Juvenile Injustice: Protecting Children of Color with Disabilities from Arrest Inside and Outside of Schools

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INTRODUCTION

In early 2013, Nehemiah Keeton got a phone call from his niece's elementary school near St. Louis, Missouri.[1] His niece was having a tantrum: something that had happened several times before,[2] something that every 8-year-old does from time to time. He headed down to the school to check on her.[3] While he was on his way, he got a call from the police saying that his niece was in custody.[4]

Officers had arrested Jmiyha Rickman at school and held her in a police car for two hours.[5] "When I get to the police station to pick her up," Mr. Keeton recounted, "her eyes were just so swollen from her crying, and crying, and crying."[6] Rightfully appalled, he described how she was "shackled"[7]: handcuffed at her wrists and ankles.[8]

Mr. Keeton insisted this punishment was "above and beyond" what any 8-year-old deserved—what any elementary student with a disability deserved.[9] Jmiyha has autism, separation anxiety, and depression.[10] Due to her previous tantrums, the school was familiar with her behavior habits and how they were typically resolved.[11] Mr. Keeton said he came down to the school every time the staff called him for help.[12] The school had no reason to call 9-1-1.[13] On that day in 2013, Jmiyha Rickman became one of far too many Black and brown children with disabilities who are wrongfully restrained, secluded, and arrested in schools.

But children of color with disabilities are at risk of harmful and unlawful arrest outside of school too. In early 2021, in Rochester, New York, Elba Pope called 9-1-1 because her 9-year-old daughter was suicidal and threatening to kill Pope and her unborn child.[14] As white officers tried to

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[1] *8-year-old special needs student handcuffed*, NBC NEWS (Mar. 6, 2013), https://www.nbcnews.com/video/8-year-old-special-needs-student-handcuffed-44442179604 [https://perma.cc/KED7-HLQY] [hereinafter Rickman Segment].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Derek Hawkins, *New video shows Rochester police scolding 9-year-old after they pepper*

restrain her daughter, Pope repeatedly told them that her daughter was having a mental health episode and urged them to call a specialist, instead of trying to detain her child.[15] The young girl continued calling out for her father, asking for a female officer, and telling the police they were pulling too hard on her.[16]

When Pope's daughter refused to cooperate with police directives, one officer yelled: "You're acting like a child."[17] She responded: "I am a child!"[18]

In less than 90 seconds, police had handcuffed the 9-year-old girl, shoved her in the back of a police car, and pepper-sprayed her.[19] She sat in the back of the police cruiser, hands restrained behind her back and chemical irritant in her eyes for more than ten minutes before an ambulance arrived.[20]

At eight- and nine-years old, children should be learning to read, write, and use their words to express themselves. But they are also eight-years old. Young elementary students have tantrums. They throw things. They have big emotions in little bodies. They cannot always articulate how they feel. Children with cognitive and physical disabilities have to learn and grow just like every other child. On top of those everyday growing pains, they must also navigate their physical differences and neurodiversity in an ableist world.[21] Criminalizing developmentally appropriate behavior and behaviors associated with a child's disability is not only harmful to the child, but also violates her federal rights.

Families can seek relief when their child with a disability has been improperly arrested by bringing a lawsuit under the Americans with Disabilities Act (ADA).[22] Under Title II of the ADA, public entities, including police departments, cannot discriminate against individuals with disabilities.[23] Title II also requires public entities to make reasonable accommodations when working with individuals with disabilities.[24] But circuit courts are split on whether Title II covers arrests and, therefore, split on

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sprayed her, WASH. POST (Feb. 12, 2021, 6:53 PM), https://www.washingtonpost.com/nation/2021/02/12/rochester-police-9-year-old/ [https://perma.cc/V4X9-2QNY].

[15] *Id.*

[16] *Id.*

[17] Brakkton Booker, *Rochester Mayor Suspends Police Officers Who Pepper-Sprayed 9-Year-Old Girl*, NPR (Feb. 1, 2021, 5:23 PM), https://www.npr.org/2021/02/01/962813494/rochester-releases-video-of-police-pepper-spraying-9-year-old-girl [https://perma.cc/B7JA-F9NT].

[18] *Id.*

[19] Hawkins, *supra* note 14.

[20] *Id.*

[21] *#Ableism*, CTR. FOR DISABILITY RIGHTS, https://www.cdrnys.org/blog/uncategorized/ableism/ [https://perma.cc/J9NE-P9SR] (last visited Apr. 29, 2021) (defining ableism as "a set of beliefs or practices that devalue and discriminate against people with physical, intellectual, or psychiatric disabilities and often rests on the assumption that disabled people need to be 'fixed' in one form or the other." Also describing the phenomenon that "As small children, many nondisabled people are taught to be 'extra' nice to people with disabilities . . .what [they're] really doing is pitying them based on the belief that they couldn't do [basic tasks] on their own and are completely helpless.").

[22] 42 U.S.C. § 12132.

[23] *Id.*

[24] 28 C.F.R. § 35.130(b)(7) (2016).

whether families of children with disabilities can recover damages or injunctive relief for injuries they incur during an arrest.[25]

Hilary Wilkerson argues that Title II should apply specifically to arrests that occur on school campuses in her article, *Special Needs, Special Solutions: Using Title II of the ADA and Behavioral Supports to Protect Students with Disabilities from Arrest.*[26] She points to the different information that officers have and conditions they face when making on-campus arrests, versus arrests on the street.[27] For these reasons, Wilkerson urges that Title II should apply in schools, even if it does not apply to community arrests.[28] Under this rule, families would be able to recover damages for arrests that occur on school campuses, but not in the community.

But setting boundaries for Title II's application based on the location where a person is arrested is both arbitrary and dangerous. What if a child is arrested on the playground? Or in the school parking lot? Or on a school bus parked off campus? These factual variations could determine whether relief is available when an officer violates a right that is designed to be universal. People with disabilities have rights under the law that pervade their lives; rights they carry with them whether at home or at school. To avoid absurd results and protect the integrity of the ADA, courts must hold that Title II applies to arrests that occur both on and off school campuses.

The Center for Disability Rights responded to the pepper spray incident in Rochester by saying, "[P]olice departments are not skilled or ready to handle these types of calls without causing harm to Black disabled people."[29] Ample scholarship, news clippings, body camera footage, and criminal prosecutions against police officers support the organization's assertion—especially when it comes to police departments working with children of color with disabilities.[30] This Note does not discuss avenues to pursue abolition or defunding the police, though evidence reveals that local resources would be well spent on community-based response teams.[31]

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[25] *See infra* Part II.

[26] *See* Hilary Wilkerson, *Special Needs, Special Solutions: Using Title II of the ADA and Behavioral Supports to Protect Students with Disabilities from Arrest*, 44 N.Y.U. REV. L. & SOC. CHANGE 97 (2019).

[27] *Id.*

[28] *Id.* at 117.

[29] *CDR Condemns Rochester Police in the handling of a young Black girl and will review Mayor Lovely Warren's Draft of Reform to the Police Department*, CTR. FOR DISABILITY RTS., https://cdrnys.org/blog/advocacy/cdr-condemns-rochester-police-in-the-handling-of-a-young-black-girl-and-will-review-mayor-lovely-warrens-draft-of-reform-to-the-police-department/ [https://perma.cc/F8ZH-8P2Y] (last visited Mar. 25, 2021).

[30] *See, e.g.* Katie Tastrom, *Disability Justice and Abolition*, THE NAT'L LAWYERS GUILD (June 27, 2021), https://www.nlg.org/disability-justice-and-abolition/ [https://perma.cc/38CE-T7TV]; *Cripping Abolition*, ABOLITION AND DISABILITY JUST., https://abolitionanddisabilityjustice.com/opening/ [https://perma.cc/3G5H-GUMD] (last visited May 13, 2021); Natalie Crystal Doggett, *If Police Training Can't Save Disabled Black Women, What Will?*, WOMEN'S ENEWS (Nov. 18, 2020), https://womensenews.org/2020/11/if-police-training-cant-protect-disabled-black-women-what-will/ [https://perma.cc/7PMX-JQVT].

[31] *See, e.g.*, Amos Irwin & Betsy Pearl, *The Community Responder Model*, CTR. FOR AM. PROGRESS, (Oct. 28, 2020), https://www.americanprogress.org/issues/criminal-justice/reports/2020/10/28/492492/community-responder-model/ [https://perma.cc/9ERA-MVBM]

Until these trauma-informed, anti-ableist teams are more robustly in place, Americans with disabilities deserve compensation when police violate their federal rights. This Note proposes setting new legal precedent across circuit courts that protects those rights.

Part I of this Note discusses the ways that children of color with disabilities face disproportionate rates of arrest, both inside and outside of schools. In light of this data, it concludes that the ADA needs to protect youth from unnecessary and harmful arrests both on and off school campuses. Part II explains the circuit split regarding Title II's application to arrest and how the majority and minority courts have come to their conclusions. Part III elaborates on why the majority of courts have held correctly on the issue and criticizes the minority opinions. Part IV outlines Wilkerson's arguments that Title II should apply to arrests that happen on school property, highlighting the assumptions her article makes about the differences between in-school and on-the-street arrests. It asserts that selectively applying Title II to arrests does not do justice to the intentions of the ADA and fails to recognize the realities Black and brown children with disabilities face. Part V describes pathways to fill the holes in Title II's application to arrests so that families across the nation have equal access to these remedies.

