] broad rule categorically excluding arrests from the scope of Title II . . . is not the law."); *Gorman*, 152 F.3d at 913 (recognizing that a claim for discriminatory arrests can exist under Title II of the ADA based on legislative history, Supreme Court jurisprudence, and DOJ regulations). *But see* De Boise v. Taser Int'l., Inc., 760 F.3d 892, 899 (8th Cir. 2014) (expressing a willingness to recognize a discrimination

policing, the quick decisions required by police officers, and the duty to protect the community at large, some circuits afford officers an affirmative defense based on exigent circumstances, which limits the success of ADA claims.[78] In 2014, the Supreme Court granted certiorari in a Ninth Circuit case, *City of San Francisco v. Sheehan*.[79] The central question posed was whether law enforcement should be required to reasonably accommodate an individual's disability during an arrest that presented a potentially exigent circumstance.[80] However, due to a "bait-and-switch"[81] of arguments, the Court never issued an opinion on the matter.

C. The Supreme Court's Missed Opportunity in Sheehan

The Ninth Circuit ruled that Teresa Sheehan plausibly claimed the police officers violated the ADA when they made no modification to their procedures in light of Sheehan's disability, but instead defaulted to deadly force.[82] Although many courts are willing to accept that the ADA may apply to arrests, some have carved out a broad exception because "[t]he exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance."[83] The Ninth Circuit acknowledged that Sheehan had a knife and was threatening to use it against the police officers who entered her room.[84] However, given Sheehan's qualifying disability, the court felt that the jury had sufficient information to decide whether Sheehan was denied her right to a reasonable accommodation under the ADA.[85]

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claim but not a willingness to second-guess police officer discretion in exigent circumstances); Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000) ("We simply hold that [discriminatory arrest] is not available under Title II under [exigent] circumstances . . . .").

78. *See Hainze*, 207 F.3d at 801 ("[W]e hold 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 . . . disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life.").

79. City of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015).

80. Petition for Writ of Certiorari at i, City of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015) (No. 13-1412).

81. *Sheehan*, 135 S. Ct. at 1779 (Scalia, J., concurring in part and dissenting in part).

82. Sheehan v. City of San Francisco, 743 F.3d 1211, 1232–33 (9th Cir. 2014), *rev'd in part and cert. dismissed in part by* 135 S. Ct. 1765 (2015).

83. Bircoll v. Miami-Dade Cty., 480 F.3d 1072, 1085 (11th Cir. 2007).

84. *Sheehan*, 743 F.3d at 1230.

85. The court found that the jury could decide the officers should have "wait[ed] for backup and . . . employ[ed] less confrontational tactics." *Id.* at 1233.

The City of San Francisco appealed to the Supreme Court, arguing that the Ninth Circuit erred in holding that law enforcement officers must provide a reasonable accommodation to an individual with a disability brandishing a knife during an arrest.[86] But in what Justice Scalia described as a "bait-and-switch,"[87] the city accepted the premise of the very question it challenged in subsequent adversarial briefings and oral argument.[88] The city acknowledged that law enforcement officers should be obliged to accommodate an individual's disability in the course of an arrest, and argued instead that Sheehan was not qualified for ADA coverage, given the "direct threat" she posed.[89]

Denied the opportunity to hear adversarial briefing, the Supreme Court dismissed the question as improvidently granted.[90] However, the Court not only conveyed the importance of the issue but also delineated an analytic structure.[91] Bearing in mind the basic Title II language introduced above,[92] the *Sheehan* framework will seem familiar.[93] According to the Supreme Court, arrests are subject to Title II if (1) "an arrest is an 'activity' in which the arrestee 'participat[es]' or from which the arrestee may 'benefi[t]'"[94] and (2) "the failure to arrest an individual with a . . . disability in a manner that reasonably accommodates that disability constitutes 'discrimination.'"[95] Although we are left to speculate how the Court might decide the question, the analysis must begin with statutory interpretation.

86. Petition for Writ of Certiorari at 25, City of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015) (No. 13-1412). The city also included an alternative argument alleging that, even if the officers were found to have denied Sheehan her right to reasonable accommodation, the officers should have been entitled to qualified immunity. *Id.* at 28–29.

87. *Sheehan*, 135 S. Ct. at 1779 (Scalia, J., concurring in part and dissenting in part).

88. *Id.* at 1772 (majority opinion) ("Having persuaded us to grant certiorari, San Francisco chose to rely on a different argument than what it pressed below.").

89. *Id.* at 1773.

90. *Id.* at 1774.

91. *See id.* at 1773 (discussing the analysis necessary to conclude that language in the ADA applies to arrests of qualified individuals with disabilities).

92. For further discussion, see *infra* Part II.B.

93. I am accepting, rather than challenging, the structure of the *Sheehan* framework because it mirrors all Title II analyses.

94. *Sheehan*, 135 S. Ct. at 1773 (alterations in original) (quoting 42 U.S.C. § 12132 (2012)).

