NOTE

Policing Reasonable Accommodations for Individuals with Disabilities

Kelley B. Harrington[*]

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 J.D. Candidate 2017, University of California, Davis School of Law; M.A., Ed.S. 2010 (Educational Psychology), University of Minnesota; B.A. 2007, University of Michigan. I would like to thank Professor Jasmine Harris for her invaluable assistance and insight; and the editors and members of the *UC Davis Law Review* for their thoughtful feedback and skillful editing.

INTRODUCTION

During the 2015 term, many in the legal field expected the Supreme Court to answer an important question: does the Americans with Disabilities Act ("ADA") require law enforcement officers to provide reasonable accommodations to an individual with a mental disability, and if so, under what circumstances?[1] To the disappointment of many, the Court did not address this question, but instead concluded that the question was improvidently granted.[2] *City & County of San Francisco, California v. Sheehan* involved the near-fatal shooting of Teresa Sheehan, a woman who resided in a group home, suffered from schizoaffective disorder, and was in need of medical support.[3] There, police responded to a call from a concerned social worker.[4] When the police arrived, they announced themselves and said they were there to help.[5] When Sheehan did not respond, the officers entered her room.[6] Sheehan then grabbed a kitchen knife, approached the officers and told them to get out.[7] The officers retreated and called for backup, but instead of waiting for reinforcements to arrive, they decided to reenter and try to subdue Sheehan.[8] They used pepper spray and had their weapons drawn.[9] However, Sheehan still did not drop the knife, so the officers shot her.[10]

During oral arguments, Justice Sotomayor articulated important questions concerning the purpose and scope of the ADA.[11] She first shared a concerning statistic that an estimated 350 people who suffer from mental illness are shot and killed by police officers each year.[12] In response to the City's argument that it was not reasonable to expect the police to make an accommodation, Sotomayor countered, raising

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[1] *See* City & Cty of S.F. v. Sheehan, 135 S. Ct. 1765, 1772-74 (2015); Lyle Denniston, Court to Rule on Disability Rights, Mercury Pollution, SCOTUSBLOG (Nov. 25, 2014, 1:39 PM), http://www.scotusblog.com/2014/11/court-to-rule-on-disabiity-rights-mercury-pollution/.

[2] *Sheehan*, 135 S. Ct. at 1768. Certiorari was granted with the understanding that San Francisco would argue the ADA does not apply to a dangerous individual, but San Francisco did not make this argument in their brief. *Id.*

[3] *Id.* at 1769.

[4] *Id.* at 1769-70.

[5] *Id.* at 1770.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 1770-71.

[9] *Id.* at 1771.

[10] *Id.*

[11] *See* Transcript of Oral Argument at 55-56, *Sheehan*, 135 S. Ct. 1765 (No. 13-1412).

[12] *Id.* at 55.

the idea that the ADA's intent may be to give individuals with mental illness a "chance" in worst-case scenarios.[13] Additionally, she pondered whether the ADA was intended to ensure that police officers attempt mitigation strategies before resorting to violence.[14] Sotomayor's words suggest that there should be an expectation for law enforcement to provide accommodations before using deadly force.[15]

Interactions between law enforcement and individuals with disabilities account for a shocking number of deaths each year, especially for those with mental illness.[16] Hundreds of individuals with mental illness are killed annually during police encounters.[17] One report estimates that individuals with mental illness are sixteen times more likely to be killed by law enforcement during a police incident than other civilians, and at least one in four of all fatal police encounters involve an individual with mental illness.[18] Often, those individuals are not making a conscious choice of violence, but instead may be resisting due to a lack of understanding or physical control.[19]

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[13] *Id.* at 54-55.

[14] *Id.*at 55-56.

[15] *See id.*; *see also* Cristian Farias, *Reasonable Accommodations: Do the Lives of the Mentally Ill Matter to the Supreme Court?*, SLATE (Mar. 25, 2015, 1:52 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/03/san_francisco_v_sheehan_supreme_court_case_police_shot_mentally_ill_woman.html (discussing how Justice Sotomayor added "legal realism — and humanity" into the *Sheehan* case).

[16] *See* TREATMENT ADVOCACY CTR., JUSTIFIABLE HOMICIDES BY LAW ENFORCEMENT OFFICERS: WHAT IS THE ROLE OF MENTAL ILLNESS? 6 (2013), http://www.treatmentadvocacycenter.org/storage/documents/2013-justifiable-homicides.pdf (stating that at least half of the people shot and killed by law enforcement each year have mental health problems); *Deadly Force: Police & the Mentally Ill*, PORTLAND PRESS HERALD, http://www.pressherald.com/interactive/maine_police_deadly_force_series_day_1/ (last visited Oct. 19, 2016) (reporting that in Maine, since 2000, 42% of the people shot by police and 58% of those who died from their injuries had mental health problems); Sandhya Somashekhar & Steven Rich, *Final Tally: Police Shot and Killed 986 People in 2015*, WASH. POST (Jan. 6, 2016), https://www.washingtonpost.com/national/final-tally-police-shot-and-killed-984-people-in-2015/2016/01/05/3ec7a404-b3c5-11e5-a76a-0b5145e8679a_story.html (stating that nearly a quarter of those killed by police officers in 2015 thus far were identified as mentally ill). The Washington Post is reporting similar statistics for those killed by police officers in 2016. *See Fatal Force*, WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings-2016/ (last visited Nov. 6, 2016).

[17] *See* sources cited *supra* note 16.

[18] DORIS A. FULLER ET AL., TREATMENT ADVOCACY CTR., OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS 1 (Dec. 2015), http://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf.

[19] *See* Harold Braswell, *Why Do Police Keep Seeing a Person's Disability as a Provocation?*, WASH. POST (Aug. 25, 2014), https://www.washingtonpost.com/posteverything/wp/2014/08/25/people-with-mental-disabilities-get-the-worst-and-

Others may be explicitly suicidal and looking for a way out.[20] But regardless of the underlying reason, many of these instances are similar to Teresa Sheehan's, where police responded to a call from a concerned friend or relative and the encounter resulted in the death or injury of a person with a disability.[21]

This Note argues that law enforcement personnel can and should make reasonable accommodations for disabled individuals, including those with mental disabilities.[22] Part I explores the background of the relevant statutes and case law involved in making a claim under Title II of the ADA.[23] Part II argues that the ADA applies to arrests and requires law enforcement to use reasonable accommodations for all individuals with disabilities, including mental disabilities.[24] It argues that the direct threat exception must only apply when there is substantial objective evidence to suggest so.[25] Part II also argues that there is insufficient guidance from the legislature, the Department of Justice and the courts about what constitutes a reasonable accommodation.[26]

Part III explores accommodations, modifications, and training available to accommodate those with disabilities.[27] Part IV argues for a comprehensive solution to these issues involving the justice system, as well as federal and state legislatures.[28] Finally, this Note concludes

least-recognized-treatment-from-police/; *see also* Leigh Ann Davis, *People with Intellectual Disabilities in the Criminal Justice Systems: Victims & Suspects*, ARC, http://www.thearc.org/document.doc?id=3664 (last visited Oct. 3, 2016).

[20] *See* Cleve R. Wootson Jr., *A Man Called Police to Help His Distressed Wife. They Wound Up Killing Her.*, WASH. POST (Oct. 18, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/10/17/shoot-me-shoot-me-kill-me-a-texas-woman-shouted-at-police-now-shes-dead/ (documenting the police shooting of a distraught woman who pointed a BB gun at law enforcement and told them to kill her); *see also* Kate Mather, *Daniel Enrique Perez, 16*, L.A. TIMES (Oct. 13, 2016), http://homicide.latimes.com/post/daniel-enrique-perez/ (documenting the police shooting of a suicidal teen who pointed a replica handgun at police officers and was subsequently shot and killed).

[21] *See 991 People Shot Dead by Police in 2015*, WASH. POST, http://www.washingtonpost.com/graphics/national/police-shootings/?tid=magnet (last visited Sept. 27, 2016) (documenting the stories of individuals with mental illness killed by the police in 2015); *Fatal Force*, WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings-2016/ (last visited Nov. 6, 2016).

[22] *See infra* Parts II–IV.

[23] *See infra* Part I.

[24] *See infra* Part II.

[25] *See infra* Part II.C.

[26] *See infra* Part II.

[27] *See infra* Part III.

[28] *See infra* Part IV.

that individuals with disabilities need more support from law enforcement, so changes and improvements must be made to properly accommodate all individuals with disabilities.[29]

I. BACKGROUND

A. The Americans with Disabilities Act

The ADA was enacted to combat discrimination against individuals with disabilities and provide enforceable standards for addressing discrimination.[30] It forbids discrimination against individuals with disabilities in major areas of life.[31] Under the ADA, an individual with a disability is defined as anyone with "a physical or mental impairment that substantially limits one or more major life activities."[32] This definition also includes those who have a history of being disabled or are regarded as disabled.[33] Title II of the ADA specifically addresses discrimination by public entities and prohibits those entities from excluding people with disabilities from participating in or enjoying the benefits of public services, programs, or activities.[34] Any department, agency, or instrumentality of a state or local government is considered a public entity.[35] Courts have interpreted the term public entity to encompass law enforcement as well.[36] Thus, the ADA governs the

[29] *See infra* CONCLUSION.

[30] 42 U.S.C. § 12101(b)(1-2) (2012); Bircoll v. Miami-Dade County, 480 F.3d 1072, 1081 (11th Cir. 2007); Delano-Pyle v. Victoria County, 302 F.3d 567, 574 (5th Cir. 2002).

[31] PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001); Fortyune v. Am. Multi-Cinema, Inc., 364 F.3d 1075, 1080 (9th Cir. 2004); *see* 42 U.S.C. § 12101(b)(1-4) (discussing the general purpose of the ADA).

