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TRYING TO FIT A SQUARE PEG INTO A ROUND HOLE: WHY TITLE II OF THE AMERICANS WITH DISABILITIES ACT MUST APPLY TO ALL LAW ENFORCEMENT SERVICES

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Police use of force has been subject to greater scrutiny in recent years in the wake of several high-profile killings of African Americans. Less attention, however, has been paid to the increasingly routine violent encounters between police and individuals with mental illness or intellectual and development disabilities ("I/DD"). This is particularly problematic, as police have become the de-facto first responders to these individuals and far too often police responses to these individuals result in tragedy.

This Note argues that the Americans with Disabilities Act requires law enforcement to provide reasonable accommodations during their interactions with and seizures of individuals with mental illness or I/DD. Arrest should not be the default option. Nor should police resort to using force when less confrontational tactics exist. When reviewing the use of force during these encounters, courts should grant less automatic deference to police split-second decision making and instead consider the totality of the circumstances, including whether and to what extent police provided reasonable accommodations, and whether such accommodations would have mitigated the risk necessitating the use of force.

While there are an increasing number of programs throughout the country dedicated to improving police responses to individuals with mental illness and I/DD, more fervent efforts must be undertaken to help officers peacefully resolve these situations and

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avoid unnecessary arrests and violent confrontations. More tailored police training, such as crisis intervention training, is crucial in this regard. Finally, this Note examines the increased criminalization of individuals with mental illness and I/DD and identifies comprehensive reasonable accommodations that should be implemented, such as judicial reform and progressive identification tools, to better protect these individuals against undue discrimination in the criminal justice system.

INTRODUCTION

Milton Hall.[1] James Boyd.[2] Kajieme Powell.[3] Kristiana Coignard.[4] Gary Page.[5] These are the names of victims of fatal police shootings who all shared a common trait—they all exhibited signs of mental illness and/or intellectual and developmental disabilities ("I/DD"). Teresa Sheehan's name might also have been included on this list. Though she survived, Sheehan was tragically shot numerous times by police who were called to help transport her for mental health treatment.[6] Unfortunately, Sheehan's case is not

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[1] *See* Lauren Walker, *Two Years Later, No Charges After Police Kill Homeless Man in Barrage of 46 Shots*, NEWSWEEK (Oct. 28, 2014), http://www.newsweek.com/two-years-later-no-charges-after-police-kill-homeless-man-barrage-46-shots-280609.

[2] *See* Fernanda Santos & Erica Goode, *Police Confront Rising Number of Mentally Ill Suspects*, N.Y. TIMES (Apr. 1, 2014), http://www.nytimes.com/2014/04/02/us/police-shootings-of-mentally-ill-suspects-are-on-the-upswing.html?_r=2.

[3] *See* Conor Friedersdorf, *The Killing of Kajieme Powell and How it Divides Americans*, ATLANTIC (Aug. 21, 2014), http://www.theatlantic.com/national/archive/2014/08/the-killing-of-kajieme-powell/378899/.

[4] *See* David M. Perry, Opinion, *When Police Deal with People in Crisis*, CNN (last updated Feb. 3, 2015, 10:06 PM), http://www.cnn.com/2015/02/03/opinion/perry-mental-illness-police/.

[5] *See* 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/.

[6] *See* Nadja Popovich, *Police Shooting of Mentally Ill Woman Reaches US Supreme Court. Why Did it Happen at All?*, GUARDIAN (Mar. 23, 2015), http://www.theguardian.com/us-news/2015/mar/23/police-shooting-mentally-ill-teresa-sheehan-supreme-court.

uncommon. These victims are indicative of an increasingly common problem in America, one that transcends traditional demographics.[7] Persons with mental illnesses and I/DD are disproportionately affected by violent use of police force; and, though efforts have been undertaken to alleviate this problem, it nonetheless is still prevalent, and may in fact be getting worse.[8]

A 2015 *Washington Post* report highlighted damning statistics indicating the frequency of deadly police shootings of persons with mental illness, I/DD, and emotional disturbances.[9] Albeit itself incredibly disconcerting, the picture becomes even bleaker when accounting for the nonfatal, yet still violent, confrontations between law enforcement and people with disabilities such as Teresa Sheehan.[10] These statistics underscore an important issue— as these police encounters become increasingly routine—that of determining and implementing appropriate procedures for interacting with and accommodating people with I/DD or other mental health issues to avoid unnecessary arrests and increasingly violent confrontations.

In 2015, the U.S. Supreme Court reviewed this contentious issue but declined to affirmatively settle the question and adopt a clear standard for the lower courts to follow.[11] The Court granted certiorari on a Ninth Circuit case, *Sheehan v. City & County of San*

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[7] Perry, *supra* note 4 ("[T]he ongoing crisis of violent police encounters with people with mental health transcends race, class and gender.").

[8] *See generally* Santos & Goode, *supra* note 2.

[9] At the time the report was published, in June 2015, *The Washington Post* reported that, "[n]ationwide, police have shot and killed 124 people this year who . . . were in the throes of mental or emotional crises . . . . The dead account for a quarter of the 462 people shot to death by police in the first six months of 2015." Lowery et al., *supra* note 5. These statistics have roughly remained consistent throughout 2015 and 2016. As of this submission, the compiled statistics indicate that out of a combined 1,834 people shot and killed by police, 449 exhibited signs of mental illness. *See* THE WASH. POST, *843 People Shot Dead By Police This Year, 991 People Were Fatally Shot By Police in 2015*, https://www.washingtonpost.com/graphics/national/police-shootings/ (last visited Nov. 18, 2016).

[10] *See, e.g.*, Sandra Allen, *The Trials of Teresa Sheehan*, BUZZFEED (July 9, 2015, 11:39 PM), http://www.buzzfeed.com/sandraeallen/the-trials-of-teresa-sheehan-how-america-is-killing-its-ment#.pvbweE2rwp.

[11] *See* City and County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015).

Francisco,[12] "to consider two questions relating to the manner in which San Francisco police officers arrested a woman who was suffering from a mental illness and had become violent."[13] However, the Court declined to decide the significant question[14] of whether, and to what extent, law enforcement officers are required to provide reasonable accommodations in their seizures of suspects with mental illness.[15] The Court's silence has important legal implications as the circuit courts have reached conflicting decisions on this matter.[16] Besides the lack of a national, uniform criminal procedure, the Supreme Court's continued silence on this issue also raises the specter of unequal protection for persons with mental illness and I/DD, with varying levels of protection in place merely based on jurisdictional or geographical differences.[17]

This Note argues that to prevent inconsistent law enforcement, and to further protect individuals with I/DD and mental illnesses, the Supreme Court should analyze these police encounters using a totality of the circumstances standard. The Court should further hold

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[12] Sheehan v. City and County of San Francisco, 743 F.3d 1211 (9th Cir. 2014), *rev'd in part*, *cert dismissed in part*, (135 S. Ct. 1765) (2015).

[13] *Sheehan*, 135 S. Ct. at 1769. However, the Court only decided one of those questions – whether the San Francisco police officers could be held personally liable for the injuries that Sheehan suffered as a result of her police encounter, pursuant to 42 U.S.C. § 1983. *See id.* at 1774. The Court held that the officers were entitled to qualified immunity. *Id.* at 1778. A discussion of this issue is beyond the scope of this Note.

[14] *See* Allen, *supra* note 10 (describing the question of whether police officers are required to accommodate suspects with disabilities as one with "tremendous stakes").

[15] The Court dismissed the question as improvidently granted. *Sheehan*, 135 S. Ct. at 1774.

[16] *See infra* Part III.

[17] *See* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 418 (1991) ("In passing the ADA, Congress exercised its power under section 5 of the fourteenth amendment to enforce the Equal Protection Clause of that amendment."); Michael L. Perlin, *"For the Misdemeanor Outlaw": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 220 (2000) ("[A]ny violation of the ADA must be read in the same light as a violation of the Equal Protection clause of the Constitution."). *See generally* Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1138–39 (2012).

that suspects with I/DD and other mental illnesses are entitled to presumptive reasonable accommodations under the American with Disabilities Act ("ADA"), which are rebuttable under certain, limited exceptions. In addition, this Note examines policies and procedures that should be implemented to provide more proactive accommodations throughout the criminal justice system, especially during high-stakes situations such as arrests.[18] As the disconcerting statistics indicating the prevalence of violent confrontations between law enforcement and the mentally ill prove,[19] there is a legitimate need for law enforcement agencies to implement more accommodating services and policies wherever feasible to ameliorate this problem and ensure that persons with mental illness or I/DD are treated justly.

Part I of this Note argues why the ADA applies to arrests and other related law enforcement services. This part analyzes the text of the ADA and the Department of Justice ("DOJ") regulations that have been promulgated to guide the enforcement of its provisions. Part II outlines the facts and procedure of *Sheehan* as well as the legal implications of the Supreme Court's holding. Part III highlights the circuit split on this issue and examines the relevant standards adopted by the circuits. Part IV focuses on additional justifications for why the ADA applies to law enforcement procedures and surveys the increased criminalization of mental illness and I/DD. This part identifies policy justifications in support of this assertion, including a brief look at how disability is treated elsewhere in the criminal justice system, and emphasizes that the ADA's reasonable accommodations requirement is consistent with the Fourth Amendment's protections against unreasonable searches and seizures. Finally, Part V discusses best practices and accommodations that should be universally adopted to provide more comprehensive protections for people with mental illness and I/DD

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[18] This note is cognizant of the fact that often officers' lives are also at risk during these encounters and recognizes the legitimate state interests in protecting public safety. Therefore, it is important to note that none of the proposed policies discussed in this Note are "anti-police." These policy suggestions are offered with the hope of fostering cooperation and understanding on both sides of the law, with the ultimate goal of avoiding unnecessary arrests and violent confrontations between people with I/DD or other mental health related issues and the police.

[19] *See, e.g.*, Lowery et al., *supra* note 5.

in their interactions with law enforcement and the criminal justice system.

