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Criminal Justice & the ADA[1]

I. Introduction

Discrimination within the nation's criminal justice system is an issue of critical importance, addressed regularly on the news, in political campaigns, and within government and local communities. While the public discussion is not always focused on disability issues, recent statistics suggest that people with disabilities encounter the criminal justice system more frequently than their non-disabled counterparts, demonstrating one of the many reasons that this topic is extremely important for the disability community.[2] It is essential for all stakeholders to understand the federal laws that protect the rights of individuals with disabilities within the criminal justice system—the Americans with Disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act (the Rehab Act). These laws, as well as the U.S. Constitution, apply to different aspects of the criminal justice system, including law enforcement, correctional facilities, re-entry planning, and criminal court proceedings.

This legal brief addresses the broad topic of criminal justice as it relates to people with disabilities, and provides an overview of the relevant statutory text and regulations, important case law and settlement agreements, and applicable constitutional provisions.

II. Overview of Relevant Laws Related to Criminal Justice and the Rights of Individuals with Disabilities

The ADA and the Rehab Act are federal civil rights laws that prohibit discrimination against individuals with disabilities in various aspects of life.[3] Though generally similar, the ADA and Rehab Act do have a few differences relevant to criminal justice issues. While Title II of the ADA applies to all programs, services, and activities of state and local governments, regardless of whether they receive federal funding,[4] the Rehab Act

applies only to entities that receive federal financial assistance.[5] Thus, even if state and local entities do not receive federal financial assistance, they still have non-discrimination obligations under Title II of the ADA. As a practical matter, however, because virtually all entities involved in the criminal justice system are state or local entities that receive federal funding, both the ADA, Rehab Act, and their respective regulations usually apply. Such entities include state and local law enforcement agencies, correctional facilities, and court judicial systems. The Rehab Act has exclusive jurisdiction for facilities and programs in the criminal justice system that are managed by the federal government, such as federal prisons.

The ADA and the Rehab Act have both general and specific non-discrimination requirements. Generally, state and local law enforcement agencies, correctional facilities, and court judicial systems must provide equal access to programs, services, and activities to people with disabilities.[6] Specifically, like other government entities covered by the ADA, law enforcement agencies, correctional facilities, and court judicial systems must provide auxiliary aids necessary to ensure effective communication,[7] must make reasonable modifications of policy,[8] must provide legally required architectural and programmatic access,[9] and must provide programs and services in the most integrated setting available.[10] Exactly what this means to each of these entities is examined in greater detail within this legal brief

III. ADA & Police Encounters

A. Application to Arrests & Individuals with Mental Illness

When discussing the ADA and police encounters, a critical preliminary legal issue is whether the ADA even applies to the arrest process. It has been the longstanding position of the U.S. Department of Justice, the federal agency that promulgates regulations and enforces Title II of the ADA, that the ADA applies to law enforcement personnel in nearly every facet of their work, including interrogating witnesses, booking and holding suspects, enforcing laws, operating 911 centers, and notably, arrests.[11] The DOJ reiterated this position in its Statement of Interest filed as recently as June 2016 in the *Robinson v. Farley* case, citing the broad scope of Title II and the ADA's legislative history.[12] Despite this, there is currently a circuit court split as to whether the ADA applies to arrests.

In one of the first decisions on this issue, *Hainze v. Richards*, the Fifth Circuit held that the ADA "does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents . . . prior to the officer's securing the scene and ensuring that there is no threat to human life."[13] In *Hainze*, a woman called 911 asking for assistance transporting her nephew, Hainze, who was suicidal, to a hospital for mental health treatment. The woman advised that Hainze had a history of depression, was currently under the influence of alcohol and anti-depressants, was carrying a

knife, and was threatening either to commit suicide or "suicide by cop."[14] When the police arrived on the scene, they saw a shoe-less Hainze talking to individuals in a pickup truck and holding a knife. The police officer drew his weapon and ordered Hainze to walk away from the truck. Hainze responded with profanities, began to walk toward the officer, and was ordered again to stop. Hainze did not stop, and when he was within four to six feet of the officer, the officer shot Hainze twice in rapid succession in his chest. Hainze survived.

The Fifth Circuit concluded that because law enforcement personnel face the "onerous task" of having to "instantaneously identify, assess, and react to potentially life-threatening situations," it would pose an "unnecessary risk to innocents" to require officers to comply with the ADA "in the presence of exigent circumstances" prior to "securing the safety of themselves, other officers, and nearby civilians."[15] It concluded that Congress could not have intended the ADA to be attained at the expense of public safety, especially as there were other remedies available under the law, such as a Section 1983 or state law claim. Thus, it held that these specific situations fall outside the scope of the ADA.

Other courts have followed the Fifth Circuit's approach. In *Lynn v. City of Indianapolis*, an individual with epilepsy was having a seizure when officers arrived on the scene.[16] The arresting officers believed that the plaintiff was high on cocaine, despite information from the dispatcher that it was believed that the man was having a seizure. During the course of the arrest, the police officer used a taser on him five times for a total of twenty-seven seconds. When evaluating the plaintiff's ADA lawsuit, the court agreed with the rationale in the *Hainze* case, and concluded that Title II does not apply.

However, the majority of circuits have rejected this type of categorical exemption; most courts have held that Title II applies to arrests, and the exigent circumstances and criminal activity simply factor into the analysis of whether the police officer's actions were reasonable.[17]

In 2014, the U.S. Supreme Court suggested that it would resolve this circuit split when it agreed to hear *City and County of San Francisco v. Sheehan.*[18] In *Sheehan*, Sheehan had schizoaffective disorder and lived in a group home for individuals with mental illness. Sheehan's social worker contacted the police seeking help to take Sheehan to a secure facility after Sheehan had threatened to kill the social worker with a knife. Two officers arrived, used a key to enter Sheehan's room, and Sheehan responded with threats of violence. The officers retreated, closed the door, and called for backup. Instead of waiting for backup to arrive, however, the officers, due to concern that Sheehan was unstable and might harm herself, decided to reenter the room immediately. The officers attempted to pepper spray Sheehan, which proved ineffective at subduing her and they subsequently shot her as she approached them a knife drawn. Sheehan survived.

Sheehan argued that the police officers violated the ADA by failing to accommodate her disability when they forced their way into her room and failed to consider her mental illness or employ different tactics that would be been likely to resolve the situation without causing injury to herself or others. Specifically, Sheehan asserted that the police officers should have "respected her comfort zone, engaged in non-threatening communications and used the passage of time to defuse the situation rather than precipitating a deadly confrontation."[19]

The district court relied on the *Hainze* decision and concluded that the ADA did not apply to this arrest and dismissed Sheehan's case.[20] The Ninth Circuit Court of Appeals reversed, holding that the ADA applies because its accommodation requirement encompasses anything a public entity does, while acknowledging that "exigent circumstances inform the reasonableness analysis under the ADA."[21] On the merits, the Ninth Circuit concluded that despite the fact that the officers had to make a quick decision, a reasonable jury could still have found that the situation had already been diffused when Sheehan returned to her room, making it reasonable to employ less confrontational tactics, such as waiting for backup.

Despite agreeing to hear the case, the Supreme Court declined to rule on the question of whether the ADA "requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody."[22] This was because instead of arguing that Title II does not apply to an officer's on-the-street responses" in certain circumstances as it had in the lower courts and in its petition for cert, San Francisco focused on the fact that Sheehan posed a direct threat so she was not a qualified individual. Because this argument was not fully briefed on appeal, and because it was not the issue on which the Court granted review, the Supreme Court declined to rule on the ADA claim because it was "improvidently granted."[23] As a result, the Ninth Circuit's decision remains good law, but the Court's decision provides no further clarity about the scope of the ADA in these circumstances. DOJ filed an amicus brief in this case stating that Title II applies to arrests.[24]

B. Providing Effective Communication

Title II of the ADA requires public entities to provide auxiliary aids and services necessary to ensure effective communication to individuals with communication disabilities.[25] Most cases involving effective communication in the criminal justice arena revolve around police interactions with members of the deaf community and analyze the reasonableness of the request in light of any exigent circumstances, and the effectiveness of any auxiliary aid and service provided.