I. CHILDREN OF COLOR WITH DISABILITIES LACK ADEQUATE LEGAL PROTECTION FROM POLICE VIOLENCE IN CIRCUITS THAT EXCLUDE ARRESTS FROM TITLE II'S COVERAGE

The purpose of the ADA is to "invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities."[32] For Black and brown children with disabilities, policing *is* a major, day-to-day area of discrimination. The intersection of their age, race, and disability is a significant predictor of their involvement in the criminal justice system.

Black and brown children are often denied the benefit of the assumption of innocence[33]—a benefit historically reserved for white children. Deep racial divisions and biases fueled the creation of two separate

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(estimating that "between 33 and 68 percent of police calls for service could be handled without sending an armed officer to the scene. . . ."); *see also* SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., NATIONAL GUIDELINES FOR BEHAVIORAL HEALTH CRISIS CARE 2 (2020), https://www.samhsa.gov/sites/default/files/national-guidelines-for-behavioral-health-crisis-services-executive-summary-02242020.pdf [https://perma.cc/7XFS-4UGD] (noting the "devastating outcomes" that can occur when crises are handled by law enforcement and encouraging partnerships between law enforcement and crisis response teams to reduce the risk of escalation during a situation).

[32] 42 U.S.C. § 12101(b)(4).

[33] *See* Eric Westervelt, *What Went Wrong: Analysis Of Police Handcuffing, Pepper-Spraying 9-Year-Old Girl*, NPR (Mar. 9, 2021, 6:01 AM), https://www.npr.org/2021/03/09/974896307/what-went-wrong-analysis-of-police-handcuffing-pepper-spraying-9-year-old-girl [https://perma.cc/8EWC-R6XL].

juvenile justice systems in the late 19th and early 20th centuries.[34] White youth, considered to be "amenable to reform," were often sent to youth facilities if they faced incarceration.[35] Black youth, on the other hand, would likely be sent to an adult prison or jail.[36] Even after facilities opened specifically for Black youth, programming differed dramatically between facilities.[37] White youth became educated and learned trades, while Black youth performed manual labor.[38] Additionally, Black youth would often be held in confinement for twice as long as white children.[39] This history is just one of many examples demonstrating how adultifying Black and brown children leads to systemic oppression.

Monique Morris describes this phenomenon as it specifically pertains to Black girls in her book, *Pushout*.[40] She explains how, "in the public's collective consciousness, latent ideas about Black females as hypersexual, conniving, loud, and sassy predominate."[41] These traits are often ascribed not only to Black women, but also Black girls, likening them more to adults than children.[42] This age compression provides context to the pepper spray incident in Rochester, when Elba Pope's 9-year-old daughter had to remind the police officer that she was, in fact, a child.[43] Other incidents of police brutality against Black girls have raised similar concerns about the effects of adultification.[44]

For young Black children like Jmiyha Rickman and Elba Pope's daughter, compounding prejudices lead to dangerous endings. The combination of societal bias against Black and brown youth and ableist ignorance leads to misinformed split-second decisions—decisions that can result in wrongful arrests and excessive force.

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[34] ASHLEY NELLIS, A RETURN TO JUSTICE: RETHINKING OUR APPROACH TO JUVENILES IN THE SYSTEM 10–11 (Rowman & Littlefield 2016).

[35] *Id.* at 10.

[36] *Id.*

[37] *Id.* at 10–11.

[38] *Id.*

[39] *Id.* at 11.

[40] MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS 34 (The New Press 2016).

[41] *Id.*

[42] *Id.* ("Along this truncated age continuum, Black girls are likened more to adults than to children and are treated as if they are willfully engaging in behaviors typically expected of Black women–sexual involvement, parenting or primary caregiving, workforce participation, and other adult behaviors and responsibilities. This compression is both a reflection of deeply entrenched biases that have stripped Black girls of their childhood freedoms and a function of an opportunity-starved social landscape that marks Black girlhood interchangeable with Black womanhood.").

[43] Booker, *supra* note 17.

[44] Alisha Haridasani Gupta, *'It's More Than Tragic,' Ma'Khia Bryant and the Burden of Black Girlhood*, N.Y. TIMES (Apr. 24, 2021), https://www.nytimes.com/2021/04/24/universal/makhia-bryant.html [https://perma.cc/3HA6-ZB6T] (discussing how Ma'Khia Bryant, a 16-year-old girl who was shot by Ohio police at the same time the judge in the trial of Derek Chauvin read the verdict, has been portrayed in the media as a woman because of bias related to her skin color, size, and behavior, consistent with studies on the erasure of Black girlhood (citing REBECCA EPSTEIN, JAMILIA J. BLAKE, & THALIA GONZÁLEZ, CTR. ON POVERTY AND INEQUALITY AT GEO. UNIV. LAW SCHOOL, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD (2020) https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf [https://perma.cc/Q53R-ZSVP])).

More than half of Black people with disabilities will be arrested by the time they reach their late 20s.[45] Similarly, more than 46 percent of Hispanic people with disabilities are arrested as children or young adults.[46] However, police departments have loose, unclear, and nonuniform guidelines for how to report their uses of force.[47] As such, existing data regarding injuries and fatalities caused by the police is messy at best. Some studies show that 27 percent of all individuals killed by the police have "mental health issues."[48] Other studies reveal that as many as 81 percent of victims of officer-involved killings had a mental illness, were impaired by substance abuse, or both.[49] According to the Ruderman Foundation, "a third to a half of all use-of-force incidents involve a disabled civilian."[50] Regardless of the inconsistency among these figures, data consistently show that individuals of color with disabilities are disproportionately affected by police violence.

Protecting this population from arrests—specifically arrests outside of school—is also critical given the disproportionate rates of suspension and expulsion for Black and brown kids with disabilities. Black students with disabilities represent about 19 percent of all K-12 students with disabilities, but account for over 35 percent of students with disabilities suspended from school.[51] While white students with disabilities make up 8.4 percent of out-of-school suspensions, Black students with disabilities make up 23.2 percent of out-of-school suspensions.[52] Racial bias,[53] compounded with ableism, results in this disproportionate discipline and classroom removal. Children of color with disabilities are therefore more likely to receive discipline and spend time outside of school than their white, non-disabled peers. This data supports the premise that Black and brown students with disabilities are more vulnerable to out-of-school arrests

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[45] Ronnie Cohen, *Young people with disabilities more likely to be arrested*, REUTERS HEALTH (Nov. 10, 2017, 3:00 PM), https://www.reuters.com/article/us-health-disabilities-law-enforcement/young-people-with-disabilities-more-likely-to-be-arrested-idUSKBN1DA2SZ [https://perma.cc/AN78-34Z2] (citing Erin J. McCAuley, M.Ed., *The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender*, AM. J. OF PUB. HEALTH 1977–81 (Dec. 1, 2017), https://ajph.aphapublications.org/doi/10.2105/AJPH.2017.304095 [https://perma.cc/7P3F-QPGR]).

[46] *Id.*

[47] DAVID M. PERRY, PHD & LAWRENCE CARTER-LONG, RUDERMAN FAMILY FOUNDATION, THE RUDERMAN WHITE PAPER ON MEDIA COVERAGE OF LAW ENFORCEMENT USE OF FORCE AND DISABILITY 8 (2016), https://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf [https://perma.cc/8DH8-7MD2].

[48] *Id.* at 7.

[49] *Id.* at 8.

[50] *Id.* at 7.

[51] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-258, K-12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES 16 (Mar. 2018) [hereinafter GAO Discipline Disparities].

[52] *Id.* at 73.

[53] CHRISTOPHER EMDIN, FOR WHITE FOLKS WHO TEACH IN THE HOOD . . . AND THE REST OF Y'ALL TOO 34–35 (Beacon Press 2016) (discussing education research revealing an "association between being academically successful and 'acting white,'" not because Black students view academic success as "acting white," but that white teachers enforced classroom "rules that are unrelated to the actual teaching and learning process," favoring students who "play the game" of "acting white").

given the high rates at which they are removed from school campuses. It also reveals trends in over-penalizing students of color with disabilities in different forms, arrest-related and otherwise.

This Note does not argue that policymakers should devote less time or energy to eliminating unnecessary and harmful arrests of students with disabilities in schools. It proposes instead that courts should protect individuals with disabilities from unnecessary and harmful arrests outside of schools too. Holding that Title II of the ADA applies to arrests in all contexts will both fulfill the intent of the statute and guard the dignity of arrestees. In doing so, courts will protect one of the most vulnerable populations in discriminatory policing: Black and brown kids with disabilities.

