

NOTE

DANGEROUS INTERSECTION: PROTECTING PEOPLE WITH MENTAL DISABILITIES FROM POLICE BRUTALITY DURING ARRESTS USING THE AMERICANS WITH DISABILITIES ACT

I. INTRODUCTION

“He has a TBI He’s not going to do anything to you guys. He just took his medicine,” are some of the last words that Rakeyia Scott shouted at police officers before they shot and killed her husband.¹ Rakeyia’s husband, Keith, suffered from a traumatic brain injury (“TBI”) he obtained in a motorcycle crash the previous year.² Keith Scott’s death caused outrage in his Charlotte, North Carolina, community.³ The community led protests and riots in the days following this shooting.⁴ The public outrage was substantial enough to pressure the Charlotte Police Department into releasing bodycam and dashboard camera footage of the shooting.⁵

In August 2016, Joseph Nathaniel Weber, a man with autism, was shot after being stopped by the police for a traffic violation.⁶ Weber did

1. Nick Valencia, *Charlotte Shooting: Police Release Video and Photo Evidence*, CNN (Sept. 24, 2016), <http://www.cnn.com/2016/09/24/us/charlotte-keith-lamont-scott-shooting-video>.

2. *See id.* A brain injury qualifies as a disability under the Americans with Disabilities Act. MAYO CLINIC, UNDERSTANDING BRAIN INJURY: A GUIDE FOR EMPLOYERS 5 (2011), <http://www.ndrn.org/images/Documents/webcats/mc1298.pdf>.

3. Wesley Lowery & Cheryl W. Thompson, *Autopsy Shows Keith Lamont Scott Had Four Gunshot Wounds — Including One in the Back*, WASH. POST (Oct. 12, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/10/12/autopsy-shows-keith-lamont-scott-was-shot-four-times-by-charlotte-officer-once-in-the-back/?utm_term=.29df086f506c.

4. David A. Graham, *Officer Vinson Acted Lawfully When He Shot Keith Scott*, ATLANTIC (Nov. 30, 2016), <http://www.theatlantic.com/news/archive/2016/11/keith-lamont-scott-police/509183>.

5. Richard Fausset et al., *Police Release Videos in Killing of Carolina Man*, N.Y. TIMES, Sept. 25, 2016, at A1. The police officer who shot Keith Scott did not face criminal charges after District Attorney Andrew Murray concluded that he acted in self-defense. Natalie Musumeci, *No Charges in Fatal Police Shooting of Keith Scott*, N.Y. POST (Nov. 30, 2016), <http://nypost.com/2016/11/30/evidence-suggests-keith-scott-was-armed-before-deadly-shooting-prosecutor>.

6. Matt Agorist, *Cops Kill Speech Impaired Autistic Man Trying to Find Safety in*

not obey the officer's commands, and the officer called for backup.⁷ Weber then drove away from the scene toward New Age Services, a community organization that provides services to people with mental disabilities.⁸ Weber was a frequent participant in the activities provided by New Age Services.⁹ He got out of the car in front of the organization's building, where, according to police, he did not follow the officer's commands.¹⁰ Weber was shot and killed.¹¹ His family has since revealed that Weber had low verbal skills and contended that Weber did not know what to do in the situation.¹²

In Houston, Texas, a police officer shot and killed Brian Claunch, a double amputee who suffered from both schizophrenia and bipolar disorder.¹³ Claunch, who was in his wheelchair at the time of the incident, threatened police officers with the pen he was holding.¹⁴ When Claunch began to advance towards the officers in his wheelchair, still holding the pen, an officer opened fire.¹⁵ Dr. Ed Reitman, a clinical psychologist who was interviewed about this case, noted that "emotionally disturbed individuals" often react excessively when threatened.¹⁶ Dr. Reitman believes that this incident could have been

Home for People with Disabilities, FREE THOUGHT PROJECT (Aug. 23, 2016), <http://thefreethoughtproject.com/cops-kill-autistic-man>.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Chris Arnold, *Questions Remain in Hays Officer-Involved Shooting*, KSNW-TV, <http://ksn.com/2016/08/19/questions-remain-in-hays-officer-involved-shooting> (last updated Aug. 22, 2016, 10:12 AM).

12. Agorist, *supra* note 6; Arnold, *supra* note 11. The Hays police department offers training to its officers regarding interaction with special needs populations. Gardner Royce, *Neighbor Witnesses Hays Officer-Involved Shooting*, KWCH (Aug. 24, 2016, 10:01 PM), <http://www.kwch.com/content/news/Neighbor-witnesses-Hays-officer-involved-shooting-391236381.html>. These training sessions highlight how to recognize and deal with an individual with mental illness. *Id.*

13. CNN Wire Staff, *Police Kill Amputee in Wheelchair at Group Home for the Mentally Ill*, CNN (Sept. 24, 2012, 1:14 PM), <http://www.cnn.com/2012/09/23/us/texas-amputee-shooting>. While this case involves a victim who had both physical and mental disabilities, this Note focuses on individuals with mental disabilities. For more instances of police brutality against people with physical disabilities, see Greg Botelho & Joseph Netto, *Delaware Police Shoot Man in Wheelchair; His Relatives Ask Why*, CNN, <http://www.cnn.com/2015/09/25/us/delaware-police-shoot-man-wheelchair> (last updated Sept. 26, 2015, 1:44 AM); Raeanna Marnati, *Duluth Police Officer Richard Jouppi Fired*, KBJR6 (Aug. 3, 2016, 11:41 AM), <http://www.kbjr6.com/story/32660633/duluth-police-officer-richard-jouppi-fired>.

14. CNN Wire Staff, *supra* note 13.

15. *Id.*

16. *Id.*

prevented if the officer had training in interacting with an individual with an emotional disturbance.¹⁷

These stories are a few of the many incidents involving the police and people with disabilities.¹⁸ The tension between police officers and the communities they serve is frequently highlighted in the media.¹⁹ While this tension has long existed, the availability of social media and cell phones has pushed these issues into the public eye.²⁰ Many of the stories presented to us in the news involve police using excessive or deadly force against an individual.²¹ In 2015, police officers in the United States killed at least 1152 people.²² Out of the sixty largest police departments in the country, only one did not kill a civilian.²³

What the media often fails to highlight, however, is the correlation between a police officer using deadly force during an arrest or apprehension and the victim having a mental disability or mental illness.²⁴ The Center for Public Representation, a non-profit law firm, notes that there are “significant patterns in police killings of people with psychiatric disabilities.”²⁵ While there is no national data collected about police killing people with disabilities, recent studies demonstrate that roughly one-third to one-half of the people shot and killed by the police have some sort of psychiatric disability or mental illness.²⁶ When

17. *Id.* Eventually, the officer who killed Brian Claunch was cleared of wrongdoing. Hunter Stuart, *Houston Officer Cleared of Wrongdoing in Killing of Brian Claunch, Double Amputee*, HUFFINGTON POST (Nov. 5, 2013), http://www.huffingtonpost.com/2013/11/05/brian-claunch-houston-shot-matthew-marin-police-cleared-disabled-amputee_n_4218889.html.

18. Lowery & Thompson, *supra* note 3.

19. *Strengthening Trust Between Police and the Public in an Era of Increasing Transparency: Hearing Before the Republican Policy Comm. Law Enforcement Task Force*, 114th Cong. 1 (2015) (testimony of Brian A. Jackson, the RAND Corporation).

20. *Id.* President Barack Obama has spoken on the need to improve the relationship between the police force and the communities they serve. Eric Lichtblau, *Justice Department Will Track Use of Force by Police Across the Nation*, N.Y. TIMES, Oct. 14 2016, at A12.

21. See, e.g., Agorist, *supra* note 6; CNN Wire Staff, *supra* note 13.

22. *2015 Police Violence Report*, MAPPING POLICE VIOLENCE, <http://mappingpoliceviolence.org/2015> (last visited Feb. 15, 2018). For a breakdown of national trends in police killings, see *National Trends*, MAPPING POLICE VIOLENCE (Sept. 2016), <http://mappingpoliceviolence.org/nationaltrends>.

23. *2015 Police Violence Report*, *supra* note 22. Riverside Police Department did not kill anybody in 2015. *Id.*

24. DAVID M. PERRY & LAWRENCE CARTER-LONG, *THE RUDERMAN WHITE PAPER ON MEDIA COVERAGE OF LAW ENFORCEMENT USE OF FORCE AND DISABILITY 7-11* (2016). While this Note focuses on disability, it is important to note the similar patterns that have emerged between police and people of color. For more information, see generally Cassandra Chaney & Ray V. Robertson, *Racism and Police Brutality in America*, 17 J. AFR. AM. STUDS. 480 (2013).

25. *Police Violence and People with Disabilities*, DISABLED WORLD, <https://www.disabled-world.com/editorials/cops.php> (last updated Nov. 15, 2013).

26. PERRY & CARTER-LONG, *supra* note 24 at 7; see also Lichtblau, *supra* note 20 (discussing how the federal government just decided to start tracking the use of force in 2016).

reporters set out to find the rates of police killings in San Francisco alone, they found that about fifty-eight percent of people killed by the police between 2005 and 2013 had a mental illness.²⁷ Studies such as this sparked former Federal Bureau of Investigation (“FBI”) Director James B. Comey to express embarrassment that the media has more data than government agencies on the use of force and police killings.²⁸ Currently, the Death in Custody Reporting Act²⁹ requires police departments to report fatal encounters between police and citizens.³⁰ However, the Act only requires that the reports include the victim’s name, gender, race, ethnicity, and age—it notably leaves out disability status.³¹

International human rights organizations have criticized America’s police for their excessive force against individuals with mental illness, particularly in situations where the individual could have been subdued without causing death.³² More concerning are cases where a police officer harms or kills a person with a disability even “when the victim’s family or friend summoned the officers to provide assistance.”³³ In these instances, the police officer is already aware of the individual’s disability.³⁴

Despite these high rates of violence, police officers rarely, if ever, face consequences.³⁵ Less than three percent of officers are

27. Alex Emslie & Rachael Bale, *More Than Half of Those Killed by San Francisco Police Are Mentally Ill*, KQED NEWS (Sept. 30, 2014), <http://ww2.kqed.org/news/2014/09/30/half-of-those-killed-by-san-francisco-police-are-mentally-ill>.

28. Lichtblau, *supra* note 20.

29. See Death in Custody Reporting Act of 2013, Pub. L. No. 113-242, 128 Stat. 2860 (codified as amended at 42 U.S.C. § 13727(b)(1) (2012)).

