

Police Training and Autism Spectrum Disorder: Providing a Reasonable Accommodation Under the ADA

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“Including individuals with disabilities among people who count in composing ‘We the People,’ Congress understood . . . would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation.”¹

I. INTRODUCTION

The Americans with Disabilities Act (ADA) protects individuals with disabilities from being discriminated against in numerous facets of their lives, including in education, employment, and public accommodations.² The ADA broadly prohibits discrimination in these numerous areas to allow persons with disabilities to fully participate in all aspects of society.³ Title II of the ADA

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¹ *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring).

² 42 U.S.C. § 12101 (1990). The Americans with Disabilities Act was signed into law in 1990. Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327 (1990).

³ 42 U.S.C. § 12101(a)(1).

specifically protects disabled individuals from discrimination in services, programs, and activities provided by state and local governments.⁴ Law enforcement is a service provided by local governments and thus, the police must comply with Title II of the ADA.⁵ In order to comply with the ADA, police departments cannot discriminate against those with a qualifying disability or deny them services.⁶ The ADA defines disability as “a physical or mental impairment that substantially limits one of more life activities of such individual.”⁷ The phrase “substantially limits” is not a demanding standard.⁸

Most individuals with Autism Spectrum Disorder (ASD) have a disability under the ADA because ASD substantially limits one or more life activities of those individuals.⁹ For example, as will be discussed in Part II, ASD substantially affects one’s ability to care for oneself, communicate, learn, and perform manual tasks, which are all major life activities delineated in the

⁴ Title II applies to public entities, which are defined as “any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; and the National Railroad Passenger Corporation, and any commuter authority.” 42 U.S.C. §§ 12131(1)(A)–(C); *see also* 28 C.F.R. § 35.102 (2008) (providing that the ADA applies to “all services, program, and activities provided or made available by public entities”).

⁵ *See Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998) (concluding that the ADA’s definition of public entity includes local police departments); *see also Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 209 (1998) (stating that Title II “plainly covers state institutions without any exception”).

⁶ 42 U.S.C. § 12132 (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”). While the terms services, programs, or activities are not defined in the statute, the regulations accompanying the ADA provide that Title II’s coverage is comparable to Section 504 of the Rehabilitation Act of 1973 in that Title II “applies to anything a public entity does.” 28 C.F.R. pt. 35 app. B (2016) (Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services). Similarly, the term benefit is not defined in the statute, but has also been interpreted broadly. *See Yeskey*, 524 U.S. at 210 (stating that services provided to inmates theoretically benefit them and can therefore be treated as benefits).

⁷ 42 U.S.C. § 12102(1)(A). Paragraphs (B) and (C) also include within the definition of disability “a record of such an impairment; or being regarded as having such an impairment.” *Id.* §§ 12102(1)(B)–(C).

⁸ *See ADA Amendments Act of 2008*, Pub. L. No. 110–325, §§ 2(a)(4)–(7), 122 Stat. 3553, 3553 (2008) (overturning *Toyota Motor Manufacturing, Inc. v. Williams*, 534 U.S. 184 (2002) and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) because their narrow interpretation of “substantially limits” is inconsistent with the purpose of the ADA). The definition of disability “shall be construed in favor of broad coverage of individuals under this Act.” *Id.* § 3(4)(A), 122 Stat. at 3555; *see also Baum v. Metro Restoration Servs., Inc.*, 240 F. Supp. 3d 684, 692 (W.D. Ky. 2017) (noting that the “substantially limits” standard is not intended to be a demanding standard) (citing 29 C.F.R. § 1630.2(j)(1)).

⁹ The ADA provides that “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” 42 U.S.C. § 12102(2)(A).

ADA.¹⁰ But what is required of officers when they encounter individuals with autism? Even though the ADA covers those with ASD and law enforcement must comply with Title II, the answer is not yet clear. The answer of what is required of officers is not clear because the circuit courts have taken differing approaches¹¹ and the Supreme Court has declined to decide the issue.¹² Police encounters with individuals who have ASD, in which officers fail to take into account the individual's disability, tend to escalate and have dramatic consequences in part because of the officers' misunderstanding about their disability.¹³

Given the often-dramatic results of police encounters with autistic people,¹⁴ this Note will provide an analysis of what constitutes a reasonable accommodation under the ADA for those with ASD. This is especially important because those with ASD typically cannot request a reasonable accommodation for themselves and police may be unaware of their disability.¹⁵ This Note posits that the reasonable accommodation for those with autism needs to occur before the encounter itself given the disability's unique qualities. ASD is essentially an invisible disability that results in communication difficulties and thus, necessitates police training on how to interact with autistic individuals in order for Title II of the ADA to truly serve its purpose.¹⁶

¹⁰ See *id.*; *infra* Part II.A.

¹¹ Some courts have held that Title II does not apply to the arrests of those with mental disabilities, essentially providing an instance in which police action is free from the requirements of the ADA. See *Bates ex rel. Johns v. Chesterfield Cty.*, 216 F.3d 367, 372–73 (4th Cir. 2000) (holding that police did not violate Title II of the ADA when interacting with autistic individual). Other courts have held that arrests are not beyond the scope of Title II but are merely one factor in determining whether the officer's actions in a given situation were permissible. See *Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir. 1999) (“[A] broad rule categorically excluding arrests from the scope of Title II . . . is not the law.”).

¹² *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1773 (2015) (declining to decide whether a police interaction with a mentally disabled person violated Title II of the ADA). “Whether [Title II] applies to arrests is an important question that would benefit from briefing and an adversary presentation.” *Id.* In *Sheehan*, however, all parties argued, or at least accepted, that Title II applies to arrests. *Id.* “No one argues the contrary view. As a result, we do not think that it would be prudent to decide the question in this case.” *Id.*

¹³ See Steve Silberman, *The Police Need to Understand Autism*, N.Y. TIMES (Sept. 19, 2017), <https://www.nytimes.com/2017/09/19/opinion/police-autism-understanding.html> [on file with *Ohio State Law Journal*] (detailing an example in which an officer misinterpreted the symptoms of ASD resulting in an interaction between himself and a teenager with ASD escalating).

¹⁴ See, e.g., Daniella Silva, *Florida Cop Charged with Attempted Manslaughter in Shooting of Autistic Man's Unarmed Therapist*, NBC NEWS (Apr. 13, 2017), <https://www.nbcnews.com/news/us-news/florida-cop-charged-manslaughter-shooting-autistic-man-s-unarmed-therapist-n745716> [<https://perma.cc/KS7H-97GE>] (describing a police encounter with someone with ASD in which the officer shot the individual's unarmed therapist).

¹⁵ See *infra* Parts II.A–B, III.

¹⁶ See *infra* Parts II.A, V.

Part II provides background knowledge regarding ASD, its prevalence and symptoms, why these individuals are more likely to have police encounters than the population at large, and how the symptoms of ASD can affect encounters with police. Part III delves further into the ADA's requirements and previous case law regarding police interactions with disabled persons in which the various circuits have reached distinct conclusions. Part IV explains why the current interpretations are insufficient to adequately protect those with ASD given that officers have been held to have not violated Title II of the ADA if they were unaware of the disability. Part V lays out how police training regarding ASD, its symptoms, and altering police tactics when interacting with those with ASD is a reasonable accommodation which needs to be provided to those with ASD to best further the ADA's purpose.

II. BACKGROUND INFORMATION REGARDING ASD

Autism Spectrum Disorder has a wide-range of symptoms. Of significance, the number of individuals diagnosed with ASD has increased over recent years. Given the increase of the number of people with autism, police are more likely to have an encounter with someone who has ASD during their careers. Many of the symptoms of ASD can affect how these individuals interact with the police. This Part of the Note will address these issues in turn: the symptoms of ASD and how those symptoms can affect an encounter with police.

A. *ASD Symptoms and Prevalence*

Autism Spectrum Disorder, as its name suggests, consists of a wide-ranging group of developmental disorders.¹⁷ In 2013, the American Psychiatric Association merged what had previously been four distinct diagnoses into one umbrella diagnosis of ASD.¹⁸ These diagnoses that came under the umbrella of ASD are autistic disorder, childhood disintegrative disorder, pervasive developmental disorder-not otherwise specified (PDD-NOS), and Asperger syndrome.¹⁹ The exact cause of ASD is not known, but current research has linked autism to biological and neurological differences in the brain.²⁰ Moreover, research has also found a link between certain genetic vulnerabilities and the possibility of a diagnosis of autism with regards to environmental factors

¹⁷ *Autism Spectrum Disorder*, NAT'L INST. MENTAL HEALTH, <https://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd/index.shtml> [<https://perma.cc/2HYC-VMSC>] (last updated Mar. 2018).

¹⁸ AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5)* (2013).

¹⁹ *Id.* at 53.

²⁰ *Resources – About Autism*, AUTISM SOC'Y ME., <http://www.asmonline.org/resources/about-autism.aspx> [<https://perma.cc/MX55-DN XR>] (noting that these brain abnormalities can be seen in both Magnetic Resonance Imaging (MRI) and Positron Emission Tomography (PET) scans).

is currently being studied.²¹ ASD is a cognitive impairment, not a mental illness.²² Thus, there is no cure for ASD.²³

Because ASD is a spectrum, symptoms and their severity among individuals with ASD can vary; however, people with ASD generally have these broad characteristics:

- (1) Ongoing social problems that include difficulty communicating and interacting with others;
- (2) Repetitive behaviors as well as limited interests or activities;
- (3) Symptoms that typically are recognized in the first two years of life;
- and (4) Symptoms that hurt the individual's ability to function socially, in school or work, or other areas of life.²⁴

More specifically, regarding problems with social communication and interaction, symptoms of ASD may include: making little or inconsistent eye contact, having difficulty with the back and forth of conversations, repeating what others say instead of using their own words (echolalia), having an unusual tone of voice, and responding slowly or not at all to someone calling their name.²⁵ In fact, it is estimated that approximately 30% of individuals with ASD are nonverbal.²⁶

In addition, with regards to repetitive behaviors, those with ASD tend to repeat certain behaviors or have unusual behaviors.²⁷ One aspect of this phenomena is called “stimming,” which is short for self-stimulatory behavior.²⁸ Stimming occurs when an individual with ASD repeatedly does some movement or activity to provide him or herself a sensory input, essentially to

²¹ Stephanie Blenner et al., *Diagnosis and Management of Autism in Childhood*, 343 BRITISH MED. J. 894, 894–95 (2011). Findings demonstrate that children with a sibling with autism are themselves more likely to be diagnosed with autism. *Id.* at 894.