II. COURTS DISAGREE ABOUT WHETHER TITLE II OF THE ADA PROTECTS INDIVIDUALS WITH DISABILITIES FROM DISCRIMINATION DURING ARRESTS

The ADA aims to eliminate discrimination against individuals with disabilities across many aspects of life.[54] Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity."[55] Public entities include "any department, agency, special purpose district, or other instrumentality of State or States or local government."[56] It is well established that a local law enforcement agency constitutes a "public entity."[57]

A qualified individual with a disability is "an individual with a disability who, with or without reasonable modification . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[58] If an officer finds that an individual with a disability is eligible for arrest, that individual may require an accommodation to avoid physical harm or maintain her bodily functions while entering police custody.[59]

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[54] 42 U.S.C. § 12101(b)(1).

[55] *Id.* § 12132.

[56] *Id.* § 12131(1)(B).

[57] Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998) ("A local police department falls squarely within the statutory definition of 'public entity.'") (citing Pa. Dep't. of Corrs. v. Yeskey, 524 U.S. 206, 209–10 (1998)) (internal quotation marks omitted); *see also* Bircoll v. Miami-Dade Cnty., 480 F.3d 1072, 1083 n.14 (11th Cir. 2007); *see also* Gohier v. Enright, 186 F.3d 1216, 1219 (10th Cir. 1999).

[58] 42 U.S.C. § 12132(2).

[59] *See id.* § 12102 (defining an individual with a disability one who has a "physical or mental impairment that substantially limits one or more major life activities," which includes seeing, hearing, walking, breathing, etc., as well as the operation of a major bodily function, including, but not limited to, the functions of the bladder, respiratory, and circulatory functions); *See, e.g. Gorman,* 152 F.3d at 907 (holding that the plaintiff could bring a claim under Title II of the ADA when officers denied him access to a wheelchair-accessible van, which led to his injuries when he fell off the bench in the van

Police officers can be held liable for ADA violations made during an arrest in two ways. First, under the "effects theory," plaintiffs can hold an officer liable for wrongfully arresting an individual with a disability if the officer mistook a manifestation of her disability for criminal activity.[60] For example: An officer may not arrest a deaf driver during a traffic stop for failing to comply with commands if the driver could not hear the officer.[61] Second, under the "accommodations theory," plaintiffs can hold an officer liable for failing to reasonably accommodate a person's disability during arrest.[62] An example of this type of ADA violation might include failing to call for a wheelchair-accessible van to transport an arrestee in a wheelchair.[63] The plaintiff bears the burden of proving that a reasonable accommodation existed.[64] If an individual with a disability endures an incident in line with the "effects theory" or the "accommodations theory," she can bring a claim under Title II of the ADA.[65]

Courts disagree, however, about whether arrests are covered under Title II as "services, programs, or activities" of local police departments.[66] A majority of courts hold that Title II applies to arrests, and therefore, allow individuals with disabilities to bring suit under the ADA if they were unnecessarily or improperly arrested.[67] A minority of courts have held to the contrary.[68] Others have made narrow holdings on the issue, but have declined to meaningfully enter the debate.[69]

A. Majority Circuits

A majority of circuit courts have held that the ADA does, indeed, cover arrests.[70] The first opinion to decide this issue using the majority

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and landed in a pool of his own urine).

[60] Michelle Kain, *A* Gray *Area: The Scope of Title II of the ADA's Applicability to Ad Hoc Police Encounters*, 61 B.C. L. REV. E-SUPPLEMENT II-.93, II-.97 (2020).

[61] *See* Lewis v. Truitt, 960 F. Supp. 175 (S.D. Ind. 1997) (applying ADA to the arrest of a deaf man where arresting officers knew or should have known the man could not hear but nonetheless arrested him because he did not respond to officers appropriately).

[62] Kain, *supra* note 60 at II-.97 to II-.98.

[63] *See Gorman*, 152 F.3d at 907.

[64] Sheehan v. City & Cnty. of San Francisco, 743 F.3d 1211, 1232–33 (9th Cir. 2014), *rev'd in part, cert. dismissed in part sub nom.* City & Cnty. of San Francisco, Cal. v. Sheehan, 575 U.S. 600 (2015).

[65] *Gohier*, 186 F.3d at 1220–21 (collecting cases).

[66] *Sheehan*, 743 F.3d at 1231–32 (collecting cases).

[67] *See infra* Part II, Section A.

[68] *See infra* Part II, Section B.

[69] Gray v. Cummings, 917 F.3d 1, 17 (1st Cir. 2019) (acknowledging the existing circuit split and assuming that Title II "applies to ad hoc police encounters" for the purposes of the case at hand, siding with the majority approach, but not endorsing it fully); Tucker v. Tennessee, 539 F.3d 526, 536 (6th Cir. 2008), *abrogated on other grounds by* Anderson v. City of Blue Ash, 798 F.3d 338 (6th Cir. 2015)(concluding that interpreting the ADA to require too much of officers would prevent them from responding rapidly to changing situations, declining to elaborate on the district court's holding that arrests do not fall within the ADA's ambit).

[70] Haberle v. Troxell, 885 F.3d 170, 180 (3d Cir. 2018); *see also* Roberts v. City of Omaha, 723

approach was *Gorman v. Bartch*.[71] There, the plaintiff was injured during arrest while riding in a police vehicle that was not wheelchair-accessible.[72] In deciding that the plaintiff could bring a claim for a discriminatory arrest under Title II, the Eighth Circuit cited the Supreme Court's decision in *Pennsylvania Department of Corrections v. Yeskey*.[73] In that case, the Court held that state prisons "fall squarely within the statutory definition of 'public entity.'"[74] Therefore, any individual with a disability being kept in state custody was entitled to reasonable accommodations.[75] What *Yeskey* did not specify, however, is when custody begins.[76] Therefore, the case left open the question of whether a qualified individual with a disability is entitled to reasonable accommodations at the time she is being taken into custody.[77]

Yeskey reasoned that, while prison services do not fit the common understanding of "benefits" or "services" under Title II, prison services nevertheless constitute "benefits of the services, programs, or activities of a public entity."[78] In response, the Eighth Circuit asserted that, though arrests are not commonly thought to confer a benefit on arrestees, officers had denied the plaintiff the benefit of being "handled and transported in a safe and appropriate manner consistent with his disability."[79] Additionally, the Supreme Court noted that a qualified individual with a disability may participate in a service on either a "voluntary" or a "mandatory" basis.[80] Consequently, the fact that the plaintiff in *Gorman* did not volunteer to be arrested did not preclude him from claiming he was denied participation in his arrest.[81] As such, the Eighth Circuit concluded that the plaintiff could bring his claim under Title II because the ADA's coverage extends to arrests.[82] The Tenth Circuit echoed this holding one year later in *Gohier v. Enright*, stating that "a broad rule categorically excluding arrests from the scope of Title II . . . is not the law."[83]

On the other hand, some courts have reasoned that, because Title II is framed in the alternative, plaintiffs can allege ADA violations arising from arrests without characterizing them as a "program, service, or

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F.3d 966, 973 (8th Cir. 2013) ("[T]he ADA . . . appl[ies] to law enforcement officers taking disabled suspects into custody."); *see also Bircoll*, 480 F.3d at 1083; *see also Gohier*, 186 F.3d at 1219; *see also Gorman*, 152 F.3d at 91.

[71] *See Gorman*, 152 F.3d at 907.

[72] *Id.* at 907–08.

[73] *Id.* at 912.

[74] *Yeskey*, 524 U.S. at 210.

[75] *Id.*

[76] David D. Doak, *Theorizing Disability Discrimination in Civil Commitment*, 93 TEX. L. REV. 1589, 1624 (2015).

[77] *Id.*

[78] *Id.* at 1623–24.

[79] *Gorman*, 152 F.3d at 913.

[80] *Yeskey*, 524 U.S. at 210–11.

[81] *Gorman*, 152 F.3d at 912.

[82] *Id.* at 913.

[83] *Gohier*, 186 F.3d at 1221.

activity" of a public entity.[84] The Eleventh Circuit has held that a plaintiff can bring a valid claim under the ADA if she can prove she was "subjected to discrimination" by a public entity.[85] In *Bircoll*, the court reasoned that the "final clause in Title II 'is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.'"[86] As such, *Bircoll* opened the door for plaintiffs to allege Title II violations from improper arrests without needing to classify arrests as a covered law enforcement task.[87] The Third Circuit adopted this reasoning in 2018 when it held that it could "look instead to the second phrase [within Title II], namely, to whether the arrestee was 'subjected to discrimination' by the police."[88]

Additionally, in *Sheehan v. City and County of San Francisco*, the Ninth Circuit upheld a broad standard for Title II's application to arrests—though it included a caveat.[89] The *Sheehan* court decided that the obligation to make reasonable accommodations applies to arrests across the board, but added that the presence of "exigent circumstances" informs the analysis of what accommodations are "reasonable."[90] Though this holding teeters on the minority approach, the Ninth Circuit still affirmatively declared that it "agree[d] with the majority of circuits to address the question that Title II applies to arrests."[91] On appeal, the defendant City conceded in its petition for certiorari that the ADA may require law enforcement to provide accommodations to "an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody."[92] Because the parties did not dispute whether Title II applied to arrests at oral argument, the Supreme Court declined to answer the question, dismissing it as improvidently granted.[93] The *Sheehan* case has been the Supreme Court's only opportunity to weigh in on this circuit split.