In a recent case, *Williams v. City of New York*, the plaintiff, who was deaf, was arrested and detained overnight by the New York Police Department (NYPD).[26] Plaintiff and her husband attempted to secure police presence when evicting their tenants, given prior

incidents between the parties. The police failed to respond, and after some minor disputes with the tenants transpired, plaintiff's husband, who was also deaf, called the police through video relay service, asking for police assistance because he believed that one of the tenant's boyfriend had a firearm. When the police arrived, the police hardly engaged with the owners. The owners requested an ASL interpreter, but one was not provided. Further, one of the tenants (who was being evicted but not part of the alleged physical altercation) knew ASL and offered to interpret, but the police declined this option as well. The police spoke with the tenant and the tenant's boyfriend, who reported that the owner had engaged in an assault, but failed to make an effort to adequately communicate with the owner. Plaintiff was arrested and held overnight and at no time was an ASL interpreter provided and at no time did the police try to communicate with her in any other way to advise why she was under arrest or how long she would be in custody. In her ADA lawsuit, the NYPD asserted that it had no responsibility under the ADA to provide any accommodation until after the individual has been arrested and booked, a position the court rejected and called "extraordinary."[27] The NYPD also asserted that it was unreasonable to provide an accommodation prior to arrest because they needed to secure the scene. The court rejected this argument because the facts suggested that that no one was in any imminent danger, and permitted the case to move forward. Following this decision, the parties settled this lawsuit, which also included constitutional claims under Section 1983, and state law tort claims of assault, battery and false imprisonment, for $750,000.[28] This case demonstrates the importance of effective communication both during an arrest and in police custody.

Compare that case to a situation where the court found that the exigent circumstances allowed a police officer to forego a request for a sign language interpreter. In *Bircoll v. Miami-Dade County*, the plaintiff, a deaf man, asserted that the police department violated the ADA by failing to provide him with an oral interpreter both during a field sobriety test and at the police station before he took an Intoxilyzer test.[29] The court rejected both claims. With respect to the field sobriety test, the court held an oral interpreter's presence at a field sobriety test is not a reasonable modification of police procedures due to the "exigent circumstances of a DUI stop on the side of the highway, the on-the-spot judgment required of police, and the serious public safety concerns in DUI criminal activity."[30] Waiting for an interpreter also jeopardized the officer's ability to obtain an accurate measure of the driver's blood alcohol level. The court also rejected the plaintiff's argument the police should have accommodated him by skipping the field sobriety tests altogether and going directly to the station for the breathalizer test. This proposal, explained the court, would force police to arrest all deaf DUI suspects, which is not reasonable. The court was also persuaded by the fact that the plaintiff admitted that he reads lips (though he understands only about 50% of what is said), that he received both verbal and physical demonstrations of the field sobriety tests, and that he admitted that he understood.

The *Bircoll* court also rejected the plaintiff's ADA claim regarding ineffective communication at the police station. While the exigency of the situation was reduced, the court held that time remained a factor in the breathalyzer test to accurately measure the individual's impairment, if any. In so finding, the court also emphasized that this communication was short and not complex, that the plaintiff could read English and was given a short consent form, and that the plaintiff testified had previous knowledge of the information being communicated through the consent form.

Other cases about effective communication turn on whether an alternative auxiliary aid or service was effective in light of the individual's communication skills and the public entity's efforts. For instance, in *Valanzuolo v. City of New Haven*, a deaf individual was arrested by the New Haven police department for failing to appear in court.[31] At no time during plaintiff's arrest, ten hour hospital stay in police custody or transportation to booking and processing was plaintiff provided with an ASL interpreter. The plaintiff alleged a deprivation of rights under the ADA for failure to provide an ASL interpreter. The court entered judgment in favor of the defendant and held that the City of New Haven provided the plaintiff with effective communication through the use of pen and paper. Specifically, it cited the fact that during the initial arrest, plaintiff had a pen/paper at his door with which he regularly used to communicate, had communicated using that method previously, had read the arrest warrant, and communicated via handwritten note with the police on three or four pages of the officer's pad and did so in complete sentences with proper spelling.

The DOJ has been committed to ensuring effective communication among the nation's law enforcement community and has entered into a number of settlement agreements on this topic. The most recent agreement was entered on May 3, 2016, with the police department of Columbia, South Carolina, after the DOJ investigated a complaint alleging that the complainant was not provided with an ASL interpreter for police questioning over a three-month period, including at the time of his arrest.[32] Given the comprehensive nature of this agreement, law enforcement departments are encouraged to review it for guidance on how to implement training, change signage, modify handcuffing policies, and a variety of other topics that could prove helpful as law enforcement agencies evaluate their own best practices.

In addition to revised policies and training requirements, some of the highlights of the settlement include Columbia Police Department's agreement to designate at least one employee as the ADA coordinator responsible for ADA compliance; provide appropriate auxiliary aids and services, including qualified sign language interpreters; create "communication cards" to aid in communication with persons who are deaf or hard of hearing during routine interactions in the field;[33] use pictogram to determine if someone requires an interpreter in all non-exigent circumstances;[34] and use a communication assessment form into custody for processing.[35]

This agreement also addresses the different requirements for communication during imminent threats and exigent circumstances. When there is such an exigent circumstance and insufficient time exists to make appropriate auxiliary aids and services available, police are permitted to use what is available, consistent with an appropriate law enforcement response—such as exchanging written notes or using the services of a person who knows sign language but who is not a qualified interpreter, for an interim period during the period of ongoing imminent threat, even if the person who is deaf or hard of hearing would prefer a qualified sign language interpreter or another appropriate auxiliary aid or service. *However, when* there is no longer an imminent threat, the police department agreed to follow its procedures to provide appropriate auxiliary aids and services.

To ensure that these requirements are met, the police department has also agreed to form and maintain working relationships with one or more qualified oral/sign language interpreter agencies to ensure interpreter availability on a priority basis 24/7. The department also agreed to modify its handcuffing policy by handcuffing an individual in front of his body to enable sign language or writing. It also agreed to ensure a sufficient number of working TTYs and videophones at each station, but no fewer than one of each, and provide signage to inform the community about their availability.

C. ADA Claim for Failure to Train/Modify Procedures When Interacting with People with Disabilities

While not within the scope of this legal brief, there are a significant number of cases involving police interactions with individuals with mental illness that are not brought under the ADA, but instead under Section 1983 for excessive force.[36] Whether the individual has a known mental illness is sometimes part of the court's analysis as to whether the force used in any particular situation is excessive. That said, plaintiffs do sometimes include claims under Title II as part of these cases given the requirement under the ADA to make reasonable modifications of policy.[37] Plaintiffs have brought these ADA claims alleging that law enforcement violated the ADA by failing to provide proper training regarding interacting with people with disabilities and by failing to modify policing policies when necessary for people with disabilities.

An example of the tragic outcomes that can occur when police refuse to make simple modifications to their typical policing practices comes from the horrific death of Ethan Saylor, a 26-year-old man with Down Syndrome.[38] Saylor was an avid theater-goer, and after seeing a movie, entered the theater again without paying for a second ticket. Three off-duty county sheriffs were working as security guards, and spoke to Saylor's aide about the situation. Saylor's aide explained Saylor's disability, asked that he not be approached and that the manager simply wait and let her attempt to address it. Instead of following this suggestion, the officers approached Saylor, told him that he needed to leave the theater. When he refused, they grabbed his arms, dragged him

from the theater while yelling that he would go to jail. Saylor was heard screaming "mommy, mommy" and saying "it hurts."[39] The officers ended up handcuffing Saylor, with one on top of him, fracturing his larynx, and making it difficult to breathe. Saylor died from affixation.