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

II. HOW THE ADA TREATS ARRESTS: AN EXERCISE IN STATUTORY INTERPRETATION

This Part conducts the analysis that the Supreme Court suggested in *Sheehan* by considering: (1) whether an arrest can be categorized as an activity[96] in which the arrestee participates and benefits and (2) whether failing to reasonably accommodate an individual's disability in the course of an arrest constitutes illegal discrimination under the ADA. Based on the ordinary meaning of "activity," regulations interpreting Title II coverage, and other Supreme Court cases, an arrest qualifies as an activity, and the failure to reasonably accommodate an individual's disability can result in illegal discrimination.

A. Arrests as an "Activity" Under Title II

As with all questions of statutory interpretation, analysis begins with the text of the statute.[97] Title II states, in part, "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity . . . ."[98] Although the law defines a public entity,[99] it fails to define a public service, program, or activity. Sifting through these three possibilities, Justice Alito made a nonbinding yet helpful suggestion that arrests should be characterized as an "activity."[100]

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96. The word "activity" is used throughout this Note because that is how Justice Alito categorized arrests in *Sheehan*. *Id.* ("[Title II] would apply if an arrest is an 'activity' . . . ."). However, Title II would also cover arrests if arrests were categorized as a public service or program. For consistency, arrests are referred to as an activity.

97. *E.g.*, Bailey v. United States, 516 U.S. 137, 144–45 (1995).

98. 42 U.S.C. § 12132. Title II of the ADA defines a qualified individual as one who, "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2). In other words, a person must, with or without a disability, be eligible to receive the benefits of the public program, service, or activity.

99. Public entities are defined, in part, as "any department, agency, special purpose district, or other instrumentality of a State or States or local government." *Id.* § 12131(1)B). There is no disagreement that a police force is a public entity under the statute. *See* Waller v. City of Danville, 515 F. Supp. 2d 659, 662–63 (W.D. Va. 2007) ("Courts have liberally interpreted [public entity] . . . to include . . . local police forces."), *aff'd*, Waller *ex rel.* Estate of Hunt v. Danville, 556 F.3d 171 (4th Cir. 2009).

100. *See Sheehan*, 135 S. Ct. at 1773.

According to a common canon of statutory interpretation, a word in a statute "must be given its 'ordinary or natural meaning.'"[101] The *Oxford English Dictionary* defines "activity" as "the quality or condition of being an agent or of performing an action or operation."[102]Additionally, *Webster's Unabridged Dictionary* defines activity as "an organizational unit or the function it performs."[103] Thus, while the definition of "activity" incorporates many endeavors, an arrest clearly fits within the ordinary dictionary meaning. Police officers are public agents and an arrest is an action taken by these agents to achieve the aim of public safety. Additionally, an arrest is a function performed by an organizational unit, the police department. To the extent that ambiguity remains as to the ordinary meaning of "activity," interpretive regulations provide additional gap filling.[104]

Congress granted explicit statutory authority to the DOJ to "promulgate regulations . . . that implement [Title II]."[105] The regulations to Title II nearly mirror the statutory text[106] and are granted substantial judicial deference.[107] The regulatory language sweeps in everything a public entity does, regardless of whether the activity is funded with federal dollars.[108] However, the regulatory language goes on to provide some necessary guidance by delineating two categories of activities subject to Title II:

> [T]hose involving general public contact as part of ongoing operations of the entity and those directly administered by the entities for program beneficiaries and participants. Activities in the first category include communication with the public (telephone contacts, office

101. *Bailey*, 516 U.S. at 145 (quoting Smith v. United States, 508 US. 223, 228 (1993)).

102. *Activity*, OXFORD ENGLISH DICTIONARY, 2a (3d. ed. 2010), http://www.oed.com/view/Entry/1958?redirectedFrom=activity#ied [https://perma.cc/5JFL-V9EZ].

103. *Activity*, WEBSTER'S UNABRIDGED DICTIONARY 20 (2d ed. 2001).

104. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

105. 42 U.S.C. § 12134(a) (2012). Furthermore, when Congress explicitly grants an agency interpretive authority, the agency's regulations are granted deference unless they are found to be "arbitrary, capricious, or . . . contrary to the statute." *Chevron*, 467 U.S. at 844.

106. *See* 28 C.F.R. § 35.102(a) (2016) ("[T]his part applies to all services, programs, and activities provided or made available by public entities.").

107. *See, e.g.*, Helen L. v. DiDario, 46 F.3d 325, 331 (3d Cir. 1995) ("[R]egulations which the Department promulgated [under Title II] are entitled to substantial deference.").

108. *See* 28 C.F.R. § 35.102(a) ("[Title II] applies to all . . . activities provided or made available by public entities."); *see also* 28 C.F.R. pt. 35, app. B, § 35.102, at 677 ("Title II coverage, however, is not limited to '[e]xecutive' agencies [as is the Rehabilitation Act], but includes activities of the legislative and judicial branches of State and local governments.").

> walk-ins, or interviews) and the public's use of the entity's facilities. Activities in the second category include programs that provide State or local government services or benefits.[109]

An arrest likely qualifies under either of the categories. An arrest can be part of a public entity's ongoing operations under the first category, or can be a program that provides "local government services"[110] under the second category.