²² AUTISM SOC'Y ME., *supra* note 20. The fact that the American Psychiatric Association studies ASD does not make autism a mental illness. *See* AM. PSYCHIATRIC ASS'N, *supra* note 18, at 31–32.

²³ AUTISM SOC'Y ME., *supra* note 20. While ASD is not curable, with intervention, many of the behaviors of ASD can be positively changed over time. *Id.*; *see* NAT'L INST. MENTAL HEALTH, *supra* note 17 (stating that certain treatments and therapies can help those with ASD cope with its difficulties and “make the most of their strengths”).

²⁴ NAT'L INST. MENTAL HEALTH, *supra* note 17.

²⁵ *Id.*; Fredda Brown et al., *Characteristics of Children with Autism*, PBS, <http://www.pbs.org/parents/inclusivecommunities/autism2.html> [<https://perma.cc/7Z89-F2C7>]. Brown's article also lists other symptoms of ASD, such as being uninterested in sharing experiences and showing interest in very few objects. However, because these symptoms are less relevant during a police encounter, they will not be stressed in this Note.

²⁶ Lisa Jo Rudy, *An Overview of Nonverbal Autism*, VERYWELL HEALTH, <https://www.verywell.com/what-is-nonverbal-autism-260032> [<https://perma.cc/MH34-YHZT>] (last updated Oct. 24, 2018) (explaining that, while nonverbal autism is not a diagnosis, this percentage of individuals “use no spoken language or only a few words”).

²⁷ NAT'L INST. MENTAL HEALTH, *supra* note 17.

²⁸ *Repetitive Behaviours and Stimming*, AMBITIOUS ABOUT AUTISM, <https://www.ambitiousaboutautism.org.uk/understanding-autism/behaviour/repetitive-behaviours-and-stimming> [<https://perma.cc/93CN-TQ3L>] (last updated Oct. 2, 2017).

calm him or herself down.²⁹ Stimming can take many forms, including repeating sounds or words, rocking or swinging, and licking or chewing on items that are not edible.³⁰

Other symptoms of ASD can also affect the individual's ability to function. One such symptom is a sensitivity to certain stimuli.³¹ This inability, or diminished ability, to integrate certain sensory input results in those with ASD being very sensitive to light and noise.³² Sensory dysfunction also results in a sensitivity to touch, causing many individuals with ASD to dislike being touched.³³ One's ability to process sensory inputs can additionally affect motor skills, balance, and coordination.³⁴

The Center for Disease Control and Prevention estimates that one in fifty-nine children in the United States have autism.³⁵ This number has increased significantly since 2000, when the prevalence of autism in the United States was one in 150 children.³⁶ As the number of those diagnosed with ASD rise, and these individuals age into adolescence and adulthood, the chances that police will encounter someone with ASD do as well. These encounters are likely to be affected by the manifestation of the symptoms of ASD.

²⁹ *See id.*

³⁰ *Id.*

³¹ *See* Cindy Hatch-Rasmussen, *Sensory Integration*, AUTISM RES. INST., https://www.autism.com/symptoms_sensory_overview [<https://perma.cc/JLC7-WTJA>] (describing that individuals with autism may have a “dysfunctional sensory system”).

³² NAT'L INST. MENTAL HEALTH, *supra* note 17.

³³ *Difficulties with Physical Contact*, AUTISM HELP, <https://www.autismhelp.info/early-years/early-years-sensory> [<https://perma.cc/W3ER-V67Q>] (“Children with autism can have an unusual response to being touched, especially if physical contact is unexpected. Adults with autism have described how a light touch or brush from another person can cause discomfort or pain.”). This sensitivity occurs because of a problem with sensory integration affecting the body's tactile system. Hatch-Rasmussen, *supra* note 31. Dysfunction in the tactile system can even result in those with ASD to refuse to eat certain ‘textured’ food or be sensitive to wearing certain types of clothing. *Id.*

³⁴ Hatch-Rasmussen, *supra* note 31 (noting that a dysfunction of the proprioceptive system can result in the lack of a “subconscious awareness of body position”); *see also* Morena Mari et al., *The Reach-to-Grasp Movement in Children with Autism Spectrum Disorder*, 358 PHIL. TRANSACTIONS: BIOLOGICAL SCI. 393, 393 (2003) (describing that those with ASD tend to be clumsy and have poor balance as well as poor coordination). Moreover, persons with ASD tend to have unusual gait patterns, meaning that when they walk they have poorly coordinated limbs movements and shortened steps. *Id.*

³⁵ *Autism Spectrum Disorder (ASD): Data & Statistics*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/autism/data.html> [<https://perma.cc/RYSY-TYQN>] (noting that ASD is significantly more prevalent among boys than among girls); *What Is Autism?*, AUTISM SPEAKS, <https://www.autismspeaks.org/what-autism> [<https://perma.cc/FSZ3-6P5Q>].

³⁶ CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 35.

B. *Effects on Police Interaction*

There are two key ways in which the symptoms of ASD can affect, or even create, encounters with the police: police misperceive the effects of an individual's disability as criminal activity³⁷ and autistic individuals effectuate crimes as a result of their disability.³⁸ First, certain ASD symptoms can be interpreted as criminal behavior by police officers, such as stimming.³⁹ For example, a fourteen-year-old autistic boy was pinned to the ground by a police officer because the boy was stimming: rigidly and repeatedly raising a piece of yarn to his nose and smelling it.⁴⁰ The officer, trained in drug recognition, interpreted the boy's conduct as a sign of drug intoxication although the individual was not under the influence of drugs.⁴¹ In fact, only 20% of patrol responses involving individuals with ASD are related to criminal activity.⁴²

On the other hand, individuals with ASD also commit crimes due to their disability, which can result in interactions with the police. For example, those with ASD are more likely to wander off, both as children and adults.⁴³ And since these individuals tend to be unaware of social norms, they are more likely to trespass on the property of others.⁴⁴ Moreover, when an individual with ASD has a sensory overload, he or she may have a meltdown or a violent outburst.⁴⁵ This could lead the individual to assault a caretaker or a family member.⁴⁶

³⁷ See generally *Adle v. Me. State Police Dep't*, 279 F. Supp. 3d 337 (D. Me. 2017) (identifying cases in which the police have mistaken the effects of an individual's disability as criminal activity and consequently made arrests).

³⁸ See *Buchanan v. Maine*, 417 F. Supp. 2d 45, 73 (D. Me. 2006). In *Buchanan*, a schizophrenic individual stabbed a police officer. *Id.* at 52–53.

³⁹ See *AMBITIOUS ABOUT AUTISM*, *supra* note 28.

⁴⁰ Silberman, *supra* note 13.

⁴¹ *Id.*

⁴² Pamela Kulbarsh, *Law Enforcement and Autism*, OFFICER (Feb. 15, 2013), <https://www.officer.com/command-hq/technology/computers-software/article/10880086/law-enforcement-and-autism> [<https://perma.cc/55DJ-TEGW>].

⁴³ See Beth Arky, *Autism Plus Wandering*, CHILD MIND INST., <https://childmind.org/article/autism-plus-wandering/> [<https://perma.cc/GYP4-6PXS>] (providing that those with ASD have an impaired sense of danger, which can lead to wandering or elopement). In a survey of more than 800 parents who have children with autism, “roughly 50 percent of children between the ages of 4 and 10 with an ASD [diagnosis] wander at some point, four times more than their unaffected siblings.” *Id.*

⁴⁴ See *id.* (stating that some of the reasons that individuals with ASD wander are to head to a favorite place, like a park, and to pursue a special topic of interest, like a child who loves trains heading for the train tracks); see, e.g., *Bates ex rel. Johns v. Chesterfield Cty.*, 216 F.3d 367, 369 (4th Cir. 2000) (detailing that an autistic individual who had wandered off entered onto private property).

⁴⁵ See David Rettew, *The Link Between Autism and Violence Isn't Autism*, PSYCHOL. TODAY (May 8, 2017), <https://www.psychologytoday.com/blog/abcs-child-psychiatry/201705/the-link-between-autism-and-violence-isn-t-autism> [<https://perma.cc/RA3E-86BN>].

⁴⁶ See *infra* note 53 and accompanying text.

As a result, individuals with ASD are seven times more likely to have police encounters than their neurologically typical counterparts.⁴⁷ In addition to an increased likelihood of having encounters with police, the encounters themselves are impacted by the symptoms of ASD in various ways. For example, an individual with ASD may not respond, or have a delayed response, to a question posed by law enforcement⁴⁸ or an individual may answer the question, “have you been drinking?” literally and subsequently answer yes, despite not having had anything alcoholic to drink.⁴⁹

Furthermore, characteristics of ASD, coupled with typical police procedure, can cause these encounters to escalate. For example, on the one hand, officers can interpret the lack of eye contact or the lack of an answer as a sign of guilt, resulting in the officer raising their voice, shining a light in the subject’s face, or touching the subject.⁵⁰ On the other hand, those with ASD may not follow instructions and, due to the fact that they are sensitive to light, sound, and touch,⁵¹ may react negatively, or even violently, to these tactics.⁵² Unfortunately, this combination has led to extreme, and even deadly, consequences.⁵³ According to a news report, nearly 50% of the people who die

⁴⁷ See Nick Boisvert, *Police Officers Agitate People with Autism, Worsen Situation in a Third of Encounters, Study Finds*, CBC NEWS (June 13, 2017), <http://www.cbc.ca/news/canada/toronto/autism-police-study-camh-1.4158684> [<https://perma.cc/9HPC-QKHS>]; Matt Brown, *Programs – Autism and Law Enforcement – Facts for Prosecutors*, AUTISM SOC’Y ME., <http://www.asmonline.org/resources/law-prosecutors.aspx> [<https://perma.cc/GC43-2S2U>] (noting that those with ASD and other developmental disabilities are seven times more likely to come into contact with the police).