I. A BRIEF INTRODUCTION TO THE AMERICANS WITH DISABILITIES ACT: WHY THE ADA APPLIES TO ARRESTS[20]

Arlene Mayerson, the Disability Rights Education and Defense Fund's Directing Attorney, in a piece explaining the history of the ADA, neatly identified why the ADA is such an important piece of legislation: "If the ADA means anything, it means that people with disabilities will no longer be out of sight and out of mind . . . . Accommodating a person with a disability is no longer a matter of charity but instead a basic issue of civil rights."[21]

The ADA is a comprehensive antidiscrimination statute designed to safeguard equal opportunity and full participation for persons with disabilities.[22] Congress clearly intended a broad remedial scope for the ADA "to provide a clear and comprehensive

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[20] This note focuses specifically on Title II of the ADA and the obligations it places on public entities, however the ADA is a much broader anti-discrimination statute. The ADA prohibits discrimination on the basis of disability in the areas of employment, public accommodations, transportation, and telecommunications. A GUIDE TO DISABILITY RIGHTS LAWS, U.S. DEP'T OF JUST. (July 2009), https://www.ada.gov/cguide.htm. Title II specifically applies to State and Local governments and the services and agencies operated therein. *See* 42 U.S.C. § 12132 (1990). Title I of the ADA is specifically designated for employment practices. *See* 42 U.S.C. § 12111 (2008). Title III is specifically designated to cover public accommodations and services operated by private entities. *See* 42 U.S.C. § 12181 (1990). Title IV of the ADA applies to common carriers and telecommunications services. *See* 47 U.S.C. § 225 (2010); *see also Title IV of the ADA*, https://www.fcc.gov/general/title-iv-ada (last visited Sept. 16, 2016). Finally, Title V of the ADA covers miscellaneous provisions that do not fit neatly into these categories. *See* 42 U.S.C. §§ 12201–12213 (2009).

[21] Arlene Mayerson, *The History of the Americans with Disabilities Act*, DISABILITY RTS. EDUC. & DEF. FUND (1992), http://dredf.org/news/publications/the-history-of-the-ada/.

[22] *See* SOUTHEAST ADA CTR., ADA NAT'L NETWORK, ADA ANNIVERSARY TOOL KIT 1, http://adaanniversary.org/2015/ada_findings_history_2015_adatoolkit.pdf (last visited Sept. 16, 2016). The ADA has a simple yet direct message, that "millions of Americans with disabilities are full-fledged citizens and as such are entitled to legal protections that ensure them equal opportunity and access to the mainstream of American life." *Id.* at 2.

national mandate for the elimination of discrimination against individuals with disabilities"[23] and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[24] Congress further expressed their intent "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."[25] Moreover, in providing a rule of construction for defining "disability," Congress mandated that "disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of [the ADA]."[26] Thus, the ADA's express statutory language points in a single direction—towards the broad application and interpretation of its provisions.

The ADA further provides an expansive definition of discrimination. Title II of the ADA, which sets forth broad prohibitions against discrimination, mandates that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[27] The ADA broadly defines "public entity" to include "*any* State or local government; [and] *any* department, agency, special purpose district, or other instrumentality of a State or States or local government."[28] The majority of courts have consistently affirmed a broad reading of

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[23] 42 U.S.C. § 12101(b)(1) (2009).

[24] 42 U.S.C. § 12101(b)(2).

[25] 42 U.S.C. § 12101(b)(4).

[26] 42 U.S.C. § 12102(4)(a) (2009).

[27] 42 U.S.C. § 12132 (1990). The Americans with Disabilities Act Title II regulations provide a similar mandate—public entities are prohibited from "deny[ing] a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service." 28 C.F.R. § 35.130(b)(1)(i) (2011). Title III of the ADA broadly defines discrimination to include "a failure 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 or services." 42 U.S.C. § 12182(b)(2)(A)(iii) (1990).

[28] 42 U.S.C. § 12131(1) (1990) (emphasis added).

these definitions,[29] generally including law enforcement agencies within the ADA's ambit.[30] Furthermore, according to the Supreme Court, the ADA contains no explicit exceptions that "could cast the coverage" of law enforcement agencies "into doubt."[31] Thus, law enforcement agencies and the respective services they administer, including arrests, "fall squarely within" the ADA's statutory definition of "public entit[ies]."[32]

Administrative regulations proffered by the DOJ further support this broad reading.[33] The DOJ, through the Attorney General, has the sole authority to promulgate regulations and guidelines for the implementation of Title II procedures,[34] and is explicitly authorized to oversee regulations for "[a]ll programs, services, and regulatory activities relating to law enforcement."[35] The DOJ has provided that, in order to comply with the ADA, law enforcement agencies have the affirmative obligation to adopt reasonable policies that prevent discrimination of people with disabilities during their encounters with law enforcement, including arrests.[36]

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[29] As the Ninth Circuit has noted, "[d]iscrimination includes a failure to reasonably accommodate a person's disability." Sheehan v. City and County of San Francisco, 743 F.3d 1211, 1231 (9th Cir. 2014); *see also* 28 C.F.R. § 35.130(b)(7) (2011).

[30] *See infra* Part III; *see also* Gorman v. Bartch, 152 F.3d 907, 916 (8th Cir. 1998) (extending the ADA's definition of public entity to include local police departments).

[31] *See* Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 209 (1998) (holding that the text of the ADA is unambiguous in regards to the breadth of its coverage).

[32] *See id.* at 210.

[33] DOJ guidelines revised in 2006 state "[l]aw enforcement agencies are covered [by Title II of the ADA] because they are programs of State or local governments, regardless of whether they receive Federal grants or other Federal funds. The ADA affects virtually everything that officers and deputies do, for example . . . arresting, booking, and holding suspects." U.S. DEP'T OF JUST., *Commonly Asked Questions About the Americans with Disabilities Act and Law Enforcement* § I, http://www.ada.gov/q%26a_law.htm (last modified Apr. 4, 2006).

[34] *See* 42 U.S.C. § 12134(a) (1990).

[35] 28 C.F.R. § 35.190(b)(6) (2011).

[36] *See* 28 C.F.R. Pt. 35, App. B ("The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in

The ADA regulations require public entities to actively accommodate individuals based on their needs in order to avoid discrimination; it is not enough to merely refrain from discriminatory practices.[37] In other words, public entities have an "affirmative duty" to provide reasonable accommodations for people with disabilities in order to avoid discrimination.[38] This obligation is even more apparent in other sections of the ADA where it is expressly included in the text of the statute.[39]

There are a few notable exceptions to this obligation. First, the plain text of the regulations offers two obvious limitations on a public entity's obligation to provide reasonable accommodations in its policies and practices.[40] Second, the DOJ has further acknowledged an exigency exception—that "[p]olice officers may, of course, respond appropriately to real threats to health or safety, even if an individual's actions are a result of her or his disability."[41] The DOJ has suggested that people who pose a direct threat to others may not even qualify for protection under Title II.[42] However, this

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policies that result in discriminatory arrests or abuse of individuals with disabilities.").

[37] In the reasonable accommodations provision, the ADA regulations require 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." 28 C.F.R. § 35.130(b)(7) (2011).

[38] *See* David A. Maas, *Expecting the Unreasonable: Why a Specific Request Requirement for ADA Title II Discrimination Claim Fails to Protect Those Who Cannot Request Reasonable Accommodations*, 5 HARV. L. & POL'Y REV. 217, 218, 220 (2011).

[39] *See* 42 U.S.C. § 12112(b)(5) (2008).

[40] First, any such accommodation needs only to be *reasonable*. Second, the public entity may be excused from this obligation if it can make a showing that the providing the accommodation would "fundamentally alter" the nature of the services provided. 28 C.F.R. § 35.130(b)(7) (2011).

[41] U.S. DEP'T OF JUSTICE, *supra* note 33, § II.

[42] *See* 28 C.F.R. § 35.139(a) (2011) ("This part does not require a public entity to 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."). Similarly, "[a]n individual who poses a direct threat to the health or safety of others will not be qualified." *ADA Title II*

exigency exception is not absolute according to the DOJ.[43] A public entity must still consider whether reasonable accommodations would help defuse the situation and "mitigate the risk" in evaluating a direct threat.[44]

Finally, as the institution that Congress expressly designated to regulate compliance with the ADA, the DOJ's interpretations must be considered binding in the absence of a judicial finding that the regulations are arbitrary, capricious, or contrary to legislative intent.[45] Therefore, because the DOJ has definitively concluded that Title II of the ADA applies to arrests and related law enforcement services, this interpretation must be given controlling weight.[46]

Technical Assistance Manual, II-2.8000 [hereinafter *ADA Title II Manual*], http://www.ada.gov/taman2.html#II-2.8000 (last visited Sept. 16, 2016).

[43] As the DOJ indicates, "it is important that police officers are trained to distinguish behaviors that pose a real risk from behaviors that do not, and to recognize when an individual, such as someone who is having a seizure or exhibiting signs of psychotic crisis, needs medical attention." U.S. DEP'T OF JUST., *supra* note 33, § II.

[44] *See* 28 C.F.R. Pt. 35, App. B ("Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others will not be 'qualified,' if reasonable modifications to the public entity's policies, practices, or procedures will not eliminate that risk"); *ADA Title II Manual*, *supra* note 42; *see also* 28 C.F.R. § 35.139(b) ("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 . . . whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.").

[45] *See* ABF Freight System, Inc. v. N.L.R.B., 510 U.S. 317, 324 (1994) (quoting Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844 (1984)) ("When Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency's decision controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute.").

[46] *See* Brief for the United States as Amicus Curiae Supporting Vacatur in Part and Reversal in Part at 14, City and County of San Francisco v. Sheehan 135 S. Ct. 1765 (2015) (No. 13-1412), 2015 WL 254640; *see also* Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 597–98 (1999) ("Because the Department is the agency directed by Congress to issue regulations implementing Title II . . . its views warrant respect."); Bragdon v. Abbott, 524 U.S. 624, 646 (1998) (applying *Chevron*'s deferential standard to the DOJ's interpretation of ADA Title III).

II. CITY AND COUNTY OF SAN FRANCISCO V. SHEEHAN

The scope of the ADA relating to law enforcement was recently tested in *Sheehan v. City and County of San Francisco*.[47] The issue proved to be particularly salient because in August 2008, police officers, responding to a call to help transport Teresa Sheehan for mental health treatment, tragically shot and nearly killed her.[48]

Sheehan lived in Conard House, a group home for persons with mental illness.[49] On August 7, 2008, Heath Hodge, a social worker, visited Sheehan to conduct a routine welfare check.[50] Hodge was concerned that Sheehan had been off her medications for months, had stopped attending her weekly counseling sessions, and was inadequately caring for herself.[51] He reported that, when Sheehan did not respond to his initial knocking, he used his key to enter Sheehan's private room without her permission.[52] After addressing Sheehan several times to no avail, she reportedly suddenly sprang up and yelled, "Get out of here! You don't have a warrant! I have a knife and I'll kill you if I have to!"[53] Hodge then backed out of the room and Sheehan slammed the door shut, locking it behind her.[54]

Concerned for Sheehan's well-being and the safety of other residents and staff, Hodge cleared the building, completed an application to have Sheehan temporarily detained for psychiatric evaluation and treatment, and requested police help for transporting Sheehan to a secure mental health facility.[55] Officers Holder and Reynolds responded to the call and met with Hodge to assess the situation before attempting to seize Sheehan.[56] The officers, accompanied by Hodge, knocked on Sheehan's door and announced

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[47] *See* Sheehan v. City and County of San Francisco, 743 F.3d 1211 (9th Cir. 2014), *rev'd in part*, *cert dismissed in part*, (135 S. Ct. 1765) (2015).