[32] 42 U.S.C. § 12102(1)(A)–(C) (2012).

[33] *Id.*

[34] *Id.* § 12132 (2012).

[35] *Id.* § 12131(1)(B) (2012).

[36] *See* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 210 (1998). Although *Yeskey* specifically held that state prisons are a public entity under Title II of the ADA, the decision emphasized the broad language used by Congress in Title II's definition of a public entity and its choice not to include exceptions. *Id.* at 209-10. Thus, the *Yeskey* decision has been interpreted expansively to include law enforcement activities. *See, e.g.*, Seremeth v. Bd. of Cty. Comm'rs Frederick Cty., 673 F.3d 333, 338 (4th Cir. 2012) (finding that the ADA applies to police interrogations in light of *Yeskey*); Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998) (holding that a local police department falls within the ADA's statutory definition of public entity in light of *Yeskey*); Williams v. City of N.Y., 121 F. Supp. 3d 354, 368 (S.D.N.Y. 2015) (finding that law enforcement acting in an investigative or custodial capacity are within the scope of Title II); Schorr v. Borough of Lemoyne, 243 F. Supp. 2d 232, 238-39 (M.D. Pa. 2003) (holding that

behavior of government actors and provides an outlet for individuals with disabilities, like Teresa Sheehan, to seek relief.[37]

B. Department of Justice Regulations

Title II of the ADA grants the Department of Justice ("DOJ") the power to create and implement Title II regulations.[38] The DOJ regulations require public entities to make reasonable modifications to policies, practices, or procedures when necessary to avoid discrimination against individuals with disabilities.[39] There is an exception to this requirement if the entity can show that the modifications would fundamentally alter the nature of the service.[40] Additionally, a public entity's communication with individuals with disabilities must be as effective as the entity's communications with others.[41] The DOJ has issued technical assistance and policy guidance to aid public entities in complying with the requirements.[42] Recently, the DOJ published a statement of interest, stating that Title II applies to all law enforcement activities, including arrests.[43]

Although the DOJ regulations require each public entity to make reasonable accommodations to individuals with disabilities, the entity is not required to accommodate when there is a direct threat to the

involuntary commitment by police is an activity of a public entity); Calloway v. Boro of Glassboro Dep't of Police, 89 F. Supp. 2d 543, 554 (D.N.J. 2000) (holding that investigative questioning at the police station is an activity of a public entity). *See generally* Bircoll v. Miami-Dade Cty., 480 F.3d 1072, 1083-84 (11th Cir. 2007) (acknowledging that law enforcement is a public entity under the ADA's Title II).

[37] *See* 28 C.F.R. §§ 35.170–178 (2016). Individuals may file a complaint with the Department of Justice or pursue a private action.

[38] *See* 42 U.S.C. § 12134(a) (2012).

[39] 28 C.F.R. § 35.130(b)(7) (2016).

[40] *Id.*

[41] *See id.* §§ 35.160–35.163.

[42] *See The Americans with Disabilities Act: Title II Technical Assistance Manual*, ADA.GOV, http://www.ada.gov/taman2.html (last visited Sept. 27, 2016); *see also* Disability Rights Section, U.S. DEP'T OF JUSTICE, *Commonly Asked Questions About the Americans with Disabilities Act and Law Enforcement*, ADA.GOV, http://www.ada.gov/qanda_law.pdf (last visited Sept. 27, 2016) [hereinafter *Commonly Asked Questions*] (providing information on the ADA in a manner easily understood to consumers and public entities); Disability Rights Section, U.S. Dep't of Justice, *Communicating with People Who Are Deaf or Hard of Hearing: ADA Guide for Law Enforcement Officers*, ADA.GOV (Jan. 2006), http://www.ada.gov/lawenfcomm.htm [hereinafter *Communicating with People*].

[43] Statement of Interest of the United States of America at 1, Williams v. City of N.Y. (S.D.N.Y. 2015) (12 Civ. 6805 (VEC)), http://www.ada.gov/enforce_current.htm#TitleII.

health or safety of others.[44] A direct threat is defined as "a significant risk to the health or safety of others that *cannot* be eliminated by a modification of policies, practices or procedures."[45] Public entities are required to make an individualized and objective assessment to determine the following: "the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk."[46] Finally, a public entity may impose safety requirements for the operation of services, programs or activities, but the safety requirements must be "based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities."[47]

C. The Fourth Amendment Reasonableness Standard

In addition to an ADA claim, individuals often bring Fourth Amendment claims against law enforcement agencies.[48] Protections for both individuals with disabilities and law enforcement officers are found in the Fourth Amendment.[49] The Fourth Amendment requires that searches be reasonable in nature,[50] and the use of force during a search is subject to a reasonableness standard.[51] To determine whether

[44] 28 C.F.R. § 35.139(a) (2016).

[45] *Id.* § 35.104(4) (emphasis added).

[46] *Id.* § 35.139(b).

[47] *Id.* § 35.130(h).

[48] *See, e.g.*, City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1768 (2015) (noting that Sheehan brought both a Title II claim and a Fourth Amendment claim); Waller v. City of Danville, 556 F.3d 171, 173-74 (4th Cir. 2009) (noting that Waller brought both a Title II claim and a Fourth Amendment claim); Gohier v. Enright, 186 F.3d 1216, 1217 (10th Cir. 1999) (noting that Gohier brought both a Title II claim and a Fourth Amendment claim).

[49] Fourth Amendment standards apply to a plaintiff's Section 1983 claim of excessive force, when the use of force is a seizure. Graham v. Connor, 490 U.S. 386, 394 (1989). But, a qualified immunity defense is available to police officers in claims of excessive force. Saucier v. Katz, 533 U.S. 194, 197 (2001). *See generally* Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261 (2003) (discussing how courts have balanced the interests of protecting individuals with disabilities from excessive force with protecting police officers from liability for "split-second" decision making in the line of duty).

[50] United States v. Knights, 534 U.S. 112, 118-19 (2001); United States v. McHugh, 639 F.3d 1250, 1260 (10th Cir. 2011); United States v. Alabi, 943 F. Supp. 2d 1201, 1231 (D.N.M. 2013).

[51] *Graham*, 490 U.S. at 395.

the use of force during a search was reasonable, a court must balance the nature and quality of the intrusion on the individual's Fourth Amendment rights against the government interests at stake.[52] The test is objective and based on whether the officers' actions were reasonable in light of the circumstances.[53] Its application requires "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[54]

The Supreme Court has held that individuals have a right to retreat into their own home and "be free from unreasonable governmental intrusion."[55] Indeed, in the *Sheehan* case Teresa Sheehan was in her own home — her room — when law enforcement entered.[56] Thus, in considering qualified immunity for police officers, the courts must examine whether the officer's conduct violated a right and whether that right was clearly established at the time of the misconduct.[57] For the right to be clearly established, a clear warning must have been provided to police officers at the time of the incident that their conduct was unconstitutional.[58] Arguably, a warning was provided to the officers in *Sheehan* when there was no "objective need for immediate entry," although the Supreme Court ultimately determined that the entry and use of force was permissible.[59] Thus, although a court must consider a variety of factors when conducting a Fourth Amendment analysis, it may find the use of force during a search to be justified.

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[52] Plumhoff v. Rickard, 134 S. Ct. 2012, 2020 (2014); *Knights*, 534 U.S. at 119; *Graham*, 490 U.S. at 396.

[53] *Saucier*, 533 U.S. at 211; *Graham*, 490 U.S. at 397.

[54] *Saucier*, 533 U.S. at 205 (quoting *Graham*, 490 U.S. at 396); *Graham*, 490 U.S. at 396.

[55] Payton v. New York, 445 U.S. 573, 589-90 (1980) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

[56] City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1770 (2015).

[57] Tolan v. Cotton, 134 S. Ct. 1861, 1865-66 (2014).

[58] *Id.* at 1866.

[59] *Compare* Sheehan v. City & Cty. of S.F., 743 F.3d 1211, 1229 (9th Cir. 2014) (denying a claim for qualified immunity), *with Sheehan*, 135 S. Ct. at 1774 (finding that the officers were entitled to qualified immunity).

D. Case Law

Several federal cases have discussed the applicability of Title II to police arrests.[60] Title II claims for arrests have been addressed under two main theories: (1) the wrongful-arrest theory and (2) the reasonable accommodation during arrest theory.[61] The wrongful-arrest theory indicates that an ADA violation occurs when police have wrongfully arrested an individual with a disability, and the effects of the disability are misperceived as criminal activity.[62] The reasonable accommodation during arrest theory indicates that there is an ADA violation if police failed to reasonably accommodate the individual's disability during the course of investigation or arrest.[63]

The Supreme Court first held that a state prison is a public entity under Title II in *Pennsylvania Department of Corrections v. Yeskey*, where a prisoner was refused admission to a boot camp because of his medical history.[64] In its analysis, the Court concluded that even though the ADA did not expressly mention prisons, Title II is an unambiguous statute and thus, it could be applied to situations that were not anticipated by Congress.[65] Justice Scalia's opinion in *Yeskey* opened the door to later court decisions which interpreted Title II to include law enforcement activities. For example, in *Gorman v. Bartch*, the Eighth Circuit relied on *Yeskey* to hold that law enforcement agencies are public entities and an arrest is a program, activity or service under Title II.[66] Similarly, in *Gohier v. Enright*, the Tenth Circuit held that broadly excluding arrests from the scope of Title II is

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[60] *See generally* Roberts v. City of Omaha, 723 F.3d 966 (8th Cir. 2013) (applying a Title II claim to an arrest); Seremeth v. Bd. of Cty. Comm'rs Frederick Cty., 673 F.3d 333 (4th Cir. 2012) (applying a Title II claim to an arrest); Waller v. City of Danville, 556 F.3d 171 (4th Cir. 2009) (applying a Title II claim to an arrest); Gohier v. Enright, 186 F.3d 1216 (10th Cir. 1999) (discussing the applicability of Title II in the context of an arrest); Gorman v. Bartch, 152 F.3d 907 (8th Cir. 1998) (applying a Title II claim to an arrest).