Saylor's estate brought a claim under Section 1983 for excessive force, state law claims of negligence, gross negligence, and battery, and wrongful death.[40] It also brought a claim under Title II of the ADA for "failure to train."[41] The court denied the defendant's motion to dismiss on this claim, finding that "courts have recognized an implicit duty to train officers as to how to interact with individuals with disabilities in the course of an investigation or arrest."[42] Defendant asserted that Title II could not put them on notice of an "exhaustive set of particular accommodations and policies to be proactively implemented with respect to every conceivable disability."[43] The court rejected this argument, emphasizing the plaintiff's suggestion that law enforcement simply follow the "advice of the caregiver of a clearly disabled individual and simply waiting would have been the most logical accommodation" and noting that "it would not appear that the Deputies were trained to make any modification at all in their treatment of individuals with development disabilities."[44] The court denied the defendant's motion for summary judgment on the ADA claim for similar reasons.[45]

Courts have also recognized Title II claims for failure to train in excessive force cases involving suspects with mental illness.[46] In support of this claim, courts have cited a passage in the ADA's legislative history stating: "[T]o comply with the non-discrimination mandate, it is often necessary to [train] 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 [how to recognize and aid people having] seizures.... Such discriminatory treatment based on disability can be avoided by proper training."[47]

Based on this, plaintiffs have brought claims under the ADA asserting that they were subject to excessive force that could have been avoided had the officers received proper training to recognize and accommodate individuals with mental illness or other disabilities. In *Buben v. City of Lone Tree*, police first found the plaintiff throwing items off of a third story balcony and then in his apartment, nude and covered in blood.[48] The plaintiff did not comport with the officers' demands, which he asserted was due to his "impaired mental state."[49] Due to Plaintiff's non-compliance, he was ultimately tased two times and he fell off of a balcony. The court permitted the Plaintiff's ADA case to move forward on the theory that the city "should have adopted polices to accommodate disabled individuals such as Plaintiff, and should have properly trained its officers to recognize and reasonably accommodate individuals exhibiting signs of 'excited delirium,' mental illness or disability."[50] Notably, the court distinguished the *Hainze* rationale, finding that the on-the-street exception did not apply because the plaintiff was not challenging the conduct that occurred on the scene, but rather alleging an ADA violation occurred when policymakers failed to institute policies giving officers the tools and resources to handle the situation peacefully. *See Broadwater v. Fow*, 945

F. Supp. 2d 574, 590-91 (M.D. Pa. 2013) (denying motion to dismiss on plaintiff's ADA claim that the state police failed to "properly train troopers to have peaceful encounters with mentally and physically disabled persons and failed to establish a proper policy for handling such encounters").

This is another area where courts across the country are divided. Several courts have concluded that the ADA does not permit a failure to train claim,[51] while other courts have opted not to make a determination on the issue at all.[52] And other courts have stated that a failure to train claim must have "caused some violation of law."[53]

D. Discrimination Claims

As discussed in this section, at times, the ADA requires law enforcement to take affirmative measures to ensure that people with disabilities are not subjected to discrimination. There are also more straightforward cases where an individual is simply treated differently as a direct result of his or her disability.

An example of this type of treatment can be found in a recent case, *Jones v. Lacey*.[54] In Jones, the plaintiff was stopped for a broken taillight, and the officer smelled marijuana when he approached the car. The plaintiff presented an expired Michigan medical marijuana license, and the officer suggested that he would allow her to leave without penalty. However, when the officer was searching the plaintiff's effects, he discovered medication and asked plaintiff what they were. Plaintiff responded by advising that she was HIV positive, causing the officer to become very upset. He made comments such as: "Okay, that's probably something to tell me when you get out of the car … [b]ecause I want to make sure I put gloves on."[55] Such comments continued and the officer issued the plaintiff a citation for marijuana and her companion a ticket for the broken taillight. The officer admitted that "if it wasn't for that [HIV disclosure], I don't think I would have wrote anybody for anything, but that kind of really aggravated me."[56] Based on the officer's comments, the court easily concluded that facts existed suggesting that the officer issued tickets due to the plaintiff's disability. Notably, most of the officer's comments were captured on the police dash cam video.[57]

IV. ADA And Correctional Facilities

Roughly one third of people living in correctional facilities—or, approximately 2.2 million people—report having a disability.[58] Needless to say, correctional facilities, such as jails and prisons, exercise vast control over their residents' lives: they dictate inmates' housing conditions; control their access to essentials like food, healthcare, toilets, and showers; manage their recreational, educational, and vocational opportunities; and often influence their likelihood of re-entering free society. Given this

awesome power, a prison that discriminates on the basis of disability has the potential to have a particularly destructive, pervasive, and enduring impact on its inmates.

In 1998, the U.S. Supreme Court confirmed in *Yeskey v. Pennsylvania Department of Corrections*, that Title II of the ADA applies "to any department, agency . . . or other instrumentality of a State," including state prisons.[59] Accordingly, for nearly two decades, it has been clear that correctional facilities are barred from discriminating against inmates on the basis of their disabilities. Put another way, people with disabilities do not lose their rights under the ADA simply because they are incarcerated.[60]

In spite of *Yeskey*, prisoners with disabilities still face significant challenges, and instances of discrimination remain common. This section highlights four areas of particular concern for inmates with disabilities: physical accessibility, segregation on the basis of disability, effective communication, and the treatment of inmates with mental illness.

A. Physical Accessibility

As a baseline, the ADA requires correctional facilities' physical structures to comply with accessible architecture standards promulgated by the federal government. Not all prisons have complied with this mandate, which has left inmates without access to basic resources and facilities that are available to other prisoners. For example, in *Pierce v. County of Orange*, a group of pretrial detainees housed in the county jail facilities demonstrated that Orange County failed to provide accessible bathrooms, sinks, and showers, and other fixtures.[61] The Ninth Circuit noted that the plaintiffs' expert witness provided testimony about a host of inaccessible elements in the two buildings designated by the court as "accessible" that did not comply with federal accessibility standards and the county offered no concrete ideas for other curative methods.[62] Similarly, in *Jaros v. Illinois Dept. of Corrections*, a former inmate showed that an Illinois prison lacked grab bars and thus prevented him from using his shower and transporting himself to meals.[63] Creating a catch-22, the Illinois Department of Corrections refused to add these accessibility features because the plaintiff was housed at a facility not designated as ADA-accessible, but also refused to transfer him to an ADA-accessible facility because he would not be incarcerated long enough to meet the Department's criteria for transfer. In both cases, the appellate courts reversed and remanded decisions, allowing the inmates' ADA claims to move forward.

Prisons have occasionally tried to avoid providing accessible facilities by offering inmates assistance with navigating physical barriers. For instance, in *Clemons v. Dart*, rather than assigning an inmate who used a wheelchair to an accessible room, the Cook County Sherriff provided him with an inaccessible room but promised that nurses were always on call to help him access the sink, shower, and toilet in his room.[64] When

the inmate sued, the Sheriff argued that he had not discriminated because the nursing staff would allow him to access all the same facilities and available to individuals without disabilities. The court rejected that argument, reasoning that on-demand nursing support was not equivalent to providing an accessible cell because it reduced the inmate's ability to engage in independent living to the fullest extent possible—a right protected by the ADA.