[48] *Id.* at 1215.

[49] *Id.* at 1217.

[50] *Id.*

[51] *Id.* at 1218.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 1217.

[56] *Id.* at 1218.

their presence as police officers.[57] They then entered the room with Hodge's key, again without Sheehan's permission.[58] Sheehan reacted violently to this intrusion, allegedly grabbing a knife and threatening to kill the officers.[59] The officers retreated and Sheehan again slammed the door behind them.[60] The officers called for backup, but rather than wait for it to arrive, forcibly reentered Sheehan's room brandishing their weapons because they were concerned that Sheehan may have had a means of escape or the chance to gather more weapons.[61] Believing that Sheehan was threateningly advancing on them with a knife, the officers pepper sprayed and shot Sheehan five or six times.[62] Sheehan survived the shooting, but her life was forever changed as a result.[63]

The City of San Francisco then prosecuted Sheehan for assault with a deadly weapon and making criminal threats.[64] The jury acquitted Sheehan of the criminal threat charges but could not reach a verdict on the assault charges.[65] The prosecutors decided not to retry Sheehan.[66] Sheehan then filed suit herself in the U.S. District

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[57] *Id.*

[58] *Id.*

[59] *Id.* at 1218–19.

[60] *Id.* at 1219.

[61] *Id.* However, as the officers conceded, there was no consideration of Sheehan's disability when deciding to force a reentry. *Id.* Further, Sheehan argued that the officers failed to discuss alternative tactics or accommodations that could have been employed to defuse the situation. *Id.* at 1232.

[62] *Id.* at 1219–20. However the exact number of shots fired is unclear. A recent exposé on Teresa Sheehan's life and ordeals prompted by this incident reports "[t]here were 14 bullet holes in her body." Allen, *supra* note 10.

[63] Aside from the physical, mental, emotional, and social trauma resulting from the shooting, Sheehan has also been forced to endure dramatic lifestyle changes. Teresa's sisters, Patricia and Frances Sheehan, say that Teresa is forced to live in a single-room-occupancy hotel because it was the only facility available that could accommodate her physical disabilities resulting from the shooting. *See* Allen, *supra* note 10. They have also realized the unfortunate likelihood that Teresa is not receiving psychiatric care or counseling for the trauma of being shot. *Id.* Finally, they say that Teresa's mental and social health has deteriorated as a result of her shooting, believing that she has become "much more withdrawn" and "more childlike." *Id.*

[64] *Sheehan*, 743 F.3d at 1220.

[65] *Id.*

[66] *Id.*

Court for the Northern District of California, alleging, among other claims, violations of her Fourth Amendment rights and her rights under the ADA.[67] The District Court granted the State's motion for summary judgment against all of Sheehan's claims.[68] In dismissing Sheehan's ADA claim, the court relied on the Fifth Circuit's decision in *Hainze v. Richards*[69] and held that, because "the officers attempted to detain a violent, mentally disabled individual under exigent circumstances[,] [i]t would be unreasonable to ask officers, in such a situation, to first determine whether their actions would comply with the ADA before protecting themselves and others."[70]

Sheehan then appealed to the Ninth Circuit, which vacated in part by holding that the District Court erred in granting summary judgment on Sheehan's ADA claims.[71] The court held that police are not excused from the ADA's reasonable accommodations requirement, specifically noting that Title II of the ADA applies to arrests.[72] Rather than create a categorical exigency exception, the court determined that exigency is but one factor to consider under the ADA's reasonableness analysis.[73]

The City of San Francisco subsequently petitioned for a writ of certiorari and asked the Supreme Court to review whether Title II of the ADA required law enforcement agencies to provide reasonable accommodations in their seizures of mentally ill suspects, even when faced with exigent circumstances.[74] The Supreme Court expected to rule on the State's argument raised below, that "Title II *does not apply* to an officer's on-the-street responses to reported

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[67] *Id.*

[68] *See* Sheehan v. City and County of San Francisco, No. C 09-03889(CRB), 2011 WL 1748419, at *9 (N.D. Cal. May 6, 2011).

[69] The Fifth Circuit held that the ADA "does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000).

[70] *Sheehan*, 2011 WL 1748419 at 11.

[71] *Sheehan*, 743 F.3d at 1234.

[72] *Id.* at 1232.

[73] *Id.* The Ninth Circuit's reasoning will be discussed in greater detail *infra* Part III.

[74] City and County of San Francisco v. Sheehan, 135 S.Ct. 1765, 1772 (2015).

disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life."[75] However, San Francisco raised an entirely new argument in its petition for certiorari, namely that Sheehan did not qualify for accommodations under the ADA.[76]

The Court recognized that San Francisco's new argument was "predicated on the proposition that the ADA governs the manner in which a qualified individual with a disability is arrested,"[77] and noted that there may be circumstances where reasonable accommodations could sufficiently mitigate the risk presented by a potentially violent suspect.[78] Because San Francisco no longer relied on its earlier argument, there was no contrary view to the presumption that the ADA applies to arrests, thus the Supreme Court exercised its discretion to dismiss the question as improvidently granted.[79] Despite its ruling, the Court acknowledged that "[w]hether [the ADA] applies to arrests is an important question that would benefit from briefing and an adversary presentation,"[80] essentially inviting a procedurally sound case to address this contentious issue in the future.

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[75] *Id.* (emphasis in original).

[76] *Id.* at 1772–73. San Francisco's new argument was that "a person who poses a direct threat or significant risk to the safety of others is not qualified for accommodations under the ADA." *Id.* at 1773. Because Sheehan posed a significant safety risk, San Francisco contended that she was therefore not a qualified individual entitled to ADA protection. *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* at 1774. In a scathing opinion, Justice Scalia went even further, criticizing the City for employing "bait-and-switch" tactics. *Id.* at 1779 (Scalia, J., concurring in part and dissenting in part).

[80] *Id.* at 1773. Justice Scalia, agreeing with the Court's decision to dismiss the question as improvidently granted, observed in his concurring opinion, "[w]e were thus deprived of the opportunity to consider, and settle, a controverted question of law that has divided the Circuits, and were invited instead to decide an ADA question that has relevance only if we assume the Ninth Circuit correctly resolved the antecedent, unargued question on which we granted certiorari." *Id.* at 1779 (Scalia, J., concurring in part and dissenting in part).

III. The Circuits are Split on Whether the ADA Applies to Arrests

Without an affirmative interpretation from the Supreme Court, the issue of whether, and to what extent, the ADA applies to arrests remains an open question and has resulted in a circuit split. The majority of circuits have held that the ADA does apply to arrests and other related law enforcement activities,[81] but that exigent circumstances must inform the reasonableness determination under the ADA.[82] However some courts, most prominently the Fifth Circuit, have been hesitant to expand the ADA's scope.[83]

The Ninth Circuit has broadly applied Title II coverage to all public entity functions.[84] In *Sheehan*, the court held that the ADA's reasonable accommodations requirement broadly applies to all police services and activities, including arrests.[85] However, the court did narrow its holding by placing some potential limitations on the reasonableness inquiry. The court looked to other circuits for their views on whether the ADA applies to police encounters and found that although the ADA applies to arrests, "exigent circumstances inform the reasonableness analysis under the ADA, just as they

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[81] *See, e.g.*, Mark Joseph Stern, *Don't Answer That!*, Slate (May 18, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/sheehan_case_of_police_shooting_mentally_ill_woman_san_francisco_saved_the.html.

[82] *See, e.g.*, Sheehan v. City and County of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part*, *cert dismissed in part*, (15 S. Ct. 1765) (2015).

[83] *See, e.g.*, Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000); *see also* Roberts v. City of Omaha, 723 F.3d 966, 973 (8th Cir. 2013) (noting that it is unclear what, if any, obligations the ADA imposes on officers attempting to detain a violent suspect, the court held that "nothing in the law clearly established that the ADA . . . applied to the undisputed circumstances of this case").

[84] *See* Barden v. City of Sacramento, 292 F.3d 1073, 1076 (9th Cir. 2002) ("Rather than determining whether each function of a city can be characterized as a service, program, or activity for purposes of Title II . . . we have construed the ADA's broad language [as] bring[ing] within its scope anything a public entity does." (alteration in original) (internal quotation marks omitted) (quoting Lee v. City of Los Angeles, 250 F.3d 668, 691 (9th Cir. 2001)).

[85] *Sheehan*, 743 F.3d at 1232.

inform the distinct reasonableness analysis under the Fourth Amendment."[86]

The Ninth Circuit also declined to make a categorical, prophylactic reasonableness determination by reaffirming that reasonableness is a question of fact better left to a jury.[87] The court noted that this is especially important in the law enforcement context

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[86] *Id.* (citing Waller ex rel. Estate of Hunt v. City of Danville, 556 F.3d 171, 175 (4th Cir. 2009)). The Fourth Circuit in *Waller* concluded that, similar to the Ninth Circuit's analysis, although the ADA does apply to police encounters, exigent circumstances must be considered when determining the extent and scope of reasonable accommodations. Waller ex rel. Estate of Hunt v. City of Danville, 556 F.3d 171, 175 (4th Cir. 2009). The court noted that "[r]easonableness in law is generally assessed in light of the totality of the circumstances, and exigency is one circumstance that bears materially on the inquiry into reasonableness under the ADA." *Id.* The Fourth Circuit again addressed the issue of the ADA's application to police encounters in *Seremeth v. Board of County Commissioners Frederick County* and held that police activities are unambiguously subject to ADA protections. Seremeth v. Bd. of Cty. Comm'rs Frederick Cty., 673 F.3d 333, 337 (4th Cir. 2012). Mirroring *Waller*, the court noted, "while there is no separate exigent-circumstances inquiry, the consideration of exigent circumstances is included in the determination of the reasonableness of the accommodation." *Id.* at 339. In *Bircoll v. Miami-Dade County*, the Eleventh Circuit reached a similar conclusion and reasoned:

> The question is not so much one of the applicability of the ADA because Title II prohibits discrimination by a public entity by reason of [an individual's] disability. The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance.

Bircoll v. Miami-Dade County, 480 F.3d 1072, 1085 (11th Cir. 2007). The court examined the text of the ADA and explained that the final clause of § 12132 "protects qualified individuals with a disability from being 'subjected to discrimination by any such entity,' and is not tied directly to the 'services, programs, or activities' of the public entity." *Id.* (quoting Bledsoe v. Palm Beach Cty. Soil & Water Conservation Dist., 133 F.3d 816, 821–22 (11th Cir. 1998)). The court then concluded that Title II "is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context." *Id.* (quoting *Bledsoe*, 133 F.3d at 822). The court further emphasized that the reasonableness determination in the Title II ADA context is not a bright-line rule but rather a highly functional, case-by-case standard. *Id.* at 1086.

