

Winter 2008

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

Elizabeth Harvey Osborn

Follow this and additional works at: <https://scholar.law.colorado.edu/lawreview>



Part of the [Disability Law Commons](#)

Recommended Citation

Elizabeth H. Osborn, *What Happened to "Paul's Law"?: Insights on Advocating for Better Training and Better Outcomes in Encounters Between Law Enforcement and Persons with Autism Spectrum Disorders*, 79 U. COLO. L. REV. 333 (2008).

Available at: <https://scholar.law.colorado.edu/lawreview/vol79/iss1/8>

This Comment is brought to you for free and open access by the Law School Journals at Colorado Law Scholarly Commons. It has been accepted for inclusion in University of Colorado Law Review by an authorized editor of Colorado Law Scholarly Commons. For more information, please contact lauren.seney@colorado.edu.

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

ELIZABETH HERVEY OSBORN*

“Paul Childs—a 15-year-old boy with cognitive disabilities, a seizure disorder, and a knife in his hand—was killed by Denver police in the doorway of his home earlier this month after the family called 911 for help. His mother said she hopes better training will lead to better outcomes.”¹

INTRODUCTION

Following Paul Childs’s death, family and community members promoted “Paul’s Law,” a bill that would have required all Colorado law enforcement officers to be trained in techniques for appropriate response to mentally ill or disabled suspects. Although the bill was not presented to the General Assembly, the events that triggered the proposal spotlight the need for better law enforcement training regarding developmental disabilities. The history and disposition of “Paul’s Law” provide instructive insights to those advocating for mandatory

* Elizabeth Hervey Osborn is a candidate for Juris Doctorate from the University of Colorado Law School, Class of 2008, and received a BS-Sociology from Brigham Young University in 1987. I thank the Autism Legislative Project, Emily Calhoun, Alan Canner, Kielly Dunn, Mark Evans, Daniel Everson, Sarah Holloway, Matthew Lasek, Karla Scornavacco, Lee Ann Setzer, the staff of the Wise Law Library, and the Editors and Members of the University of Colorado Law Review for their insight, feedback, and support. Nevertheless, any errors in this article are my own. I express my heartfelt gratitude to Stephen, Nathaniel, Benjamin, Timothy, and Laura Osborn for their love, patience, and encouragement. This article is dedicated to the memory of my nephew, Ford Thomas Hervey.

1. Kevin Simpson & John Ingold, *Training Sought to Mitigate Cop/Disabled Standoffs*, DENV. POST, July 29, 2003, at A1.

law enforcement training regarding autism spectrum disorder (“ASD”), a developmental disability involving communication and social-processing difficulties.

Echoing Helen Childs’s plea, this Comment explores Colorado’s experience with Paul’s Law, arguing that “better training” is required to ensure “better outcomes” in encounters between police and people with ASD and identifying means for achieving this goal.² Part I provides background for understanding why such training is needed, first describing the characteristics of ASD that require special law enforcement response and then looking at the rights of persons with ASD under the Federal Americans with Disabilities Act. Part II focuses on the problem of “exigent circumstances,” where inadequately trained law enforcement personnel respond in ways that needlessly make a bad situation worse. Finally, Part III considers both legislative and community-based approaches for achieving “better training” and “better outcomes.”

I. BACKGROUND

Communication and social interaction disabilities, such as ASD, present a particular challenge in the context of police encounters, where misunderstood, socially atypical behavior may result in a dangerous situation for both the officer and the individual. Such needless danger can be avoided, however, if law enforcement officers are trained to recognize and appropriately respond to signs of disability. This Part presents background information for understanding this need for better training. First, a recounting of the events leading up to the death of Paul Childs illustrates the problem, followed by an outline of the relevant characteristics of autism and related disabilities. Discussion then turns to an overview of current interpretation of the Americans with Disabilities Act as applied to encounters between disabled persons and law enforcement.

2. Helen Childs, Paul’s mother, hoped the effect of “Paul’s Law” would be widespread: “I want this to be like the Amber Alert I want this to be national.” Hector Gutierrez, *Teen’s Death Spurs “Paul’s Law” Plan*, ROCKY MTN. NEWS, Aug. 13, 2003, at 20A. This Comment uses the experience of Colorado as a paradigm for examining issues and concerns likely to be encountered by advocates of police training statutes in many states.