[61] *Gohier*, 186 F.3d at 1220-21.

[62] *Id.* at 1220. *See generally* Rachel E. Brodin, Comment, *Remedying a Particularized Form of Discrimination: Why Disabled Plaintiffs Can and Should Bring Claims for Police Misconduct Under the Americans with Disabilities Act*, 154 U. PA. L. REV. 157, 161-63 (2005) (discussing the wrongful arrest theory).

[63] *Gohier*, 186 F.3d at 1220-21. *See generally* Brodin, *supra* note 62, at 164-65 (discussing the reasonable accommodation theory).

[64] Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 210 (1998).

[65] *Id.* at 211-12.

[66] Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998); *see Yeskey*, 524 U.S. at 210 (holding that a state prison is a public entity under Title II of the ADA).

not warranted.[67] And, in *Roberts v. City of Omaha*, the Eighth Circuit agreed that the ADA applies to officers taking disabled suspects into custody.[68]

In contrast, past decisions by the Fourth and Fifth Circuits have concluded that Title II does not apply to police officers in certain circumstances.[69] In *Hainze v. Richards*, the Fifth Circuit concluded that Title II does not apply to police officers' "on-the-street" responses, regardless of whether the individual has a mental disability.[70] There, the Fifth Circuit reasoned that Title II contains an exigent circumstances exception, which absolves public entities of the duty to provide reasonable accommodations in these circumstances.[71] In *Rosen v. Montgomery County, Maryland*, the Fourth Circuit also concluded that arrests were exempted from Title II based on the involuntary nature of the interaction.[72] However, many courts have disregarded *Rosen* since the *Yeskey* decision, finding that the voluntariness of participation in a government program, service, or activity is not a distinguishing factor that will exempt it from Title II's protection.[73] In 2009, the Fourth Circuit changed its course, recognizing a Title II claim in *Waller v. City of Danville*, where an individual with a mental illness held a woman hostage in an apartment, leading to a violent confrontation with police.[74] More recently, in *Seremeth v. Board of County Commissioners Frederick County*, the Fourth Circuit held that

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

[68] Roberts v. City of Omaha, 723 F.3d 966, 973 (8th Cir. 2013).

[69] *See, e.g.*, Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000) (holding that the ADA does not apply to an officer's "on-the-street" responses); Rosen v. Montgomery Cty. Md., 121 F.3d 154, 158 (4th Cir. 1997) (holding that the ADA does not apply to cases where there is a lack of any discernible harm).

[70] *Hainze*, 207 F.3d at 801. An "on-the-street" response refers to a police officer responding to a reported disturbance. In *Hainze*, the police responded to a call for a police transport to a mental health facility. Hainze had a history of depression, was under the influence of alcohol, carrying a knife, and threatening suicide. *Id.* at 797.

[71] *Id.* at 801.

[72] *See Rosen*, 121 F.3d at 157-58.

[73] *See* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 211 (1998); *see, e.g.*, Seremeth v. Bd. of Cty. Comm'rs Frederick Cty., 673 F.3d 333, 337 (4th Cir. 2012) (stating that courts across the country have questioned *Rosen's* holding in light of *Yeskey*); Thompson v. Davis, 295 F.3d 890, 897 (9th Cir. 2002), *cert. denied*, 583 U.S. 921 (2003) (noting that the court's reasoning in *Rosen* was discredited in *Yeskey*); Paulone v. City of Frederick, 787 F. Supp. 2d 360, 381 (D. Md. 2011) (calling into question courts reliance on *Rosen*); Calloway v. Boro of Glassboro Dep't of Police, 89 F. Supp. 2d 543, 556 (D.N.J. 2000) (stating that *Rosen's* reasoning is now discredited).

[74] *See* Waller v. City of Danville, 556 F.3d 171, 172 (4th Cir. 2009) (applying a Title II claim to an arrest).

the ADA applies to law enforcement investigations and rejected the Fourth Circuit's prior reasoning in *Rosen*, finding that *Rosen*'s precedential value is more properly limited to the fact that the plaintiff suffered no injury in that case.[75]

The opportunity to finally resolve this question came when the Supreme Court granted certiorari in the *Sheehan* case.[76] The Ninth Circuit had previously concluded that Title II does apply to arrests and that the reasonableness of an accommodation is a question of fact.[77] But ultimately, the Supreme Court determined that the officers in *Sheehan* were entitled to qualified immunity under the Fourth Amendment, leaving open the question of Title II's applicability to law enforcement activities.[78]

II. THE ADA'S TITLE II INCLUDES ARRESTS AND REQUIRES LAW ENFORCEMENT TO MAKE REASONABLE ACCOMMODATIONS

A. The Protections of Title II Extend to Law Enforcement Arrests

The correct interpretation of Title II includes law enforcement activities and, more specifically, arrests.[79] The plain language of the ADA requires a public entity to make reasonable modifications, unless a fundamental alteration or direct threat defense is raised.[80] The statutory text does not contain an exception excluding law enforcement as a covered entity within the meaning of Title II.[81] Thus, there should be no blanket exception excluding law enforcement's "on-the-street responses" from Title II's protection.[82]

The ADA's legislative history provides further support that Congress intended for Title II to apply to law enforcement activities.[83] In one House report, arrests were mentioned as an example of an activity where discriminatory treatment could be avoided with training.[84] Legislators

[75] *See Seremeth*, 673 F.3d at 337-38.

[76] City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1769 (2015).

[77] *Id.* at 1768.

[78] *Id.* at 1768-69.

[79] *See supra* Part I.

[80] *See supra* text accompanying notes 44–47.

[81] *See* 42 U.S.C. §§ 12131–12134 (2012).

[82] *See* Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000).

[83] *See, e.g.*, H.R. REP. NO.101-485, pt. 2, at 84 (1990) (noting that Title II applies to issues regarding communication between state and local agencies, including the police); 136 CONG. REC. 11,461 (1990) (noting Congressman Levine's assertions that the ADA should be applied to combat police discrimination).

[84] H.R. REP. NO.101-485, pt. 3, at 50.

also provided examples of deaf individuals and individuals with epilepsy who may have been inappropriately arrested due to improper training.[85] During congressional debates, Congressman Mel Levine noted that it is not uncommon for persons with disabilities to be mistreated by law enforcement.[86] Levine further argued that the mistreatment of persons with disabilities by law enforcement is in fact discrimination, just as forbidding entry to a store or restaurant would be.[87]

The DOJ has interpreted Title II to apply to "anything a public entity does."[88] This interpretation, along with the technical assistance documents created specifically for law enforcement, support the determination that law enforcement activities are covered by the ADA.[89] One document created by the DOJ discusses commonly asked questions about the ADA and law enforcement.[90] The document states that the ADA affects virtually everything officers do, including arrests, booking, and holding suspects.[91] And, as mentioned in Part I, the DOJ has argued that the ADA applies to law enforcement arrests.[92]

The court decisions outlined in Part I also support this conclusion.[93] Scholar Rachel Brodin commented on how *Pennsylvania Department of Corrections v. Yeskey* has opened the door for lower courts to apply the ADA to police officers' actions.[94] She argues that disabled plaintiffs, who bring claims under Title II for police officer arrests, will now find a friendlier response by courts than those pre-*Yeskey*.[95] In *Delano Pyle v. Victoria*, the Fifth Circuit acknowledged a claim under Title II of the ADA for a hearing impaired plaintiff, who argued that law enforcement failed to take his impairment into account when arresting him.[96] And, in *Mohney v. Pennsylvania*, a Pennsylvania District Court concluded that, based on previous court decisions and the ADA's legislative history, Title II is potentially applicable to arrests.[97]

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[85] 136 CONG. REC. 11,461.

[86] *Id.*

[87] *Id.*

[88] 28 C.F.R. § 35.102 (2016).

[89] *See supra* text accompanying note 42.

[90] *Commonly Asked Questions*, *supra* note 42.

[91] *Id.*

[92] *E.g.*, Statement of Interest of the United States at 11, Williams v. City of N.Y., 12 Civ. 6805 (VEC) (S.D.N.Y. 2015).

[93] *See supra* Part I.D.

[94] *See* Brodin, *supra* note 62, at 170-77.

[95] *Id.* at 177.

[96] Delano-Pyle v. Victoria Cty., 302 F.3d 567, 568 (5th Cir. 2002).

[97] Mohney v. Pennsylvania, 809 F. Supp. 2d 384, 400 (W.D. Pa. 2011).

This conclusion was also acknowledged by the City of San Francisco in the recent *Sheehan* case.[98] In its original petition to the Supreme Court, the City argued that Title II of the ADA does not apply to an officer's "on-the-street" responses and asked the Court to resolve a Circuit split about whether the ADA applies to police arrests.[99] In its brief however, the City chose to omit this argument and instead, explicitly stated "[t]here is no claim that an arrest is not one of the 'services, programs or activities' of a public entity" under Title II.[100] Thus, even the City ultimately conceded, in agreement with the Ninth Circuit, that arrests fall within the purview of the ADA.[101] Most recently, in *Williams v. City of New York,* the district court concluded that Title II applies to law enforcement acting in an investigative or custodial capacity.[102] Although plaintiffs still face the difficult task of prevailing on an ADA claim for police misconduct, given the recent stance taken by the DOJ and lower courts, it seems evident that Title II applies to law enforcement activities and arrests.[103]

B. The Law Presupposes that Law Enforcement Will Accommodate Those with Disabilities

With the understanding that Title II's protections apply to law enforcement arrests, individuals who are considered to be a "qualified individual with a disability" are entitled to reasonable modifications.[104] These modifications apply to the rules, policies, or practices of the public entity, and include "the removal of . . . communication, or transportation barriers, or the provision of auxiliary aids and services."[105] As discussed previously, the DOJ regulations require that public entities reasonably accommodate individuals with disabilities

[98] *See* Petitioners' Brief at 34, City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765 (2015) (No. 13-1412).

