COMMENTS

REMEDYING A PARTICULARIZED FORM OF DISCRIMINATION: WHY DISABLED PLAINTIFFS CAN AND SHOULD BRING CLAIMS FOR POLICE MISCONDUCT UNDER THE AMERICANS WITH DISABILITIES ACT

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INTRODUCTION

On November 18, 2000, Ryan K. Schorr, a twenty-five-year-old who suffered from bipolar disorder, was involuntarily committed to the Holy Spirit Hospital in Camp Hill, Pennsylvania, after his family and roommate noticed that his condition was deteriorating.[1] Though Schorr was placed in a high security room at the hospital, when a crisis intervention worker opened his door to enter, he pushed past her and escaped confinement.[2] After Schorr answered his family's phone call to his apartment, his family informed the police of his whereabouts.[3] West Shore Regional Police Officers Harry Hart Jr. and Gary Berresford arrived at Schorr's apartment and, after knocking on the door and receiving no response, entered the residence through a partially open back door.[4] The officers found Schorr in his bedroom, where a

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[1] Schorr v. Borough of Lemoyne (*Schorr I*), 243 F. Supp. 2d 232, 233 (M.D. Pa. 2003); Kara McConnell, *Judge Gives Green Light to Lawsuit*, SENTINEL, Feb. 27, 2003, http://www.cumberlink.com/articles/2003/02/27/news/news03.prt.

[2] *Schorr I*, 243 F. Supp. 2d at 233.

[3] *Id.*

[4] Schorr v. Borough of Lemoyne (*Schorr II*), 265 F. Supp. 2d 488, 490 (M.D. Pa. 2003); McConnell, *supra* note 1.

violent confrontation ensued.[5] Schorr shot at Berresford's hand and Hart struck Schorr with a baton; eventually Schorr fled the room.[6] The officers called for backup, but before assistance arrived, Schorr, brandishing pots and pans, returned to the bedroom.[7] Hart shot and killed him.[8] Schorr's parents brought an action in their own right and as representatives of their son's estate against the police officers, the police commission, and the chief of police.[9]

The circumstances of Schorr's death are, unfortunately, not unique. There are a number of cases in which police officers, in attempts to apprehend people with mental disabilities, have injured or killed them, even when the victim's family or friend originally summoned the officers to provide assistance.[10] However, what distinguishes the Schorrs' case from the majority of excessive force cases is that the Schorrs not only brought the usual claims for police misconduct under Section 1983,[11] but also sued the police commission under the Americans with Disabilities Act (ADA)[12] and the Rehabilitation Act.[13] The Schorrs alleged that the police commission violated their

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[5] *Schorr II*, 265 F. Supp. 2d at 490.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *See, e.g.*, Neuburger v. Thompson, 124 F. App'x 703, 704 (3d Cir. 2005) (discussing a woman's shooting death by police who were called in an attempt to prevent her suicide); Clem v. Corbeau, 98 F. App'x 197, 199-200 (4th Cir. 2004) (per curiam) (discussing an excessive force claim by a plaintiff whose wife called police when he would not eat or take his medication and who was subsequently shot three times by an officer); Thompson v. Williamson County, 219 F.3d 555, 556 (6th Cir. 2000) (providing the factual background of a case in which a mentally disabled man was shot and killed by police); *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, 331 (2003) ("Sometimes . . . incidents [with mentally ill individuals] become confrontational and escalate to a violent conclusion, ending with the serious injury or death of the disturbed person."). *See generally* Jennifer Fischer, Student Article, *The Americans with Disabilities Act: Correcting Discrimination of Persons with Mental Disabilities in the Arrest, Post-Arrest, and Pretrial Processes*, 23 LAW & INEQ. 157, 195 (2005) ("A lack of community-based treatment alternatives and law enforcement's inability to appropriately respond to persons with a mental illness through appropriate policies and programs result in the unjustified institutionalization of persons with a mental illness in jails and prisons, and too often result in their deaths.").

[11] 42 U.S.C. § 1983 (2000).

[12] 42 U.S.C. §§ 12101-12213 (2000).

[13] 29 U.S.C. § 794(a) (2000). Claims under the ADA and the Rehabilitation Act pertaining to police officers' actions in effecting an arrest are similar in substance and are often treated by courts as interchangeable. Therefore, references to the ADA

son's right to be free from discrimination on the basis of disability by "failing to make reasonable modifications to [its] policies, practices and procedure to ensure that his needs as an individual with a disability would be met,"[14] in violation of Title II of the ADA.[15] The court agreed that the Schorrs could state a claim under Title II,[16] as well as under Section 1983.[17]

While the court's decision in *Schorr I* was a significant step toward acceptance of the ADA's application to law enforcement activities,[18] it was not the first judicial opinion to espouse such a notion. As early as 1998, courts began laying the foundation for claims of police misconduct under Title II.[19] The United States Supreme Court has not yet ruled on the applicability of Title II to police actions in effecting an arrest,[20] and historically the circuit courts have been split on the question.[21] However, in many jurisdictions plaintiffs can now bring ADA

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throughout this Comment should be read to include Section 504 of the Rehabilitation Act. See *infra* Part III.C for a discussion of the similarities and differences between the two actions.

[14] *Schorr I*, 243 F. Supp. 2d 232, 234 (M.D. Pa. 2003) (internal quotation marks omitted).

[15] Title II provides: "Subject to the provisions of this [title], 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." 42 U.S.C. § 12132 (2000).

[16] *See Schorr I*, 243 F. Supp. 2d at 239 ("[I]t is clear to this Court that Plaintiffs have stated a claim under the ADA.").

[17] *See id.* at 234 (characterizing plaintiffs' Section 1983 claim as a Fourteenth Amendment substantive due process claim and denying defendants' motion to dismiss on that count).

[18] *See* McConnell, *supra* note 1 (noting that Judge Kane, who presided over the Schorrs' case, was "one of the first judges to recognize that how police respond to people with disabilities depends on their training").

[19] *See* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 210-11 (1998) (broadly construing Title II's phrase "programs, services, or activities" and holding that prisoners could fall within the category of "qualified individual[s] with a disability"); Gorman v. Bartch, 152 F.3d 907, 913 (8th Cir. 1998) (holding that a disabled arrestee's claim against police officers fell within the ADA).

[20] For the purposes of this Comment, I will use the term "arrest" broadly to refer to any action by a police officer detaining or incarcerating an individual. *Accord* Gohier v. Enright, 186 F.3d 1216, 1220 n.2 (10th Cir. 1999) ("This opinion broadly uses the term 'arrest' to include several different scenarios: arrests[,] investigations potentially involving an arrest, . . . and violent confrontations not technically involving an arrest . . . .").

[21] *See* Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000) (holding that while Title II does not apply to police officers' "on-the-street" responses to disturbances, once an area is secure and there is no threat to human safety, the officers must reasonably accommodate a suspect's disability); *Gohier*, 186 F.3d at 1221 ("[A] broad rule categorically excluding arrests from the scope of Title II . . . is not the law."); *Gorman*,

claims pertaining to police misconduct and realistically believe that they have a chance for recovery.[22]

The growing possibility that disabled plaintiffs[23] can bring claims for police misconduct under Title II has significant benefits for the practice of civil rights law in this country. The traditional route for police misconduct lawsuits, Section 1983, presents many obstacles to success for both disabled plaintiffs[24] and the general population.[25] Any alternative means of bringing a subset of civil rights cases—even one that is limited to a specific group of plaintiffs (disabled persons) and a specific type of claim (police misconduct)—should not be ignored.

This Comment will explore courts' treatment of actions for police misconduct under Title II and the contours of the decisional law in that area. Part I will discuss the theoretical bases for application of the ADA to arrests, namely the wrongful arrest theory and the reasonable accommodation theory. Part II will analyze the case law that has arisen out of plaintiffs' attempts to bring claims for police misconduct under Title II. Part II will also demonstrate how initial assumptions that lower courts made about the applicability of the ADA to such lawsuits—which prevented them from allowing the claims to go for-

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152 F.3d at 912 (holding that plaintiff's claims pertaining to police officers' actions in transporting him to the police station after an arrest fit within the meaning of the ADA); Rosen v. Montgomery County, 121 F.3d 154, 157 (4th Cir. 1997) ("The most obvious problem is fitting an arrest into the ADA at all."); *see also* McConnell, *supra* note 1 (noting that historically the circuit courts have been split on whether the ADA applies to police activities). *See generally* Thompson v. Davis, 295 F.3d 890, 897-98 (9th Cir. 2002) (surveying cases pertaining to ADA application to police activities).

[22] *See infra* Part II.C (discussing recent cases ruling on claims of police misconduct under the ADA).

[23] This Comment will focus mainly on actions by individuals with mental or emotional disabilities because they are frequently subject to interaction with the police. *See* Avery, *supra* note 10, at 262-63 ("[I]n medium and large cities nationwide, police departments estimate that an average of approximately seven percent of police calls involve mentally ill people."). However, in analyzing the decisional law surrounding the ADA, I will also discuss cases involving plaintiffs who suffer from a variety of other disabilities, including deafness, paraplegia, and physical difficulties resulting from a stroke. The type of disability in an individual case is often relevant to the question of whether the police officers were aware of the plaintiff's disability because individuals with mental and emotional disabilities may be less likely to inform the officers of their disability, and the disability itself may not be immediately apparent to the officer. See *infra* note 173 for a discussion of the knowledge requirement under Title II.

[24] *See* Avery, *supra* note 10, at 265-66 (discussing mentally disabled plaintiffs' difficulties in proving claims against police officers under Section 1983).

[25] *See* Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537, 538 (2003) (noting that the Rehnquist Court ruled against plaintiffs in the "overwhelming majority" of civil rights cases).

ward—were discredited by the Supreme Court in *Pennsylvania Department of Corrections v. Yeskey*,[26] leaving the path clear for acceptance of Title II in the law enforcement context. Part III addresses the question of why a disabled plaintiff should bring ADA claims for civil rights violations when the traditional remedy is an action under Section 1983. Part III will also compare the obstacles to recovery under each claim and will attempt to determine under what circumstances an ADA claim might succeed even when a parallel Section 1983 action would likely fail. In addition, Part III will describe the distinction between the ADA and the Rehabilitation Act and the advantages and disadvantages of pleading a parallel claim under the Rehabilitation Act in addition to an ADA claim. Finally, Part III will provide reasons, beyond strategic benefits, for disabled plaintiffs to plead claims in addition to the usual Section 1983 claims. In conclusion, this Comment will bring together two strands of argument—the feasibility of ADA claims for police misconduct and the desirability of those actions over the traditional civil rights claims—to demonstrate that there are important practical and symbolic reasons for plaintiffs to plead their disability claims under the ADA.

I. THEORETICAL BASES FOR APPLYING THE ADA TO ARRESTS: WRONGFUL ARREST THEORY AND REASONABLE ACCOMMODATION THEORY

Courts have developed two different theories under which a plaintiff may state an ADA claim based on police officers' actions in effecting an arrest.[27] The "wrongful arrest theory" applies when police officers have "wrongly arrested someone with a disability because they misperceived the effects of that disability as criminal activity."[28] A claim under the "reasonable accommodation theory," on the other

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[26] 524 U.S. 206 (1998).

[27] Although courts have analyzed ADA claims according to these theories for over ten years, it appears that no court had articulated the terms "wrongful arrest theory" and "reasonable accommodation theory" in reference to the analysis of an ADA claim pertaining to police officer action until *Gohier v. Enright*, 186 F.3d 1216, 1220 (10th Cir. 1999). *See* Jackson v. Inhabitants of Sanford, Civ. No. 94-12-P-H, 1994 WL 589617, at *6 (D. Me. Sept. 23, 1994) (allowing the plaintiff's claim to proceed because the ADA precludes discriminatory and "unjustified arrests" of disabled persons, but not specifically applying the wrongful arrest theory); *see also* Anthony v. City of New York, No. 00 Civ. 4688(DLC), 2001 WL 741743, at *11 (S.D.N.Y. July 2, 2001) (citing *Jackson* and other ADA cases from the 1990s as illustrations of the wrongful arrest theory and the reasonable accommodation theory), *aff'd*, 339 F.3d 129 (2d Cir. 2003).

[28] *Gohier*, 186 F.3d at 1220.

hand, posits that even though police officers properly investigated and arrested a person with a disability, they "failed to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees."[29] In addition, there are cases that fall in between the two theories, to which courts have generally declined to apply Title II.[30]

A. *Wrongful Arrest Theory*

A plaintiff has a valid claim under the wrongful arrest theory if police officers have arrested her because of lawful actions that she has taken as result of her disability. The paradigm case illustrating this theory is *Lewis v. Truitt*.[31] In *Lewis*, three police officers went to plaintiff Charles Lewis's home in order to take his granddaughter to police headquarters to resolve a custody dispute.[32] The officers attempted to speak with Lewis, even though other people present at the house had told the officers that Lewis was deaf and that the best way to communicate with him was by writing questions down on a piece of paper.[33] The officers proceeded to enter the plaintiff's home and "physically assault[]" him, causing "bruises, contusions, and severe internal injuries."[34] They eventually arrested him and charged him with resisting law enforcement.[35] Lewis filed an action against the officers and the city under the ADA, and the court partially denied defendants' motion for summary judgment on the claim, stating that "a genuine issue of material fact exists on the question of whether Defendants arrested Plaintiff *because of his disability*."[36]

Courts have similarly allowed ADA claims to go forward based on allegations of wrongful arrest as the result of other disabilities. In *Jackson v. Inhabitants of Sanford*, plaintiff Roland Jackson argued that

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[29] *Id.* at 1220-21.