A. *Encounter at the Doorway*

Fifteen-year-old Paul Childs was a familiar face in his northeast Denver neighborhood. He was a "gentle soul,"³ a "nice boy" who had a habit of wandering off on his own.⁴ Paul admired and respected the police officers who brought him home after his frequent adventures.⁵

In the early summer of 2003, Paul was hospitalized following a seizure.⁶ Upon returning home, he seemed to have lost the ability to speak.⁷ Upset, the teen "trashed" his bedroom.⁸ The next afternoon, on July 5, Paul wanted to go outside, but his concerned mother would not allow him to leave the house.⁹ In his frustration, Paul picked up a kitchen knife and began walking around the house with it.¹⁰ When he did not respond to his mother's instruction to put down the knife, Paul's sixteen-year-old sister Ashley called 911, thinking that perhaps his friends, the police officers, could help calm him.¹¹ When Ashley tried to explain her brother's condition to the dispatcher, the dispatcher interrupted, "OK, that's fine. I don't need the story."¹²

3. Jim Spencer, *Teen's Death Shows Police Were Not Prepared*, DENV. POST, July 8, 2003, at B1 [hereinafter Spencer, *Not Prepared*].

4. Racquel Rutledge, *Outrage in Denver After Police Shoot a Disabled Teen*, CHRISTIAN SCI. MONITOR (Boston), July 14, 2003, at 1, available at <http://www.csmonitor.com/2003/0714/p01s02-ussc.html>.

5. *Id.* The police had been called to the home forty-seven times in the previous four years. *Id.*

6. Spencer, *Not Prepared*, *supra* note 3.

7. *Id.*

8. *Id.*

9. Sean Kelly, *911 Tape Released in Shooting—Police Chief Vows Full Probe into Disabled Teen's Death*, DENV. POST, July 8, 2003, at A1 [hereinafter Kelly, *911 Tape*].

10. *Id.* "[F]amily members said the knife was 'the dullest in the house' and 'couldn't cut a tomato.'" *Id.* Ashley Childs described the knife to the 911 dispatcher as "[s]ix inches. It's like a long knife, like a cutting knife, like a kitchen knife." *Transcript: Excerpts from the 911 Emergency Phone Call*, DENV. POST, July 8, 2003, at A5 [hereinafter *Transcript*]. According to another report the knife was "broken, with no tip, with no edge." Rutledge, *supra* note 4, at 3. However, other reports claim it was a "13-inch kitchen knife," Wayne Harrison, *Settlement Reached Between Denver, Paul Childs' Family*, THE DENVER CHANNEL, May 25, 2006, <http://www.thedenverchannel.com/print/3344649/detail.html>, or an "8 ½-inch blade," Sean Kelly, *Cop Cleared in Shooting*, DENV. POST, Oct. 17, 2003, at A1 [hereinafter Kelly, *Cop Cleared*].

11. Spencer, *Not Prepared*, *supra* note 3.

12. Kelly, *911 Tape*, *supra* note 9.

Within minutes, Denver police arrived, including Officer James Turney, who had returned Paul home following an incident just six weeks before.¹³ At least two officers present were equipped with Tasers, devices promoted as a “less lethal” alternative for subduing resistant individuals.¹⁴ Officer Turney ran to the front door and ordered, “Everyone! Get out of the house! Go out the back door!”¹⁵ Another officer rushed up behind him.¹⁶

Paul’s mother unlocked the front security door, and then she swept her daughter, a visiting friend, and three children out the back of the home.¹⁷ Officer Turney opened the security door and ordered Paul, who was standing behind the inner front door, to “come out with his hands in the air.”¹⁸ Someone shouted for a Taser.¹⁹ Paul stepped out in a “wide arc” from behind the door in “short choppy steps,” holding the knife close to his chest.²⁰ At first sight, Officer Turney recalled that he had seen this youngster before, but his attention quickly shifted to the knife in the boy’s hands.²¹ He focused only on “arresting the suspect and stopping the threat.”²²

13. Sean Kelly, *Cop Recounts Slaying of Teen*, DENV. POST, Oct. 22, 2004, at B1 [hereinafter Kelly, *Cop Recounts Slaying*]. At that time, Paul’s mother, Helen Childs, had explained to Officer Turney that her son had “mental problems.” Jim Spencer, *Turney Left Time, Space Only to Kill*, DENV. POST, Oct. 22, 2004, at B1 [hereinafter Spencer, *Turney Left Time*].

