[ADA]PTING POLICIES & PRACTICES: APPLYING TITLE II'S REASONABLE MODIFICATIONS REQUIREMENT TO LAW ENFORCEMENT INTERACTIONS WITH INDIVIDUALS WITH DISABILITIES

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> "Including individuals with disabilities among people who count in composing 'We the People,' Congress understood . . . would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation."**

Theresa Sheehan was a mentally ill woman suffering from schizoaffective disorder.[1] Sheehan had no prior criminal record, and she was residing in a group home for individuals with mental illnesses.[2] On August 7, 2008, having been off of her medication for some time, Sheehan locked herself in her bedroom and warned her social worker that she had a knife.[3] Without seeing the knife, and believing Sheehan likely did not pose an imminent risk of harm to herself, the social worker called the non-emergency police number to request assistance to transport Sheehan for involuntary psychiatric hospitalization.[4]

The responding officers were informed of Sheehan's mental disability prior to arriving, as well as the fact that she had discontinued her medication and had been displaying increased symptoms for some time.[5] At no point did the social worker indicate that Sheehan was a danger to herself.[6] With this knowledge, the officers proceeded to repeatedly knock on and eventually unlock Sheehan's bedroom door, at which point Sheehan grabbed a kitchen

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** Tennessee v. Lane, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring).

1 City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1769 (2015).

2 *Id.*

3 *Id.* at 1769–70.

4 *Id.* at 1770. Because of shortcomings in the mental health system, police are commonly tasked with responding to calls involving mental health crises, leading to increased interactions between law enforcement and individuals with disabilities. *Law Enforcement and Mental Health*, NAT'L ALLIANCE ON MENTAL ILLNESS, http://www.nami.org/Get-Involved/Law-Enforcement-and-Mental-Health (last visited Sept. 28, 2016); *see also* David M. Perry & Lawrence Carter-Long, *The Ruderman White Paper on Media Coverage of Law Enforcement Use of Force and Disability*, RUDERMAN FAMILY FOUND. 8 (Mar. 2016), http://www.rudermanfoundation.org/wp-content/uploads/2016/03/MediaStudy-PoliceDisability_final-final1.pdf ("[P]olice have become the default responders to mental health calls.").

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

6 *Id.*

knife and walked towards the officers.[7] There are no claims that Sheehan made stabbing gestures, only that she yelled at the officers to leave her room and threatened to kill them if they came near her.[8] The officers complied by temporarily retreating into the hallway.[9] Without waiting for backup to arrive, the responding officers again forced the door to Sheehan's room open and entered—guns drawn—knowing full well that they would face a mentally ill person in the midst of a crisis episode.[10] The officers immediately shot pepper spray in Sheehan's face before firing five shots to her torso, her right arm, and, after she fell helplessly to the ground, her face.[11]

INTRODUCTION

A third to a half of those who die at the hands of law enforcement have some form of disability.[12] Our nation is in the throes of a groundbreaking and important conversation about race and policing; however, limiting the discussion to race minimizes the role of disability in these and other police interactions.[13]

Law enforcement officers frequently encounter individuals with disabilities in a variety of situations throughout the course of their duties.[14] These situations may begin as routine calls, but they can quickly evolve into high

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7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Sheehan*, 135 S. Ct. at 1771; Brief for Respondent at 6, City & County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015), No. 13-142, 2015 WL 603153, at *6.

12 Perry & Carter-Long, *supra* note 4, at 7; *see also* Richard Pérez-Peña, *When 'Yelling Commands' Is the Wrong Police Response*, N.Y. TIMES, Sept. 29, 2016, http://www.nytimes.com/2016/09/30/us/when-yelling-commands-is-the-wrong-police-response.html ("[P]olice use of force—sometime lethal—against those with diminished mental capacity is distressingly common."); TREATMENT ADVOCACY CTR. & NAT'L SHERIFF'S ASSOC., JUSTIFIABLE HOMICIDES BY LAW ENFORCEMENT OFFICERS: WHAT IS THE ROLE OF MENTAL ILLNESS? 3 (2013), http://tacreports.org/storage/documents/2013-justifiable-homicides.pdf [hereinafter TAC REPORT] (estimating that at least half of the victims shot and killed by law enforcement each year have some type of mental health disability).

13 Ari Melber & Marti Hause, *Half of People Killed by Police Have a Disability: Report*, NBC NEWS (Mar. 14, 2016), http://www.nbcnews.com/news/us-news/half-people-killed-police-suffer-mental-disability-report-n538371.

14 *See* Gary Cordner, U.S. DEP'T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., PEOPLE WITH MENTAL ILLNESS 1 (2006), http://ric-zai-inc.com/Publications/cops-p103-pub.pdf (discussing a police department that spent "more time on [mental health] cases than on injury traffic accidents, burglaries, or felony assaults"); James K. McAfee & Stephanie L. Musso, *Police Training and Citizens with Mental Retardation*, 20 CRIM. JUST. L. REV. 55, 56 (1995); Peter C. Patch & Bruce A. Arrigo, *Police Officer Attitudes and Use of Discretion in Situations Involving the Mentally Ill*, 22 INT'L. J.L. & PSYCHIATRY 23, 24 (1999).

pressure interactions, particularly when faced with an individual with a physical or mental disability.[15] Mental and developmental disabilities (e.g., schizophrenia, autism) as well as physical disabilities (e.g., epilepsy, deafness and hard of hearing) create unique challenges in law enforcement interactions for both the individual with the disability as well as the responding officer.[16]

Conventional approach tactics to which law enforcement officers default when first encountering any individual in the field, as well as those tactics that are used for the duration of the encounter, are often more inhibiting to individuals with disabilities.[17] For instance, individuals who are deaf or hard of hearing may struggle to effectively communicate with an officer, and individuals with mental illnesses may feel more agitated when placed in stressful situations.[18] Inevitably, officers misinterpret such miscommunication and agitation as a lack of cooperation or even violent tendencies.[19] The unfortunate result is discrimination—more often than not, unintended—toward individuals with disabilities by uninformed and typically untrained or

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15 TAC REPORT, *supra* note 12; *see also* Alex Emslie & Rachael Bale, *More Than Half of Those Killed by San Francisco Police are Mentally Ill*, KQED NEWS (Sept. 30, 2014), http://ww2.kqed.org/news/2014/09/30/half-of-those-killed-by-san-francisco-police-are-mentally-ill ("There are common elements in many of these instances when a fragile situation turns life-threatening for a person in crisis: That person often has a weapon, police issue commands, the person becomes more agitated, police respond with force."); Perry & Carter-Long, *supra* note 5, at 8 (noting the "most common type of killing: An individual enters a mental health crisis, acquires a weapon…, and is shot by law enforcement").

16 *See* McAfee & Musso, *supra* note 14, at 58; Elizabeth H. Osborn, *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); Perry & Carter-Long, *supra* note 4, at 18 ("[P]olice have too frequently interpreted epilepsy as a threat . . . .").

17 *See* Jennifer Fischer, *The Americans with Disabilities Act: Correcting Discrimination of Persons with Mental Disabilities in the Arrest, Post-arrest, and Pretrial Processes*, 23 LAW & INEQ. 157, 172 (2005); Melber & Hause, *supra* note 13.

18 Fischer, *supra* note 17, at 172; *see also* Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 331 (2003) ("Sometimes . . . incidents [involving individuals with mental disabilities] become confrontational and escalate to a violent conclusion, ending with the serious injury or death of the disturbed person."); Perry & Carter-Long, *supra* note 4, at 18 ("Deaf individuals cannot be expected to obey verbal commands when delivered out of sight.").

19 *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., EXAMPLES AND RESOURCES TO SUPPORT CRIMINAL JUSTICE ENTITIES IN COMPLIANCE WITH TITLE II OF THE AMERICANS WITH DISABILITIES ACT (2017) [hereinafter CRIMINAL JUSTICE GUIDANCE] ("Without proper training, criminal justice personnel may misinterpret the conduct of individuals with mental health disabilities or I/DD [intellectual and developmental disabilities] as intentional disrespect or disobedience, which may escalate encounters and lead to unnecessary criminal justice involvement."); Perry & Carter-Long, *supra* note 4, at 18 (discussing examples of police interpreting a disability as a threat); LINDA TEPLIN, KEEPING THE PEACE: POLICE DISCRETION AND MENTALLY ILL PERSONS, NAT'L INST. JUST. J., July 2000, at 9, 12 (discussing how individuals with mental and developmental disabilities are prone to interactions with law enforcement officers partially because effects or symptoms of these disabilities can provoke encounters with law enforcement).

minimally trained law enforcement.[20] Discrimination of any kind by law enforcement officers—the individuals who are tasked with protecting the safety of the public—is not only a violation of the law, but it can also lead to tragic, and often avoidable, consequences.[21]

What happened to Theresa Sheehan is an example of such a consequence; she was endangered by law enforcement when she needed their protection the most. Although Sheehan miraculously survived, she was left permanently physically disabled, which led her to bring suit against the State of California, alleging violations of the Americans with Disabilities Act ("ADA").[22] The case ultimately came before the Supreme Court on the question of whether law enforcement encounters are within the scope of the ADA's protection and, more specifically, whether the San Francisco police department had violated Title II of the ADA by failing to consider Sheehan's mental health disability in their response.[23] But the Court was compelled to dismiss the case on procedural grounds, and it punted on this landmark question.[24]

Many breathed a sigh of relief at the Supreme Court's failure to address the issue. Law enforcement officials presumably feared increased costs of compliance with the ADA, while disability rights advocates worried that the Court might impose limitations on the breadth of the statute in crisis situations.[25] Disability rights advocates in fact sought to avoid the Supreme Court's review of the issue altogether by urging San Francisco to drop the appeal, citing concerns that the Court would severely limit the ADA's protections in law enforcement situations.[26] In the aftermath of *City and County of San Francisco v. Sheehan*,[27] this Comment seeks to address the ADA's

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20 *See* Pérez-Peña, *supra* note 12 (discussing the limited training and education officers receive to recognize and deal with individuals with disabilities); Perry & Carter-Long, *supra* note 4, at 4 (discussing how law enforcement's use of unjustified force against individuals with disabilities marginalizes, excludes, and disadvantages them).

21 TAC REPORT, *supra* note 12, at 3; *see also* 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/ ("[P]olice are often ill equipped to respond to such individuals—and…the encounters too often end in needless violence."); Pérez-Peña, *supra* note 12 ("There are hundreds of thousands of times when officers are helpful, but far too often, people in crisis end up being Tasered, beaten, arrested and even shots . . . .") (quoting Laura Usher, Criminal Justice and Advocacy Manager, Alliance on Mental Illness).

22 Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2012); City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1769 (2015).

23 *Sheehan*, 135 S. Ct. at 1769.

24 *See* explanation *infra* note 135.

25 *See* Nicole Flatow, *Advocates Beg San Francisco To Drop Police Shooting Case, Warn Supreme Court Will Make Things Worse*, THINKPROGRESS (Jan. 15, 2015), https://thinkprogress.org/advocates-beg-san-francisco-to-drop-police-shooting-case-warn-supreme-court-will-make-things-worse-4ba321e4ba58#.une58024t.

26 *Id.*

27 135 S. Ct. 1765 (2015).

role in law enforcement's interactions with individuals with disabilities. Although *Sheehan* was left undecided on a technicality, it is more than likely a similar case will eventually make its way to the highest Court.[28]

Under Title II of the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[29] The regulations implementing Title II demand that state and local governments "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability."[30] The regulations also direct that an individual is not qualified for purposes of the ADA when he or she presents a "direct threat" that cannot be mitigated by "reasonable modifications."[31] The majority of federal circuits have generally found that Title II applies to law enforcement activities, including street interactions, taking and responding to complaints or calls for assistance, vehicle stops and searches, arrests, detentions, interviews, interrogations, and emergency responses.[32] However, the federal circuits have adopted inconsistent standards for analyzing to what extent modifications are "reasonable" when law enforcement responds to and interacts with individuals with disabilities, in part due to confusion over the application and intersect of the "reasonable modifications"[33] and "direct threat"[34] provisions of the Title II regulations.

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28 In fact, the Supreme Court recently heard a case involving the Fourth Amendment, in which the Court rejected the Ninth Circuit's "provocation theory," although the case did not involve any intersect with the ADA. *See generally* County of Los Angeles v. Mendez, 581 U.S. __ (2017).

29 42 U.S.C. § 12132 (2012).

30 General Prohibitions Against Discrimination, 28 C.F.R. § 35.130(b)(7)(i) (2016).

31 28 C.F.R. § 35.139(a).

32 *See* Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part on other grounds*, City & County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015) (arrests); Seremeth v. Bd. of Cty. Comm'rs Frederick Cty., 673 F.3d 333, 338 (4th Cir. 2012) (interrogations); Bircoll v. Miami-Dade County, 480 F.3d 1072, 1084–85 (11th Cir. 2007) (law enforcement agency and correctional facility); Delano-Pyle v. Victoria County, 302 F.3d 567, 574–76 (5th Cir. 2002) (vehicle stops); Gorman v. Bartch, 152 F.3d 907, 913 (8th Cir. 1998) (taking suspects into custody). *But see* Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000) (holding that Title II does not apply to officers' initial responses until after the scene has been secured).

33 28 C.F.R. § 35.130(b)(7)(i).

34 28 C.F.R. § 35.139(a).