It may seem unconventional to categorize arrests as an activity that benefits an individual. Generally we do not assume the individual arrested conceives of him- or herself as a beneficiary, nor do we assume the individual volunteered for the arrest. In fact, some courts have held arrests and law enforcement activity exempt from the ADA for this very reason, finding that an individual held against his or her will cannot be said to have participated in the activity voluntarily.[111] The analysis of these courts, however, overlooks the fact that nothing in the language of the statute requires voluntariness. The Supreme Court explicitly recognized this principle in *Pennsylvania Department of Corrections v. Yeskey*.[112]

An individual with a disability is qualified under Title II when he or she is eligible to participate in and benefit from a public activity, regardless of the impact of the disability.[113] The statute, however, says nothing about the voluntariness of the individual's participation. Based on the ordinary meaning of "eligibility" and "participation," in *Yeskey*, the Supreme Court concluded that eligibility for Title II does not require an individual to participate voluntarily in "programs, services, and activities."[114] In *Yeskey*, an inmate in a state correctional facility, who met all the requirements to enroll in a diversion program for first-time offenders, was denied participation in the program, and consequently its benefits, because of his disability.[115] Justice Scalia noted that public entities offer many activities in which participation is

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109. 28 C.F.R. pt. 35, app. B, § 35.102, at 677.

110. *Id.*

111. *See* Torcasio v. Murray, 57 F.3d 1340, 1347 (4th Cir. 1995) ("The terms 'eligible' and 'participate' imply voluntariness on the part of an applicant who seeks a benefit from the state; they do not bring to mind [individuals] who are being held against their will.").

112. Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 211 (1998).

113. *See* 42 U.S.C. § 12131(2) (2012) ("'[Q]ualified individual with a disability' means an individual with a disability who . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.").

114. *Yeskey*, 524 U.S. at 211.

115. *Id.* at 206.

mandatory, refuting the claim that one must submit voluntarily to a program.[116] Reading in a voluntary participation requirement for arrests would be contrary to the statute's language.

Nor can it be said that an arrested individual receives no benefit from the arrest. *Sheehan* itself illustrates this point. Home workers called the police out of concern that Sheehan might hurt herself. The police officers were called to protect Sheehan and help ensure her safety, a benefit that she could have received had the arrest been ADA compliant.[117] But because the officers failed to modify their tactics in light of her disability, she suffered substantial injury.[118] Thus, arrest proceedings do provide a benefit when they are conducted appropriately. An arrest proceeding that results in an unequal benefit because of one's disability constitutes discrimination under the ADA, as analyzed in the next Section.

B. Discriminatory Arrests Under Title II

Title II not only addresses the scope of the ADA's application to public entities, but also mandates that public entities provide benefits and conduct activities in a nondiscriminatory manner. Title II states, "[N]o qualified individual with a disability shall . . . be subjected to discrimination by [public] entit[ies]."[119] Although the statutory text does not define discrimination, the ADA's other provisions, statutory purpose, interpretive regulations, and legislative history provide instructive insight into the meaning of discrimination under Title II. Taken together, discrimination under Title II occurs when an individual with disabilities receives an unequal benefit from an activity because of his or her disability.[120] Discrimination often results when public entities fail to modify policies and procedures in a manner that would reasonably accommodate the individual's disability, leading to a distinct injury.[121]

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116. *Id.* at 211 ("A drug addict convicted of drug possession, for example, might, as part of his sentence, be required to participate in a drug treatment program for which only addicts are 'eligible.'").

117. City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1768 (2015).

118. *See id.* at 1767 ("[T]he officers shot Sheehan multiple times.").

119. 42 U.S.C. § 12132 (2012).

120. *See, e.g.*, Gohier v. Enright, 186 F.3d 1216, 1219 (10th Cir. 1999) (applying the standard).

121. *See, e.g.*, Schorr v. Borough of Lemoyne, 243 F. Supp. 2d 232, 236 (M.D. Pa. 2003) (recognizing that modification of policies and procedures can effectuate the ADA's antidiscrimination mandate).

Although Title II does not define discrimination, Titles I and III make clear that discrimination constitutes the receipt of different benefits because of a disability.[122] Title I prohibits employment-based disability discrimination.[123] The antidiscrimination mandate in Title I includes "denying equal . . . benefits to a qualified individual because of the known disability."[124] Title III prohibits discrimination in public accommodations.[125] Like Title I, Title III's antidiscrimination mandate focuses on unequal benefits or opportunities, reading in part, "[I]t shall be discriminatory to afford an individual . . . the opportunity to participate in or benefit from a [program] that is not equal to that afforded to other individuals."[126] Thus, under both Titles I and III, disparate treatment through the provision of unequal benefits because of one's disability constitutes illegal discrimination; and so it does under Title II.[127]

If discrimination is the injury, a reasonable accommodation is the envisioned prevention mechanism. Notwithstanding the absence of similar language in Title II, Titles I and III provide for reasonable accommodation as the primary mechanism to avoid discrimination. Under Title I, discrimination results when a group fails to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."[128] Like Title I, Title III uses "reasonable modifications" as a tool to avoid discrimination.[129] Under Title III, discrimination results from a "failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to . . . accommodate[]

122. When the same word is used in different parts of a statute, we can infer that the word carries a similar meaning throughout the statute. *See* Ratzlaf v. United States, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

123. 42 U.S.C. § 12112(a).