14. Kelly, *911 Tape*, *supra* note 9. Kelly also notes that “[o]ne police official said officers had no clear shot at Paul with the Taser.” *Id.* See also *Suspension Overturned in Paul Childs Shooting*, THE DENVER CHANNEL, Jan. 13, 2005, <http://www.thedenverchannel.com/print/4081046/detail.html> (“Several officers had their Taser guns drawn during the confrontation with Childs, but they never fired the weapons.”). For a general description of the safety policy of the Denver Police Department, see Letter from Gerald R. Whitman, Denver Chief of Police, to Shanetta Brown Cutlar, Special Litigation Section, U.S. Department of Justice (July 15, 2004) (on file with author). For an interesting current discussion of Taser use on communication-disabled individuals, see JOINT STUDY COMMITTEE ON AUTISM SPECTRUM DISORDER, LAW ENFORCEMENT, PUBLIC SAFETY, AND FIRST RESPONDERS, REPORT TO THE 2007 GENERAL ASSEMBLY OF NORTH CAROLINA, Dec. 31, 2006, <http://www.ncleg.net/homePage.pl> (follow hyperlinks for “Legislative Publications,” then “Study Reports to the 2007 NCGA,” then “Autism Report”) [hereinafter JOINT STUDY COMMITTEE].

15. *Transcript*, *supra* note 10.

16. Kelly, *Cop Recounts Slaying*, *supra* note 13.

17. *Id.*

18. *Id.*

19. Spencer, *Turney Left Time*, *supra* note 13.

20. Kelly, *Cop Recounts Slaying*, *supra* note 13.

21. *Id.*

22. *Id.*

As the boy shuffled slowly toward the open door, the officers repeatedly yelled at him to drop the knife, but he did not.²³ With Paul only three or four feet away, Officer Turney was concerned that Paul could reach out and stab him, but he "waited until the last possible moment."²⁴ At that point, Officer Turney fired four shots at "center mass."²⁵ Within thirty-two seconds of police arrival at the home, Paul Childs was dead.²⁶

B. The Challenge of Autism Spectrum Disorder

Although the record is not clear about the specific nature of Paul Childs's developmental disability, his tragic death offers a frightening example of the worst that can happen in an encounter between an inadequately prepared law enforcement officer and a person with a social interaction and communication disability, such as ASD. Families and friends of persons diagnosed with ASD are becoming increasingly concerned about the risk of such "dangerous encounters."²⁷ This concern has led some to advocate for a change in how police and other public safety personnel are trained.²⁸ The following sections give an overview of how ASD affects communication and social processing and why this disability poses particular peril in encounters with police.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. See generally BILL DAVIS & WENDY GOLDBAND SCHUNICK, DANGEROUS ENCOUNTERS—AVOIDING PERILOUS SITUATIONS WITH AUTISM (2002). For a specific example of this growing concern, see Testimony of John Thomas, Deputy Director of the Arc of Massachusetts, to the Massachusetts Joint Committee on Public Safety and Homeland Security, Apr. 25, 2007, <http://www.arcmass.org> (follow hyperlinks for "State House/Policy," then "Testimony," then "Public Safety 2007, S1378") (summarizing the need for law enforcement training).

28. See generally DENNIS DEBBAUDT, AUTISM, ADVOCATES, AND LAW ENFORCEMENT PROFESSIONALS—RECOGNIZING AND REDUCING RISK SITUATIONS FOR PEOPLE WITH AUTISM SPECTRUM DISORDERS (2002).

1. “Mindblindness”—Communication and Social Processing Disability

“Autism spectrum disorder” is a term describing a group²⁹ of neurological developmental disabilities which impair the individual’s ability “to communicate and to interact in a socially appropriate manner.”³⁰ There is no cure for ASD at this time.³¹ It is a cognitive impairment, not a mental illness.³² In ASD, the brain’s processing functions for sensory input operate in a way that is different from the average person’s, leading one researcher to describe the condition as “mindblindness.”³³ Much as an ear disorder might affect the brain’s ability to hear or to maintain body balance, or an optic nerve disorder might

29. Autism Spectrum Disorders are within the category of Pervasive Developmental Disorders, and describe persons having characteristic problems with “communication skills, social interactions, and restricted, repetitive, and stereotyped patterns of behavior.” MARGARET STROCK, NAT’L INST. OF MENTAL HEALTH, AUTISM SPECTRUM DISORDERS (PERVASIVE DEVELOPMENTAL DISORDERS) 1 (2004). Diagnoses within the Autism Spectrum include Autism, Rett’s Disorder, Childhood Disintegrative Disorder, Asperger’s Disorder, and pervasive developmental disorders not otherwise specified (PDD-NOS). *Id.* at 2.