This Comment offers a normative framework for applying Title II's reasonable modifications[35] requirement to law enforcement interactions[36] with individuals with disabilities, with a particular focus on those interactions that invoke direct threat concerns.[37] If courts begin to consistently and correctly interpret Title II as it applies to law enforcement, then law enforcement agencies can proactively create and implement reasonable policies and procedures, and, to the extent they fail to do so, individuals with disabilities will be better situated to successfully obtain legal redress after the fact. Part I provides a foundational discussion of Title II of the ADA, including its legislative history, implementing regulations, and technical assistance. Part I continues with a review of the varied approaches courts have taken in analyzing the extent of Title II's application to law enforcement, and, more specifically, the role of the direct threat provision. Part II provides the foundational argument that Title II of the ADA applies to all law enforcement interactions with individuals with disabilities. Finally, Part III encourages courts to consider and weigh three factors to guide their assessment of law enforcement's policy and practice modifications—or lack thereof. These three factors will help to ensure that reviewing courts properly assess the reasonableness of the modifications, and that the direct threat provision is applied in the limited way the regulations direct.

I. BACKGROUND

When analyzing the relationship between the ADA and law enforcement, it is first useful to provide a foundational discussion of (1) the statutory language and legislative history, (2) the implementing regulations designed

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35 The Supreme Court has used the terms "reasonable modifications" and "reasonable accommodations" interchangeably and interpreted them to mean "changes" and "adjustments. *See* Alexander v. Choate, 469 U.S. 287, 299–301 (1985) (citing Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 410–411, 413 (1979)). This Comment will use the phrase "reasonable modifications," consistent with the regulatory language. Quoted sources using the term "accommodation" should be interpreted as having the same meaning as "modifications."

36 This Comment focuses on law enforcement's interactions with individuals with disabilities, particularly during the initial response or pre-arrest and arrest phases. It proceeds on the proposition that law enforcement is subject to the ADA at *all stages* of interaction with individuals with disabilities. For purposes of consistency, this Comment will refer to law enforcement's activities in these phases as "interactions." Interactions should be read to include encounters in the pre-arrest, arrest, and post-arrest, pretrial phases, as well as in situations where law enforcement is called for assistance, whether in response to a suspected crime or emergency, or for purposes of assisting or transporting individuals with mental or physical disabilities. Essentially, this Comment focuses on any early, confrontational interactions with individuals with disabilities—whether leading to an arrest or not.

37 Because interactions with law enforcement so frequently involve individuals with mental, emotional, or developmental disabilities, the large majority of the cases discussed in this Comment involve the same. The proposed framework is, however, applicable to all forms of disability, be it mental, developmental, or physical.

to enforce and interpret the statute, and (3) the case law interpreting the scope of the statute. Specifically, what shortcomings exist in the current landscape of interpretation of the ADA as it applies to law enforcement activities? Section A provides an overview of the ADA generally, as well as Title II, the statutory provision governing public entities. Section B continues with an overview of Title II's implementing regulations. Section C discusses the technical assistance, which serves to supplement the regulations and to provide more detailed guidance for interpreting the ADA. Finally, Section D offers a discussion of select cases involving law enforcement encounters with individuals with disabilities, focusing on the arbitrary and varied analyses plaguing the courts.

A. *Title II, The Americans with Disabilities Act*

The ADA is the landmark federal law prohibiting discrimination based on disability.[38] Legal recourse for discrimination of individuals with mental and physical disabilities was extremely limited until the ADA was enacted on July 26, 1990.[39] The ADA attempted to correct this legal inadequacy by "provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against persons with disabilities."[40] The ADA is viewed as a great legislative accomplishment, and its enactment brought excitement and optimism to the disability rights community.[41] President George H. W. Bush captured this feeling when he signed the ADA into law, declaring:

> This act is powerful in its simplicity . . . . Legally, it will provide our disabled community with a powerful expansion of protections and then basic civil rights . . . . Together, we must remove the physical barriers we have created and the social barriers that we have accepted . . . . Let the shameful wall of exclusion finally come tumbling down.[42]

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38 Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2012).

39 *See id.* § 12101(a)(4) (indicating as a finding that led to the need for the Americans with Disabilities Act that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability often had no legal recourse to redress such discrimination").

40 *Id.* § 12101(b)(1).

41 *See* Fischer, *supra* note 17, at 177 (discussing Congress's hope that the "passage of the ADA would lead to systemic change that would result in the elimination of discrimination against persons with disabilities").

42 President George H. W. Bush, *Remarks of President George Bush at the Signing of the Americans with Disabilities Act*, EEOC (July 26, 1990), http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html.

This "simplicity" is reflected in the broad language of the ADA, and reveals Congress's view that the Act's protections should be far reaching.[43] In drafting the ADA, Congress noted that "discrimination against persons with disabilities persists in critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."[44]

Title II of the ADA protects individuals with disabilities from discrimination by public entities, which include state and local governments and agencies in their programs, services, and activities.[45] A "public entity" includes any state or local government or any department, agency, special purpose district or other instrumentality of a state or local government.[46] Through Title II, the ADA seeks to ensure the fair treatment of qualified individuals with disabilities in the public context.[47] The language directs that

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[48]

Title II's implementing regulations further clarify this provision by requiring that, to prevent such discrimination, public entities must "make reasonable modifications in policies, practices, or procedures" to accommodate individuals with disabilities who are subject to the protections of the ADA.[49]

When determining whether an individual is protected by the ADA, the initial considerations are (1) whether the individual has a disability as defined within the ADA and (2) whether they are "qualified" for purposes of the ADA.[50] An individual has a covered disability if he or she has "a physical or mental impairment that substantially limits one or more major life activities," or has "a record of" or is "regarded as having" such an impairment.[51] The broad definition applies whether or not an individual is on medication or a

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43 *See* 42 U.S.C. § 12132 (2012).

44 *Id.* § 12101(a)(3).

45 *Id* §§ 12131–12165; *see also* General Prohibitions Against Discrimination, 28 C.F.R. § 35.130 (2016).

46 42 U.S.C. § 12131(1) (2012). The ADA uses the requirements of Section 504 of the Rehabilitation Act as a baseline in providing that the programs or activities of public entities are "all of the operations of . . . a department, agency . . . or other instrumentality of a State or of a local government." The Rehabilitation Act, 29 U.S.C. § 794(b) (2012).

47 This is distinct from the private context addressed through Title III, 42 U.S.C. §§ 12181–12189 (2012), and the employment context addressed through Title I, 42 U.S.C. §§ 12111–12117 (2012).

48 42 U.S.C. § 12132 (2012).

49 28 C.F.R. § 35.130(b)(7)(i) (2016); *see also* discussion *infra* Part I.B.

50 *See* Anderson v. City of Blue Ash, 798 F.3d 338, 357 (6th Cir. 2015).

51 42 U.S.C. § 12102(1) (2012); *see also* General Prohibitions Against Discrimination, 28 C.F.R. § 35.108(a)(1) (2016).

treatment plan that mitigates the effects of the impairment on "major life activities."[52] Under Title II, a "qualified individual with a disability" means

> [A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[53]

The "qualified" inquiry in effect asks—case-by-case—whether the individual is entitled to enjoy the services provided.[54] Relevant to law enforcement interactions with individuals with disabilities, an individual is not "qualified" for purposes of the ADA where he or she poses a "direct threat" to the safety of the public and where that threat cannot be mitigated through reasonable modifications.[55]

Beyond the mere words of the ADA—through which Congress recognized "outright intentional exclusion, the discriminatory effects of . . . communication barriers; . . . [and] failure to make modifications to existing facilities and practices"—the underlying legislative history clarifies Congress's recognition of the particular challenges that persisted in interactions between law enforcement and individuals with disabilities.[56] In fact, Congress expressly acknowledged the risk of unintended discrimination toward individuals with disabilities in their interactions with law enforcement, noting that officers are often unable to recognize or deal with physical and mental disabilities.[57] In doing so, Congress implicitly acknowledged that law enforcement—as a public entity—falls within Title II of the ADA and, thus, its "services" must be equally provided to individuals with disabilities.

Congress specifically emphasized training and similar strategies as the primary tool for entities to successfully ensure compliance with the ADA imposed obligations.[58] For example, the House Judiciary Committee noted

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52 42 U.S.C. § 12102(4)(1)(D) ("An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."); *see also* 28 C.F.R. § 35.108(a)(2)(i) ("[t]he definition of disability shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.").

53 42 U.S.C. § 12131(2).

54 *Id.*

55 28 C.F.R. § 35.139; *see also* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., A TECHNICAL ASSISTANCE MANUAL COVERING STATE AND LOCAL GOVERNMENT PROGRAMS AND SERVICES (TITLE II) OF THE AMERICANS WITH DISABILITIES ACT (1993) [hereinafter TAM]. This exception plays a particularly important role in assessing Title II's application to law enforcement interactions with individuals with disabilities and is further discussed in Parts I.B and III.C.

56 42 U.S.C. § 12101(a)(5); *see also* H.R. REP. NO. 101485 (1990).

57 H.R. REP. NO. 101-485, at 84–85 (1990).

58 H.R. REP. NO. 101-485, pt. 3, at 50 (1990) ("In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability.").

that individuals with physical conditions such as epilepsy "are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid of seizures."[59] Arrest situations are even specifically addressed as an example of a circumstance where "discriminatory treatment based on disability can be avoided by proper training."[60] The Committee concluded that such treatment could be altogether avoided with a simple—and most importantly, reasonable—solution: better training.[61]

The congressional reports indeed discuss Title II in the law enforcement context specifically, noting that police officers often fail to recognize certain disabilities which results in ineffective and often discriminatory treatment of these affected individuals.[62] One congressman, Representative Mel Levine of California, speaking on the record during the passage of the ADA, explained the big picture problem and the role of the ADA in ensuring that law enforcement agencies provide proper training and tools to improve officer responses:

> [I]t is not rare for persons with disabilities to be mistreated by the police. Sometimes this is due to persistent myths and stereotypes about disabled people. At other times, it is actually due to mistaken conclusions drawn by the police officer witnessing a disabled person's behavior . . . . Although I have no doubt that police officers in these circumstances are acting in good faith, these mistakes are avoidable and should be considered illegal under the Americans with Disabilities Act . . . .One way to cut down on these incidents is for police officers to receive training about various disabilities.[63]

The improvement of training practices is undoubtedly Congress's—and many commentators'—most cited technique for avoiding discrimination by law enforcement against individuals with disabilities.[64] Congress's emphasis on better training and law enforcement's inclusion in the discussions leading to the implementation of the ADA is consistent with Title II's broad, all-encompassing language. It is also consistent with the more specific rules issued through Title II's implementing regulations. Since ADA compliance and enforcement rely heavily on them, it is necessary now to turn to a discussion of Title II's implementing regulations.

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59 *Id.*

60 *Id.*

61 *Id.*

62 *See id.* ("[P]ersons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures.").

63 136 CONG. REC. 11461 (daily ed. May 22, 1990) (statement of Rep. Mel Levine).

64 *See, e.g.*, H.R. REP. NO. 101-485, pt. 3, at 50 (1990); Osborn, *supra* note 16, at 333–34.

B. *Title II: Implementing Regulations*

Because the statutory requirements of Title II are rather brief and written broadly, their legal application depends heavily on the implementing regulations and guidance. The Department of Justice ("DOJ") is the federal agency charged with implementing Titles II and III of the ADA.[65] The DOJ has issued formal regulations for Title II mandating law enforcement's duties under the ADA.[66] Since Congress explicitly delegated rulemaking authority for Title II to the DOJ,[67] the DOJ's interpretation of Title II and the implementing regulation is entitled to substantial deference.[68] There are two major issues raised in the practical application of Title II to law enforcement. First, are the activities of law enforcement—including arrests and other interactions with citizens—within the purview of the ADA? And second, if so, how should the law enforcement agencies that are implementing policies and practices, and the judges assessing these policies as a matter of law determine what is reasonable? Through its regulatory commentary, the DOJ has answered the former question in the affirmative;[69] however, the latter is inherently a more difficult question to answer.

As an initial matter, the regulations reiterate that Title II of the ADA applies broadly to "all services, programs, and activities provided or made available by public entities."[70] Further interpretive commentary to the regulations confirms that the prohibition of discrimination in "[T]itle II applies to anything a public entity does" and extends to "all services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies."[71] The regulations thus advance the broad application that Congress intended in the ADA as a whole.

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65 42 U.S.C. § 12134(a) (2012).

66 *See* General Prohibitions Against Discrimination, 28 C.F.R. § 35.130 app. B at 689 (2016).

67 42 U.S.C. §§ 12134(a)–(b).

68 *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013) (holding that an agency's interpretation is entitled to *Chevron* deference where the interpretation is based on a permissible construction of that statute); Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 598 (1999) ("The well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.") (internal quotation marks omitted); Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

69 28 C.F.R. § 35 app. B at 689 (confirming that law enforcement must "make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities."). Most federal circuits seem to be in agreement. *See* sources cited *supra* note 32.

70 28 C.F.R. § 35.102 app. B at 680.

71 *Id.*

The regulatory mandate that lays the groundwork for this Comment is the reasonable modifications provision found in Section 35.130 of the regulations.[72] While the general requirement that public entities make reasonable modifications to avoid discrimination on the basis of disability is not specifically articulated in the statutory requirements of Title II itself, the implementing regulations direct that

> 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.[73]

Requiring reasonable modifications "acknowledges the barriers created by society and requires that these barriers be removed in order for persons with disabilities to become equal participants in society."[74] In this sense, the provision is unique to those found in other civil rights laws, in that it requires treatment *different from* that of the nondisabled population.[75] It is the opportunity and access that must be equal; the service itself need not be identical to the service generally provided to others if that is necessary to provide equal opportunity and access.[76] In fact, it is inherent in the word "modification" that the service is not identical, and that individuals with disabilities are treated differently to ensure their ability to equally enjoy the service provided by the public entity.[77] The language of the ADA and its regulations acknowledges that simply treating individuals with disabilities the same as those without would not, as a practical matter, address the effects of disability discrimination.[78] Instead of a straightforward non-discrimination statute, the ADA purports to establish a level playing field for those individuals with disabilities to obtain equal footing alongside the nondisabled.[79]

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72 *See* General Prohibitions Against Discrimination, 28 C.F.R§ 35.130(b)(7)(i) (2016).