⁴⁸ See NAT’L INST. MENTAL HEALTH, *supra* note 17; Brown et al., *supra* note 25 (describing that those with ASD have trouble maintaining back-and-forth conversations and sometimes do not respond or are delayed in doing so).

⁴⁹ See Ian Stuart-Hamilton, *People with Autism Spectrum Disorder Take Things Literally*, PSYCHOL. TODAY (Apr. 7, 2013), <https://www.psychologytoday.com/blog/the-gift-aging/201304/people-autism-spectrum-disorder-take-things-literally> [<https://perma.cc/MM9N-MRN9>] (explaining that autistic individuals typically do not grasp colloquialisms or sarcasm, and instead, interpret statements literally).

⁵⁰ See Carolyn Gammicchia & Catriona Johnson, *Autism: Information for Law Enforcement and Other First Responders*, AUTISM SOC’Y, https://www.autism-society.org/wp-content/uploads/files/2014/04/Law_Enforcement_and_Other_First_Responders.pdf [<https://perma.cc/7M3M-X64P>] (providing that officers and other first responders should not interpret a lack of eye contact as a sign of guilt or disrespect).

⁵¹ AUTISM HELP, *supra* note 33.

⁵² *Id.* It is important to keep in mind that even light touching can be painful for someone with ASD. *Id.*

⁵³ *E.g.*, Matt McCall, *Family, Activists Protest 5 Years After Autistic Teen’s Death in Calumet City*, CHI. TRIB. (Feb. 1, 2017), <http://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-stephon-watts-anniversary-st-0201-20170201-story.html> [<https://perma.cc/5LHF-NBPX>]. Stephon Watts, a fifteen-year-old autistic boy, was shot and killed by police after his father called the non-emergency line. *Id.* The family states that officers knew that their son had autism as they had been to the home on numerous occasions.

at the hands of police have some kind of disability.⁵⁴ What is key information regarding a situation with someone with ASD is that, “the more force a police officer applies to gain control over the situation, the more dangerous and out of control the situation likely becomes.”⁵⁵ As a result, there currently exists a situation in which officers, based on their training, attempt to gain control of a situation by using force, and in which autistic individuals, based on their disability, react negatively and even violently to the police tactics used in these encounters.

III. REQUIREMENTS OF THE ADA AND RELEVANT CASE LAW

Based on the requirements of the ADA, most individuals with ASD have a qualifying disability because ASD substantially limits one or more of their life activities,⁵⁶ such as their ability to speak, learn, and communicate.⁵⁷ Because these individuals have a qualifying disability, they are covered by the ADA.⁵⁸ Accordingly, local governments, including police departments, are required to comply with Title II of the ADA and cannot discriminate against individuals or deny them benefits because of their disability, and may be required to provide reasonable accommodations to said individuals.⁵⁹

Id. According to police, officers shot Stephon Watts after he refused to drop a knife and lunged at an officer. *Id.* The family maintains that Stephon was holding a butter knife. *Id.*

⁵⁴ Marti Hause & Ari Melber, *Half of People Killed by Police Have a Disability: Report*, NBC NEWS (Mar. 14, 2016), <https://www.nbcnews.com/news/us-news/half-people-killed-police-suffer-mental-disability-report-n538371> [<https://perma.cc/GM63-4A4P>]. The report is not solely focused on ASD. *Id.*

⁵⁵ Elizabeth Hervey Osborn, *What Happened to “Paul’s Law”?: Insights on Advocating for Better Training and Better Outcomes in Encounters Between Law Enforcement and Persons with Autism Spectrum Disorders*, 79 U. COLO. L. REV. 333, 344 (2008). Police officers shot and killed a fifteen-year-old boy with cognitive disabilities and a seizure disorder who was holding a knife. *Id.* at 337. Officers had been called to the boy’s home by a family member. *Id.* at 335. While on the phone with 911, the family member attempted to explain the boy’s condition to the first responder, who responded that they did not “need the story.” *Id.*

⁵⁶ 42 U.S.C. § 12102(1)(A) (1990) (defining disability as “a physical or mental impairment that substantially limits one of more life activities of such individual”).

⁵⁷ *Id.* § 12102(2)(A); see *supra* notes 23–31 and accompanying text. A substantial effect on any one of these life activities would be sufficient to demonstrate that the person had a disability for purposes of the ADA. 42 U.S.C. §§ 12102(1)–(2). In addition, the regulations accompanying the ADA specifically list autism as a qualifying disability because it “substantially limits brain function” and may also substantially limit major life activities other than those explicitly identified. 29 C.F.R. § 1630.2(j)(3)(iii) (2013).

⁵⁸ 42 U.S.C. §§ 12102(1)–(2).

⁵⁹ See *Estate of Saylor v. Regal Cinemas, Inc.*, No. WMN-13-3089, 2016 WL 4721254, at *16 (D. Md. Sept. 9, 2016). “[T]he Act in no way limits the terms ‘services, programs, or activities,’ and appears to include all core functions of government. Among the most basic of these functions is the lawful exercise of police powers, including the appropriate use of force by government officials acting under color of law.” *Schorr v. Borough of Lemoyne*, 243 F. Supp. 2d 232, 235 (M.D. Pa. 2003), *abrogated by Harberle v. Troxell*, 885 F.3d 170

While those with ASD are covered by the ADA, the courts have not been uniform in their decisions as to what the ADA requires in the context of a police encounter. Per Title II, “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.”⁶⁰

Title II’s prohibition of discrimination begs the question of precisely what benefit a person with ASD is being denied or what discrimination a person with ASD is being subjected to as a result of a police encounter. Courts have held that Title II applies in several instances regarding police encounters. First, claims can arise as a “wrongful arrest,” where the officer makes an arrest based on the disability and its manifestations, and not for criminal activity.⁶¹ Second, Title II claims can also arise under a reasonable accommodation theory, when the officer makes a lawful arrest but fails to accommodate for the person’s disability during the investigation or arrest.⁶² Moreover, it is important to note that individuals on the autism spectrum can be the focus of police investigations and encounters without being a suspect or subject to arrest.⁶³

(3rd Cir. 2018). The Third Circuit remanded *Harberle* to the Eastern District of Pennsylvania where the case was dismissed. *Harberle ex rel. Nixon v. Borough of Nazareth*, No. 5:15-cv-02804, 2018 WL 4770682 (E.D. Pa. Oct. 2, 2018). The case is currently pending appeal. *Appeal filed*, *Harberle v. Borough of Nazareth*, No. 18-3429 (3d Cir. Nov. 2, 2018).

⁶⁰42 U.S.C. § 12132; see *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) (noting that the term “benefit” has been applied broadly).

⁶¹One such example in terms of ASD would be when an officer arrests an autistic person for driving under the influence when he/she fails a field sobriety test even though the individual has not consumed any alcohol. Those with ASD may fail these tests due to their autism because they have problems with balance and coordination. See *Mari et al.*, *supra* note 34, at 393. Thus, if an officer makes an arrest in such a case, the officer has arrested the person because of their disability, and not due to any criminal activity. For a similar example, see *Jackson v. Inhabitants of Town of Sanford*, No. 94-12-P-H, 1994 WL 589617, at *1, *6 (D. Me. Sept. 13, 1994), in which officers arrested a man for drunk driving because of his slurred speech. It turned out that the man was sober; his slurred speech was due to a previous stroke.

⁶²See *Estate of Saylor*, 2016 WL 4721254, at *1 (recounting a Title II claim that came about when a man with Down syndrome attempted to watch another movie at a theater without paying for another ticket). One such example would be if officers arrested someone who is paralyzed and then failed to provide a wheelchair restraint in the vehicle during transport, resulting in injuries. See *Gorman v. Bartch*, 152 F.3d 907, 909–12 (8th Cir. 1998). Instances involving ASD and a failure to provide a reasonable accommodation will be the focus of the subsequent parts of this Note.

⁶³Individuals with ASD commonly wander and therefore, family members or caretakers may contact police to report the individual missing. *Arsky*, *supra* note 43 (noting that 32% of parents had called police because their child had been “missing long enough to cause significant safety concerns”). In fact, a lieutenant in Maryland stated that the most incidents regarding ASD seen by police there involved “nonverbal kids who have wandered away from home.” Tim Prudente, *Police Training Expands for Encounters with People Who Have Developmental Disabilities*, *BALT. SUN* (Jan. 17, 2016), <http://www.baltimoresun.com/news/maryland/howard/bs-md-autism-police-training-20160117-story.html>

However, the courts have not reached a consensus that, even if Title II of the ADA is implicated or applicable, when it is violated. Some circuits have held that Title II includes an exigent circumstances exception, absolving public entities of the obligation to provide a reasonable accommodation in these situations.⁶⁴ Other circuits have not interpreted the ADA to contain an exigent circumstances exception, but instead have held that the circumstances surrounding the encounter or arrest are but one factor in determining whether the police provided a reasonable accommodation to the suspect.⁶⁵ Even when courts have determined that the ADA applies, courts have grappled with whether there has been a violation of the ADA as a result of the officers' conduct.⁶⁶

One of the unique issues that ASD, along with other mental disabilities, presents is that the disability may not be readily discernable by someone unaware of its symptoms.⁶⁷ This fact distinguishes ASD from numerous physical disabilities, in that one may be unaware that an individual is autistic upon seeing the individual or having a short interaction with him or her.⁶⁸ For example, if someone is blind, others may be able to tell by the fact that the person uses a walking stick or has a seeing-eye dog. Similarly, one may be able to deduce that another is paralyzed by the individual's use of a wheelchair. With ASD, however, we may not know that someone has a disability because of its

[<https://perma.cc/GN6Y-S9CP>]. Moreover, those with ASD are more likely to be victims of crime and may come into contact with police as a result. See C.S. Allely et al., *Violence Is Rare in Autism: When It Does Occur, Is It Sometimes Extreme?*, 151 J. PSYCHOL. 49, 50 (2017).

⁶⁴ See *Waller ex rel. Estate of Hunt v. City of Danville*, 556 F.3d 171, 174–75 (4th Cir. 2009) (noting that some courts have incorporated an exigent circumstances exception into Title II); *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) (“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.”).