B. Minority Circuits

A minority of courts have held that Title II does not extend to officers making arrests.[94] They either argue that arrests do not fit under Title II's coverage,[95] or, if Title II does cover arrests, that police officers are excused from Title II's obligation to provide reasonable accommodations to

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[84] *Bircoll*, 480 F.3d at 1084–85; *Haberle*, 885 F.3d at 180.

[85] *Bircoll*, 480 F.3d at 1084–85 (quoting 42 U.S.C. § 12132).

[86] *Id.* at 1085 (quoting Bledsoe v. Palm Beach Cty. Soil & Water Conservation Dist., 133 F. 3d 816, 821-22 (11th Cir. 1998) (internal quotation marks omitted).

[87] *Id.* at 1084.

[88] *Haberle*, 885 F.3d at 180.

[89] *Sheehan*, 743 F. 3d at 1231–32.

[90] *Id.* at 1232.

[91] *Id.*

[92] *Sheehan*, 575 U.S. at 609 (internal quotation marks omitted).

[93] *Id.* at 610.

[94] Rosen v. Montgomery, 121 F.3d 154, 157 (4th Cir. 1997) ("The most obvious problem is fitting an arrest into the ADA at all."); Hainze v. Richards, 207 F.3d 795, 797 (5th Cir. 2000).

[95] *Rosen*, 121 F.3d at 157.

individuals with disabilities when presented with "exigent circumstances."[96]

In *Rosen*, the Fourth Circuit heard a case regarding a deaf man who was arrested during a DUI stop.[97] Officers denied him access to an interpreter and a TTY phone,[98] which he requested so he could contact a lawyer.[99] The court reasoned that an arrestee cannot be "excluded from participation" in or "denied the benefits" of arrest merely because he was not reasonably accommodated during that arrest.[100] The Fourth Circuit determined that detaining someone against his will could not constitute one of the "services, programs, or activities" covered under Title II because "participation" in one of those programs requires a person's voluntary action.[101] Thus, the court set an early precedent that Title II's coverage did not extend to arrests.[102]

However, several courts have denounced the holding in *Rosen* because it relied on the district court's decision in *Gorman*, which was later overturned by the Eighth Circuit, and because it was decided before the Supreme Court's decision in *Yeskey*.[103] While *Yeskey* did not explicitly overturn *Rosen*, it invalidated *Rosen*'s reasoning.[104] The Supreme Court explained that, "[w]hile 'eligible' individuals 'participate' voluntarily in many programs, services, and activities, there are others for which they are 'eligible' in which 'participation' is mandatory."[105] Only one Fourth Circuit case has ever cited *Rosen*, which also called *Rosen*'s reasoning into question without explicitly overruling the decision.[106]

The Fourth Circuit departed from *Rosen*'s reasoning after the Supreme Court decided *Yeskey* and after the Fifth Circuit decided *Hainze v.*

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[96] *Hainze*, 207 F.3d at 801.

[97] *Rosen*, 121 F.3d at 156.

[98] A Text Telephone (TTY), also called a Telecommunication Device for the Deaf (TDD), is a device that allows individuals who are deaf, hard-of-hearing, or have speech impairments to use a telephone to communicate by typing out messages. *What is a TTY?*, ABOUTTTY.COM, http://www.abouttty.com/#:~:text=A%20TTY%20is%20a%20special,conversation%20in%20order%20to%20communicate [https://perma.cc/8T4G-EV6X] (last visited Apr. 29, 2021).

[99] *Rosen*, 121 F.3d at 158 ("The police 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.").

[100] *Rosen*, 121 F.3d at 157.

[101] *Id.* (citing Torcasio v. Murray, 57 F.3d 1340, 1347 (4th Cir. 1995) ("[T]he terms 'eligible' and 'participate' imply voluntariness on the part of an applicant who seeks a benefit from the State; they do not bring to mind prisoners who are being held against their will."), *cert. denied*, 516 U.S. 1071 (1996)).

[102] *See id.*

[103] Thompson v. Davis, 295 F.3d 890, 897 (9th Cir. 2002) (stating that *Rosen's* reasoning is "now discredited"), *cert. denied*, 538 U.S. 921 (2003); *see also* Paulone v. City of Frederick, 787 F.Supp.2d 360, 379 (D. Md. 2011); *see also* Calloway v. Boro of Glassboro Dep't of Police, 89 F.Supp.2d 543, 556 (D. N.J. 2000).

[104] *Yeskey*, 524 U.S. at 211.

[105] *Id.* (providing an example of mandatory programs for which an individual must be "qualified" to participate: "A drug addict convicted of drug possession . . . might, as part of his sentence, be required to 'participate' in a drug treatment program for which only addicts are 'eligible.'").

[106] Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty., 673 F.3d 333, 337 n.2 (4th Cir. 2012) (doubting *Rosen*'s logic, conceding that "*Rosen* is still precedential in the context of reasonable-accommodation cases," and highlighting several courts who have called *Rosen*'s holding into question).

Richards.[107] In *Hainze*, the defendant officer shot the plaintiff while responding to a 9-1-1 call concerning the plaintiff's mental health.[108] The court declined to hold the defendant officer liable for violating the ADA because the plaintiff was holding a knife at the time of the shooting.[109] The Fifth Circuit reasoned: "Title II does not apply to an officer's on-the-street responses . . . prior to the officer's securing the scene and ensuring that there is no threat to human life."[110] Therefore, the court held that officers could forego ADA considerations in the presence of "exigent circumstances."[111] The Fourth Circuit adopted this "exigent circumstances" exception to its Title II analyses years later.[112]

This minority approach comes with many flaws. Even if *Hainze* concluded that Title II does not apply to disturbances *prior* to an officer securing the scene, the court implicitly recognized that arrestees may state valid claims under Title II after the scene is secure.[113] The opinion states plainly: "Once the area was secure and there was no threat to human safety . . . deputies would have been under a duty to reasonably accommodate Hainze's disability in handling and transporting him to a mental health facility."[114] Furthermore, the Fifth Circuit declined to follow its holding in *Hainze*, narrowly employing the majority approach in *Wilson v. City of Southlake*.[115]

Though the minority approach has its drawbacks for plaintiffs, the Fourth and Fifth Circuits, and a number of district courts in other circuits, continue to take this stance.[116] This precedent denies families their right to compensation when their child with a disability is harmed, disproportionately affecting families of color in those jurisdictions.

III. WHY THE MAJORITY CIRCUITS TAKE THE CORRECT APPROACH

To best protect children of color with disabilities who are vulnerable to harmful arrests, courts should universally recognize that Title II applies

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[107] Waller v. City of Danville, 515 F. Supp.2d 659, 664 (W.D. Va. 2007), *aff'd*, Waller ex rel. Estate of Hunt v. Danville, Va., 556 F.3d 171, 175 (4th Cir. 2009) (holding that "exigency is one circumstance that bears materially on the inquiry into reasonableness under the ADA").

[108] *Hainze*, 207 F.3d at 797.

[109] *Id.* at 801 ("Hainze was not denied the benefits and protections of Williamson County's mental health training *by* the County, Sheriff Richards, or the officers. Rather, Hainze's assault of Allison with a deadly weapon denied him the benefits of that program.") (emphasis original).

[110] *Id.*

[111] *Id.*

[112] *Waller*, 556 F.3d at 175.

[113] *Bircoll*, 480 F.3d at 1083.

[114] *Hainze*, 207 F.3d at 802.

[115] Wilson v. City of Southlake, 936 F.3d 326, 333 (5th Cir. 2019) ("[O]ur obligation to apply binding precedent faithfully does not require us to extend it where it doesn't belong.") (Ho, J., concurring).

[116] Adle v. Maine Police Dep't, 279 F. Supp. 3d 337, 364 (D. Me. 2017) (citing First Circuit cases that defer to the reasoning in *Hainze*); *see also* Brunette v. City of Burlington, Vt., No. 2:15-CV-00061, 2018 WL 4146598, at *34 (D. Vt. Aug. 30, 2018) (noting that the Second Circuit has yet to decide the issue but citing *Waller* and *Hainze* for support).

to arrests and eliminate the "exigent circumstances" exception to the ADA.

A. The Text Of The ADA Supports The View That Title II Covers Arrests

Title II of the ADA dictates that no individual with a 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 such entity*."[117] As promoted by the Third and Eleventh Circuits, Title II's alternative framing allows a plaintiff to prevail on an improper arrest claim merely by proving that a public entity subjected her to discrimination.[118] This reasoning has eliminated the need to square arrests as a service, program, or activity that involves "participation" or "benefits."[119] Thus, arrests fit comfortably within Title II's coverage.