124. *Id.* § 12112(b)(4).

125. *Id.* § 12182.

126. *Id.* § 12182(b)(1)(A)(ii).

127. In fact, courts have found the provision of unequal benefits to constitute a violation of Title II. *See, e.g.*, Frame v. City of Arlington, 657 F.3d 215, 231 (5th Cir. 2011) (finding petitioners had a valid claim under the antidiscrimination clause of Title II of the ADA as they were denied the benefits of the city's sidewalks).

128. 42 U.S.C. § 12112(b)(5)(A).

129. Although Title I uses the phrase "reasonable accommodation" and Title III uses "reasonable modification," many courts use these words and standards interchangeably. *See* Johnson v. Spoetzl Brewery, 116 F.3d 1052, 1059 (5th Cir. 1997) (noting that the parallel language in Titles I and III lends itself to using the two interchangeably for analysis purposes).

individuals with disabilities."[130] Therefore, in both titles, the provision of reasonable accommodations is necessary to ensure equal benefits, thus avoiding illegal discrimination. Courts have also required reasonable accommodations under Title II to prevent discrimination.[131]

It may seem peculiar that Titles I and III set out the law more precisely than Title II. But Titles I and III were entirely new provisions under the ADA, while Title II extended an already-existing law.[132] Because of this, Congress did not draft similar language for Title II. Congress intended Title II to be interpreted in accordance with Titles I and III and remain equally broad. Legislative history supports[133] this assertion: "Title II should be read to incorporate provisions of Titles I and III" that are otherwise consistent with Title II.[134] As one congressional report notes, "[T]he committee has chosen not to list all types of actions that would constitute discrimination because [T]itle II extends the anti-discrimination prohibition of Section 504 [of the Rehabilitation Act] to all actions of state and local government."[135]

In addition, the overall statutory purpose of the ADA supports a clear and comprehensive antidiscrimination mandate that can be easily implemented:

> It is the purpose of [the ADA] (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination . . . (3) to ensure that the Federal Government plays a central role in enforce[ment] . . . and (4) to invoke the sweep of congressional authority . . . to address the major areas of discrimination faced day-to-day by people with disabilities.[136]

To carry out this general purpose of eliminating discrimination through effective enforcement, Congress enacted Title II to eliminate disability-based discrimination in all aspects of public community

130. 42 U.S.C. § 12182(b)(2)(A)(ii).

131. *See, e.g.*, Henrietta D. v. Bloomberg, 331 F.3d 261, 276 (2d Cir. 2003) (finding that, under Title II, "the demonstration that a disability makes it difficult for a plaintiff to access benefits that are available to both those with and without disabilities is sufficient to sustain a claim for a reasonable accommodation").

132. *See* Schorr v. Borough of Lemoyne, 243 F. Supp. 2d 232, 236 (M.D. Pa. 2003) (explaining that Title II expands the Rehabilitation Act's antidiscrimination provision found in Section 504).

133. H.R. REP. NO. 101-485, pt. 3, at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 474.

134. *Id.*, *reprinted in* 1990 U.S.C.C.A.N. 445, 475.

135. *Id.*, pt. 2, at 84, *reprinted in* 1990 U.S.C.C.A.N. 303, 367.

136. 42 U.S.C. §§ 12101(b)(1)–(4).

life.[137] Congress recognized the plethora of settings in which discrimination may arise and was aware that eliminating discrimination would be burdensome but necessary.[138] Ensuring the receipt of equal benefits in all public activities, including arrests, fits squarely within the larger statutory scheme. In fact, Congress intended that reasonable accommodations be used to avoid discrimination in Title II.[139]

The ADA regulations provide an additional source of support.[140] A public entity is prohibited from "provid[ing an activity] that is not as effective in affording equal opportunity to obtain the same result [or] to gain the same benefit . . . as that provided to others. . . ."[141] Additionally, "[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."[142] This language aligns Title II with Titles I and III. First, the regulatory definition of discrimination nearly mirrors the statutory definitions articulated in Titles I and III. Second, similarly to Titles I and III, the regulatory language incorporates reasonable accommodation as a tool to help avoid discrimination.

A discriminatory arrest occurs when an individual with a disability receives a different benefit from an arrest than one without a disability would receive.[143] In an arrest proceeding, the benefit sought is a safe and appropriate arrest.[144] Thus, to avoid discrimination, law enforcement officers are required to modify their customary arrest proceedings in a manner that reasonably accommodates the individual's disability. When an individual's disability is not considered

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137. *See* H.R. REP. NO. 101-485, pt. 3, at 49–50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 472–73 ("The purpose of [T]itle II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life.").

138. *Id.* at 50, *reprinted in* 1990 U.S.C.C.A.N. 445, 473 ("While the integration of people with disabilities will sometimes involve substantial short-term burdens . . . the long-range effects of integration will benefit society as a whole.").

139. *Id.* ("The provision of reasonable accommodation is central to [Title II's] nondiscrimination mandate.").

140. For a *Chevron* analysis of Title II's enforcement and interpretive regulations, see *supra* notes 97–110 and accompanying text.

141. 28 C.F.R. § 35.130(b)(1)(iii) (2016).

142. *Id.* § 35.130(b)(7).