⁶⁵ See *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1085 (11th Cir. 2007) (holding that the exigent circumstances surrounding an arrest “go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance”); *Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir. 1999) (“[A] broad rule categorically excluding arrests from the scope of Title II . . . is not the law.”).

⁶⁶ *Estate of Saylor*, 2016 WL 4721254, at *16–17 (holding that a lack of police training did not violate the ADA because there was not an obvious need for training regarding mental disabilities).

⁶⁷ This lack of awareness can prevent individuals from bringing a claim that they were discriminated against because of their disability. See *Garner v. City of Ozark*, No. 1:13-CV-90-WKW, 2015 WL 728680, at *10 (M.D. Ala. Feb. 19, 2015) (determining that officers did not violate the ADA during their encounter with an autistic person because they were not aware of the individual’s disability).

⁶⁸ See Pacer Center, *When Your Child Has an Invisible Disability*, HUFFPOST (May 21, 2015), https://www.huffingtonpost.com/pacer/traveling-when-your-child-has-an-invisible-disability_b_7355262.html [<https://perma.cc/568W-4R6R>].

“invisible” nature.⁶⁹ ASD, along with other mental disabilities, arguably cannot be readily seen, especially if a person is unaware of what the symptoms are. This fact can prove problematic for Title II claims.

The existing case law regarding interpretations of Title II of the ADA for those with mental disabilities has been problematic. However, those with visible, mental disabilities have fared somewhat better in the court system. For example, the family of Robert Saylor brought suit after he died during an encounter with police.⁷⁰ Saylor, a twenty-six-year-old man with Down syndrome, came into contact with police as he was sitting in a movie theater without having paid to see the movie a second time.⁷¹ Saylor had gone to see the movie with his caretaker, who was pulling the car up to the front of the theater.⁷² The caretaker approached an employee at the theater and explained that Saylor had Down syndrome and to please let her handle the situation to get Saylor to leave, as his mother was on her way to the theater.⁷³ However, security was called and a sergeant entered the theater where he found Saylor “sitting quietly in his seat.”⁷⁴ After talking with Saylor, officers then forcibly removed Saylor from his seat, during which time everyone involved fell to the ground.⁷⁵ Due to Saylor’s size, officers used three sets of handcuffs to handcuff him.⁷⁶ As soon as he was handcuffed, Saylor stopped breathing.⁷⁷ Saylor was taken to a hospital where he was pronounced dead.⁷⁸

⁶⁹ See Megan Burgess, *My Son’s Autism Is an Invisible Disability*, THE MIGHTY (Aug. 7, 2017), <https://themighty.com/2017/08/my-sons-autism-is-an-invisible-disability/> [<https://perma.cc/R3EJ-YR2M>].

⁷⁰ *Estate of Saylor*, 2016 WL 4721245, at *1.

⁷¹ *Id.*

⁷² *Id.* at *2.

⁷³ *Id.* at *3.

⁷⁴ *Id.*

⁷⁵ *Id.* at *4.

⁷⁶ *Estate of Saylor*, 2016 WL 4721245, at *4.

⁷⁷ *Id.*

⁷⁸ *Id.* The cause of death was asphyxia. *Id.*

Saylor's family brought claims for violation of Title II of the ADA.⁷⁹ One such claim was for failure to train, which the court dismissed.⁸⁰ The other was for a failure to accommodate Saylor's disability.⁸¹ While the State moved to dismiss this claim, the court denied the State's motion because Saylor's caretaker had requested that the officers wait for a few minutes until the mother arrived.⁸² This could have been a reasonable accommodation even though the State asserted that it could not have left Saylor in the theater because he "could become violent."⁸³

While the court's refusal to grant the defendant's motion to dismiss regarding a Title II claim for a failure to provide a reasonable accommodation is promising, there are likely to be other challenges when these claims are brought by individuals with ASD or their families. First, Saylor was "readily recognizable as someone with [a] disability."⁸⁴ It likely will not be readily recognizable that someone with ASD has said disability if the officer is wholly unaware of the symptoms because ASD is not readily discernible by merely looking at someone.⁸⁵ Second, Saylor's caretaker made a request for an accommodation: that officers wait a few minutes so she and the mother could resolve the situation.⁸⁶ In another case, however, there may not be a parent or caretaker around to make a specific request to police and, given the

⁷⁹ *Id.* at *16. Saylor's family brought numerous other claims, such as gross negligence and excessive force claims. *Id.* at *1. The family brought a civil suit after criminal charges were not brought against the officers involved in the incident. Theresa Vargas, *Grand Jury Rejects Criminal Charges in Death of Robert Saylor, Man with Down Syndrome*, WASH. POST (Mar. 22, 2013), https://www.washingtonpost.com/local/no-criminal-charges-in-death-of-robert-saylor-frederick-man-with-down-syndrome/2013/03/22/3a723b6c-932f-11e2-8ea1-956c94b6b5b9_story.html?utm_term=.061c4a781f78 [https://perma.cc/T7EL-Q4PJ]. "In order to establish a claim under Title II [of the ADA], Plaintiffs must prove that: 1) [the plaintiff] was disabled, 2) [they] were otherwise qualified to receive the benefits of such [public] service, program, or activity, and 3) [they] were excluded from participation in or denied benefits . . . or otherwise discriminated against, on the basis of their disability." *Estate of Saylor*, 2016 WL 4721245, at *16 (citing *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005)).

⁸⁰ *Estate of Saylor*, 2016 WL 4721245, at *16–18. For more information on failure to train claims, see *infra* Part V.A. The case does state that the police department had a manual with guidelines for dealing with those with mental disabilities. *Estate of Saylor*, 2016 WL 4721245, at *4. The manual stated that officers should avoid "forcing discussion," "touching the person (unless essential to safety)," and "crowding the person." *Id.* The only mandated in-service training for this department was on sexual assault. *Id.* The manual does not appear to have been followed during the encounter with Saylor. See *id.* at *3–4 (noting that officers attempted to obligate a conversation with them, touched Saylor, and had multiple deputies surrounding him).

⁸¹ *Estate of Saylor*, 2016 WL 4721245, at *18.

⁸² *Id.* at *18–20.

⁸³ *Id.* at *19.

⁸⁴ *Id.* at *2 (providing that Saylor had "the physical and facial features common to individuals with Down Syndrome").

⁸⁵ See *supra* notes 68–69 and accompanying text.

⁸⁶ *Estate of Saylor*, 2016 WL 4721245, at *18.

communication difficulties that those with ASD experience, it is highly probable that they cannot make such a request for themselves.⁸⁷

These concerns played out in *Garner v. City of Ozark*.⁸⁸ In the case, a mother brought suit on behalf of her son with ASD, Wynter Stokes, who is completely nonverbal.⁸⁹ The suit stemmed from an encounter between Stokes and police, in which Stokes was substantially injured when an officer commanded his canine to attack Stokes multiple times.⁹⁰ Stokes had wandered off from home without his mother's knowledge and wound up at a private residence.⁹¹ The homeowner notified the police that someone was in her yard and "would not acknowledge her when spoken to or asked to leave."⁹² Officers then arrived at the residence.⁹³ An officer located Stokes and confronted him; Stokes then tried to flee.⁹⁴ The officer stated that he then grabbed Stokes' shirt and asked for his name, to which Stokes tried to pull away and the officer grabbed his arm.⁹⁵ According to the officer, the boy then grabbed the officer's neck and the two struggled.⁹⁶ The boy then fled and the officer released his canine, who took Stokes down.⁹⁷

Stokes' mother then brought claims for violation of Title II of the ADA, arguing that the City failed to train its officers and failed to provide a reasonable accommodation.⁹⁸ With regards to providing a reasonable accommodation, the court stated that "the defendant's duty to provide a reasonable accommodation is not triggered until the plaintiff makes a 'specific demand' for an accommodation."⁹⁹ Obviously, such a requirement could not be satisfied by Stokes, who is nonverbal.¹⁰⁰ Thus, the plaintiff argued that the City should have

⁸⁷ See *supra* notes 24–26 and accompanying text detailing the symptoms of ASD.

⁸⁸ See *Garner v. City of Ozark*, No. 1:13–CV–90–WKW, 2015 WL 728680 (M.D. Ala. Feb. 19, 2015).

⁸⁹ *Id.* at *1.

⁹⁰ *Id.* at *2 n.1.

⁹¹ *Id.* at *2.

⁹² *Id.*

⁹³ *Id.* The homeowner's spouse reported to an officer that the suspicious person had been on his porch and was unarmed. *Id.* at *2. Moreover, according to the complaint, the spouse informed an officer that the person was "different" and "possibly autistic." *Id.* The court stated that there was no evidence that the officer who actually confronted Stokes was aware of these statements. *Id.*

⁹⁴ *Garner*, 2015 WL 728680, at *2.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* The officer "represents that he had no knowledge of [Stokes'] autism until after [Stokes] was in police custody." *Id.* at *3. Moreover, the criminal charges against Stokes were subsequently dropped. *Id.*

⁹⁸ *Id.* at *9. The Plaintiff also brought a § 1983 claim for excessive force and state law claims for assault and battery. *Id.* at *3.

⁹⁹ *Id.* at *9 (citing *Gaston v. Bellinrath Gardens & Homes, Inc.*, 167 F.3d 1361, 1363 (11th Cir. 1999)).

¹⁰⁰ *Garner*, 2015 WL 728680, at *9. "The City contends that [Stokes] could not have requested any sort of ADA accommodation." *Id.*

trained its officers to recognize autism and accommodated individuals in accordance with that training.¹⁰¹ The court, however, granted defendants' motion for summary judgment on the issue because one of the elements of an ADA claim was missing: that Stokes had been discriminated against *because of* his disability and denied an accommodation as a result.¹⁰² "[Stokes'] reported misconduct and flight—not his autism—was the reason [the officer] used his canine to repeatedly seize [Stokes]."¹⁰³

Another court similarly granted summary judgment for defendants in regards to a Title II claim involving ASD.¹⁰⁴ Bates, a teenager with ASD, appears to have wandered off one evening, arriving at someone's home approximately two miles from Bates' home.¹⁰⁵ Bates wandered up the driveway, into the homeowner's open garage, and up to a cage containing kittens.¹⁰⁶ The homeowner attempted to ascertain where the boy was from but he did not reply and then ran off into a wooded area.¹⁰⁷ The homeowner then called 911 and officers arrived shortly thereafter.¹⁰⁸ An officer located Bates and asked him to come talk; Bates walked away.¹⁰⁹ Bates then walked over to the officer's motorcycle and sat sideways on it.¹¹⁰ The officer subsequently pushed Bates off the motorcycle.¹¹¹ Next, an altercation ensued between the two individuals.¹¹² Backup arrived on scene and the officers were eventually able to cuff Bates.¹¹³ Bates' parents eventually arrived and informed officers that their son was autistic.¹¹⁴ Officers would not let them approach their son at first.¹¹⁵ Bates' mother retrieved his medication and Bates calmed down.¹¹⁶

¹⁰¹ *Id.* at *9.