[87] *Sheehan*, 743 F.3d at 1233 (citing EEOC v. UPS Supply Chain Solutions, 620 F.3d 1103, 1110 (9th Cir. 2010)).

and highlighted countervailing considerations that should inform the reasonableness inquiry: the need for officers to make split-second decisions when confronting an armed and potentially dangerous suspect,[88] as well as whether de-escalation tactics and reasonable accommodations are available to sufficiently defuse the situation.[89] The court concluded that in Sheehan's case, "[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, including the accommodations that Sheehan asserts were necessary."[90] Sheehan asserted that, among other claims, "the officers should have respected her comfort zone, engaged in non-threatening communications and used the passage of time to defuse the situation rather than precipitating a deadly confrontation."[91] The court declined to adopt an outright deferential standard favoring police officers, instead suggesting a more holistic analysis where officers' needs for split-second decision making is merely one factor to inform the reasonable analysis under the ADA.[92]

Similarly, the Tenth Circuit in *Gohier v. Enright* held that "a broad rule categorically excluding arrests from the scope of Title II . . . is not the law."[93] In *Gohier*, a presumed mentally ill man was shot and killed by a police officer after repeatedly ignoring warnings and making a "stabbing motion" with what police believed was a knife.[94] The decedent's estate brought suit against the officer and the city of Colorado Springs alleging excessive use of force, failure to train, and violations under Title II of the ADA.[95] The court identified two theoretical bases for Title II claims arising from arrests: wrongful arrests, where "police wrongly arrested someone with a disability because they misperceived the effects of that disability as criminal activity;" and reasonable accommodations, where police

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[88] *See id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *See id.* at 1233–34.

[93] Gohier v. Enright, 186 F.3d 1216, 1221 (10th Cir. 1999).

[94] *Id.* at 1218.

[95] *Id.*

"failed to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees."[96] However, in order to raise a successful reasonable accommodations claim, the court indicated that a plaintiff would have to identify and raise specific arguments about what officers should have done differently in effectuating an arrest.[97] Ultimately, the court refused to adopt either the "wrongful arrest" or "reasonable accommodation" theory, which asks the question whether ADA claims must be constrained to these two categorical bases.[98]

The Second Circuit has adopted a slightly different approach to recognizing ADA claims in the context of law enforcement duties.[99] After broadly holding that all public entities fall under the ADA umbrella,[100] the Second Circuit addressed the question of whether the ADA applies to arrests and related police activity in *Anthony v. City of New York*.[101] In *Anthony*, New York Police Department officers responded to a 911 call from an incoherent, possibly emotionally disturbed woman in regards to potential domestic violence.[102] When officers arrived at the scene, however, they found Anthony, a woman with Down syndrome, alone in the apartment.[103] The officers were unable to contact Anthony's legal guardian, and at their supervisor's command, handcuffed Anthony and took her to

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[96] *Id.* at 1220–21.

[97] *Id.* at 1222. The court acknowledged that Gohier might have stated a valid claim under Title II of the ADA if he had argued that Title II required public agencies to "better train its police officers to recognize reported disturbances that are likely to involve persons with mental disabilities, and to investigate and arrest such persons in a manner reasonably accommodating their disability." *Id.*

[98] The *Gohier* court recognized an ADA claim that was "logically intermediate between the two archetypes envisioned by those theories." *Id.* at 1221.

[99] *See* Anthony v. City of New York, 339 F.3d 129, 140–41 (2d Cir. 2003).

[100] *See* Reg'l Econ. Cmty. Action Program v. City of Middletown, 294 F.3d 35, 45 (2d Cir. 2002) ("The ADA and the Rehabilitation Act . . . prohibit all discrimination based on disability by public entities.") *superseded by statute*, ADA Amendments of 2008, Pub.L. No. 110-325, 122 Stat. 3553, *as recognized in* Anderson Group, LLC v. City of Saratoga Springs, 805 F.3d 34 (2d. Cir. 2015).

[101] *See generally Anthony*, 339 F.3d 129.

[102] *Id.* at 133.

[103] *See id.* at 132–33.

the hospital for a psychiatric evaluation.[104] Anthony and her legal guardian sued the officers, alleging, among other claims, violations of her Fourth and Fourteenth Amendment rights and her rights under the ADA.[105]

Although recognizing that Title II of the ADA may indeed apply to law enforcement services, the court narrowly focused its discussion on whether the officers' actions were primarily motivated by discriminatory intent,[106] and found there were insufficient facts to warrant an ADA violation.[107] Surprisingly, the Second Circuit did not discuss whether law enforcement officials were obligated to provide reasonable accommodations pursuant to the ADA, and the court has yet to affirmatively decide this issue. The Second Circuit may soon have another opportunity, however, after a recent decision in the District Court for the Southern District of New York in *Williams v. City of New York*.[108] *Williams* arose from the seizure and overnight detention of a deaf woman, whom officers made no attempt to accommodate by providing an interpreter or other

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[104] *Id.* at 133–34.

[105] *Id.* at 134.

[106] *Id.* at 141. The court read this discriminatory intent requirement into the ADA and concluded that "[t]here is no evidence . . . that the [police actions] were motivated by discrimination against individuals with disabilities." *Id.* The Sixth Circuit has also read a threshold discriminatory intent requirement into the ADA provisions. *See* Tucker v. Tenn., 539 F.3d 526, 532 (6th Cir. 2008) ("[T]he plaintiff must show that the discrimination was *intentionally* directed toward him or her in particular."). The Sixth Circuit in *Tucker* noted that even if arrests were covered by the ADA, a determination the court carefully abstained from making, intent to discriminate is the driving factor in the reasonableness analysis. *See Tucker*, 539 F.3d at 536 ("Accordingly, even if the arrest were within the ambit of the ADA, the district court correctly found that the City Police did not intentionally discriminate against [appellants] because of their disabilities in violation of the ADA.").

[107] *Anthony*, 339 F.3d at 141.

[108] *See* Williams v. City of New York, 121 F. Supp. 3d 354, 365 (S.D.N.Y. 2015) ("A number of courts have considered whether interactions between law enforcement and disabled individuals—whether initiated by the disabled individual or the police and whether the interaction culminates in an arrest—are 'services, programs, or activities' subject to the requirement of accommodation under Title II of the ADA. Those courts have generally found that Title II applies, but the reasonableness of the accommodation required must be assessed in light of the totality of the circumstances of the particular case.").

communication aid.[109] The court unequivocally denied the City's argument that the ADA does not require police officers to provide accommodations when effectuating an arrest[110] and held that the ADA applies to all law enforcement interactions.[111]

However, other courts have narrowly interpreted the ADA and have declined to extend coverage to police encounters. In *Rosen v. Montgomery County Maryland,* the Fourth Circuit dealt with a case in which a deaf person was arrested for driving while under the influence of alcohol.[112] The court acknowledged that the defendant had a qualifying disability, but was reluctant to expand the scope of the ADA.[113] Emphasizing that Rosen failed to raise specific arguments bringing the circumstances of his arrest within the scope of the ADA,[114] the Fourth Circuit also relied on the fact that Rosen failed to establish that his injury was a result of prejudice due to his disability.[115] The court flatly refused to accept that police officers might be required to provide reasonable accommodations when

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[109] *Id.* at 359.

[110] *Id.* at 364–65 ("The City's crabbed interpretation of Title II's coverage of police activity simply does not comport with the language of Title II and its implementing regulations, particularly in light of the remedial purpose of the statute and the weight of authority that has considered the issue.").

[111] *Id.* at 368 ("The only reasonable interpretation of Title II is that law enforcement officers who are acting in an investigative or custodial capacity are performing 'services, programs, or activities' within the scope of Title II. 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.").

[112] *See* Rosen v. Montgomery County, 121 F.3d 154, 155–56 (4th Cir. 1997).

[113] *Id.* at 157 ("[C]alling a drunk driving arrest a 'program or activity' of the County, the 'essential eligibility requirements' of which (in this case) are weaving in traffic and being intoxicated, strikes us as a stretch of the statutory language and of the underlying legislative intent.").

[114] *Id.* ("Rosen points to nothing in the ADA itself or in the regulations that specifically bring arrests within the ADA's ambit, despite the fact that such 'program or activity' is one that is 'participated in' by millions of persons every year.").

[115] *Id.* at 158 ("Rosen is simply unable to point to any tangible adverse consequence resulting from the manner of his arrest . . . . Our decision to affirm . . . is based on an even more fundamental infirmity: the lack of any discernible injury.").

conducting an initial search or seizure.[116] Despite this ruling, more recent decisions by the Fourth Circuit have considerably narrowed *Rosen*'s precedential reach.[117]

The Fifth Circuit in *Hainze v. Richards* reached a conclusion similar to *Rosen*, holding that[118] "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life."[119] Like *Sheehan*,[120] police were dispatched to transport Hainze "to a hospital for mental health treatment."[121] Officers witnessed Hainze with a knife in his hand standing next to the passenger door of a pickup truck.[122] One of the officers immediately drew his gun and ordered Hainze away from the truck.[123] Hainze responded with profanities and began to walk towards the officer, at which point the remaining officers exited their vehicles with their weapons drawn.[124] Despite repeated warnings to stop, Hainze continued walking towards the officers and was shot twice in the chest.[125] Merely twenty seconds elapsed from the time the officers responded to the 911 call to the time Hainze was shot.[126] The *Hainze* court rejected Hainze's claims for relief and

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[116] *Id.* ("If we assume however, that the police were required to provide [reasonable accommodations] at some point in the process, that point certainly cannot be placed before the arrival at the stationhouse.").

[117] Recognizing that *Rosen*'s narrow interpretation of the ADA seems contrary to legislative intent, and noting that "[c]ourts across the country have called *Rosen's* holding into question," the Fourth Circuit in *Seremeth* adopted a broad reading of the ADA and emphasized a narrow interpretation of *Rosen.* Seremeth v. Bd. of Cty. Comm'rs Frederick Cty., 673 F.3d 333, 337–38 (4th Cir. 2012) ("*Rosen's* precedential reach is more properly cast as limited to the injury grounds necessary to reach its conclusion.").

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

[119] *Id.*

[120] Sheehan v. City and County of San Francisco, 743 F.3d 1211, 1217 (9th Cir. 2014), *rev'd in part*, *cert dismissed in part*, (135 S. Ct. 1765) (2015).