30. The Autism Society of Maine, Programs—Autism and Law Enforcement—Facts for Prosecutors, http://asmonline.org/programs_law_prosecutors.asp (last visited Sept. 20, 2007); see also NAT’L AUTISTIC SOC’Y, AUTISM: A GUIDE FOR CRIMINAL JUSTICE PROFESSIONALS 2 (London 2005), available at http://www.nas.org.uk/content/1/c4/80/67/cjp_guide.pdf.

31. Autism Society of Maine, *supra* note 30. There is no “cure” in the sense that no treatment exists to eliminate the communication, processing, and social difficulties associated with ASD; although intervention (especially early) can improve social skills and quality of life, and reduce the costs associated with lifetime care, it does not “change” or “repair” the processing deficits resulting from autism. See Autism Society of America, *What is Autism: Treatment*, http://www.autism-society.org/site/PageServer?pagename=about_treatment_home (last visited Sept. 20, 2007). Some advocacy groups consider the word “cure” problematic. See, e.g., Autism Speaks: The Autism “Cure,” http://www.autismspeaks.org/whatisit/cure_intro.php (last visited Oct. 4, 2007) (copy on file with author).

32. Autism Society of Maine, *supra* note 30. This is a subtle distinction, and the definition of mental illness is itself difficult because practitioners within the field disagree on what conditions are included within the term, especially as neuroscience advances our understanding of the fundamental organization of the brain. The distinction is, however, important enough that for purposes of insurance coverage, for example, many states statutorily define autism and related disorders as distinct from mental illness. See, e.g., COLO. REV. STAT. § 10-16-104.5 (2006) (in context of defining autism as “other than mental illness” for purposes of insurance coverage).

33. See generally SIMON BARON-COHEN, MINDBLINDNESS: AN ESSAY ON AUTISM AND THEORY OF MIND (1997). “Mindblindness” refers to an inability of the brain to convert sensory information into an accurate understanding of one’s surroundings, particularly manifested in an inability to assess what other people are thinking and feeling.

affect the brain's ability to interpret visual stimuli, ASD affects the brain's ability to understand and process many kinds of sensory information vital to understanding language and social interaction, including sight, sound, and touch.³⁴ In fact, the "mindblindness" of ASD is more common in children than hearing loss or vision impairment.³⁵

Like individual rays of sunlight bent by falling rain to form a rainbow's spectrum, autism spectrum disorders impact to a different degree each affected individual's ability to process and express sensory and social information.³⁶ The intensity with which characteristics of the disorder appear varies from person to person. An affected person may present some degree of atypical response to stimuli such as cold or pain because of the brain's inability to process the information the senses receive.³⁷ Some individuals may react strongly to sudden loud noises, or a light touch or tap may provoke a violent reaction.³⁸ Many are not able to maintain eye contact in conversation, as they find this painful and intimidating.³⁹ Some ASD individuals engage in repetitive behaviors ("stimming"), such as rocking, finger flicking, reciting a familiar series of words, or returning to a familiar or interesting place or thing, as a way to calm and cope with the torrent of unprocessed sensory information.⁴⁰

34. Autism Society of Maine, *supra* note 30.

35. STROCK, *supra* note 29, at 2007 Addendum (noting that hearing loss affects 1.1 per 1,000 children; vision impairment affects 0.9 per 1,000 children; but ASD affects an estimated 3.4 to 6 per 1,000 children). For a discussion of the prevalence of ASD within the U.S. population, including distribution by race and gender, see Marshalyne Yeargin-Allsopp et al., *Prevalence of Autism in a US Metropolitan Area*, J. AM. MED. ASS'N, Jan. 1, 2003, at 49, 49. The estimated prevalence of ASD in eight-year-old children in Colorado is 5.9 per 1000 children, or 1 in 166 (the gender distribution is 1 in 100 boys, and 1 in 588 girls). MELODY STEVENS ET AL., PREVALENCE OF THE AUTISM SPECTRUM DISORDERS (ASDs) IN MULTIPLE AREAS OF THE UNITED STATES, 2000 AND 2002, COMMUNITY REPORT FROM THE AUTISM & DEVELOPMENTAL DISABILITIES MONITORING (ADDM) NETWORK 20 (Centers for Disease Control and Prevention 2000) at 20.