¹⁰² *Id.* at *10. In making this determination, the court also looked to "additional persuasive authority not cited by [d]efendants." *Id.* The court notes that other district courts have reached similar conclusions when the officer did not know of the disability. *See, e.g.,* Bridges v. City of Americus, No. 1:09–CV–56 WLS, 2014 WL 1315339, at *11 (M.D. Ga. Mar. 31, 2014); Redding v. Chesnut, No. 5:06–CV–321 (CDL), 2008 WL 4831741, at *8 (M.D. Ga. Nov. 3, 2008).

¹⁰³ *Garner*, 2015 WL 728680, at *10.

¹⁰⁴ *Bates ex rel. Johns v. Chesterfield Cty.*, 216 F.3d 367, 368 (4th Cir. 2000).

¹⁰⁵ *Id.* at 369.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* A witness told the officer, "I don't know if this boy is on drugs or drunk but he is acting weird or crazy and just went running through the woods." *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Bates ex rel. Johns*, 216 F.3d at 369.

¹¹¹ *Id.*

¹¹² *Id.* Bates pushed the officer and ran away. *Id.* The officer caught up with Bates and tried to grab him. *Id.* Bates then spit on the officer who responded by grabbing Bates by the throat and wrestling him to the ground. *Id.*

¹¹³ *Id.* at 369–70.

¹¹⁴ *Id.* at 370.

¹¹⁵ *Id.*

¹¹⁶ *Bates ex rel. Johns*, 216 F.3d at 370.

Bates was charged as a juvenile for assaulting the officer.¹¹⁷ Bates then filed a civil suit for violation of the ADA.¹¹⁸ The ADA claim was not given much consideration by the court.¹¹⁹ In fact, the court did not “undertake an independent ADA inquiry” because their Fourth Amendment scrutiny had already addressed that the officers acted reasonably.¹²⁰ “[T]he arrest of Bates [was] not by reason of Bates’ disability, but because of Bates’ objectively verifiable misconduct.”¹²¹

Such decisions leave the applicability of Title II of the ADA to police encounters in a state of uncertainty. The Supreme Court has declined to resolve this uncertainty.¹²² But, perhaps the fact that both parties in *City and County of San Francisco v. Sheehan* accepted before the Supreme Court that Title II of the ADA applies to arrests demonstrates that opinions are changing regarding police conduct during encounters with those with mental disabilities.¹²³ For example, the ADA has applied in other contexts to those with ASD, such as in the employment context and in the school environment.¹²⁴

In the employment context, for example, an employer need not know the precise diagnosis of an employee to be liable for discrimination on the basis of that disability; the employer’s perception is sufficient.¹²⁵ In *Glaser v. Gap Inc.*, an employee suffered an adverse employment action, but was not diagnosed with ASD until after commencement of the lawsuit.¹²⁶ This fact did not bar the employee’s claim that he was discriminated against because of his disability.¹²⁷ Moreover, in the education environment, the court denied defendants’ motion for summary judgment regarding a Title II claim. A student may have been subjected to intentional discrimination because of his autism, namely that the

¹¹⁷ *Id.*

¹¹⁸ *Id.* Bates also brought claims that officers violated his Fourth Amendment right to be free from unreasonable search and seizure. *Id.*

¹¹⁹ *See id.* at 372–73. Bates argued that officers should have taken his disability into account when interacting with him and that if officers had, he would not have been detained or arrested. *Id.* at 373.

¹²⁰ *Id.* “[W]e have concluded that under all the circumstances the officers’ actions were objectively reasonable.” *Id.*

¹²¹ *Id.* (assaulting the officer).

¹²² *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1772–73 (2015) (stating that the City of San Francisco had changed its argument from what had been argued below and the Court wanted adverse points of view before deciding the issue).

¹²³ *See id.*

¹²⁴ *See, e.g., Brady v. Wal-Mart*, 531 F.3d 127, 134–36 (2d Cir. 2008); *Miller v. Monroe Sch. Dist.*, 159 F. Supp. 3d 1238, 1249–50 (W.D. Wash. 2016).

¹²⁵ *See* 42 U.S.C. § 12102(1)(C) (1990); 29 C.F.R. 1630.2(g)(3),(p) (2013); *see also Brady*, 531 F.3d at 134–35 (noting that if an employer had reason to believe that an employee had a disability, the employer had an obligation to offer a reasonable accommodation even if one was not requested).

¹²⁶ *Glaser v. Gap Inc.*, 994 F. Supp. 2d 569, 576–77 (S.D.N.Y. 2014) (stating that other employees and supervisors had observed that the employee in question was “different”).

¹²⁷ *Id.* at 578.

student was placed in seclusion due to manifestations of the symptoms of ASD.¹²⁸

IV. INSUFFICIENCY OF ADA INTERPRETATION INVOLVING POLICE ENCOUNTERS

The current interpretations of the ADA regarding police encounters are insufficient to accurately address the issue of those with autism. Given the symptoms of autism,¹²⁹ most autistic individuals cannot request a reasonable accommodation, as is normally required by the ADA.¹³⁰ Moreover, individuals with ASD are more likely than others to have encounters with police for two main reasons: police can misperceive the effects of an individual's disability as criminal activity and autistic individuals can effectuate crimes as a result of their disability.¹³¹ However, given the "invisibility" of the disability, officers may be unaware that the person with whom they are dealing is autistic.¹³²

As a result, officers can take symptoms of autism as disrespectful or signs of guilt, such as failing to answer a question or make eye contact.¹³³ This can lead to an escalation of the situation because many individuals with autism respond negatively to loud noises, bright lights, and to being touched, all things that may be involved in a police encounter.¹³⁴ Consequently, individuals on the autism spectrum can respond violently to such actions, resulting in the police responding violently as well.¹³⁵ Subsequent lawsuits claiming violations of Title II of the ADA have generally not been successful¹³⁶ because various courts have found that the plaintiffs had not been discriminated against "because of [their] disability" given that officers were unaware that the suspect was autistic at the

¹²⁸ *Miller*, 159 F. Supp. 3d at 1249–50 (stating that the fact that the student with autism had been disruptive and aggressive did not necessarily signify that he was not discriminated against because of his disability).

¹²⁹ See *supra* notes 24–26 and accompanying text.

¹³⁰ See *supra* notes 25–26 (describing the communication difficulties that those with ASD have, including a large portion of individuals who are nonverbal).

¹³¹ *Brown.*, *supra* note 47 (stating the increased likelihood of police encounters); see *Adle v. Me. State Police Dept.*, 279 F. Supp. 3d 337 (D. Me. 2017) (describing instances where officers mistook manifestations of a disability as criminal acts); *Buchanan v. Maine*, 417 F. Supp. 2d 45, 73 (D. Me. 2006) (detailing a crime committed by a mentally disabled individual).

¹³² See *Pacer Center*, *supra* note 68.

¹³³ *Gammicchia & Johnson*, *supra* note 50.

¹³⁴ NAT'L INST. MENTAL HEALTH, *supra* note 17 (detailing these sensitivities).

¹³⁵ See, e.g., *Bates ex rel. Johns v. Chesterfield Cty.*, 216 F.3d 367, 370 (4th Cir. 2000) (explaining how an individual with ASD responded violently to being touched by an officer, to which the officer also responded with violence).

¹³⁶ See *supra* Part III (describing instances in which individuals with ASD brought claims and they were decided on summary judgment).

time.¹³⁷ This is precisely the problem: dealing with this specific disability at the moment of a police encounter is simply too late. Additionally, there is a split among the circuits as to whether Title II is even applicable to arrests.¹³⁸

Interpreted in this fashion, the ADA's promise of preventing discrimination against disabled individuals in numerous facets of their lives, rings hollow when these individuals come into contact with the police.¹³⁹ If police conduct is excused because of exigent circumstances, or if officers can simply assert that they were unaware that someone had ASD,¹⁴⁰ then some of the protections that Title II is supposed to provide are essentially eliminated.

There is almost a perverse incentive to turn a blind eye and remain unaware of how to detect if someone has autism because then officers have no duty to provide a reasonable accommodation. It leads to a self-fulfilling, cyclical problem. Such a reality would leave those with ASD, and likely numerous other individuals with mental disabilities, in the same place they were before the passage of the ADA regarding police encounters. If the ADA's promise of preventing discrimination against disabled individuals in services provided by local governments through their policing is to mean anything, it must require the police to do *something*.

V. POLICE TRAINING AND IMPLEMENTATION AS A REASONABLE ACCOMMODATION

Given the invisibility of autism, especially to one not aware of its symptoms, and the divergence of the courts on what the ADA requires when police encounter a disabled individual, officers and autistic individuals will likely continue to have highly contentious encounters. This can have serious consequences for both parties.¹⁴¹ In addition, given that individuals with ASD are seven times more likely to have encounters with the police than the public at large,¹⁴² coupled with the prevalence of ASD in the United States,¹⁴³ it is highly likely that most police officers will encounter someone with ASD at

¹³⁷ See, e.g., *Garner v. City of Ozark*, No. 1:13-CV-90-WKW, 2015 WL 728680, at *10 (M.D. Ala. Feb. 19, 2015) (holding that the plaintiff was not discriminated against by reason of his disability).