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

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

upheld a deferential standard towards law enforcement officers' need for split-second decision-making.[127] The Fifth Circuit held,

> Law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations. To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents.[128]

The Fifth Circuit in effect created a categorical exception covering exigent circumstances by holding that the affirmative duties imposed by Title II of the ADA do not extend to officers in the field in potentially dangerous situations.[129]

This categorical exigency exception allows law enforcement officers to execute their duties without the potential burden of having to delay taking action to identify what, if any, reasonable accommodations are necessary in a given situation.[130] As the *Hainze* court explained, "[w]hile the purpose of the ADA is to prevent the discrimination of disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public."[131] However, by fixating on first securing the scene at all costs, the Fifth Circuit endorsed an exigency justification that completely overlooked the potential equity of more accommodating de-escalation tactics.

For instance, the Fifth Circuit focused on the threat that Hainze created by advancing on the officers with a knife; however there was

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[127] *See id.* at 801–02 ("We are not persuaded that requiring . . . officers to use less than reasonable force in defending themselves and others, or to hesitate to consider other possible actions in the course of making such split-second decisions, is the type of 'reasonable accommodation' contemplated by Title II.").

[128] *Id.* at 801.

[129] *Id.*

[130] *See* Maas, *supra* note 38, at 221 ("This narrow exception allows officers to function in their law enforcement capacity without the unreasonable burden of proactively accommodating persons with disabilities.").

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

no discussion of alternative, less restrictive methods that the responding officers could have implemented to avoid a potentially lethal confrontation. The officers in *Hainze* were aware that they were dispatched to transport a mentally ill, and potentially suicidal, individual to a hospital for mental health treatment, yet their initial response was to draw their weapons.[132] Adding to the predicament, the officers' violent response was predicated on a misguided assumption that Hainze was a public safety threat.[133] Unfortunately, this mistake of fact is all too common in seizures of persons with I/DD or mental illness.[134]

These circuit court opinions merely touch on the broad continuum of needs and accommodations that can arise in the intersection between individuals with I/DD and mental illness and law enforcement.[135] This is one of the primary reasons why more proactive accommodations are necessary. As this circuit split

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[132] *See id.* at 797.

[133] *See id.* ("When the officers [responded to the 911 call], Hainze was holding a knife and standing next to a pickup truck occupied by two persons. The police did not then know that the persons were unharmed and were related to Hainze."). The Fifth Circuit took this into consideration but concluded that the officers' actions were reasonable and "were the result of a quick discretionary decision made in self-defense and for the safety of those at the scene." *Id.* at 801.

[134] *See* Lowery et al., *supra* note 5 (discussing Gary Page and a police encounter in response to a 911 call in which he stated that he wanted suicide-by-cops). In Gary Page's story, officers arrived on the scene to find that Page had taken a hostage. *Id.* According to the report, "[t]hey opened fire, striking him five times in the torso and once in the head. Page's gun later turned out to be a starter pistol, loaded only with blanks. His threats of violence turned out to be equally empty, the product of emotional instability and agonizing despair." *Id.* In a similar encounter, Daniel Covarrubias, who had a history of depression and substance abuse, on the day he was shot and killed by the police, "was taking powerful painkillers for a broken collarbone" and was in a hallucinogenic state. *Id.* Covarrubias was hiding from police and when confronted allegedly pointed a "dark object" at officers, which was mistakenly believed to be a gun. *Id.* The "police opened fire, hitting Covarrubias five times, including once in the head . . . .The dark object in his hand turned out to be a cellphone." *Id.*

[135] *See* Maas, *supra* note 38, at 220 ("However, the existing jurisprudence has not fully addressed all of the complicated and sensitive issues that arise in the interactions between persons with disabilities and law enforcement. In particular, courts have not grappled with the reality that many persons with disabilities are incapable of articulating their needs to police officers.").

illustrates, although the Supreme Court in *Sheehan* may have been procedurally correct to dismiss the issue as improvidently granted, the Court nonetheless missed a critical opportunity to resolve a significant unsettled issue of law.[136]

IV. ADDITIONAL JUSTIFICATIONS FOR WHY THE ADA APPLIES TO ARRESTS AND RELATED LAW ENFORCEMENT ACTIVITIES

A. The ADA Is Inextricably Tied to the Fourth Amendment in These Instances

Instances of police shootings of mentally ill individuals or suspects with I/DD implicate not only the ADA's reasonable accommodations requirement but also the Fourth Amendment's Constitutional protections against unreasonable searches and seizures.[137] The Fourth Amendment to the U.S. Constitution provides in pertinent part "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable*

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[136] As San Francisco pointed out in its petition for certiorari, "[t]his case provides the Court with its first opportunity to resolve this question, in a case where a public entity's potential liability turns on the answer." Petition for Writ of Certiorari at 22, City and County of San Francisco v. Sheehan 135 S. Ct. 1765 (2015) (No. 13-1412), 2014 WL 2201057 ("This case presents a suitable vehicle to address this conflict. Certiorari was sought only twice before in the relevant cases.").

[137] Holding that a jury could find that the officers' forced second entry into Sheehan's apartment was unreasonable, the *Sheehan* court held "we cannot say as a matter of law that the officers continued to carry out the search or seizure in a reasonable manner when they decided to force the second entry, without taking Sheehan's mental illness into account and in an apparent departure from their police officer training." Sheehan v. City and County of San Francisco, 743 F.3d 1211, 1225 (9th Cir. 2014), *rev'd in part*, *cert. dismissed in part*, 135 S. Ct. 1765 (2015); *see also* Nicole Flatow, *Supreme Court Takes on Major Case on Police Shootings*, THINKPROGRESS (Dec. 2, 2014), http://thinkprogress.org/justice/2014/12/02/3598052/the-supreme-court-agreed-to-hear-a-case-about-police-shootings-of-those-with-mental-illness/ ("[The Sheehan case] is not about cops' criminal liability. It's about whether cops are obligated to take special precautions in using deadly force — and in entering an individual's home without a warrant or permission — when they know an individual was mentally ill.").

searches and seizures."[138] As the Supreme Court has further emphasized, "[t]he touchstone of the Fourth Amendment is reasonableness."[139] Likewise, the ADA regulations require public entities to provide reasonable accommodations for individuals with disabilities when necessary to avoid discrimination.[140] Reasonableness therefore forms an essential element and common focus of both the Fourth Amendment's limitations on searches and seizures as well as Title II of the ADA's accommodations requirement.[141] The ADA's reasonable accommodation requirement cannot help but inform the reasonableness determination under the Fourth Amendment.

In its Fourth Amendment jurisprudence, the Supreme Court has adopted a balancing test to determine the reasonableness of a search or seizure.[142] The Supreme Court has promulgated two distinct prongs of the reasonableness analysis: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[143] The Court further explained in *Terry v. Ohio* that

> [i]n order to assess . . . reasonableness . . . as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.'[144]

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[138] U.S. CONST. amend. IV (emphasis added).

[139] United States v. Knights, 534 U.S. 112, 118 (2001).

[140] *See* 28 C.F.R. § 35.130(b)(7) (2011).

[141] As the Ninth Circuit held in *Sheehan*, "[t]he ADA . . . applies to arrests, though we agree . . . that exigent circumstances inform the reasonableness analysis under the ADA, just as they inform the distinct reasonableness analysis under the Fourth Amendment." *Sheehan*, 743 F.3d at 1232 (citing Waller ex rel. Estate of Hunt v. City of Danville, 556 F.3d 171, 175 (4th Cir. 2009)) ("Just as the constraints of time figure in what is required of police under the Fourth Amendment, they bear on what is reasonable under the ADA.").

[142] *See* Scott v. Harris, 550 U.S. 372, 383 (2007).

[143] Terry v. Ohio, 392 U.S. 1, 20 (1968).

[144] *Id.* at 20–21 (brackets in original) (quoting Camara v. Municipal Court, 387 U.S. 523, 534–35, 536–37 (1967)).

The Court applied this balancing test in the context of excessive force and declared in *Graham v. Connor* that the reasonableness standard applies to "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen."[145] The Court adopted a functional approach that requires a case-by-case determination, paying specific attention to the facts and circumstances of each case, including whether exigent circumstances prompted the officer's actions.[146] This totality of the circumstances analysis is germane for ADA purposes because, due to the affirmative duty that the ADA places on public entities to provide reasonable accommodations, it is impossible to analyze the facts and circumstances of particular cases involving suspects with I/DD without considering if reasonable accommodations were required, and to what extent they were provided.[147]

The Ninth Circuit's analysis in *Sheehan* provides a useful framework for recognizing the merits of the totality of the circumstances approach for judging the reasonableness of police actions. The Ninth Circuit considered the totality of the circumstances in determining the reasonableness of the officers' forced second entry into Sheehan's apartment and "conclude[d] that a reasonable jury could find that the officers' . . . [actions were] objectively unreasonable."[148] The court emphasized that Sheehan's mental illness should have informed the officer's choice of

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[145] Graham v. Connor, 490 U.S. 386, 395 (1989) (emphasis in original).

[146] *Id.* at 396.

[147] *See generally* Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 267 (2003) ("[C]ourts should consider the emotional state of the subject, the training available to, and actually provided to, the officers involved . . . and the choices made by officers leading up to the use of force that may have influenced the necessity of resolving an incident through force."); Waller ex rel. Estate of Hunt v. City of Danville, 556 F.3d 171, 175 (4th Cir. 2009) ("A reasonable belief on the part of officers 'that this was a potentially violent hostage situation' may not resolve the ADA inquiry, but it cannot help but inform it.").

[148] Sheehan v. City and County of San Francisco, 743 F.3d 1211, 1226 (9th Cir. 2014), *rev'd in part*, *cert. dismissed in part*, 135 S. Ct. 1765 (2015).

tactics,[149] and succinctly noted the fundamental flaw with what transpired: "[t]he officers' decision to force an entry was in effect a decision to cause a violent—and potentially deadly—confrontation with a mentally ill person without a countervailing need."[150] Conversely, neither of the two cases discussed above that have pushed back the most regarding the ADA, *Hainze* and *Rosen*, considered the totality of the circumstances in their analyses.[151] Viewing the totality of the circumstances when analyzing police encounters will serve to broaden the lens of review of police encounters and allow for greater scrutiny on use of police force.

B. Examining Disability Rights Elsewhere in the Criminal Justice System

An examination of the Supreme Court's disability-related jurisprudence in other sectors of the criminal justice system reveals a commitment to more stringent protections for persons with mental illnesses and I/DD. In 1998, the Supreme Court issued a watershed decision that marked a turning point for implementing the ADA's extensive protections. In a sweeping opinion in *Pennsylvania Department of Corrections v. Yeskey*, the late Justice Scalia, writing for a unanimous court, concluded that Title II of the ADA "unambiguously extends to state prison inmates."[152] In rejecting the argument that "qualified individual with a disability" as it is defined in the ADA is ambiguous in regards to state prisoners, the Court held that by its express terms the ADA applies to *anyone* with a disability, with no specific exceptions for prison inmates.[153] The Court further responded to the argument that the ADA's statement of findings and purpose[154] did not expressly mention state prisoners and explained that, even assuming *arguendo* that Congress did not envision the ADA applying to state prisoners, "in the context of an unambiguous

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[149] *Id.* at 1227.