Another important point raised by the *Clemons* case is that Title II "requires affirmative, proactive accommodations necessary to ensure meaningful access to public services and programs, not accommodation upon request."[65] The court held that the Sheriff "gets things backward" by arguing that the plaintiff was not discriminated against because he could obtain assistance when he asked for it. Reasoned the court: "[Sheriff] was required to provide non-discriminatory access; [Plaintiff] was not required to request it."[66]

Prisons' obligations to inmates with physical disabilities are not limited to complying with architectural standards. They must also make reasonable modifications to prison policies in order to allow individuals with disabilities to enjoy the programs and services that are available to other inmates. For example, in *Wright v. New York State Department of Corrections*, a man with cerebral palsy and scoliosis who could operate a motorized wheelchair, but not a manual wheelchair, was successful in his challenge of New York's absolute ban on motorized chairs in prison due to safety concerns.[67] The court found that because the policy effectively prevented the inmate from enjoying a wide range of prison services, and therefore, the prison was required to allow for exceptions to this policy when appropriate. Notably, the court held that the prison's insistence that plaintiff instead rely on "inmate mobility aides" was fundamentally "in tension" with the ADA's "emphasis on independent living and self-sufficiency" which ensures that "a public benefit is not contingent upon the cooperation of third persons."[68] The court rendered this opinion even though it acknowledged that "prisons are unique environments with heightened security and safety concerns."[69] The court also concluded that this program was ineffective in practice, as it requires inmates with mobility assistants to contemplate their need to move in advance through a formal request.

Similarly, in *Reaves v. Department of Corrections*, a man with quadriplegia and who was unable to sit in a wheelchair challenged various aspects of the Massachusetts Department of Corrections' procedures, including not providing him with a gurney and not modifying the outdoor recreation schedule to allow him to go outside or socialize with his peers—procedures that had prevented him from showering, going outdoors, or socializing with peers for over sixteen years.[70] The court found the Department had an obligation to modify its policies and provide the inmate with accommodations that would allow him to be able to enjoy the "experience[s] that [are] fundamental to what it means to be human" alongside other prisoners.[71] For instance, the Department had

concluded that it would be a security concern to permit Reaves to participate in outdoor recreation because the facility was a maximum-security facility, and putting Reaves in the yard would be dangerous because he is "physically helpless" and it would be dangerous to assist an officer to protect him because "the officer would have been greatly outnumbered by inmates."[72] The court said that even if it does not question that conclusion, the Department could have taken the plaintiff outside at a different time, by himself, with fewer inmates, or to a different location. Failing to consider alternative solutions and reasonable modifications to practices was inconsistent with the language and purpose of the ADA.

B. Integration

The ADA also requires people with disabilities to be allowed to live in the most integrated setting possible, and prohibits segregating prisoners on the basis of disability. Here again, prisons have not always lived up to the ADA's requirements, with the most flagrant recent example likely being the segregation of prisoners with HIV. In *Henderson v. Thomas*, a group of prisoners with HIV challenged Alabama Department of Corrections' HIV policy, which categorically restricted inmates with HIV to certain housing units, limited their ability to participate in prison programs, and required them to wear a white armband that effectively publicized their status as HIV-positive.[73] The court found that Alabama's "segregation policy" was not supported by any scientific or medical evidence, and that it violated the ADA. As a result of this finding in 2012, Alabama became the last state to end its policy of overtly segregating inmates with AIDS.[74]

Still, prisons continue to impose more subtle forms of segregation, both against individuals with HIV and other types of disabilities. For example, the Department of Justice recently issued a letter of findings, concluding that the Nevada Department of Corrections discriminates against inmates with HIV in at least two ways: first, by requiring them to either share rooms with other inmates with HIV or to live alone, and second by excluding them from transitional housing settings and certain vocational opportunities.[75] Likewise, in *Pierce v. County of Orange*, discussed above in Section IV.A, the court found that Orange County violated the ADA by automatically and permanently housing inmates with disabilities in a jail complex with inferior programming and services than other facilities in the county that were available to individuals without disabilities.[76] And finally, prisoners with mental illness are often effectively segregated from the general population through the use of solitary confinement, a phenomenon that will be discussed at greater length below.

C. Effective Communication

Under the ADA, prisons have to provide accommodations that enable inmates who are deaf or hard of hearing to communicate effectively. In *Pierce v. DC*, although it was obvious to the prison that an inmate was deaf, the prison did not to evaluate how it could enable him to communicate effectively while in prison, nor did it provide him with any accommodations.[77] In its defense, the prison argued that it was not required accommodate to the inmate because he had not specifically requested any accommodations in order to effectively communicate. The court rejected that argument, and found that "prison officials have an affirmative duty to assess the potential accommodation needs of inmates with known disabilities who are taken into custody and to provide the accommodations that are necessary . . . without regard to whether or not the disabled individual has made a specific request for accommodation."[78]

Other cases have illustrated the types of accommodations prisons may have to provide in order to ensure its inmates can communicate effectively. These have included systems that inform inmates of announcements made by loudspeaker, access to functioning teletype machines (TTY), sign language interpreters, hearing aids, batteries for hearing aids, video remote interpreting systems, inmate helpers, visual alarms, and other auxiliary aids.[79] Further, courts have found that inmates are entitled to these types of accommodations in a wide variety of settings, ranging from religious services to medical consultations to disciplinary hearings.[80] And finally, courts have also required prisons to make accommodations for visitors who themselves are deaf or hard of hearing who are seeking to communicate with prison inmates.[81]

While these cases demonstrate the range of accommodations courts have imposed on correctional facilities to ensure effective communication, leading advocates argue that the goal of effective communication cannot be fully realized until prisons are required to provide videophones, not just TTYs, for inmates who communicate with American Sign Language. The National Disability Rights Network and the National Association of the Deaf have pointed out that "American Sign Language, not English, is the primary language for many people who are deaf and hard of hearing," and, because ASL its own unique language that is distinct from English, "videophones, not TTYs, are the functional equivalent of telephones for this group of prisoners."[82] Various states, including Maryland and Kentucky, have agreed to provide videophones per the terms of settlement agreements.[83]

D. Mental Health Issues

Finally, correctional institutions are obligated to accommodate individuals with mental illness. A significant amount of litigation in this area has centered on the intersection between mental illness and solitary confinement. Disability advocates contend that correctional facilities far-too-frequently refer people with mental illnesses to solitary

confinement, where their impairments are often exacerbated, rather than providing these inmates with the proper care and medical treatment.[84] Under pressure created by class action litigation, several states have agreed to reduce solitary confinement for inmates with mental illness; for example, the Illinois Department of Corrections agreed to reduce the amount of hours inmates with mental illness spend in isolation, and committed to increasing health care resources for these inmates.[85] Adding momentum to this movement, the United States Department of Justice recently articulated its view that under the ADA, prisons cannot confine an inmate to solitary confinement because of that person's mental illness.[86]

Outside of the solitary confinement context, the ADA also has been interpreted to require prisons to take steps to ensure that prisoners with mental illness are housed in a manner that keeps them safe. For example, in *Wright v. Texas Department of Criminal Justice*, a mother sued the Texas Department of Criminal Justice after her son took his own life while in prison.[87] Her lawsuit alleged that her son, who was diagnosed with severe bipolar and schizophrenia, had been classified by prison doctors as having a "high risk suicide status."[88] She claimed that even though the prison knew about Wright's mental illness, it failed to provide him with a roommate or a cell without "tie off" points, both of which would have reduced his likelihood of committing suicide. The court found that failure to make these accommodations could constitute discrimination under the ADA.

V. ADA and Re-Entry

For the 95% of incarcerated people who will eventually leave their correctional facilities, the quality of discharge planning and services may significantly impact the success of their transitions into the community.[89] For inmates with disabilities, an absence of appropriate discharge services often results in a lack of access to appropriate public services, a decline in mental and physical well-being, and even recidivism or institutionalization. Whether these barriers occur in violation of the ADA and the Rehab Act, including the ADA's integration mandate, is an emerging legal issue.

Significantly, insufficient discharge planning affects huge numbers of inmates with disabilities each year. According to the National Alliance on Mental Illness (NAMI), at least 16% of prisoners and 25% of jail inmates nationwide have a severe mental illness, such as schizophrenia or bipolar disorder,[90] and over 20% of inmates in prisons reported having a cognitive or intellectual disability.[91] Unfortunately, although problems with inmate re-entry have been studied and acknowledged in many jurisdictions, correctional facilities have yet to establish best practices for reforming this aspect of their services.