¹³⁸ The Fourth Circuit has held that Title II is not applicable during arrests. See *Bates ex rel. Johns*, 216 F.3d at 372-73. The Tenth Circuit, on the other hand, has held that arrests are not beyond Title II's protections. See *Gohier v. Enright*, 186 F.3d 1216, 1220-21 (10th Cir. 1999). "There is division within the Circuits over whether Title II of the ADA applies at all to encounters with violent, mentally ill individuals." *Ade v. Me. State Police Dep't*, 279 F. Supp. 3d 337, 363-64 (D. Me. 2017) (stating that the threshold question under either theory is whether exigent circumstances existed).

¹³⁹ Silberman, *supra* note 13 (noting that the problems faced by individuals with ASD during encounters with police are exacerbated for those who are black or Hispanic).

¹⁴⁰ See *Bates ex rel. Johns*, 216 F.3d at 372; *Garner*, 2015 WL 728680, at *10.

¹⁴¹ See *supra* Parts II, III.

¹⁴² Brown, *supra* note 47.

¹⁴³ CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 35.

some point in their career. Thus, and specifically in jurisdictions where the court has held that there is an exigency exception to Title II of the ADA, officers and police departments will not be held to have violated Title II of the ADA. As a result, there likely will not be any incentives for officers to learn the symptoms of ASD and how to best respond during an encounter with an autistic individual.

Therefore, there needs to be mandated training before officers go out in the field in order for Title II to truly serve its purpose and prevent public entities from discriminating against those with disabilities. A failure to require training is incompatible with the purposes of the ADA. In its findings, Congress stated that it recognized “that physical and mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.”¹⁴⁴ Congress continued, stating that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”¹⁴⁵

When looking to these congressional findings concerning the ADA, Congress was clear that those with qualifying disabilities should be free from discrimination in essentially all facets of their lives and that the federal government would provide a remedy if such discrimination did indeed occur. These individuals should have the ability to “fully participate in all aspects of society.”¹⁴⁶ In order to attain full participation, those with ASD, as well as their caretakers, need to feel confident that in the public sphere, they will not be the target of police attention because of some of the symptoms of their disability nor will they not be accommodated if arrested for criminal activity. Similarly, to feel comfortable participating in society on a broader level, those with ASD, their families, and their caretakers need assurances that when someone with ASD leaves their home one morning, that it will not be the last time they do so if they react negatively during a police encounter.

Antiquated ideas of what it means to have a disability need to change, and proper training can help effectuate that change. Congress found that we need to remove antiquated ideas and prejudices about disabilities, and that was one of its purposes behind passing the ADA.¹⁴⁷ One such antiquated idea about disabilities relates directly to ASD, specifically that disabilities are visible to others and if they are not, that they somehow do not exist.¹⁴⁸ Many people have heard of a related example involving handicapped stickers. A person with a

¹⁴⁴ 42 U.S.C. § 12101(a)(2) (1990).

¹⁴⁵ *Id.* § 12101(a)(7).

¹⁴⁶ *Id.* § 12101(a)(2).

¹⁴⁷ *Id.* § 12101(a)(1).

¹⁴⁸ See Pacer Center, *supra* note 68 (describing an instance in which a mother, with her autistic son, began to board a plane early due to the boy’s disability and another passenger commented that they should not be boarding “because there isn’t a thing wrong with that child”).

handicapped sticker parks their vehicle in the designated spot and walks into a store. If that person looks “normal,” they are instantly judged by others who assert they are not disabled and are simply being “lazy.” This is an antiquated idea and a prejudice that must be changed concerning those with disabilities, especially our assumption that, if we cannot readily perceive the disability, that the person is not disabled. Along similar lines, an antiquated idea that came up during several occasions in the case law was that the officer assumed the autistic individual in question was on drugs.¹⁴⁹ An argument could be made that, as a society, we tend to draw the conclusion that someone who acts “odd,” “erratic” or in a way we cannot understand, is on drugs. But as statistics regarding ASD demonstrate, this is a largely antiquated perception.¹⁵⁰ Therefore, there needs to be police training on ASD to truly accommodate these individuals during police encounters.

A. Using Other Federal Claims to Address Police-Produced Harms Will Not Prevent Those Harms from Occurring

Police training as a reasonable accommodation under Title II of the ADA provides an appropriate remedy to the current situation. However, it should be noted that the ADA is not the sole federal statute under which one could bring a claim after an adverse police encounter.¹⁵¹ Depending on the circumstances of the police encounter, someone with ASD could bring a claim under 42 U.S.C. § 1983.¹⁵² In fact, a failure to train claim has been recognized as a basis for liability under § 1983.¹⁵³ On the surface, it appears to be an ideal match for those with ASD seeking to bring claims after negative encounters with police who have not been trained about the symptoms of autism or have not been trained on how to comply with the ADA.

Bringing a § 1983 claim for failure to train, however, is not as clear-cut as its name appears. First, some courts have stated that a failure to train officers on

¹⁴⁹ See, e.g., Silberman, *supra* note 13.

¹⁵⁰ See Brown, *supra* note 47 (“Because individuals with Autism often display many of the behaviors described above, people commonly mistake them for (a) someone under the influence of alcohol or drugs, (b) someone acting ‘suspiciously’, or (c) someone who is being evasive or deceitful.”).

¹⁵¹ See, e.g., *Bates ex rel. Johns v. Chesterfield Cty.*, 216 F.3d 367, 370 (4th Cir. 2000) (bringing multiple claims, including state tort claims in addition to the ADA claim); *Garner v. City of Ozark*, No. 1:13–CV–90–WKW, 2015 WL 728680, at *3 (M.D. Ala. Feb. 19, 2015) (same).

¹⁵² 42 U.S.C. § 1983 provides that “[e]very person who, under color of any statute . . . or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable”

¹⁵³ *City of Canton v. Harris*, 489 U.S. 378, 387 (1989) (“[T]here are limited circumstances in which an allegation of a ‘failure to train’ can be the basis for liability under § 1983.”).

how to comply with the ADA is not a form of intentional discrimination.¹⁵⁴ Second, the elements a plaintiff must prove are stringent.¹⁵⁵ For example, some circuits require that plaintiffs prove three things: “(1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality’s deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury.”¹⁵⁶ While a plaintiff can likely satisfy the first element, establishing the second element of deliberate indifference creates a significant hurdle.¹⁵⁷

To satisfy this element, a plaintiff must generally show prior instances of the conduct demonstrating that the municipality “ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury.”¹⁵⁸ Thus, if this is the first time such an incident against someone with ASD has occurred, the plaintiff is without a remedy under a § 1983 action. Furthermore, even if a history of violations can be shown, liability only arises upon a showing of the defendant’s personal participation in the incident, reducing the ability to hold supervisors accountable.¹⁵⁹ Even if implicated, defendants tend to assert that they are entitled to qualified immunity against a § 1983 claim.¹⁶⁰ Qualified immunity bars liability if the government official’s conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁶¹

Therefore, while a failure to train claim under § 1983 may seem like a possible avenue to confront and resolve the negative encounters of those with ASD and police, such a claim is likely to fail. Moreover, focusing on the ADA is more appropriate because the statute’s entire focus is on individuals with qualifying disabilities, which is truly what is at issue here.

¹⁵⁴ *Everson v. Leis*, 412 F. App’x 771, 780 n.3 (6th Cir. 2011).

¹⁵⁵ *Bd. of Cty. Comm’rs v. Brown*, 520 U.S. 397, 410 (1997) (addressing the “stringent standard of fault”).

¹⁵⁶ *Becker v. Bd. of Trs. Clearcreek Twp.*, No. 3:05cv00360, 2008 WL 4449375, at *11, *34 (S.D. Ohio Sept. 30, 2008) (granting defendants’ motion for summary judgment because the plaintiff did not produce evidence regarding any policy that inadequately trained employees in disregard of a known or obvious risk) (quoting *Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir. 2006)).

¹⁵⁷ *See Brown*, 520 U.S. at 410.

¹⁵⁸ *Miller v. Sanilac Cty.*, 606 F.3d 240, 255 (6th Cir. 2010) (quoting *Fisher v. Harden*, 398 F.3d 837, 849 (6th Cir. 2005)).

¹⁵⁹ *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *Miller v. Monroe Sch. Dist.*, 159 F. Supp. 3d 1238, 1247–48 (W.D. Wash. 2016) (granting defendants’ motion for summary judgment regarding a count in plaintiff’s complaint attempting to hold school board members responsible for the actions taken by employees in the school).

¹⁶⁰ *Miller*, 159 F. Supp. 3d at 1247–48 (asserting that defendants are entitled to qualified immunity).

¹⁶¹ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978) (stating that municipalities are not vicariously liable merely because they employ someone who has committed a constitutional violation).

B. State and Locality Action

Some jurisdictions have chosen to implement police training on autism after violent encounters between police and autistic individuals made headlines.¹⁶² In Miami, Florida, officers responded to a report that there was a suicidal man with a gun.¹⁶³ It turns out that the individual suffered from severe autism and was holding a toy truck; the man had wandered from his care facility and his caretaker was trying to get the man to return to the facility.¹⁶⁴ Police arrived and the caretaker informed officers that the man was autistic.¹⁶⁵ However, officers then shot the caretaker, whose hands were in the air.¹⁶⁶ The incident was caught on video, sparking outrage. In fact, the officer was charged with attempted manslaughter and the autistic man's family brought a civil suit against the City of North Miami.¹⁶⁷ As a result, the Florida legislature took action, unanimously passing a bill mandating that Florida police officers participate in autism training to better understand its symptoms and how to react in encounters with autistic individuals.¹⁶⁸ This marked a significant change in Florida, which did not offer any specific post-basic training on ASD, let alone mandate such training.¹⁶⁹ This training was set to go into effect on October 1, 2017 and the Autism Society of Florida helped to develop the curriculum.¹⁷⁰

On a similar note, although to a different extent, Maryland implemented mandatory police training because a local man died after an encounter with

¹⁶² *E.g.*, Elizabeth Koh, *New Law Requiring Autism Training for Police Officers to Take Effect*, MIAMI HERALD (Sept. 30, 2017), <http://www.miamiherald.com/news/state/florida/article-176348886.html> [<https://perma.cc/V55K-HWLB>].

¹⁶³ Silva, *supra* note 14.