Furthermore, the "exigent circumstances" defense does not exist anywhere in the text of the ADA.[120] In fact, this common-law exception is contrary to the legislative intent of the ADA because it conflicts with an existing affirmative defense that aims to address the same safety concerns.[121] If an officer can cite a genuine threat to human life or safety during arrest, she can invoke the "direct threat" defense against a claim for discrimination.[122] When an individual poses a "direct threat" to the health or safety of herself or others—a threat that cannot be mitigated by a reasonable accommodation—then "[Title II] does not require a public entity to permit that individual to participate in or benefit from services, programs, or activities. . . ."[123] Officers must conduct an individualized assessment of the situation to confirm the presence of a direct threat.[124] Otherwise, officers are required to make reasonable accommodations before going too far, too fast.[125]

This affirmative defense differs from the "exigent circumstances" exception because a direct-threat analysis focuses on well-established,

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[117] 42 U.S.C. § 12132 (emphasis added).

[118] Kain, *supra* note 60 at II-.93.

[119] *Haberle,* 885 F.3d at 180 ("[W]e do not need to resolve that issue in this case . . . we can look instead to the second phrase, namely, to whether the arrestee was "subjected to discrimination" by the police.)(citing 42 U.S.C. §12132); *see also Bircoll*, 480 F.3d at 1084.

[120] *Seremeth,* 673 F.3d at 339 ("Most importantly, nothing in the text of the ADA suggests that a separate exigent-circumstances inquiry is appropriate.").

[121] H.R. REP. NO. 101-485, pt. 4, at 38 (1990) (describing how Title II programs may not exclude a qualified individual with a disability unless, for example, that individual "pos[es] a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. . . ."), *as reprinted in* 1990 U.S.C.C.A.N. 512, 527.

[122] 28 C.F.R. § 35.139(a) (2010).

[123] *Id.*

[124] *Id.* § 35.139(b) (2010); Shanna Rifkin, *Safeguarding the ADA's Antidiscrimination Mandate: Subjecting Arrests to Title II Coverage*, 66 DUKE L.J. 913, 933 (2017) ("[T]he regulation's main contribution is in recognizing that an accurate direct-threat analysis is contingent on an individualized assessment.").

[125] *See id.* § 35.139(b) (2010); *see also* Rifkin, *supra* note 124, at 933.

objective factors.[126] On the contrary, circuit courts have remained silent on whether proving exigent circumstances depends on subjective or objective facts.[127] Law enforcement officers may not determine that a person poses a direct threat "based on generalizations or stereotypes about the effects of a particular disability." Instead, officers must rely on "the best available objective evidence" to assess the 1) nature, duration, and severity of the risk; 2) the probability that the potential injury will actually occur; and, 3) whether reasonable modifications of policies, practices, or procedures will mitigate or eliminate the risk.[128] The common-law "exigent circumstances" exception relieves an officer of her obligations under the ADA merely if she is responding "to *potentially* life-threatening situations."[129] Therefore, courts should discontinue the use of the "exigent circumstances" exception to better hold officers accountable for failing to honor their ADA requirements. If an officer cannot earnestly fulfill the objective requirements of the direct-threat defense, she should be considered liable for violating the ADA.

B. The Department Of Justice Includes Arrests Under Title II's Coverage

ADA regulations also support Title II's coverage of arrests. The United States Department of Justice (DOJ), the federal agency charged with enforcing the ADA,[130] released new regulations for Title II in 2010.[131] Before they took effect, a number of commenters to the proposed regulations requested that the DOJ make a particular addition.[132] They implored the DOJ to mandate law enforcement officers to undergo training to recognize the difference between criminal activity and the manifestations of various disabilities.[133]

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[126] 28 C.F.R. § 35.139(b) (2010).

[127] Ryan Lefkowitz, *What are you En(Title)d Two? Protecting Individuals with Disabilities During Interactions with Law Enforcement Under Title II of the ADA*, 49 U. MEM. L. REV. 707, 736–37 (2019).

[128] 28 C.F.R. § 35.139(b) (2010); *see, e.g.*, Wood v. Maryland Dep't of Transp., 732 F. App'x 177, 181 (4th Cir. 2018) (determining "direct threat" based on the three-prong test); *see also* Bay Area Addiction Rsch. & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 736 (9th Cir. 1999) (employing the "significant risk" test); *see also* Montalvo v. Radcliffe, 167 F.3d 873, 877 (4th Cir. 1999) (discussing the "direct threat" standard in the context of Title III); *see also* Washington v. Ind. High Sch. Athletic Ass'n, Inc., 181 F.3d 840, 851 n.14 (7th Cir. 1999) (noting the three-prong "direct threat" assessment).

[129] *Hainze*, 207 F.3d at 801 (emphasis added).

[130] 42 U.S.C. § 12134.

[131] U.S. DEP'T OF JUSTICE OFFICE OF CIVIL RIGHTS, REVISED ADA REGULATIONS IMPLEMENTING TITLE II AND TITLE III (2012), https://www.ada.gov/regs2010/ADAregs2010.htm [https://perma.cc/85KX-UDJV].

[132] U.S. DEP'T OF JUSTICE OFFICE OF CIVIL RIGHTS, TITLE II REGULATIONS 2010 GUIDANCE AND SECTION-BY-SECTION ANALYSIS (2010), https://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm [https://perma.cc/44EY-ZM8S].

[133] *Id.*

The regulations intentionally left out this requirement.[134] The DOJ explained its choice to leave out the mandate, stating: "Discriminatory arrests and brutal treatment are already unlawful police activities. The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities."[135] Clarifying this regulatory obligation confirms that law enforcement officers have an affirmative duty to reasonably modify arrests to avoid discriminating on the basis of disability.[136]

The DOJ has published additional guidance and supplementary documents that shed light on this debate as well. While these documents are not binding, they receive a considerable degree of judicial deference.[137] In 2017, the DOJ reaffirmed that the services, programs, and activities covered by Title II of the ADA include "[l]aw enforcement street interactions . . . vehicle stops and searches, arrests . . . and emergency responses."[138] Another document from 2006 dictates: "The ADA affects virtually everything that officers and deputies do, for example . . . arresting, booking, and holding suspects."[139] It even highlights scenarios to avoid, including arresting a "teenager with mental illness who is beyond the control of her parents" until the officer can get her into treatment.[140] This scenario draws attention to the main concern of this Note and reinforces why courts should apply Title II to officer's on-the-street responses. To remain consistent with DOJ technical assistance documents, courts should continue holding that Title II covers arrests.

The 2006 technical assistance manual also provides assorted accommodations that the ADA requires during arrests.[141] These accommodations may include handcuffing a deaf arrestee with her hands in front to allow for writing notes and signing; modifying procedures for giving *Miranda* warnings to an individual with an intellectual disability; or calling an accessible taxi service when an accessible police van is not available for

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[134] *Id.*

[135] *Id.*

[136] Delano-Pyle v. Victoria Cnty., Tex., 302 F.3d 567, 575 (5th Cir. 2002) ("A plain reading of the ADA evidences that Congress intended to impose an affirmative duty on public entities to create policies or procedures to prevent discrimination based on disability.").

[137] Danielle Barondess, *[ADA]pting Policies & Practices: Applying Title II's Reasonable Modifications Requirement to Law Enforcement Interactions with Individuals with Disabilities*, 24 GEO. MASON L. REV. 981, 994–95 n.94 (citing Auer v. Robbins, 519 U.S. 452, 461 (1997) ("holding an agency's interpretation of its own regulation is 'controlling unless plainly erroneous or inconsistent with the regulation'") (internal quotation marks omitted)).

[138] U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, EXAMPLES AND RESOURCES TO SUPPORT CRIMINAL JUSTICE ENTITIES IN COMPLIANCE WITH TITLE II OF THE AMERICANS WITH DISABILITIES ACT 2 (2017), https://www.ada.gov/cjta.html [https://perma.cc/L5NJ-CJXB] [hereinafter 2017 Technical Assistance].

[139] U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, COMMONLY ASKED QUESTIONS ABOUT THE AMERICANS WITH DISABILITIES ACT AND LAW ENFORCEMENT 1 (2006), https://www.ada.gov/qanda_law.pdf [https://perma.cc/7BWA-X48K].

[140] *Id.* at 3.

[141] *Id.* at 9–10.

arrestees using wheelchairs.[142] This guidance supports that the ADA does, in fact, require certain modifications during arrest and cites specific examples of such modifications.

Additionally, the DOJ produced guidelines specific to law enforcement interactions with individuals who are deaf or hard of hearing.[143] It states: "Generally, interpreter services are not required for simple transactions—such as checking a license or giving directions to a location—or for urgent situations—such as responding to a violent crime in progress."[144] However, "[a]s a rule, when interpreter service is needed, it must be provided by the [law enforcement] agency."[145] The guidance highlights that an officer may not need to provide an interpreter when an arrestee's behavior is "threatening," but should provide one if requested.[146] This language tracks with the language of the direct-threat defense and leaves out any mention of exigencies, reinforcing that Title II does apply to arrests.

These regulations, guidance documents, and technical assistance materials are particularly instructive for both law enforcement and reviewing courts.[147] The materials reinforce that arrests are under the purview of Title II. The DOJ accounts for officers facing threats, but does not make reference to "exigent circumstances" anywhere. If police step out of line from the DOJ's direction by wrongfully or improperly arresting an individual with a disability, they should be held liable for their actions.