30. *Id.* For use of force that does not result in fatality, the Justice Department relies on voluntary reporting by police departments. *Id.* For the view that imposing a financial penalty for not reporting these fatalities is critical to the success of the program, see Letter from the American Civil Liberties Union to Lorretta Lynch, Attorney Gen., Sally Yates, Deputy Attorney, and Karol Mason, Assistant Attorney Gen. 2 (Oct. 3, 2016), <https://www.aclu.org/other/proposed-implementation-death-custody-reporting-act-dicra>.

31. See 42 U.S.C. § 13727(b)(1).

32. AMNESTY INT’L, USA: RACE, RIGHTS AND POLICE BRUTALITY 17 (1999).

33. Rachel E. Brodin, Comment, *Remedying a Particularized Form of Discrimination: Why Disabled Plaintiffs Can and Should Bring Claims for Police Misconduct Under the Americans with Disabilities Act*, 154 U. PA. L. REV. 157, 158 (2005); see also *Police Violence and People with Disabilities*, *supra* note 25.

34. Brodin, *supra* note 33. For a recent example of the police fatally shooting a man described as “mentally challenged” after a family member called the police to request help, see Tony Perry et al., *Police Fatally Shoot Black Man They Say Took ‘Shooting Stance’ in San Diego Suburb, Sparking Protests*, WASH. POST (Sept. 28, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/09/28/police-shoot-black-man-in-san-diego-suburb-sparking-protests-circumstances-remain-unclear>.

35. See, e.g., DERAY MCKESSON ET AL., CAMPAIGN ZERO, POLICE UNION CONTRACTS AND POLICE BILL OF RIGHTS ANALYSIS 1 (2016), <https://static1.squarespace.com/static/>

charged with a crime after these killings, and only 0.2% of charges lead to convictions.³⁶ These officers are also unlikely to be administratively disciplined.³⁷ One of the remedies left open for victims of police brutality or their families is the Americans with Disabilities Act (“ADA”).³⁸

This Note examines how Title II of the ADA as it stands today encompasses interactions between police officers and individuals with disabilities.³⁹ It discusses how people with mental disabilities are often the victims of police brutality, and how, despite this legislative framework, victims and their families are often unable to recover under the ADA.⁴⁰ It contemplates the language of the statute and shows why it should be easier to hold the police liable under Title II.⁴¹ Finally, this Note discusses how courts have not provided clear guidance as to when the police may be held liable under the ADA, particularly in cases where the officer is trying to arrest an individual with a mental disability.⁴²

This Note suggests that courts adopt a uniform standard to apply to arrest situations.⁴³ Under this new standard a police officer can be liable pursuant to the ADA if: (1) the scene was secure; (2) there was no threat to human life; and (3) the police officer was or should have been aware of the disability.⁴⁴ This standard will make clear that the ADA applies to all interactions between police and people with disabilities, including arrest situations.⁴⁵

The ADA does not currently allow police officers to be held liable in their individual capacities.⁴⁶ Further, the doctrine of qualified immunity precludes officers from liability, which in many cases closes the door on Title II litigation.⁴⁷ This Note suggests that, along with changing the court standard to evaluate these cases, the ADA should be

559fbf2be4b08ef197467542/t/5773f695f7e0abbdfe28a1f0/1467217560243/Campaign+Zero+Police+Union+Contract+Report.pdf.

36. *Id.*

37. *Id.*

38. Pub. L. No. 101-336, 104 Stat 337 (codified as amended in scattered sections of 42 and 47 U.S.C.); see Jennifer Fischer, *The Americans with Disabilities Act: Correcting Discrimination of Persons with Mental Disabilities in the Arrest, Post-Arrest, and Pretrial Processes*, 23 LAW & INEQ. 157, 177-87 (2005). See generally Brodin, *supra* note 33.

39. See *infra* Part II.

40. See *infra* Part II.

41. See *infra* Part III.A.

42. See *infra* Part III.B–C.

43. See *infra* Part IV.A.

44. See *infra* Part IV.A.

45. See *infra* Part IV.A.

46. See, e.g., Taylor v. Schaffer, No. 1:14-cv-123-jgm, 2015 U.S. Dist. LEXIS 16119, at *15-16 (D. Vt. Feb. 10, 2015).

47. See *infra* Part IV.B.

amended so as to allow officers to be held individually liable.⁴⁸ In conjunction with this amendment, officers should not be allowed to raise a qualified immunity defense when they are being sued for violating Title II of the ADA.⁴⁹ This will ensure that there is a remedy when a victim or her family sues an officer in his individual capacity.⁵⁰

II. THE FREQUENT INTERACTIONS BETWEEN POLICE AND DISABILITY

This section discusses the underlying problems that arise when police and people with disabilities interact at the levels that they do today.⁵¹ Subpart A explains that society in general—and therefore the police—often misunderstand how a disability manifests itself.⁵² It discusses how this misunderstanding leads to the mistaken belief that an individual with a disability is being provocative or aggressive.⁵³ Subpart B discusses why there is an increase in police encounters with individuals who have a mental disability and how this increase affects the way police officers are trained.⁵⁴ Finally, Subpart C provides a brief overview on the history of the ADA, with an emphasis on its relation to policing.⁵⁵

A. *Mistaking Disability as Uncooperative or Worse, Aggressive*

For the purposes of this Note, the terms “mental disability” and “mental illness” are used when referencing a person with a cognitive impairment under the ADA.⁵⁶ A mental or intellectual *disability* is a lifelong condition where a person has limited cognitive ability.⁵⁷ A mental *illness* is not necessarily a lifelong condition and is characterized by a disturbance in thought processes.⁵⁸ Both individuals with mental

48. *See infra* Part IV.B.

49. *See infra* Part IV.B.

50. *See infra* Part IV.B.

51. *See infra* Part II.A–C.

52. *See infra* Part II.A.

53. *See infra* Part II.A.

54. *See infra* Part II.B.

55. *See infra* Part II.C.

56. Disability is defined as a “mental impairment that substantially limits one or more major life activities.” Americans with Disabilities Act, 42 U.S.C. § 12102(1)(A) (2012). Major life activities include “learning, reading, concentrating, thinking, communicating, and working.” § 12102(2)(A).

57. INTELLECTUAL DISABILITY RIGHTS SERV., SECTION 32: STEP-BY-STEP GUIDE TO MAKING A SECTION 32 APPLICATION FOR A PERSON WITH AN INTELLECTUAL DISABILITY 17 (2011), http://www.idrs.org.au/education/s32-guide/IDRS_Section_32_Guide_online.pdf.

58. *Id.* This distinction is not of central importance to this Note, as the Americans with Disabilities Act covers both individuals with a mental disability and individuals with a mental illness.

disabilities and individuals with mental illnesses are protected by the language of the ADA.⁵⁹

When a police officer interacts with an individual, he expects compliance.⁶⁰ However, a person with a mental disability may not be able to comply with an officer's order.⁶¹ This is often mistaken as a malicious choice to resist.⁶² A person with a disability may be resisting for a multitude of reasons other than malicious intent—such as a lack of understanding or a lack of physical control.⁶³ In fact, people with mental disabilities face huge disadvantages when interacting with the police.⁶⁴ When a person with a disability is a suspect, she may not understand the officer's instructions, may be overwhelmed by the police, or may run away while she is being detained.⁶⁵ If a person has a mental disability that hinders her ability to understand an officer's commands, it is medically unreasonable to expect her to comply.⁶⁶

The federal government recognized that these problems are common, and provided guidelines for police officers after the passage of the ADA.⁶⁷ The guidelines specifically account for situations in which a person is “demonstrating threatening behavior because of his or her disability.”⁶⁸ A police officer must be careful to avoid criminalizing disability where no crime has been committed and must be able to recognize when a person needs medical attention.⁶⁹ Further, a police

59. See Americans with Disabilities Act, 42 U.S.C. § 12102(1).

60. 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>.

61. Harold Braswell, *Why Do Police Keep Seeing a Person's Disability as a Provocation?*, WASH. POST (Aug. 25, 2014), https://www.washingtonpost.com/posteverything/wp/2014/08/25/people-with-mental-disabilities-get-the-worst-and-least-recognized-treatment-from-police/?utm_term=.f7cedd5a7eb6.

62. *Id.*

63. *Id.* For more information about cognitive dysfunction because of mental illness, see ALICE MEDALIA & NADINE REVHEIM, OFFICE OF MENTAL HEALTH, DEALING WITH COGNITIVE DYSFUNCTION ASSOCIATED WITH PSYCHIATRIC DISABILITIES 5 (2017), https://www.omh.ny.gov/omhweb/cogdys_manual/CogDysHndbk.htm (explaining that mental illness may affect an individual's ability to think clearly or pay attention). People with mental illness or mental disability may be unable to process information quickly. *Id.* at 7. A supportive environment will help a person with mental illness cope with their cognitive delays. *Id.*

64. LEIGH ANN DAVIS, ARC, PEOPLE WITH INTELLECTUAL DISABILITIES IN THE CRIMINAL JUSTICE SYSTEMS: VICTIMS & SUSPECTS 2 (2009), <http://www.thearc.org/document.doc?id=3664>.

65. *Id.*

66. Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 507 (2002).

67. See *Commonly Asked Questions About the Americans with Disabilities Act and Law Enforcement*, U.S. DEP'T JUST., CIV. RIGHTS DIVISION, www.ada.gov/q%26a_law.htm (last updated Apr. 4, 2006) [hereinafter *Commonly Asked Questions*].

68. *Id.*

69. *Id.*

officer must be careful to speak slowly and clearly in order to make themselves understood to the person with a disability.⁷⁰ The guidelines recognize that an officer might misunderstand disability, and encourage sensitivity and awareness for when an officer approaches an individual with a disability.⁷¹ However, compliance with ADA provisions is not a priority for police leaders.⁷² This lack of compliance, when combined with a police force that is “already prone to using force,” can be deadly.⁷³

Police officers often mistake an individual’s disability as being a sign of aggression or a provocation.⁷⁴ The case of Ethan Saylor received national media attention in 2013.⁷⁵ Ethan Saylor, a man with Down syndrome, went to a movie theater and watched *Zero Dark Thirty*.⁷⁶ After the first showing, Ethan wanted to stay and watch the movie again, but did not pay for a second ticket.⁷⁷ The theater manager called for his security staff to arrive.⁷⁸ Three sheriff’s deputies, who were off-duty and working as security officers, arrived and brutally handcuffed Ethan, fracturing his throat in the process.⁷⁹ He died as a result of this botched arrest.⁸⁰ Ethan Saylor’s death sparked media outrage in which many accused the deputies as fundamentally misunderstanding a disability like Down syndrome.⁸¹

70. *Id.*

71. *Id.*

72. Amiel Fields-Meyer, *When Police Officers Don’t Know About the ADA*, ATLANTIC (Sept. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/09/the-steadily-problematic-interactions-between-deaf-americans-and-police/541083>.