143. To clarify, during an arrest, individuals with disabilities should, when necessary, receive different treatment than individuals without disabilities. Police officers should modify standard policies to accommodate the individual's disability. In so doing, the individual will receive the *same benefit* as someone without a disability: a safe and appropriate arrest.

144. For illustrative examples of the different treatment individuals with disabilities are subject to, see *supra* Part I.B.

and accommodated, that individual is likely to receive a benefit that differs greatly from someone without a disability, thus constituting discrimination. Other provisions of the ADA, the overall statutory purpose, interpretive regulations, and legislative history all support such an interpretation.

Some courts arrive at a similar conclusion.[145] Others, however, reject the application of Title II to arrests because of the potential risk to public safety should officers be required to pause and consider a disability.[146] Although public safety is rightly a chief concern, the next Part will explain why these courts have mistakenly emphasized this and consequently misconstrued the ADA's mandate.

III. ACCOMPLISHING THE ADA'S GOALS WITHOUT RISKING PUBLIC SAFETY

In reviewing arrests gone wrong and subsequent ADA-violation claims, some courts have expressed concern that requiring a police officer to pause and reasonably accommodate a disability will threaten public safety.[147] Consider the facts in *Sheehan*.[148] Police officers were called to intervene when Sheehan, who has schizophrenia and was off her medication, had a knife and was threatening to use it. The police officers had to make a quick decision about how to most effectively protect everyone involved. According to some circuits, obliging officers to pause and contemplate a reasonable accommodation could risk public safety, and is therefore not required.[149] But what these courts fail to recognize is that the ADA still applies regardless of an exigency. Rather than strip injured parties of their rights under the ADA, courts should analyze exigent circumstances as a direct-threat affirmative defense to an ADA violation. In fact, the petitioners in *Sheehan* amended their argument in this precise fashion.

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145. *See, e.g.*, Schorr v. Borough of Lemoyne, 243 F. Supp. 2d 232, 236 (M.D. Pa. 2003) ("The legislative history of the ADA provides additional support for a broad interpretation encompassing [arrests under the ADA].").

146. *See* Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000) ("Title II does not apply to an officer's on-the-street responses to reported disturbances . . . .")

147. *See id.* ("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.").

148. For a review of the facts in *Sheehan*, see *supra* Part I.C.

149. For examples, see *supra* note 15.

Title I and Title III of the ADA stipulate that an otherwise qualified individual will be exempt from ADA coverage when the individual poses a "direct threat to the health or safety of others."[150] Title II does not include this exemption in the text of the law.[151] However, the DOJ's interpretive regulations once again align Title II with Titles I and III.[152] "This part 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*."[153] The regulation thereafter guides courts and public entities by clarifying that a direct-threat affirmative defense claim under Title II requires an individualized assessment:

> [A] public entity must make an *individualized assessment* . . . that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications . . . will mitigate the risk.[154]

Taken together, these regulations address the concern of reluctant courts. When an individual truly poses a direct threat to others, police officers are relieved from their duty to comply with the ADA because the individual is no longer qualified under the ADA. But the regulation's main contribution is in recognizing that an accurate direct-threat analysis is contingent on an individualized assessment.[155] Enabling police officers to make such assessments necessitates comprehensive disability training.[156] Sheehan's story illustrates the importance of training in making an individualized direct-threat assessment.

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150. 42 U.S.C. § 12182(b)(3) (2012); *see also id.* § 12113(b) ("The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.").

151. For a discussion of why Title II often lacks the detail of Titles I and III, see *supra* notes 129–35 and accompanying text.

152. For a *Chevron* analysis of Title II's interpretive and enforcement regulations, see *supra* notes 97–110 and accompanying text.

153. 28 C.F.R. § 35.139(a) (2016) (emphasis added).

154. *Id.* (emphasis added).

155. *See id*. ("In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment.").

156. This notion is supported by regulatory guidance and legislative history, discussed *infra* Part IV.

When the City of San Francisco amended its brief in *Sheehan*, its argument shifted away from arrests under the ADA generally to Sheehan herself, arguing that she posed a direct threat.[157] Rather than argue that the ADA did not apply because of the exigency, the city claimed an affirmative defense that there was no duty to reasonably accommodate Sheehan because she was a direct threat to the officers and her community.[158] While claiming the individual presented a direct threat is a valid affirmative defense, the city's application was flawed. The San Francisco police officers failed to assess the true risk Sheehan posed and thus did not consider whether she could be reasonably accommodated by a change in procedure, as required by law.

The officers were uniquely situated to make a thoughtful individual assessment of Sheehan's needs. They were in a group home with staff who knew about Sheehan's disability.[159] Thus, the officers had resources readily available to assess the level of risk Sheehan posed and to determine whether a modification could be made that would accommodate her disability.[160] An expert in Sheehan's case suggested a few appropriate accommodations: respecting her comfort zone, using calm and concise communication, and allowing the passage of time to diminish the risk.[161] Nothing, however, indicates that the officers conducted an individualized assessment as required by law.[162] The officers had an opportunity to modify their procedures in a way that would have ensured Sheehan's safety. Doing so would have not only prevented Sheehan's injuries, but also protected the officers from legal recourse.