One of the first cases addressing the issue of re-entry for people with disabilities was brought not under the ADA, but under New York State Law. In *Brad H. v. City of New York*, inmates in New York City jails brought an action challenging the City's failure to provide inmates with mental illness with discharge planning services.[92] This case demonstrates that inadequate discharge planning deprives individuals with disabilities appropriate benefits and services. Plaintiffs alleged that upon discharge, the city released inmates without giving any referrals and provided only a few dollars for train fare. As a result, inmates with mental illness were denied access to the psychiatric medication and services they needed as they transitioned into the community. The case settled in 2003, with Defendants agreeing to provide all inmates who spend 24 hours or more in New York City jails and receive psychiatric treatment during their incarceration with comprehensive discharge planning services.[93] The services agreed upon include mental health assessment; case management; access to medication and prescriptions; and assistance accessing public benefits, housing, and transportation.

However, this settlement applied to city jails only—not state facilities. In 2014, a man with schizophrenia was released from a five-year prison sentence with no psychiatric medication or referrals to mental healthcare providers. Nine days later, he went on a violent stabbing spree, killing a young boy and wounding several others. Recognizing the vital importance of meaningful re-entry programming, in January of 2015, the State of New York enacted legislation requiring the implementation of mental health discharge plans for all inmates who have received psychiatric care within three years of their release dates.[94]

The application and scope of the ADA and Rehab Act as they relate to the provision of meaningful re-entry services for inmates with disabilities is an emerging legal issue. One recent decision addresses this issue head-on. In *US v. Los Angeles County*, the United States filed a Complaint against the County for violations of the Civil Rights of Institutionalized Persons Act and the Violent Crime Control and Law Enforcement Act.[95] At the same time, the government and county filed a stipulated Settlement Agreement that provides for comprehensive policies related to a wide range of issues, including discharge planning. Various individuals sought to intervene, challenging the discharge planning requirements as a violation of the ADA.

The County had a practice of releasing inmates without engaging in discharge planning. A group of Intervenors with disabilities argued that they had been denied access to various public services as a result of Los Angeles County's failure to provide meaningful discharge planning—namely, access to transportation, shelter, medical care, psychiatric care, and other services. While the County argued that its practices could not be discriminatory because all inmates were treated equally with respect to discharge planning and services, the court disagreed, pointing out that the ADA applies not only to intentional discrimination, but also to "facially neutral practices that disproportionately impact disabled people."[96] It concluded that the practice of releasing

inmates without engaging in discharge planning disproportionately affected inmates with disabilities, and denied the County's motion for judgment on the pleadings on the basis that inmates with disabilities were not offered the same degree of access to public services as their non-disabled peers.

The decision in *U.S. v. Los Angeles County* also demonstrates that in some instances, discharge planning can conflict with the ADA's integration mandate. The stipulated settlement agreement created a system whereby inmates with an "intense need for assistance" be directly referred to an Institution for Mental Disease (IMD), a segregated institution, despite the ADA's requirement requiring public entities to "administer services, programs, and activities in the most integrated setting appropriate."[97] The court agreed that this provision conflicted with the Supreme Court's decision in *Olmstead v. L.C. by Zimring*.[98]

Another reason that appropriate discharge planning is so important is that, when done in a meaningful way, it can reduce instances of recidivism. Without adequate access to public services upon release, many inmates with disabilities return to prison or jail. According to a 2005 study conducted by the Bureau of Justice Statistics, 76% of inmates with mental illness in federal prisons had at least one prior conviction, compared to 61% of inmates without mental illness.[99] Mentally ill inmates were also more than four times as likely to be chronic repeat offenders; nearly 10% of inmates with mental illness in federal prisons had 11 or more prior convictions, compared to 2.2% of inmates without mental illness.[100] The statistics were similar among inmates in state prisons and local jails, although the discrepancies among those populations were not as stark.

The court in *U.S. v. Los Angeles County* called attention to the cycle of homelessness and recidivism that exists, with some individuals having been arrested "hundreds of times."[101] The court also emphasized that it appeared this group was "released onto the streets, often in a more vulnerable, less stable state than when they entered the jail system."[102] Under those circumstances, the court remarked, there appeared little doubt that many of the county's ex-inmates with mental illness would end up back in its correctional facilities *if* released without proper access to services.

In addition, without meaningful re-entry programs, many inmates are held at jails and prisons beyond their release dates. For instance, in *Patient A. v. Vermont*, plaintiff alleged that he was held at a state correctional facility for over two years beyond his minimum sentence because of his schizoaffective disorder.[103] Plaintiff alleged that his continued incarceration was a result of Defendants' failure to identify appropriate supports and services in the community, whereas inmates without disabilities were released at or close to the completion of their minimum sentences. As a result, he claimed that the state had discriminated against him because of his disability, had violated the ADA's integration mandate, and had failed to comply with its legal duty

under *Olmstead* to place him in the most integrated setting possible. The case settled in 2016.

Unfortunately, *Prisoner A*'s case is not unusual. A 2006 study showed that the average stay for inmates with mental illness in New York's Riker's Island Jail and Florida's Orange County Jail was greater than the average stay for all inmates, and cited the fact that many inmates need to wait months for a bed at a psychiatric hospital before being released as one factor contributing to the disparity in length of incarceration.[104]

VI. ADA and Criminal Proceedings

A discussion of criminal justice would not be complete without a reference to accessibility within criminal court proceedings. Similar to other aspects of the criminal justice system, disagreements and misunderstandings about when and toward whom Title II applies have existed, preventing individuals with disabilities from fully participating in judicial proceedings and accessing judicial services. Problems range from lack of appropriate communication during judicial proceedings to lack of physical access to courtrooms. These problems affect not only criminal defendants, but also their families, witnesses, members of the public, and court employees. Recent case law analyzing these issues reveal common barriers to accessibility, including misunderstandings about sovereign immunity, confusion about what circumstances require courts to provide accommodations, and, in some instances, indifference or even intentional discrimination toward individuals with disabilities during criminal justice proceedings.

In 2004, the U.S. Supreme Court addressed the issue of sovereign immunity in *Tennessee v. Lane*.[105] In that case, two plaintiffs, both of whom were paraplegic and used wheelchairs, brought an action against the state of Tennessee for failing to provide physically accessible courtrooms and facilities. The first plaintiff was compelled to appear on the second floor of a courthouse to answer to criminal charges against him. Because there were no elevators or ramps at the courthouse, he was forced to crawl up the stairs to reach the courtroom. On his second visit, he refused to crawl up the stairs and was then arrested and jailed for failure to appear. The second plaintiff was a court reporter who had been unable to enter several county courtrooms because they were not accessible by wheelchair. As a result, she was denied several opportunities to work and participate in the judicial process.