[99] *See* Petition for Writ of Certiorari at 19, 25-28 *Sheehan*, 135 S. Ct. 1765 (No. 13-1412) (quoting *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000)); *see also Sheehan*, 135 S. Ct. at 1772-73.

[100] Petitioners' Brief at 34, *Sheehan*, 135 S. Ct. 1765 (No. 13-1412); *see also Sheehan*, 135 S. Ct. at 1773 ("San Francisco's new argument effectively concedes that . . . the ADA . . . *may* 'requir[e] law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect . . . .'").

[101] *See supra* note 100 and accompanying text.

[102] Williams v. City of N.Y., 121 F. Supp. 3d 354, 368-69 (S.D.N.Y. 2015).

[103] *See supra* Part I.D.

[104] *See* 42 U.S.C. § 12131(2) (2012); *supra* Part I.B.

[105] 42 U.S.C. § 12131(2).

unless there is a direct threat to the health or safety of others.[106] The regulations provide that law enforcement must take appropriate steps to ensure that their communications with individuals with disabilities are as effective as their communications with others.[107] Law enforcement must also make modifications to avoid discrimination "on the basis of disability."[108]

Independent of Title II, state statutes identify the role of police officers in transporting disabled persons to mental health facilities.[109] For example, a California statute provides that when a mentally ill individual is a danger to themselves or others, a "peace officer . . . may, upon probable cause, take . . . the person into custody for a period of up to 72 hours for assessment, evaluation, and crisis intervention."[110] The act of transporting an individual with a disability into custody is to provide the individual with necessary supports and services.[111] The existence of statutes like this one are a reminder that police officers should be playing a supportive role to help individuals in crisis.

The Department of Justice ("DOJ") has provided some technical guidance to help law enforcement determine what types of situations may call for reasonable modifications.[112] Much of the information available discusses modifications for deaf individuals.[113] For example, an appropriate modification may be to handcuff a deaf arrestee's hands in front to allow the person to sign or write notes.[114] On the DOJ

106 *See supra* Part I.B.

107 *See* 28 C.F.R. § 35.160(a)(1) (2016).

108 *See id.* § 35.130(b)(7) (2016).

109 *See, e.g.*, ALASKA STAT. § 47.30.705 (2016) (emergency detention for evaluation); ARK. CODE ANN. § 20-47-210 (2016) (immediately confining dangerous persons); CAL. WELF. & INST. CODE § 5150 (2016) (dangerous or gravely disabled person; taking into custody; procedures); COLO. REV. STAT. § 27-65-105 (2016) (emergency procedure); CONN. GEN. STAT. § 17a-503 (2016) (detention by police officer prior to commitment).

110 WELF. & INST § 5150(a).

111 *See, e.g.*, Ford v. Norton, 107 Cal. Rptr. 2d 776, 777 (2001) (stating that section 5150 is intended to provide short-term intensive treatment, without stigma or loss of liberty, to individuals with mental disorders).

112 *See* Civil Rights Div., U.S. DEP'T OF JUSTICE, *Americans with Disabilities Act: Information for Law Enforcement*, ADA.GOV (Dec. 1, 2008), http://www.ada.gov/policeinfo.htm; *Commonly Asked Questions*, *supra* note 42; *Communicating with People*, *supra* note 42; Civil Rights Div., U.S. Dep't of Justice, *Model Policy for Law Enforcement on Communicating with People Who Are Deaf or Hard of Hearing*, ADA.GOV (Jan. 2006), http://www.ada.gov/lawenfmodpolicy.htm [hereinafter *Model Policy*].

113 *See* sources cited *supra* note 112.

114 *See Commonly Asked Questions*, *supra* note 42.

website, there is a model policy for communicating with deaf individuals, stating that officers should ask what type of aid or service is needed and defer to those choices, in the absence of an undue burden.[115] For individuals who have visual impairments, the DOJ suggests that officers read aloud any documents or instructions that are posted visually and describe the procedures in advance.[116]

The DOJ briefly addresses situations where an individual in crisis or suffering from a mental disability may require a modification.[117] A DOJ reference list of commonly asked question acknowledges that police officers should be trained to distinguish between behaviors that pose a real risk to health or safety and those that do not.[118] It states that officers should be able to recognize when someone is exhibiting signs of crisis and when those behaviors are the result of a disability.[119] But, compared with the amount of information available regarding deaf individuals, the amount of information about other physical and mental disabilities is substantially less.[120] Although the ADA protections should apply with equal force to all, intuitively it is much easier for law enforcement to recognize and accommodate those with a physical disability, visual impairment, or hearing impairment than a mental or developmental disability.[121] And as news media highlight, law enforcement desperately needs substantial training to comply with the ADA's requirements.[122]

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115 *See Model Policy*, *supra* note 112.

116 *See Commonly Asked Questions*, *supra* note 42.

117 *See id.*

118 *Id.*

119 *See id.*

120 *See* David A. Maas, *Expecting the Unreasonable: Why a Specific Request Requirement for ADA Title II Discrimination Claims Fails to Protect Those Who Cannot Request Reasonable Accommodations*, 5 HARV. L. & POL'Y REV. 217, 225-26 (arguing that law enforcement agencies would benefit from DOJ provisions addressing mental and developmental disabilities).

121 *See id.* at 223-26 ("[M]ental and developmental disabilities 'present a particular challenge in the context of police encounters, where misunderstood, socially atypical behavior may result in a dangerous situation for both the officer and the individual.'" (quoting Elizabeth Hervey Osborn, Comment, *What Happened to "Paul's Law"?: Insights on Advocating for Better Training and Better Outcomes in Encounters Between Law Enforcement and Persons with Autism Spectrum Disorders*, 79 U. COLO. L. REV. 333, 334 (2008))).

122 *See, e.g.*, Braswell, *supra* note 19 (discussing the need for improved police training); Liza Lucas, *Changing the Way Police Respond to Mental Illness*, CNN NEWS (July 6, 2015, 3:51 PM), http://www.cnn.com/2015/07/06/health/police-mental-health-training/ (discussing the need for police training on how to respond to individuals with mental illness); Ashley Luthern, *Ex-Milwaukee Officer Won't Be Charged in Dontre Hamilton Shooting,* MILWAUKEE-WIS. J. SENTINEL (Dec. 22, 2014), http://www.jsonline.

C. The Direct Threat Exception Only Applies When There Is a Significant Risk of Substantial Harm

When arresting individuals with disabilities, law enforcement entities do not enjoy categorical immunity from the ADA.[123] Federal law requires police officers to make reasonable modifications, but often rely on the direct threat exception to avoid doing so.[124] As discussed earlier, most courts now recognize that a plaintiff may make a claim under Title II, but if there is a direct threat to the health or safety of others, law enforcement are not required to make modifications.[125] Opponents argue that persons with a mental impairment who pose a direct threat to others are not "qualified" individuals within the meaning of the ADA and, thus, do not receive the ADA's protection.[126] For example, in *Sheehan*, the City of San Francisco argued that Title II does not require a public entity to permit an individual to participate in services when the person poses a direct threat to self or others.[127] In effect, the City tried to argue that an individual who poses a direct threat cannot be a qualified individual with a disability eligible for ADA accommodations.[128]

However, the showing of a direct threat is an individualized, fact-specific analysis.[129] There is no separate exigent circumstances exception

com/news/milwaukee/former-officer-wont-be-charged-in-fatal-shooting-of-dontre-hamilton-b99398655z1-286559211.html (discussing the Crisis Intervention Team training that Milwaukee police officers will receive as a result of the police officer shooting of Dontre Hamilton, an individual with schizophrenia).

123 *See* Seremeth v. Bd. of Cty. Comm'rs Frederick Cty., 673 F.3d 333, 336-39 (4th Cir. 2012) (concluding that the ADA applies to law enforcement's investigation of criminal conduct); Williams v. City of N.Y., 121 F. Supp. 3d 354, 363-64, 368 (S.D.N.Y. 2015) (supporting the interpretation that law enforcement officers acting within their "investigative or custodial capacity" are performing "services, programs, or activities" within the scope of Title II of the ADA). The anti-discrimination provisions of Title II are enforceable through an implied private right of action. Barnes v. Gorman, 536 U.S. 181, 185 (2002).

124 28 C.F.R. § 35.139(a) (2016) ("This part does not require a public entity to permit an individual to participate in . . . services, programs, or activities . . . when that individual poses a direct threat to the health or safety of others.").

125 *See id.*; *supra* Part II.A (discussing the applicability of Title II to arrests).

126 *See* Luthern, *supra* note 122.