73. *See id.*

74. Braswell, *supra* note 61.

75. David M. Perry, *Justice for Down Syndrome Man Who Died in Movie Theater*, CNN, <http://www.cnn.com/2013/08/29/opinion/perry-down-syndrome-death> (last updated Aug. 29, 2013, 12:24 PM).

76. Theresa Vargas, *Judge Orders Civil Trial in Death of 26-Year-Old with Down Syndrome*, WASH. POST (Sept. 9, 2016), https://www.washingtonpost.com/local/judge-orders-civil-trial-in-police-custody-death-of-26-year-old-with-down-syndrome/2016/09/09/4d5ba96c-76ce-11e6-b786-19d0cb1ed06c_story.html?utm_term=.2aa9be6afa87.

77. *Id.*

78. Perry, *supra* note 75.

79. *Id.*

80. *Id.*

81. *Id.* For more information on the behavior of people with Down syndrome, see *Managing Behavior*, NAT’L DOWN SYNDROME SOC’Y, <http://www.ndss.org/Resources/Wellness/Managing-Behavior> (last visited Feb. 15, 2018). The mistaken belief that disability is aggression is not limited to individuals with mental or cognitive disabilities. See Anna Almendrala, *Deaf Man Allegedly Beaten, Tasered by Police Officer After Trying to Use Sign Language*, HUFFINGTON POST, http://www.huffingtonpost.com/2014/02/19/deaf-man-arrested-sign-language_n_4811785.html (last updated Feb. 19, 2014) (describing how a deaf man was beaten by police after the police mistook his usage of sign language as a form of provocation).

The killing of Kajieme Powell similarly shows the interplay between disability and aggression, and highlights how this aggression is often met with overreaction.⁸² Powell, a man with a mental illness, was killed by the St. Louis police because he brandished a knife and began to approach officers.⁸³ Officers opened fire and shot nine times, continuing even after Powell was already on the ground.⁸⁴ St. Louis police released the video of this encounter in the interest of transparency.⁸⁵ But, the video left people concerned that Powell could have been subdued without killing him.⁸⁶ One reporter noted that Powell seemed “more sick than . . . dangerous.”⁸⁷ Powell’s erratic behavior was clearly indicative of the fact that he suffered from a mental illness.⁸⁸ But, reporters noted that while Powell was obviously aggressive, the police responded with even more aggression and seemed to escalate the situation.⁸⁹ In fact, one reporter asserted that the police “instantly escalate[d] the situation” and “[didn’t] seem to know how to stop Powell, save for using deadly force.”⁹⁰ Others noted that if the police, in recognizing that they were dealing with a person with a mental illness, kept distance between themselves and Powell and instead engaged him in conversation, his death could have been avoided.⁹¹ Failure to use de-escalation techniques like those put forth by Crisis Intervention Teams (“CIT”)⁹² is often a relevant factor when an interaction ends in death or serious bodily injury to the individual.⁹³

B. Police as the First Point of Contact with People with Mental Illness

With many state and local governments cutting back on mental health services, the police have begun to interact with people with

82. Braswell, *supra* note 61.

83. Ezra Klein, *Did the St. Louis Police Have to Shoot Kajieme Powell?*, VOX (Aug. 20, 2014, 11:13 PM), <http://www.vox.com/2014/8/20/6051431/did-the-st-louis-police-have-to-shoot-kajieme-powell/in/5757650>.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* For the opposing view that Powell purposely provoked the officers, 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>.

88. *See* Klein, *supra* note 83.

89. *Id.*

90. *Id.*

91. Friedersdorf, *supra* note 87.

92. *See infra* Part II.B.

93. Elizabeth Nolan Brown, *The Invisible Plague of American Cops Killing Mentally Ill Teens*, WEEK (Sept. 4, 2014), <http://theweek.com/articles/444081/invisible-plague-american-cops-killing-mentally-ill-teens>.

disabilities at higher levels than ever before.⁹⁴ The San Diego Sheriff's Office, for example, reported that calls involving mental illness doubled between 2009 and 2011.⁹⁵ Police in Medford, Oregon, reported a similar trend and said that their police officers interact with at least one person with a mental illness on a daily basis.⁹⁶ People with mental illness compose about six percent of America's population,⁹⁷ and studies show that only about four percent of violent crimes involve a person with a mental illness.⁹⁸ The police are interacting with this population at a high rate in consideration of the small proportion of society they make up.⁹⁹

Individuals who are chronically mentally ill frequently interact with the criminal justice system and mental health system.¹⁰⁰ These interactions include involuntary hospitalizations, police interactions, and imprisonment.¹⁰¹ This results in a phenomenon where people with disabilities, especially people with mental disabilities or mental illness, are at constant risk of coming in contact with state authority.¹⁰² This Note discusses situations in which people with disabilities are subject to arrest in particular.¹⁰³

People with mental disabilities interact with the police frequently enough that it spurred the FBI to publish an article describing the proper tactics to approach a person with a mental disability, particularly autism.¹⁰⁴ When an officer knows that a person has a disability, he

94. *Id.*

95. 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=0.

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.*

100. Jan C. Costello, "Wayward and Noncompliant" People with Mental Disabilities: What Advocates of Involuntary Outpatient Commitment Can Learn from the Juvenile Court Experience with Status Offense Jurisdiction, 9 PSYCHOL. PUB. POL'Y & L. 233, 246 (2003).

101. *Id.* For more information on mental illness and the prison system, see Anasseril E. Daniel, *Care of the Mentally Ill in Prisons: Challenges and Solutions*, 35 J. AM. ACAD. PSYCHIATRY & L. 406 (2007); and Melanie Campbell, Note, *Vulnerable and Inadequately Protected: Solitary Confinement, Individuals with Mental Illness, and the Laws That Fail to Protect*, 45 HOFSTRA L. REV. 263 (2016).

102. Costello, *supra* note 100.

103. *See infra* Part III.C. Children with disabilities are three times more likely to be arrested than children without disabilities. Jackie Mader & Sarah Butrymowicz, *Pipeline to Prison: Special Education Too Often Leads to Jail for Thousands of American Children*, HECHINGER REPORT (Oct. 26, 2014), <http://hechingerreport.org/pipeline-prison-special-education-often-leads-jail-thousands-american-children>. Some estimate that as high as seventy percent of children arrested have a disability. *Id.* These statistics hold true for adults as well, as the majority of the adult prison population has a disability. *Id.*

104. Dennis Debbaut & Darla Rothman, *Contact with Individuals with Autism: Effective Resolutions*, FBI L. ENFORCEMENT BULL., Apr. 2001, at 20, 22-23.

should approach that individual in a non-threatening manner.¹⁰⁵ The officer should avoid touching the individual and speak in a calm, composed tone of voice.¹⁰⁶ The FBI recognizes that a person with autism will react differently to any sign of an officer's aggression than a person without a cognitive impairment.¹⁰⁷ This distinction is crucial in ensuring that interactions between police and individuals with mental disabilities go as smoothly as possible.¹⁰⁸

Further, law enforcement agencies recognize the need for safety on both the part of the individual with a mental illness and the officer.¹⁰⁹ There has been growing pressure from the public to address these issues.¹¹⁰ This recognition led law enforcement to turn to "specialized law enforcement strategies."¹¹¹ Hundreds of local police departments implemented CITs, where the police department teams up with mental health groups.¹¹² The goal is to have the mental health organizations train the police to appropriately respond to people with mental illnesses.¹¹³ Similar to the tactics outlined by the FBI, CITs put forth de-escalation strategies.¹¹⁴ The model depends on mental health advocates and other members of the community to train police officers to recognize signs of mental illness and to learn to use de-escalation methods through skills-based exercises.¹¹⁵ Emergency 9-1-1 operators are trained to assign mental disturbance calls to officers who have benefitted from this training.¹¹⁶ Officers also learn about the mental health services that the community provides.¹¹⁷ However, CIT training is mostly on a voluntary basis.¹¹⁸ While some departments require every

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 24.

109. See MELISSA REULAND ET AL., LAW ENFORCEMENT RESPONSES TO PEOPLE WITH MENTAL ILLNESSES: A GUIDE TO RESEARCH-INFORMED POLICY AND PRACTICE 1 (2009), http://www.nccpsafety.org/assets/files/library/LE_Responses_to_Mental_Illnesses_-_Policy_and_Practice.pdf.

110. *Id.* at 1.

111. *Id.* at 9.

112. *Id.* For more information on CITs, see *So What Is CIT?*, CIT INT'L, INC., <http://www.citinternational.org/resources/Pictures/What%20is%20CIT.pdf> (last visited Feb. 15, 2018).

113. REULAND ET AL., *supra* note 109, at 9.

114. *Id.* at 1; see also Debbaudt & Rothman, *supra* note 104, at 20, 22-23.

115. Amy C. Watson & Anjali J. Fulambarker, *The Crisis Intervention Team Model of Police Response to Mental Health Crises: A Primer for Mental Health Practitioners*, BEST PRACT. MENT. HEALTH, Dec. 2012, at 71, 72-73.

116. *Id.* at 73.

117. *Id.* But mental health services in communities have been losing their funding, so there might not be available services for the officers to learn about. Santos & Goode, *supra* note 95.

118. Watson & Fulambarker, *supra* note 115, at 74.

officer to undergo this training, other departments suggest that only a quarter of their department needs to be CIT trained.¹¹⁹ While preventative measures like CIT training seek to intervene before an officer injures or kills an individual with a mental disability, there still needs to be an avenue for victims and their families to sue.¹²⁰ The ADA provides this avenue.¹²¹

C. History of the ADA

Americans with mental disabilities are overrepresented in the criminal justice system.¹²² The ADA, a piece of comprehensive legislation aimed at eliminating discrimination against people with disabilities, applies to the criminal justice system in general.¹²³ Title II of the ADA has similar language to section 504 of the Rehabilitation Act of 1973,¹²⁴ and both statutory sections provide the same remedies.¹²⁵ The Rehabilitation Act preceded the ADA but served the same goal of preventing discrimination based on disability.¹²⁶ The Rehabilitation Act prohibited disability discrimination on the federal level.¹²⁷ Under section 504, no department or instrumentality of a government may discriminate against an individual on the basis of disability.¹²⁸ Congress intended for Title II to protect the same rights as section 504.¹²⁹ The ADA went further than the Rehabilitation Act and extended to all state and local governments, regardless of whether that government receives federal funds.¹³⁰ Where under section 504 only law enforcement agencies that receive federal funds would be affected, Title II of the ADA affects local law enforcement agencies as well.¹³¹

119. *Id.* at 75.