Courts that focus on exigencies as a barrier to ADA compliance also overlook the timing of events. Police officers receive training far before an exigency presents itself.[163] In Ethan Saylor's case, the failure

157. *See* City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1772–73 (2015) (noting that petitioners shifted to analyze whether Sheehan was herself a qualified individual given the potential exigency).

158. *Id.* at 1773.

159. *Id.* at 1767.

160. *See* Brief for Respondent, at 40–42, City of San Francisco, 135 S. Ct. 1765 (2015) (No. 13-1412).

161. *Id.* at 37.

162. *Id.* at 40; *see Sheehan*, 135 S. Ct. at 1768 (stating the officers did not consider "if they could accommodate [Sheehan's] disability").

163. *See* Schorr v. Borough of Lemoyne, 243 F. Supp. 2d 232, 238 (M.D. Pa. 2003) ("The alleged non-compliance with the training requirements of the ADA did not occur the day that the officers shot Ryan Schorr; it occurred well before that day . . . .").

to train occurred well before the officers encountered him.[164] At the time of the encounter, however, the officers' behavior evidenced an absence of disability training. Had the officers received comprehensive disability training, they may have implemented a different course of action; perhaps they never would have approached Saylor to begin with, heeding his aide's advice.

Training is a necessary mechanism to effectuate the purpose of the ADA. Comprehensive disability training helps protect police officers, the community, and individuals with disabilities by ensuring police officers will be less likely to conflate exigent circumstances with ordinary symptoms of a disability. Officers can thereafter modify their policies and procedures in a manner that best accommodates the individual's particular needs.[165]

IV. POLICE OFFICER TRAINING AS AN ADA-COMPLIANCE MECHANISM

> *In my experience, officers who can recognize and delineate disabilities become ambassadors. Once their awareness is raised, they are amazingly helpful in avoiding inappropriate arrests.*[166]

When off-duty deputies charged into the theater where Saylor was watching a movie, they had reason to know of his disability. Not only is Down syndrome facially recognizable, but his aide verbally informed them of his disability. Despite knowledge of the disability, the deputies' actions evidenced a lack of awareness of how to interact with an individual with Down syndrome. Had they been trained to understand the complexities of Down syndrome, Saylor might still be alive today. This Part analyzes the statutory and legal support for requiring comprehensive disability training, thereafter discussing the prevalence and substance of existing training programs. This Part concludes by introducing a model for disability training enacted by the Maryland legislature in honor of Ethan Saylor.

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164. *See* Estate of Saylor v. Regal Cinemas, Inc., 54 F. Supp. 3d 409, 426 (D. Md. 2014) (discussing plaintiffs' Title II argument that the failure to train was based on a right to have law enforcement equipped to interact with members of the disabled community).

165. *See supra* note 164 and accompanying text.

166. Dolores Norley, Defendants with Retardation: Quintessential Cast-offs, Keynote Address at Developmentally Disabled Offender Program (June 4, 1986), *in* PERSKE, *supra* note 48, at 25.

A. Statutory and Legal Support for Comprehensive Disability Training

Courts, Congress, and the DOJ have recognized that disability training is necessary to defend the ADA's antidiscrimination mandate. Courts recognize the logic in police officer training as an ADA-compliance mechanism.[167] Ryan Schorr was hospitalized when his bipolar disorder spiraled out of control.[168] But Schorr escaped from the facility.[169] Schorr's parents enlisted local police officers to help their son and asked that they bring him back to the hospital.[170] However, a violent confrontation transpired at Schorr's apartment in which he was shot and killed.[171] Schorr's parents thereafter brought a claim against the police commission alleging that the absence of disability training proximately caused their son's death.[172] The court agreed: "[The police commission] failed to institute policies to accommodate disabled individuals . . . by giving the officers the tools and resources to handle the situation peacefully."[173] The Tenth Circuit also recognized the logic inherent in such a claim: "[Plaintiff] might have argued that Title II required Colorado Springs to better train its police officers to recognize reported disturbances that are likely to involve persons with mental disabilities, and to investigate and arrest such persons in a manner reasonably accommodating their disability."[174]

That a training manual on disabilities exists, however, is insufficient for ADA compliance. The court in *Saylor* acknowledged that effective ADA training must actually aid the officers' interaction

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167. *See, e.g.*, Schorr v. Borough of Lemoyne, 243 F. Supp. 2d 232, 235 (M.D. Pa. 2003) (concluding that Congress's broad policy mandate to eliminate discrimination must necessarily include training of police officers). *But see* Waller v. City of Danville, 515 F. Supp. 2d 659, 665 (W.D. Va. 2007) ("The act or omission involved in failing to train police officers to deal with mentally ill individuals may have a disparate impact on such individuals as a class, but can never by itself equate to a specific act of intentional discrimination against a particular plaintiff."), *aff'd*, Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 177 (4th Cir. 2009). The decision in *Waller v. City of Danville* was appealed to the Fourth Circuit, but the Fourth Circuit punted on the question of training. *Waller*, 556 F.3d at 177. The court's analysis in *Waller*, however, was flawed as it applied standards for a failure-to-train claim under 28 U.S.C. § 1983 rather than failure to train under the ADA. *See id.* at 177 n.3 (using a Supreme Court case on § 1983 liability to find no grounds for a failure-to-train claim under the ADA).