127 City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1773 (2015).

128 *See id.*

129 *See e.g.*, Seremeth v. Bd. of Cty. Comm'rs Frederick Cty., 673 F.3d 333, 339-41 (4th Cir. 2012) (finding that due to the exigencies inherent in domestic violence situations, the deputies' accommodations were reasonable); *see* Bircoll v. Miami-Dade Cty., 480 F.3d 1072, 1085-86 (11th Cir. 2007) ("The reasonable-modification inquiry in Title II-ADA cases is 'a highly fact-specific inquiry.'") (quoting Holbrook v. City of Alpharetta, 112 F.3d 1522, 1527 (11th Cir. 1997); *see also* 28 C.F.R. § 35.139(b)

in the ADA.[130] Instead, the circumstances are part of the fact-based determination as to whether a modification is reasonable.[131] In order to conclude that a direct threat exists, a public entity must make an individualized assessment based on reasonable judgment and objective evidence.[132] As discussed previously, this objective evidence must rely on the nature, duration, and severity of the risk; the probability that injury will actually occur; and whether reasonable modifications in policies, practices, or procedures will mitigate that risk.[133]

One factor that generally weighs against the presence of a direct threat is that police officers are usually not required to make split-second decisions during field encounters.[134] Professor Michael Avery argues that courts rely too heavily on the excuse that officers are forced to make split-second decisions, and that this assumption is contrary to a police officer's training about thoughtful and deliberate decision-making.[135] For example, in *Sheehan*, the facts strongly suggest that the officers were not forced to make a quick decision.[136] There, the police officers retreated from Teresa Sheehan's room when she told them to get out.[137] They then had time to call for reinforcement and consider their next steps before re-entering Sheehan's room.[138] Similarly, in *Deorle v. Rutherford*, the Ninth Circuit determined that an officer had made a "calculated and deliberate decision" when he fired multiple shots at an individual with mental illness who was walking toward him.[139] The individual was unarmed and slowly walking toward the officer.[140] The officer had been at the scene for over half an hour before shooting the man and was able to observe the individual

(2016) (requiring a public entity to make an individualized assessment in determining whether an individual poses a direct threat).

130 *See Seremeth*, 673 F.3d at 339.

131 *See id.* ("[T]he consideration of exigent circumstances is included in the determination of the reasonableness of the accommodation.").

132 *See* 28 C.F.R. § 35.139(b) (2016).

133 *Id.*; *see supra* Part I.B.

134 *See* Avery, *supra* note 49, at 320-23 (arguing that police officer training minimizes the need for split-second decision making).

135 *Id.* ("The training given to police officers, when followed, minimizes the need for split-second decisions.").

136 *See* Brief for Respondent at 34, City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765 (2015) (No. 13-1412) ("[W]hen [the police officers] decided to reenter Sheehan's room, they had been on the scene for 26 minutes.").

137 *Sheehan*, 135 S. Ct. at 1770.

138 *See id.* at 1770-71.

139 Deorle v. Rutherford, 272 F.3d 1272, 1283 (9th Cir. 2001).

140 *See id.* at 1275.

and consult with others.[141] The court concluded that the officer had made a calculated and deliberate decision to shoot.[142] Given the circumstances, the officers in these situations could have made reasonable accommodations.[143]

Additionally, the direct threat exception should not be available in situations where the reason for the encounter relates specifically to the person's disability.[144] In *Sheehan*, the respondent argued that it does not make sense to apply a direct threat exception when an individual's emotional state is the reason for the interaction.[145] There, the service provided to the individual was involuntary, and the reason for providing the service was related to the individual's disability.[146] The police officers were aware that the individual may exhibit irrational or uncooperative behavior.[147] Thus, in *Sheehan*, the respondent argued that instead of a direct threat analysis, the "reasonableness" requirement under the Fourth Amendment is the appropriate analysis to apply when police respond to a call regarding an individual's mental illness.[148]

D. Police Officers Are Not Entitled to Qualified Immunity Where the Force Used Is Objectively Unreasonable

The other defense commonly used by law enforcement is that the force used to effect a particular seizure was reasonable under the Fourth Amendment.[149] If a police officer's fears are found to be

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[141] *Id.* at 1276-77.

[142] *Id.* at 1283.

[143] For example, the officers could have used a calm voice, maintained distance, and waited patiently instead of reacting in an aggressive manner. *See infra* Part III (discussing reasonable accommodations).

[144] *See* Brief for Respondent at 27-28, City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765 (2015) (No. 13-1412).

[145] *Id.*

[146] *Id.*

[147] *See id.*

[148] *See id.* at 29.

[149] *See, e.g.*, Champion v. Outlook Nashville, Inc., 380 F.3d 893, 895-96 (6th Cir. 2004) (holding that the officers' actions violated the decedent's clearly established rights); Deorle v. Rutherford, 272 F.3d 1272, 1282-85 (9th Cir. 2001) (holding that the officer's use of force violated the plaintiff's Fourth Amendment right to be free from unreasonable seizures); Ludwig v. Anderson, 54 F.3d 465, 472 (8th Cir. 1995) (reversing the district court's ruling that the officer's conduct was not objectionably unreasonable); Alexander v. City of S.F., 29 F.3d 1355, 1366 (9th Cir. 1994) (claiming that the decedent's Fourth Amendment rights were violated because the police used unreasonable force).

reasonable and the right in question is not clearly established, the qualified immunity doctrine will shield the officer from civil liability.[150] But, as mentioned in Part II.C, the court will use an objective test to determine whether the officer's actions were reasonable, in light of the circumstances.[151] The test requires attention to the facts of each case, including the severity of the crime, whether the suspect poses an immediate threat to others, and whether the suspect is actively resisting or attempting to evade arrest.[152] For example, in considering whether the use of deadly force is justified, the fact that a person is passively resisting and has not presented a threat of harm to others is not sufficient.[153] Nor is the use of deadly force justified where a person has a gun and is behaving in a dangerous manner.[154] The appropriate inquiry is whether the individual posed "such a threat that the use of deadly force was justifiable."[155]

Another relevant factor in assessing reasonableness is an individual's mental state.[156] Although some courts have failed to consider an individual's mental state,[157] others have found it relevant in assessing the reasonableness of force.[158] In *Pena v. Leombruni*, for example, the Seventh Circuit concluded that testimony regarding the plaintiff's mental state was irrelevant to the reasonableness of force used where the defendant picked up a chunk of concrete and advanced towards a police officer.[159] Other circuits have come to similar conclusions by

[150] *See* Tolan v. Cotton, 134 S. Ct. 1861, 1864-66 (2014); *see also* Pearson v. Callahan 555 U.S. 223, 231 (2009) (explaining that the doctrine of qualified immunity protects government officials from civil liability when their conduct does not violate clearly established rights).

[151] *See supra* note 51 and accompanying text.

[152] Graham v. Connor, 490 U.S. 386, 396 (1989).

[153] Williams v. Indiana State Police Dep't, 797 F.3d 468, 485 (7th Cir. 2015).

[154] *See* Cole v. Carson, 802 F.3d 752, 759-60 (5th Cir. 2015).

[155] *Id.* at 760.

[156] *See* Champion v. Outlook Nashville, Inc., 380 F.3d 893, 904 (6th Cir. 2004).

[157] *See, e.g.*, Wood v. City of Lakeland, 203 F.3d 1288, 1292-93 (11th Cir. 2000), *abrogated by* Hope v. Pelzer 536 U.S. 730 (2002); Pena v. Leombruni, 200 F.3d 1031, 1034 (7th Cir. 1999); Sova v. City of Mt. Pleasant, 142 F.3d 898, 900-03 (6th Cir. 1998).

[158] *See, e.g.*, *Champion*, 380 F.3d at 904-05 ("[W]here it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining . . . the reasonableness of the force employed." (quoting Deorle v. Rutherford, 272 F.3d 1272, 1283 (9th Cir. 2001))); Ludwig v. Anderson, 54 F.3d 465, 472 (8th Cir. 1995) ("[E]motionally disturbed status may be relevant to . . . determination of objective reasonableness . . . .").

[159] *Pena*, 200 F.3d at 1034.

failing to acknowledge whether officers should have considered the plaintiff's mental state before responding to the situation.[160]

However, in *Deorle v. Rutherford*, the Ninth Circuit held that when it is or should be apparent that an individual is emotionally disturbed, this information must be considered in determining the reasonableness of force used by police officers.[161] In *Deorle*, the court explained that threats and an increased use of force may exacerbate an emotionally disturbed individual.[162] It further stated that even when an emotionally disturbed individual is acting out or inviting the use of deadly force, the governmental interest in using deadly force is diminished by the fact that the officers are confronted with a mentally ill individual.[163] This reasoning was adopted in *Champion v. Outlook Nashville, Inc.*, where the court analyzed an excessive force claim for a decedent who had autism spectrum disorder.[164] There, the court also concluded that the decedent's disability must be taken into account when assessing the amount of force exerted.[165] Earlier decisions have made conclusions similar to *Deorle* and *Champion*, finding that the emotional state of the plaintiff is a factor to be considered in the reasonableness of a police officer's actions.[166] Thus, some courts are choosing to consider an individual's specific disability in assessing whether the force used was reasonable.

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[160] In *Wood v. City of Lakeland*, the police responded to a call regarding a suicidal teenager. 203 F.3d at 1292-93. The court's opinion focused on whether there was evidence to support the position that the teenager did not pose a threat, and did not mention whether the teenager's mental state should have been a factor in assessing reasonableness. *Id.* In *Sova v. City of Mt. Pleasant*, officers responded to a suicidal individual who was cutting himself. 142 F.3d at 902-03. The court's opinion did not consider whether the officers properly handled the decedent as an emotionally disturbed person, but instead, it discussed how the Fourth Amendment reasonable test requires attention to the facts of each case, which include the severity of the crime at issue, whether suspect poses an immediate threat to the safety of officers or others, and whether he is actively resisting arrest or attempting to evade arrest. *Id.*

[161] Deorle v. Rutherford, 272 F.3d 1272, 1285 (9th Cir. 2001).

[162] *Id.* at 1282-83.

[163] *Id.* at 1282-83.

[164] Champion v. Outlook Nashville, Inc., 380 F.3d 893, 900-905 (6th Cir. 2004).

[165] *Id.* at 904.

[166] *See, e.g.*, Ludwig v. Anderson, 54 F.3d 465, 472 (8th Cir. 1995) (stating that whether an individual was emotionally disturbed is material to the reasonableness of police officers' actions); Alexander v. City of S.F., 29 F.3d 1355, 1366 (9th Cir. 1994) (agreeing that police officers used unreasonable force, based on the totality of the circumstances, where the plaintiff was a mentally ill individual who threatened to shoot anyone who entered the home); *see also Deorle*, 272 F.3d at 1283.