The state argued that its Eleventh Amendment immunity, also referred to as sovereign immunity, prevented the plaintiffs from taking any action against it for monetary damages. When considering this claim, the Supreme Court first pointed out that Congress had clearly intended to abrogate states' Eleventh Amendment immunity when it enacted Title II of the ADA and thus, the real issue was whether Congress had

the authority to abrogate immunity. The Supreme Court held that Congress had unquestionably acted within its scope of powers when it enacted Title II, as Section 5 of the Fourteenth Amendment gives Congress the power to take appropriate steps to protect the public's constitutional rights. This includes the First Amendment right to access criminal proceedings and the Sixth Amendment right for a criminal defendant to be present at all stages of his or her trial. The Court underscored the validity of Title II as a response to a long history of discrimination against people with disabilities in the criminal justice system, emphasizing that its holding applied only to the "class of cases implicating the accessibility of judicial services."[106]

Since *Lane*, the right of individuals in both criminal and civil cases to bring an action against states or government entities for ADA violations has been widely acknowledged. However, because the *Lane* holding was limited to class of the cases involving the accessibility of judicial services, it sparked a new debate among individuals and government entities over which proceedings fall into that category. In *Prakel v. Indiana*, a criminal defendant's son brought an action against the state of Indiana for denying him access to his mother's criminal proceedings.[107] The plaintiff was deaf and used ASL as his primary language. In order to participate in and understand his mother's pretrial hearings, he made multiple requests for interpreters in advance of the hearings. All of his requests were denied, and as a result he was forced to choose between being absent from the proceedings or personally paying for an interpreter. The proceedings included a fact-finding hearing, a sentencing hearing, and a hearing to address his request for a sign language interpreter. The defendants argued that the hearings Prakel wanted to attend did not fall into the category of "judicial services" because they were not part of formal trial proceedings. The court disagreed, noting that the Rehab Act's definition of "services, programs, and activities" as "all of the operations of…a local government" has also been applied to the ADA.[108] Accordingly, the *Prakel* court held that any public judicial proceeding or trial falls under the category of a judicial service and must be accessible to people with disabilities.

Moreover, because the plaintiff in *Prakel* was a spectator rather than a criminal defendant, the case also raises the question of exactly whose rights are protected by the ADA. Title II states that "[a] public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others."[109] Still, the *Prakel* defendants denied Prakel's request for a sign language interpreter partially on the basis that it was their court's practice to provide interpreters exclusively for witnesses and defendants during criminal proceedings. When determining whether the plaintiff was a qualified individual under the ADA, the court relied again on the U.S. Supreme Court's holding in *Lane*, recognizing that all members of the public have the right to participate in criminal proceedings. It also pointed out that the plain language of Title II extends the right to fully participate in public services, programs, and activities to members of the public, including spectators at criminal proceedings. While members of

the public continue to face problems accessing judicial proceedings, cases like Lane and *Prakel* have helped to firmly establish the right of *all* people to participate in *every* stage of criminal proceedings.

Yet there are circumstances when a person with a disability does not have standing to sue a public entity. The Seventh Circuit recently confronted this issue in Hummel v. St. Joseph County Bd. of Commissioners.[110] In that case, several plaintiffs with cases pending in state court sued the city of South Bend, Indiana, under the ADA for failure to provide a wheelchair-accessible courthouse and parking lot. However, by the time the case made it to district court, none of the original plaintiffs had cases pending in the county. Consequently, the district court dismissed those plaintiffs' claims for lack of standing. Two of the remaining plaintiffs' claims involved lack of access to parking during snow removal periods; these cases were also dismissed as speculative because the plaintiffs could not show that the parking regulations were likely to harm them in the future. Finally, the remaining claims were dismissed after the city voluntarily remodeled the buildings in question to make them accessible. The Hummel case is a reminder to litigants that to seek damages or injunctive relief, plaintiffs must either have clear evidence of past injury or be able to establish that a "real and immediate threat" exists as a result of a non-ADA-compliant courthouse .[111]

VI. Interplay Between Disability and Constitutional Provisions

While this legal brief focuses on the ADA and the Rehab Act, it is important to remember that people with disabilities have rights and governmental entities have responsibilities under the U.S. Constitution as well. This section offers a brief overview of some of the applicable constitutional principles, including the First, Fourth, Fifth, Eighth and Fourteenth Amendments.

The First Amendment, in relevant part, prohibits any laws impeding on the free exercise of religion and abridging the freedom of speech.[112] One issue discussed in the courts is whether prisoners have a First Amendment right to telephone access and, if so, how that applies to inmates with communication-related disabilities who require alternate telephone access. While certain circuits have determined that prisoners have a First Amendment right to telephone access,[113] other circuits have been reluctant to reach that conclusion.[114] However, even when courts recognize this right, plaintiffs must demonstrate that the denial is for more than isolated instances. For instance, in *Heyer v. U.S. Bureau of Prisons*, two deaf inmates sued the U.S. Bureau of Prisons on several counts, including their right to free speech under the First Amendment.[115] The plaintiffs alleged that their access to the TTY is consistently delayed or restricted, but the court held that these were isolated instances and as such, did not violate the Constitution.

Inmates, including those with disabilities, have a First Amendment right to practice their religion, and this is another common issue litigated in the courts. In *Hernandez v. County of Monterey*, the court found that the County had violated both the ADA and the First Amendment by offering religious services "in a location inaccessible to inmates who cannot climb stairs, excluding such inmates from those programs."[116]

The Fourth Amendment also comes into play in certain cases given its prohibition against unreasonable searches and seizures.[117] Cases regarding excessive force during an arrest, stop or other seizure are interpreted under the Fourth Amendment. Police officers must be on notice that their conduct is unlawful,[118] and as discussed supra, the U.S. Supreme Court has yet to definitely state whether law enforcement has a duty to accommodate its approach to effectuating an arrest or other confrontations with individuals with mental illness or other disabilities.[119]

The Eighth Amendment prohibits the government's use of cruel and unusual punishment.[120] The exhibiting of cruel and unusual punishment on individuals with disabilities most often arises in pretrial detention or in prisons after a conviction. The U.S. Supreme Court has stated that, unlike other constitutional provisions, the Eighth Amendment should be interpreted in light of "evolving standards of decency that mark the progress of a maturing society,"[121] and therefore the inmate must prove that "the risk of which he complains is not one that today's society chooses to tolerate."[122] An example of how this may manifest is when an inmate with a disability claims to have deficient medical care. For an inmate to state a claim for cruel and unusual punishment based on inadequate medical care, he must allege a serious medical condition and a prison official's deliberate indifference to that condition.[123] Courts have held that deliberate indifference can be shown through inaction after the informing of the prison of the problem.[124] For instance, in *Holmes v. Godinez*, 311 F.R.D. 177, 228 (N.D. Ill. 2015), the court permitted a class of deaf and hard of hearing inmates' case to proceed based on claims that due to the provision of appropriate auxiliary aids and services, plaintiffs were denied appropriate medical care.[125]

Another claim under the Eighth Amendment's prohibition on cruel and unusual punishment claim is the "long-term denial of outside exercise."[126] Exercise is considered a basic human necessity and therefore, protected by the Eighth Amendment.[127] This type of deprivation can be particularly important for those individuals with a disability. If an inmate cannot access outside or inside exercise location due to barriers, his Eighth Amendment and ADA rights may be violated. In *Hernandez*, the court stated that a prison's "exclusion of inmates with disabilities from outside exercise . . . violates the Eighth Amendment" as well as the ADA.[128]

Further, the Fifth and Fourteenth Amendment prohibit the federal and state governments alike from depriving a person of life, liberty, or property without due process of law.[129] A denial of due process can manifest throughout the criminal justice

system for persons with disabilities in many ways, including during criminal proceedings or during disciplinary investigations and hearings while incarcerated.[130] For example, in *Bonner v. Arizona Dep't of Corrections*, the court held that a deaf inmate's due process rights were violated because he was not provided a qualified sign language interpreter during a disciplinary hearing.[131] In so doing, it stated: "[T]o require a deaf, mute, and vision-impaired inmate to navigate through this legal miasma without a qualified interpreter certainly would not comport with the department's stated goal of accomplishing discipline with 'dignity, reason, and humaneness.'"[132]

VIII. Conclusion

Non-discrimination in the field of criminal justice is crucially important to all individuals, including people with disabilities. The power of the criminal justice system is great, and the impact of an individual's exposure to the criminal justice system is long-lasting. While various legal remedies exist, it is important for people with disabilities and their advocates to understand their rights under the ADA and the Rehab Act, just as it is critical for those working within the criminal justice system to understand their responsibilities.