120. *See infra* Part IV.

121. *See infra* Part IV.

122. DORIS A. FULLER ET AL., TREATMENT ADVOC. CTR., OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS 5 (2015), <http://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf>.

123. Paula N. Rubin & Susan W. McCampbell, *The Americans with Disabilities Act and Criminal Justice: Mental Disabilities and Corrections*, RES. IN ACTION, July 1995, at 1, <https://www.ncjrs.gov/pdffiles/amdisact.pdf>.

124. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701–794 (2012)); *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000).

125. *Hainze*, 207 F.3d at 799.

126. 29 U.S.C. §§ 701–794.

127. *Id.*

128. 29 U.S.C. § 794.

129. *Hainze*, 207 F.3d at 799.

130. *Id.*; Russell Powell, *Beyond Lane: Who Is Protected by the Americans with Disabilities Act, Who Should Be?*, 82 DENV. U. L. REV. 25, 28 (2004).

131. Compare 29 U.S.C. § 794, with 42 U.S.C. § 12131(1).

People with disabilities are often subjected to negative stereotypes and prejudices, which disadvantage them in society.¹³² Disability activists argue that disability law, such as the ADA, allow for people with disabilities “to challenge the practices that enact and enforce their subordinated status.”¹³³ As such, congressional findings before the ADA was implemented highlight that people with disabilities have been subjected to unequal treatment and are substantially disadvantaged socially, vocationally, economically, and educationally.¹³⁴ Studies presented to Congress before the passage of the ADA found that this prejudice was a common experience for most individuals with disabilities.¹³⁵ Congress found that disability discrimination continued to be a “pervasive social problem” that existed in “such critical areas as . . . access to public services.”¹³⁶ Congress then went on to acknowledge that unlike victims of racial or gender discrimination, people with disabilities have lacked legal recourse to redress discrimination.¹³⁷

When the ADA was enacted, individuals with mental disabilities and their advocates believed that the legislation would substantially help the disability community.¹³⁸ The legislative history shows that Congress sought broad protections for people with disabilities.¹³⁹ However, many people with mental illnesses continue to face discrimination based on their disability.¹⁴⁰ Many advocates hoped that the ADA would systematically change the way individuals with disabilities were treated, as per Congress’s intent in enacting the legislation.¹⁴¹

132. Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397, 418 (2000).

133. *Id.* See generally Jerry Alan Winter, *The Development of the Disability Rights Movement as a Social Problem Solver*, 23 DISABILITY STUD. Q. 33 (2003) (providing an overview of the disability rights movement that eventually led to the passage of the Americans with Disabilities Act).

134. Bagenstos, *supra* note 132, at 420.

135. *Id.* at 423.

136. 42 U.S.C. § 12101(a).

137. *Id.* For more information regarding the history of the Americans with Disabilities Act, see *History of the ADA*, MID-ATLANTIC ADA CTR., <http://www.adainfo.org/content/history-ada> (last visited Feb. 15, 2018); and *Timeline of the Americans with Disabilities Act*, ADA NAT’L NETWORK, <https://adata.org/ada-timeline> (last visited Feb. 15, 2018); and see also Edward D. Berkowitz, *A Historical Preface to the Americans with Disabilities Act*, 6 J. POL’Y HIST. 96, 102-03 (1994) (discussing the history of disability policy that led to the passage of the Americans with Disabilities Act).

138. Fischer, *supra* note 38, at 159.

139. Powell, *supra* note 130, at 28-29; see also 42 U.S.C. § 12101(4)(A) (“The definition of disability in this chapter shall be construed in favor of broad coverage of individuals . . .”).

140. Fischer, *supra* note 38, at 159-60.

141. *Id.* at 159.

III. AS IT STANDS, TITLE II OF THE ADA PROVIDES INSUFFICIENT PROTECTION FOR PEOPLE WITH DISABILITIES WHO ARE INJURED OR KILLED BY THE POLICE DURING ARRESTS

While law enforcement agencies have tried to reduce the amount of conflict between their officers and people with disabilities,¹⁴² individuals with disabilities continue to be killed as a result of police brutality.¹⁴³ Victims and their families should be able to hold an offending officer liable.¹⁴⁴ Preventative measures are not sufficient, as evidenced by the statistics that indicate fifty-eight percent of people killed by the police have a disability.¹⁴⁵ Unless and until preventative measures can stop these killings, there must be an avenue for victims to seek relief.¹⁴⁶ Subpart A discusses the application of Title II of the ADA to police encounters with people with mental illness.¹⁴⁷ Subpart B explains how the statute itself and the doctrine of qualified immunity preclude holding a police officer individually liable.¹⁴⁸ Subpart C provides an overview of cases brought under Title II of the ADA relating to police encounters, specifically with respect to arrest situations.¹⁴⁹ These cases show that there is no clear directive on how, if at all, Title II covers arrests.¹⁵⁰

A. Title II of the ADA

The stated purpose of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹⁵¹ The statute aimed to create “consistent, enforceable standards” in this regard.¹⁵² However, the ADA has failed to provide a clear and consistent mandate as to whether the ADA applies to arrest situations.¹⁵³ There are no enforceable standards for applying the ADA to arrests, and courts have similarly failed to provide a clear standard on this matter.¹⁵⁴ Title II of the ADA is the portion of the Act that best applies to these situations because Title II

142. See *supra* notes 108-17 and accompanying text.

143. See *supra* Part I.

144. See *infra* Part IV.

145. Emslie & Bale, *supra* note 27.

146. See *infra* Part IV.

147. See *infra* Part III.A.

148. See *infra* Part III.B.

149. See *infra* Part III.C.

150. See *infra* Part III.C.

151. 42 U.S.C. § 12101(b)(1) (2012).

152. *Id.* § 12101(b)(2).

153. See *infra* Part III.C.

154. See *infra* Part III.C.

applies to public entities.¹⁵⁵ A public entity includes “any department, agency, special purpose district, or other instrumentality of a State or States or local government.”¹⁵⁶ The ADA prohibits discrimination against a person with a disability by a public entity.¹⁵⁷ Police agencies are encompassed in this Title because they are instrumentalities of state or local governments.¹⁵⁸

An examination of the legislative history of the ADA shows that Title II intended to contemplate all police activity.¹⁵⁹ The preamble to the legislation specifically discusses law enforcement activity and urges law enforcement to begin making changes in policies that then resulted in discriminatory arrests.¹⁶⁰ It states that there is an obligation of law enforcement to “make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities.”¹⁶¹

Title II affects law enforcement duties in a variety of ways because it applies to almost everything that a police officer does, including talking to witnesses, receiving citizen complaints, providing medical services, and enforcing laws.¹⁶² However, court cases have concluded that Title II does not uniformly apply to arrest situations.¹⁶³

To bring a claim under Title II of the ADA, a claimant must prove that: (1) she qualifies as a person with a disability under the statute; (2) that she was excluded from participation in or denied the benefits of service by a public entity, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial, or discrimination was because of the claimant’s disability.¹⁶⁴

1. What Is a Qualified Disability?

The ADA provides that a person has a disability when: (1) she has “a physical or mental impairment that substantially limits one or more major life activities”; (2) there is “a record of such an impairment”; or (3) she is “regarded as having such an impairment.”¹⁶⁵ Further, Title II of the ADA defines a qualified individual with a disability as someone

155. 42 U.S.C. § 12131(1).

156. *Id.*

157. *Id.* § 12132.

158. *Commonly Asked Questions*, *supra* note 67.

159. 56 Fed. Reg. 35,694-01, 35,703 (July 26, 1991) (to be codified at 28 C.F.R. pt. 35, app. A).

160. *Schorr v. Borough of Lemoyne*, 243 F. Supp. 2d 232, 236 (M.D. Pa. 2003).

161. *Id.*

162. *Commonly Asked Questions*, *supra* note 67.

163. *See infra* Part III.C.

164. *Gohier v. Enright*, 186 F.3d 1216, 1219 (10th Cir. 1999).

165. 42 U.S.C. § 12102 (2012).

“who, with or without reasonable modifications to rules, policies, or practices, the removal of architecture, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”¹⁶⁶ Under these standards, a person with a mental disability or mental illness is afforded the protections of Title II.¹⁶⁷ The individuals mentioned earlier, Keith Scott,¹⁶⁸ Joseph Nathaniel Weber,¹⁶⁹ Brian Claunch,¹⁷⁰ Ethan Saylor,¹⁷¹ and Kajieme Powell¹⁷² all qualified as disabled under the statute and would have benefitted from clearer directives applying the ADA to arrest situations.¹⁷³

2. When Is a Person Denied a Benefit or Service by a Public Entity?

Individuals claiming that they were denied a benefit or service need not be seeking that benefit voluntarily.¹⁷⁴ In most scenarios, an individual is not voluntarily arrested.¹⁷⁵ However, the Supreme Court in *Pennsylvania Department of Corrections v. Yeskey* held that an individual can still claim that she was denied a public service or benefit by a public entity, even if he did not purposely avail himself of that service or benefit.¹⁷⁶ In determining what constituted a benefit or service, the Supreme Court considered the language as it is normally understood and concluded that prisons provide “services” which

166. *Id.* § 12131(2).

167. *Id.* §§ 12131–12132.

168. *See supra* notes 1-5 and accompanying text.

169. *See supra* notes 6-12 and accompanying text.

170. *See supra* notes 13-17 and accompanying text.

171. *See supra* notes 74-80 and accompanying text.

172. *See supra* notes 81-90 and accompanying text.

173. *See* 42 U.S.C. § 12131(2). It is worth noting that the victims’ families did not try to bring lawsuits under Title II of the Americans with Disabilities Act.

174. *Pa. Dep’t of Corrs. v. Yeskey*, 524 U.S. 206, 211 (1998).

175. This Note does not account for victims who are trying to commit “suicide by cop.” *See* Alan Feuer, *The Nation: Desperadoes; Drawing a Bead on a Baffling Endgame: Suicide by Cop*, N.Y. TIMES (June 21, 1998), <http://www.nytimes.com/1998/06/21/weekinreview/the-nation-desperadoes-drawing-a-bead-on-a-baffling-endgame-suicide-by-cop.html>. Suicide by cop is when a person forces a cop to shoot them because they want to die. *Id.* Studies show that the majority individuals who commit suicide by cop are white men between the ages of eighteen and fifty-four, and disproportionately have substance abuse problems. H. Range Hutson et. al., *Suicide by Cop*, 32 ANNALS OF EMERGENCY MED. 665, 665, 667-68 (1998). An individual with addiction or substance abuse problems is not classified as a person with a disability under the ADA. 42 U.S.C. § 12114(a).