73 *Id.*; *see also* 42 U.S.C. § 12132 (2012). *But see* 42 U.S.C. § 12147 (mandating that existing public transit facilities be altered to accommodate individuals with disabilities).

74 Fischer, *supra* note 17, at 180.

75 *See, e.g.*, Age Discrimination in Employment Act of 1967 § 4, 29 U.S.C. § 623 (2012); Civil Rights Act of 1964 § 201, 42 U.S.C. § 2000a (2012).

76 *Cf.* 28 C.F.R. § 35.130(b)(7)(i); *see also id.* § 35.130(b)(1)(iv) (permitting the provision of different or separate services if necessary to ensure the equal effectiveness of that service for disabled persons).

77 28 C.F.R. § 35.130(b)(7); *see also id.* § 35.130(b)(1)(iv).

78 *See* Tennessee v. Lane, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring) ("Including individuals with disabilities . . . would sometimes require not blindfolded equality, but responsiveness to difference.").

79 *See* WILLIAM D. GOREN, UNDERSTANDING THE ADA 1–2 (4th ed. 2013) ("[G]etting a person with a disability to the same starting line [as a nondisabled person] gives him or her the opportunity to take advantage of the same services, activities, and businesses everyone else uses.").

The exceptions to the reasonable modifications requirement are limited.[80] Title II does not mandate that a public entity make modifications where "the modifications would fundamentally alter the nature of the service being provided."[81] The regulations provide little insight as to exactly what the fundamental alteration defense requires, and courts have provided little guidance on the issue.[82] Because the fundamental alteration defense is its own fact-specific inquiry, this Comment's discussion of it is minimal.[83] Notwithstanding, the relevance of the fundamental alteration defense is limited in the context of law enforcement's interactions anyway, because requiring law enforcement agencies to implement training programs, conduct community outreach, and make other related "modifications" would never fundamentally alter the nature of law enforcement as an entity. If anything, these modifications *further* the primary objective of law enforcement: to safely protect and serve the general public.

The direct threat provision, contrary to the reasoning underlying much of the case law,[84] does not operate as a blanket exception to the reasonable modifications requirement. Instead, it operates as a factor in determining whether an individual is "qualified" under the ADA to receive modifications to the entity's services, programs, and activities.[85] The direct threat principle is derived from the regulations, and provides that an entity need not "permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others."[86] Prior to the enactment of the ADA, "the Supreme Court recognized that there is a need to balance the interests of people with disabilities against legitimate concerns for public safety."[87] The regulations explain the relevant inquiry:

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80 *See* James C. Harrington, *The ADA and Section 1983: Walking Hand in Hand*, 19 REV. LITIG. 435, 441 (2000).

81 General Prohibitions Against Discrimination, 28 C.F.R. § 35.130(b)(7)(i) (2016).

82 *See* Jefferson D.E. Smith & Steve P. Calandrillo, *Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After* Olmstead v. L.C., 24 HARV. J.L. & PUB. POL'Y 695, 722 (2001).

83 *See id.* at 723; *see also* discussion *infra* Part I.D.

84 *See* discussion *infra* Part I.D.

85 28 C.F.R. § 35.104 (defining a "qualified" individual under the ADA); *see also* 28 C.F.R. § 35.139 (direct threat provision).

86 28 C.F.R. § 35.139(a). Even if an individual poses a direct threat, he or she would still technically "receive" and "benefit from" law enforcement's services—police will still interact with and possibly arrest or detain the individual, thus providing a "service." *Cf. id.* Unlike public entities in other contexts, law enforcement does not have the ability to simply refuse to "service" an individual altogether. The natural implication of this distinction is that an individual posing a direct threat in a law enforcement situation is not "qualified" to receive certain *modifications* to the services, programs, and activities.

87 General Prohibitions Against Discrimination, 28 C.F.R. § 35.104 app. B at 668 (2016) (discussing Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273 (1987)).

> In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.[88]

If reasonable modifications of policies, practices, or procedures could have mitigated the risk, the direct threat principle does not excuse an entity's failure to provide them.[89] The appended commentary to the regulations clarifies that "generalizations or stereotypes about the effects of a particular disability" may not form the basis for a conclusion that an individual poses a direct threat.[90] Thus, the regulations make clear the standard to which entities are subject in determining whether and how to make modifications.

Turning specifically to Title II's application to law enforcement, while the regulations stop short of a specific training requirement, the commentary notes that training practices already fall under the "general regulatory obligation to modify policies, practices, or procedures."[91] The regulatory commentary specifically references law enforcement, noting that they are required under the nondiscrimination provision to "make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities."[92] In reference to yet another regulatory provision, the DOJ again cites training as an often necessary tool, with an emphasis on the law enforcement context.[93]

The regulations and their commentary ultimately serve to implement and enforce the simple yet powerful language of the ADA. In addition to the regulations, the DOJ has issued supplemental guidance to further fill the gaps, which are discussed in detail in Section C.

C. *Regulatory Guidance and Technical Assistance Documents*

In addition to Title II and its implementing regulations, the DOJ publishes additional guidance and technical assistance materials to further clarify the breadth and application of Title II. The documents are frequently updated and provide increased insight to the application of the regulations. While these materials do not carry the binding force of law that the regulations do,

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88 *Id.* § 35.139(b); *see also Arline*, 480 U.S. at 287–88; TAM, *supra* note 55, § II-2.8000.

89 See 28 C.F.R. § 35.139(b).

90 *Id.* § 35.104 app. B at 668.

91 *Id.* § 35.130 app. B at 670.

92 *Id.*

93 *Id.* § 35.105 app. B at 669 (self-evaluation provision) ("[I]t would be appropriate for public entities to evaluate training efforts because, in many cases, lack of training leads to discriminatory practices, even when the policies in place are nondiscriminatory.").

they are entitled to some degree of judicial deference.[94] The Technical Assistance Manual for Title II (the "TAM") details law enforcement's duties as a public entity, delving into the particular nuances of the Title II regulations.[95] Additional guidance addresses common problems that public entities face in complying with the ADA, necessary responses and policies specific to law enforcement, as well as general examples and resources to assist criminal justice entities in complying with Title II.[96]

Consistent with the statute and the regulations, the TAM and other regulatory guidance documents endorse the broad application of Title II, and they do so with specific reference to law enforcement.[97] In fact, the DOJ has issued two documents fully dedicated to the ADA's application to law enforcement and other criminal justice entities.[98] Not only does it confirm that "[t]he ADA affects virtually everything that officers and deputies do," it also discusses common compliance failures "in a variety of law enforcement settings."[99] The DOJ has explicitly cited "citizen interaction, detention, and arrest procedures" as areas where law enforcement agencies must make modifications to policies, practices, or procedures.[100] More recent guidance, published in 2017, adds "[l]aw enforcement street interactions, taking and responding to complaints or calls for assistance, vehicle stops and searches, arrests, detentions, interviews, interrogations, and emergency responses" to the broad array of situations covered by Title II.[101]

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94 Congress explicitly delegated to the DOJ the authority to promulgate regulations under Title II. *See* 42 U.S.C. § 12134(a) (2012). Congress also directed the DOJ to issue technical assistance on compliance with the ADA. *Id.* § 12206(c)(3). Accordingly, the Department's guidance and technical assistance are interpretations of its own regulations and are thus entitled to deference. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (holding an agency's interpretation of its own regulation "controlling unless plainly erroneous or inconsistent with the regulation") (internal quotation marks omitted); United States v. Larionoff, 431 U.S. 864, 872 (1977) ("In construing administrative regulations, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.") (internal quotation marks omitted).

95 TAM, *supra* note 55, at intro.

96 *See* CRIMINAL JUSTICE GUIDANCE, *supra* note 19; U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., THE ADA AND CITY GOVERNMENTS: COMMON PROBLEMS (2008), https://www.ada.gov/comprob.htm [hereinafter COMMON PROBLEMS]; U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., COMMONLY ASKED QUESTIONS ABOUT THE AMERICANS WITH DISABILITIES ACT AND LAW ENFORCEMENT (2006), https://www.ada.gov/q&a_law.htm [hereinafter LAW ENFORCEMENT GUIDANCE]; U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., COMMUNICATING WITH PEOPLE WHO ARE DEAF OR HARD OF HEARING: ADA GUIDE FOR LAW ENFORCEMENT OFFICERS (2006), https://www.ada.gov/lawenfcomm.htm.

97 *See* TAM, *supra* note 55; CRIMINAL JUSTICE GUIDANCE, *supra* note 19; LAW ENFORCEMENT GUIDANCE, *supra* note 96; COMMON PROBLEMS, *supra* note 96.

98 *See* CRIMINAL JUSTICE GUIDANCE, *supra* note 19; LAW ENFORCEMENT GUIDANCE, *supra* note 96.

99 LAW ENFORCEMENT GUIDANCE, *supra* note 96.

100 COMMON PROBLEMS, *supra* note 96.

101 CRIMINAL JUSTICE GUIDANCE, *supra* note 19.

The guidance documents also provide useful illustrations and hypotheticals to assist in the interpretation and compliance of the reasonable modifications requirement. In 2008, the DOJ explained that, in police interactions, "people with disabilities are often placed in unsafe situations or are unable to communicate with officers because standard police practices and policies are not appropriately modified."[102] The guidance instructs that law enforcement officers be prepared to modify their default practices, for instance, by "allowing, in appropriate circumstances, arrestees who are deaf to be handcuffed in front of their bodies so that they can communicate with others and by allowing detainees access to their medication."[103] Additionally, the recent 2016 guidance provides an entire section on "examples of policies and procedures that assist in achieving ADA compliance in key areas."[104] These policies include crisis response and de-escalation training, as well as suggestions for coordinating with mental health organizations.[105]

Additionally, the guidance specifically describes situations where the reasonable modification obligation applies. For instance, it applies "when an agency employee knows or reasonable should know that the person has a disability and needs a modification, even where the individual has not requested a modification, such as during a crisis, when a disability may interfere with a person's ability to articulate a request."[106] Many times, law enforcement may not be explicitly told of an individual's disability; however, that fact does not necessarily absolve them of their obligations under Title II. The DOJ stresses that law enforcement officers must be trained to recognize signs of physical and mental disabilities in order to inform their response and to correctly recognize when a real safety risk exists and when one does not.[107] Ultimately, law enforcement should be prepared to recognize when an individual needs medical attention and when they require modified responses.[108]

The TAM, as well as the general guidance documents, point to training as a logical tool for ensuring that modifications are made, not only in the context of evaluating safety risks, but also in generally preventing discriminatory effects from typical policies and practices.[109] Sometimes, "[u]nexpected actions taken by some individuals with disabilities may be miscon-

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102 COMMON PROBLEMS, *supra* note 96.

103 *Id.*

104 CRIMINAL JUSTICE GUIDANCE, *supra* note 19.

105 *See id.*

106 *Id.*

107 *See id.*; LAW ENFORCEMENT GUIDANCE, *supra* note 96.

108 LAW ENFORCEMENT GUIDANCE, *supra* note 96.

109 *See* CRIMINAL JUSTICE GUIDANCE, *supra* note 19 (using training as an example of how law enforcement leaders have complied with Title II's reasonable modifications requirement); LAW ENFORCEMENT GUIDANCE, *supra* note 96 ("[I]t is important that police officers are trained to distinguish behaviors that pose a real risk from behaviors that do not."); TAM, *supra* note 55, § II-8.2000 ("If appropriate, training should be provided to employees.").

strued by officers or deputies as suspicious or illegal activity or uncooperative behavior."[110] Still, the DOJ, through its interpretation of its own regulations, emphasizes that "[t]raining, sensitivity, and awareness will help to ensure equitable treatment of individuals with disabilities as well as effective law enforcement."[111]

The guidance documents' specific attention to the unique challenges that law enforcement entities face are useful for understanding and assessing the role of the direct threat principle, initially discussed in Part I.B. For instance, the TAM addresses each of the many inquiries for determining whether an individual is subject to the Title II's protections.[112] Specifically, the TAM addresses whether safety factors may be consider in determining whether an individual is "qualified" for purposes of the ADA.[113] In answering yes, and reiterating the direct threat principle, the TAM provides criteria for assessing whether a direct threat actually exists.[114] Factors for assessment include: "1) The nature, duration, and severity of the risk; 2) The probability that the potential injury will actually occur; and, 3) Whether reasonable modifications of policies, practice, or procedures will mitigate or eliminate the risk."[115]

The regulatory guidance provides yet another tool for both law enforcement agencies and reviewing courts. It is consistent with the broad scheme of the ADA in that it offers guidance intended to ensure that individuals with disabilities "are treated equally in the criminal justice system and afford[ed] . . . equal opportunity to benefit from safe, inclusive communities."[116] Police departments can and should rely on the guidance when implementing best practices and policies, and courts can look to the guidance when assessing whether such practices and policies are consistent with the enforcement goals of the ADA.