[30] *See, e.g., id.* at 1221 (affirming summary judgment on the ADA claim because the case was "logically intermediate between" the wrongful arrest theory and the reasonable accommodation theory).

[31] 960 F. Supp. 175 (S.D. Ind. 1997).

[32] *Id.* at 176.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 177.

[36] *Id.* at 179 (emphasis added). The case was settled a month after the court's ruling on summary judgment. Docket at entry 51, Lewis v. Truitt, No. IP96-C-0411-H/G (S.D. Ind. Apr. 22, 1997) (PACER).

he was arrested because of symptoms that he suffered after a stroke and that the Town of Sanford had failed to train its police officers to recognize such symptoms and to modify its policies, practices, and procedures to prevent discriminatory treatment of the disabled.[37] Jackson had been arrested for driving under the influence of intoxicating liquor and/or drugs after a police officer noticed that he was "unsteady on his feet, swayed noticeably, slurred his speech, and appeared confused."[38] Even though Jackson informed the officer that he was not drunk and that he had suffered a brain aneurysm that left him with physical difficulties, the officer insisted that Jackson perform sobriety tests.[39] After Jackson could not satisfactorily complete the tests due to his physical disabilities, the officer arrested him.[40] The court denied the town's motion for summary judgment on the ADA claims.[41]

Although few judges have specifically recognized the existence of the wrongful arrest theory in their rulings on plaintiffs' ADA claims for police misconduct, the idea behind the wrongful arrest theory—that police officers violate the ADA when they arrest a disabled individual because of actions that the individual was engaged in due to her disability—has been espoused by courts in a number of circuits.[42]

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[37] Jackson v. Inhabitants of Sanford, Civ. No. 94-12-P-H, 1994 WL 589617, at *1, 6 (D. Me. Sept. 23, 1994).

[38] *Id.* at *1.

[39] *Id.*

[40] *Id.*

[41] *Id.* at *6. Within a few days of the summary judgment ruling, the case settled for between $25,000 and $50,000. Telephone Interview with Ronald D. Bourque, Bourque & Clegg, LLC, Attorney for Roland Jackson, in Sanford, Me. (May 18, 2005). Under the terms of the settlement, the town had to review its policies and procedures to make sure that it did not discriminate against people with disabilities. Brent Macey, *Sanford Settles Suit Over Arrest of Disabled Man*, PORTLAND PRESS HERALD, Sept. 30, 1994, at 1A. In addition, the town's police officers had to receive "adequate training to enable them to distinguish between symptoms of disabilities and criminal activity." *Id.*

[42] *See, e.g.*, Gohier v. Enright, 186 F.3d 1216, 1220 (10th Cir. 1999) (discussing the wrongful arrest theory); *Schorr I*, 243 F. Supp. 2d 232, 237-38 (M.D. Pa. 2003) (noting the magistrate judge's analysis of the application of the wrongful arrest theory to plaintiffs' claim); McCray v. City of Dothan, 169 F. Supp. 2d 1260, 1276 (M.D. Ala. 2001) (noting the plaintiff's attempted recovery under the wrongful arrest theory), *aff'd in part, rev'd in part*, No. 01-15756-DD, 2003 WL 23518420 (11th Cir. Apr. 24, 2003); Anthony v. City of New York, No. 00 Civ. 4688(DLC), 2001 WL 741743, at *11 (S.D.N.Y. July 2, 2001) (discussing several cases involving the wrongful arrest theory).

B. *Reasonable Accommodation Theory*

While the wrongful arrest theory applies when an arrest results from an individual's disability, the reasonable accommodation theory applies when there is a legitimate basis for the arrest, but in making that arrest the police officers do not take steps to reasonably accommodate the plaintiff's disability. Even though a number of courts have noted their preference for the wrongful arrest theory over the reasonable accommodation theory, with some even stating that only claims under the former are viable,[43] recent developments in Title II jurisprudence[44] have opened the door to plaintiffs' arguments under the reasonable accommodation theory.

In *Rosen v. Montgomery County*, plaintiff Jeffrey Rosen presented a Title II claim under the reasonable accommodation theory, contending that police officers made no attempt to accommodate his deafness when they took him into custody after his arrest for drunk driving.[45] According to Rosen, the officers did not attempt to communicate with him in writing and they "ignored his requests for an interpreter and for a TTY telephone so he could call a lawyer."[46] The court rejected Rosen's ADA claims and affirmed the district court's grant of summary judgment to the defendants based on a "lack of any discernible injury" that Rosen may have suffered.[47] Even though its decision rested on the lack of injury, the court made clear its reservations about applying the ADA in such a situation. Declaring that the "most obvious problem" with the plaintiff's claim was "fitting an arrest into the ADA at all,"[48] the court went on to limit the duties that police officers owe to suspects before arriving at the stationhouse: "The police

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[43] *See, e.g.*, Patrice v. Murphy, 43 F. Supp. 2d 1156, 1159 (W.D. Wash. 1999) ("Where plaintiffs have argued that an arrest was a type of service, program or activity from which he has [sic] been excluded or denied the benefits, . . . there is no ADA claim . . . . Where a plaintiff alleges that he was arrested because of his disability[,] . . . an ADA claim should lie."); Gorman v. Bartch, 925 F. Supp. 653, 655 (W.D. Mo. 1996) ("[H]ad Plaintiff been arrested because he was handicapped, his arguments would more clearly satisfy the statutory requirements."), *aff'd in part, rev'd in part*, 152 F.3d 907 (8th Cir. 1998).

[44] *See infra* Part II.B (presenting recent court decisions supporting the proposition that the ADA applies to law enforcement activity).

[45] 121 F.3d 154, 156 (4th Cir. 1997).

[46] *Id.*

[47] *Id.* at 158. The plaintiff had claimed that the injury that he suffered was humiliation and embarrassment. *Id.* at 157. However, the court rejected this argument because "these are emotions experienced by almost every person stopped and arrested for drunk driving." *Id.* at 158.

[48] *Id.* at 157.

do not have to get an interpreter before they can stop and shackle a fleeing bank robber, and they do not have to do so to stop a suspected drunk driver, conduct a field sobriety test, and make an arrest."[49]

Four years later, however, in *McCray v. City of Dothan*, a district court in Alabama allowed a deaf plaintiff's ADA claim to go forward under the reasonable accommodation theory, based on the officers' failure to provide an interpreter during the interrogation and after the arrest.[50] The officers had been attempting to interrogate the plaintiff about a private property traffic accident. When one of the officers refused to communicate by handwritten notes with the plaintiff, the incident escalated into a confrontation and the officers allegedly assaulted the plaintiff and arrested him.[51] The court held that under the circumstances, the police were "under an obligation under the ADA to accommodate in effecting arrest activities,"[52] and that the appropriateness of the officers' attempts at reasonable accommodation were disputed issues of material fact.[53]

Like the wrongful arrest theory, the reasonable accommodation theory has often guided the determinations of courts in principle even when the courts did not cite the theory by name.[54] Even though it appears that these claims are less successful than claims under the wrongful arrest theory because of some courts' reluctance to find such actions cognizable under the ADA,[55] a number of courts throughout the country have sustained plaintiffs' Title II claims on reasonable accommodation grounds.[56]

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[49] *Id.* at 158.

[50] 169 F. Supp. 2d 1260, 1272-76 (M.D. Ala. 2001), *aff'd in part, rev'd in part on other grounds*, No. 01-15756-DD, 2003 WL 23518420 (11th Cir. Apr. 24, 2003). The district court also denied the defendants' motion for summary judgment on wrongful arrest theory grounds. *Id.* at 1276.

[51] *Id.* at 1269-70.

[52] *Id.* at 1275.

[53] *Id.* at 1276. The parties in *McCray* ultimately agreed on a settlement in the amount of $575,000, the majority of which was for attorneys' fees. Telephone Interview with the Office of Bobbie Crook, Esq., Attorney for Douglas McCray, in Dothan, Ala. (May 18, 2005).

[54] *See* cases cited *supra* note 27 (providing instances in which courts have described the wrongful arrest theory without articulating it by name).

[55] *See* cases cited *supra* note 43 (noting decisions that refused to recognize ADA claims based on the reasonable accommodation theory).

[56] *See, e.g.*, Gorman v. Bartch, 152 F.3d 907, 913 (8th Cir. 1998) (allowing the plaintiff's claim that the officers failed to reasonably accommodate his disability when transporting him to the police station), *rev'g* 925 F. Supp. 653 (W.D. Mo. 1996); *Schorr I*, 243 F. Supp. 2d 232, 238-39 (M.D. Pa. 2003) (rejecting the magistrate judge's con-

C. *In Between the Two Theories*

Because the wrongful arrest theory and the reasonable accommodation theory each apply only to a subset of possible Title II claims pertaining to police officers' actions in effecting the arrest of a disabled individual, it is not surprising that there are cases that do not fit neatly into either of the theories. In *Gohier v. Enright*, a police officer was responding to reported disturbances when he saw the plaintiff's decedent, Michael Lucero, walking down the street.[57] Lucero did not match the description of the man for whom the officer was looking.[58] The police officer nevertheless got out of his car and approached Lucero, who suffered from schizophrenia, and a confrontation ensued, prompting the officer to draw his pistol.[59] Lucero did not respond to the officer's order to show his hands and instead, while holding a "long, slender object that [the officer] thought was a knife," advanced on the officer.[60] When Lucero reached the officer's car he "either stepped or lunged toward [the officer], making a stabbing motion with the object."[61] The officer shot him twice, killing him.[62] The Tenth Circuit affirmed the district court's grant of summary judgment and held that the circumstances leading to Lucero's death created an ADA claim that was "logically intermediate between the two archetypes envisioned" by the wrongful arrest theory and the reasonable accommodation theory.[63] The officer was not using force on Lucero because the officer "misconceived the lawful effects of [Lucero's] disability as criminal activity"; also, the officer did not "fail to accommodate Lucero's disability while arresting him for 'some crime unrelated to his disability.'"[64] Rather, the court reasoned, the officer used force because Lucero's conduct was not lawful.

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clusion that the reasonable accommodation theory did not apply to the plaintiffs' action).

[57] 186 F.3d 1216, 1217 (10th Cir. 1999).

[58] *Id.*.

[59] *Id.* at 1217-18.

[60] *Id.* at 1218.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 1221.

[64] *Id.* (quoting Patrice v. Murphy, 43 F. Supp. 2d 1156, 1159 (W.D. Wash. 1999)). Not all courts have read into the reasonable accommodation theory the requirement that the reason for the apprehension of the plaintiff (or the plaintiff's decedent) must be unrelated to her disability. *See, e.g.*, *Schorr I*, 243 F. Supp. 2d 232, 233, 238-39 (M.D. Pa. 2003) (allowing an ADA claim to go forward based on the shooting death of plaintiffs' decedent that occurred as police officers were trying to apprehend him after he escaped from a high security room at a hospital). It is also important to note that the

Courts' receptiveness to plaintiffs' actions for police misconduct under Title II generally appears to be limited to claims under either the wrongful arrest theory or the reasonable accommodation theory. While judges have allowed a fair number of such claims to go forward,[65] *Gohier* suggests that plaintiffs who are arrested for engaging in illegal activity (such as assaulting a police officer) related to their disability may fall into a gap between the two theories. As a result, these plaintiffs may be unable to state an ADA claim even if the officers did not reasonably accommodate the disability in effecting the arrest.

II. DISCARDING OLD ASSUMPTIONS: MAKING WAY FOR APPLICATION OF THE ADA TO ARRESTS

Prior to 1998,[66] cases interpreting the ADA usually rejected claims by plaintiffs who sought to apply Title II to police activities.[67] Strictly construing the provisions of the statute, courts made several assumptions as to the intent of the ADA's framers and the limited situations in which the provisions of Title II would apply: (1) an arrestee or prisoner is not a "qualified individual" under the ADA because "[t]he terms 'eligible' and 'participate' imply voluntariness on the part of [the plaintiff];"[68] (2) the phrase "benefits of the services, programs, or activities"[69] does not apply to services, programs, or activities that are not traditionally thought of as "benefiting" an individual;[70] and (3)

Gohier court acknowledged that the plaintiff might have stated a valid Title II claim under the reasonable accommodation theory if he had argued 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." *Gohier*, 186 F.3d at 1222.

[65] *See supra* notes 42, 56 (citing cases in which courts have referred to the wrongful arrest theory or the reasonable accommodation theory).

[66] The year 1998 marked a turning point in courts' acceptance of ADA claims relating to law enforcement activities because of the Court's decision in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). *See infra* Part II.B (discussing the impact of the *Yeskey* decision).

[67] *See infra* Part II.A (discussing *Gorman v. Bartch*, 925 F. Supp. 653 (W.D. Mo. 1996), and *Rosen v. Montgomery County*, 121 F.3d 154 (4th Cir. 1997), two pre-1998 cases in which courts refused to apply Title II to police activities).