Notes

1. This legal brief was written by Barry C. Taylor, Vice President of Systemic Litigation and Civil Rights, Rachel M. Weisberg, Staff Attorney with Equip for Equality, the Illinois Protection and Advocacy Agency (P&A). The authors would like to thank Jennifer James, Equip for Equality PILI Fellow, Brian Phelps, Equip for Equality PILI Fellow, Lauren Latterell Powell, Equip for Equality Legal Intern, and James Naughton, Equip for Equality Legal Intern, for their valuable assistance with this Legal Brief. Equip for Equality is providing this information under a subcontract with the Great Lakes ADA Center.
2. Jennifer Bronson & Laura Maruschak, *Disabilities Among Prison and Jail Inmates, 2011-12*, BUREAU OF JUST. STATISTICS (Dec. 2015), http://www.bjs.gov/content/pub/pdf/dpji1112.pdf.
3. 42 U.S.C. §§ 12131–12134 (2016) (Title II of the ADA); 29 U.S.C. § 794 (2016) (Section 504 of the Rehabilitation Act).
4. Title II of the ADA states: "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 (2016).
5. Section 504 of the Rehabilitation Act states: "No otherwise qualified individual with a disability in the United States …shall, solely by reason of her or his disability, be

excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance..." 29 U.S.C. § 794(a) (2016).

6. 42 U.S.C. § 12132 (2016); 29 U.S.C. § 794(a) (2016).
7. 28 C.F.R. § 35.160(b) ("A public entity shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.").
8. 28 C.F.R. § 35.130(b)(7) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.").
9. 28 C.F.R. § 35.149.
10. 28 C.F.R. § 35.130(d) (A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.").
11. *Commonly Asked Questions about the Americans with Disabilities Act and Law Enforcement*, DEPT. OF JUST., www.ada.gov/q&a_law.htm (last visited Aug. 29, 2016) [hereinafter *Commonly Asked Questions*].
12. Statement of Interest of the United States, *Robinson v. Farley*, 15-cv-00803 (D.D.C. filed June 20, 2016) www.ada.gov/briefs/robinson_soi.pdf (last visited Sept. 13, 2016.
13. *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000).
14. *Id.* at 797.
15. *Id.* at 801.
16. *Lynn v. City of Indianapolis*, 2014 WL 3535554 (S.D. Ind. July 16, 2014) (citing *Sallenger v. City of Springfield*, 2005 WL 2001502, *30-31 (C.D. Ill. Aug. 4, 2005)).
17. *See, e.g., Bircoll v. Miami–Dade County,* 480 F.3d 1072, 1085 (11th Cir. 2007) (holding that "the question is not so much one of the applicability of the ADA because Title II prohibits discrimination by a public entity by reason of [a person's] disability. The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance."); *Gohier v. Enright,* 186 F.3d 1216, 1221 (10th Cir.1999) (concluding that "a broad rule categorically excluding arrests from the scope of Title II ... is not the law."). *See also Waller ex rel. Estate of Hunt v. City of Danville,* 556 F.3d 171, 175 (4th

Cir.2009) ("Just as the constraints of time figure in what is required of police under the Fourth Amendment, they bear on what is reasonable under the ADA."); *Tucker v. Tennessee,* 539 F.3d 526, 534 (6th Cir.2008) (addressing a Title II reasonable accommodation claim in which the plaintiffs asserted that police officers "discriminated against them in violation of the ADA by failing to provide a qualified sign language interpreter or other such reasonable accommodation(s) during the domestic disturbance call that resulted in their arrest").

18. *Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211 (9th Cir. 02014), *cert. granted sub nom. City & Cty. of San Francisco, Cal. v. Sheehan*, 135 S. Ct. 702, 190 L. Ed. 2d 434 (2014), and *rev'd in part, cert. dismissed in part sub nom. City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015).
19. *Id.* at 1232-33.
20. *Sheehan v. City & Cty. of San Francisco*, 2011 WL 1748419 (N.D. Cal. May 6, 2011).
21. *Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014).
22. *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1772, 191 L. Ed. 2d 856 (2015).
23. *Id.* at 1774.
24. Br. For the United States as Amicus Curiae at 9-17, *Sheehan v. City & Cty. of San Francisco*, No. 13-1412 (S.Ct. Jan. 16, 2015), https://www.justice.gov/sites/default/files/crt/legacy/2015/01/21/sheehansctbrief.pdf
25. 28 C.F.R. § 35.160(b).
26. *Williams v. City of New York*, 121 F.Supp.3d 354 (S.D.N.Y. 2015).
27. *Id.* at 359, 364.
28. *Williams v. City of New York*, 12-cv-6805, Dkt. No. 103 (S.D.N.Y. settlement signed October 27, 2015).
29. *Bircoll v. Miami-Dade County*, 480 F.3d 1072 (11th Cir. 2007).
30. *Id.* at 1086.
31. *Valanzuolo v. City of New Haven*, 972 F.Supp.2d 263 (D. Conn. 2013).
32. *Settlement Agreement between the Dep't of Just. And the City of Columbia, South Carolina Police Department under the Americans with Disabilities Act*, ADA.GOV, (April 18, 2016), www.ada.gov/columbia_pd/columbia_pd_sa.html.
33. www.ada.gov/columbia_pd/columbia_pd_sa_attb.html
34. www.ada.gov/columbia_pd/columbia_pd_sa_atta.html
35. www.ada.gov/columbia_pd/columbia_pd_sa_attc.html

36. *See Clem v. Corbeau*, 284 F.3d 543 (4th Cir. 2002) (suspect with mental illness had a clearly established right to be free from police officer's use of deadly force in excessive force case); *Barker v. City of Boston*, 795 F.Supp.2d 117 (D. Mass. 2011) (dismissing Section 1983 case alleging that inadequate police training in dealing with mental illness led to plaintiff's death); *Armstrong v. Village of Pinehurst*, 810 F.3d 892, 900, 910 (4th Cir. 2016) (permitting an excessive force case to proceed where police, in executing an involuntary commitment order, used a taser five times in two minutes when the decedent was an "out-numbered mentally ill individual who [was] only a danger to himself," contrasting this case to one where an individual has committed a crime or poses a threat to the community," and emphasizing police must "de-escalate the situation and adjust the application of force downward"); *Hillstrom v. Pierce County*, 2015 WL 9500838 (W.D. Wash. Feb. 3, 2015) (Verdict and Settlement Summary) (describing settlement requiring $750,000 payment and training resolving in excessive force case following the death of an individual with mental illness); *Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010) (rejecting claim that taser was needed during traffic stop because officer perceived the plaintiff to have a mental illness; instead, stating that office should have "made greater effort to take control of the situation through less intrusive means").
37. 28 C.F.R. § 35.130(b)(7).
38. *Estate of Saylor v. Regal Cinemas, Inc.*, 54 F.Supp.3d 409 (D. Md. 2014).
39. *Id.* at 414.
40. Excessive force cases have also been brought on behalf of individuals with development disabilities. *See*, *e.g.*, *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004) (affirming $900,000 jury verdict in excessive force case following the death of a suspect with autism noting that "the diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force exerted").
41. *Estate of Saylor*, 54 F.Supp.3d at 424-25.
42. *Id.* at 425.
43. *Id.* at 426-27.
44. *Id.* at 427.
45. *Estate of Saylor v. Regal Cinemas, Inc.*, 13-cv-03089, 2016 WL 4721254, at *1 (D. Md. Sept. 9, 2016).
46. *See, e.g.*, *Gohier v. Enright*, 186 F.3d 1216, 1221-22 (10th Cir. 1999).
47. H.R.Rep. No. 101–485, pt. III (1990), *reprinted in* 1990 U.S.C.C.A.N. 445.
48. *Buben v. City of Lone Tree*, 2010 WL 3894185, *10–12 (D. Colo. Sept. 30, 2010).
49. *Id.* at *1.