176. *See Yeskey*, 524 U.S. at 211 (stating that just because an individual did not purposely avail himself to the benefits of the prison he was in does not mean that the prison can deny him a service or benefit).

theoretically “benefit” the prisoners, and therefore prisoners could sue a prison for a Title II violation.¹⁷⁷

In *Frame v. City of Arlington*, the Fifth Circuit, following *Yeskey*, held that sidewalks, and the maintenance thereof, are also considered services.¹⁷⁸ In coming to this conclusion, the court looked to *Black’s Law Dictionary*, which defined a public service as work “facilitated by the government for the general public’s convenience and benefit.”¹⁷⁹ The services or benefits at issue in both *Frame* and *Yeskey* fell unambiguously in the plain meaning of Title II.¹⁸⁰ However, court cases have shown that arrest situations do not fall squarely into the language of Title II, particularly on the question of whether arrests can be classified as a service or benefit.¹⁸¹ When Title II is ambiguous, the court refers to the “responsible agency’s reasonable interpretation of that statute.”¹⁸² The Department of Justice (“DOJ”) is responsible for Title II.¹⁸³ The DOJ has concluded that Title II applies to everything a public entity does.¹⁸⁴

This Note argues that when a police officer injures or kills a person with a mental disability, in contravention of CIT methods, the officer is acting in a way that fundamentally denies the person with a disability the protections afforded to them by the ADA.¹⁸⁵ This Note further argues that, in light of the *Yeskey* and *Frame* decisions, arrests should be considered a “service or benefit” under Title II of the ADA.¹⁸⁶

B. Immunity for Individual Police Officers: Who Is Responsible?

A police officer cannot be held individually liable under the ADA.¹⁸⁷ Case law has settled that “individuals, sued in their official

177. *Id.* at 210.

178. *Frame v. City of Arlington*, 657 F.3d 215, 225 (5th Cir. 2011).

179. *Id.* at 226 (quoting *Public Service*, BLACK’S LAW DICTIONARY 1352 (9th ed. 2009)).

180. *See Yeskey*, 524 U.S. at 209-10; *Frame*, 657 F.3d at 226.

181. *See infra* Part III.C.

182. *Frame*, 657 F.3d at 224-25.

183. *Id.* at 225.

184. *Information and Technical Assistance on the Americans with Disabilities Act*, ADA.GOV, https://www.ada.gov/ada_title_ii.htm (last visited Feb. 15, 2018). The DOJ put forth the Americans with Disabilities Accessibility Guidelines regarding Title III, which it is also responsible for. JAMES C. HARRINGTON, A RE-BIRTH FOR CIVIL RIGHTS LITIGATION: USING THE AMERICANS WITH DISABILITIES ACT TO OVERCOME SECTION 1983 HURDLES AND HOLD GOVERNMENT AND POLICE ACCOUNTABLE 7 (2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=998036.

185. *See infra* Part IV.A.

186. *See infra* Part IV.A. The third portion of a Title II claim, requiring that the discrimination is because of disability, is beyond the scope of this Note.

187. *Taylor v. Schaffer*, No. 1:14-cv-123-jgm, 2015 U.S. Dist. LEXIS 16119, at *16 (D. Vt. Feb. 10, 2015).

capacities, are not ‘public entities.’”¹⁸⁸ The ADA also does not allow a plaintiff to sue an individual defendant in his personal capacity.¹⁸⁹ Further, government officials who perform discretionary functions are protected from liability unless their actions clearly violate a statutory or constitutional right of which a reasonable person would have known.¹⁹⁰ This “qualified immunity” is a doctrine that provides protection for public officials, including police officers, from legal liability.¹⁹¹ Qualified immunity protects police officers as they will not be liable for damages as long as their actions are reasonably consistent with the constitutional rights they are alleged to have violated.¹⁹² The Supreme Court created this doctrine after a series of court cases and held that an officer cannot be sued for damages when the victim’s constitutional right was not clearly established.¹⁹³ Further, an officer is protected when his conduct was objectively reasonable in light of the circumstances.¹⁹⁴ This standard closes the door for many plaintiffs wishing to recover under a law such as the ADA.¹⁹⁵

Under the “clearly established” standard, an officer could not be held liable if he did not know that his conduct was unlawful.¹⁹⁶ The officer must recognize that the law is clearly established at the time of his conduct.¹⁹⁷ When a law is clearly established, a competent public official should be required to know the law governing his conduct.¹⁹⁸ However, police officers do not always know that the ADA is governing their conduct at the time when it is not clear that the individual they are

188. *Palakovic v. Wetzel*, No. 3:14-145, 2015 WL 3937499, at *25 (W.D. Pa. June 26, 2015), *vacated and remanded on other grounds*, 854 F.3d 209 (3d Cir. 2017); *see also* *Emerson v. Thiel College*, 296 F.3d 184, 189 (3d Cir. 2002); *O’Donnell v. Pa. Dep’t Corrs.*, 790 F. Supp. 2d 289, 305 (M.D. Pa. 2011) (noting that the Eleventh Amendment bars suit against state agencies and officials acting in their official capacity).

189. William Goren, *Individual Liability*, UNDERSTANDING THE ADA (Sept. 19, 2016), <http://www.williamgoren.com/blog/tag/individual-liability>.

190. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

191. *See* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 271-72 (1995).

192. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

193. David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 25-26 (1989).

194. *Anderson*, 483 U.S. at 639.

195. *See* Rudovsky, *supra* note 193, at 27.

196. *Harlow*, 457 U.S. at 818 (“If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the conduct not previously forbade was unlawful.”).

197. *Id.*

198. *Id.*

approaching has a disability.¹⁹⁹ The law requires that a reasonable officer understands that his conduct is violating the protected right at issue.²⁰⁰

C. *Inconsistencies in Court Holdings*

Since the passage of the ADA, individuals with mental disabilities or their families have brought cases under Title II of the ADA.²⁰¹ The following cases involve Title II claims when an individual with a mental disability was being arrested or detained.²⁰² The courts did not provide a clear directive on whether Title II affirmatively applies to arrest situations.²⁰³ The courts grappled with whether an arrest falls under Title II protection because it is unclear whether an arrest is a service or benefit.²⁰⁴ This Note argues that Title II protections should extend to arrest situations.²⁰⁵

1. *Hainze* Analysis

Pursuant to the statute, courts have applied Title II to law enforcement activities.²⁰⁶ However, there has been disagreement over whether Title II applies to arrest situations.²⁰⁷ The claimant in *Hainze v. Richards* made two claims.²⁰⁸ First, he alleged that he was denied the benefits of the county's mental health training.²⁰⁹ Williamson County, Tennessee, where the incident occurred, trained its deputies to properly respond to individuals with mental health problems.²¹⁰ The claimant argued that the officer acted "in contravention of that training."²¹¹ This claim was rejected on the ground that Hainze was not denied the benefits of this training *by* a public entity, which is a prerequisite to a successful Title II claim.²¹²

Second, he alleged that the county did not reasonably accommodate his mental disability when he was arrested.²¹³ Specifically, Hainze

199. *See infra* Part IV.

200. *See Harlow*, 457 U.S. at 818.

201. *See infra* Part III.C.1–6.

202. *See infra* Part III.C.1–6.

203. *See infra* Part III.C.1–6.

204. *See infra* Part III.C.1–6.

205. *See infra* Part IV.

206. *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000).

207. *Id.* at 800.

208. *Id.* at 800-01.

209. *Id.* at 800.

210. *Id.*

211. *Id.* (discussing how the officer did not engage him in conversation, give him space, or attempt to defuse the situation at all before escalating).

212. *Id.* at 801.

213. *Id.*

argued that the law enforcement agency's policy of responding to mental health calls the same way it responds to criminal calls was discrimination.²¹⁴ The court also rejected this argument.²¹⁵ The court held that Title II did not apply to arrest situations before the officer had secured the scene and made sure that there was no threat to human life.²¹⁶ The court concluded that Congress could not have intended that the purpose of preventing discrimination would supersede human safety.²¹⁷ While the ADA claim failed in that set of circumstances, the court stated that its decision did not necessarily close off the possibility of an individual with a disability from suing the police under Title II in other situations.²¹⁸ The court also stated that if the scene was secure and there was no threat to human life, the deputies would have been obligated to reasonably accommodate the claimant's disability.²¹⁹ *Hainze* therefore indicates that Title II of the ADA could apply to arrests in certain contexts.²²⁰

2. *Schaffer* Analysis

The victim in *Taylor v. Schaffer* was a man suffering from a seizure disorder, TBI, and several other mental disorders.²²¹ A local hospital called the police to conduct a welfare check on Macadam Lee Mason, the victim, because he was acting erratically.²²² The day before, Mason had suffered a seizure and was presently in the midst of a mental health episode.²²³ The police dispatched three troopers, who had dealt with Mason before, and therefore knew of his disability.²²⁴ Mason's life partner approached the police and asked them to leave him alone, stating that this was the best way to deal with him after a seizure.²²⁵ Police ignored this request and then set up a perimeter around Mason's house, where they spotted him emerging from a nearby wooded area.²²⁶ Mason, although uncooperative and defiant during the encounter with the police,

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 802.

220. *See id.*

221. *Taylor v. Schaffer*, No. 1:14-cv-123-jgm, 2015 U.S. Dist. LEXIS 16119, at *3 (D. Vt. Feb. 10, 2015).

222. *Id.*

223. *Id.* at *4.

224. *Id.*

225. *Id.*

226. *Id.*

did not have a gun or weapon.²²⁷ Regardless, the offending officer, who knew of his disability, claimed he felt threatened and shot Mason with a taser.²²⁸ He died shortly thereafter.²²⁹

The court's analysis in this case shows that a police officer cannot be sued in his individual capacity.²³⁰ This is in accordance with *Hainze*.²³¹ However, *Schaffer* differs from *Hainze* when discussing whether an arrest fits within the ADA framework at all.²³² While *Hainze* unambiguously stated that an officer has a duty to reasonably accommodate an individual with a disability during an arrest as long as the scene was secure and there was no threat to human life,²³³ the *Schaffer* court said that it is unclear whether a police encounter is a program or service under Title II.²³⁴ In fact, the court said that arrests "fit oddly into the ADA framework," but qualified this reasoning by saying that it is not clear that an arrest is a service.²³⁵ This Note posits that arrests, as an essential function of police departments, do qualify as a service.²³⁶

3. *Patrice* Analysis

In *Patrice v. Murphy*, the court found that an arrest is not a "service, program, or activity" that a person with a disability could be denied the benefits of.²³⁷ This type of analysis forecloses a potential route for recovery for a victim with a disability who was injured or killed during an arrest.²³⁸ As earlier discussed, people with disabilities frequently interact with the police, and this includes arrest situations.²³⁹ The *Patrice* court notes that the issue of whether the ADA covers arrest situations is unclear based on earlier cases.²⁴⁰ It goes on to explain that the legislative history of the ADA mentions that people with disabilities are often improperly arrested.²⁴¹ Despite this evidence of congressional

227. *Id.* at *3-4.