¹⁶⁴ *Id.*

¹⁶⁵ *See id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*; *Autistic Man's Family Sues over Florida Police Shooting*, CBS NEWS (June 6, 2017), <https://www.cbsnews.com/news/arnaldo-soto-autistic-mans-family-sues-florida-police-shooting/> [<https://perma.cc/XNP6-TKSC>].

¹⁶⁸ Jordan Lewis, *Florida Police Take Step in the Right Direction with Autism Training*, MIAMI HURRICANE (Oct. 9, 2017), <http://www.themiamihurricane.com/2017/10/09/florida-police-take-step-in-the-right-direction-with-autism-training/> [<https://perma.cc/UW3P-YP35>]; Colin Wolf, *Florida House Passes Bill Requiring Autism Training for Police Officers*, ORLANDO WKLY. (Mar. 30, 2017), <https://www.orlandoweekly.com/Blogs/archives/2017/03/30/florida-house-passes-bill-requiring-autism-training-for-police-officers> [<https://perma.cc/F5PE-ZFJB>]; *see* FLA. H.R., H.R. STAFF ANALYSIS, Rep. on H.B. 39, Reg. Sess., at 1 (2017) (stating that the training shall include “instruction on the recognition of the symptoms and characteristics of an individual on the autism disorder spectrum and appropriate responses to an individual exhibiting such symptoms and characteristics”).

¹⁶⁹ *See, e.g.*, FLA. H.R. STAFF ANALYSIS, *supra* note 168, at 1.

¹⁷⁰ *Id.* at 4; *Autism First Responder Training*, AUTISM SOC'Y FLA., <http://www.autismfl.com/autism-law-enforcement-trainings/> [<https://perma.cc/CWY8-DKYW>].

police.¹⁷¹ The training requirement, mandated by the Maryland General Assembly,¹⁷² came three years after a man with Down syndrome was involved in an altercation with police after he attempted to watch, for a second time, a movie at the theater without paying.¹⁷³ After public outcry,¹⁷⁴ Maryland recruits will now be required to complete the four-hour training on “intellectual and developmental disabilities.”¹⁷⁵ Unlike the Florida training, the training mandated in Maryland is not focused specifically on ASD.¹⁷⁶ Moreover, it will now be a requirement for recruits, and not additional, supplemental training as in Florida.¹⁷⁷

While not many states have passed legislation to mandate state-wide training, numerous trainings, especially by advocacy groups, have taken place at the local level.¹⁷⁸ For example, Carolyn Gutowski, an attorney in Columbus, Ohio, along with the Delaware County Sheriff’s Officer Chief Deputy Jon Scowden, provide autism trainings to officers throughout central Ohio.¹⁷⁹ Gutowski notes that, while there is no training requirement in Ohio, a number of central Ohio agencies, including Westerville, Perry Township, Genoa

¹⁷¹ Prudente, *supra* note 63 (explaining that the training came about after outrage over Saylor’s death at the hands of police in a movie theater). For more discussion on Saylor and the civil suit brought by his family, see *supra* Part III.

¹⁷² See David Dishneau, *Md. Police to Get Training in Interacting with Disabled*, POLICE ONE (May 22, 2014), <https://www.policeone.com/police-training/articles/7217464-Md-police-to-get-training-in-interacting-with-disabled/> [<https://perma.cc/9MQE-5AE6>].

¹⁷³ Prudente, *supra* note 63; see *Estate of Saylor v. Regal Cinemas, Inc.*, No. WMN-13-3089, 2016 WL 4721254, at *2–4 (D. Md. Sept. 9, 2016); *supra* Part III.

¹⁷⁴ Carrie Wells, *Death of Mentally Disabled Frederick County Man Sparks Outrage*, BALTIMORE SUN (Feb. 21, 2013), <https://www.baltimoresun.com/news/maryland/bs-md-saylor-death-investigation-20130221-story.html> [<https://perma.cc/FL34-9MFF>].

¹⁷⁵ Prudente, *supra* note 63.

¹⁷⁶ Compare Wolf, *supra* note 168 (discussing the passage of a law requiring “autism awareness training”), with Dishneau, *supra* note 172 (referring to a broader program for the “mentally ill”).

¹⁷⁷ Wolf, *supra* note 168; Dishneau, *supra* note 172 (noting that the training will be used during in-service trainings for veteran officers as well).

¹⁷⁸ Geoff Dempsey, *Coventry Police Get Autism Awareness Training*, PATCH (Jan. 16, 2019), <https://patch.com/rhode-island/coventry/coventry-police-get-autism-awareness-training> [<https://perma.cc/4RSR-R7HP>] (describing how a retired Lieutenant began autism trainings for the Coventry police in Rhode Island); Adrian Rabin, *Police Trained on How to Respond to People with Autism*, CNN (Apr. 4, 2016), <https://www.cnn.com/2016/04/01/health/autism-police-training/index.html> [<https://perma.cc/N5V2-X6EE>] (detailing how the Lynchburg Police Department became the first in Virginia to train all of its officers on ASD); *Autism Training for Police Officers: The Basics of Response*, POLICE ONE (Apr. 2, 2018), <https://www.policeone.com/patrol-issues/articles/473026006-Autism-training-for-police-officers-The-basics-of-response/> [<https://perma.cc/54DP-FPZY>] (explaining how the Allegheny County Chiefs of Police Association developed a video guide on how to interact with individuals with autism).

¹⁷⁹ Interview with Carolyn E. Gutowski, Attorney, in Columbus, Ohio (Mar. 2, 2018) [hereinafter Gutowski Interview]. Both individuals who lead the trainings have children with ASD. *Id.*

Township, and Shawnee Hills have almost all their officers complete this training.¹⁸⁰

While steps have been taken to assure that police officers are aware of ASD and its symptoms, until there is a federal standard, these efforts will likely be insufficient to ensure that those with ASD are provided reasonable accommodations throughout the country.¹⁸¹ Taking into account that the Supreme Court declined to clarify the ADA's requirements with regards to police encounters with disabled individuals,¹⁸² the circuits will likely continue to have differing interpretations of what the ADA requires in this context. Therefore, legislative action is likely the best way to ensure police training on autism and that autistic people are provided a reasonable accommodation when they come into contact with the police. Such legislation should conform with the purpose of the ADA, will likely result in fewer injuries to autistic persons and officers as well as less tense situations, and upon implementation, likely result in fewer lawsuits. Therefore, this is the correct level at which to take action when it is taken into account that most individuals with ASD cannot request a reasonable accommodation for themselves.

C. Implementation and Content of Police Training

In order for the ADA to truly have meaning, Title II requires police training regarding ASD as a reasonable accommodation.¹⁸³ The question then becomes how such training will be implemented, what exactly its contents will be, and what impact it will have, both on officers and on individuals with ASD.

This training would need to consist of three key components: (1) the symptoms of ASD, (2) how to recognize them during an encounter, and (3) tactics to prevent an encounter from escalating to ensure that the encounter is productive. When Gutowski begins a training, before addressing the training's core components, she uses the first few minutes to establish credibility with the officers; she provides an overview of both instructors' backgrounds.¹⁸⁴ Both instructors have children with ASD, but are also familiar with police work and its many challenges.¹⁸⁵ Thus, by providing this background information, officers may be more receptive to the training as well as the trainers.¹⁸⁶ Next,

¹⁸⁰ *Id.*

¹⁸¹ *Id.* (noting that nationwide training will be necessary to solve the problem).

¹⁸² *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1773 (2015).

¹⁸³ In fact, the regulations accompanying the ADA demonstrate that Congress envisioned officers providing those with qualifying individuals reasonable accommodations during their encounters with police. *See* 28 C.F.R. § 35.139(a) (2015) (exempting Title II coverage during an arrest only when someone “poses a direct threat to the . . . safety of others”); *see also* 28 C.F.R. § 35.104 (2018) (noting that the direct threat must be a “significant risk . . . that cannot be eliminated” by modifying the government activity).

¹⁸⁴ Gutowski Interview, *supra* note 179.

¹⁸⁵ *Id.*

¹⁸⁶ *See id.* This aspect could be key in implementing training on the national level— involving people that are familiar not only with ASD but with police work as well to provide

and still before getting to the training's core component, the training should address the question of *why* autism training.¹⁸⁷ The reasons to be shared with officers are ASD's prevalence¹⁸⁸ and the increased likelihood that these individuals will have encounters with police¹⁸⁹ because of "unusual" behavior. Moreover, Gutowski notes an interesting fact: "due to the huge increase in ASD diagnoses over the 1990s and early 2000s, we have an unprecedented number of young adults with ASD entering our society . . . there are few comprehensive programs to support adults with autism."¹⁹⁰ Thus, instrumental to the training is its framing, so that officers are aware of the role of ASD in our society and why it is important to be aware of its existence.

Regarding the first substantive component of the training, it is essential that officers be aware of certain symptoms of ASD.¹⁹¹ One background fact of ASD that officers should keep in mind is that ASD is a neurodevelopmental disorder, not a learned behavior.¹⁹² One of the symptoms imperative to understanding how ASD can affect police encounters is for officers to know that those with ASD have communication difficulties,¹⁹³ and that a large portion of individuals with ASD are nonverbal.¹⁹⁴ Moreover, the training needs to explain that those with ASD tend not to make eye contact and can have delayed responses to questions, even when providing their own name.¹⁹⁵ Another key fact for officers

the trainings. Ideally this combination would encourage officers to be more receptive to the training.

¹⁸⁷*Id.* Gutowski and Snowden address why there is a specific training dealing solely with ASD, as opposed to developmental disabilities more generally, or mental illnesses, such as schizophrenia. *Id.*

¹⁸⁸It is estimated that one in fifty-nine children has ASD. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 35.

¹⁸⁹It is estimated that those with ASD are seven times more likely to have encounters with police than the public at large. Brown, *supra* note 47.

¹⁹⁰Gutowski Interview, *supra* note 179.

¹⁹¹*See, e.g.,* FLA. H.R. STAFF ANALYSIS, *supra* note 168, at 1 (stating that one component of the Florida training on ASD shall be "recognition of the symptoms and characteristics" of ASD).