D. *Case Law: Inconsistencies in Applying Title II to Law Enforcement*

The case law addressing law enforcement and the ADA is extensive and arises in a number of different contexts and factual scenarios. In response, courts have employed varying approaches. Subsection 1 of this Section lays the foundations of the case law by discussing two primary phases of analysis adopted by courts, which are relevant for purposes of this Comment. Subsection 1 also lays out the requirements for bringing a Title II claim, as well as the two prominent theories that have evolved in evaluating Title II claims.

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110 LAW ENFORCEMENT GUIDANCE, *supra* note 96.

111 *Id.*

112 *See* TAM, *supra* note 55, § II-2.8000.

113 *Id.*

114 *Id.*

115 *Id.*

116 CRIMINAL JUSTICE GUIDANCE, *supra* note 19.

Subsection 2 discusses the landmark case that paved the way for the application of Title II to law enforcement activities. Finally, Subsection 3 expounds the arbitrary and inconsistent analyses adopted by courts when determining whether law enforcement has complied with Title II's reasonable modifications requirement.

1. Title II Claims: Posture of Cases Involving Law Enforcement

To establish a claim under Title II of the ADA, a plaintiff must show that (1) he or she is a qualified individual with a disability; (2) he or she was either excluded from participation in or denied the benefits of some public entity's service, program, or activity or was otherwise discriminated against; and (3) that the exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.[117] In cases involving law enforcement, the biggest points of contention arise in the first and second elements. First, is an individual "qualified" if the law enforcement officer perceives a threat to public safety? And second, did law enforcement respond with the appropriate modifications to ensure the plaintiff would not be deprived of the benefits of the service? The two questions intersect.

Assessing Title II claims in the context of law enforcement can be broken down into two primary phases of analysis. The initial phase asks whether Title II of the ADA applies to law enforcement at all. If the answer is yes—which it typically is[118]—the second phase probes whether law enforcement complied with the reasonable modifications requirement. The first phase initially provoked a longstanding circuit split.[119] However, a majority of the federal circuits now agree that Title II applies to law enforcement activities, at least to some degree.[120] The second phase asks (1) whether the plaintiff was in effect discriminated against by being denied the benefits of law enforcement services, and, if so, (2) whether reasonable modifications could have been made to prevent the discrimination by equalizing the plaintiff's opportunity to benefit from the service.[121]

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117 42 U.S.C. § 12132 (2012); *see also* Robertson v. Las Animas Cty. Sheriff's Dep't, 500 F.3d 1185, 1193 (10th Cir. 2007) (confirming this standard).

118 *See* discussion *infra* Part II (discussing Tile II's applicability to all law enforcement activities).

119 *See* discussion *infra* Part I.D.3 (discussing the circuit split and various judicial approaches to Title II's application to law enforcement).

120 *See* discussion *infra* Part I.D.2 (discussing cases involving claims against law enforcement under the ADA).

121 *Cf.* General Prohibitions Against Discrimination, 28 C.F.R. § 35.130(b)(7)(i) (2016).

2. *Yeskey* and Foundations of the Application of Title II to Law Enforcement

Whether the ADA applied to law enforcement activities at all was an unsettled question until the Supreme Court's 1998 decision in *Pennsylvania Department of Corrections v. Yeskey*.[122] The historical trend of rejecting plaintiffs' liability claims against law enforcement changed when a unanimous Supreme Court held that the ADA does in fact apply to some law enforcement activities.[123] The Court's holding, however, was narrow and technically limited to the post-arrest context of prisons and prison services.[124] Whereas *Yeskey* made clear that reasonable modifications are required in state prisons and prison services as "public entities" under the ADA, the full extent of Title II's application in earlier phases of the criminal justice process has remained less obvious.

Some courts have been resistant to the application of Title II in earlier phases of law enforcement encounters. However, since *Yeskey*, the federal courts have reached a general agreement that Title II applies to law enforcement interactions to some extent[125]—although the Sixth Circuit has expressed some concern at such a broad reading of the statute.[126] Some courts have adopted narrow readings of *Yeskey* and the ADA by limiting its applicability entirely.[127] For example, some circuits have held that individuals are not qualified under the ADA at all when a scene is not "secured" or when the individuals may pose a danger to law enforcement or the public.[128] In *Hainze v. Richards*,[129] the Fifth Circuit championed a minority view that "Title II 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."[130] Despite the hesitation of some

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122 524 U.S. 206 (1998); *cf.* Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998) (determining that there is no voluntariness requirement for plaintiffs to be qualified under the ADA); Crawford v. Ind. Dep't of Corr., 115 F.3d 481, 483 (7th Cir. 1997) ("Incarceration itself is hardly a 'program' or 'activity' to which a disabled person might wish access . . . .").

123 *Yeskey*, 524 U.S. at 210 ("The text of the ADA provides no basis for distinguishing . . . programs, services, and activities [that are provided by prisons] from those provided by public entities that are not prisons.").

124 *Id.*; *see also* Osborn, *supra* note 16, at 345.

125 *See* cases cited *supra* note 32 and accompanying text.

126 *See* Tucker v. Tennessee, 539 F.3d 526, 534–35 (6th Cir. 2008) (noting concern for a holding that the ADA applies to arrests).

127 *See, e.g.*, Bates v. Chesterfield County, 216 F.3d 367, 372 (4th Cir. 2000); Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000).

128 *See, e.g.*, *Bates*, 216 F.3d at 372 (holding that in a volatile situation, pausing to comply with the ADA might be dangerous and impractical); *Hainze*, 207 F.3d at 801 (5th Cir. 2000) (holding that law enforcement need not make reasonable modifications prior to their securing the scene).

129 207 F.3d 795 (5th Cir. 2000).

130 *Hainze*, 207 F.3d at 801.

circuits, *Yeskey* paved the way for Title II application in other law enforcement contexts by reading the ADA broadly, a reading that continues to inform courts in addressing cases involving law enforcement interactions at earlier stages.[131]

3. Judicial Analysis of Law Enforcement Compliance with Title II

Because of the ADA's broad language and the regulations' emphasis on reasonable modifications, the inquiry for determining whether an entity has complied with Title II is inherently one of reasonableness. While courts have attempted to articulate the scope of law enforcement's legal obligation through the lens of individual cases, lower courts continue to focus on different factors from one case to another, leading to inconsistent and unpredictable jurisprudence.

The unsettled nature of the law in this respect is on full display in the Supreme Court's recent decision in *Sheehan*. There, the Supreme Court granted certiorari from a decision of the Ninth Circuit.[132] In the months leading up to the Supreme Court's decision, law enforcement and disability advocacy groups watched closely in anticipation of this potentially landmark case.[133] Many wondered whether the highest Court would shed light on the application of Title II's reasonable modifications requirement in law enforcement interactions. In particular, would the Supreme Court limit the protections of the ADA by holding that it does not apply in potentially dangerous field operations?[134] Where is the line drawn to ensure the protection of police

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131 *See* Roberts v. City of Omaha, 723 F.3d 966, 973 (8th Cir. 2013) (holding that the ADA applies to "law enforcement officers taking disabled suspects into custody"); Seremeth v. Bd. of Cty. Comm'rs Frederick Cty., 673 F.3d 333, 338 (4th Cir. 2012) ("[T]he ADA applies to police interrogations."); Bircoll v. Miami-Dade County, 480 F.3d 1072, 1084 (11th Cir. 2007) (finding the Title II clause to be "a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context"); Anthony v. City of New York, 339 F.3d 129, 140–41 (2d Cir. 2003); Gohier v. Enright, 186 F.3d 1216, 1221 (10th Cir. 1999) ("[A] broad rule categorically excluding arrests from the scope of Title II . . . is not the law."); Gorman v. Bartch, 152 F.3d 907, 913 (8th Cir. 1998).

132 City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1769 (2015).

133 *See Supreme Court Considers Impact of Disability Law on Police*, NEWSMAX (Mar. 23, 2015), http://www.newsmax.com/US/police-disability-laws-supreme/2015/03/23/id/631831/.

134 Many civil rights groups were concerned that the Supreme Court would limit the protections of the ADA by imposing a blanket exception for law enforcement interactions with individuals with disabilities because of implicated safety concerns. *See* Claudia Center, *How Police Can Stop Shooting People with Disabilities*, ACLU (Mar. 20, 2015), https://www.aclu.org/blog/speak-freely/how-police-can-stop-shooting-people-disabilities ("If the Supreme Court rules that Ms. Sheehan somehow is not protected by the ADA, then the decades-long movement to achieve safer police interactions with individuals with disabilities will suffer a devastating setback.").

officers, the public, and the individual with the disability? The Court ultimately punted on a technicality, and these questions remain largely unanswered.[135]

Despite the Supreme Court's minimal legal direction in *Sheehan*, it is worth noting the Ninth Circuit's analysis. The Ninth Circuit expressed concern that the officers forcibly entered Sheehan's room without first attempting any alternative, less aggressive resolution.[136] The court began its analysis by confirming that Title II of the ADA indeed applies to arrests, and went on to hold that officers may have failed to reasonably accommodate Sheehan's disability by failing to "tak[e] her mental illness into account or [failing to employ] generally accepted police practices for peaceably resolving a confrontation with a person with mental illness."[137] The officers were expressly advised of Sheehan's fragile mental state prior to confronting her, and the known facts show no indication that Sheehan was necessarily a danger to herself, nor was there any reason to believe that she had any real means of escape to possibly harm anyone else.[138] At least one of the officers outright admitted that she did not take Sheehan's mental illness into account when forcing through the bedroom door without waiting for backup.[139] The court also noted that even if some threat existed, officers likely had more time than they utilized to implement a more careful operation, sensitive to the needs of Sheehan and her disability.[140] Ultimately, according to the Ninth Circuit, a reasonable jury "could find that the situation had been defused sufficiently, following the initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics."[141]

In an earlier case, the Eleventh Circuit attempted to establish a testable inquiry for assessing the reasonableness of law enforcement's modifications.[142] In *Bircoll v. Miami-Dade County*,[143] the court asked, "whether, given [the] criminal activity and safety concerns, any modification of police procedures [was] reasonable before the police physically arrest[ed] a criminal suspect,

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135 Certiorari was originally granted on the notion that San Francisco would argue that Title II does not apply in the arrest phase *at all* when an officer encounters a potentially dangerous individual. *Sheehan*, 135 S. Ct. at 1772. San Francisco abandoned that argument and instead claimed that Sheehan was not a "qualified" individual under the ADA because she "pose[d] a direct threat" which could not "be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services." *Id.* at 1773. Since this argument was different from the arguments considered by the lower courts, the Supreme Court refused to address the ADA's applicability to law enforcement activities entirely. *Id.* ("The Court does not ordinarily decide questions that were not passed on below.").

136 Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1217 (9th Cir. 2014), *rev'd in part*, City & County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015).

137 *Id.*

138 *Id.* at 1218.

139 *Id.* at 1219.

140 *Id.* at 1230.

141 *Id.* at 1233.

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

143 480 F.3d 1072 (11th Cir. 2007).

secure[d] the scene, and ensure[d] that there [was] no threat to public or officer's safety."[144] The court correctly articulated the real issue, which is not whether the ADA applies at all—as the majority of circuits have held that it does—but rather, whether law enforcement made the requisite modifications in accordance with Title II.[145] The court stated, "[t]he exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance."[146] Despite touching on exigent circumstances, safety concerns, and "threat[s] to the public or officer's safety," the court did not offer any real indication of how to balance the safety threat with the rights of the individual.[147] Instead, it reverted to a freeform factual assessment without fine-tuning any framework for its analysis.[148]

Somewhat in line with *Bircoll*, other circuit courts have implicitly recognized an exception to Title II's applicability to law enforcement interactions, holding that law enforcement is absolved from its duty to consider ADA compliance in direct threat situations where officer or public safety would be at risk.[149] For instance, the Fourth Circuit has advised that "the volatile nature of a situation may make a pause for psychiatric diagnosis impractical and even dangerous."[150] In *Bates v. Chesterfield County*,[151] a neighbor contacted law enforcement when a young man with autism exhibited concerning behavior.[152] When law enforcement arrived, a struggle ensued, resulting in the officers restraining the young man.[153] Law enforcement officers were not told that he had autism until a family friend arrived shortly after he was restrained and advised the officers, after which the young man's parents arrived and confirmed.[154] When he noticed his parents, the young man turned abruptly, leading the officers to "react[] by grabbing Bates and forcing him to the ground."[155] The Fourth Circuit tied its analysis of the plaintiff's ADA claim in with the plaintiff's Fourth Amendment claim.[156] The court, in a brief

144 *Id.* at 1085.

145 *Id.*

146 *Id.*

147 *Id.* at 1085–89.

148 *Id.*

149 *See, e.g.*, Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 177 (4th Cir. 2009); Bates v. Chesterfield County, 216 F.3d 367, 372 (4th Cir. 2000). This exception originated in the Title II regulations. *See* General Prohibitions Against Discrimination, 28 C.F.R. § 35.139(a) (2016) (direct threat provision).

150 *Bates*, 216 F.3d at 372.

151 216 F.3d 367 (4th Cir. 2000).

152 *Id.* at 369.

153 *Id.* at 372.

154 *Id.* at 370.