228. *Id.* at *5. Shaffer said he felt threatened by Mason because he was walking towards him with one hand clenched and the other hand giving the middle finger. *Id.*

229. *Id.*

230. *Id.* at *16.

231. *See supra* Part III.C.1.

232. *See Schaffer*, 2015 U.S. Dist. LEXIS, at *16-17.

233. *Hainze v. Richards*, 207 F.3d 795, 802 (5th Cir. 2000).

234. *Schaffer*, 2015 U.S. Dist. LEXIS, at *16-17.

235. *Id.*

236. *See infra* Part IV.

237. *Patrice v. Murphy*, 43 F. Supp. 2d 1156, 1160 (W.D. Wash. 1999).

238. *See id.*

239. *See supra* Part I.B.

240. *Patrice*, 43 F. Supp. 2d at 1158-59.

241. *Id.* at 1159.

intent, the court holds that arrests do not fall within the scope of the statutory language.²⁴² Indeed, it can be interpreted that classifying an arrest as a “service or activity” flies in the face of statutory interpretation.²⁴³ The statutory framework does not provide a clear directive on if or when an arrest can fit within Title II protections and therefore the courts have failed to provide a clear directive as well.²⁴⁴ To avoid confusion and inconsistent rulings, the courts must adopt a uniform standard clarifying this.²⁴⁵

4. *Tucker* Analysis

Although the plaintiffs in *Tucker v. Tennessee* had physical, rather than mental disabilities, the analysis provides an alternative understanding of what qualifies as a service or benefit under Title II.²⁴⁶ The Tuckers are family members who are deaf and mute.²⁴⁷ When they were arrested after a domestic disturbance, they sued the city police for failing to provide a sign language interpreter or other reasonable accommodations during their arrest.²⁴⁸ The district court concluded that the police “were not performing a ‘service, program, or activity’ to which the ADA applied.”²⁴⁹

On appeal, the Sixth Circuit looked at the ADA and determined that because the definition of a qualified individual with a disability included the phrase “meets the essential requirements for receipt of services or the participation in programs or activities provided by a public entity” that the discrimination must be related to services, programs or activities.²⁵⁰ The court reasoned that if the discrimination was not tied to services, the court would not be able to figure out whether a person was a qualified individual with a disability.²⁵¹ The ADA does not specifically lay out

242. *Id.* at 1160.

243. *See id.* at 1159 (“[N]either the cases cited nor the legislative history explains how an arrest falls within the scope of the statutory language.”).

244. *See supra* Part III.A.

245. *See infra* Part IV.A.

246. *Tucker v. Tennessee*, 539 F.3d 526, 534-36 (6th Cir. 2008). Since the ADA protects individuals who have either mental or physical disabilities, it is relevant to look at case law involving plaintiffs with physical disabilities. *See* 42 U.S.C. § 12102(1)(A) (2012).

247. *Id.* at 528. For a recent example of a police interaction with a deaf person that resulted in death, see Maria Perez, *Family of Oklahoma Deaf Man Shot by Police Call for the Cop’s Arrest*, NEWSWEEK (Sept. 23, 2017, 11:39 AM), <http://www.newsweek.com/police-shooting-oklahoma-city-deafness-670033>.

248. *Tucker*, 539 F.3d at 530.

249. *Id.*

250. *Id.* at 532 (quoting 42 U.S.C. § 12131 (2)).

251. *Id.*

that an arrest is a service, program, or activity.²⁵² The district court determined that it was not.²⁵³ But on appeal, the Sixth Circuit left unanswered whether an arrest is a service.²⁵⁴ It concluded that even if arrests are protected under Title II of the ADA, the city police in this case did not intentionally discriminate against the Tuckers because of a disability.²⁵⁵

5. *Rosen* Analysis

Rosen v. Montgomery County, like *Tucker*, also involved a plaintiff who qualified under the ADA because he is deaf.²⁵⁶ Again, the plaintiff is not an individual with a mental disability, but the case provides relevant insight into whether Title II encompasses arrests.²⁵⁷ *Rosen*, a deaf man, was arrested for drunk driving.²⁵⁸ He sued under Title II of the ADA.²⁵⁹ The court struggled to fit an arrest into the language of the ADA.²⁶⁰ It relied on past case law that said the words “eligible” and “participate” imply voluntariness from a plaintiff who seeks a benefit, and that *Rosen* was not voluntarily arrested.²⁶¹ However, new case law has since provided that a public entity need not be sought out voluntarily for Title II to still apply.²⁶² The Supreme Court ruling in *Yeskey* therefore invalidates the reasoning in *Rosen*.²⁶³

6. What Does the Supreme Court Think?

In 2015, a case came before the Supreme Court asking whether an arrestee, who had a mental illness, could sue police officers for not reasonably accommodating her disability even though she was armed and dangerous at the time of the arrest.²⁶⁴ The Supreme Court granted certiorari under the impression that the question was based on whether Title II applies to an on-the-street response to a disturbance prior to the officer securing the scene and making sure that there is no threat to human life.²⁶⁵ However, once the petitioner, the City and County of San

252. *Id.* at 534.

253. *Id.*

254. *Id.* at 536.

255. *Id.*

256. *Rosen v. Montgomery Cty.*, 121 F.3d 154, 155 (4th Cir. 1997).

257. *See id.* at 155.

258. *Id.* at 155-56.

259. *Id.* at 156.

260. *Id.* at 157.

261. *Id.*

262. *Pa. Dep’t Corrs. v. Yeskey*, 524 U.S. 206, 211 (1998).

263. *See id.*

264. *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1772 (2015).

265. *Id.*

Francisco, reached the Supreme Court, it abandoned this argument and instead made an argument about who counts as a “qualified individual.”²⁶⁶ The court dismissed the question because the specific theory that San Francisco raised was not passed on below.²⁶⁷ The question remains unanswered.²⁶⁸

Further, this case concluded that individual police officers could not be held personally liable under the circumstances presented.²⁶⁹ It reaffirmed the rule that a public official, including a police officer, is immune from a lawsuit under the ADA unless they violated a statutory or constitutional right that was clearly established.²⁷⁰

IV. THE COMBINATION OF A UNIFORM COURT STANDARD AND ELIMINATION OF INDIVIDUAL IMMUNITY WILL BETTER SERVE THE INTERESTS OF PEOPLE WITH DISABILITIES

As interactions between the police and people with mental disabilities or mental illness become more common,²⁷¹ there must be a more stable framework for evaluating whether a police officer has violated the ADA.²⁷² There also must be an easier way to hold officers liable when they do violate the statute.²⁷³ Police departments around the United States have recognized that their interactions with people with disabilities can escalate, and have taken preventative measures such as CIT training.²⁷⁴ While these preventative measures will hopefully eradicate police killings of people with disabilities in the future, there needs to be an avenue for victims today.²⁷⁵ Title II litigation may be pursued by the DOJ or by individuals with a private cause of action.²⁷⁶ Individuals alleging discrimination based on disability may seek injunctive, declaratory, or monetary relief.²⁷⁷

This Note proposes that a clear, uniform standard should be adopted by the courts when deciding whether an officer discriminated

266. *Id.* at 1772-73.

267. *Id.* at 1774.

268. *Id.* at 1773-74

269. *Id.*

270. *Id.*

271. Santos & Goode, *supra* note 95.

272. *See supra* Part III (discussing lack of clear standards).

273. *See infra* Parts IV.A–B.

274. REULAND ET AL., *supra* note 109, at 1.

275. *See id.*

276. HARRINGTON, *supra* note 184, at 5.

277. *Id.* Individuals seeking monetary relief may only do so under Title II. *Id.* Title III of the ADA does not provide an avenue for monetary relief. *Id.* at 6.

against a person with a disability.²⁷⁸ The proposed court standard makes it clear that arrests do fall within the scope of Title II protections.²⁷⁹ While holding police officers responsible for failing to reasonably accommodate individuals during an arrest, it also provides protections to officers by requiring that the officer know about the disability before failing to accommodate.²⁸⁰ Along with the court standard, this Note proposes that police officers should not be entitled to qualified immunity for ADA claims.²⁸¹ To accomplish this, this Note suggests that the ADA be amended to specifically state that officials may not raise the defense of qualified immunity when they act in contravention of the statute.²⁸²

A. Court Standard

Courts should adopt a uniform standard in cases where an individual makes an ADA claim against an officer regarding an arrest. The standard should be as follows: (1) When the scene is secure; (2) there is no threat to human life; and (3) the officer knows or should have known about the disability, that officer is required to reasonably accommodate the individual during an arrest.²⁸³ This is similar to the *Hainze* standard, with two exceptions.²⁸⁴ First, the officer had to have

278. See *infra* Part IV.A.

279. See *infra* Part IV.A.

280. See *infra* Part IV.A. The reasonableness of an accommodation is a question of fact, which must be determined by the jury or presiding judge if a jury trial is waived. HARRINGTON, *supra* note 184, at 7. Certain factors in evaluating reasonableness include the resources of the entity, the cost of the accommodation, how effective the accommodation would be in compensating for the individual's disability, and whether the entity would have to fundamentally alter its program to accommodate the individual. *Id.*

281. See *infra* Part IV.B.

282. See *infra* Part IV.B.

283. One lawyer suggests that the standard should require the plaintiff, the individual with a disability, to tell the officer how to reasonably accommodate him or her. William Goren, *Compliance with the ADA when Arresting and Qualified Immunity*, UNDERSTANDING THE ADA: BLOG OF WILLIAM D. GOREN, J.D., LL.M. (July 27, 2016), <http://www.williamgoren.com/blog/2016/07/27/ada-compliance-arrests-qualified-immunity>. Then, the officer must have ignored this request for the standard to apply. *Id.* However, this standard is unreasonable. See *id.* Shifting the burden to ask for reasonable accommodations to the person with the disability might be hindered when the disability means not being able to speak or communicate with officers. See Lorraine Netter, *Speech Disorders and Getting Disability*, DISABILITY SECRETS (2017), <http://www.disabilitysecrets.com/resources/disability/speech-disorders-and-getting-disability.htm> (describing the multitude of speech disorders and mental disabilities that would prevent a person from speaking). Further, a person might not be able to communicate in any manner other than sign language. See Talila A. Lewis, *Police Brutality and Deaf People*, ACLU (Mar. 21, 2014, 1:13 PM), <https://www.aclu.org/blog/police-brutality-and-deaf-people> (providing an overview of police brutality against deaf people and explaining how many law enforcement officers do not understand sign language). Sign language may be misconstrued by the police as a form of aggression. *Id.*