III. REASONABLE ACCOMMODATIONS

A. Training Materials for Reasonable Accommodations Are Available for Law Enforcement Agencies

In light of the arguments made in Part II,[167] the ultimate question is: what conduct is considered reasonable for ADA compliance? In confronting individuals with mental disabilities, published training materials recommend that officers arrive on the scene quietly and avoid loud noises, which may be startling to the subject.[168] Existing training materials suggest that officers communicate with one another, prepare a plan prior to engaging with the subject, and take time to proceed slowly.[169] Because those with mental illness can exhibit unpredictable and threatening behavior, police officers should not respond in a confrontational manner.[170] In crisis situations, an increased use of force may exacerbate the circumstances.[171] Indeed, in *Carlson v. Fewins*, the Sixth Circuit recognized that compliance techniques that work on criminal subjects "are not likely to work with emotionally disturbed people."[172] Instead, officers should remain calm, avoid excitement, move slowly, and exercise restraint.[173] Officers should talk to the person to try to de-escalate the situation and find out what is bothering the individual.[174]

Some accommodations may be more appropriate than others, so law enforcement must be able to understand the signs and behaviors of different disabilities.[175] For example, persons with autism spectrum disorder may take instructions very literally, may repeat words or imitate officers as a result of the disability, and may take longer to process or respond to information.[176] Individuals with intellectual

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[167] *See supra* Part II.

[168] *See* Avery, *supra* note 49, at 291-92.

[169] *Id.* at 291-92.

[170] *See id.* at 291-94.

[171] *See id.*

[172] Carlson v. Fewins, 801 F.3d 668, 676 (6th Cir. 2015). In *Carlson*, the judge cited Michael Avery as an example of an expert's advice on how to respond to "emotionally disturbed people." *Id.*

[173] *See* Avery, *supra* note 49, at 291-94.

[174] *See id.* at 295-96.

[175] *See e.g.,*. Elizabeth Hervey Osborn, Comment, *What Happened to "Paul's Law"?: Insights on Advocating for Better Training and Better Outcomes in Encounters Between Law Enforcement and Persons with Autism Spectrum Disorders*, 79 U. COLO. L. REV. 333 (2008) (arguing for better understanding and training for police officers about individuals with autism spectrum disorder).

[176] *See id.* at 340-41.

disabilities may not understand commands or instructions, or may be upset at being detained and try to run.[177] Individuals with disabilities like epilepsy or diabetes may be thought to be intoxicated or using drugs.[178]

Some commentators argue there is a lack of appropriate training for law enforcement to appropriately deal with individuals with disabilities.[179] In a report by the Washington Post, the media outlet wrote that law enforcement receive a significant amount of training on how to properly use a gun, but only a few hours on how to interact with those with disabilities.[180] A report recently issued by California Disability Rights documented that, in California, officers in academy training receive six hours of training focused on police interactions with people with disabilities.[181] This is less than ten percent of the total academy training hours.[182] Aside from this training, there is no requirement in California law that officers receive additional or continuous training about interacting with individuals with disabilities.[183]

Professor Michael Avery discusses the types of training materials provided to police officers for confronting those with mental disabilities.[184] He argues that police have had access to this material for several decades, but the information is often ignored or undervalued when courts look at the "totality of the circumstances" in

[177] Davis, *supra* note 19.

[178] *See, e.g.*, Graham v. Connor, 490 U.S. 386, 388-89 (1989) (hearing claim brought by diabetic individual who sustained injuries when arrested by police, who mistook his behavior during insulin reaction); Fera v. City of Albany, 568 F. Supp. 2d 248, 253 (N.D.N.Y. 2008) (discussing a triable issue on Title II claim where police officers had knowledge of epilepsy and plaintiff was about to have a seizure and placed alone in back of van after arrest).

[179] *See, e.g.*, Braswell, *supra* note 19 (arguing there is a lack of police training to handle encounters with individuals with disabilities); Wesley Lowery et al., *Distraught People, Deadly Results*, WASH. POST (June 30, 2015), http://www.washingtonpost.com/sf/investigative/2015/06/30/distraught-people-deadly-results/ (calling for training methods for police encounters with individuals with disabilities to change); Lucas, *supra* note 122 (noting the lack of effective training for police encounters with people with disabilities).

[180] Lowery et al., *supra* note 179.

[181] PAMILA LEW ET AL., DISABILITY RIGHTS CAL., AN OUNCE OF PREVENTION: LAW ENFORCEMENT TRAINING AND MENTAL HEALTH CRISIS INTERVENTION 7 (2014), http://www.disabilityrightsca.org/pubs/CM5101.pdf.

[182] *Id.*

[183] *Id.*

[184] Avery, *supra* note 49, at 290-91.

an excessive force claim.[185] There are differing opinions by courts about whether specialized training is needed to protect law enforcement from liability.[186] One court rejected the idea that a municipality could prevent liability just by offering a course covering encounters with people with disabilities, regardless of the training's quality.[187] The court stated that just because the officers received some training in a course discussing "[d]isturbed-[d]istressed [p]ersons" did not mean that the training was adequate under the law.[188] But at least one court has rejected the argument that specialized training is needed to adequately deal with emotionally disturbed individuals.[189] In *Pena v. Leombruni*, the court held that a sheriff's general training on the use of deadly force was adequate to handle an irrational individual.[190] The sheriff's policy was that deputies were not to use deadly force unless they were threatened by death or great bodily harm.[191]

B. Crisis Intervention Team Training

One of the more well-known specialized training curriculums for law enforcement is the Crisis Intervention Team Training ("CIT").[192] CIT is an educational program designed to teach police officers about mental health conditions, medications, and resources in the local community.[193] The forty-hour training program focuses on verbal de-escalation skills and role-playing, rather than traditional compliance

185 *Id.* at 296.

186 *Compare* Pena v. Leombruni, 200 F.3d 1031, 1033 (7th Cir. 1999) (rejecting the need for such specialized training), *with* Russo v. City of Cincinnati, 953 F.2d 1036, 1047 (6th Cir. 1992) (requiring such specialized training).

187 *Russo*, 953 F.2d at 1047.

188 *Id.*

189 *Pena*, 200 F.3d at 1033.

190 *See id.*

191 *Id.*

192 *See* Janet R. Oliva & Michael T. Compton, *A Statewide Crisis Intervention Team (CIT) Initiative: Evolution of the Georgia CIT Program*, 36 J. AM. ACAD. PSYCHIATRY L. 38, 39 (2008) (reporting that the CIT model is the most widely recognized crisis program for police officers); *see also* LEW ET AL., *supra* note 181, at 11 (noting that the CIT model is the most frequently endorsed program by law enforcement experts and police personnel in California).

193 CIT INT'L, http://www.citinternational.org/ (last visited Nov. 16, 2016) (outlining the core elements of the Crisis Intervention Team Training CORE Program); *see* RANDOLPH DUPONT, SAM COCHRAN & SARAH PILLSBURY, CRISIS INTERVENTION TEAM CORE ELEMENTS 14 (2007), http://cit.memphis.edu/pdf/CoreElements.pdf.

based training often used by police.[194] CIT began in Memphis, Tennessee, as a community response to a police shooting of a young man with mental illness, who ultimately died after refusing to put down a knife.[195] About fifteen percent of the police jurisdictions nationwide are purportedly implementing a CIT program.[196]

Police departments, who have implemented the CIT program for a number of years, have seen success.[197] For example, the San Antonio Police Department boasts savings of more than fifty million dollars in the county mental health system due to collaborative efforts by police, emergency medical services, fire and child protective services.[198] Miami-Dade County has redesigned its mental health systems by training police officers in crisis intervention and redirecting individuals with mental illness towards treatment.[199] In Portland, Oregon, law enforcement officials suggest that there has been a culture shift since the Portland Police Bureau began implementing a CIT-based program.[200]

But are these CIT programs effective? There are a number of research projects looking at the effectiveness of the CIT program.[201] A

194 RANDOLPH DUPONT, SAM COCHRAN & SARAH PILLSBURY, CRISIS INTERVENTION TEAM CORE ELEMENTS 14 (2007), http://cit.memphis.edu/pdf/CoreElements.pdf.

195 The shooting was also charged with racial undertones, as the man was black and the officers were white. *See The CIT Program: Background*, U. OF MEMPHIS CIT CTR., http://www.cit.memphis.edu/overview.php?page=1 (last visited Nov. 16, 2016). The CIT program arose from an initial task force of advocates from the National Alliance On Mental Illness, police officers, university leaders, hospital administrators and church officials. *Id.* The development of CIT became known as the "Memphis Model." *See Memphis Model*, U. OF MEMPHIS CIT CTR., http://www.cit.memphis.edu/overview.php?page=2 (last visited Nov. 16, 2016).

196 Lucas, *supra* note 122.

197 *See id.*

198 *Id.*

199 Newt Gingrich & Van Jones, *Mental Illness Is No Crime*, CNN NEWS (May 27, 2015, 7:57 AM), http://www.cnn.com/2015/05/27/opinions/gingrich-jones-mental-health/.