[68] *Gorman*, 925 F. Supp. at 656, *aff'd in part, rev'd in part on other grounds*, 152 F.3d 907 (8th Cir. 1998).

[69] *See* 42 U.S.C. § 12132 (2000) ("[N]o 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 . . . ." (emphasis added)).

[70] *See Gorman*, 925 F. Supp. at 656 (holding that criminal suspects who are being held against their will do not count as applicants who are seeking a benefit from the

the framers of the ADA did not intend for Title II to apply to arrestees and prisoners.[71] Courts generally did not question these assumptions for the first eight years that the ADA was in effect.[72] However, in the late 1990s, encouraged by the Supreme Court's opinion in *Pennsylvania Department of Corrections v. Yeskey*,[73] courts began to challenge, and eventually discard, all three of these assumptions.

A. *Who Is a "Qualified Individual with a Disability"?: Old Assumptions About Title II*

The decision of the district court in *Gorman v. Bartch* illustrates the early limitations imposed on Title II application to police activities. Plaintiff Jeffrey Gorman was arrested outside a bar in Kansas City while he attempted to obtain assistance from two police officers after he had been asked to leave the bar.[74] Gorman suffered from paraplegia resulting from a severe spinal cord injury and was confined to a wheelchair.[75] However, the police van that the officers used to transport Gorman to the station lacked the equipment necessary for carrying a person in a wheelchair.[76] As a result, the officers took Gorman out of his wheelchair, lifted him onto a bench within the van, and used his belt to tie him to the wall behind the bench.[77] During the

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state); *see also Rosen*, 121 F.3d at 157 ("[C]alling a drunk driving arrest a 'program or activity' . . . strikes us as a stretch of the statutory language . . . .").

[71] *See Gorman*, 925 F. Supp. at 655 ("The term 'qualified individual' was specifically defined by Congress to describe a person who meets eligibility requirements for the . . . participation in programs. It strains the statute to talk about Plaintiff's 'eligibility' to be arrested . . . or to 'participate' in being arrested . . . .").

[72] *See, e.g.*, Torcasio v. Murray, 57 F.3d 1340, 1347 (4th Cir. 1995) (holding that it was not clearly established that the ADA applied to prisoners); *Gorman*, 925 F. Supp. at 658 (granting the defendants' motion for summary judgment on arrestee's ADA claims). *But see* Jackson v. Inhabitants of Sanford, Civ. No. 94-12-P-H, 1994 WL 589617, at *6 (D. Me. Sept. 23, 1994) (concluding that the ADA "clearly appli[ed]" to the plaintiff's claim for police misconduct).

[73] 524 U.S. 206 (1998). For a detailed discussion of *Yeskey* and its impact on Title II cases, see *infra* text accompanying notes 91-98.

[74] 925 F. Supp. at 654. The circuit court opinion provides additional detail as to the facts surrounding the incident. Gorman became involved in a disagreement at a Kansas City bar called "Guitars and Cadillacs." Gorman v. Bartch, 152 F.3d 907, 909 (8th Cir. 1998). Gorman started to descend the steps to the dance floor, and a bar employee told him that he could not go onto the dance floor. *Id.* When Gorman protested, the employee threw him out of the bar, and the employees at the door denied him readmission. *Id.* Gorman approached two police officers to solicit their help and ended up arguing with them. *Id.* They arrested him for trespassing. *Id.*

[75] *Gorman*, 925 F. Supp. at 654.

[76] *Id.*

[77] *Id.*

trip to the station, the belt broke and Gorman fell from the bench, suffering injuries to his back and shoulders.[78] In addition, the fall broke Gorman's urine bag, leaving him soaked in his own urine.[79]

Gorman filed an ADA claim against the police officer who drove the van, the police chief, and the police commissioners.[80] He alleged that the police commissioners had failed 1) to provide a proper transportation vehicle for individuals suffering from his disability, 2) to modify department policies and procedures dealing with arrest and transportation of such individuals, and 3) to establish proper training for police officers on how to handle disabled arrestees.[81] Examining the language of Title II, the district court acknowledged that the Kansas City Police Department constituted a public entity and that Gorman was disabled, but rejected the claim that the plaintiff was considered a "qualified individual with a disability,"[82] as required by Title II.[83] The court explained that the statute's use of the term "eligibility" in the definition of a "qualified individual"[84] prevented Title II from applying to arrestees: "It strains the statute to talk about Plaintiff's 'eligibility' to be arrested and taken to jail or to 'participate' in being arrested . . . ."[85] The court further noted that the words "'eligible' and 'participate' imply voluntariness on the part of an applicant who seeks a benefit from the state," and do not apply to criminal suspects "who are being held against their will."[86] The court therefore granted summary judgment to the defendants, holding that the ADA was not applicable to Gorman's case.[87]

Other courts based their refusal to apply Title II to arrestees or prisoners on the language of the statute and the intent of its framers. The court in *Rosen v. Montgomery County* held that calling an arrest a

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[78] *Id.*

[79] 152 F.3d at 910. The police officers had denied Gorman's request to use the bathroom before the trip to the station. *Id.* at 909.

[80] *Id.* at 910.

[81] *Id.*; 925 F. Supp. at 654-55.

[82] 925 F. Supp. at 655.

[83] 42 U.S.C. § 12132 (2000) ("[N]o 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 . . . .").

[84] *See* 42 U.S.C. § 12131(2) (2000) ("The term 'qualified 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.").

[85] 925 F. Supp. at 655.

[86] *Id.* at 656 (quoting Torcasio v. Murray, 57 F.3d 1340, 1347 (4th Cir. 1995)).

[87] *Id.*

"program or activity" was "a stretch of the statutory language and of the underlying legislative intent."[88] The court noted that the plaintiff had not pointed to any language in the ADA that specifically brought arrests within its ambit.[89] Even courts that acknowledged early on that prison activities could fall under Title II were hesitant about the idea of viewing an arrest itself as a "program or activity."[90]

B. Pennsylvania Department of Corrections v. Yeskey: *A Broader Reading of Title II*

The Supreme Court's decision in *Pennsylvania Department of Corrections v. Yeskey*[91] firmly disposed of the assumptions that had prevented the lower courts from applying the ADA to police actions. Though *Yeskey* dealt with ADA claims in the context of state prison programs,[92] the decision also served to question the foundations of the arguments against the application of Title II to arrests. First addressing the argument that Yeskey was not a "qualified individual with a disability," the Court pointed out that the definition in the statute included *anyone* with a disability, without exceptions for prisoners or suspected criminals.[93] Further, the Court rejected the Department of Corrections' argument that the words "eligibility" and "participation" implied voluntariness on the part of the individual seeking the benefit from the government and therefore did not apply to prisoners who were being held against their will.[94] Justice Scalia, writing for a unanimous Court, argued that this assumption was wrong for two rea-

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[88] 121 F.3d 154, 157 (4th Cir. 1997).

[89] *Id.*

[90] *See, e.g.*, Armstrong v. Wilson, 124 F.3d 1019, 1023 (9th Cir. 1997) (stating that an educational program in a prison is considered a "program or activity" even though incarceration itself is not); Crawford v. Ind. Dep't of Corr., 115 F.3d 481, 483 (7th Cir. 1997) ("Incarceration itself is hardly a 'program' or 'activity' to which a disabled person might wish access, but there is no doubt that an educational program is a program, and when it is provided by and in a state prison it is a program of a public entity." (internal citation omitted)).

[91] 524 U.S. 206 (1998). Ronald Yeskey was a prisoner who was denied admission to a prison boot camp. *Id.* at 208. Yeskey was recommended for placement in a Motivational Boot Camp for first-time offenders, which, if successfully completed, would have allowed him to receive early parole. *Id.* However, he was refused admission because of a medical history of hypertension. *Id.*

[92] *See id.* at 213 ("[T]he ADA unambiguously extends to prison inmates.").

[93] *Id.* at 210; *see* 42 U.S.C. § 12131(2) (2000) (defining a "qualified individual with a disability" as a person who, "with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity").

[94] 524 U.S. at 211.

sons: first, the words did not necessarily connote voluntariness, and second, even if the words did connote voluntariness, participation in prison activities such as the boot camp *was* voluntary.[95] Although the second justification for the Court's argument does not apply in the arrest context, where participation is almost always involuntary, the Court's unanimous declaration that the language of Title II did not require voluntariness destroyed a significant obstacle to plaintiffs' ADA claims pertaining to arrests.

The *Yeskey* Court also responded to the argument, which had frequently appeared in response to both prison and arrest-related ADA claims, that the language of the ADA did not specifically mention prisoners or arrestees in its statement of findings and purpose.[96] Stating that the contention that no reference to penal institutions appeared in the ADA was "questionable" to begin with, the Court found that even if Congress did not envision that the ADA would apply to prisoners, "in the context of an unambiguous statutory text that is irrelevant."[97] The Court explained that "the fact that a statute can be 'applied in situations not expressly anticipated by Congress'" demonstrates breadth rather than ambiguity.[98]

Lower courts soon followed the lead of the *Yeskey* Court in construing the ADA to apply to police officers' actions. In *Patrice v. Murphy*, the court found support in the legislative history of the ADA "for the proposition that, at least in some circumstances, an arrest may trigger the protections of the ADA."[99] The court cited a House Judiciary Committee report on the ADA:

> In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid [for] sei-

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[95] *Id.*

[96] Lower courts had, on occasion, already acknowledged the ADA's applicability to claims against arresting police officers. *See, e.g.*, Jackson v. Inhabitants of Sanford, Civ. No. 94-12-P-H, 1994 WL 589617, at *6 (D. Me. Sept. 23, 1994) ("The legislative history of the ADA demonstrates that Congress was concerned with unjustified arrests of disabled persons such as [plaintiff] alleges here.").

[97] *Yeskey*, 524 U.S. at 211-12.

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

[99] 43 F. Supp. 2d 1156, 1159 (W.D. Wash. 1999).

> zures. Such discriminatory treatment based on disability can be avoided by proper training.[100]

In addition, another court noted that the "broad language" of the ADA and the "absence of any stated exceptions" to its reach suggested that Title II could apply to areas involving law enforcement.[101]

Lower courts were also able to rely on the statutory analysis of the ADA that the Third Circuit elucidated in *Yeskey*, and which the Supreme Court affirmed.[102] The court in *Yeskey* noted that Congress had instructed that Title II be interpreted in a manner consistent with the Rehabilitation Act,[103] and the statutory definition of "program or activity" under the Rehabilitation Act "indicate[d] that the terms were intended to be all-encompassing."[104] Additionally, the court emphasized the provision of the Rehabilitation Act that stated that "program or activity" was to include "'*all* of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government.'"[105]

The Third Circuit opinion in *Yeskey* also looked to the relevant Department of Justice regulations.[106] The regulations defined "[b]enefit" as including the "provision of services, financial aid or disposition (i.e., treatment, handling, decision, sentencing, confinement, or other prescription of conduct)."[107] In addition, the regulations as-

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[100] *Id.* (quoting H.R. Rep. No. 101-485, pt. III, at 50 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 267, 473); *see also* 136 CONG. REC. E1913, 1916 (1990) (statement of Rep. Hoyer) ("[Title II] includes providing training to public employees in order to ensure that discriminatory actions do not occur. For example, persons who have epilepsy are sometimes inappropriately arrested because police officers have not received proper training to recognize seizures and to respond to them."); SUSAN STEFAN, UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 99 (2001) ("Police practices, specifically mentioned by Congress in its legislative history of ADA, are of particular concern to people with psychiatric disabilities, who are killed and injured by the police at an astonishing rate.").

[101] Hainze v. Richards, 207 F.3d 795, 799 (5th Cir. 2000).

[102] Yeskey v. Pa. Dep't of Corr., 118 F.3d 168, 170-72 (3d Cir. 1997) (construing Section 504 and Title II broadly enough to apply to correctional facilities), *aff'd*, 524 U.S. 206 (1998).

[103] For a discussion of the Rehabilitation Act, see *infra* Part III.C.

[104] *Yeskey*, 118 F.3d at 170.

[105] *Id.* (quoting 29 U.S.C. § 794(b) (1994)).

[106] 28 C.F.R. § 35.190(b)(6) (2004); 28 C.F.R. § 42.540(j) (2004). The regulations were promulgated in response to the express authorization by Congress in both the ADA, 42 U.S.C. § 12134(a) (2000), and the Rehabilitation Act, 29 U.S.C. § 794(a) (2000).

[107] 28 C.F.R. § 42.540(j) (2004).

signed to the Department of Justice the responsibility of coordinating compliance with the ADA for "[a]ll programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions . . . [and] all other government functions not assigned to other designated agencies."[108] Such regulations provided strong support for the court's position that the ADA applied to law enforcement activity.

C. *An Open Road for Title II Plaintiffs?*

With the Supreme Court rejecting the traditional arguments against application of the ADA to law enforcement activities, and the lower courts beginning to accept a broad reading of Title II, the courthouse door appears to be open for disabled plaintiffs to bring ADA claims arising from police misconduct. Of the courts that have recently ruled on such claims, district or appellate courts in five circuits have made favorable rulings.[109] However, the path is not entirely clear for ADA plaintiffs. Courts in several other circuits have rejected plaintiffs' ADA claims for police misconduct[110]—but unlike courts in the pre-*Yeskey* Title II cases,[111] these courts (with one exception)[112] did

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[108] 28 C.F.R. § 35.190(b)(6) (2004).