[150] *Id.*

[151] *See generally* Rosen v. Montgomery County, 121 F.3d 154 (4th Cir. 1997); Hainze v. Richards, 207 F.3d 795 (5th Cir. 2000).

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

[153] *Id.* at 210.

[154] *Id.* at 211; *see also* 42 U.S.C. § 12101 (2009).

statutory text that is irrelevant."[155] As the Court explained, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."[156] The Court's decision in *Yeskey* clearly paved the way for a broader reading of Title II that supports the notion that the ADA applies to law enforcement, including arrests.[157]

The Supreme Court has further considered the intersection of disability and the criminal justice system in light of capital punishment.[158] In *Atkins v. Virginia*, the Supreme Court created a categorical rule prohibiting the use of capital punishment for individuals with intellectual disabilities.[159]Applying the Eighth Amendment's prohibition against cruel and unusual punishment[160] in light of "evolving standards of decency," the Supreme Court held that the "Constitution places a substantive restriction on the State's power to take the life" of prisoners with intellectual disabilities.[161] The Court's opinion in *Atkins* was emblematic of an underlying shift in public opinion favoring increased protections for people with disabilities.[162]

Twelve years later, the Supreme Court in *Hall v. Florida* affirmed the categorical bar created by *Atkins* and held a Florida

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[155] *Yeskey*, 524 U.S. at 211–12.

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

[157] *See* Rachel E. Brodin, *Remedying a Particular Form of Discrimination: Why Disabled Plaintiffs Can and Should Bring Claims for Police Misconduct Under the Americans with Disabilities Act*, 154 U. PA. L. REV. 157, 170–73 (2005).

[158] *See* Atkins v. Virginia 536 U.S. 304 (2002); Hall v. Florida, 134 S. Ct. 1986 (2014).

[159] *Atkins*, 536 U.S. at 321.

[160] *See* U.S. CONST. amend. VIII.

[161] *Atkins*, 536 U.S. at 321 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

[162] *See, e.g.*, Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911, 912 (2001); *see also* AM. ASS'N ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, *Criminal Justice System*, https://aaidd.org/news-policy/policy/position-statements/criminal-justice#.Vt4ogpODGkq (last visited Sept. 16, 2016).

statute that used a fixed IQ score as the measure of incapacity to be unconstitutional.[163] As the Court highlighted, "[i]ntellectual disability is a condition, not a number."[164] The Court referenced significant evolving policy rationales, including respect for human dignity and increasing calls for social justice as a basis for their decision.[165]

This Supreme Court jurisprudence affording persons with disabilities increased protection in various sectors of the criminal justice system highlights the absence of Supreme Court guidance effectively bringing law enforcement within the scope of the ADA. As former Supreme Court Justice and President of the American Bar Association Lewis Powell, Jr. once said, "Equal justice under the law is not merely a caption on the facade of the Supreme Court building; it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists."[166] It is time to make this aspiration a reality. Individuals with I/DD and mental illness are entitled to more than mere piecemeal protection; they require a robust set of protections that include extensive ADA legislation and favorable Supreme Court jurisprudence.[167]

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[163] *See* Hall v. Florida, 134 S. Ct. 1986, 1990 (2014) ("If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed. This rigid rule, the Court now holds, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.").

[164] *Id.* at 2001.

[165] The Supreme Court noted that, "[t]he Eighth Amendment is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 1992 (quoting Weems v. United States, 217 U.S. 349, 378 (1910)). Likewise, "[t]o enforce the Constitution's protection of human dignity, this Court looks to the evolving standards of decency that mark the progress of a maturing society. The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be." *Id.* Finally, in holding that no "legitimate penological purpose" exists when executing a person with an intellectual disability the court opined, "to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being." *Id.*

[166] Francis J. Larkin, *The Legal Services Corporation Must be Saved*, 34 JUDGES' J. 1, 1 (Winter 1995).

[167] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also* Maas, *supra* note 38, at 217.

C. Additional Policy Justifications

A 2013 joint report by the Treatment Advocacy Center ("TAC") and National Sheriffs' Association highlighted a disturbing trend that is not uncommon in today's society: "at least half of the people shot and killed by police each year in this country have mental health problems."[168] As Chuck Wexler, Executive Director of the Police Executive Research Forum, succinctly noted in the Washington Post, "this is a national crisis . . . . We have to get American police to rethink how they handle encounters with the mentally ill."[169] Any attempt to remedy this problem must be grounded in the ADA's remedial provisions. As explained in Section I, Title II of the ADA places an affirmative obligation on public entities, including law enforcement agencies, to provide reasonable accommodations in their services and practices when it is necessary to avoid discrimination on the basis of disability.[170]

The Supreme Court has also played a large role in shaping and interpreting the policy considerations characteristic of the ADA. In *Olmstead v. L.C. ex rel. Zimring*, the Supreme Court determined that the ADA's antidiscrimination provisions required placement of people with mental disabilities in less restrictive community settings rather than forced institutionalization.[171] The Court held that:

> Such action is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking

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[168] TREATMENT AND ADVOCACY CTR. & NAT'L SHERIFFS' ASS'N, JUSTIFIABLE HOMICIDES BY LAW ENFORCEMENT OFFICERS: WHAT IS THE ROLE OF MENTAL ILLNESS? 3 (Sept. 2013) [hereinafter TAC JOINT REPORT], http://www.treatmentadvocacycenter.org/storage/documents/2013-justifiable-homicides.pdf. The Washington Post has this number at approximately a quarter. *See* Lowery et al., *supra* note 5.

[169] *See* Lowery et al., *supra* note 5.

[170] *See supra* Part I.

[171] *See* Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 587 (1999).

> into account the resources available to the State and the needs of others with mental disabilities.[172]

Olmstead concerned two women with mental health illnesses and developmental disabilities who remained institutionalized despite their psychiatrists determining that their needs could be appropriately met in a more integrated community setting.[173] The Supreme Court held that this isolation was a violation of Title II of the ADA.[174] In reaching this conclusion, the Court highlighted two important justifications. First, "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."[175] Second, "confinement in an institution severely diminishes the everyday life activities of individuals."[176] Although *Olmstead* decided a fairly narrow issue concerning institutionalization, the underlying rationale of promoting community integration should not be limited to these instances.

As the DOJ has indicated, the goal of Title II's so-called integration mandate[177] is "to provide individuals with disabilities opportunities to live their lives like individuals without disabilities."[178] Applying this mandate to the law enforcement context, it is evident that police must provide more proactive reasonable accommodations during a search or seizure to ensure that persons with disabilities are afforded the same protections as persons without. For example, people without disabilities are typically able to identify themselves to the police and provide

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[172] *Id.*

[173] *Id.* at 593.

[174] *Id.* at 597 ("Unjustified isolation . . . is properly regarded as discrimination based on disability.").

[175] *Id.* at 600.

[176] *Id.* at 601.

[177] *See* 28 C.F.R § 35.130(d) (2011) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.").

[178] U.S. DEP'T OF JUST., *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.*, http://www.ada.gov/olmstead/q&a_olmstead.htm (last updated June 22, 2011).

reasonable explanations for their actions, if necessary. However this communication might not be readily available, or even possible, for people with disabilities.[179]

Although the *Olmstead* de-institutionalization mandate was viewed as a humane way of caring for mental illness in community-based settings, an unintended consequence of this was the increased criminalization of mental illness due to the lack of adequate treatment alternatives.[180] Too often there is a lack of resources devoted to mental health treatment and, as a result, many individuals with mental health issues or disabilities are funneled through the criminal justice system.[181] A 2002 report published by the National Council on Disability stated:

> For adults, neglect or poor treatment by the mental health system increases the likelihood an adult with mental illness will encounter other more coercive and crisis-oriented systems, like law enforcement, corrections, institutionalization and emergency rooms. Absent the services and supports they need in the community, people with serious mental illness become caught up in the criminal justice system. Ironically, these individuals are often discharged from jails and prisons into the community with little or no planning for treatment. Lacking treatment, their lives become a revolving door of arrest, incarceration, release and rearrest.[182]

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[179] *See generally* U.S. DEP'T OF JUST., *supra* note 33, § II.

[180] *See* DARRELL STEINBERG ET AL., STAN. L. SCH. THREE STRIKES PROJECT, WHEN DID PRISONS BECOME ACCEPTABLE MENTAL HEALTHCARE *Facilities* 1 (Feb. 19, 2015), http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/632655/doc/slspublic/Report_v12.pdf ("Although deinstitutionalization was originally understood as a humane way to offer more suitable services to the mentally ill in community-based settings, some politicians seized upon it as a way to save money by shutting down institutions without providing any meaningful treatment alternatives. This callousness has created a one-way road to prison for massive numbers of impaired individuals and the inhumane warehousing of thousands of mentally ill people.").

[181] *See id.* at 1–2; TAC JOINT REPORT, *supra* note 168, at 4, 7–8.

[182] NAT'L COUNCIL ON DISABILITY, THE WELL BEING OF OUR NATION: AN INTER-GENERATIONAL VISION OF EFFECTIVE MENTAL HEALTH SERVICES AND SUPPORTS 37 (Sept. 16, 2002),

This is one reason why reasonable accommodations are necessary throughout the criminal justice system; they can serve as another line of defense against the criminalization of mental illnesses and I/DD. Rather than strict punitive responses such as incarceration, a wide range of reasonable accommodations—from arranging proper mental health treatment to coordinating benefits, among others—can serve as less restrictive alternatives to incarceration and lessen the possibility of an unnecessary violent police intrusion.[183]

Nevertheless, there are legitimate countervailing policy considerations that cut against the obligation to provide reasonable accommodations for persons with mental health issues and/or I/DD in the law enforcement context. The National League of Cities submitted an amicus brief in *Sheehan* that argued that the ADA should not apply to arrests in emergency situations.[184] Chief among their reasons were the safety concerns that arise if an officer is required to delay taking action to assess what, if any, reasonable accommodations are appropriate for a given suspect.[185] The brief also addressed the inherent inequity of requiring police officers to exercise their judgment in confronting people with mental illnesses or developmental disabilities when that particular job is better suited to mental health professionals.[186] This is especially true because

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https://www.ncd.gov/rawmedia_repository/0775e9da_e4b3_468f_837b_6c7cf82b03a2.pdf.

[183] *See id.* at 46–48.

[184] *See* Brief of Amici Curiae Nat'l League of Cities, U.S. Conference Of Mayors, Nat'l Ass'n of Counties, Int'l City/County Mgmt. Ass'n, League of California Cities, California State Ass'n of Counties, Washington State Ass'n of Mun. Attorneys, and Ass'n of Washington Cities as Amici Curiae Supporting Petitioners at 21, City and County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015) (No. 13-1412), 2015 WL 328831.