200 Erica Goode, *For Police, a Playbook for Conflicts Involving Mental Illness*, N.Y. TIMES (Apr. 25, 2016), http://www.nytimes.com/2016/04/26/health/police-mental-illness-crisis-intervention.html. The use of force by Portland officers has decreased by 65.4 percent from 2008 to 2014, which is attributed in large part by increased training and oversight. *Id.*

201 *See, e.g.*, Michael T. Compton et al., *A Comprehensive Review of Extant Research on Crisis Intervention Team (CIT) Programs*, 36 J. AM. ACAD. PSYCHIATRY L. 47, 47-55 (2008) (analyzing the effectiveness of the CIT program in Memphis, TN); Michael T. Compton et al., *Crisis Intervention Team Training: Changes in Knowledge, Attitudes, and Stigma Related to Schizophrenia*, 57 PSYCHIATRY SERV. 1199, 1199-202 (2006) [hereinafter *Changes*] (studying the changes in knowledge, attitudes, and social distance of police officers with respect to schizophrenia after CIT training); Janet R. Oliva & Michael T. Compton, *A Statewide Crisis Intervention Team (CIT) Initiative:*

study conducted by Emory University found that after training, officers had improved attitudes about aggressiveness in individuals with schizophrenia, greater knowledge about schizophrenia, and became more supportive of treatment programs for those with schizophrenia.[202] Another study looked at the officers' feedback regarding Georgia's CIT program.[203] Officers reported improvements in their interactions with individuals with mental illness and attributed these improvements to the program's practical instruction.[204] They also described increased empathy and patience when interacting with those with mental illness.[205]

In some police departments, officers who want to become CIT certified must request enrollment in a training program or be selected to complete the program.[206] These CIT coordinators are then available to respond to mental health crises during a patrol shift.[207] For example, Georgia offers CIT training for local law enforcement but a local CIT coordinator must select the officers, so not all officers are trained.[208] But some law enforcement agencies have set a goal of training all officers, not just experienced officers, like the original Memphis CIT model.[209] In Ventura County, California, the CIT program is added to the last week of academy training for all officers.[210] Santa Clara County, California, has added an interactive video simulator training as part of the CIT training, where the officers must react to certain scenarios.[211] The Chicago Police Department recently launched a mandatory de-escalation training program with a heavy focus on mental health training.[212]

Evolution of the Georgia CIT Program, 36 J. AM. ACAD. PSYCHIATRY L. 38, 38-46 (2008) (analyzing the effectiveness of Georgia's CIT program).

202 Compton et al., *Changes*, *supra* note 201, at 1201.

203 Oliva & Compton, *supra* note 201, at 44.

204 *Id.*

205 *Id.*

206 *See, e.g.*, *id.* at 41 (noting that officers in Georgia are selected for the CIT program).

207 *See id.* at 42.

208 *Id.* at 41 (discussing the process for selecting officers for CIT trainings in Georgia).

209 LEW ET AL., *supra* note 181, at 14.

210 *Id.*

211 *Id.* at 14-15.

212 Annie Sweeney, *Chicago Police Rolling Out New, Mandatory 'De-Escalation' Training*, CHI. TRIB. (Sept. 17, 2016), http://www.chicagotribune.com/news/ct-chicago-police-training-met-20160916-story.html.

Other police departments have chosen to adopt a "co-responder" model. For example, the Los Angeles Police Department and San Diego Police Departments pair a licensed mental health clinician with police officers to respond to calls.[213] In Minneapolis, Minnesota, the city recently announced plans to start a pilot program that would pair mental health professionals with police responding to emergencies.[214] Cities like Overland Park, Kansas, found that the co-responder model helps the department avoid making arrests and cut costs.[215] But although some police departments are choosing to provide this training to their officers, it is unclear exactly how many departments have access to robust mental health training.[216]

C. The Public Is Calling for Responses from the Legislature and Regulatory Agencies

Commentators from various media sources are arguing for federal, state, and local legislatures to introduce mandatory training requirements for law enforcement on how to respond to individuals with disabilities.[217] Families who have lost loved ones with disabilities are advocating for these bills to be passed.[218] For example, the mother of Ethan Saylor — a man with Down syndrome who was killed by law enforcement[219] — attended a Senate Judiciary Subcommittee hearing

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[213] LEW ET AL., *supra* note 181, at 15.

[214] *See* Betsy Hodges, *2017 Budget: Foundational Investments to Build a 21st Century City – Overview* (Aug. 10, 2016) https://mayorhodges.com/2016/08/10/2017-budget-foundational-investments-to-build-a-21st-century-city-overview/.

[215] *See* Aamer Madhani, *Police Departments Struggle to Get Cops Mental Health Training*, USA TODAY (Oct. 2, 2016, 2:01 PM), http://www.usatoday.com/story/news/nation/2016/10/02/police-departments-struggle-cops-mental-health-training/91297538/.

[216] *See id.*

[217] *See, e.g.*, Claudia Center, *How Police Can Stop Shooting People with Disabilities*, ACLU BLOG (Mar. 20, 2015, 2:00 PM), https://www.aclu.org/blog/speak-freely/how-police-can-stop-shooting-people-disabilities (calling for law enforcement to adopt ADA compliant policies and trainings); *cf.* Braswell, *supra* note 19; Lucas, *supra* note 122.

[218] *See, e.g.*, Debra Alfarone, *"Ethan Saylor Bill" Signed in Maryland*, WUSA9 (May 13, 2015, 2:23 AM), http://www.wusa9.com/story/news/local/maryland/2015/05/12/ethan-saylor-bill-md/27198967 (discussing Ethan Saylor's parent's efforts to pass legislation in Maryland); Rebecca Farley, *Senate Subcommittee Holds Hearing on Law Enforcement Responses to Individuals in Crisis*, NAT'L COUNCIL FOR BEHAV. HEALTH (May 1, 2014) [hereinafter *Subcommittee Hearing*], https://www.thenationalcouncil.org/capitol-connector/2014/05/senate-subcommittee-holds-hearing-law-enforcement-responses-individuals-crisis/ (noting the presence at the hearing of parents who had tragically lost children); Lucas, *supra* note 122 (noting that Keith Vidal's mother has advocated for such legislation to be passed).

[219] Braswell, *supra* note 19.

to discuss the need for collaboration between the criminal justice and mental health systems.[220] This Senate Judiciary Subcommittee hearing discussed a variety of strategies to support law enforcement responses to individuals with disabilities who are in crisis.[221]

One example of proposed federal legislation that might have addressed this issue was the Justice and Mental Health Collaboration Act.[222] The Act would have authorized the Attorney General to expand treatment programs for those with mental illness in correctional facilities and provided services for those transitioning out of correctional facilities.[223] The Act would also have authorized the Attorney General to provide grants for programs to teach law enforcement personnel how to identify and respond to incidents involving those with disabilities.[224] Other legislation proposing similar reforms has also been introduced in recent years,[225] but, thus far, none has passed.[226]

The DOJ has recommended that certain police departments require special training to improve interactions with individuals with disabilities, or make changes to the CIT training policies.[227] The

[220] Farley, *Subcommittee Hearing*, *supra* note 218.

[221] *See id.*

[222] H.R. 731, 114th Cong. (2015).

[223] *See id.*

[224] *See id.*

[225] *See e.g.,* Michael Petruzzelli, *Senate Approves Bipartisan Criminal Justice, Mental Health Bill*, NAT'L COUNCIL FOR BEHAV. HEALTH (Dec. 17, 2015), https://www.thenationalcouncil.org/capitol-connector/2015/12/senate-approves-bipartisan-criminal-justice-mental-health-bill/ (proposing expanded training programs and grants for law enforcement to identify and respond to those with mental health disorders).

[226] *See, e.g.*, Rebecca Farley, *Justice and Mental Health Collaboration Act Hits Snag in Senate*, NAT'L COUNCIL FOR BEHAV. HEALTH (Jan. 2, 2014), http://www.thenationalcouncil.org/capitol-connector/2014/01/justice-mental-health-collaboration-act-hits-snag-senate/; *see also* H.R. 731, Justice and Mental Health Collaboration Act of 2015, https://www.congress.gov/bill/114th-congress/house-bill/731; H.R. 3722, Mental Health and Safe Communities Act of 2015, https://www.congress.gov/bill/114th-congress/house-bill/3722; S. 993, Comprehensive Justice and Mental Health Act of 2015, https://www.congress.gov/bill/114th-congress/senate-bill/993. Each of these bills failed to pass before the 114th Congress adjourned in January of 2017.

[227] *See e.g.*, JAMES K. STEWART ET AL., DEP'T OF JUST., COLLABORATIVE REFORM PROCESS: A REVIEW OF OFFICER-INVOLVED SHOOTINGS IN THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT 75-76 (2012), http://www.lvmpd.com/Portals/0/OIO/Collaborative%20Reform%20Process_FINAL.pdf (a report was prepared by the Community Oriented Policing Services to advise the Las Vegas Police Department on reform); *Justice Department Secures Statewide Training for Law Enforcement on Interacting with Persons with Intellectual or Developmental Disabilities*, U.S. DEP'T JUST. (May 12, 2015) [hereinafter *Statewide Training*], http://www.justice.gov/opa/pr/justice-department-secures-statewide-training-law-enforcement-interacting-persons (noting the Department

Community Oriented Policing Services Office ("COPS") is a component of the US Department of Justice, responsible for providing technical assistance to law enforcement for reform within the department.[228] For example, the COPS program investigated the Las Vegas Police Department in 2012 and recommended changes to their CIT training policies.[229] These changes were to increase the amount of hours required for CIT training and recertify officers on a three-year basis.[230] More recently, the Justice Department announced that it had reached a settlement agreement with the state of Tennessee to launch a training program available to all officers, regarding effective interactions with individuals with intellectual or developmental disabilities.[231] This training was the result of a court-approved plan to resolve long standing litigation between the United States and Tennessee about care for those with intellectual and developmental disabilities.[232]

IV. COMPLIANCE WITH THE ADA'S REASONABLE ACCOMMODATION MANDATE REQUIRES A COMPREHENSIVE SOLUTION

A. Accommodations Can Be Made by Law Enforcement with Proper Training and Expectations

The task of defining which accommodations are reasonable and necessary under the ADA is a complex one. The solution requires a comprehensive approach to police reform and change by the justice system, the legislature, and local law enforcement agencies. Although the accommodations discussed in Part III may be characterized as reasonable accommodations, in reality they are considered best practices for all individuals in crisis, regardless of whether the individual is a qualified person with a disability under the ADA.[233]

What accommodations are reasonable? Most law enforcement training manuals already provide examples of appropriate

of Justice's action requiring Tennessee to launch a training program).