36. See STROCK, *supra* note 29, at 1.

37. *Id.* at 10 ("Some ASD children are oblivious to extreme cold or pain. An ASD child may fall and break an arm, yet never cry. Another may bash his head against a wall and not wince, but a light touch may make the child scream with alarm.")

38. *Id.*; see also Matt Brown, *Recognizing/Responding to Autism—A Guide for First Responders*, slide 14 (July 12, 2006) (PowerPoint training presentation for law enforcement and safety personnel) (on file with the author).

39. Autism Society of Maine, *supra* note 30.

40. *Id.*

As many as 50% of persons with ASD are unable to communicate verbally and may use a picture- or sign-based method of communication, while others may have extensive vocabularies and knowledge, yet function at a much lower social and developmental level than peers of the same age.⁴¹ Though most persons with ASD perform poorly on standard tests of intellectual function, many demonstrate normal or above-normal intelligence.⁴² However, a person with ASD will take longer to process and understand instructions or to grasp a social situation than a non-affected person would.⁴³ An individual with ASD has “difficulty seeing things from another person’s perspective,” and therefore is “unable to predict or understand other people’s actions.”⁴⁴ An individual may take instructions very literally, or repeat back the words of a question.⁴⁵ The “mindblindness” of ASD leaves the individual unaware of many of the social rules that most people take for granted, such as not staring at windows, not touching other people’s things, knowing when not to laugh, or respecting personal space.⁴⁶

41. *Id.* The persons with ASD whom police are most likely to encounter are those:

from the more able end of the spectrum with high-functioning autism, or Asperger syndrome, [sic] as they generally have a greater degree of independence than those who have autism accompanied by severe learning difficulties. . . . However, the command of spoken language in a person with high-functioning autism or Asperger syndrome is not necessarily indicative of their level of understanding or social awareness. Their apparent independence may mask their social disability

Id. at 2.

42. Yeargin-Allsopp et al., *supra* note 35, at 52. In a study of Atlanta children diagnosed with ASD, 32% had an IQ score within normal range or higher. *Id.*

43. Autism Society of Maine, *supra* note 30.

44. STROCK, *supra* note 29, at 7.

45. Autism Society of Maine, *supra* note 30; see also DEBBAUDT, *supra* note 28, at 35 (“Their use of language is usually concrete and literal. They may understand a request to waive their right to remain silent as a question about whether or not they can wave their right hand or arm, th[e]n answer yes and waive their rights.”).

46. Autism Society of Maine, *supra* note 30; see also DEBBAUDT, *supra* note 28, at 17–20. The National Autistic Society (UK) gives an example: “A five-year-old girl, obsessed with the leather tags on a pair of jeans, would approach people wearing jeans and flick the tags with her finger. The obsession continued into her teens: it led her into more than one very vulnerable situation.” NAT’L AUTISTIC SOC’Y, *supra* note 30, at 10.

2. Increased Likelihood of Encounter

Many of the behaviors characteristic of ASD are easily misinterpreted by persons unfamiliar with the disorder. Following instructions literally or parroting back someone's statements may seem rude or disrespectful.⁴⁷ Failure to make eye contact may be read as evasive or deceptive.⁴⁸ Repetitive motions or words, self-injury, or a breach of social rules may be labeled as suspicious behavior.⁴⁹ The problem is compounded by commonly held dehumanizing stereotypes about ASD: that people with ASD have no emotions, or do not want friends, or "are unruly and choose not to behave."⁵⁰ These stereotypes and easily misunderstood behaviors contribute to the likelihood of an encounter with police.⁵¹ People with ASD and other developmental disabilities are "seven times more likely to come into contact with law enforcement."⁵² In such an encounter, characteristics

47. Autism Society of Maine, *supra* note 30.

48. *Id.*; see also Dennis Debbaudt & Matt Brown, *The Role of the Autism Response Team in Interrogation, Prosecution, and Defense*, AUTISM SPECTRUM Q., Summer 2006, at 8, 8.