155 *Id.*

156 *Id.* at 373. It is common for law enforcement encounters with individuals with disabilities to lead to claims under both Title II and the Fourth Amendment. *See, e.g.*, Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1216 (9th Cir. 2014), *rev'd in part*, City & County of San Francisco v. Sheehan,

two paragraphs of analysis, categorized the use of force as objectionably reasonable and essentially did not even reach the ADA issue.[157] Somehow, the court asserted reasonableness of the officers' actions, without any substantial discussion devoted to the unique nature of the plaintiff's disability.[158]

The Fourth Circuit reaffirmed this approach in *Waller* ex rel. *Estate of Hunt v. City of Danville*[159] when it rejected a plaintiff's claim that law enforcement officers failed to reasonably modify their policies and practices to engage in a hostage situation that ultimately led to the plaintiff being shot.[160] Despite the fact that law enforcement had been informed that the plaintiff was a mental patient and had been in and out of hospitals, the officers deployed their Emergency Response Team which apparently used forcible tactics.[161] The plaintiff claimed that the team exhibited the failure of the agency to properly train officers to interact with individuals with disabilities.[162] Nonetheless, the court concluded that the reasonable modifications that the plaintiff sought were not reasonable.[163] The court explained that "it would [have been] unclear to officers which of the plaintiff's various alternatives they would be required to pursue."[164] The plaintiff's proposed modifications suggested that the officers should have (1) refrained from banging and yelling around the door, which further agitated the plaintiff, (2) called mental health professionals, (3) contacted the plaintiff's family, or (4) sought to administer medication.[165] In response, the court stated that "[t]o say officers should have taken certain other actions during a standoff is to lean far in the direction of impermissible hindsight."[166]

The court did not expand on exactly what made the officers' actions in *Waller* reasonable, but it did note that law enforcement waited several hours before entering.[167] The court rejected the plaintiff's argument that because the

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135 S. Ct. 1765 (2015); Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 173 (4th Cir. 2009); *see generally* Avery, *supra* note 18 (discussing law enforcement's duties to individuals with disabilities through the lens of the Fourth Amendment). In *Sheehan*, the Ninth Circuit—in addition to the Title II claim—addressed Ms. Sheehan's Fourth Amendment claim partially under a "provocation theory." *Sheehan*, 743 F.3d at 1230. Although this Comment focuses on law enforcement's duties as prescribed by Title II of the ADA, many of the same considerations that inform a Title II reasonable modifications analysis may also affect a Fourth Amendment analysis. *See Waller*, 556 F.3d at 175 ("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.").

157 *Bates*, 216 F.3d at 373.

158 *See id.*

159 556 F.3d 171 (4th Cir. 2009).

160 *Waller*, 556 F.3d at 177.

161 *Id.* at 173.

162 *Id.*

163 *Id.* at 176.

164 *Id.*

165 *Id.* at 175.

166 *Waller*, 556 F.3d at 175–76.

167 *Id.* at 177.

situation was not imminent, the requirement of modifications would be a reasonable one.[168] Despite admitting that the officers had "two hours to assess" the situation and that they "did not face an immediate crisis," the court rationalized that the potential risk to the hostage made the officers' actions reasonable.[169] Notwithstanding, the court did not impose a blanket exception to law enforcement's duties under Title II; it only stated that "[a] reasonable belief on the part of the officers that this was a potentially violent hostage situation may not resolve the ADA inquiry, but it cannot help but inform it."[170]

Finally, in *Hainze*—the case demonstrative of the exception to the majority rule that law enforcement interactions with individuals with disabilities are covered under Title II—the Fifth Circuit interpreted an individual's use of force against the officer as sufficient to eliminate the officer's duties under the ADA.[171] Effectively, the court created a blanket exception wherever some threat may exist. The officer in *Hainze* was responding to an individual who was holding a knife near public citizens.[172] The officer responded quickly and with force when the individual approached her with the knife.[173] The court concluded that it was the actions of the plaintiff, rather than that of the officer or the law enforcement agency, that ultimately denied the plaintiff the benefits of law enforcement's program and services.[174]

A review of the case law demonstrates that courts sometimes struggle with the idea that, to ensure that disabled persons have equal access to public services, compliance with the non-discrimination mandate of Title II necessarily requires that individuals with disabilities are treated differently—rather than the same as—the nondisabled population.[175] Returning to the reasonable modifications provision specifically, it is the duty of the courts to assess law enforcement's service as provided to the individual plaintiff, to ensure that the plaintiff's opportunity, access, and benefit is the same is that of nondisabled individuals.[176] Some courts have shrugged off a Title II-driven analysis

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168 *Id.* at 175–76.

169 *See id.* at 175 ("Accommodations that might be expected when time is of no matter become unreasonable to expect when time is of the essence.").

170 *Id.* (internal quotation marks omitted); *see also* Williams v. City of New York, 121 F. Supp. 3d 354, 368 (S.D.N.Y. 2015) (noting that while the "argument that exigent circumstances may excuse law enforcement action from providing accommodations fits within [the appropriate] standard[, the] argument that on-the-street interactions are categorically excluded from Title II coverage does not").

171 *See* Hainze v. Richards, 207 F.3d 795, 800–01 (5th Cir. 2000) ("Hainze was not denied the benefits and protections of [the] County's mental health training *by* the County, Sheriff Richards, or the officers. Rather, Hainze's assault of [the officer] with a deadly weapon denied him the benefits of that program.").

172 *Id.* at 801.

173 *Id.*

174 *Id.* at 802.

175 *See* Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 344 (2001).

176 *See* General Prohibitions Against Discrimination, 28 C.F.R. § 35.130(b)(7)(i) (2016).

by only relying on the "reasonableness" of the Fourth Amendment.[177] Others have tipped the scales too far in attempting to balance public safety concerns.[178] Regardless, most courts have struggled to streamline the analysis in a way that unequivocally informs an outcome one way or another, thus emphasizing the need for a more consistent framework.

II. TITLE II'S APPLICATION TO LAW ENFORCEMENT ACTIVITIES

The majority of federal circuit courts have recognized that the ADA applies to all law enforcement activities.[179] Even the few circuits that have questioned the ADA's broad applicability in law enforcement interactions point to concerns for public safety to justify their position on early stage encounters—particularly the pre-arrest and arrest stages.[180] While the crux of the analysis for most courts arises in second phase of analysis—whether law enforcement's actions were in compliance with the ADA—it is worth establishing the first phase, that Title II of the ADA and, accordingly, the reasonable modifications provision, applies to law enforcement.

As an initial matter, law enforcement agencies fall squarely within the definition of a "public entity" under Title II as programs of State or local governments.[181] Because the regulations are clear that Title II applies to all services and programs a public entity offers, there is no indication that law enforcement's Title-II covered activities should be specifically limited.[182] All actions of law enforcement are plainly included as part of "the services, programs, or activities of a public entity."[183]

Congress did not limit its discussion to the later stages of custody, interrogation, or prison; it stressed that discrimination persists specifically in earlier stages of law enforcement.[184] The plain language and the legislative history underlying the ADA support a broad and expansive reading of Title

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177 *See infra* text accompanying notes 229–232.

178 *See supra* text accompanying notes 159–170.

179 *See supra* text accompanying note 32.

180 *See* Tucker v. Tennessee, 539 F.3d 526, 531–36 (6th Cir. 2008) (questioning the applicability of the ADA in the arrest phase); Hainze v. Richards, 207 F.3d 795, 802 (5th Cir. 2000) (rejecting the applicability of the ADA in the arrest phase); Rosen v. Montgomery County, 121 F.3d 154, 157–58 (4th Cir. 1997) (expressing disagreement that the ADA applies in the arrest phase).

181 42 U.S.C. § 12131(1)(B) (2012); 28 C.F.R. § 35.104; *see also* LAW ENFORCEMENT GUIDANCE, *supra* note 96.

182 General Prohibitions Against Discrimination, 28 C.F.R. § 35.102(a) (2016).

183 28 C.F.R. § 35.130(a).

184 *See, e.g.*, 136 CONG. REC. 11,461 (May 22, 1990) (statement of Rep. Mel Levine) ("Many times, deaf persons who are arrested are put in handcuffs. But many deaf persons use their hands to communicate . . . these mistakes . . . constitute discrimination."); *id.* ("Persons with epilepsy who are having seizures are often inappropriately dealt with by police.").

II's application to law enforcement: "In fact, one of the Act's most impressive strengths has been identified as its comprehensive character, and accordingly the Act has been described as a milestone on the path to a more decent, tolerant, progressive society."[185] In enacting Title II, Congress's primary purpose was to ensure that public services be provided effectively and with equal access, free from discrimination toward individuals with disabilities.[186] The congressional intent exemplified in the language and history of Title II make clear the evils that the ADA was designed to combat, and demand an inclusive reading of the text.[187] Committee reports further reflect Congress's intent to include *all activities* of public entities—which would presumably include all stages of law enforcement activities.[188]

In addition, the Supreme Court has clarified that the ADA applies to at least some forms of law enforcement-related services, specifically prison services.[189] In *Yeskey*, the Supreme Court held that the non-discrimination obligations of public entities under Title II do extend to situations where individuals with disabilities do not voluntarily seek the service.[190] In the context of prisons—at issue in *Yeskey*—as in most capricious encounters with law enforcement, an individual is not voluntarily availing him or herself to the public service.[191] But Justice Scalia, speaking for the Supreme Court, clarified that even individuals who are imprisoned involuntarily are eligible for and receiving the programs and services provided by the public entity: "As we have said before, the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."[192] Through *Yeskey*, the Supreme Court disposed of any requirement that the individuals themselves must voluntarily submit to or seek out the services to be entitled to the appropriate modifications or to be protected from discrimination on the basis of disability.[193]

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185 JEFFREY A. JENKINS, THE AMERICAN COURTS: A PROCEDURAL APPROACH 221 (2011) (internal quotation marks omitted).

186 42 U.S.C. § 12132; *see also* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 397 (1991).

187 42 U.S.C. § 12132 (2012).

188 *See* H.R. REP. NO. 101–485, pt. 3, at 50 (1990).

189 Pennsylvania Dep't. of Corrections v. Yeskey, 524 U.S. 206, 213 (1998).

190 *Id.* at 211.

191 *See id.*

192 *Id.* at 212 (internal quotation marks omitted). Subsequent to *Yeskey*, the DOJ updated the regulations to specifically address discrimination against individuals with disabilities in the context of prisons and correctional facilities. General Prohibitions Against Discrimination, 28 C.F.R. § 35.152(b) (2016) ("Public entities shall ensure that qualified inmates or detainees with disabilities shall not, because a facility is inaccessible to or unusable by individuals with disabilities, 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 public entity.").

193 *Yeskey*, 524 U.S. at 211–13.

Title II ensures that individuals with disabilities are afforded effectively equal access to *all* programs, services, and activities of public entities.[194] This logically includes the full spectrum of encounters with law enforcement, from the initial response, and thereafter. This includes, but is not limited to, arrest and interrogation, interactions during custody, pretrial and trial, and interactions in prison settings.[195] If an individual is not provided with the reasonable modifications called for under the ADA at any of these phases, the individual is at a disadvantage. If the individual is at such a disadvantage, he or she suffers discrimination based on his or her disability because he or she is, in effect, being denied full and equal access to a public entity's programs, services, and activities. Denial of this access to a public entity is in direct violation of the ADA.[196]

For instance, suppose officers are called to assist with an individual who has a mental disability causing severe anxiety and paranoia. Assume the officers are told of the condition and that the individual has locked herself in her room, alone. Right off the bat, application of Title II is triggered, because this case so far involves an initial response, which is a covered interaction with law enforcement.[197] If law enforcement proceeds to ignore the individual's disability and employ the same aggression-focused tactics commonly utilized,[198] the individual is placed at a disadvantage.[199] She faces increased challenges—reconciling her disability with law enforcement's aggressive response and controlling her reaction, which may be beyond her control. This disadvantage puts her in greater danger when interacting with law enforcement, and directly discriminates against her by extinguishing her ability to benefit fully and equally from law enforcement's services and activities. This hypothetical is quite similar to what happened to Ms. Sheehan, the subject of the Introduction. It is not a unique one and is further expanded on in the application of the proposed framework discussed in Part III.

There is no indication that Congress intended for—or that the DOJ interprets—the ADA to apply differently in the context of certain public entities or certain services; accordingly, no special exception should be read into the application of the ADA in law enforcement activities. To find such an exception would not only conflict with the statutory and regulatory plain language, but would also deviate from the broad purpose of Title II, namely,

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194 42 U.S.C. § 12132 ("Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").

195 *See* CRIMINAL JUSTICE GUIDANCE, *supra* note 19.

196 *See generally* 28 C.F.R. § 35.130.

197 *See supra* text accompanying notes 184–188.

198 *See* Melber & Hause, *supra* note 13; Pérez-Peña, *supra* note 12.

199 *See* LAW ENFORCEMENT GUIDANCE, *supra* note 96 ("Individuals [with certain disabilities] may not recognize or be able to respond to police directions. These individuals may erroneously be perceived as uncooperative.").

protecting and providing legal redress to individuals with disabilities when receiving a public benefit—here, the protection of law enforcement.[200]

III. WHAT'S REASONABLE?: AN ANALYTICAL FRAMEWORK FOR APPLYING TITLE II TO LAW ENFORCEMENT INTERACTIONS WITH INDIVIDUALS WITH DISABILITIES

Once a court has confirmed that the ADA applies to law enforcement's interactions with individuals with disabilities, the second and more difficult question becomes determining whether law enforcement complied with Title II; more specifically, whether law enforcement made the requisite modifications to their policies, practices, and procedures to ensure non-discrimination on the basis of disability. These modifications can take different forms, which consequently causes confusion by law enforcement as they attempt to comply with the ADA, as well as confusion by courts after the fact as they ponder whether an agency did indeed comply. Further, the direct threat provision's increased role when assessing Title II as it applies to law enforcement interactions creates an added complication. Without resolution on this issue, the lower courts are left formulating their own haphazard approaches to an issue that can have vast and devastating implications.