[185] *See id.* at 21–23.

[186] *Id.* at 31; TAC JOINT REPORT, *supra* note 168, at 8 ("The transfer of responsibility for mentally ill persons from mental health professionals to law enforcement officers is patently illogical. Law enforcement officers self-select and are trained to do traditional police work. If they had wanted to become mental health professionals, they would have done so. To take people trained in law enforcement and use them as mental health professionals is a grossly inappropriate use of their skills . . . Law enforcement agencies are thus penalized

"[p]olice officers commonly determine that a suspect has a mental illness only when they arrive on the scene, and usually have limited information about the suspect's mental illness and current state of deterioration."[187]

But, this is exactly why only *reasonable* accommodations are necessary. It is important to not only protect the well-being of individuals with disabilities but also law enforcement officers.[188] Ultimately, there must be a workable dynamic that protects the rights and safety of individuals with I/DD, protects police officers' safety, and simultaneously addresses the inherent disconnect between the traditional obligations of officers and the practical mental health treatment roles they are routinely forced into.

V. COMPREHENSIVE REASONABLE ACCOMMODATIONS MUST PROVIDE SECURITY FOR PERSONS WITH DISABILITIES

A. The Supreme Court Should Adopt a Clear, Uniform Standard

Reflecting the majority of the circuit courts' opinions that the ADA does apply to arrests,[189] and consistent with existing jurisprudence favoring increased protections for persons with mental illness and disability,[190] if and when the Supreme Court is presented this issue again, the Court should hold that law enforcement agencies have an affirmative obligation to provide individually tailored reasonable accommodations to suspects with I/DD and other mental health illnesses in order to effectuate the

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for not doing a better job on something they are neither trained nor equipped to do.").

[187] Brief as Amici Curiae, *supra* note 184, at 31.

[188] *See* TAC JOINT REPORT, *supra* note 168, at 9 ("The transfer of responsibility for individuals with serious mental illnesses from mental health professionals to law enforcement officers is incompatible with good psychiatric care. The current situation is victimizing both the patients and the law enforcement officers.").

[189] *See supra* Part III.

[190] *See supra* Section IV.B.

ADA's remedial purpose.[191] There cannot be a one-size-fits-all approach.[192] Beyond merely recognizing this duty, the Supreme Court should adopt a bright line rule that individuals with I/DD and mental illnesses are entitled to presumptive reasonable accommodations when subject to an arrest, and that law enforcement agencies have the burden of rebutting this presumption under certain, limited circumstances.[193] Some of these possible exceptions are provided in the ADA administrative regulations,[194]

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[191] Noting that courts "do not sit or act in a social vacuum," Justice Marshall recognized the role the judiciary should play in promoting equality in his dissent in *City of Cleburne v. Cleburne Living Center*. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 466 (1985). Marshall emphasized that

> [H]istory makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time . . . . Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause. It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the facts of such change as a source of guidance on evolving principles of equality.

Id.

[192] *See* N.Y.C. DEP'T OF CITYWIDE ADMIN. SERVS., REASONABLE ACCOMMODATIONS PROCEDURAL GUIDELINES 1 (2015), http://www.nyc.gov/html/dcas/downloads/pdf/misc/eeo_reasonableaccommodation.pdf ("There is no *one-size-fits-all* formula for deciding when to grant a reasonable accommodation. Rather, the reasonable accommodation process must be flexible, interactive, and individualized with meaningful, cooperative and timely communication between the individual requesting the accommodation and the agency.").

[193] Additionally, in order to truly satisfy the remedial purposes of the ADA, there must be a more functional analysis of whether reasonable accommodations are necessary to avoid discrimination rather than a categorical specific request requirement as some courts have required. *See, e.g.*, Rylee v. Chapman, 316 F. App'x 901, 906 (11th Cir. 2009) (citing Gaston v. Bellingrath Gardens & Home, Inc., 167 F. 3d 1361, 1363 (11th Cir. 1999)); *see also* Maas, *supra* note 38, at 222 ("The specific request requirement fails to protect fairly and adequately persons with disabilities during interactions with law enforcement.").

[194] *See* 28 C.F.R. § 35.130(b)(7) (2011) (providing a "fundamental alteration" defense); *see also* 28 C.F.R. § 35.139(a) (2012) (providing a direct threat exception).

and many lower courts have already recognized a possible public safety exception.[195]

The Supreme Court should hold that the determination of both reasonable accommodations and exigency during an arrest should be considered using a totality of the circumstances approach.[196] Traditionally, exigent circumstances and proper use of force is determined with significant deference to an officer's on-the-scene decision making.[197] This traditional analysis is too narrow, however.[198] This proposed approach would broaden the scope of police encounters to include analysis of what, if any, reasonable accommodations were provided pre-arrest, and whether police presence or misconduct incited the need for invoking the exigency exception.[199]

An application of this analysis to the facts of *Sheehan* demonstrates that the responding officers failed to accommodate Sheehan or defuse the situation.[200] The officers were obviously aware of Sheehan's disability as they responded to a call to temporarily seize Sheehan and take her for psychiatric evaluation

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[195] *See supra* Part III.

[196] *See* Graham v. Connor, 490 U.S. 386, 396 (1989) ("The proper application of the Fourth Amendment reasonableness determination "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.").

[197] As the Supreme Court held in *Graham v. Connor*, "[t]he reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* Furthermore, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97.

[198] *See* Avery, *supra* note 147, at 331 ("The notion . . . that officers are always required to make 'split-second' decisions regarding the use of force is a myth.").

[199] *See generally id.* at 331–32.

[200] Nor were other possible alternatives considered. Sandra Allen identified some of these alternatives, for example: "[p]ut your weapon away. Lower your voice. Don't expect the person in psychiatric crisis to react rationally or nonviolently. Secure the scene but wait for backup before moving in. Seek the assistance of mental health professionals. Most importantly: Buy yourself time." Allen, *supra* note 10.

and treatment.[201] Thus, there was no issue of whether they had to second guess themselves or hesitate in deciding whether reasonable accommodations were necessary for this specific situation. Instead, if following the presumptive accommodation standard introduced above, they would have been required to provide reasonable accommodations and employ less confrontational tactics to achieve their purpose. Sheehan did not expect to be confronted by the police that day; the entire situation arose out of a desire to help Sheehan receive proper evaluation and treatment, not out of the need to arrest an armed and dangerous individual.[202] This approach allocates responsibility by examining relevant police conduct and strategic decisions, the conduct of the victim, as well as a more functional consideration of whether the situation could have been mitigated or avoided entirely by providing reasonable accommodations.[203]

B. Examples of Preemptive Reasonable Accommodations that Should be Universally Implemented

1. Police Training

First and foremost, because police officers are often the first responders to calls involving individuals with I/DD,[204] more thorough and tailored police training must be implemented so officers are able to respond to these situations in an appropriately humane and accommodating manner. Unfortunately, implementing appropriate training seems to be easier said than done. The *Washington Post* report highlighted a troublesome, yet wholly avoidable problem: insufficient and ineffective police training.[205]

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[201] Sheehan v. City and County of San Francisco, 743 F.3d 1211, 1217 (9th Cir. 2014), *rev'd in part*, *cert dismissed in part*, (135 S. Ct. 1765) (2015).

[202] *See* Flatow, *supra* note 137 ("The case started like too many others involving mentally ill individuals and the police: a call to police for help.").

[203] As the officers in *Sheehan* acknowledged, they did not even consider whether Sheehan's mental illness should be accommodated before forcing the second entry. *Sheehan*, 743 F.3d at 1219.

[204] *See, e.g.*, Santos & Goode, *supra* note 2.

[205] Unfortunately this seems to be a common problem. As the Washington Post report found, "[m]ore than half the killings involved police agencies that have not provided their officers with state-of-the-art training to deal with the mentally

This is a particular problem because, generally speaking, police officers are in a position to choose how to respond in a given situation,[206] and there are often numerous de-escalation tactics police can employ to defuse situations.[207] Without the continued focus on training police officers, persons with disabilities and mental illness will remain at an increased risk of unnecessarily and unjustly becoming entangled with the criminal justice system. More dynamic training efforts are necessary to help officers understand, identify, and empathize with these individuals.

Law enforcement agencies should not be expected, however, to implement meaningful changes on their own. Impactful and sustainable training for confronting people with disabilities can only be effectively accomplished by forging partnerships between law enforcement and mental health professionals.[208] For instance, the Criminal Justice and Mental Health Consensus Project calls for community partnerships to help create different service options as alternatives to incarceration.[209] These partnerships function with the dual goals of supporting the legitimate public safety concerns that law enforcement is tasked with protecting and allowing for the necessary care of people with disabilities.[210] This holistic method allows community partners to proactively provide reasonable accommodations for people with disabilities, such as developing

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ill. And in many cases, officers responded with tactics that quickly made a volatile situation even more dangerous." Lowery et al., *supra* note 5; *see also* Avery, *supra* note 147, at 296 ("Police training materials provide a clear and simple approach to handling emotionally disturbed people that can be taught to officers . . . . Yet, in many cases involving police encounters with emotionally disturbed people, the reality of police training . . . is either entirely ignored or significantly undervalued.").

[206] INT'L ASS'N OF CHIEFS OF POLICE, BUILDING SAFER COMMUNITIES: IMPROVING POLICE RESPONSE TO PERSONS WITH MENTAL ILLNESS 17 (June 2010) [hereinafter IACP RECOMMENDATIONS], http://www.theiacp.org/portals/0/pdfs/ImprovingPoliceResponsetoPersonsWithMentalIllnessSummit.pdf.

[207] *See* COUNCIL OF STATE GOV'TS, CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT 42 (June 2002), https://www.ncjrs.gov/pdffiles1/nij/grants/197103.pdf.

[208] *Id.* at 45.

[209] *Id.* at 9.

[210] *Id.*

more considerate and less aggressive police methods, and focusing on treatment programs as alternatives to arrest and incarceration.[211] Community partnerships can further solidify police training in regards to crisis intervention and appropriate responses to persons with mental illness.[212]

One of the most progressive programs designed with these goals in mind is the "Memphis Model," or more formally, Crisis Intervention Training ("CIT").[213] The CIT program is primarily used to arm first responders, specifically law enforcement officers, with the skills and supports necessary to help individuals with disabilities and mental illnesses avoid arrest and incarceration where appropriate.[214] Many of the central features of these programs are used to educate officers about mental health and the potential efforts that can be made to decrease the likelihood of a violent confrontation or unnecessary arrest.[215] The success of the CIT program in Memphis[216] offers hope that increased, or at least more tailored,

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[211] *See, e.g.*, IACP RECOMMENDATIONS, *supra* note 206, at 14–16.