49. Autism Society of Maine, *supra* note 30; see also DAVIS & SCHUNICK, *supra* note 27, at 39–46 (describing common reasons law enforcement might be called in response to characteristic autistic behaviors, such as self-injurious behavior, wandering alone, running away, peering into windows, turning on water faucets, suspected drug abuse, and suspected child abuse); DEBBAUDT, *supra* note 28, at 19–21;.

50. Brown, *supra* note 38, at slide 11.

51. Scott J. Modell & Dave Cropp, *Police Officers and Disability: Perceptions and Attitudes*, 45 INTEL. & DEVELOPMENTAL DISABILITIES 60, 62–63 (2007).

"[C]rime is, by definition, out of order." If crime is "out of order," then most good cops tend to look for things in society that are out of order When they see people acting in a way that is different and have not been trained to recognize the behavior as a disability, they may see the behavior as out of order and may see crime.

Id. (citations omitted).

52. Autism Society of Maine, *supra* note 30; see also Dennis Debbaudt, *Avoiding Unfortunate Situations*, <http://www.inlv.demon.nl/avunsi/avoiding.html> (last visited Sept. 24, 2007). Modell and Cropp point out that changes in societal attitude toward the disabled predict an ongoing likelihood of police encounter:

[P]ersons with physical and developmental disabilities are no longer swept under the carpet and ignored by mainstream society. They live, work, and play as integral, visible, and interactive members of their neighborhood community. As increased numbers of individuals with disabilities are living in mainstream society, the number of interactions with law enforcement for these individuals is becoming statistically greater.

Modell & Cropp, *supra* note 51, at 61. These considerations illustrate the importance of autism awareness at all levels of the public safety, emergency services,

associated with the disability are at risk of being misinterpreted as indicative of criminal behavior or intent.⁵³

Moreover, the number of children diagnosed with ASD has been steadily increasing. In the early 1990s approximately one in ten thousand children was diagnosed with ASD,⁵⁴ but in some parts of the United States, ASD is now estimated to affect one out of 150 children.⁵⁵ This dramatic increase in the rate of diagnosis prompts some to describe ASD as an “epidemic.”⁵⁶ The cause of this increased prevalence is unknown, but it is speculated to stem from a combination of greater public awareness, improved diagnostic tools, genetic influences, and environmental factors.⁵⁷

Because diagnosis of ASD takes place in childhood and the rate of diagnosis has surged within the last twenty years, currently most services for ASD are aimed at children.⁵⁸ However, children with these sensory and social processing difficulties are now entering adolescence and adulthood. Society’s tolerance of weird or unusual behavior decreases when the actor is no longer a sympathetic child.⁵⁹ Furthermore, the behaviors associated with ASD pose challenges for communities and

and legal systems; however, this Comment focuses primarily on law enforcement response. A bibliography of autism safety resources is found at a website sponsored by the Parents of Autistic Children of Northern Virginia (POAC-NOVA), http://www.poac-nova.org/base.cgim?template=autism_awareness (last visited Sept. 24, 2007).

53. See, e.g., Debbaudt & Brown, *supra* note 48, at 8.

54. Autism Speaks, *The Advertising Council and Autism Speaks Unveil National PSA Campaign to Raise Awareness of Autism*, http://www.autismspeaks.org/press/ad_council_launch.php (Apr. 6, 2006).

55. Press Release, Centers for Disease Control and Prevention, CDC Releases New Data on Autism Spectrum Disorders (ASDs) from Multiple Communities in the United States (Feb. 8, 2007) (on file with author), available at <http://www.cdc.gov/od/oc/media/pressrel/2007/r070208.htm>.

56. See *Autism: Present Challenges, Future Needs—Why the Increased Rates? Hearing before the H. Comm. on Gov’t Reform*, 106th Cong. (2000) [hereinafter *Autism: Present Challenges*].

57. Yeargin-Allsopp et al., *supra* note 35, at 53. Recent genetic research indicates that ASD is very strongly related to a particular kind of genetic mutation occurring at many sites on the genome. See Jonathan Sebat et al., *Strong Association of De Novo Copy Number Mutations with Autism*, 316 *SCIENCE* 445 (Apr. 20, 2007). For a provocative theory tying changing birth rate patterns to higher rates of autism, see Steve Silberman, *The Geek Syndrome*, *WIRED*, Dec. 2001, at 175, 175–82 (arguing that increased rate of ASD is linked to social trends encouraging reproduction by math- and science- gifted individuals).