[109] *See* Delano-Pyle v. Victoria County, 302 F.3d 567, 576 (5th Cir. 2002) (upholding a jury verdict finding a violation of the ADA); Gorman v. Easley, 257 F.3d 738, 751 (8th Cir. 2001) (affirming a jury verdict on plaintiff's Title II claim), *rev'd on other grounds sub nom.*, Barnes v. Gorman, 536 U.S. 181 (2002); Lee v. City of Los Angeles, 250 F.3d 668, 691-92 (9th Cir. 2001) (broadly construing Title II and remanding the matter to the district court to allow plaintiffs an opportunity to amend their ADA claim); Arnold v. City of York, 340 F. Supp. 2d 550, 554 (M.D. Pa. 2004) (denying defendants' motion to dismiss plaintiffs' ADA claims); McCray v. City of Dothan, 169 F. Supp. 2d 1260, 1276 (M.D. Ala. 2001) (denying summary judgment to defendants on plaintiff's ADA claim), *aff'd in part, rev'd in part on other grounds*, No. 01-15756-DD, 2003 WL 23518420 (11th Cir. Apr. 24, 2003).

[110] *See* Anthony v. City of New York, 339 F.3d 129, 141 (2d Cir. 2003) (affirming a district court's grant of summary judgment to defendants on plaintiffs' ADA claim on the basis that there was no finding of intentional discrimination); Thompson v. Williamson County, 219 F.3d 555, 558 (6th Cir. 2000) (holding that plaintiffs' ADA claim that their son was denied medical services because of his disability failed as a matter of law because plaintiffs did not prove that decedent was denied access to a public service or that, if he was, the denial was because of his disability); Bates *ex rel.* Johns v. Chesterfield County, 216 F.3d 367, 373 (4th Cir. 2000) (finding no ADA violation because the use of force and arrest of plaintiff were not by reason of his disability); Sudac v. Hoang, 378 F. Supp. 2d 1298, 1306 (D. Kan. 2005) (rejecting plaintiff's ADA claim and finding that the alleged denial of benefits occurred because of decedent's actions).

[111] *See supra* text accompanying notes 66-90 (discussing pre-*Yeskey* cases in which courts refused to apply Title II to police activities).

not reject plaintiffs' claims on the grounds that Title II can never be applied in an arrest context. This Part will provide a brief summary of how courts have treated disabled plaintiffs' Title II actions for police misconduct post-*Yeskey*.

In *McCray v. City of Dothan*, the court denied the defendants' motion for summary judgment in a case brought by a deaf plaintiff who claimed that police officers had failed to accommodate his disability in arresting him.[113] The court adopted the Fifth Circuit's rule that "police activity is a government program under the ADA, but only when the circumstances surrounding the activity is [sic] 'secure' and there is 'no threat to human safety.'"[114] Not finding any evidence of a threat to human safety in the case at hand, the court concluded that summary judgment was inappropriate.[115] Two years after the district court ruling, and six months after review by the Eleventh Circuit of plaintiffs' non-ADA state and federal claims,[116] the parties settled for $575,000.[117]

On review of a district court ruling on a claim under the ADA for injuries sustained while being transported in a police van that was not equipped with wheelchair restraints,[118] the Eighth Circuit in *Gorman v. Easley* upheld a jury verdict of over two million dollars.[119] The court quickly dismissed the defendants' argument that Gorman was not a "qualified individual with a disability" and also denied two challenges by the police board to the jury instructions.[120]

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[112] Crocker v. Lewiston Police Dep't, No. 00-13-PC, 2001 WL 114977, at *8-9 (D. Me. Feb. 9, 2001) (holding that an arrest is not the type of activity that a person could be "excluded from" under the ADA and granting defendants' motion for summary judgment on plaintiff's ADA claim).

[113] 169 F. Supp. 2d at 1272. For a summary of the facts of *McCray*, see *supra* text accompanying notes 50-53.

[114] 169 F. Supp. 2d at 1275 (quoting Hainze v. Richards, 207 F.3d 795, 802 (5th Cir. 2000)).

[115] *Id.* at 1275-76.

[116] *See McCray*, 2003 WL 23518420, at *8 (affirming in part and reversing in part the district court's ruling pertaining to plaintiff's non-ADA state and federal claims).

[117] *See supra* note 53 (describing the settlement terms).

[118] For the facts of *Gorman*, see *supra* text accompanying notes 74-87.

[119] 257 F.3d 738, 743 (8th Cir. 2001). However, the court remanded to the district court for examination of the appropriateness of the damages. *Id.* at 749. The Supreme Court later reversed the Eighth Circuit and held that the punitive damages, which the jury had awarded Gorman in the amount of $1,200,000, were properly vacated by the district court. Barnes v. Gorman, 536 U.S. 181, 189 (2002).

[120] *Gorman*, 257 F.3d at 750-51. The jury instructions that the police board believed erroneous included the elements that plaintiff had to prove in order for liability to lie under the ADA and the Rehabilitation Act: "First, that the defendants failed to

Two recent Pennsylvania district court opinions also sided with plaintiffs who brought ADA claims for police misconduct, denying defendants' motions to dismiss. In *Schorr I*, the court held that the scope of "services, programs, or activities" under the ADA was not limited to "commonly available and publicly shared accommodations such as parks, playgrounds, and transportation," as a lay reader might believe, but in fact includes "the most basic of these functions . . . [namely] the lawful exercise of police powers, including the appropriate use of force by government officials acting under color of law."[121] The court further held that the Fifth Circuit's rationale for rejecting ADA claims when the conduct occurred in the face of "exigent circumstances"[122] did not apply to the Schorrs' claim because the Schorrs brought their claim not against the individual police officers, but against the police commission for failing to properly train the officers:

> 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, when the Defendant policy makers failed to institute policies to accommodate disabled individuals such as Schorr by giving the officers the tools and resources to handle the situation peacefully.[123]

The court therefore concluded that the Schorrs' ADA claim could proceed against the police commission.[124] After the district court's ruling, the parties agreed on a settlement that included a confidential monetary payment as well as an agreement by the county and the police department to adopt procedures for dealing with mentally ill people, including the use of a mental health professional as a liai-

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provide plaintiff appropriate transportation that reasonably accommodated his disability after he was arrested, and [s]econd, that as a direct result of the defendants' failure, plaintiff sustained damages." *Id.* at 750. The district court had defined "reasonable accommodation" as "making modifications to the defendants' practices for transporting the plaintiff after he was arrested so that he would be transported in a manner that was safe and appropriate consistent with his disability." *Id.*

[121] 243 F. Supp. 2d 232, 235 (2003). For a summary of the facts of *Schorr I* and *Schorr II*, see *supra* text accompanying notes 1-15.

[122] *See* Hainze v. Richards, 207 F.3d 795, 801-02 (5th Cir. 2000) (holding that officers have no duty to reasonably accommodate disabled suspects until the area is secure and there is no threat to human safety).

[123] *Schorr I*, 243 F. Supp. 2d at 238. For a discussion of failure to train claims in general, see *infra* Part III.E.

[124] *Id.* at 239; *accord* Arnold v. City of York, No. Civ.A. 4:03-1352, 2004 WL 2331781, at *8-9 (M.D. Pa. June 28, 2004) (applying the holding in *Schorr I* to the plaintiff's claim of police misconduct under the ADA and denying the defendant city's motion to dismiss), *adopted by* 340 F. Supp. 2d 550 (M.D. Pa. 2004).

son.[125] The settlement also provided for police officer training in dealing with mentally ill individuals.[126]

Even more recently, in *Hogan v. City of Easton*, a court denied defendants' motion to dismiss an ADA claim brought by a man with a mental health disorder.[127] Michael Hogan had been shot by police who were responding to Hogan's wife's 911 call to obtain help in calming him down after he experienced deterioration in his mental condition.[128] Citing *Schorr I*, *Yeskey*, and the Eighth Circuit opinion in *Gorman v. Bartch*, the court held that Hogan stated a valid claim under the ADA "based on the failure of the City and County to properly train its police officers for encounters with disabled persons."[129] The *Hogan* case is now in the discovery phase, with a trial expected in January 2006.[130]

Courts in other jurisdictions, however, have not been as willing to allow disabled plaintiffs' ADA claims for police misconduct to go to a jury. In *Pannell v. City of Bellvue*, police officers arrested John Pannell after a brief struggle that occurred when they attempted to enter his residence in response to a 911 call of domestic violence.[131] Pannell, who was unable to communicate or move quickly due to a prior stroke, had not immediately responded to the officers' demand that he drop the baseball bat he was holding and open the door for them.[132] The district court granted the defendants' motion to dismiss the ADA claim, holding that there was "no showing that the officers intended to act as they did toward the plaintiff on the basis that he was disabled."[133]

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[125] Telephone Interview with Gerald J. Williams, Williams, Cuker & Berezofsky, Attorney for Susan and Keith Schorr, in Phila., Pa. (May 26, 2005).

[126] *Id.*

[127] No. Civ.A. 04-759, 2004 WL 1836992, at *7 (E.D. Pa. Aug. 17, 2004).

[128] *Id.* at *1, 7. When the police officers arrived at the Hogans' residence, Mr. Hogan had calmed down and was inside by himself. *Id.* at *2. The nine police officers who ultimately arrived at the scene did not ask Mrs. Hogan, who was outside the house, what her husband's current condition was or whether she still needed help in calming him down. *Id.* They proceeded to initiate a standoff with Mr. Hogan that resulted in gunshot wounds to Mr. Hogan's stomach, right hand, and left wrist. *Id.* at *3-4.

[129] *Id.* at *7.

[130] Telephone Interview with Jordan B. Yeager, Boockvar & Yeager, Attorney for Michael Hogan, in Doylestown, Pa. (May 23, 2005).

[131] 184 F. Supp. 2d 686, 687 (N.D. Ohio 2002).

[132] *Id.* at 687-88. Pannell alleged that his family members shouted to the police officers who were at the door that Pannell was a stroke victim. *Id.*

[133] *Id.* at 689. It is interesting to note that there is no support for an intent requirement for ADA actions in the Supreme Court's opinion in *Yeskey*.

The following year, in *Anthony v. City of New York*, the Second Circuit reviewed the claim of a woman with Down Syndrome who alleged that ADA violations occurred in the course of police officers' entry into her apartment, in response to a 911 call reporting a man with a knife, and the subsequent transportation of her to a mental hospital[134] The Second Circuit, like the district court in *Pannell*, read a discriminatory intent requirement into Title II that did not appear in the legislative history of, or case law interpreting, the ADA: "There is no evidence . . . that the seizure and hospitalization were motivated by discrimination against individuals with disabilities. Anthony has alleged no facts showing that Sergeant Mendez, who ordered Officers Collegio and Migliaro to seize Anthony, acted with discriminatory intent."[135] The court affirmed the district court's grant of summary judgment to defendants on the ADA claim.[136]

Overall, disabled plaintiffs who today bring claims under Title II for police officers' actions in effecting an arrest will find a friendlier response by district and appellate courts than did plaintiffs pre-*Yeskey*. Although *McCray* and *Pannell* demonstrate that not all jurisdictions abide by the traditional Title II rule for proving a claim, most courts no longer reject the very notion of bringing an action under the ADA for police misconduct. In a number of jurisdictions, such claims are allowed to go forward, and in some, large jury verdicts in the ensuing trials are upheld.

III. TITLE II VERSUS SECTION 1983: ANOTHER BITE AT THE APPLE?

Even if courts are willing to apply Title II to police actions, questions arise about the necessity and desirability of pursuing an ADA claim in such cases. Actions under Section 1983 provide the usual civil remedy for police misconduct, and most cases that include an ADA claim resulting from an arrest also contain parallel Section 1983 claims.[137] As this Part will argue, the differences between ADA claims

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[134] 339 F.3d 129, 131-32 (2d Cir. 2003).

[135] *Id.* at 141.

[136] *Id.*

[137] *See, e.g.*, Hogan v. City of Easton, No. Civ.A 04-759, 2004 WL 1836992, at *5-11 (E.D. Pa. Aug. 17, 2004) (ruling on plaintiffs' cause of action under the ADA and six causes of action under Section 1983 that resulted from a confrontation between plaintiff and police officers); *Schorr I*, 243 F. Supp. 2d 232, 234-35 (M.D. Pa. 2003) (reviewing plaintiffs' claims under Section 1983 and the ADA pertaining to the killing of plaintiffs' decedent by police officers); Lewis v. Truitt, 960 F. Supp. 175, 177 (S.D. Ind. 1997) ("Plaintiffs filed this action against Defendants alleging violations of 42 U.S.C. § 1983 [and] the Americans with Disabilities Act . . . .").

and claims under Section 1983—in terms of elements, remedies, and various immunities—suggest that, even if disabled plaintiffs should not replace their Section 1983 claims with claims under Title II, they should still plead both claims.[138] This Part will also explore the possibility of pleading claims under Section 504 of the Rehabilitation Act,[139] which is very similar to Title II in substance,[140] but allows for greater flexibility in overcoming potential defenses.[141]

A. *Bars to Claims for Misconduct Under Section 1983: Jumping Through Hoops*

Claims under Section 1983 for police misconduct in effecting an arrest, particularly in cases where the plaintiff is disabled, are difficult to win. In order to prove liability under the statute, "the plaintiff must prove that she has been deprived of a federal statutory or constitutional right by someone acting 'under color of' state law."[142] Although

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[138] *See* James C. Harrington, *The ADA and Section 1983: Walking Hand in Hand*, 19 REV. LITIG. 435, 445-63 (2000) (arguing that disabled plaintiffs should, for strategic litigation reasons, plead civil rights claims under the ADA in addition to Section 1983).