Because the Supreme Court in *Sheehan* did not clarify the precise application of the ADA to law enforcement interactions, police interaction with individuals with disabilities will continue to fall below the standards required by the ADA.[201] Title II's anti-discrimination mandate was meant to provide "clear, strong, consistent, enforceable standards addressing discrimination against persons with disabilities."[202] Yet this has not proven to be the case where law enforcement is involved; the unique nature of the "services" law enforcement provides make Title II's application vague at best.[203] Accordingly, individuals with disabilities are frequently placed in discriminatory and sometimes dangerous situations, and then face a further uphill battle as they navigate the legal system.

To combat these problematic effects, a more uniform legal framework is necessary to inform courts of the relevant factors for reviewing such claims, with a particular focus on the role of direct threat provision. While ADA claims are intrinsically fact dependent, the foundation of the analysis is a legal one, grounded in the reasonable modifications requirement as reconciled with the direct threat principle.[204] Even open-ended balancing tests

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200 *See* 42 §§ U.S.C. 12131–34 (2012); General Prohibitions Against Discrimination, 28 C.F.R. §35.101 (2016).

201 Fischer, *supra* note 17, at 171.

202 42 U.S.C. §§ 12101(b)(2).

203 *See supra* Part I.D.

204 *See* Williams v. City of New York, 121 F. Supp. 3d 354, 368 (S.D.N.Y. 2015) ("Whether a disabled individual succeeds in proving discrimination under Title II of the ADA will depend on whether the officers' accommodations were reasonable under the circumstances.").

should be subject to constraints, and provide specific guidance wherever possible, to avoid the potential for judicial activism and to ensure some sense of consistency. When law enforcement fails to modify its policies and practices to accommodate the physical or mental disabilities of its citizens during the different stages of interacting with law enforcement, and when the judicial system fails to offer *ex post* redress, the justice system fails to protect a population that desperately needs protection; one that the ADA was designed to protect.

Although *Sheehan* punted the opportunity to resolve this enduring issue, it is only a matter of time before a court will again be faced with whether an individual has a viable claim under the ADA against law enforcement for failing to comply with their Title II duty to make reasonable modifications in interactions with individuals with disabilities. This Comment proposes that courts facing this issue should consider three central factors: (1) whether law enforcement was aware or should have been aware of the individual's disability; (2) whether the law enforcement agency had implemented training measures or other structural policies or procedures in conjunction with universally accepted police practices and, correspondingly, whether the individual officer's conduct was in line with the same; and (3) whether there was a threat to officer or public safety, and how immediate that threat was.[205] Naturally, there is some overlap between these three factors. Courts should address these factors chronologically, because the outcome of the first two factors will inform the analysis in the third factor.[206] Law enforcement's knowledge of whether an individual has a disability that would require accommodation is the logical first step, and the imminent threat inquiry is best assessed in light of the first two factors, considering whether reasonable modifications to policies can indeed be made. By proceeding through this three step analysis, courts ensure a more consistent application of Title II, particularly in reconciling the reasonable modifications provision with the direct threat provision, both of which remain the source of abundant misunderstanding in the courts.

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[205] Various courts have considered these proposed factors to some degree, usually turning their analysis on one factor without assessing others. *See* Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1216–17 (9th Cir. 2014), *rev'd in part*, City & County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015) (rejecting Ms. Sheehan's claim that the department failed to implement necessary training practices on the basis that liability is not dependent on the individual officers' failure to follow the training); Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 173, 177 (4th Cir. 2009) (noting that the responding officers were informed of the plaintiff's mental disability, but rejecting the plaintiff's claim on other grounds); Bircoll v. Miami-Dade County, 480 F.3d 1072, 1085 (11th Cir. 2007) (considering the threat to the officer's and the public's safety in assessing whether proposed modifications were reasonable); Bates v. Chesterfield County, 216 F.3d 367, 372 (4th Cir. 2000) (same).

[206] *See* discussion *infra* Part III.C.

A. *Factor 1: Knowledge of Disability*

The first question courts should ask when analyzing a Title II claim against law enforcement on a theory that it failed to make reasonable modifications is whether law enforcement—at the time of the interaction—was aware of, or should have been aware of, the individual's disability. The degree of knowledge has bearing on the subsequent duties that law enforcement has in interacting with that individual,[207] and affects the reasonableness of law enforcement's chosen tactics. The DOJ's technical guidance explicitly directs that the reasonable modifications obligation is triggered when the officers "know[] or reasonably should know that the person has a disability."[208] "Several factors may indicate that a person has a…disability…including self-report, information provided to dispatch or to the officer…, the [officer]'s prior knowledge of the person, or the [officer]'s direct observation."[209] The knowledge factor applies to both physical and mental disabilities, and both apparent and invisible effects of disabilities.[210] Seemingly, cases involving physical disabilities that are visible to law enforcement should always tilt this factor in favor of requiring reasonable modifications, since law enforcement is effectively put on notice of the need for such modifications.[211] The analysis is more problematic where mental or developmental disabilities and physical disabilities manifest through sometimes indiscernible symptoms (e.g., epilepsy, schizophrenia).[212]

The most straightforward application of the knowledge factor will arise in cases where law enforcement was explicitly advised of the individual's disability prior to or during the interaction. In such situations, law enforcement should unequivocally be required to make reasonable modifications.[213] At the least, where law enforcement is advised of the individual's disability, the analysis for Factor 1 would shift in favor of the plaintiff. This is the case more often than one might think. Given shortcomings in the mental health system, "law enforcement agencies have increasingly become *de facto* first responders to people experiencing mental health crisis."[214] In fact, the vast majority of law enforcement interactions with a disability no longer arise

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207 *See* CRIMINAL JUSTICE GUIDANCE, *supra* note 19.

208 *Id.*

209 *Id.*

210 *See* Osborn, *supra* note 16, at 345–46.

211 *Cf.* Perry & Carter-Long, *supra* note 4, at 19 (discussing instances where individuals in wheelchairs were subjected to excessive force by law enforcement officers).

212 *See id.* ("[P]eople with non-apparent disabilities are most vulnerable . . . to police violence . . . .").

213 *See* Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part*, City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1769 (2015); Jackson v. Inhabitants of Sanford, Civ. No. 94-12-P-H, 1994 WL 589617, at *1, *6 (D. Me. Sept. 23, 1994) (denying defendant's summary judgment partially on the basis that the officer was advised of the plaintiff's brain aneurysm).

214 *Law Enforcement and Mental Health*, NAT'L ALLIANCE ON MENTAL ILLNESS, http://www.nami.org/Get-Involved/Law-Enforcement-and-Mental-Health (last visited Sept. 28, 2016).

from law enforcement's response to a report of a crime generally.[215] "More often, the police officers [are] called by relatives, neighbors or other bystanders" to report an individual's erratic behavior.[216] Thus, law enforcement is put on notice that they cannot apply their usual tactics, and instead should use their awareness of the disability to make a determination, albeit often a quick one, as to how to modify their approach to the situation.

For instance, in Ms. Sheehan's case, law enforcement knew of Ms. Sheehan's disability from the outset.[217] This should have triggered an alternative approach on the part of the law enforcement officers, and should have been a weighty factor in the analysis had the Supreme Court reached the issue. In anticipating the potential challenges posed by Ms. Sheehan's disability, officers "could have surveyed the premises, consulted with command on strategies, and used calm communication to try to convince Ms. Sheehan to go with them to the psychiatric hospital."[218] In *Waller*, law enforcement, after being informed that the plaintiff had a mental disability, proceeded to call in its Emergency Response Team.[219] The team deployed forcible tactics—including banging on and yelling through the door—which only agitated the plaintiff.[220] Even though the court acknowledged law enforcement's knowledge of the plaintiff's disability, it failed to address why that knowledge could not have led the officers to at least attempt alternative forms of non-confrontational methods, including more peaceable entry and perhaps consultation with mental health experts. These cases involve eerily familiar situations: law enforcement responds to a call for assistance with an individual with a disability, but the individual "does not comply with the usual commands, does not heed the standard warnings, acts in a way that seems to invite danger, and ends up dead" or injured.[221]

Instead of defaulting to conventional forcible tactics or other crisis training tools, officers must acknowledge known manifestations of a disability, and modify their approach in accordance with well-accepted alternative techniques. "[U]sing force to address compliance—an option in conventional policing—is counterproductive without careful attention to a suspect's health or cognitive abilities."[222] That "careful attention"—at least where law enforcement has some notice of the individual's disability—is exactly what Title II's reasonable modifications requirement calls for.

Turning now to instances where law enforcement is not expressly advised of the plaintiff's disability, must law enforcement agencies ensure that

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215 Lowery, *supra* note 21.

216 *Id.*

217 Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1217 (9th Cir. 2014), *rev'd in part*, City & County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015).

218 Center, *supra* note 134.

219 Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 173 (4th Cir. 2009).

220 *Id.* at 175–76.

221 Pérez-Peña, *supra* note 12.

222 Melber & Hause, *supra* note 13.

officers are able to recognize symptoms or manifestations of an individual's disability in order to assess whether modifications would be reasonable? The answer is yes. Through training and collaboration with mental health professionals, the goal should be that "every officer has enough awareness to recognize when there might be a mental health issue [or other form of disability] involved, and to call for specialized backup."[223] The regulations even indicate that law enforcement must "make appropriate efforts to determine whether perceived strange or disruptive behavior or unconsciousness is the result of a disability."[224] Law enforcement should be expected to conduct an assessment of the situation to consider whether an individual may have a disability, and, consistent with the remaining two factors proposed in this Part, act in accordance with properly modified policies and practices.[225]

Some courts have gone too far and read a knowledge *requirement* into Title II by claiming that law enforcement must have been advised of the plaintiff's disability for the claim to possibly succeed.[226] The knowledge factor should not be a *requirement* or threshold standard for a claim to succeed under Title II. So much more is now known about mental and physical disabilities to the extent that symptoms, effects, and manifestations of these disabilities should often be cognizable to responding officers.[227] For instance, Crisis Intervention Training ("CIT") programs have seen success in training officers to recognize and effectively deal with various types of disabilities during various stages of law enforcement interactions.[228] Thus, while law enforcement's knowledge of the disability should be instructive in considering whether they should have taken the disability into account during their response, it should not operate as a bright line rule, and law enforcement should not be automatically absolved of its obligations under Title II just because they were not expressly advised of the plaintiff's disability.

Encouraging courts to assess knowledge as a factor will help to avoid outcomes such as those in *Bates* and *Waller*, where the court failed to conduct

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223 Pérez-Peña, *supra* note 12.

224 General Prohibitions Against Discrimination, 28 C.F.R. § 35.130 app. B at 689 (2016).

225 *See id.*

226 *See, e.g.*, Lewis v. Truitt, 960 F. Supp. 175, 178 (S.D. Ind. 1997).

227 *See* ROBERT A. MATTHEWS & LOYD W. ROWLAND, NAT'L ASS'N FOR MENTAL HEALTH, A MANUAL FOR THE POLICE OFFICER: HOW TO RECOGNIZE AND HANDLE ABNORMAL PEOPLE 8 (1975) (providing examples of ways to notice an individual's mental disability including drastic changes in behavior, strange loss of memory, appearing to think people are plotting against him, talking to him or herself, hearing voices or seeing visions, engaging in dangerous behavior, etc.).

228 *See* Randolph Dupont et al., *Crisis Intervention Team Core Elements*, THE UNIV. OF MEMPHIS SCH. OF URBAN AFFAIRS & PUB. POLICY DEP'T OF CRIMINOLOGY AND CRIMINAL JUSTICE CIT CTR. 3 (2007), http://www.cit.memphis.edu/information_files/CoreElements.pdf; *Essential Elements for the Commonwealth of Virginia's Crisis Intervention Team Programs (CIT)*, DEP'T OF CRIMINAL JUSTICE SERVS. & DEP'T OF BEHAVIORAL HEALTH & DEVELOPMENTAL SERVS. 5, http://www.dbhds.virginia.gov/library/forensics/ofo%20-%20vacitessentialelements.pdf (last updated October 1, 2014) [Hereinafter "VIRGINIA CIT"].

any substantive analysis of the plaintiff's Title II claim, instead using the Fourth Amendment issue to the drive the analysis.[229] In both cases, the court glossed over the effects of the plaintiffs' disabilities, and instead assessed law enforcement's actions through the lens of a Fourth Amendment reasonableness analysis. This in itself is telling. Instead of considering the fact that in *Waller* the officers were aware of the plaintiff's mental illness,[230] and that in *Bates* the officers perhaps could have recognized some signs of autism in the plaintiff's behavior—and they were eventually informed of it during the interaction[231]—the courts focused narrowly on law enforcement's actions as objectively reasonable and generally accepted tactics.[232]

The knowledge factor serves as the crucial first step in evaluating law enforcement's duties to make reasonable modifications. Assessing this factor, Title II obligations are triggered where law enforcement knew or should have known of the individual's disability.

B. *Factor 2: Departmental Policies, Training, & Universally Accepted Police Practices*

The second factor would assess the law enforcement agency's policies, including training and other structural practices, as well as to what extent those policies are consistent with universally accepted police practices. In addition, this factor would include an evaluation of the individual officer's behavior in applying the department's training or other similar tactical policies. The regulations and DOJ-issued interpretive guidance direct law enforcement agencies to make a concerted effort to address discriminatory effects that result from conventional policing practices.[233] Thus, evaluating Title II claims requires not only an assessment of the law enforcement agency's policies and practices—including training—but also to what extent those policies and practices compare to universally accepted police practices that have proven successful in interactions with individuals with disabilities.