C. The History of The ADA Demonstrates Title II Covers Arrests

i. The Rehabilitation Act of 1973

Prior to 1990, the main legislation governing disability rights was the Rehabilitation Act of 1973.[148] Section 504 of the Rehabilitation Act prohibited any "program or activity receiving Federal financial assistance" from discriminating against a qualified individual with a disability.[149] This prohibition is mirrored in Title II of the ADA. Congress has directed courts to interpret Title II of the ADA consistent with Section 504 of the

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[142] *Id.*

[143] U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, COMMUNICATING WITH PEOPLE WHO ARE DEAF OR HARD OF HEARING: ADA GUIDE FOR LAW ENFORCEMENT OFFICERS (2020), https://www.ada.gov/lawenfcomm.htm [https://perma.cc/E898-7CST].

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] Barondess, *supra* note 137 at 997.

[148] *Introduction to the ADA*, U.S. DEP'T OF JUSTICE, OFFICE OF CIVIL RIGHTS, https://www.ada.gov/ada_intro.htm [https://perma.cc/J67L-QZMT] (last visited May 13, 2021).

[149] 29 U.S.C. § 794(a).

Rehabilitation Act, ensuring that individuals with disabilities receive equal or greater access, inclusion, and antidiscrimination protections.[150]

One key difference in the Rehabilitation Act and the language in Title II reveals why courts should widely agree that Title II applies to arrests. Whereas Title II does not define what the "services, programs, and activities" of a public entity include, the Rehabilitation Act did outline that definition. It defined those programs or activities as "*all of the operations* of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government. . . ."[151] Read literally, arrests would certainly be considered part of "all of the operations of" a local police department. Therefore, because the ADA was not intended to impinge on any of the rights afforded to persons with disabilities under the Rehabilitation Act, courts should unanimously hold that Title II covers arrests.

ii. Legislative History

Legislative history illustrates how Congress contemplated arrests when it passed the ADA. To begin, one congressional report notes that public employees should undergo disability training in order to maintain compliance with the ADA.[152] It provides an example of noncompliance: "[P]ersons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures."[153] This explicit recognition of policing issues for individuals with disabilities reveals that Congress considered discrimination during arrest to be a concern of the ADA.

Another report states: "The [c]ommittee has chosen not to list all types of actions that are included within the term 'discrimination'. . . because this title essentially simply extends the anti-discrimination prohibition embodied in [Section 504 of the Rehabilitation Act] to *all actions* of state and local governments."[154] By emphasizing this extension of the Rehabilitation Act, Congress highlighted its intention to maintain a broad scope of activities covered by the ADA.

As evidenced by the text, regulations, intent, and history of the ADA, Title II applies to arrests in all contexts, including both inside and outside of schools.

IV. THE ADA COVERS ARRESTS THAT OCCUR BOTH INSIDE AND

[150] 42 U.S.C. §§ 12134(b), 12201(a).

[151] 29 U.S.C. § 794(b) (emphasis added).

[152] H.R. REP. NO. 101-485, p.3, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473.

[153] *Id.*

[154] H.R. REP. NO. 101-485, p.2, at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367 (emphasis added).

OUTSIDE OF SCHOOLS

Minority circuits should not pursue half measures to mitigate the existing gap in Title II's coverage. Incrementally expanding Title II's coverage to arrests under certain conditions, for specific officers, in particular locations overcomplicates the court's Title II analysis and undercuts the text and intent of the ADA. One such proposed solution is limiting Title II's coverage to arrests that occur on school campuses.

There can be no doubt that children of color with disabilities need protection from arrests in schools, particularly unnecessary and forceful on-campus arrests. Students with disabilities represent about 26 percent of school-related arrests,[155] but make up only 13 percent of the K-12 student population.[156] Only 18 percent of students with disabilities are Black,[157] but they make up 35 percent of students with disabilities who are arrested.[158] These students are disproportionately restrained and secluded by school personnel, and have disproportionate contact with school resource officers[159] (SROs)—law enforcement officers deployed to work on one or more school campuses.[160]

Local police departments, sheriff's agencies, or school systems typically employ SROs.[161] To become an SRO, a person must first become a sworn law enforcement officer and complete the training their agency requires.[162] The National Association of School Resource Officers

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[155] *Percentage of students receiving selected disciplinary actions in public elementary & secondary schools, by type of disciplinary action, disability status, sex, and race/ethnicity: 2013-14*, NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/programs/digest/d17/tables/dt17_233.28.asp [https://perma.cc/SD7A-9SW6] (last visited Mar. 6, 2021).

[156] Tala Salem, *Special Education Students On the Rise*, U.S. NEWS AND WORLD REPORT, (June 6, 2018, 12:52 PM) https://www.usnews.com/news/education-news/articles/2018-06-06/special-education-students-on-the-rise [https://perma.cc/SLS5-TWXC].

[157] *Number and percentage of public school students with disabilities served under IDEA overall and by race/ethnicity, and those who are English language learners, by state: School Year 2013-14*, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, https://ocrdata.ed.gov/estimations/2013-2014 [https://perma.cc/C3JH-TDTT] (last visited Mar. 6, 2021) (Under subsection "All Enrollment," select "IDEA enrollment.").

[158] *Number and percentage of public school students with disabilities receiving school-related arrests by race/ethnicity, by state: School Year 2013-14*, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, https://ocrdata.ed.gov/estimations/2013-2014 [https://perma.cc/C3JH-TDTT] (Under subsection "Discipline," select "School-related arrests.") (last visited Mar. 6, 2021).

[159] GAO Discipline Disparities, *supra* note 51, at 83–85.

[160] *School Resource Officers*, NAT'L ASS'N OF SCH. RESOURCE OFFICERS, https://www.dpi.nc.gov/districts-schools/district-operations/center-safer-schools/school-resource-officers [https://perma.cc/U8SB-8SD9] (last visited Dec. 28, 2021) ("NASRO recommends that agencies select officers carefully for SRO assignments . . . and that officers received at least 40 hours of specialized training in school policing before assigned."); *cf.* TEX. OCC. CODE ANN. § 1701.263 (requiring school resource officers to undergo training that must only "consist of at least 16 hours of training" and prohibiting training programs from "requir[ing] a peace officer to pass an examination" in order to be certified as a school resource officer).

[161] *Supporting Safe Schools*, U.S. DEP'T OF JUSTICE, COMMUNITY ORIENTED POLICING SERVS., https://cops.usdoj.gov/supportingsafeschools [https://perma.cc/2NW7-P9N8] (last visited May 3, 2021) [hereinafter COPS].

[162] *How do I become a school resource officer?*, NAT'L ASS'N OF SCH. RESOURCE OFFICERS, https://www.nasro.org /faq/ [https://perma.cc/27X9-MFPH] (last visited May 3, 2021).

(NASRO) recommends that a candidate has three years of experience as an officer before applying for an SRO position, but that experience is not required.[163] SROs share similar responsibilities to community police officers, including making arrests.[164] In some cases, SROs are expected to be educators or informal counselors.[165] However, not all schools have an SRO on campus. If an emergency arises at those schools, a community officer would report to the scene. Courts have held that Title II applies to arrests performed by both SROs[166] and community police officers.[167]

Hilary Wilkerson postures that the ADA can help protect students with disabilities during arrest in her article, *Special Needs, Special Solutions: Using Title II of the ADA and Behavioral Supports to Protect Students with Disabilities from Arrest.*[168] She argues that courts refusing to recognize that Title II applies to arrests "should, at the very least, require Title II accommodations during a student's arrest on a school campus."[169] This statutory protection, she reasons, will encourage stronger SRO training and guarantee that families can pursue an avenue of recourse they are entitled to under federal law.[170] While Wilkerson's article points out some important considerations for school discipline reform, her support for Title II's application in the context of arrest makes unsettling assumptions about the ongoings of a school environment.

First, Wilkerson argues that "law enforcement officers who work in a school are more likely to be aware they are working with a student with disabilities."[171] She contends that officers who know that they are more likely to respond to calls involving individuals with disabilities will be more likely to know how to accommodate the individuals' needs.[172]

This argument makes several false assumptions. To begin, an officer would only be aware that she was responding to a call involving a student with a disability if the officer was familiar with the child in question,[173] or if the caller communicated that detail to the officer. This assumes the school has properly identified and evaluated all students with disabilities, and that personnel know who those kids are. This might be particularly difficult at large schools. The argument further assumes that someone called the officer in the first place, rather than the officer approaching a student of her own volition. These gaps in the officer's knowledge mirror

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163 *Id.*

164 COPS, *supra* note 161.

165 *Id.*

166 *See, e.g., Wilson,* 936 F.3d 326 at 331.

167 *See, e.g., Sheehan*, 743 F.3d at 1233.

168 *See* Wilkerson, *supra* note 26.

169 *Id.* at 112.

170 *Id.* at 117–21.

171 *Id.* at 115.

172 *Id.* at 115–16.