[139] 29 U.S.C. § 794(a) (2000).

[140] *See* Katie Eyer, Note, *Rehabilitation Act Redux*, 23 YALE L. & POL'Y REV. 271, 298 (2005) (stating that the Rehabilitation Act and Title II "have been in most circumstances treated as identical by reviewing courts" because of statutory provisions requiring their uniform interpretation).

[141] *See, e.g.*, *infra* text accompanying notes 224-26 (noting that courts have held that states are not protected from suit under Section 504 by the Eleventh Amendment).

[142] MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION § 1:2, at 2 (3d ed. 2004). Although this Comment focuses on claims under Section 1983 pertaining to constitutional violations, it is possible that a plaintiff could plead a Section 1983 claim for violation of the ADA itself. In order to state a valid claim for a statutory violation, a plaintiff must show that "Section 1983 creates an individually enforceable right in the class of beneficiaries to which he belongs." City of Rancho Palos Verdes v. Abrams, 125 S. Ct. 1453, 1458 (2005). In addition, even though there is a rebuttable presumption that the right is enforceable, the defendant may defeat this presumption by showing that Congress did not intend the remedy for a newly created right. *Id.* Although most courts have held that rights under Title II may be enforced in Section 1983 actions, other courts have held that Title II cannot be enforced through such a suit because the ADA remedies are exclusive. *See* 1 AMERICANS WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL § 2:51 (2005) [hereinafter PRACTICE AND COMPLIANCE] (discussing the case law on the question of whether a plaintiff can plead a Section 1983 action for violation of Title II of the ADA). Although the substantive law that a plaintiff would need to prove in order to succeed in a Section 1983 action based on a violation of the ADA would be different than the elements necessary to prove a Section 1983 action based on a constitutional violation, the immunities and damages would be regulated by the same rules as for any other 1983 action. *See infra* text accompanying notes 150-69 (discussing immunity doctrines).

the elements that a plaintiff must prove vary depending on the type of claim and the type of governmental activity,[143] the Supreme Court has held that Fourth Amendment standards apply to Section 1983 plaintiffs' claims of excessive force when the use of force constitutes a "seizure."[144] The plaintiff must therefore first show that the force exercised against her represented a seizure.[145] In addition, as Professor Michael Avery has argued, the "totality of the circumstances" doctrine that has been adopted by courts in such Fourth Amendment cases has proven "inadequate in deterring police misconduct and in providing remedies for mentally and emotionally disturbed [plaintiffs]."[146] This test, as articulated in *Graham v. Connor*, provides that courts must balance the "nature and quality" of the Fourth Amendment intrusion against the "countervailing governmental interests at stake."[147] In judging the reasonableness of the police officers' use of force—which must be examined from the perspective of a "reasonable officer on the scene"—courts look to the following three factors: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[148] In applying the "totality of the circumstances test," lower courts have given much weight

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[143] AVERY, *supra* note 143, § 2:18, at 78. Examples of common claims under Section 1983 relating to police activities include excessive use of force, unlawful entry, failure to provide immediate medical attention, and unlawful search and seizure. *Id.* The Supreme Court has held that there is no single standard for claims under Section 1983 because the statute itself is not a source of substantive rights. *Id.* (citing Graham v. Connor, 490 U.S. 386, 393-94 (1989)).

[144] *Id.* (citing *Graham*, 490 U.S. at 394). Because excessive use of force is the claim that most commonly appears in cases brought by disabled plaintiffs pertaining to police misconduct, this Comment will focus on that claim. Claims of excessive force that do not constitute seizures (e.g., a claim against police officers resulting from a high-speed chase of a suspect) are analyzed under substantive due process principles. *See* County of Sacramento v. Lewis, 523 U.S. 833, 843-45 (1998) (stating that police action, such as engaging in a car chase, is properly examined under the Due Process Clause rather than the Fourth Amendment).

[145] AVERY ET AL., *supra* note 142, § 2:18, at 78 n.3 (citing Vathekan v. Prince George's County, 154 F.3d 173, 178 (4th Cir. 1998)). To prove that a "seizure" occurred, the plaintiff must prove that government actors have, in some way, restrained her liberty by means of physical force or show of authority. *Graham*, 490 U.S. at 395 n.10 (citing Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)).

[146] Avery, *supra* note 10, at 267-68. Avery's article focuses on the claims of mentally and emotionally disturbed plaintiffs. For a general discussion of the challenges of bringing a Section 1983 claim for police misconduct, see Thorne Clark, Comment, *Protection from Protection: Section 1983 and the ADA's Implications for Devising a Race-Conscious Police Misconduct Statute*, 150 U. PA. L. REV. 1585, 1597-602 (2002).

[147] 490 U.S. 386, 396 (1989) (internal quotation marks omitted).

[148] *Id.*

to the "emergency confronting the officer and the pressures that he may have experienced" and have not required that officers use the least intrusive means possible to handle such situations.[149]

Even if a plaintiff is able to prove excessive force under Section 1983, she still might not succeed in her claim because the police officer could be entitled to qualified immunity. The qualified immunity defense, which is applicable to claims of excessive force,[150] provides police officers immunity from damages "unless a reasonable officer would have known that his actions would violate clearly established constitutional rights of the plaintiff."[151] As Professor James Harrington has explained, the existence of the qualified immunity defense for police officers in Section 1983 claims "serves to make the civil rights plaintiff's burden almost insurmountable."[152]

The doctrine of municipal immunity also acts as an obstacle to a successful Section 1983 claim against local governments since the Supreme Court has held that there is no respondeat superior liability under the statute.[153] Under *Monell v. Department of Social Services*, a plaintiff can state a claim against a local governing body for monetary, declaratory, or injunctive relief only if she can show that the injury she suffered was the result of the government's policy or custom.[154] In addition, in a *Monell* claim alleging that a municipality failed to adequately train its police officers, the plaintiff must prove that "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."[155]

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[149] Avery, *supra* note 10, at 273-74.

[150] *See id.* at 270 ("[I]n *Saucier v. Katz*, [533 U.S. 194, 197 (2001),] the [Supreme] Court held that a qualified immunity defense is available to claims of excessive force.").

[151] AVERY ET AL., *supra* note 142, § 2:1, at 41. As the authors of the treatise note, the scope of the protection of police officers' actions under the qualified immunity defense has expanded over the past decade. *Id.*

[152] Harrington, *supra* note 138, at 437-38. "As a practical matter, officials almost always secure qualified immunity, either from the trial court or the appellate tribunal. Only the most flagrant and shocking conduct will defeat qualified immunity; merely 'stupid' actions are insufficient." *Id.* at 438. The low threshold required for a police officer to establish qualified immunity is exemplified in *Brosseau v. Haugen*, 125 S. Ct. 596, 600 (2004) (per curiam), in which the Court held that it was not clearly established that an officer violated the Fourth Amendment's deadly force standards by shooting a suspect who was fleeing in a vehicle.

[153] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978) ("[A] municipality cannot be held liable under § 1983 on a *respondeat superior* theory.").

[154] *Id.* at 690, 694.

[155] City of Canton v. Harris, 489 U.S. 378, 388 (1989). For a discussion of courts' treatment of failure to train claims against local governments and the importance of

While municipal immunity and qualified immunity protect the local government and police officers who are sued in their individual capacity and, another immunity doctrine protects state government entities. The Eleventh Amendment and the court-developed doctrine of sovereign immunity bar suits against state governments,[156] preventing a plaintiff from obtaining under Section 1983 either legal or equitable relief directly against a state entity.[157] However, under *Ex parte Young*,[158] a Section 1983 plaintiff can secure an equitable remedy, such as an injunction, by suing the state officials in their official capacity instead of suing the state entity.[159]

An additional consideration that plaintiffs might have to contend with in bringing Section 1983 claims is the bar under *Heck v. Humphrey* against claims that challenge the validity of outstanding criminal judgments.[160] In *Heck*, the Court held that a plaintiff who seeks to recover damages for

> an unconstitutional conviction, imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid . . . must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a

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police training with respect to encounters with mentally and emotionally disturbed people, see Avery, *supra* note 10, at 323-31.

[156] "Generally speaking, the state's sovereign immunity extends to suits against state departments, arms, institutions, instrumentalities, agencies, counties, townships, as well as commissions or boards." 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 12 (2001) (internal citations omitted).

[157] The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Although the language of the Eleventh Amendment refers only to suits against a state by citizens of another state, the Supreme Court has "extended the Amendment's applicability to suits by citizens against their own state." Bd. of Trs. v. Garrett, 531 U.S. 356, 363 (2001).

[158] 209 U.S. 123 (1908).

[159] *See* Mountain Cable Co. v. Pub. Serv. Bd., 242 F. Supp. 2d 400 (D. Vt. 2003) ("In its long-standing exception to Eleventh Amendment sovereign immunity, *Ex parte Young* 'permits federal courts to enjoin state officials to conform their conduct to requirements of federal law . . . .'" (citing Milliken v. Bradley, 433 U.S. 267, 289 (1977))). An equitable remedy against state officials will often be unsuccessful in cases of police misconduct, however, because of justiciability problems. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (holding that the plaintiff, who was subjected to a chokehold following a stop for a traffic violation, did not have standing to seek an injunction against the police department because it was impossible for the plaintiff to meet his burden of showing "irreparable injury").

[160] 512 U.S. 477, 489-90 (1994).

> state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.[161]

In *Hainze v. Richards*, in which plaintiff Kim Michael Hainze brought claims under both Section 1983 and the ADA, the Fifth Circuit held that Hainze's Section 1983 claims had properly been dismissed because he had been convicted of aggravated assault with a deadly weapon for the same set of events that were the subject of his police misconduct claim.[162]

Finally, the damages available in cases brought under Section 1983 are often limited by law. Successful plaintiffs are entitled to reasonable compensatory damages,[163] which are determined by the fact-finder.[164] Proof of intentional discrimination is not necessary to obtain damages in a Section 1983 suit based on a Fourth Amendment violation.[165] In addition, a plaintiff may be entitled to attorneys' fees under Section 1988 at the discretion of the district court.[166] Punitive damages are available only when "the defendant's conduct is shown to be motivated by evil motive or intent, or when [the conduct] involves reckless or callous indifference to the federally protected rights of

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[161] *Id.* at 486-87 (internal citation omitted).

[162] 207 F.3d 795, 797, 798-99 (5th Cir. 2000); *cf.* Hogan v. City of Easton, No. Civ.A. 04-759, 2004 WL 1836992, at *9 (E.D. Pa. Aug. 17, 2004) (noting, but rejecting, the defendants' contention that the plaintiff's excessive force claim was legally barred under *Heck* because the plaintiff had already pled guilty in state court to "one count of terroristic threats and nine counts of recklessly endangering another person").

[163] *See* AVERY ET AL., *supra* note 142, § 13:2, at 598 ("The plaintiff is entitled to fair and reasonable compensation for the loss, harm, or injury suffered.").

[164] *Id.* § 13:2, at 599 ("Setting the amount of compensatory damages is generally held to be within the discretion of the trier of fact . . . ."). Though the damage award "is seldom reversed on appeal," the authors of the treatise note that some courts have recently begun "to subject compensatory damage awards to greater scrutiny." *Id.*

[165] *See* HAROLD S. LEWIS, JR., CIVIL RIGHTS LITIGATION: PRACTICE AND PROCEDURE, *in* STEPHEN YAGMAN, POLICE MISCONDUCT AND CIVIL RIGHTS: FEDERAL JURY PRACTICE AND INSTRUCTIONS § 10-21, at 682 (2d ed. 2002) ("It should be noted that § 1983 contains no general requirement that the plaintiff prove the defendant acted with any particular state of mind."). Some predicate constitutional claims under Section 1983, such as First Amendment claims and Eighth Amendment claims, do require proof of a particular state of mind. *Id.* For a discussion of the intentional discrimination requirement in Title II actions, see *infra* note 206 and accompanying text.

[166] 42 U.S.C. § 1988 (2000); *see* AVERY ET AL., *supra* note 142, § 14:1, at 635 ("The Civil Rights Attorney's Fees Awards Act of 1976 provides that the prevailing party in actions brought under several civil rights statutes is entitled to attorneys' fees . . . ." (internal citation omitted)). Section 1988 was passed in response to a Supreme Court decision restricting punitive damages in Section 1983 claims to cases in which the defendants acted in bad faith. *Id.* § 14:1, at 636 (referencing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)).

others,"[167] and are never available in a *Monell* claim against a local government.[168]

The substantive law that governs the elements necessary to prove a Section 1983 claim, immunities that protect the defendants, and limits on damages have made it exceedingly difficult for plaintiffs to bring successful and worthwhile claims under this statute.[169] In fact, as several commentators have noted, the Supreme Court's recent rulings have greatly restricted civil rights plaintiffs' access to the courts and have frustrated the purpose of much of the civil rights legislation enacted over the past forty years.[170] The next Part will explore the contours of decisional law for Title II claims of police misconduct and the question of whether plaintiffs might fare better under the ADA than under Section 1983.