Law enforcement has an affirmative duty to implement policies and procedures that modify the default practices to prevent discrimination based on disability.[234] Where discrimination—even if only in effect—persists, law enforcement should "take[] necessary corrective measures, such as revising

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229 *See* Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 173 (4th Cir. 2009); Bates v. Chesterfield County, 216 F.3d 367, 370–73 (4th Cir. 2000).

230 *Waller*, 556 F.3d at 173.

231 *Bates*, 216 F.3d at 369–70.

232 *See Waller*, 556 F.3d at 173; *Bates*, 216 F.3d at 373.

233 *See supra* Part I.C.

234 *See* 42 U.S.C. § 12182 (b)(2)(A)(iii) (2012); *see also* Delano-Pyle v. Victoria County, 302 F.3d 567, 575 (5th Cir. 2002); 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 Modifications*, 5 HARV. L. & POL'Y REV. 217, 220–21 (2011).

policies and procedures; refining quality assurance processes; and implementing training."[235] Discrimination occurs when a public entity fails to "take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services."[236] Thus, "[t]he purpose of the[] regulations is to motivate training regimes that eventually set a minimum standard that persons with disabilities can expect in their interactions with law enforcement."[237] Better training and efficient structural policies encouraging "sensitivity, and awareness will help to ensure equitable treatment of individuals with disabilities as well as effective law enforcement."[238]

Learning "to recognize when someone has a mental illness, how to deal with psychotic behavior . . . and how to respond," are all accomplishable by better training and understanding of types of disabilities.[239] Training with the purpose of enabling law enforcement to recognize and respond to effects of disabilities operates to prevent the type of latent discrimination inherently addressed through the reasonable modifications provision of Title II.[240] The analysis should therefore be less concerned with the individual officer's state of mind, and more concerned with whether the agency as a whole adopted training and other related policies in line with those recognized across the country as successful.

Training is the most obvious and tangible policy modification, and one that has seen success in improving law enforcement interactions with individuals with disabilities.[241] Training as a modification to prepare law enforcement officers to make adjustments in their responses to individuals with disabilities is a recurring theme throughout Title II's legislative history, regulations, supplemental guidance, and interpreting case law. Liability is usually

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235 CRIMINAL JUSTICE GUIDANCE, *supra* note 19.

236 42 U.S.C. § 12182 (b)(2)(A)(iii).

237 Maas, *supra* note 234, at 225; *see also* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 23 (Dec. 4, 2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf ("[O]fficers . . . who are not specially trained on this issue, do not use appropriate techniques or de-escalate encounters with individuals with mental illness or impaired faculties to prevent the use of force and, when force is used, officers do not adjust the application of force to account for the person's mental illness.").

238 LAW ENFORCEMENT GUIDANCE, *supra* note 96.

239 Fischer, *supra* note 17, at 170.

240 *See id*. at 179 ("The language of the ADA shows an understanding by Congress that the environment society has constructed through its policies, practices, and structures often excludes those with disabilities and is thus a form of discrimination."); Maas, *supra* note 234, at 220 (identifying latent discrimination which "come[s] in the form of normal treatment, when special treatment is necessary").

241 *See* Dupont et. al., *supra* note 228, at 14 (discussing the successful CIT program); Fischer, *supra* note 17, at 188–90 (discussing sufficient training as a reasonable accommodation); Dr. S.R. Thorward, *Crisis Intervention Team (CIT) Training Sees Immediate Results*, 32 CAP. U. L. REV. 1075, 1077 (2004) ("Clearly CIT is an immediate and worthwhile success.").

dependent on the department failing to adopt appropriate training, and not necessarily on the specific officers failing to follow such training.[242] The DOJ's guidance emphasizes that better training has been successful both in improving the benefits of law enforcement for the individual with the disability, as well as in protecting the general public.[243] In fact, the guidance explains that "[a]ppropriate training can prepare personnel to execute their ADA responsibilities in a manner that keeps staff, individuals with disabilities, and members of the community safe; promotes public welfare; [and] builds trust with the community."[244] This public safety and trust goes a long way to "ensure effective use of . . . resources[,] and contribut[es] to reliable . . . judicial results."[245]

Training as a form of modification is unique in that it begins to address the potential ADA violation well before the actual interaction between law enforcement and the individual begins.[246] Conventional law enforcement tactics include teaching "officers to be forceful, to take charge of a situation and to physically control anyone who might be a danger."[247] But applying that same approach to interactions with individuals with disabilities, can make an already volatile situation significantly more dangerous.[248] A lack of training directly correlates with greater violent outcomes when individuals with mental disabilities are involved.[249] Since training is a modification that Congress contemplated when enacting the ADA and since the last two decades have seen a growing trend to teach officers de-escalation tools, training is the first thing courts should look at when assessing this second factor in a Title II claim.[250] Training is a reasonable modification, both from a financial perspective as well as from the perspective of the "fundamental alteration" defense[251] and the direct threat principle discussed in Part III.C.

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242 Gohier v. Enright, 186 F.3d 1216, 1222 (10th Cir. 1999) (holding that a plaintiff did not have a valid cause of action under Title II when there was not a corresponding claim that the law enforcement agency failed to properly train its officers).

243 CRIMINAL JUSTICE GUIDANCE, *supra* note 19.

244 *Id.*

245 *Id.*

246 *See* Fischer, *supra* note 18, at 188 ("[T]he ADA violation may occur earlier than the act itself; for example, the violation may be in not providing reasonable accommodations for the mental illness, such as failing to provide sufficient training for the police or adequate mental health care.").

247 Pérez-Peña, *supra* note 12.

248 Lowery et. al., *supra* note 21.

249 *Id.* ("More than half the killings involve police agencies that have not provided their officers with state-of-the-art training to deal with the mentally ill.").

250 *See* H.R. REP. NO. 101- 485 (III), at 50 (1990); Pérez-Peña, *supra* note 12.

251 The fundamental alteration defense should rarely be an issue in cases addressing law enforcement interactions because improving training practices—and in turn, officer's responses to individuals with disabilities—will only improve and further the goals of law enforcement entities. *See* Fischer, *supra* note 17, at 192–93 (arguing that avoiding unnecessary arrests and criminalization of individuals with disabilities has economic benefits for the federal, state, and local governments). Such policies and practices do not alter the character of law enforcement as a service.

The Los Angeles Police Department in particular has served as a model for implementing tactics sympathetic and responsive to the specific needs of individuals with mental disabilities.[252] Sandy Jo MacArthur, the assistant chief in charge of overseeing the LAPD's mental health response teams "said her officers are trained to embrace tactics that may seem counterintuitive. Instead of rushing to take someone into custody, they try to slow things down and persuade the person to come with them."[253] In other words, the law enforcement officers act *differently* in situations involving individuals with disabilities by modifying their usual approach.[254] Another successful approach involves police stations having sworn officers with special mental health training who are assigned as the first-line response to mental health crises in the community.[255] These programs have designated officers who serve as liaisons to the more formal mental health system.[256] Communities that utilize such "specialized response systems combining the criminal justice system and the mental health system, including greater training for officers, had arrest rates of persons with an apparent mental illness a third less than those without specialized systems."[257]

Perhaps the most well-known approach to training law enforcement officers to be prepared to safely interact with individuals with disabilities is the Memphis Crisis Intervention Training model.[258] Its collaborative approach encourages inter-group advocacy and works hands-on with the police to develop greater understanding when interacting with individuals with disabilities.[259] The theory is specialization: Departments prepare a portion of specializing officers who are tasked with handling responses to mental health crises.[260] According to the University of Memphis's website for its CIT program, a successful program will have trained twenty to twenty-five percent of the agency patrol division.[261] To do so, law enforcement teams up with advocacy groups which provide police training teaching officers to deal with various disabilities in a pre-arrest, arrest, or pre-trial encounters.[262]

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252 Lowery et. al., *supra* note 21.

253 *Id.*

254 *Accord* General Prohibitions Against Discrimination, 28 C.F.R. § 35.130(b)(7)(i) (2016) (reasonable modifications provision).

255 Fischer, *supra* note 17, at 172; *see also* Dupont et. al., *supra* note 228; VIRGINIA CIT, *supra* note 228, at 2.

256 Fischer, *supra* note 17, at 191.

257 *Id.* at 172.

258 *See* Dupont et. al., *supra* note 228, at 3; Thorward, *supra* note 241, at 1075.

259 Dupont et. al., *supra* note 228, at 3, 6–8.

260 Judy Hails & Randy Borum, *Police Training and Specialized Approaches for Responding to People With Mental Illnesses*, 49 CRIME & DELINQUENCY 52, 59–60 (2003); *see also* Dupont et. al., *supra* note 228, at 10, 12–13 (specifically discussing the CIT program).

261 Dupont et. al., *supra* note 228, at 10.

262 *Id.* at 14–15.

Other strategies may also serve as reasonable modifications.[263] For instance, the DOJ published an informational report suggesting, among other things, that law enforcement agencies use alternative responses apart from deadly force.[264] The report states, "Police officers can resolve most tense and threatening situations involving people with mental illness by maintaining a calm demeanor, using good oral and nonverbal communication, and using proper tactics, but when those techniques fail, it is crucial to have additional alternatives short of deadly force."[265] Non-lethal weapons such as pepper spray, are accessible and affordable, and can effectively address potential threats without the tragic outcome where lethal force is used.[266]

Finally, when assessing a particular agency's modifications after the fact, courts should consider the size of the agency, as well as its access to funding.[267] There are limitations to some of these larger programs, such as the CIT program.[268] In certain small town areas, "few local police agencies have the money for crisis-intervention training."[269] Still, programs and strategies do exist that hold the potential to reduce discrimination against individuals with disabilities by law while also being financially feasible.[270] The extent of programs an agency should have taken in order to provide modifications to individuals with disabilities should be assessed in consideration with practical and financial concerns or the particular agency.[271]

C. *Factor 3: Threat to Officer or Public Safety*

The third and final factor is perhaps the most difficult, and it is heavily dependent on the conclusions regarding the second factor. It asks, to what degree did the plaintiff present an apparent threat to public safety or to the safety of the officer? This factor is inherently twofold, first asking whether law enforcement reasonably perceived a threat and secondly assessing the proximity or imminence of that threat. Most importantly, reviewing courts

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263 Cordner, *supra* note 14, at 22–28 (listing various techniques and policies law enforcement agencies can adopt to ensure more effective interactions with individuals with mental disabilities).

264 *Id.* at 24–25.

265 *Id.*

266 *Id.* at 25.

267 Maas, *supra* note 234, at 228–29.

268 Cordner, *supra* note 14, at 26–27.

269 Lowery et. al., *supra* note 21.

270 *See* Hails & Borum, *supra* note 260, at 60.

271 *Id.* Law enforcement agencies rightfully express concern at the lack of funding from the federal government, making it next to impossible for law enforcement to carry out their duties under the ADA to provide reasonable accommodations. Fischer, *supra* note 17, at 179. As a practical matter, to adequately protect and avoid discrimination of the disabled population, it is crucial that law enforcement officers receive adequate training and resources. More accessible funding would encourage often resistant law enforcement agencies to adopt policies that accommodate interactions with persons with disabilities under the ADA.

should look back at whether reasonable modifications—considered in the context of the second factor—could have mitigated the threat.[272] Law enforcement is not automatically relieved of their duties to comply with Title II where a perceived threat exists; however, the fact of increased danger certainly would require further judicial consideration of the reasonableness of the modifications law enforcement should have adopted.[273]

Under the Title II regulations, a public entity need not "permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others."[274] In assessing whether a direct threat exists, the regulatory guidance encourages entities to consider the nature and severity of the risk, the likelihood of injury, and, most importantly, "[w]hether reasonable modifications of policies, practice, or procedures will mitigate or eliminate the risk."[275] The regulations recognize two limitations which operate to soften the effects of the direct provision. First, in determining whether such a "direct threat" exists, the public entity must assess "whether reasonable modifications of policies, practices, or procedures . . . will mitigate the risk."[276] Thus, a direct threat only substantially affects the outcome of the analysis where the risk "cannot be eliminated or reduced to an acceptable level by the public entity's modification."[277] Second, the perception of the threat cannot be based on mere generalizations or unfair stereotypes about characteristics or manifestations of certain disabilities.[278]

With respect to the first limitation—requiring mitigating modifications—many of the training and mental health collaboration efforts being adopted throughout the country have proven successful in teaching law enforcement officers to assess and respond without lethal force to high pressure situations involving individuals with disabilities.[279] It is thus critical that courts assessing law enforcement's actions in Title II claims consider whether these types of training and collaborative modifications could have diminished the risk. Of course, unlike in other Title II contexts, law enforcement interacting with individuals with disabilities—whether in response to a call for assistance due to mental illness, in a pre-arrest or arrest situation, or in a similar encounter—does not usually have the luxury of time to make a long-winded assessment as to the likelihood and severity of the threat and as to what modifications to make. Thus, the direct threat principle plays a unique role in the law enforcement context. Notwithstanding, increased training and newer, adaptive police practices, which better inform how to assess

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272 *Cf.* General Prohibitions Against Discrimination, 28 C.F.R. § 35.139(b) (2016).

273 *See* Avery, *supra* note 18, at 331.

274 28 C.F.R. § 35.139(a); *see also* discussion *supra* note 86.

275 TAM, *supra* note 55, § II-2.8000.

276 28 C.F.R. § 35.139(b); *see also* Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 287–89 (1987); TAM, *supra* note 55, § II-2.8000.