50. *Id.* at *12 (internal citations omitted).
51. *See Buchanan v. Maine*, 469 F.3d 158, 177 (1st Cir. 2006) ("An argument that police training, which was provided, was insufficient does not present a viable claim that [plaintiff] was "denied the benefits of the services ... of a public entity" by reason of his mental illness, as required under 42 U.S.C. § 12132") (internal citations omitted).
52. *Sanders v. City of Minneapolis*, 474 F.3d 523, 527 (8th Cir. 2007) (declining to determine whether to find a cause of action for failure to train under the ADA); *Thao v. City of Saint Paul*, 481 F.3d 565, 567-68 (8th Cir. 2007) (same).
53. *Waller ex rel. Estate of Hunt v. Danville*, *VA*, 556 F.3d 171, 177 (4th Cir. 2009).
54. *Jones v. Lacey*, 108 F.Supp.3d 573 (E.D. Mich. 2015).
55. *Id.* at 578.
56. *Id.* at 579.
57. Cases discussed throughout this section demonstrate the critical importance of effective training for law enforcement personnel. Indeed, the DOJ has noted that training is one of the best ways to avoid common problems." *Commonly Asked Questions*, *supra* note 11. Various police departments across the country have implemented crisis intervention training and created crisis intervention teams, which allow officers in the field to access a mental health professional for advice and the mental health officer can activate services to get someone back on needed medication, contact homeless shelters for the individual, or address issues for homeless veterans. *An Integrated Approach to De-Escalation and Minimizing Use of Force*, POLICE EXECUTIVE RESEARCH FORUM, (2012), www.policeforum.org/assets/docs/Critical_Issues_Series/an%20integrated%20approach%20to%20de-escalation%20and%20minimizing%20use%20of%20force%202012.pdf.
58. *See About a Third of Prison and Jail Inmates Reported a Disability in 2011-12*, BUREAU OF JUSTICE STATISTICS, (2015), http://www.bjs.gov/content/pub/press/dpji1112pr.cfm; see also *Correctional Populations in the United States, 2014*, BUREAU OF JUSTICE STATISTICS, (2015) http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5519.
59. *Yeskey v. Pennsylvania Department of Corrections*, 524 U.S. 206, 213 (1998).
60. However, it is worth noting that inmates' opportunities to recovery are limited by the Prison Litigation Reform Act, which requires prisoners to exhaust administrative remedies before filing in federal court. See 42 U.S.C. § 1997e.
61. *Pierce v. County of Orange*, 526 F.3d 1190, 1220 (9th Cir. 2008).
62. *Id.* at 1217-18.
63. *Jaros v. Illinois Dept. of Corrections*, 684 F.3d 667, 672 (7th Cir. 2012).

64. *Clemons v. Dart*, 2016 WL 890697 (N.D. Ill. Mar. 9, 2016).
65. *Id.* at *6.
66. *Id.*
67. *Wright v. New York State Department of Corrections*, 2016 WL 4056036 (2nd Cir. July 29, 2016).
68. *Id.* at *6-7.
69. *Id.* at *7.
70. *Reaves v. Department of Corrections*, 2016 WL 4124301 (D. Mass July 15, 2016).
71. *Id.* at *29.
72. *Id.* at *28.
73. *Henderson v. Thomas*, 289 F.R.D. 506, 509 (M.D. Ala. 2012).
74. Arian Campos-Flores, "Alabama to End Segregation of HIV-Positive Inmates," *Wall Street Journal*, September 30, 2013.
75. *Justice Department Finds that Nevada Discriminates Against Inmates with HIV and Inmates with Other Disabilities*, June 20, 2016, U.S. DEP'T OF JUST.., www.justice.gov/opa/pr/justice-department-finds-nevada-discriminates-against-inmates-hiv-and-inmates-other; Letter of findings: https://www.ada.gov/briefs/ndoc_lof.docx
76. *Pierce v. County of Orange*, 526 F.3d 1190, 1221 (9th Cir. 2008)
77. *Pierce v. DC*, 128 F. Supp. 3d 250 (D.D.C. 2015).
78. *Id.* at 272.
79. *See Bearden v. Clark Cty.*, 2016 WL 1158693 (W.D. Wash. Mar. 24, 2016); *Holmes v. Godinez*, 311 F.R.D. 177, 228 (N.D. Ill. 2015).
80. *Holmes*, 311 F.R.D. at 228.
81. *Durrenberger v. Tex. Dep't of Crim. Justice*, 757 F. Supp. 2d 640, 656 (S.D. Tex. 2010).
82. *Second Report and Order and Third Further Notice of Proposed Rulemaking*, NAT'L DISABILITY RIGHTS NETWORK AND NAT'L ASSOC. OF THE DEAF (Jan. 19, 2016), www.ndrn.org/images/Documents/Issues/Juvenile_Justice/FCC_Comment_NDRN_NAD_FINAL_FOR_FILING.pdf.
83. National Association of the Deaf, Landmark Settlements Reached in Maryland and Kentucky for Deaf Prisoners, June 8, 2015, https://nad.org/news/2015/6/landmark-settlements-reached-maryland-and-kentucky-deaf-prisoners.
84. *See e.g.*, *Briefing Paper: The Dangerous Overuse of Solitary Confinement in the United States*, ACLU (2014), www.aclu.org/stop-solitary-briefing-paper.

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108. *Id.* at 682.

109. 28 C.F.R. § 35.160 (2016).

110. *Hummel v. St. Joseph Cty. Bd. of Comm'rs*, 817 F. Supp. 3d 1010 (7th Cir. 2016).

111. *Id.* at 1017 (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 95 (1983)).

112. U.S. Const. amend. I.

113. *Johnson v. California*, 207 F.3d 650, 656 (9th 2000).

114. *Arsberry v. Illinois*, 244 F.3d 558, 564–68 (7th Cir.2001); *Boriboune v. Litscher*, 91 F. App'x 498, 499 (7th Cir. 2003).

115. *Heyer v. U.S. Bureau of Prisons*, 2015 WL 1470877 (E.D. N.C. 2015).

116. Hernandez v. County of Monterey, 110 F.Supp.3d 929, 954 (N.D. Cal. 2015). *See also Burgess v. Goord*, 1999 WL 33458 (S.D.N.Y. 1999) (permitting First Amendment claim to proceed where inmate could not attend religious services due to the prison's requirement that he use the stairs).

117. U.S. Const. amend. IV.

118. *Sauicer*, 533 U.S. at 207.

119. *See supra* discussion regarding *City of San Francisco v. Sheenan*, 135 S.Ct. 1765 (2015).

120. U.S. Const. amend. VIII.

121. *Atkins v. Virginia*, 536 U.S. 304 (2002).

122. *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

123. *Wilson v. Seiter*, 501 294, 296 (1991); *Estelle v. Gamble*, 429 U.S. 97 (1976).

124. *Montalvo v. Koehler*, 1992 WL 396220 at *5 (S.D. N.Y. 1992).

125. *Holmes v. Godinez*, 311 F.R.D. 177 (N.D. Ill. 2015).

126. *LeMaire v. Maass*, 12 F.3d 1444, 1457–58 (9th Cir. 1993). *See also Pierce v. County of Orange*, 526 F.3d 1190, 1212 – 13 (holding that pretrial detainees denial of exercise if a violation of a prisoner's rights).

127. *Id.*

128. *Hernandez*, 110 F.Supp.3d at 954.

129. U.S. Const. amend. V (restricting the federal government); U.S. Const. amend. XIV (restricting state governments).

130. "There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555–56, (1974). *Scruggs v. Jordan*, 485 F.3d 934, 939 (7th Cir. 2007) (citing *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)) (To allege one's due process rights were violated during a disciplinary hearing in prison, an inmate must establish that: "(1) he has a liberty or property interest that the state has interfered with; and (2) the procedures he was afforded upon that deprivation were constitutionally deficient.").

131. *Bonner v. Arizona Dep't of Corrections*, 714 F. Supp. 420, 425 (D. Ariz. 1989).

132. *Id.* at 425-26.