173 *But see, e.g., Wilson* 936 F.3d at 332 (quoting the defendant school resource officer who "declared that '[o]n or before [the date of the incident], I had no actual knowledge that [the student] had any disability that qualified him as a special education student,'" despite having met with the child's parents regarding his disability not four months earlier).

those gaps of officers on the street and do not provide a special circumstance for officers making arrests in schools. Additionally, officers in schools are actually less likely to work with a student with a disability than a law enforcement officer on the street is to work with an individual with a disability. Students with disabilities make up between 13 and 14 percent of the nationwide student population,[174] whereas 26 percent of adults in the United States have a disability.[175] Even if an SRO does not receive specific context from a caller, she would have no more reason to expect to be working with an individual with a disability than a community officer would.

Second, Wilkerson distinguishes school arrests from community arrests because "law enforcement officers working in a school have an awareness of and access to the reasonable accommodations each student needs."[176] Because an officer in a school has access to school personnel familiar with the student, Wilkerson reasons, officers can consult with teachers and staff to determine what reasonable accommodations that student requires.[177]

Again, Wilkerson's argument discounts important considerations about the realities of working as a teacher or school administrator. If a student's behavior results in his removal from class, his teacher still has as many as thirty or more other students to continue protecting and educating in that classroom.[178] If a teacher, who may be more familiar with the student's needs, is not available to take questions about necessary accommodations, an officer may be left to speak with less knowledgeable staff[179] or to make her own judgments. In an emergency situation, it is impractical to

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[174] Maya Riser-Kositsy, *Special Education: Definitions, Statistics, and Trends*, EDUC. WEEK (July 21, 2021), https://www.edweek.org/teaching-learning/special-education-definition-statistics-and-trends/2019/12#:~:text=In%20the%20U.S.%20overall%2C%2013.7,19.2%20percent%20in%20New%20York [https://perma.cc/M2VM-GZ5J] (13.7%, as low as 9.2% in Texas); Salem, *supra* note 156 (13%); Katherine Schaeffer, *As schools shift to online learning amid pandemic, here's what we know about disabled students in the U.S.*, PEW RESEARCH CTR., (Apr. 23, 2020), https://www.pewresearch.org/fact-tank/2020/04/23/as-schools-shift-to-online-learning-amid-pandemic-heres-what-we-know-about-disabled-students-in-the-u-s/#:~:text=1%20The%20nearly%207%20million,for%20which%20data%20is%20available [https://perma.cc/K63C-M3VP] (14%).

[175] *Disability Impacts All of Us*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html [https://perma.cc/5BVY-WF24] (last visited Apr. 6, 2021).

[176] Wilkerson, *supra* note 26, at 116.

[177] *Id.*

[178] *Table 8. Average class size for public school teachers in elementary schools, secondary schools, and schools with combined grades, by classroom type and state: 2007-08*, NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/surveys/sass/tables/sass0708_2009324_t1s_08.asp [https://perma.cc/5HZV-HUAS] (last visited Apr. 26, 2021).

[179] *See generally* Stephanie Butzer & Blair Miller, *ACLU lawsuit claims DougCo. School resource officers handcuffed child with autism for hours*, ABC 7 DENVER (Mar. 9, 2021, 6:53 PM), https://www.thedenverchannel.com/news/local-news/aclu-lawsuit-claims-dougco-school-resource-officers-handcuffed-child-with-autism-for-hours [https://perma.cc/QA4Y-ZKCZ] (This news story describes an incident in which an 11-year-old Hispanic boy with autism was removed from class after a behavior incident and was sitting calmly with the school counselor. After the principal texted the SRO in case the boy re-escalated again, the SRO handcuffed the boy and left him in a police car for hours. He repeatedly banged his head against the glass and injured himself. The boy was charged with assault and assaulting a police officer).

assume that personnel will retrieve the student's individualized education plan (IEP), behavior intervention plan (BIP), or other related documents to determine appropriate accommodations. Moreover, reasonable accommodations in an IEP or BIP are intended to mitigate behaviors that hinder a child's learning, not to address how law enforcement should work with students with disabilities.[180] As such, officers in schools are just about as likely as community officers to know what reasonable accommodations may be necessary for a student.

This argument also assumes that an SRO knows to check in with personnel regarding a student's accommodations. Even if SROs receive some training to ask personnel about accommodations—and no evidence suggests that they do—community officers might not. After all, Jmiyha Rickman was arrested by community police officers who responded to a call about her behavior at school.[181] For these reasons, Wilkerson's second argument distinguishing school-based arrests from community arrests fails.

Third, the article separates school-based arrests from off-campus arrests because SROs respond to fewer violent and dangerous circumstances than officers in the community do.[182] This may be true, but it does not warrant a separate standard for ADA compliance.

Minority circuits concern themselves particularly with the ways making accommodations could interfere with "split-second decisions" officers must make in emergency situations.[183] Without a deluge of violent incidents, SROs and other officers responding to school calls may have fewer of these quick judgments to make. Lower levels of violence also means that the appropriate quantum of force to use with a student, more often than not, is minimal if anything. In bringing up these rates of violence, Wilkerson implies that officers in school settings may be able to more easily implement reasonable accommodations. Thus, it would be appropriate to burden these officers with making reasonable accommodations, rather than officers on the street. But the ADA's mandates don't hinge on the ease of implementation—they are mandatory. While successfully supporting an "undue burden" defense can exempt an officer from her obligations under the ADA, an officer's default should be to accommodate an individual with a disability in her custody, regardless of the setting.[184] Thus, Wilkerson's third attempt to distinguish community arrests from school arrests falls short of justifying a partial application of

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[180] *What types of accommodations are commonly used for students with disabilities?*, THE IRIS CTR. AT VAND. UNIV., https://iris.peabody.vanderbilt.edu/module/acc/cresource/q2/p03/#content [https://perma.cc/T6A2-LKCP] (last visited May 11, 2021); *see also Accommodations: What they are and how they work*, UNDERSTOOD, https://www.understood.org/en/learning-thinking-differences/treatments-approaches/educational-strategies/accommodations-what-they-are-and-how-they-work [https://perma.cc/M8CX-4TBH] (last visited May 11, 2021) (explaining that the four most common types of accommodations involve presentation, response, setting, and timing and scheduling).

[181] Rickman Segment, *supra* note 1.

[182] Wilkerson, *supra* note 26, at 117.

[183] *E.g.*, *Hainze*, 207 F.3d at 801–02.

[184] 28 C.F.R. § 35.150(a)(3) (2014).

Title II.

The basic premise from Wilkerson's article is correct: Title II should apply to arrests. This Note advances this basic premise with different wording: Title II *does* apply to arrests, and circuit courts holding otherwise have incorrectly interpreted the ADA. To say that Title II *should* apply to arrests implies that proponents of this interpretation are asking courts to stretch the text or meaning of the ADA where it has not already been. There's nothing "special" about this solution—it's a federal right. In light of this legal reality, the reach of the ADA does not depend on the physical location where a student is arrested. Wilkerson's article sells the scope of Title II short by limiting courts' application of the law to school-based arrests alone. This proposal and other incremental solutions to patching Title II's coverage of arrests mischaracterize the broad mandate of the ADA. As such, courts must evaluate Title II's scope as it pertains to arrests both inside and outside of schools.

V. HOW TO PROTECT CHILDREN OF COLOR WITH DISABILITIES FROM ARRESTS INSIDE AND OUTSIDE OF SCHOOLS MOVING FORWARD

The judicial, legislative, and executive branches all have a hand in ensuring that courts apply Title II to arrests in all scenarios, regardless of geography. While creating new precedent is the most probable and timely solution to this issue, amendments to the ADA and new DOJ regulations could solidify compensatory and injunctive relief for plaintiffs nationwide.

A. Setting New Precedent

Courts have ample grounds to continue ruling in favor of Title II applying to arrests, correcting precedent where necessary.[185] Of course, a Supreme Court ruling on Title II's application to arrests would most efficiently set the record straight across circuit courts. Though the Court does not have such a case on its docket as of December 2021, plaintiffs raise this question frequently enough that an appeal is quite likely to reach the Court again in the future.[186]

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[185] *See supra* Part III.

[186] Roell v. Hamilton Cty., Ohio/Hamilton Cty. Bd. of Cty. Commissioners, 870 F.3d 471, 489 (6th Cir. 2017); *Haberle,* 885 F.3d at 180; *Wilson,* 936 F.3d 326 at 331; *Gray,* 917 F.3d at 17; Hogan v. City of Pharma, No. 1:20-CV-1331, 2020 WL 7481298 (N.D. Ohio 2020); Chase v. City of Bangor, No. 1:20-cv-00287-JAW, 2021 WL 1396277 (D.C. Me. 2021); Gray v. City of Denham Springs, No. 19-00889-BAJ-EWD, 2021 WL 1187076 (D.C. Md. 2021); Lou et al v. Lopinto et al., 2:21CV00080 (E.D. La. 2021).