B. *ADA Claims for Police Misconduct: Avoiding the Hoops?*

The initial substantive elements that a plaintiff must prove under Title II of the ADA are entirely different from the elements necessary to prove a claim under Section 1983. In a Title II claim, a plaintiff must prove

> (1) that [she] is a qualified individual with a disability;[171] (2) that [she] was either excluded from participation in or denied the benefits of some

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[167] Smith v. Wade, 461 U.S. 30, 56 (1983).

[168] *See* Harrington, *supra* note 138, at 438-39 (noting that, for *Monell* claims, "only actual damages, and not punitive damages, are available"). In addition, a plaintiff who could not prove actual damages, but could prove liability, could argue for nominal damages. *See* Carey v. Piphus, 435 U.S. 247, 266 (1978) ("[T]he law recognizes the importance to organized society that [certain] rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury . . . .").

[169] Harrington has also articulated two other major obstacles for Section 1983 plaintiffs. *See* Harrington, *supra* note 138, at 439 (noting the interlocutory appeals system that allows an official to save the expense of mounting a defense and the appellate courts' "propensity to substitute [their] own interpretation of the facts for that of a judge or jury").

[170] *See, e.g.*, Chemerinsky, *supra* note 25, at 540 ("[T]here is a consistent and disturbing theme to the Rehnquist Court's decisions in recent years: civil rights plaintiffs lose."); David Rudovsky, *Civil Rights Litigation: The Current Paradox*, 5 U. PA. J. CONST. L. 487, 489 (2003) ("[D]espite the [current] explosion of litigation, with thousands of cases filed each year, an enormous increase in the number of lawyers, organizations, and services that are available to people who want to litigate these issues in court, we see a marked retrenchment in legal doctrine and access to the courts.").

[171] Proving a disability under the ADA has become increasingly difficult in recent years. *See, e.g.*, Toyota Motor Mfg. v. Williams, 534 U.S. 184, 195 (2002) ("Merely having an impairment does not make one disabled for purposes of the ADA.").

> public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.[172]

In addition, a plaintiff must show that the police officers knew that the plaintiff was disabled.[173] Some courts have also required that the discrimination be intentional.[174]

A "totality of the circumstances" analysis does not necessarily apply to ADA claims—and countervailing governmental interests do not *always* come into play—because ADA claims do not implicate constitutional principles. However, while courts examining claims under the wrongful arrest theory[175] are not likely to take into account countervailing governmental interests, such interests often *will* come into play in the context of claims under the reasonable accommodation theory.[176] In *Hainze v. Richards*, for example, the court balanced the plaintiff's rights under the ADA to be free from discrimination based on his disability against the interest in public safety and prevention of risks to the officers and bystanders: "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."[177]

With regard to claims that a government entity failed to train its police officers to recognize and appropriately handle individuals with disabilities, plaintiffs have faced fewer obstacles under Title II than they have under Section 1983. Whereas *City of Canton v. Harris* re-

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[172] Gohier v. Enright, 186 F.3d 1216, 1219 (10th Cir. 1999).

[173] *See* Lewis v. Truitt, 960 F. Supp. 175, 178 (S.D. Ind. 1997) (holding that a plaintiff must show that the defendants knew or should have known that the plaintiff was disabled in order to recover under the ADA for police misconduct); *accord* Jackson v. Inhabitants of Sanford, Civ. No. 94-12-P-H, 1994 WL 589617, at *1, 6 (D. Me. Sept. 23, 1994) (denying summary judgment to defendants on plaintiff's ADA claim in part because plaintiff had told the police officer that he suffered a brain aneurysm that caused physical difficulties).

[174] *See, e.g.*, Dillery v. City of Sandusky, 398 F.3d 562, 568 (6th Cir. 2005) (holding that the plaintiff had not established a claim under the ADA resulting from police harassment when she was on the street in her wheelchair because she had not proven intentional discrimination); *see also supra* text accompanying notes 131-37 (discussing cases in which courts required evidence of intentional discrimination to establish an ADA claim for police misconduct).

[175] *See supra* Part I.A (discussing the wrongful arrest theory).

[176] *See supra* Part I.B (discussing the reasonable accommodation theory).

[177] 207 F.3d 795, 801 (5th Cir. 2000).

quired a showing of deliberate indifference for Section 1983 claims,[178] courts have not set a similar standard for succeeding on failure to train actions under Title II.[179] In fact, in the few cases in which plaintiffs have pleaded both ADA and Section 1983 claims for failure to train, courts have been more receptive to the ADA action even though the substance of the failure to train argument was the same. In *Jackson v. Inhabitants of Sanford*, for example, the court granted summary judgment to the town on the plaintiff's failure to train claim under Section 1983 because "Jackson offer[ed] no evidence that Town of Sanford policymakers were, prior to Jackson's arrest, deliberately indifferent to inadequate training policies likely to result in constitutional violations."[180] However, on the plaintiff's ADA claim that the town "failed to train its police officers to recognize symptoms of disabilities and . . . to modify police policies, practices and procedures to prevent discriminatory treatment of the disabled," the court denied summary judgment.[181]

The immunities available to defendants also differ under Title II. Since Title II claims must be brought against government entities,[182] not individual defendants, the qualified immunity defense usually does not apply.[183] As the *ADA Practice and Compliance Manual* notes:

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[178] 489 U.S. 378, 388 (1989); *see supra* note 155 and accompanying text (noting a deliberate indifference requirement).

[179] However, it must be noted that even if a failure to train claim might be easier to prove under Title II than under Section 1983, a plaintiff may still have to prove intentional discrimination in order to receive compensatory damages. *See infra* note 206 and accompanying text (discussing the standard for obtaining compensatory damages under Title II).

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

[181] *Id. But see Schorr I*, 243 F. Supp. 2d 232, 234, 239 (M.D. Pa. 2003) (denying defendants' motion to dismiss on the failure to train claims under both the ADA and Section 1983).

[182] 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 entity*, or be subjected to discrimination by any *such entity*." 42 U.S.C. § 12132 (2000) (emphasis added).

[183] *See* Harrington, *supra* note 138, at 442 (noting that "issues of qualified (good faith) immunity and municipal immunity do not arise" in ADA actions against government entities). "The defense of qualified immunity is available to defendants only when they are sued in their individual capacities . . . ." PRACTICE AND COMPLIANCE, *supra* note 142, § 7:75. Despite the seemingly clear language of Title II, there is some confusion among the courts as to whether ADA claims may be brought against defendants in their individual capacity, and whether qualified immunity may apply. Most courts recognize that the provisions of the ADA allow only for claims against government entities. *See, e.g.*, EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1279 (7th Cir. 1995) ("[I]ndividuals who do not independently meet the ADA's definition of

> Whether qualified immunity is available at all in suits brought pursuant to ADA Title II is an open question since the defense is available only in individual capacity suits, but the recent trend is for courts to hold that individual capacity suits are not cognizable under Title II, which is directed at public entities.[184]

Similarly, municipal immunity is not an issue because the ADA claim itself is brought against a government entity, and therefore a *Monell* theory of respondeat superior is unnecessary.[185]

The question of sovereign immunity in Title II actions, however, is more complex.[186] The Supreme Court has held that "Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and 'act[s] pursuant to a valid grant of constitutional authority.'"[187] Because it is settled law that the language of the ADA evidences Congress's intent to abrogate the states' immunity,[188] the relevant question is whether Congress passed the ADA pursuant to a "valid grant of constitutional authority." The Supreme Court has held that Congress cannot abrogate state sovereign immu-

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'employer' cannot be held liable under the ADA."); Montez v. Romer, 32 F. Supp. 2d 1235, 1241 (D. Colo. 1999) ("I conclude that the individual defendants in their individual capacities are not properly subject to suit under the Rehabilitation Act or the Disability Act."). *But see* Niece v. Fitzner, 922 F. Supp. 1208, 1218-19 (E.D. Mich. 1996) (construing Title II to authorize suits against public actors in their individual capacities). Some courts have ruled on defendants' qualified immunity arguments without even discussing the issue of individual liability under the ADA. *See, e.g.*, Torcasio v. Murray, 57 F.3d 1340, 1342 (4th Cir. 1995) (holding, without reference to the individual liability dispute, that defendant officials of the Virginia Department of Corrections were protected by qualified immunity in a suit under the Rehabilitation Act and the ADA); Gorman v. Bishop, 919 F. Supp. 326, 331 (W.D. Mo. 1996) (granting defendant summary judgment on qualified immunity grounds as to plaintiff's claims against him in his individual capacity without discussing whether individuals are subject to ADA suits).

[184] PRACTICE AND COMPLIANCE, *supra* note 142, § 2:153 (internal citations omitted).

[185] *See* Harrington, *supra* note 138, at 442 (noting that issues of municipal immunity do not arise in ADA claims because those actions are brought against state and local government entities themselves, not individuals).

[186] *See id.* ("The current question is the extent to which the ADA overcomes state sovereign immunity for 14th Amendment purposes.").

[187] Bd. of Trs. v. Garrett, 531 U.S. 356, 363 (2001) (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000)).

[188] *See* 42 U.S.C. § 12202 (2000) ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter."); *Garrett*, 531 U.S. at 363-64 (noting § 12202 and stating that the question of whether Congress had intended to abrogate the states' immunity was not in dispute).

nity through the exercise of its Article I commerce power,[189] but it *can* abrogate that immunity through its powers under Section Five of the Fourteenth Amendment.[190]

In the past four years, the Supreme Court has begun to examine the nature of Congress's source of authority in enacting the ADA in order to determine whether Congress has validly abrogated the states' sovereign immunity under the statute. In *Board of Trustees v. Garrett*, the Court held that the Eleventh Amendment bars the recovery of monetary damages under Title I of the ADA[191] in private law suits by state employees against the state.[192] However, the Court explicitly declined to rule on the question of whether Title II actions against the state for monetary damages were similarly restricted.[193]

In *Tennessee v. Lane*, the Supreme Court examined the question of whether Title II of the ADA fell within Congress's enforcement power under the Fourteenth Amendment such that the statute validly abrogated the states' sovereign immunity.[194] George Lane and Beverly Jones, the respondents in the case, were paraplegics who used wheelchairs and claimed that they were denied access to the state courts.[195] The Court's holding was limited by the nature of the respondents' claim: "[W]e conclude that Title II, *as it applies to the class of cases impli-*

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[189] *See* Seminole Tribe v. Florida, 517 U.S. 44, 72-73 (1996) ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). Article I of the Constitution states that "[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8.

[190] *See Garrett*, 531 U.S. at 364 ("Congress may subject nonconsenting States to suit in federal court when it does so pursuant to a valid exercise of its § 5 power."). Section Five of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5.

[191] Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112 (2000).

[192] 531 U.S. at 360. The Court noted that its ruling did not prevent private plaintiffs from obtaining injunctive relief against state officials under Title I, nor prevent enforcement of Title I standards by the United States in actions for monetary damages. *Id.* at 374 n.9.

[193] *See id.* at 360 n.1 ("We are not disposed to decide the constitutional issue whether Title II . . . is appropriate legislation under § 5 of the Fourteenth Amendment . . . .").

[194] 541 U.S. 509, 513 (2004).

[195] *Id.* at 513-14.

cating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment."[196] Although a strong argument certainly could be made for extending *Lane* to a Title II claim pertaining to police misconduct,[197] the Supreme Court has yet to rule on the question.[198] Even if states were immune from monetary judgments under Title II, however, cases stemming from police officers' actions brought against local police departments or the board of police commissioners would not be subject to state sovereign immunity,[199] and actions for injunctive relief under *Ex parte Young*[200] would be available.[201]

The *Heck v. Humphrey* bar against Section 1983 claims that challenge the validity of outstanding court judgments[202] may or may not be

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[196] *Id.* at 533-34 (emphasis added).

[197] The *Lane* Court's analysis of whether Congress had the power under Section Five to enact Title II of the ADA relied heavily on the basic constitutional guarantees that Congress sought to remedy under the Act. *Id.* at 522-23. These guarantees were "subject to more searching judicial review" than discrimination based on a disability, which is subject only to rational basis review. *Id.* The Court referred to the right of access to courts, which was specifically at issue in *Lane*, as a right that is "protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 523. The rights claimed by disabled plaintiffs seeking to sue state governments for harm caused during an arrest similarly implicate the Due Process Clause. In addition, the *Lane* Court's discussion of the harm that Title II was designed to address cited a "pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, *including the penal system*, public education, and voting." *Id.* at 525 (emphasis added) (internal citations omitted).

[198] The Court has, however, granted certiorari in a case pertaining to a closely-related question: whether states are protected by the doctrine of sovereign immunity from suits by disabled prisoners under the ADA. Goodman v. Georgia, 125 S. Ct. 2266 (2005); *see* Linda Greenhouse, *Justices To Decide if Disabled Inmates May Sue States for Damages*, N.Y. TIMES, May 17, 2005, at A14 (reporting on the Supreme Court's grant of certiorari in the case to determine whether state prison inmates may sue the state for discrimination under the ADA). The Court's decision in this case will likely shed light on the question of whether states are protected by sovereign immunity from suits by arrestees under Title II.