284. See *Hainze v. Richardson*, 207 F.3d 795, 802 (5th Cir. 2000) (holding that an officer has

known or should have known about the disability.²⁸⁵ This would be easily proven when the person calling the police states that the person has a disability, when the disability is readily visible, or when the officer personally knows the individual in question to have a disability.²⁸⁶ Second, this standard would make clear that Title II of the ADA does apply to arrest situations, since there have been disagreements among the courts as to whether arrests can be considered a public service or benefit.²⁸⁷ This standard would prove to be beneficial for both police officers and people with disabilities alike.²⁸⁸

The DOJ notes that “discriminatory arrests and brutal treatment are already unlawful police activities,” and that law enforcement has an obligation to modify practices that “result in discriminatory arrests or abuse of individuals with disabilities.”²⁸⁹ The phrase “discriminatory arrest” speaks to instances where a person’s disability, such as cerebral palsy, is mistaken as criminal activity.²⁹⁰ Discriminatory arrests are beyond the scope of this Note. However, this Note does speak to abuse of individuals with disabilities.²⁹¹

Frame held that the court should defer to the DOJ when it is not clear whether something can be classified as a service or benefit under Title II.²⁹² This Note argues that, with deference to DOJ mandates, courts should adopt a standard that clearly indicates that arrests are classified as a service or benefit.²⁹³

The DOJ clearly considered arrests to be a service, even though an arrest is not something an individual typically seeks out.²⁹⁴ DOJ

to reasonably accommodate a disability when the scene is secure and there is no threat to human life).

285. *See id.*

286. *See supra* Part I.

287. *See* Taylor v. Schaffer, No. 1:14-cv-123-jgm, 2015 U.S. Dist. LEXIS 16119, at *16 (D. Vt. Feb.10, 2015) (stating that it’s unclear whether an arrest situation is encompassed within Title II of the ADA).

288. *See infra* Part IV.A.1–2.

289. 28 C.F.R. app. B § 35.130 (2016).

290. *See id.* There have been cases where a disability is mistaken for public intoxication. *See, e.g.*, Shaun Heasley, *Man with Cerebral Palsy Sues over Bogus Drunk Driving Arrest*, DISABILITY SCOOP (June 6, 2011), <https://www.disabilityscoop.com/2011/06/06/man-cp-sues-drunk-driving/13247>; Becca Mitchell, *Man Says His Disability Got Him Wrongfully Arrested for Being Drunk in Public*, WTKR, <http://wtkr.com/2013/06/25/man-says-his-disability-got-him-wrongfully-arrested-for-being-drunk-in-public> (last updated June 26, 2013, 7:05 AM); Jayne Wallace, *First Person: My Condition Means People Always Assume I’m Drunk*, GUARDIAN (Aug. 26, 2009, 7:09 PM), <https://www.theguardian.com/lifeandstyle/2009/aug/27/first-person-coping-with-ataxia>.

291. *See supra* Part I.

292. *Frame v. City of Arlington*, 657 F.3d 215, 224 (5th Cir. 2011).

293. *See id.*

294. *See* 28 C.F.R. app. B § 35.130 (2016).

regulations regarding Title II were codified at 28 C.F.R. Part 35.²⁹⁵ Appendix B of this codification, which includes directives on arrests, is titled “Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services.”²⁹⁶ The word “services” is in the title.²⁹⁷ This evidence, along with evidence from court cases, indicates that an arrest is indeed a service, and therefore Title II applies.²⁹⁸

Both *Frame* and *Yeskey* lead to the conclusion that an arrest is a service under Title II.²⁹⁹ A sidewalk does not fit squarely into the definition of a service when we consider plain English, but a sidewalk is considered a service under Title II.³⁰⁰ A prison, also something that most would not consider a service, is considered a service under Title II.³⁰¹ Following the lead from these cases, along with the DOJ’s indication that an arrest is a service, the proposed uniform standard would make it definitive that an arrest qualifies as a service under Title II language.³⁰²

Further, courts have not ruled out Title II’s applicability to arrest situations.³⁰³ In fact, they have provided unclear standards.³⁰⁴ The decisions in relevant cases do not suggest that arrests are categorically excluded from Title II protections.³⁰⁵ The decision in *Hainze*, for example, just recognizes that the officer in that situation was not subject to Title II because exigent circumstances existed.³⁰⁶ Following the rationale of *Hainze*, other courts have held that Title II does not apply when officers are disarming a suspect or securing the scene.³⁰⁷ Therefore, it follows that Title II does apply once the scene is secure.³⁰⁸ The Supreme Court granted certiorari to the question of whether Title II applies to arrest situations, but did not make a determination as to that

295. 28 C.F.R. § 35.

296. 28 C.F.R. app. B § 35.

297. *Id.*

298. *Id.*; see *supra* Part III.

299. See *Pa. Dep’t Corrs. v. Yeskey*, 524 U.S. 206, 210 (1998); *Frame v. City of Arlington*, 657 F.3d 215, 225 (5th Cir. 2011).

300. *Frame*, 657 F.3d at 226.

301. *Yeskey*, 524 U.S. at 210.

302. See *supra* notes 281-85 and accompanying text.

303. See, e.g., *Sudac v. Hoang*, 378 F. Supp. 2d 1298, 1306 (D. Kan. 2005).

304. See *supra* Part III.C.

305. *Sudac*, 378 F. Supp. 2d at 1306.

306. *Hainze v. Richards*, 207 F.3d 795, 802-03 (5th Cir. 2000) (recognizing officers were not subject to Title II because the area was not yet secure and without threat to human safety).

307. See, e.g., *Sudac*, 378 F. Supp. 2d at 1306.

308. See *id.*; see also *Hainze*, 207 F.3d at 802 (finding that once the area was secure, the officers would have been under a duty to reasonably accommodate plaintiff’s disability).

question.³⁰⁹ In order to prevent future litigation on the issue, the courts should adopt the proposed uniform standard.

1. Benefits for Police Officers

The proposed standard, while supplying obvious protections for people with disabilities, has built in protections for police officers as well.³¹⁰ The standard allows for a police officer to concern herself, first and foremost, with safety.³¹¹ As argued in *Hainze*, the need to secure the surrounding area and ensure that there is no threat to human life, is paramount to an officer carrying out his duties.³¹² By requiring that the scene is secure and there is no threat to human life, the standard allows for police to be primarily concerned with security before concerning themselves with accommodating a disability.³¹³ Further, the proposed standard has a knowledge requirement.³¹⁴ This will ensure that when an officer is acting without knowledge of the person's disability, he cannot be held liable under Title II.³¹⁵

The court standard will let officers know that they should be concerned with disability once the scene is secure.³¹⁶ When officers are required to think about disability, they will hopefully rely on training they have received from CIT.³¹⁷ This extra layer of accountability would hopefully incentivize departments to provide CIT classes and require all officers to attend.³¹⁸ Many of the cases earlier discussed involved situations where the police dispatcher relayed that the individual in question had a disability.³¹⁹ With the knowledge that officers will have to accommodate that individual, departments should dispatch officers who have had CIT classes or otherwise know how to handle a person with a mental disability.³²⁰ CIT methods are supposed to ensure safety for the police as well.³²¹ When police are required to refer back to their training while apprehending a person with a disability, their chances of safety improve.³²² While the standard opens a new avenue of liability for

309. *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1772 (2015).

310. *See infra* Part IV.A.2.

311. *See supra* note 281 and accompanying text.

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

313. *Id.*

314. *See supra* note 281 and accompanying text.

315. *See supra* note 281 and accompanying text.

316. *See supra* note 281 and accompanying text.

317. *See Debbaudt & Rothman, supra* note 104, at 22-23.

318. *See supra* note 281 and accompanying text.

319. *See supra* Part I.

320. *See Watson & Fulambarker, supra* note 115, at 73.

321. *Id.* at 76.

322. *Id.*

officers, it will also give them an incentive to think about disability and therefore increase their own safety level.³²³

2. Benefits for People with Disabilities

In applying the proposed court standard, victims of police brutality will have an opportunity to recover for violations of the ADA.³²⁴ Specifically, when a police officer fails to reasonably accommodate a person with a disability, in contravention of Title II of the ADA, he will be held accountable.³²⁵ If, for example, an individual with a mental illness is being confronted by the police, and the scene is secure, the officers should attempt to de-escalate the situation.³²⁶ They can do so by speaking calmly or by giving the individual space.³²⁷ These are reasonable modifications,³²⁸ and are similar to the de-escalation techniques used by CITs.³²⁹ When an officer acts in contravention of these techniques, and ends up physically injuring or killing an individual with a disability, the proposed standard would hold them civilly liable under the ADA.³³⁰

When law enforcement officers are insulated from Title II, individuals with mental disabilities are put at greater risk.³³¹ Protecting police from the ADA provides a disincentive to take extra steps to protect people with mental illness, such as providing mandatory CIT programs.³³² CIT programs provide familiarity with disability,³³³ and studies show that familiarity with disability, particularly mental illness, reduces discrimination.³³⁴

323. *See id.*

324. *See supra* notes 280-82 and accompanying text.

325. *See supra* notes 280-82 and accompanying text.

326. *Examples and Resources to Support Criminal Justice Entities in Compliance with Title II of the Americans with Disabilities Act*, U.S. DEP'T OF JUST., <https://www.ada.gov/cjta.html> (last updated Jan. 2017).

327. *Id.*

328. *Id.*

329. *See What Is CIT?*, NAT'L ALLIANCE ON MENTAL ILLNESS, <http://www.nami.org/Law-Enforcement-and-Mental-Health/What-Is-CIT> (last visited Feb. 15, 2018).

330. *See supra* notes 282-86 and accompanying text.

331. Thomas J. Auner, Comment, *For the Protection of Society's Most Vulnerable, the ADA Should Apply to Arrests*, 49 LOY. L.A. L. REV. 335, 346 (2016).

332. *Id.* at 349.