[212] *Id.* at 17–19.

[213] *See Memphis Model*, CIT INT'L, http://www.citinternational.org/training-overview/163-memphis-model.html (last visited Sept. 16, 2016); *see also* IACP RECOMMENDATIONS, *supra* note 206, at 9 (describing Crisis Intervention Training as a collaborative effort emphasizing community-based treatment programs instead of arrest by "de-escalating crisis situations, decreasing the use of force by officers and increasing mental health consumers' access to community treatment options"); Allen, *supra* note 10 ("De-escalation tactics, often called the Memphis Model or Crisis Intervention Team (CIT) training, are lauded by experts as being the best practices police can employ . . . .").

[214] *See Memphis Model*, *supra* note 213.

[215] *See* IACP RECOMMENDATIONS, *supra* note 206, at 9 ("In jurisdictions that have implemented CIT, its central feature is a 40-hour long training program for law enforcement officers that includes information on how to recognize the behavioral characteristics of persons with mental illness; local mental health system characteristics; and methods of de-escalating crisis situations."). For example, as Lieutenant Mario Molina of the San Francisco Police Department has stated, "[m]ost police officer-involved shootings happen within 90 seconds to two minutes of arrival of officers at the scene . . . . Our officers need to slow down. Create that distance, create that time, that might help to resolve the situation without using force." Allen, *supra* note 10.

[216] *See generally CIT: Facts and Benefits,* CIT INT'L, http://www.citinternational.org/cit-overview/131-cit-facts-and-benefits.html (last visited Sept. 16, 2016).

training can help reduce the number of unnecessary arrests and violent confrontations between the police and persons with disabilities. In fact, many communities around the country have already organized successful CIT programs.[217] These programs provide a strong model for implementing comprehensive police training nationwide.

Former judge and independent Police Auditor for the City of San Jose, LaDoris Hazzard Cordell has championed similarly progressive policies to combat police misconduct.[218] Although she considers police misconduct from the purview of racial discrimination, her proposed reforms should be construed more broadly to address discrimination on the basis of disability and mental illness. Arguing for greater reform than merely more intensive training, she proposes different strategies that can be implemented to mitigate police misconduct.[219] First, she argues for broadening the definition and scope of "reasonable use of force" to consider the totality of the circumstances in a police encounter.[220] Hazzard further contends that there must be independent civilian oversight of police conduct because, as she notes, such oversight "holds police officers accountable to the public by providing independent review of complaints of police misconduct, instead of relying solely upon internal investigations in which the police investigate themselves."[221] These reforms highlight significant policy considerations: deterring police misconduct,[222] promoting

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[217] *See generally* CIT INTERACTIVE MAP, http://cit.memphis.edu/citmap/index.php (last visited Sept. 16, 2016); *see, e.g.*, COMMUNITIES FOR CRISIS INTERVENTION TEAMS IN NYC, http://www.ccitnyc.org (last visited Sept. 16, 2016).

[218] *See generally* LaDoris Hazzard Cordell, *Policing the Police*, SLATE (Aug. 15, 2014, 4:56 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/we_know_how_to_decrease_police_violence_like_what_we_ve_seen_after_the_michael.single.html.

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] This justification mirrors the purpose of the Fourth Amendment's exclusionary rule as a "deterrent safeguard." As the Supreme Court affirmed in *Mapp v. Ohio*, "the purpose of the exclusionary rule is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing

more tailored training in regards to disabilities, and holding the police accountable for their actions.

2. Judicial Reform

There must also be continued judicial training and more accommodating judicial processes to avoid the pitfalls of unnecessary incarceration and repeated involvement with the criminal justice system. The good news is that many jurisdictions, including New York, have recognized this and have implemented specialized "problem-solving" courts, including mental health courts.[223] In an attempt to provide a more holistic approach to the judicial process, New York's problem-solving courts "look to the underlying issues that bring people into the court system, employ innovative approaches to address those issues, and seek to simplify the court process for litigants."[224] These courts emphasize a broad range of goals tying together law enforcement, judicial operations, and individual concerns.[225] In furthering these goals, the specialized mental health courts are, at least in theory, especially cognizant of improving the quality of life for people with disabilities, and finding less restrictive alternatives to incarceration.[226]

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the incentive to disregard it." Mapp v. Ohio, 367 U.S. 643, 656 (1961) (citing Elkins v. U.S., 364 U.S. 206, 217 (1960)).

[223] *See, e.g.*, *Problem Solving Courts Overview*, https://www.nycourts.gov/COURTS/problem_solving/index.shtml (last visited Sept. 16, 2016).

[224] *Id.*

[225] Virtually all of New York's Mental Health Courts share the ultimate goals of improving public safety: reducing the frequency of arrests and/or the amount of time that criminal offenders are actually incarcerated; using limited judicial resources more effectively by limiting contacts between law enforcement and people with disabilities; improving courts' ability to identify and assess people with disabilities and obtaining the necessary treatment, thereby reducing further exposure to law enforcement; and, improving coordination between the mental health and criminal justice systems. *See generally Mental Health Courts: Mission and Goals*, NYCOURTS.GOV, https://www.nycourts.gov/courts/problem_solving/mh/mission_goals.shtml (last visited Sept. 16, 2016).

[226] "Instead of incarcerating mentally ill offenders, Mental Health Courts can help to connect them to community-based treatment and support services that encourage recovery." *Id.*

3. Identifying Disability in the Law Enforcement Context

Despite the widespread realization that there must be systemic reform in the criminal justice system pertaining to individuals with I/DD,[227] all of the policies and accommodations mentioned above are moot if officers cannot properly identify suspects with mental disabilities and are forced to rely on their own judgments.[228] In order to achieve meaningful progress towards a workable solution, there must be efforts to help individuals communicate that they have a disability, and to help police identify individuals with I/DD or mental health issues. This unfortunately is a much more complex problem than identifying other immutable characteristics such as race or gender. Disabilities may not be readily apparent; therefore, officers may not be able to determine when accommodations are necessary.[229] The Disability Independence Group ("DIG"), a Florida based nonprofit legal advocacy group focused on disability rights, recognized this problem and developed a collective response.[230]

DIG has introduced a collaborative and progressive "wallet card" program to help facilitate positive communication with law enforcement and first responders, and to assist in self-

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[227] *See, e.g.*, COUNCIL OF STATE GOV'TS, *supra* note 207, at 2.

[228] *See, e.g.*, David M. Perry & Lawrence Carter-Long, *How Misunderstanding Disability Leads to Police Violence*, ATLANTIC (May 6, 2014), http://www.theatlantic.com/health/archive/2014/05/misunderstanding-disability-leads-to-police-violence/361786/ ("Law enforcement officials expect and demand compliance, but when they don't recognize a person's disability in the course of an interaction, the consequences can be tragic. Misconceptions or assumptions can lead to overreactions that culminate in unnecessary arrest, use of pepper spray, or individuals being tasered.").

[229] *See* Brodin, *supra* note 157, at 160 n.23 ("The type of disability in an individual case is often relevant to the question of whether the police officers were aware of the plaintiff's disability because individuals with mental and emotional disabilities may be less likely to inform the officers of their disability, and the disability itself may not be immediately apparent to the officer.").

[230] *See About DIG*, DISABILITY INDEPENDENCE GROUP, http://www.justdigit.org/about-dig/ (last visited Sept. 16, 2016).

identification.[231] This free program[232] offers a personalized identification card that "is designed to help [individuals with I/DD] communicate with officers or first responders about their disability and some of the challenges they face."[233] Further highlighting the underlying rationale for this program, "[s]omeone who has a cognitive issue could be portrayed as somebody who is not following police commands, or might appear to be under the influence of drugs or alcohol, when it is not the case. The wallet card will help ease that communication and help officers understand more."[234] Although this program is currently implemented at the local level, this is an important first step for achieving national progress towards recognizing the importance of accommodating people with disabilities when searched or seized by law enforcement.

Without more diverse and robust protections in the criminal justice system, persons with I/DD and mental illness remain vulnerable.[235] As this review indicates, more accommodating procedures can be implemented at every level of the criminal justice system—from the street to the courtroom—to ensure that individuals with mental illness and I/DD are not disproportionately subjected to violent police use of force or unduly prejudiced by shortcomings in the criminal justice system. The first step in this reform must be to help officers identify disabilities and respond accordingly, while simultaneously empowering individuals with disabilities to identify themselves and assert their rights. But as these recommendations suggest, meaningful progress towards repealing the criminalization of mental illness and protecting against

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[231] *See generally The Wallet Card Application*, DISABILITY INDEPENDENCE GROUP, http://www.justdigit.org/wallet-cards/ (last visited Sept. 16, 2016).

[232] *See This Police Dept. is Doing Something Great for People with Autism*, AUTISM SPEAKS (Jan. 29, 2015), https://www.autismspeaks.org/news/news-item/police-dept-doing-something-great-people-autism; Monique O. Modan, *Coral Gables Police Department Introduces Tool for Autistic Residents*, MIAMI HERALD (Jan. 28, 2015), http://www.miamiherald.com/news/local/community/miami-dade/coral-gables/article8523989.html.

[233] Modan, *supra* note 232.

[234] *Id.*

[235] *See* Maas, *supra* note 38, at 227.

disproportionate police use of force against persons with disabilities will only be accomplished through a concerted effort by criminal justice, judicial, and community partners to create a comprehensive plan for accommodating persons with mental illness and I/DD in their encounters with law enforcement and throughout the criminal justice system.

CONCLUSION

Individuals with I/DD and mental illness are disproportionately represented in the criminal justice system, and too often police encounters with these individuals end in needless violence.[236] Although the ADA applies to law enforcement agencies,[237] without an affirmative Supreme Court interpretation, the issue of whether and to what extent the ADA applies to arrests remains an unsettled question.[238] In order to overcome the harmful status quo reflecting the disparate treatment of individuals with mental illness and I/DD,[239] the Supreme Court must acknowledge that police officers have an affirmative duty to proactively accommodate these individuals during a search or seizure in order to avoid discrimination. The good news is that a number of advocacy and law enforcement agencies have already recognized this pressing issue and have taken affirmative steps to implement more accommodating policies and practices. More can be done, however, to ensure that individuals with I/DD and mental health issues are treated fairly in the criminal justice system and are not needlessly subjected to violent police use of force and unnecessary arrests. A comprehensive accommodations scheme is necessary to safeguard these individuals' rights and to protect against further tragedies similar to the one that befell Teresa Sheehan.

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[236] *See* Lowery et al., *supra* note 5; COUNCIL OF STATE GOV'TS, *supra* note 207, at 4.

[237] *See supra* Part I.

[238] *See supra* Part III.

[239] *See, e.g.*, Lowery et al., *supra* note 5.