58. See, e.g., *Autism: Present Challenges*, *supra* note 56; see also Combating Autism Act of 2006, Pub. L. No. 109-416, 120 Stat. 2821 (2006).

59. See *infra* Part II.C.

law enforcement when the affected person possesses the size and strength of an adult.⁶⁰

3. The Paradox of Escalation

One characteristic of ASD poses a particular problem in encounters with law enforcement. "Escalation," or meltdown, describes the response of a person with ASD under stress or in an unfamiliar situation.⁶¹ Overwhelmed by the barrage of sensory information, a person with ASD may attempt to flee the uncomfortable situation, engage in excessive stimming, become combative, or simply shut down.⁶² The individual may "cover[] his or her ears and shriek[], not knowing how or where to get help."⁶³ This expression of fear, frustration, and confusion frequently appears like a child's tantrum that has "escalated" out of the control of adult caregivers.⁶⁴

Unfortunately, the presence of police—lights and sirens, uniforms, loud and unfamiliar voices, barking dogs—often makes a difficult situation worse by contributing to the individual's sensory overload.⁶⁵ Traditional law enforcement techniques for controlling and containing such a situation are ineffective and may provoke further escalation or a violent physical outburst by the person with ASD.⁶⁶ Such outbursts do not result from "meanness or acts of purposeful injury to others," but rather they are a reaction to the overwhelming environmental stimuli.⁶⁷

60. See *infra* Part II.C.

61. See DEBBAUDT, *supra* note 28, at 23; Brown, *supra* note 38, at slide 37.

62. Brown, *supra* note 38, at slide 37.

63. DEBBAUDT, *supra* note 28, at 23.

64. *Id.*; see also Nathan Max & Douglas Quan, *Autistic Man Dies After Clash with Deputies*, PRESS-ENTERPRISE (Riverside, Cal.), July 21, 2006, at B3 ("When an autistic person's adrenaline starts going, it can be hard to regulate," Debbaudt said. "If a struggle ensues, officers can expect to encounter a lot of resistance . . .").

65. Brown, *supra* note 38, at slide 17.

66. See DEBBAUDT, *supra* note 28, at 26–27 (discussing restraint issues; note especially that placing a person with ASD on his stomach may induce breathing difficulties and respiratory arrest due to hypotonia of the diaphragm and chest muscles often associated with ASD; the struggle to breathe while so restrained may be mistaken for further resistance or an attempt to flee); see also DAVIS & SCHUNICK, *supra* note 27, at 65 (because of sensory integration problems, a light touch may result in a physical lashing out).

67. DEBBAUDT, *supra* note 28, at 24; see also Sarah Burge, *Mother Files Suit over Son's Death*, PRESS-ENTERPRISE (Riverside, Cal.), May 28, 2007, at B1 ("[A

Paradoxically, the more force a police officer applies to gain control over the situation, the more dangerous and out of control the situation likely becomes. Instead, calmness, patience, and geographical containment, as opposed to physical force, will usually lead to a de-escalation of behavior within a few minutes.⁶⁸ A police officer unprepared to recognize the signs of ASD and respond appropriately not only places the person with ASD at unnecessarily greater risk by the use of force but also creates a more dangerous situation for the officer.⁶⁹ To alleviate this problem, police and first responders need better training to recognize “the unique needs and characteristics of people with autism so the situation they’re encountering doesn’t become worse.”⁷⁰

C. Police Encounters Under the Americans with Disabilities Act

The “mindblindness” of ASD and the paradox of escalation in reaction to traditional law enforcement control techniques combine to place persons with ASD at particular risk of inappropriate treatment from inadequately trained law enforcement personnel. The Americans with Disabilities Act (“ADA”) forbids such inappropriate treatment.⁷¹

Upon signing the ADA, President George H. W. Bush recognized the united effort between Congress and an unprecedented number of disability advocacy groups in making the act a reality.⁷² He declared:

This act is powerful in its simplicity Legally, it will provide our disabled community with a powerful expansion of protections and then basic civil rights Together, we

person with ASD] may simply imitate the [police] officers, which can spell trouble if officers are loud and aggressive.”).