[228] *See COPS Office: About*, U.S. DEP'T JUST., http://cops.usdoj.gov/Default.asp?Item=35 (last visited, Nov. 21, 2016).

[229] *See* STEWART ET AL., *supra* note 227.

[230] *Id.*

[231] *Statewide Training*, *supra* note 227. The suit was the result of conditions of care and integrated setting for developmental centers. *Id.* The exit plan required that the state develop the law enforcement training discussed. *Id.*

[232] *Id.*

[233] *See supra* Part III.

accommodations when confronting individuals with disabilities.[234] First, officers should talk to the individual in a clear, calm manner, and ask appropriate questions to determine if further accommodations are needed to foster communication.[235] The more information that is known before the officers encounter the individual, the more likely they can respond appropriately to the situation.[236] Officers should move slowly, exercise restraint, and remain calm to minimize the chance of the suspect exhibiting unpredictable or threatening behavior.[237] If officers are aware of an individual's disability or can recognize the signs of a disability, specific accommodations can be made.[238] As mentioned earlier, modifications in the type or complexity of language, the use of signs to communicate, and the tone of voice used are all feasible changes that can be made.[239] Exercising restraint and moving slowly, when feasible, may mean the difference between life and death.[240] CIT training or similar materials can be used to educate law enforcement on best practices for responding to individuals with disabilities.[241] This training can also be used to help law enforcement recognize behaviors associated with certain disabilities, such as autism spectrum disorder, epilepsy, or an intellectual impairment.[242]

Admittedly, each law enforcement encounter is different, and public entities are required to make an individualized assessment to determine whether reasonable modifications are feasible under the circumstances.[243] But comprehensive training is already available to help law enforcement make that determination.[244] As some individual police departments can attest, proper training and the ability to provide accommodations, when necessary, will reduce spending and save lives.[245] The general expectation should be that law enforcement

234 *See supra* Part III.A.

235 *See* Avery, *supra* note 49, at 292-96.

236 *See id.* at 294; Osborn, *supra* note 175, at 364-66 (stating that the first key problem with law enforcement response is poor communication about the situation, the individual, and the disability).

237 *See* Avery, *supra* note 49, at 295.

238 *See* Osborn, *supra* note 175, at 366-67.

239 *See supra* Part III.A.

240 *See supra* Part III.A.

241 *See supra* Part III.B.

242 *See supra* Part III.A.

243 *See* 28 C.F.R. § 35.139(b) (2016).

244 *See* CIT INT'L, *supra* note 193 (outlining the existing Crisis Intervention Team Training for law enforcement officers).

245 *See supra* Part III.B.

officers are familiar with and able to provide accommodations to those with a suspected disability, absent a direct threat.[246]

Law enforcement agencies must prioritize this training, by allocating time to ensure that all officers can identify and demonstrate modifications when encountering an individual with a disability. This training should be mandatory for all incoming law enforcement, and re-training should be required.

B. Proper Training for Law Enforcement Must Be Prioritized

Although many law enforcement agencies may already have access to best practices for accommodating individuals with disabilities, there must be adequate funding and consistent training expectations across the country. Because of the publicized number of deaths of individuals with disabilities, the public is asking for substantial reform in the way law enforcement approach and react to those with disabilities.[247] For effective change to occur, federal and state legislatures need to respond to this problem. The Justice and Mental Health Collaboration Act is one example of federal legislation which could begin to address the issue.[248] But state legislatures should also pass similar laws that mandate crisis training and disability awareness. These laws should require a certain amount of training for all new law enforcement officers and mandatory re-training for current law enforcement. For example, in 2006 the state of Delaware unanimously passed a bill requiring specific police training to assist in the identification and response to situations involving those with disabilities.[249] Laws like the one in Delaware will force police departments to change their training curriculums, instead of waiting until a tragedy occurs to respond.[250]

Finally, the DOJ must provide more guidance about how the ADA applies to those with disabilities through written and visual training materials. These materials should provide examples of accommodations and information about how to identify an individual with a disability. The technical assistance provided to law enforcement

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[246] *See* 28 C.F.R. § 35.139(b).

[247] *See, e.g.*, Van Jones, *Pass a Justice Bill as Big as This Moment*, CNN NEWS (Nov. 3, 2015, 5:55 PM), http://www.cnn.com/2015/11/03/opinions/jones-four-fixes-criminal-justice.

[248] *See* H.R. 731, 114th Cong. (2015).

[249] *See* DEL. CODE ANN. tit. 11, § 8405(c) (2016).

[250] *See, e.g.*, Luthern, *supra* note 122 (noting that a movement by city leaders to implement changes in Milwaukee came only after a tragedy there).

through the COPS office is important, but this assistance typically occurs after law enforcement violations have occurred.[251] And for those police departments who have violated the law, the DOJ must prioritize enforcement actions, with the hope of coming to settlement agreements like the one with Tennessee.[252]

C. Courts Should Consider an Individual's Disability and Law Enforcement Training When Determining Whether Accommodations Are Reasonable

When an injustice does occur, the consideration of what is a reasonable accommodation should be based on the totality of the circumstances. Both excessive force claims under the Fourth Amendment and claims for reasonable modifications under Title II of the ADA require courts to consider individual circumstances.[253] Courts should consider factors like the emotional status of the individual, and whether the officer adhered to his training when analyzing a Fourth Amendment claim.[254] Another important factor that should be considered is the timing of the situation and whether the use of force was immediately necessary.[255] For example, in *Carlson v. Fewins*, the court questioned the existence of an immediate threat, where Carlson committed a misdemeanor and the officers had time to request and receive food and drink before killing Carlson the next morning.[256] There, the court concluded that there was "considerable room for disagreement" as to whether any exigent circumstances existed.[257] Although these factors are discussed in the context of a claim for excessive force, the same factors should be considered for claims under Title II of the ADA.[258]

In *Sheehan*, the Ninth Circuit acknowledged that Sheehan had presented evidence whereby a reasonable jury could find that the

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[251] *See, e.g.*, STEWART ET AL., *supra* note 227, at 7-8; Goode, *supra* note 200 (noting that the change in Portland began after a fatal encounter, when a local singer with schizophrenia died after a confrontation with police, but systematic change occurred after a DOJ investigation concluded in 2012 that the Portland Police Bureau had shown "a pattern or practice of unnecessary or unreasonable force during interactions with people who have or are perceived to have mental illness").

[252] *See Statewide Training*, *supra* note 227.

[253] *See supra* Parts I.B, I.C.

[254] *See* Avery, *supra* note 49, at 298-303.

[255] *See id.* at 322-23.

[256] *See* Carlson v. Fewins, 801 F.3d 668, 672-75 (6th Cir. 2015).

[257] *Id.* at 676.

[258] *See* Avery, *supra* note 49, at 298-323.

officers failed to take Sheehan's mental illness into account by forcing a deadly confrontation, instead of freezing or attempting to de-escalate.[259] There, the court took Sheehan's mental illness into account but failed to consider whether the police officers used their training.[260] There was evidence that training materials were available and the court acknowledged there was not a lack of training, but did not discuss whether the failure to adhere to the training was a factor to be considered in the reasonableness analysis.[261]

Moving forward, it is imperative that all courts begin to consider the effect of an individual's disability on law enforcement interactions. In order to properly apply a totality of the circumstances analysis, the incident should be viewed in its entirety. This requires courts to consider the known characteristics of the individual, the timing and place of the incident, the training of the police officer, and best practices in responding to the situation.[262] Title II of the ADA was enacted to protect those with disabilities, and courts should interpret the law in favor of giving individuals with mental illness a "chance" in worst-case scenarios.[263] Of course there will be instances in which a direct threat exception exists, but the significance of the risk must be weighed in light of the circumstances, factoring in an individual's disability and law enforcement training.

CONCLUSION

The Americans with Disabilities Act was enacted to remedy and prevent discrimination against individuals with disabilities.[264] The ADA applies to law enforcement agencies and, arguably, to arrests.[265] Thus, there should be a presumption that qualified individuals with disabilities are entitled to reasonable modifications in the policies and practices of law enforcement.[266]

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259 Sheehan v. City & Cty. of S.F., 743 F.3d 1211, 1230 (9th Cir. 2014).

260 *See generally id.* (holding that a genuine issue of material fact existed regarding reasonable accommodations, but not using the fact that an officer may not have followed their training as a factor in its reasonableness analysis).

261 *See id.* at 1230-31.

262 *See supra* Part III.

263 *See* Oral Argument at 55-56, City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765 (2015) (No. 13-1412); *supra* Part I.A.

264 *Supra* Part I.A.

265 *Supra* Parts I.D, II.A.

266 *Supra* Part II.B.

There are a number of reasonable accommodations that may be feasible during a police encounter,[267] and training opportunities should be available and mandatory for all law enforcement officials.[268] In order to reach the expectations of the accommodation mandate, state legislatures and the Department of Justice must prioritize opportunities for law enforcement training and disability awareness.[269] To determine whether appropriate accommodations are being made, the judicial system should consider the circumstances surrounding an individual's disability, as well as whether law enforcement had adequate training about how to effectively respond to the situation, and finally, whether the officers followed their training.[270] Although there will ultimately be circumstances in which a direct threat prevents law enforcement from making accommodations, courts must consider a variety of factors related to disability to determine whether accommodations are warranted.[271] The tools for law enforcement to provide reasonable modifications are already available. Thus, it is up to the legislature and the justice system to ensure that law enforcement adequately respond to meet the needs of all individuals with disabilities.

267 *See supra* Part IV.A.
268 *Supra* Parts III, IV.
269 *Supra* Part IV.B.
270 *Supra* Part IV.C.
271 *See supra* Parts II.C, II.D, IV.