168. *Schorr*, 243 F. Supp. 2d at 233.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 234.

173. *Id.* at 238.

174. Gohier v. Enright, 186 F.3d 1216, 1222 (10th Cir. 1999).

with the person.[175] In *Saylor*, the defendants attempted to introduce the sheriff's department's general order regarding the "Investigation of Persons with Mental Illness"[176] as factual evidence of disability-related training material.[177] But the court suggested that it would take more than a paper document to satisfy the ADA's training requirement.[178] To suffice, training must actually enable officers to modify their procedures to best accommodate the individual's disability.[179]

Legislative history also supports police officer training as an ADA-compliance mechanism. Recognizing Title II's broad obligation to eliminate disability discrimination in public arenas, the House Judiciary Committee noted:

> In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have . . . a variety of other disabilities, are frequently inappropriately arrested . . . because police officers have not received proper training . . . . Such discriminatory treatment based on disability can be avoided by proper training.[180]

The regulations provide additional support. In redrafting Title II regulations, commentators requested that mandatory police officer training be included.[181] The DOJ did not adopt this recommendation, however, because the regulatory scheme already "requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities."[182] The regulation also provides that "law enforcement personnel [are] required to make

175. *See* Estate of Saylor v. Regal Cinemas, Inc., 54 F. Supp. 3d 409, 428 (D. Md. 2014) (refusing to accept the state's argument that consideration in a training manual should be dispositive).

176. While the court did not take issue with the title of the order, the title itself self-evidences an absence of disability awareness. Saylor had Down syndrome, a developmental disability. Developmental disabilities are categorically distinct from mental illness.

177. *Saylor*, 54 F. Supp. 3d at 427 n.10.

178. *Id.* at 427–28 (addressing the evidence presented and then noting that the language itself does not per se "absolve[] its responsibility to develop a policy relating to those with developmental disabilities").

179. *Id.* at 427 (addressing the General Order presented and then noting, "[I]t would not appear that the Deputies were trained to make any modification at all in their treatment of individuals with developmental disabilities" and "[t]hey did not appear to have made any adjustment in their response to Mr. Saylor").

180. H.R. REP. NO. 101-485, pt. 3, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473 (emphasis added).

181. 28 C.F.R. pt. 35, app. B, § 35.130, at 686 (2016).

182. *Id.*

appropriate efforts to determine whether perceived strange or disruptive behavior or unconsciousness is the result of a disability."[183] Thus, the DOJ already interprets Title II and its regulations to include police officer training. Like Congress, the DOJ acknowledged that full compliance with the ADA requires effective police officer training. In fact, the DOJ acted on this in a settlement agreement when it sought police officer training that "ensure[s] that staff understand the legal obligation . . . necessary to ensure effective communication with qualified individuals with disabilities."[184] Therefore, insistence on adequate disability training should be neither novel nor contentious.

B. The Prevalence and Substance of Disability Training Programs

The DOJ recognized the need for police training but also assumed its ubiquity.[185] However, comprehensive police officer training is far from ubiquitous. Dating back to 1991, a presidential task force report noted the "urgent need to greatly upgrade the training" of police on how to interact with people with intellectual and developmental disabilities.[186] A few years later, one study asked all fifty states whether the "state require[s] officers to complete training about individuals with disabilities."[187] Researchers found that twelve states either had no such training or had ambiguous training descriptions.[188] Of the remaining thirty-six states in the study,[189] only four had a specific ADA training program.[190] Additionally, a mere four states included training on intellectual disabilities, and only two had training on developmental disabilities.[191] As of 2010, only seven states had adopted the Uniform

183. *Id.*

184. U.S. DEP'T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE WALLINGFORD POLICE DEPARTMENT (Aug. 18, 2015), http://www.ada.gov/wallingford_sa.html [https://perma.cc/WLL3-P3HU].

185. 28 C.F.R. pt. 35, app. B, § 35.130, at 686 ("The general regulatory obligation to modify policies, practices, or procedures [already] requires law enforcement to make changes in policies . . . .").

186. U.S. DEP'T OF HEALTH & HUMAN SERVS., CITIZENS WITH MENTAL RETARDATION AND THE CRIMINAL JUSTICE SYSTEM 32 (1991).

187. *See* McAfee & Musso, *supra* note 52, at 57 (observing the prevalence, or lack thereof, of police training programs that relate to individuals with disabilities across the United States).

188. *Id.* The study's applicability may be limited given that it was conducted only five years after the ADA's enactment.

189. Two states did not participate in the study.

190. McAfee & Musso, *supra* note 187, at 60 tbl.3.

191. *Id.*

Duties to Disabled Persons Act, a law requiring police officers to determine whether someone is disabled prior to an arrest.[192]

Even the states with some disability training for police officers are missing the mark. *Sheehan* and *Saylor* illustrate this point. The police officers in both cases underwent basic disability training, but were still unequipped to make on-the-scene modifications of arrest procedures to avoid discrimination and death.[193] That the officers received training but still behaved as they did evidences the programs' ineffectiveness.