[199] *See* Gorman v. Easley, 257 F.3d 738, 743-44 (8th Cir. 2001) (holding that the board of police commissioners was not an "arm of the state" for the purposes of qualifying for Eleventh Amendment immunity), *rev'd on other grounds sub nom.*, Barnes v. Gorman, 536 U.S. 181 (2002). For a list of the entities that are generally considered protected from suits for damages under principles of sovereign immunity, see *supra* note 156.

[200] 209 U.S. 123 (1908).

[201] However, similar to Section 1983 actions under *Ex parte Young*, it is likely that the justiciability doctrine would bar most attempts to bring an action under *Ex parte Young* for police misconduct. For additional discussion of the *Ex parte Young* doctrine, see *supra* note 159.

[202] 512 U.S. 477, 488-90 (1994). For a discussion of *Heck*, see *supra* text accompanying notes 160-63.

a bar to parallel ADA claims. The Supreme Court has not yet ruled on the question of whether *Heck* pertains to ADA actions, and lower courts are not in consensus on whether to apply *Heck* in ADA cases.[203] However, a strong argument can be made that *Heck* does not bar Title II claims. *Heck* itself applied only to actions under Section 1983.[204] Further, the reasons for the *Heck* bar—to prevent plaintiffs from bringing Section 1983 claims as a backdoor way of challenging their convictions—would not serve the intended purpose in many Title II claims pertaining to police misconduct, particularly those brought under the reasonable accommodation theory. In such a case, a plaintiff would be arguing that the defendants had failed to properly train the arresting officers to reasonably accommodate the plaintiff's disability. Logically, therefore, the plaintiff's argument would not necessarily call into question the appropriateness of his arrest or sentence.[205]

Compensatory damages may be available under Title II of the ADA, but intentional discrimination must be shown.[206] Punitive damages may not be awarded.[207] In *Barnes v. Gorman*, the Supreme Court determined that just as punitive damages could not be obtained in suits under Title VI of the Civil Rights Act of 1964, they also could not be obtained in claims under Title II of the ADA and Section 504 of the Rehabilitation Act because the ADA incorporates the "remedies, procedures, and rights" of the Rehabilitation Act, and the Rehabilitation Act in turn incorporates the "remedies, procedures, and rights"

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[203] *See* Browdy v. Karpe, No. 3:00 CV 1866(CFD), 2004 WL 2203464, at *8 (D. Conn. Sept. 20, 2004) ("Although the Court of Appeals for the Second Circuit has not yet considered whether the holding in *Heck* applies to ADA claims, [the court is persuaded] that the reasoning set forth in Heck to preclude section 1983 actions[] applies equally to ADA claims." (internal quotation marks omitted)). *But see* Miller v. Ghee, 22 F. App'x 388, 390 (6th Cir. 2001) (upholding the district court's dismissal of the ADA claim, not for *Heck* reasons as the district court did, but because of sovereign immunity).

[204] 512 U.S. at 486-87.

[205] It must be noted, though, that a failure to train claim that does not call into question the appropriateness of a plaintiff's arrest or sentence would not be barred by *Heck* under Section 1983.

[206] *See* Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 126 (1st Cir. 2003) ("[P]rivate individuals may recover compensatory damages under § 504 and Title II only for intentional discrimination." (citing Alexander v. Sandoval, 532 U.S. 275, 280-81 (2001))); PRACTICE AND COMPLIANCE, *supra* note 142, § 2:168 (stating that compensatory damages are available under Title II upon a showing of an intentional violation).

[207] *See* Barnes v. Gorman, 536 U.S. 181, 189 (2002) (holding that plaintiffs cannot receive punitive damages in suits under Title II or Section 504).

of the Civil Rights Act.[208] Injunctive relief, declaratory relief, and attorneys' fees may be awarded under Title II.[209]

C. *The Rehabilitation Act: Filling in the Gap?*

Section 504 of the Rehabilitation Act, which provides substantially the same protections as Title II[210] but applies only to public entities that receive "[f]ederal financial assistance,"[211] is a basis for disability discrimination claims that the legal community often overlooks.[212] As Katie Eyer has noted, despite widespread concerns about courts' treatment of the ADA in regard to immunity defenses, "most of the legal scholarship that has addressed . . . legal protections for individuals

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[208] *Id.* at 184-85. The Court analyzed the question of whether punitive damages are available under Title VI of the Civil Rights Act as follows: prior decisions had held that there was an implied private right of action under Title VI, and that the traditional presumption in favor of any appropriate relief for violation of a federal right applied; however, Title VI invokes Congress's power under the Spending Clause, which means that principles of contract law are relevant in an analysis of the appropriate relief; because a specific remedy is appropriate relief under this theory only if the recipient of federal funding is "on notice" that it is subjecting itself to liability of that nature, and because the remedy of punitive damages is neither expressly or impliedly included in Title VI, such damages are not appropriate under Title VI. *Id.* at 185-89.

[209] PRACTICE AND COMPLIANCE, *supra* note 142, §§ 2:164, 2:167, 2:169. According to Harrington, it is important to note that the ADA allows a "potentially broad recovery of a successful attorney's out-of-pocket expenses as well as attorney's fees and costs." Harrington, *supra* note 138, at 461.

[210] Katie Eyer writes of Title II and Section 504:

> There are . . . a number of provisions that require some form of consistent interpretation of the two Acts, even in the government programs and services area. Most notably, Title II provides (and has provided since its enactment) that except for certain exceptions mandated by statute, all regulations promulgated pursuant to Title II, "shall be consistent with the coordination regulations" of the Rehabilitation Act. Given that Title II as enacted included, like § 504, only a very minimal core anti-discrimination provision (which itself is virtually identical to § 504), this requirement of consistent regulations has had the effect of compelling consistent treatment of the Acts in most circumstances. Furthermore, all interpretations of Title II are, like Title I, also subject to Title V's requirement that "[e]xcept as otherwise provided [by statute], nothing in this chapter shall be construed to apply a lesser standard than the standards applied under . . . the Rehabilitation Act of 1973 . . . ."

Eyer, *supra* note 140, at 298 (internal citations omitted) (brackets in original).

[211] 29 U.S.C. § 794(a) (2000).

[212] *See* Eyer, *supra* note 140, at 271-72 (noting the "relatively skimpy treatment of the Rehabilitation Act's protections" in legal scholarship). Disability rights attorney Stephen Gold similarly notes that the Rehabilitation Act is often neglected by plaintiffs despite its advantages over the ADA in terms of immunity defenses. Telephone Interview with Stephen Gold, Esq., in Phila., Pa. (Feb. 14, 2005).

with disabilities has discussed the ADA's predecessor, § 504 of the Rehabilitation Act, in only a cursory fashion, if at all."[213]

Section 504 provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity."[214] In regard to claims of police misconduct, Title II is "similar in substance to the Rehabilitation Act, and cases interpreting either are applicable and interchangeable."[215] In addition, the ADA provides that the "remedies, procedures, and rights" of the Rehabilitation Act "shall be the remedies procedures, and rights" provided to plaintiffs under the ADA.[216]

The substantial similarity and interrelatedness between Section 504 and Title II suggests that the elements, potential defenses, and damages available for a claim under Section 504 would parallel the elements, potential defenses, and damages available under Title II,[217] and that courts willing to apply Title II to claims of police misconduct[218] would similarly be willing to apply Section 504 to those claims. Indeed, some courts examining actions in which plaintiffs have pleaded claims under both Section 504 and Title II have not distinguished between the two claims in their opinions.[219]

The one major difference between Title II and Section 504—the federal funding requirement attached to Section 504—has two important implications for claims of police misconduct, one that constricts

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[213] Eyer, *supra* note 140, at 271. For an interesting analysis of how the passage of the ADA affected the protection of rights under the Rehabilitation Act, see Ruth Colker, *The Death of Section 504*, 35 U. MICH. J.L. REFORM 219 (2002).

[214] 29 U.S.C. § 794(a) (2000).

[215] Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998) (internal quotation marks omitted). There are minor differences between the provisions and interpretation of Title II and Section 504; however, an analysis of these differences is beyond the scope of this Comment. For a comprehensive comparison of Title II and Section 504, see Eyer, *supra* note 140, at 298-309.

[216] 42 U.S.C. § 12133 (2000).

[217] *See supra* Part III.B (discussing possible damages for police misconduct under the ADA).

[218] *See supra* Part II.C (recognizing Title II's application to claims of police misconduct).

[219] *See, e.g.*, Hainze v. Richards, 207 F.3d 795, 799-803 (5th Cir. 2000) (noting that the language of Title II "generally tracks" the language of Section 504, labeling a section of the opinion "*ADA/Section 504 claims*," and analyzing both claims under Title II standards); *Schorr I*, 243 F. Supp. 2d 232, 235 n.1, 235-39 (M.D. Pa. 2003) (stating that Title II is intended to be interpreted "in a manner consistent with" Section 504 and analyzing the plaintiffs' ADA and Rehabilitation Act claims under the same standard).

the potential scope of Rehabilitation Act actions and one that expands it. Only public entities that receive federal funding may be sued under Section 504. However, as Eyer has pointed out, while this limitation is a substantial one for plaintiffs who sue private actors, it has only a minor effect in the area of "state-perpetrated discrimination," because (1) if a state entity receives any of its funding from the federal government, it is subject to liability under Section 504 for all of its programs or activities;[220] and (2) "a very substantial proportion of state budget dollars are allocated to state entities that are also recipients of federal funding."[221] In fact, in recent years very few actions against state actors under the Rehabilitation Act have been dismissed because the defendant did not receive federal funds.[222]

Therefore, while the limitation created by the federal funding requirement of the Rehabilitation Act does not appear to create a major obstacle for plaintiffs claiming police misconduct, the advantages that the funding requirement provides have the potential to set it apart significantly from Title II. States are not immune under the Eleventh Amendment from federal suits under Section 504 because when Congress amended the Rehabilitation Act in 1986[223] it "unambiguously condition[ed] the receipt of federal funds on a waiver of Eleventh Amendment immunity to claims under section 504 of the Rehabilitation Act,"[224] and state agencies waive their immunity by "continuing to accept federal funds."[225] Therefore, if plaintiffs are unable to successfully sue state government entities under Title II because of the state's sovereign immunity, a parallel claim under Section 504 would succeed where the ADA claim failed.

D. *Pleading Complementary Claims*

As the analysis of the case law surrounding Section 1983, ADA, and Rehabilitation Act claims suggests, plaintiffs bringing any of these

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[220] Eyer, *supra* note 140, at 282-83.

[221] *Id.* at 286.

[222] *Id.* at 286-87 ("Between the years 1988 and 2004, there have been only nine cases in which Rehabilitation Act claims against state entities were dismissed for lack of federal funding." (internal citation omitted)).

[223] *See* 42 U.S.C. § 2000d-7 (2000) ("A State shall not be immune under the Eleventh Amendment . . . for a violation of section 504 of the Rehabilitation Act . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.").

[224] Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 344 F.3d 1288, 1293 (11th Cir. 2003).

[225] *Id.*

actions face a number of obstacles and limitations. A Section 1983 plaintiff may have difficulty proving a Fourth Amendment violation given the "totality of the circumstances" test, may not be able to make a *Monell* showing necessary to establish the police department's municipal liability, or may lose on the basis of a *Heck* bar against recovery. A Title II plaintiff may fail to prove her claim because she is unable to prove that she has a disability under the ADA, as defined by the courts; or she may succeed in proving her claim, but then find that she is entitled only to nominal damages because she has not proven intent to discriminate. A Section 504 plaintiff may find her claim dismissed because the state governmental entity that she is suing does not receive federal funds.

Although, as Part III.B suggests, there are benefits to pleading a police misconduct claim under the ADA,[226] there are also areas in which a plaintiff would fare better under Section 1983 than under Title II. Under the ADA, plaintiffs cannot receive punitive damages and must show intentional discrimination to receive even compensatory damages.[227] A Section 1983 claim predicated on the Fourth Amendment, on the other hand, allows for reasonable compensatory damages without a showing of intentional discrimination,[228] and for punitive damages where a plaintiff can show either defendants' malicious intent or callous indifference to federally protected rights[229]—a showing that might not be much more difficult than the showing of intentional discrimination necessary to recover compensatory damages under the ADA.[230]

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[226] *See supra* Part III.B (describing how an ADA claim differs from a Section 1983 claim—in terms of elements, immunities, and the *Heck* bar—in ways that may make it easier for a plaintiff to succeed with an ADA claim).

[227] *See supra* text accompanying notes 206-08 (discussing damages available under Title II).

[228] *See supra* note 165 (stating that claims under Section 1983 generally do not require a showing of intent).

[229] *See supra* text accompanying notes 167-69 (discussing the standard for obtaining punitive damages under Section 1983).