277 TAM, *supra* note 55, § II-2.8000.

278 28 C.F.R. § 35.104 app. B at 687; *see also* TAM, *supra* note 55, § II-2.8000.

279 *See* discussion *supra* Part III.B.

and respond to individuals with disabilities, would inherently mitigate the concerns raised by the direct threat principle.

Analyzing the direct threat principle in conjunction with reasonable modifications is always necessary in cases involving high pressure law enforcement interactions. Since the outcome of one informs the outcome of the other, effective policing—meaning protection of the general public, including the individual with the disability—depends on both considerations. In *Hainze*, the Fifth Circuit effectively read a direct threat exception in, without considering whether the officers could have made reasonable modifications to mitigate the threat.[280] In doing so, it incorrectly concluded that Title II does not apply in law enforcement's on-the-street interactions at all.[281] Instead, pursuant to the reasonable modifications and direct threat provisions of the Title II regulations, the court should have conducted a deeper inquiry into the extent and imminence of the threat, and into whether modifications could have been made to mitigate it.

Notwithstanding, it is possible that, considering *Hainze* through the lens of the three factors proposed here, the outcome of the case would be the same. First, with regard to the knowledge factor, law enforcement was responding to a call for assistance in transporting the plaintiff to a mental health hospital; thus, the officers had knowledge of his disability.[282] The court breezed over the second factor considerations—departmental policies and training protocols—and never reached the issue of whether the law enforcement agency provided proper training measures to prepare officers to make reasonable modifications.[283] The court's entire analysis was driven by the fact that the interaction took place "on-the-street" with a direct and imminent threat.[284] While the court's consideration of the direct threat principle was incomplete,[285] the fact that the officer had a "split-second" to assess and respond differently implies that modifications may not have been reasonable, even with better training.[286] Regardless, the plaintiff's claim that the "county's policy of treating mental health calls identical to criminal response calls and

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280 Hainze v. Richards, 207 F.3d 795, 801–02 (5th Cir. 2000).

281 *Id.*

282 *Id.* at 797.

283 *Id.* at 800–01.

284 *Id.* at 801.

285 *See* General Prohibitions Against Discrimination, 28 C.F.R. § 35.139(b) (2016) (explaining that the assessment of a direct threat requires consideration of "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"); *see also* Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 287–89 (1987); TAM, *supra* note 55, § II-2.8000.

286 *Hainze*, 207 F.3d at 801–02 ("[The officer's] actions were the result of a quick, discretionary decision made in self-defense and for the safety of those at the scene.").

those not involving people with mental disabilities resulted in his discriminatory treatment" was not fully resolved through the court's analysis.[287] Perhaps the officers could have, before even reaching the scene, made modifications. For instance, when interacting with individuals with mental disabilities, "[o]fficers are encouraged to approach subjects in a friendly and open manner. Training materials specifically warn officers to arrive at a scene quietly, avoiding loud noise from sirens, as additional commotion may disturb a subject even more."[288] Ultimately, training can prepare officers to assess and respond appropriately to situations prior to arriving on a scene, and courts should not breeze over these potential modifications when analyzing Title II claims involving law enforcement.[289]

With respect to the second limitation, that a proclaimed threat cannot be based on "mere generalizations or unfair stereotypes," the knowledge factor directly intersects.[290] So often, individuals with mental illnesses are prone to certain tendencies that "may cause officers to approach them more aggressively, possibly escalating the situation and even evoking unnecessary violence."[291] Notably, looking at the subset of police shootings involving individuals with mental disabilities, individuals with disabilities "[were] more likely to wield a weapon less lethal than a firearm."[292] Most of the weapons carried by these individuals would "rarely prove deadly to police officers."[293] For instance, Ms. Sheehan wielded a kitchen knife.[294] Thus, in conjunction with this third factor, law enforcement must not jump the gun by merely assuming that an individual—because of his or her mental disability—must be violent, or must be carrying a weapon. These are precisely the "generalizations or stereotypes" the regulations reject as insufficient to form the basis for making a determination that a threat exits.[295] Inherent inconsistencies exist between an actual threat, the actual intentions of the individual subject, and the law enforcement officer's *perceptions* of those intentions.[296]

This factor is not a blanket exception to the general protections of Title II. Reading in an exception would essentially swallow the rule; in effect, no law enforcement on-the-street, pre-arrest, or arrest situations—basically any

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287 *Id.* at 801.

288 Avery, *supra* note 18, at 291.

289 *See id.* at 291–92 ("Training materials indicate that, whenever time permits, officers should communicate with one another and prepare a plan prior to engaging an emotionally disturbed person. Officers are encouraged not to proceed in haste, but to take the time to assess the overall situation and to proceed slowly as the event develops.") (internal citation omitted).

290 *See* 28 C.F.R. § 35.104 (app. b); TAM, *supra* note 55, at § II-2.8000.

291 Fischer, *supra* note 17, at 172.

292 Lowery, *supra* note 21.

293 *Id.* These weapons included things like blades, knives, or machetes. *Id.*

294 *See* City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1771 (2015).

295 General Prohibitions Against Discrimination, 28 C.F.R. § 35.104 app. B at 687 (2016).

296 Lowery, *supra* note 21 (recounting the story of an individual with a mental disability who "appeared to pose a threat, but unlike someone committing a robbery, her intentions were obscure").

interaction where the potential for a threat could arise—would be subject to Title II. This is in direct conflict with the text and legislative history of the ADA, as well as with the regulations and interpretive guidance.[297] The reasonable modifications qualification to the direct threat provision serves to induce public entities to make adjustments to their usual tactics—even where a threat exists—to the extent that they are reasonable.[298] Accordingly, although the existence of a possible direct threat alters the analysis, it does not foreclose law enforcement's duties under Title II. Rather, law enforcement must conduct an assessment of the immediacy of the threat and determine whether alternatives exist.

Prior to the Supreme Court's review of *Sheehan*, issues related to the direct threat principle rightfully generated concern that the Court might impose a new limitation on the ADA's protections.[299] In *Sheehan*, one officer testified that she did not consider Sheehan's psychiatric disability when instructing her colleague to forcibly open Sheehan's door.[300] In doing so, the officer claimed to be putting public safety over Sheehan's disability.[301] As mentioned, there may be instances where safety concerns do outweigh the Title II mandate because reasonable modifications cannot effectively alleviate those concerns; however, *Sheehan* was not one of those instances. Sheehan was holding a kitchen knife.[302] She was standing across the room from the officers.[303] She was of no threat to any members of the public as she was locked in her personal room.[304] She was not threatening to harm herself.[305] At the least, law enforcement officers had something that many officers don't in these types of interactions: time. There was no indication of any immediate threat, distinct from *Waller*, where the presence of a hostage with the subject could have at least made the threat more imminent.[306] In *Sheehan*, law enforcement could have monitored the situation, refrained from banging on the door and rushing into the room, and acted without force or aggression to ensure that Ms. Sheehan felt safe and comfortable.[307] Law enforcement officers in *Sheehan* had the tools and time to make an assessment to determine how to make the appropriate modifications.

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297 *See* discussion *supra* Part I.A-B.

298 *See* 28 C.F.R. § 35.139(a).

299 *See, e.g.*, Center, *supra* note 134; Flatow, *supra* note 25.

300 City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1769 (2015).

301 *Id.*

302 *Id.* at 1770.

303 *Id.*

304 *See id.*

305 *See id.*

306 *See Sheehan*, 135 S. Ct. at 1770; Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 177 (4th Cir. 2009).

307 *See* Avery, *supra* note 18, at 290–95; Melber & Hause, *supra* note 13.

The immediateness of the possible danger must be a crucial consideration for courts when conducting their analysis of the threat factor.[308] Where the threat is not immediate, there is no excuse for law enforcement failing to consider potential modifications. Modified strategies have proven effective in those situations through de-escalation techniques, which encourage sensitivity to the individuals with disabilities and understanding that an individual's reactions to orders from law enforcement may be slower or even seem inappropriate because of his or her disability.[309] For example, in *Waller*, the Fourth Circuit seemed to disregard the fact that law enforcement had two hours to implement a modified plan to diffuse a hostage situation with a mentally disabled individual.[310] It placed too little weight on the fact that the officers could have taken the time to make some modifications, which in turn could have mitigated the threat to the hostage. Instead, it referred to the plaintiff's suggested modifications as too reliant on hindsight.[311] But this misses the point. In some sense, law enforcement actually has the benefit of hindsight. Through assessment of past tragedies and outcomes, tools and practices, law enforcement officers should be able to assess—based on their knowledge of the disability, or their perception of symptoms—and react with more peaceable tactics than they would in a situation where effects of a disability are not germane. "It is a lot to demand from officers that they know how and when to alternate between aggressiveness and a gentler approach, but it is necessary."[312]

This Comment's focus on those situations where law enforcement officers in theory could have utilized different tactics in order to accommodate an individual's disability obviously should not be taken to mean that there are no situations where law enforcement acts properly despite a situation ending with lethal force. This factor, using the direct threat provision as a guide, accounts for just these scenarios. For instance, a recent article discussed Matthew Hoffman, a thirty-two year old male struggling with mental illness, who ended up dead after he approached law enforcement officers and pointed a gun directly at them.[313] In this situation, law enforcement responded appropriately to Hoffman's unprovoked advances upon officers.[314] There are undoubtedly times where "officers are faced with a deadly situation . . . [and]

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308 *See Waller*, 556 F.3d at 177; Bates v. Chesterfield County, 216 F.3d 367, 372 (4th Cir. 2000); Hainze v. Richards, 207 F.3d 795, 801–02 (5th Cir. 2000); *see generally*, Avery, *supra* note 18, at 280–82 (discussing the relevance of immediate threats in the context of the Fourth Amendment and individuals with mental disabilities).

309 Avery, *supra* note 18, at 290–96 (discussing a number of practices law enforcement can adopt to ensure safer interactions with individuals with mental disabilities).

310 *Waller*, 556 F.3d at 177.

311 *Id.*

312 Pérez-Peña, *supra* note 12.

313 Lowery, *supra* note 21.

314 *See id.*

there is no time to go into mental health measures."[315] This would be one of them. The threat was immediate, and modifications would likely have changed nothing about the degree or imminence of that threat. Even Hoffman's family says "they do not blame the police."[316] Still, there are many times when law enforcement act quickly through their default tactics, without making changes to accommodate an individual's disability, which are necessary to ensure the individual receives the same benefits and services from law enforcement as all citizens.

Reviewing whether these strategies and others discussed in Part III.B would have been reasonable or mitigated potential threats in a given situation are critical in a court's adjudication of Title II claims. Too often, courts focus only on the alleged threat, and ignore the reasonable modifications analysis entirely. But if law enforcement agencies ensure that they are implementing the training and other modifications to arm officers with the tools to quickly assess a situation and make modifications to their default tactics, then analysis changes as to the direct threat principle. Effectively, the direct threat provision will never serve as a blanket exception to Title II, even in the law enforcement context. Rather, where reasonable modifications would mitigate or eliminate the threat, law enforcement, like any other public entity, is under a duty to make them. At the heart of these cases is the balancing of law enforcement's duty to perform effective police work in protecting public safety with their duty to ensure that an intended beneficiary does not become a victim of discrimination or harm because of law enforcement's failure to reasonably accommodate a disability.

CONCLUSION

Theresa Sheehan's tragic story should be a call to action. One positive in the case is that the Supreme Court did not limit the protections of the ADA by reading in a further exception for situations involving potential threats. *Sheehan* would not have been the proper vehicle for the Court to use the direct threat provision to absolve the state of liability, because any threat that existed could have been mitigated with reasonable modifications. Officers could have taken some action to maintain the status quo or to attempt to calm Ms. Sheehan down. They could have, as suggested by Ms. Sheehan, "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."[317] Ms. Sheehan will not be the last victim of law enforcement's failure to modify its policies and practices, but her case demon-

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315 *Id.*

316 *Id.*

317 Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1233 (9th Cir. 2014), *rev'd in part*, City & County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015).

strates the functional importance of the three factors discussed in this Comment: under Factor 1, law enforcement officers knew of Ms. Sheehan's disability; under Factor 2, law enforcement officers proceeded to pound on her door causing her to become more agitated, failed to wait for specialized backup, and used aggressive tactics and lethal force when Ms. Sheehan held only a kitchen knife; and under Factor 3, Ms. Sheehan was locked in a room, alone with no means of escape, and did not express any intent to harm herself; time was not of the essence and de-escalation tactics could have mitigated the potential threat. Taken together, law enforcement officers failed to make reasonable modifications when they—knowing of her disability, yet failing to take it into account—proceeded with conventional, aggressive police tactics, which only increased any threat. As a result, Ms. Sheehan was not only refused the benefits of law enforcement's services, but was also directly harmed as a result.

Once the courts begin more consistently interpreting and correctly applying Title II—and especially the direct threat provision—to law enforcement activities, law enforcement agencies will be incentivized to implement improvements to their policies and practices through enhanced training methods and other structural changes. Ultimately, the facts of a given case will determine the outcome, but the crisper legal framework proposed in this Comment streamlines the analysis, and reminds courts to consider the reasonable modifications requirement in conjunction with any potential threat. The ultimate goal is to protect the individual subject by providing accommodations to ensure he or she enjoys the benefit of law enforcement's services, while also ensuring the safety and well-being of the general public and the responding officers. This analysis will in turn promote fairness and efficiency in the courts, and hopefully encourage law enforcement agencies and officers to adapt new practices as they are developed. Over time, and through judicial refining, discrimination on the basis of disability as the result of law enforcement policies and practices will hopefully become a thing of the past.