¹⁹²*See* AUTISM SOCIETY ME., *supra* note 20. The purpose of emphasizing this aspect of ASD is so that officers realize the brain of someone with ASD functions differently. Gutowski Interview, *supra* note 179. In this way, officers will appreciate that the behavior of someone with ASD is not learned and is not simply "bad behavior." *Id.* Gutowski uses MRI images to further this point, so that officers have a visual representation of the difference, explaining that because of these differences, officers should not expect those with ASD to act as a neurotypical person would. *Id.* She provides an analogy in her trainings to try and solidify this idea: one would not get upset if a golf cart performed differently than a Ferrari because they are built differently. *See id.* The same concept is applicable here. *Id.*

¹⁹³*See supra* notes 24–26 and accompanying text.

¹⁹⁴Rudy, *supra* note 26 (estimating that around 30% of individuals with ASD are nonverbal).

¹⁹⁵Brown et al., *supra* note 33. This information is key so that officers do not assume that these actions are signs of guilt.

to be cognizant of is that people with ASD react negatively, and even violently, to being touched and also do not handle loud noises and lights well.¹⁹⁶

It is additionally important to note how some symptoms may manifest themselves. Individuals with ASD are known for wandering off.¹⁹⁷ Furthermore, said individuals are likely to do repetitive movements or actions, stimming, which helps them to cope with sensory overloads.¹⁹⁸ Individuals may also repeat words or sounds that do not make sense to someone unfamiliar with the person. Therefore, the first step of an officer is to recognize.¹⁹⁹

Once officers are able to recognize these behaviors, they then need to know how to best respond to someone with ASD: the second and third components of the training. First, regarding communication difficulties, it is key for the officer to slow down the interaction in every way.²⁰⁰ Officers should slow down their rate of speech and speak in short, literal sentences.²⁰¹ Next, officers can employ what Gutowski and Snowden designate as “State then Wait” in their training.²⁰² They instruct officers to wait up to fifteen seconds for a response and to repeat themselves if necessary.²⁰³ Slowing down and simplifying the communicative part of the interaction is key for those with ASD to process what is occurring.²⁰⁴ In addition to slowing down their own speech, officers should be aware that they may receive unusual answers to their questions.²⁰⁵ Thus, officers should be encouraged to ask open-ended questions to ensure they do not mistake certain responses for substantive information or admissions of guilt.

¹⁹⁶ AUTISM HELP, *supra* note 33.

¹⁹⁷ Arky, *supra* note 43. It is important for officers to be aware of this fact in part because they may receive calls of a missing person with ASD. *See id.* Many people with ASD are drawn to bodies of water and more likely to drown due to their inability to process danger adequately. Gutowski Interview, *supra* note 179.

¹⁹⁸ AMBITIOUS ABOUT AUTISM, *supra* note 28. Learning about this symptom should help officers stop assuming that such movements are indicative of someone on drugs.

¹⁹⁹ *See* Gutowski Interview, *supra* note 179. However, the goal of the training is not to develop officers who can diagnose people with ASD in an instant, but for officers to consider ASD as an alternative to what they may originally have perceived as criminal conduct. *Id.*

²⁰⁰ *Id.*

²⁰¹ Officers should speak in literal sentences because those with ASD tend to interpret things literally. Stuart-Hamilton, *supra* note 49. As a result, if an officer were to say, “take a seat over there,” an individual with ASD may pick up the chair and walk away with it. Gutowski Interview, *supra* note 179.

²⁰² Gutowski Interview, *supra* note 179.

²⁰³ *Id.*

²⁰⁴ *See supra* Part II.

²⁰⁵ Gutowski Interview, *supra* note 179. Gutowski introduces officers to the concepts of scripting and echolalia. Scripting refers to the process in which someone with ASD will repeat lines of dialogue or information that he/she heard on TV or read in a book. *Id.* Echolalia refers to the act of repeating either what the other person just said or a phrase heard at another time. *Id.* Gutowski provides an example in which an officer asks someone with ASD if she stole the bike; to which that person may respond, “steal the bike.” *Id.* The individual is merely repeating the question, but it may sound like an admission to having committed the act.

Second, regarding emotional responses of those with ASD, an officer should not assume that not responding to questioning or failing to maintain eye contact is a sign of guilt or noncompliance.²⁰⁶ This step will help the officer reframe the situation and hopefully allow the officer to not interpret an individual's delayed response negatively. Moreover, during the interaction, officers are strongly recommended to maintain a hands-off approach to the extent possible.²⁰⁷ Given that those with ASD tend to respond negatively to being touched, an officer refraining from touching the individual will likely aid in the encounter remaining calm.²⁰⁸ On a similar note, officers should be trained to refrain from using bright lights if possible, given that those with ASD often have light sensitivities.²⁰⁹ Officers can also prevent the escalation of these encounters by not raising their voices and even something as simple as using only one officer to go up and knock on the door of a home when responding to a call, essentially lessening the sensory overload. However, because an encounter with police can be a sensory overload for someone with ASD, the individual may still react negatively or have a meltdown.²¹⁰

This, however, is not to say that police training will result in every encounter with an autistic person ending positively. It also does not mean that every act of violence against an autistic person by police constitutes a violation of Title II of the ADA. The realities are that the police sometimes need to make split-second decisions while performing their duties. But mandated training provides the best solution to address this ever-growing problem. Society generally views training as the best way to prepare officers to make these quick decisions on the job. In the past, topics have been added to police training programs as certain problems and issues grew in society. For example, as drug addiction grew, some departments began to train officers on drug identification.²¹¹ Similarly, as society became more concerned with sexual assault, officers were required to complete training on sexual assault.²¹² Arguably the same logic applies here, but training is additionally mandated by a broad statute designed to protect disabled individuals: the ADA.

Some may be hesitant regarding the feasibility of a large-scale training program, especially when taking into account the limited funds of public

²⁰⁶ See *supra* notes 24–26 and accompanying text. Some individuals with ASD have a heightened fear response which commonly manifests itself in a lack of eye contact. Gutowski Interview, *supra* note 179.

²⁰⁷ Gutowski Interview, *supra* note 179.

²⁰⁸ Osborn, *supra* note 55, at 344 (noting that the more force an officer applies to gain control, the more out of control the situation likely becomes when it involves someone with ASD). It is recommended that officers leave some space between themselves and someone with ASD. *Id.*

²⁰⁹ See NAT'L INST. MENTAL HEALTH, *supra* note 17.

²¹⁰ See Gutowski Interview, *supra* note 179.

²¹¹ Silberman, *supra* note 13 (noting that an officer was trained on drug recognition).

²¹² See *Estate of Saylor v. Regal Cinemas, Inc.*, No. WMN-13-3089, 2016 WL 4721254, at *4 (D. Md. Sept. 9, 2016) (stating that officers were required to complete sexual assault training).

entities. However, evidence from the analyses conducted in Florida regarding the implementation of their state-wide training on ASD help demonstrate that ASD training is not fiscally impractical. Judiciary committees within Florida's legislature found that HB 39, which mandates ASD training, would have a fiscal impact of \$10,548.²¹³ In addition, the judiciary committee stated that this amount could be "absorbed within the existing resources of the [Florida Department of Law Enforcement]."²¹⁴ Thus, training all Florida officers on ASD would not necessitate that more funds be appropriated to the Florida Department of Law Enforcement. In addition, an argument exists that mandating this training could actually save cities and municipalities money because the training would ideally lead to fewer lawsuits, thus saving entities the money previously spent on defending against these claims.²¹⁵

VI. CONCLUSION

This Note posited that Title II of the ADA mandates police training on ASD as a reasonable accommodation for individuals with ASD during their encounters with police. ASD has become increasingly prevalent in the United States. In addition to its increasing prevalence, individuals with ASD are more likely to come into contact with police than the public at large. This increased likelihood of a police encounter is caused in part by officers misinterpreting symptoms of ASD as criminal activity and because those with ASD effectuate crimes due to their disability.

ASD is considered an invisible disability, meaning it is not readily visible to someone unaware of its symptoms. While ASD is a spectrum, there are broad characteristics that those with ASD possess, many of which can affect encounters with police. These symptoms include communication problems: having difficulties with the back-and-forth of conversations, not responding when spoken to, and not making eye contact. In addition, those with ASD are sensitive to light, sound, and touch and may have meltdowns or respond violently when experiencing a sensory overload. To cope with sensory overloads, individuals with ASD tend to engage in stimming or distance themselves from an overwhelming situation. These symptoms can result in the escalation of a police encounter, especially when coupled with current police tactics.

When encounters do escalate, the circuits have split on when Title II of the ADA applies and when it is violated. Title II applies to all public entities, including police departments. Title II prohibits public entities from discriminating against individuals on account of their disability and requires that those with disabilities be provided reasonable accommodations. However, some circuits have stated that Title II does not apply to arrests during police

²¹³ H.R. STAFF ANALYSIS, *supra* note 168, at 1.

²¹⁴ *Id.*

²¹⁵ *See* Osborn, *supra* note 55, at 377.

encounters because of an exigent circumstances exception. Other circuits, however, have found that Title II is applicable to on-the-street encounters and that the arrest is merely one factor in determining if an officer's conduct is reasonable. Nevertheless, numerous courts have declined to recognize violations of Title II when the officer did not know that the individual had ASD or when the individual did not request an accommodation. The Supreme Court has not resolved this split.

Current interpretations are insufficient to adequately protect those with ASD during a police encounter because, so long as officers assert that they are unaware of the disability, they are found to not have violated the ADA. This could create a perverse incentive and run afoul to the purpose of the ADA: protecting disabled individuals in *all* facets of their lives and doing away with antiquated ideas regarding disabilities.

Thus, the reasonable accommodation for those with ASD needs to occur beforehand because individuals with ASD cannot normally request an accommodation. This reasonable accommodation is mandated training on ASD—given the symptoms and previous case law, this is the appropriate stage in which to take action. If not, this problem could become even more pervasive with time. States such as Florida have already taken steps in this direction, mandating training on ASD after a highly publicized encounter sparked outrage. The training needs to have a few main components: training officers on the symptoms of ASD and training officers on how to respond and alter their tactics. Such training will likely absolve some of the escalations and misunderstandings that occur during these interactions. While training does not guarantee results, it is likely the best, and more economical path, to ensure that the promises of Title II of the ADA do not ring hollow when those with ASD come into contact with police.