[230] *See supra* text accompanying note 206 (noting the standard for obtaining compensatory damages under the ADA). In the case of a failure to train claim against a municipality, there is an additional requirement under Section 1983 that complicates the issue of damages: the plaintiff must prove that the failure to train constitutes a policy or custom that amounts to "deliberate indifference to the rights of persons with whom the police come into contact." City of Canton v. Harris, 489 U.S. 378, 388 (1989). For compensatory damages, therefore, the damages analysis for a failure to train claim depends on whether it is more difficult for a plaintiff to prove deliberate indifference under Section 1983 or intentional discrimination under Title II. In fact, some courts have conflated the two standards, reading the deliberate indifference re-

Because of the complementary nature of Section 1983, Title II, and Section 504, it would be beneficial for a disabled plaintiff to plead all three claims in an action for police misconduct.[231] Therefore, James Harrington's recommendation that plaintiffs use creative lawyering in bringing civil rights claims,[232] and Stephen Gold's suggestion that plaintiffs use Rehabilitation Act claims to "piggy-back" on Title II claims,[233] appear to be wise advice. Harrington writes that plaintiffs should "first plead the ADA Title II action against the government entity involved," and then "plead a § 1983 action, carefully and in great factual detail, against an individual and municipality to attempt to overcome potential immunity issues."[234]

Because the case law on ADA and Rehabilitation Act immunities is far less developed than the Section 1983 case law, pleading a Title II claim also provides a plaintiff with greater potential to convince the court that the substantive law in the area—as well as the law on immunities and damages—falls in her favor. For example, under *Tennessee v. Lane*,[235] a plaintiff could make a strong argument that a state entity is liable for damages in a Title II action for police misconduct,

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quirement into the Title II compensatory damages analysis. *See, e.g.*, Lovell v. Chandler, 303 F.3d 1039, 1056 (9th Cir. 2002) (noting that the Section 1983 "deliberate indifference" standard set forth in *City of Canton* was the appropriate standard for determining whether a plaintiff had proven the requisite level of intent that entitled her to compensatory damages under Title II). However, it is likely that the failure to train standard under Section 1983 will still be more difficult for a plaintiff to meet than the intentional discrimination standard under Title II because courts have found that the *City of Canton* requirement of a *policy or custom* of deliberate indifference is unnecessary to prove Title II intentional discrimination. *See* Delano-Pyle v. Victoria County, 302 F.3d 567, 575 (5th Cir. 2002) (agreeing with the Fourth Circuit's reasoning in *Rosen v. Montgomery County*, 121 F.3d 154, 157 n.3 (4th Cir. 1997), that a "policy of discrimination" does not need to be identified by a Title II plaintiff in order to bring a successful claim for compensatory damages).

[231] There is no procedural bar to pleading all three of these claims together. Although some courts have rejected claims under Section 1983 based on a violation of the ADA under the theory that the ADA is the exclusive remedy for such violations, *see* PRACTICE AND COMPLIANCE, *supra* note 142, § 2:51 (discussing courts' rejection of Section 1983 actions for violations of Title II), this theory does not defeat Section 1983 claims for constitutional violations that are based on the same facts as parallel ADA or Rehabilitation Act claims. *See id.* ("The inability to enforce the ADA under § 1983 does not preclude a § 1983 suit for due process violations arising out of the same nucleus of operative facts.").

[232] *See* Harrington, *supra* note 138, at 463-64 (advocating "creativity of counsel" in using the ADA to "fill the void left by § 1983 decisional law").

[233] Telephone Interview with Stephen Gold, Esq., *supra* note 212 (advocating the use of Rehabilitation Act claims in conjunction with ADA claims).

[234] Harrington, *supra* note 138, at 464.

[235] 541 U.S. 509 (2004).

because Congress had abrogated the states' Eleventh Amendment sovereign immunity in such cases. However, a plaintiff would be unable to argue that states can be sued for monetary damages under Section 1983, since case law in that area is settled.[236]

E. *Going Beyond Section 1983: Responding to Particularized Discrimination*

In addition to the benefits that a claim under the ADA or the Rehabilitation Act creates in terms of the decisional law on immunities and damages, such a claim also provides disabled plaintiffs with a unique advantage: in terms of the substance of the pleadings, the governing law, and the possible remedy, the claim will be framed to respond to the particularized discrimination in question— discrimination based on disability.

Claims that police departments and local governments have failed to appropriately train officers are prime examples of the importance of particularized ADA claims. Plaintiffs suing under the ADA can argue not only that the policymaking defendants failed to train officers in the appropriate use of force and in avoiding discriminatory behavior, but specifically that the defendants failed to train their officers in how to treat people with disabilities and how to respond to situations involving disabled citizens so as to prevent situations from escalating and resulting in injury or death.

In *Hogan v. City of Easton*, for example, plaintiff Michael Hogan's ADA claim alleged that the city and the county failed to properly train their police officers for "peaceful encounters with disabled persons," and that such failure resulted in discrimination against him.[237] In his complaint, Hogan asserted that (1) upon the police officers' arrival at his residence in response to a 911 call from his wife, his family members advised the police that Hogan suffered from anxiety, panic disorders, and depression, and that he should be approached in a calm and quiet manner; (2) the officers refused to use peaceful mechanisms to resolve the standoff that developed and "instead isolated Mr. Hogan from his private sources of aid;" (3) the officers further escalated the situation by activating the city's SWAT team; and (4) as a result of the police officers' action, Hogan felt "trapped and severely

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[236] *See* Quern v. Jordan, 440 U.S. 332, 343-45 (1979) (holding that Section 1983 does not abrogate states' sovereign immunity).

[237] No. Civ.A. 04-759, 2004 WL 1836992, at *6 (E.D. Pa. Aug. 17, 2004). For a discussion of *Hogan*, see *supra* text accompanying notes 127-31.

fearful of the Police Officers" and "increasingly despondent about the situation."[238] In the ensuing confrontation, the officers shot Hogan in the hand, wrist, and stomach.[239] Even if Hogan were unable to succeed in a traditional action for excessive use of force or failure to train under Section 1983[240]—because of the officers' potential defense that at the time of the confrontation they reasonably believed that Hogan had a gun on him and would shoot them[241]—Hogan's ADA claim for failure to train could focus on the officers' actions *prior* to the confrontation.

For plaintiffs who have already proven their claims in court—or who have proven enough to convince the defendants to settle—the difference between the potential remedy resulting from an ADA claim and one resulting from a Section 1983 claim may also be an important consideration. *Jackson v. Inhabitants of Sanford*[242] illustrates the benefits of ADA claims in this context. After a federal district judge in Maine granted summary judgment to Roland Jackson on his ADA claim that the town of Sanford failed to properly train its police officers to recognize symptoms of disabilities, and failed to modify its police policies, practices, and procedures to prevent discriminatory treatment of the disabled,[243] the town of Sanford agreed to settle the case.[244] Not only did Jackson receive monetary damages in the "five-figure" range, he also obtained an important concession from the town: under the settlement, the town agreed to comply with the ADA as interpreted by

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[238] *Id.* at *2-3.

[239] *Id.* at *4.

[240] However, the egregious nature of the officers' actions might allow Hogan to succeed on his Section 1983 excessive use of force and failure to train claims. *See, e.g.*, *id.* at *4 ("Officer Mazzeo came over to Mr. Hogan, who was laying on the floor bleeding, and stepped on his wrist, making an audible crunch, which caused Mr. Hogan to pass out momentarily."). In fact, the court denied the defendants' motion to dismiss these claims, *id.* at *12, which, as of the writing of this Comment, are still pending. However, in cases in which the officers acted appropriately at the time of the confrontation, but inappropriately during the time leading up to the confrontation, a failure to train claim under the ADA would be necessary.

[241] According to the complaint, Hogan "disarmed his weapon and pulled the bolt back and the lever down in an attempt to demonstrate that it was unloaded and could not be fired." *Id.* at *4. The court found that the officers "opened fire on him" as he bent down to surrender the shotgun. *Id.* Hogan did have a shotgun prior to the confrontation with the officers, but he placed it on the ground before ascending the basement steps to the landing where the officers were standing. *Id.*

[242] Civ. No. 94-12-P-H, 1994 WL 589617 (D. Me. Sept. 23, 1994). For the details of *Jackson*, see *supra* notes 37-41.

[243] *Id.* at *6.

[244] *See* Macey, *supra* note 41, at 1A (discussing the settlement terms in the *Jackson* case).

the district judge in the summary judgment ruling.[245] The town had to ensure that police officers received adequate training in distinguishing between symptoms of disabilities and criminal activity, and had to ensure that its policies and procedures did not discriminate against people with disabilities.[246]

Although the law pertaining to failure to train claims under the ADA is fairly undeveloped, courts in cases such as *Jackson* have been receptive to such claims.[247] As these cases demonstrate, failure to train claims epitomize the advantages of pleading actions under the ADA: first by helping a disabled plaintiff to prove the claim, and then by enabling her to procure an appropriate remedy. By molding a claim to fit the particularized rights violation, a plaintiff may increase the likelihood that she will succeed in her claim and receive a remedy that responds most appropriately to the violation.[248] Pleading a claim to fit the rights violation in question more closely also brings important additional benefits. By pushing courts to develop more detailed standards for determining questions of law pertaining to the interaction between disabled persons and law enforcement officials, plaintiffs will encourage the creation of a body of disability-rights law that courts may apply even in non-ADA contexts. In addition, more frequent ADA claims for police misconduct may bring about modifications to policies and practices, which will help focus and strengthen the standards for such policies and practices in the context of Section 1983 claims.

CONCLUSION

This Comment has argued that for police misconduct cases, there is a strategic incentive for a disabled plaintiff to bring claims under the ADA in addition to the traditional claims under Section 1983. Part II described how courts since *Yeskey* have generally been willing to allow plaintiffs to plead Title II claims related to law enforcement activities. The assumptions that had previously resulted in frequent

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[245] *Id.*

[246] *Id.*

[247] *See supra* text accompanying notes 178-82 (discussing courts' treatment of failure to train claims under the ADA).

[248] *See supra* text accompanying notes 237-47 (citing *Hogan* and *Jackson* as examples of how pleading an ADA claim, rather than a Section 1983 claim, can benefit a plaintiff both by increasing her likelihood of success and by paving the way for a remedy that responds to the specific violation because ADA actions focus on the defendants' specific conduct that discriminated based on disability).

dismissal of such claims—that ADA's language and intent precluded prisoners or arrestees from falling under Title II's prohibition on denial of the "benefits of the services, programs, or activities of a public entity"[249]—were discarded by the Supreme Court in *Yeskey* and no longer serve as justification for a blanket rule excluding such plaintiffs from the reach of Title II.[250]

The difficulties inherent in Section 1983 actions for police misconduct, explored in Part III, heighten the necessity for disabled plaintiffs to plead parallel Title II and Section 504 claims. Although the road is certainly not free of comparable obstacles for such claims, and the monetary damages that are available under Title II may be limited, such actions complement Section 1983 actions by requiring different elements and generally falling subject to fewer claims of immunity by defendants.

However, beyond the practical and strategic justifications for pleading parallel ADA claims in police misconduct cases, as Part III.E suggested, lies a more compelling reason for disabled plaintiffs to include such claims. The ADA was intended to provide a mandate to eliminate discrimination against individuals with disabilities,[251] but it is not entirely self-implementing legislation. Even though Title II directs the Attorney General to promulgate regulations to ensure that public entities do not discriminate against people with disabilities,[252] many forms of discrimination against the disabled go unnoticed and unchanged. As Susan Stefan has written of discrimination based on disability, "[t]he more deeply structural, embedded, and nondiscrete the discrimination is, the less it is recognizable or remediable as discrimination."[253]

Discrimination against disabled individuals during arrests is a particularly structural and embedded form of discrimination, and it often

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[249] 42 U.S.C. § 12132 (2000).

[250] As Part II acknowledged, however, not all courts are receptive to ADA actions arising from police misconduct, and the absence of a Supreme Court opinion approving and defining such actions has resulted in the occasional articulation of unjustifiably high standards for plaintiffs to prove a Title II claim based on police officers' actions in effecting an arrest. *See, e.g.*, Pannell v. City of Bellvue, 184 F. Supp. 2d 686, 689 (N.D. Ohio 2002) (requiring a showing "that the officers intended to act as they did toward the plaintiff on the basis that he was disabled").

[251] *See* 42 U.S.C. § 12101(b) (2000) (including among the state purposes of the ADA the provision of "a clear and comprehensive national mandate for elimination of discrimination against individuals with disabilities").

[252] *See* 42 U.S.C. § 12134 (2000) ("[T]he Attorney General shall promulgate regulations . . . that implement [Title II].").

[253] STEFAN, *supra* note 100, at 24.

goes unrecognized. An officer who is taught to use force when confronted with what she perceives as a threat may apply that knowledge when responding to a mentally or physically disabled person, not realizing that by treating this person the same way that she treats others, she may in fact be failing to reasonably accommodate his disability, and thereby discriminate against him.[254] Section 1983 actions, whether or not they result in a successful judgment for a plaintiff, will not by themselves send a sufficient message to police departments and state and local governments that they must change their practices to accommodate people with disabilities and provide training for their officers in how to respond to the needs of the disabled. Actions under the ADA will send precisely such a message.

[254] *Cf.* Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 579-80 (2004) (refuting the view that ADA-mandated accommodations result in "something more than equality for the disabled" because "disability-related accommodations must operate as antidiscrimination provisions . . . in order to alter social attitudes towards the disabled").