However, with the Court's current conservative tilt,[187] the justices may not decide in line with the majority of circuit courts. The contentious issue of policing may push the Court toward the reasoning from the Fourth and Fifth Circuits. Yet, strong textual support for Title II's application to arrests may sway conservative justices to decide in the plaintiff's favor. Last year, in *Bostock v. Clayton County*, Justice Gorsuch authored an opinion that interpreted Title VII of the Civil Rights Act as prohibiting employers from discriminating against transgender individuals[188]—a controversial stance for a Trump-appointee to take.[189] Furthermore, recent cases that have chipped away at qualified immunity reveal how the Court may be more willing to strengthen police accountability than previous justices have been.[190] As such, it is not out of the question, though it may take some time, for the Supreme Court to hold that Title II applies to arrests.

While a Supreme Court ruling on the issue would easily clarify the standard across the country, individual circuits can circumvent the need for a nationwide verdict in order to protect children of color with disabilities in their jurisdiction. With a majority of courts already holding that Title II applies to arrests, more than enough persuasive precedent exists to support opinions in this vein.

Establishing this precedent may encourage people to bring more lawsuits in these circuits, though it serves a greater purpose too. The possibility of liability for officers may also encourage municipalities to take measures to prevent disability discrimination, such as improving officer disability training or providing more tools for accommodation (e.g., more wheelchair accessible vans, double handcuffs, etc.).[191] Therefore, these opinions would provide a remedial measure to potential plaintiffs and proactively guard against the need for lawsuits too. This matters especially because liability is not the same as accountability: It matters that police departments not only compensate families for the harm done, but also take responsibility by making systemic repairs to prevent future harm.

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[187] Joan Biskupic, *Analysis: The Supreme Court hasn't been this conservative since the 1930s*, CNN (Sep. 26, 2020, 6:33 PM), https://www.cnn.com/2020/09/26/politics/supreme-court-conservative/index.html [https://perma.cc/HU7V-NVZ4].

[188] *See* Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1740 (2020).

[189] David G. Savage, *Gorsuch's Supreme Court opinion for LGBTQ rights sends a shudder through conservative ranks*, L.A. TIMES (Jun. 17, 2020, 7:09 AM), https://www.latimes.com/politics/story/2020-06-17/gorsuch-supreme-court-opinion-lgbtq-rights-shakes-conservatives [https://perma.cc/6DD6-Q9H7].

[190] *See, e.g.*, Taylor v. Riojas, 141 S. Ct. 52 (2020).

[191] *See generally* 2017 Technical Assistance, *supra* note 138 (providing examples of DOJ settlements that facilitate ADA compliance, including a settlement with Hinds County, Mississippi, "agree[ing] to establish a criminal justice coordinating committee to enhance coordination between criminal justice and mental health agencies to prevent unnecessary arrest and detention and connect individuals with disabilities to mental health services").

B. Other Possible Reforms

Other efforts to reform this legal standard are possible, though not probable. In theory, Congress could amend the ADA to expressly include arrests under Title II's coverage and denounce the "exigent circumstances" exception. With President Biden in office and the current Democratic majority in the House of Representatives and the Senate,[192] an amendments act could pass both chambers. In practice, Congress is not likely to make such amendments. The ADA Amendments Act came 18 years after the bill's initial passage,[193] and it has only been nine years since then. Those 2008 amendments "reinstat[ed] a broad scope of protection to be available under the ADA," but focused mainly on clarifying the definition of impairments considered to be disabilities for purposes of the ADA.[194] The amendments did not comment on the scope of protection afforded to certain activities under Titles I, II, or III.[195] Additionally, because of the time it takes to research, write, and pass a bill, the House and Senate compositions will likely change by the time a bill is ready for a vote.

Alternatively, the DOJ could update ADA regulations or publish new technical assistance documents to clarify its enforcement position on Title II's application to arrest. This policy change would take time to come to fruition, but would be a significant marker of the majority approach taking hold in ADA enforcement. Recently, the DOJ launched investigations into policing practices in both Louisville, Kentucky, and Minneapolis, Minnesota, regarding, among other things, compliance with Title II of the ADA.[196] The results of these investigations could provide important data and insight to support new regulations or technical assistance later on.

Neither of these legislative or executive strategies will provide short-term relief to families of kids with disabilities who are injured or killed by police. However, the lasting effect of new precedent, legislative change, and regulatory updates will protect these children, as well as adults with disabilities, in the long run.

Some progress is underway outside of ADA-specific reform to

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[192] JENNIFER E. MANNING, MEMBERSHIP OF THE 117TH CONGRESS: A PROFILE 1 (Nov. 8, 2021), https://crsreports.congress.gov/product/pdf/R/R46705#:~:text=In%20the%20117th%20Congress%2C%20the,2021%2C6%20are%20as%20follows%3A&text=House%20of%20Representatives%3A%20223%20Democrats,)%2C%20and%204%20vacant%20seats [https://perma.cc/4LNS-X9W8].

[193] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553 (2008).

[194] *Id.*

[195] *See id.*

[196] Press Release, U.S. Dep't of Justice, Department of Justice Announces Investigation of the Louisville/Jefferson County Metro Government and Louisville Metro Police Department (Apr. 26, 2021), https://www.justice.gov/opa/pr/department-justice-announces-investigation-louisvillejefferson-county-metro-government-and [https://perma.cc/Q8KU-ZYZZ]; Press Release, U.S. Dep't of Justice, Attorney General Merrick B. Garland Announces Investigation of the City of Minneapolis, Minnesota, and the Minneapolis Police Department (Apr. 21, 2021), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announces-investigation-city-minneapolis-minnesota-and [https://perma.cc/2694-CPHM].

protect individuals with disabilities from police violence while experiencing a crisis. Congress recently passed The National Suicide Hotline Designation Act of 2020, which establishes a nationwide, three-digit suicide hotline that will be available to the public in the summer of 2022.[197] By dialing 9-8-8, callers can speak to a trained professional with the ability to send help to their location.[198] The dispatch service could significantly decrease the number of police responses to non-violent mental health emergencies, and therefore, decrease unwarranted and forceful arrests. Ensuring that communities have the infrastructure to support this new service will make or break its success. Supporting policy changes like the 9-8-8 system that divest from police and reinvest in community-based services will provide the most rapid change on the ground for individuals and families in need.

CONCLUSION

Jmiyha Rickman described her encounter with the police as "a bad day."[199] She told a reporter: "I'm hoping that it won't happen to nobody else."[200] But children of color with disabilities undergo this type of trauma and tragedy all the time. During just one month of writing and editing this Note, three Black and brown teenagers were shot and killed by the police.[201] One of these teens was Adam Toledo, a special education student from Chicago, Illinois.[202] Police shot and killed Adam within seconds of arriving on the scene while he was unarmed, with his hands in the air.[203] He was 13 years old.[204]

Families like Jmiyha Rickman's, Elba Pope's, and Adam Toledo's could bring excessive force claims or press criminal charges against the officers who injured or killed their children.[205] Yet, given the difficulty of prevailing on excessive force claims and the politics of prosecuting police

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[197] National Suicide Hotline Designation Act of 2020, Pub. L. No. 116-172 (2020).

[198] *Id.*

[199] Rickman Segment, *supra* note 1.

[200] *Id.*

[201] *Fatal Force*, WASH. POST (Dec. 28, 2021), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/8N48-AFZD] (follow "Download the data," then under subsection "Fatal Force," select "[Download the data]") (Adam Toledo, Mar. 29, 2021; Anthony J. Thompson, Apr. 12, 2021; Ma'Khia Bryant, Apr. 20, 2021.).

[202] Mateo Zapata, Opinion, *We are Adam: For many youth across Chicago's South and West sides, Adam Toledo's life trajectory is too familiar*, CHICAGO TRIB. (Apr. 15, 2021, 10:14 AM), https://www.chicagotribune.com/opinion/commentary/ct-opinion-adam-toledo-little-village-20210415-yfuxq4fz7jgtnl54bwn5w4ztw4-story.html [https://perma.cc/83JV-K8FF].

[203] Peter Nickeas, Dakin Andone & Emma Tucker, *Chicago police say bodycam footage shows less than a second passes from when 13-year-old is seen holding a handgun and is shot by officer*, CNN (Apr. 16, 2021, 8:08 AM), https://www.cnn.com/2021/04/15/us/adam-toledo-police-shooting-body-camera/index.html [https://perma.cc/A4QR-DUQF].

[204] *Id.*

[205] *See* Graham v. Connor, 490 U.S. 386, 394 (1989).

officers,[206] families should leverage the remaining civil remedies available to them to recover damages and to pursue injunctive relief. A settlement or a verdict may never be enough to make up for the trauma and loss these families have incurred, but these avenues toward compensation and systemic change must certainly be available to them. Courts using the minority approach to Title II's coverage strip families of their federal protections and further limit their ability to seek justice for their child's injuries or death.

For the many aforementioned reasons, courts must apply Title II of the ADA to arrests that occur both inside and outside of schools. Until massive system changes eradicate police violence, this solution will allow individuals and families to receive the relief they are entitled to under the law.

[206] Pearson v. Callahan, 555 U.S. 223, 236 (2009) (holding that courts may determine qualified immunity by evaluating whether a constitutional right was "clearly established" at the time of the misconduct before evaluating whether a right was violated).