333. *See What Is CIT?*, *supra* note 329.

334. Patrick Corrigan et. al., *An Attribution Model of Public Discrimination Towards Persons with Mental Illness*, 44 J. HEALTH & SOC. BEHAV. 162, 166-67, 173 (2003).

B. Holding Officers Individually Liable

This Note additionally proposes an amendment within the ADA that would get rid of qualified immunity for an officer in these situations.³³⁵ Qualified immunity is a court standard,³³⁶ and the statutory language would have to explicitly say that an officer can be held individually liable and is not afforded the protection of qualified immunity.³³⁷ Title II actions are currently brought against government entities, rather than individuals.³³⁸ This amendment proposes that individual actors, acting in their personal capacities, can be liable under Title II.³³⁹ Further, the amendment proposes that officers may not raise a qualified immunity defense.³⁴⁰ Making this change would provide for an easier remedy for victims or families of victims of police brutality.³⁴¹

A government official, like a law enforcement officer, may be denied qualified immunity if “the facts that a plaintiff has alleged or proved show a violation of a constitutional right and . . . the right at issue was clearly established at the time of the defendant’s alleged misconduct.”³⁴² The Supreme Court, in *Harlow v. Fitzgerald*, stated that the doctrine of qualified immunity is “no license to lawless conduct.”³⁴³ However, qualified immunity results in situations where police officers are protected when they kill an individual with a disability during an arrest.³⁴⁴ The *Harlow* Court heavily discussed the public interest surrounding qualified immunity and recognized that while the public has an interest in deterring “unlawful conduct and in compensation of victims,” the public also has an interest in making sure that officers can act as they see fit “without fear of consequences.”³⁴⁵ This Note argues that eliminating qualified immunity, alongside implementing a new court standard, will better serve the public interest by protecting our most vulnerable citizens, those with mental illness and/or mental disability.³⁴⁶

335. See *infra* Part IV.B.

336. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

337. See HARRINGTON, *supra* note 184, at 8.

338. *Id.*

339. See *infra* Part IV.B.

340. See *infra* notes 365-66 and accompanying text.

341. See *infra* notes 365-66 and accompanying text.

342. Joseph Chaparo, *Case Alert: Sheehan v. City & County of San Francisco – Ninth Circuit*, 41 W. ST. U. L. REV. 315, 318 (2014).

343. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

344. *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1765 (2015); see also HARRINGTON, *supra* note 184 (explaining that only “shocking conduct” will surpass qualified immunity).

345. *Harlow*, 457 U.S. at 819.

346. See *infra* notes 353-59 and accompanying text. *But see* Michael M. Rosen, *A Qualified*

The *Harlow* Court states that “where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.”³⁴⁷ When an officer raises the qualified immunity defense, usually during a motion for summary judgment, then the “heavy two-part burden” of proof shifts to the plaintiff.³⁴⁸ The plaintiff must show that the officer violated her statutory rights (in this case, his or her rights under the ADA), and that the right was clearly established at the time of the defendant’s conduct.³⁴⁹ In order for a right to be clearly established, there usually needs to be a Supreme Court decision or other persuasive authority that has “found the law to be as the plaintiff maintains.”³⁵⁰ This is problematic because it is not clearly established that arrests are even governed by Title II.³⁵¹ A plaintiff will not be able to meet this burden of proof when the law is not clearly established.³⁵² In accordance with the standard proposed above, Title II’s applicability to arrests would be clearly established.³⁵³ This would better allow for the plaintiff to meet that burden of proof.³⁵⁴

Eliminating qualified immunity gives civilians, in this instance, individuals with disabilities, a level playing field in court.³⁵⁵ Qualified immunity does not allow individuals, nor the public in general, to hold police accountable when they violate the law.³⁵⁶ As previously established, Title II of the ADA prohibits discrimination against people with disabilities by public entities.³⁵⁷ Law enforcement, as a public entity, is required to abide by these ADA prohibitions.³⁵⁸ However, qualified immunity provides individual law enforcement officers with a

Defense: In Support of the Doctrine of Qualified Immunity in Excessive Force Cases, with Some Suggestions for Its Improvement, 35 GOLDEN GATE U. L. REV. 139, 146-47 (2005) (defending the use of qualified immunity as an effective mechanism for sorting through burdensome litigation).

347. *Harlow*, 457 U.S. at 819.

348. *Trujillo v. Rio Arriba Cty., ex rel Rio Arriba Cty. Sheriff’s Dep’t*, No. CIV 15-0901, 2016 U.S. Dist. LEXIS 96797, at *19 (D.N.M. June 15, 2016).

349. *Id.*

350. *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir. 2001).

351. *See supra* Part III.

352. *See, e.g., Trujillo*, 2016 U.S. Dist. LEXIS 96979, at *19.

353. *See supra* Part IV.A.

354. *See Trujillo*, 2016 U.S. Dist. LEXIS 96979, at *19-20.

355. Sam Wright, *Want to Fight Police Misconduct? Reform Qualified Immunity*, ABOVE THE LAW (Nov. 3, 2015, 2:05 PM), <http://abovethelaw.com/2015/11/want-to-fight-police-misconduct-reform-qualified-immunity/?rf=1>.

356. *Id.*

357. 42 U.S.C § 12132 (2012).

358. *Id.*

loophole for avoiding liability when they violate the ADA.³⁵⁹ Eliminating qualified immunity with respect to the ADA will ensure that people with disabilities have a better chance at recovering if the police discriminate against them.³⁶⁰ Alongside the proposed standard, victims of police brutality during arrests will have the opportunity to recover damages and hold the officers accountable for their wrongdoings.³⁶¹

The ADA was previously amended in 2008.³⁶² The 2008 amendments suggested that “the definition of disability . . . shall be construed in favor of broad coverage of individuals” and overall makes it easier for people seeking protection to prove that they have a qualified disability.³⁶³ In drafting the amendments, legislators again emphasized that in order to carry out its purpose of having “clear, strong, consistent, enforceable standards addressing discrimination” there needs to be a broader scope of protection.³⁶⁴ Qualified immunity narrows the scope of protection provided to individuals with disabilities.³⁶⁵

To achieve this broad protection, the language of Title II should be amended to allow for individual liability.³⁶⁶ Currently, the text of the statute reads as follows: “Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”³⁶⁷ This amendment could easily be expanded by adding the phrase “by any such entity or *such individual acting on behalf of such entity*.”³⁶⁸ A successful suit under this language would result in a judgment against the officer himself.³⁶⁹

Further, the statute will need to be amended with respect to raised defenses to ensure that officers cannot assert a qualified immunity defense.³⁷⁰ Under Title II, a new section could be added stating, “It may *not* be a defense to a charge of discrimination under this chapter that the officer did not know he was violating a clearly established right.”³⁷¹ This

359. See *supra* Part III.B.

360. Wright, *supra* note 355.

361. See *id.*

362. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

363. 42 U.S.C. § 12102(4)(A) (2012).

364. See 42 U.S.C. § 12101.

365. Wright, *supra* note 355.

366. See *supra* notes 354-60 and accompanying text.

367. 42 U.S.C. § 12132.

368. See *id.*

369. Jordan Yurchich, *Individual Capacity vs. Official Capacity Suits*, LINKEDIN (Dec. 27, 2016), <https://www.linkedin.com/pulse/individual-capacity-vs-official-suits-jordan-yurchich>.

370. See *supra* notes 354-60 and accompanying text.

371. *Contra* 42 U.S.C. § 12113(a).

language is similar to the defenses section of the ADA regarding employment.³⁷² The proposed amendment ensures that a qualified immunity defense may not be raised.³⁷³ However, it does not completely strip law enforcement officers of their protections.³⁷⁴ As proposed earlier, the court standard would ensure that an officer is not held liable unless he knows or should have known about the disability.³⁷⁵ The difference here is that the knowledge requirement under the doctrine of qualified immunity is that the officer knew he was violating a clearly established right, while the court standard requires knowledge of the individual's disability.³⁷⁶

V. CONCLUSION

There is much work left to be done when it comes to how law enforcement interacts with people with mental disabilities.³⁷⁷ However, as long as the interactions between these two communities continue at the current rate, there must be a remedy for victims of police brutality who were discriminated against because of a disability.³⁷⁸ When people with disabilities interact with the criminal justice system, and in particular the police, it “can be an extremely traumatic, confusing, and at worst, deadly experience.”³⁷⁹ This is especially true when the disability is a mental or intellectual disability.³⁸⁰ For individuals with disabilities who are not able to communicate, “the outcomes can be disastrous.”³⁸¹

While preventative measures continue to work to curb the rates of violence against people with disabilities, it is time for victims and their families to have an easier path to civil remedies. If we, as a society, do not recognize this violence, “we miss an opportunity to learn from tragedies, identify patterns, and implement necessary reforms.”³⁸² Therefore, courts should definitively rule that arrests are covered under Title II of the ADA, and Congress should amend the ADA to prevent

372. *See id.*

373. *See supra* notes 354-60 and accompanying text.

374. *See supra* Part IV.A.

375. *See supra* Part IV.A.

376. *See supra* Part IV.A.

377. *See supra* Part I.

378. *See supra* Part II.

379. Mary O'Hara, *Up to Half of People Killed by US Police Are Disabled*, GUARDIAN (Mar. 29, 2016, 8:00 AM), <https://www.theguardian.com/society/2016/mar/29/media-must-report-police-violence-towards-disabled-people>.

380. *Id.*

381. *Id.*

382. *Id.*

officers from raising a qualified immunity defense.³⁸³ The stories of Ethan Saylor and Joseph Nathaniel Weber continue to remind us that when police approach an individual with a disability, that individual's life is on the line.³⁸⁴

*Taylor Pugliese**

383. *See supra* Part IV.

384. *See supra* Parts I–II.

* J.D. Candidate, 2018, Maurice A. Deane School of Law at Hofstra University; B.A., 2013, State University of New York at New Paltz. First, I would like to extend a huge thank you to my parents, Laura and Joe, and to my sister, Jillian, for their encouragement and love throughout law school and this Note writing process. Mom, thank you for always believing in me. I would also like to thank my Faculty Advisor, Professor Janet Dolgin, and my Notes Editor, Ayda Suberoglu, for all of their guidance along the way. I am extremely grateful to all of Volume 46 for their invaluable help in making this Note possible, especially to Jon DeMars, Tessa Patti, Mindy Hollander, Patricia Hines, Deanna Wolf, and Savannah Holzwarth. Finally, I'd like to thank Perry Acks and Michelle Roter for always making me laugh during law school—you've given me so much of your time, your energy, and your hearts.