Disabilities can be difficult to recognize, particularly if one's exposure is limited to a paper manual. Thus, comprehensive disability training that requires interaction with, or videos depicting, individuals with disabilities should be the preferred method. The DOJ does provide training videos for police departments,[194] but legislative action would be best. An exemplary model comes from the state of Maryland in honor of Ethan Saylor.

C. A Model for Disability Training: The Ethan Saylor Bill

In May 2015, Maryland passed the Ethan Saylor Bill.[195] This law takes an innovative approach to disability training for public employees.[196] Self-advocates, people with disabilities who volunteer to educate others, are an integral component of Maryland's new training requirement.[197] To date, Maryland is the only state to enact a law mandating the incorporation of self-advocates in police officer training.[198] Affording law enforcement the opportunity to engage with individuals with disabilities in a controlled and safe setting will help foster effective communication before the presence of any potential

192. *See* DUKE CHEN, OFFICE OF LEGISLATIVE RESEARCH, CONN. GEN. ASSEMBLY, POLICE PROCEDURE FOR DEALING WITH THE MENTALLY AND PHYSICALLY DISABLED IN OTHER STATES (2010), https://www.cga.ct.gov/2010/rpt/2010-R-0324.htm [https://perma.cc/EB8P-LWR5].

193. *See supra* notes 157–62, 175–77 and accompanying text; *see also* Brief for Respondent at 6–7, City of San Francisco v. Sheehan, 135 S. Ct. 1775 (2015) (No. 13-1412) (noting that the officers' behavior was contradictory to the relevant police policy received in training).

194. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *Police Response to People with Disabilities*, ADA.GOV: INFO. AND TECHNICAL ASSISTANCE ON THE AMS. WITH DISABILITIES ACT, http://www.ada.gov/policevideo/policebroadbandgallery.htm#Anchor-Part-48213 [https://perma.cc/X2P6-8VPF] (last updated May 1, 2006).

195. Ethan Saylor Alliance for Self-Advocates as Educators, ch. 388, 2015 Md. Laws.

196. *Id.*

197. *Id.*

198. Debra Alfarone, *Ethan Saylor Bill Signed in Maryland*, WUSA 9 LOCAL (May 13, 2015), http://www.wusa9.com/story/news/local/maryland/2015/05/12/ethan-saylor-bill-md/27198967 [https://perma.cc/LG2N-JPXS].

exigencies. When law enforcement officers are called to a scene involving an individual with a disability, they will have tangible experience to draw on rather than static advice from a training manual.

In May 2016, the Montgomery County police department held a training event to bridge the communication gap and foster understanding between the police and people with autism.[199] As part of this event, people with autism and their families were invited to tour the police station, meet the police dogs, and see the vehicles and equipment used by officers. In turn, police officers were encouraged to learn and interact with the attendees. One participant, Gordy Baylinson, a teenager with nonspeaking autism, was so moved by the event that he wrote a letter to the police.[200] He had heard "too many tragic stories of [police] mistreatment and mishandling of autistics due to lack of knowledge."[201] And so, Baylinson wrote, "[T]his letter is . . . a cry for attention. With your attention, I can help you recognize the signs of nonspeaking autism. If you can recognize the signs, then you will be able to recognize our differences which then leads to understanding . . . ."[202]

Training, like the event in Montgomery County, that includes people with disabilities benefits not only the disability community but the law enforcement community as well. "[Police] don't enjoy having to be . . . fearful or hostile in their approach. They see themselves [] as the guardians of safety and harmony. They are appalled when faced with the possibility of an inappropriate arrest caused by their having too little understanding of a new situation."[203] Had the police officers in *Saylor* and *Sheehan* been armed with adequate training and effective communication skills, both cases may have ended peacefully rather than tragically.

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199. Jennifer Davis, *Md. Teen Writes Letter to Police Providing Insight on Being Non-Speaking with Autism*, FOX 5 LOCAL NEWS (May 20, 2016), http://www.fox5dc.com/news/local-news/143596753-story [https://perma.cc/J8P6-Y7W9].

200. *Id.*

201. Colby Itkowitz, *This Nonspeaking Teenager Wrote an Incredibly Profound Letter Explaining Autism*, WASH. POST (May 19, 2016), https://www.washingtonpost.com/news/inspired-life/wp/2016/05/19/this-non-speaking-teen-wrote-an-incredibly-profound-letter-to-police-about-autism [https://perma.cc/5YF7-SJVX].

202. *Id.*

203. Norley, *supra* note 48, at 25.

CONCLUSION

The ADA was enacted to eradicate disability discrimination. Knowing that miscommunication between law enforcement and individuals with disabilities could lead to discrimination, Congress intended that police officer activity be subject to ADA coverage, just like all other public activities. Thus, law enforcement officers should be required to comply with the ADA during arrests by reasonably accommodating an individual's disability, so long as that person is not a direct threat to others. Comprehensive police officer training that humanizes people with disabilities can enable officers to make accurate individualized assessments about the level of threat posed and to appropriately modify police procedures to best accommodate the individual. Although society has come a long way in guaranteeing equal opportunity for individuals with disabilities, the stories of Saylor and Sheehan reflect a dangerous vulnerability in the ADA's promise of protection.