68. See DEBBAUDT, *supra* note 28, at 27 (“Geographical containment is the preferred method of control for a person with autism”); see also Debbaudt, *Autism Risk & Safety Management, Information for Law Enforcement, First Response, and Criminal Justice Professionals*, <http://www.autismriskmanagement.com/lawenforcement.html> (last visited Oct. 4, 2007).

69. DEBBAUDT, *supra* note 28, at 27.

70. Max & Quan, *supra* note 64, at A1 (quoting Lee Grossman, President and CEO of The Autism Society of America).

71. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006).

72. George H.W. Bush, U.S. President, Remarks of President George Bush at the Signing of the Americans with Disabilities Act (July 26, 1990), *available at* <http://www.eeoc.gov/ada/bushspeech.html> (last visited Oct. 4, 2007).

must remove the physical barriers we have created and the social barriers that we have accepted Let the shameful wall of exclusion finally come tumbling down.⁷³

Congress stated that its purpose in passing the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."⁷⁴ The Act defines individuals with disabilities as those persons who have "a physical or mental impairment that substantially limits one or more of the major life activities," or have "a record of such an impairment," or are "regarded as having such an impairment."⁷⁵ The definition of "physical or mental impairment" includes neurological disorders and specific learning disabilities.⁷⁶ The phrase "major life activities" includes sensory processing and communication abilities, such as "seeing, hearing, speaking, . . . learning, and working."⁷⁷ Furthermore, the definition of disability expressly includes individuals having a condition that provokes a reaction in others, where that reaction effectively limits the individual's major life activities.⁷⁸ Under the statute and its implementing regulations the rights-protection provisions of the ADA are imposed not only on employers, communications providers, and public accommodations, but also on public entities,⁷⁹ which include "[a]ny State or local government" and any instrumentality of State or local government.⁸⁰

The Act forbids public entities from discriminating against qualified individuals on the basis of their disability.⁸¹ Congress recognized in drafting the ADA that reasonable modification to meet the needs of individuals with disabilities would require more than adaptation of facilities and services in some circumstances and would require a change of attitude and procedures on the part of public servants in order to "eradicat[e]

73. *Id.*

74. 42 U.S.C. § 12101(b)(1)–(2).

75. 42 U.S.C. § 12102(2)(A)–(C).

76. 28 C.F.R. § 36.104 (2006).

77. *Id.*

78. *Id.*

79. 42 U.S.C. §§ 12101, 12131–32.

80. 28 C.F.R. § 36.104.

81. 42 U.S.C. § 12132.

the ‘invisibility of the handicapped.’”⁸² The committee report specifically considered appropriate training of public servants, including police officers, to be a reasonable modification:

In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for [these disabilities]. . . . Such discriminatory treatment based on disability can be avoided by proper training.⁸³

The committee used epilepsy as an example of an “invisible” disability—a disability not immediately obvious from the individual’s outward appearance—that might be subject to inappropriate discriminatory treatment in the absence of training about a condition’s physical manifestations and necessary accommodations.⁸⁴ ASD is a similarly “invisible” disability at risk of being misunderstood by inadequately trained law enforcement officers.⁸⁵ ASD impairs the ability of affected individuals to process sensory and social information,⁸⁶ thus making it difficult for an affected individual to receive the intended safety benefit of public police protection. As discussed above, ASD behaviors are easily mistaken for suspicious or criminal behavior.⁸⁷ Moreover, the actions of a police officer untrained in “recognition of and aid for” ASD can exacerbate the negative behaviors associated with the disability, unnecessarily putting both the person with ASD and law enforcement officers at greater risk of harm.⁸⁸

82. See H.R. REP. NO. 101-485, pt. III, at 50 (1990).

83. *Id.*

84. *Id.* As Congress’s example implies, an “invisible” disability may not present an immediate externally discernable cue, such as a crutch or a cane, a wheelchair, a hearing aid, or some physical deformity. Nonetheless the disability may be identified and addressed by individuals trained to recognize it and make proper accommodations.

85. See, e.g., Pathfinders for Autism: About Autism, <http://www.pathfindersforautism.org/aboutAutism.aspx> (last visited Oct. 4, 2007) (“[Autism] is a hidden disability in the sense that the individuals affected are, in many cases, physically indistinguishable from their peers.”).

86. See discussion *supra* notes 29–46 and accompanying text.

87. See discussion *supra* notes 47–53 and accompanying text.

88. See discussion *supra* notes 61–70 and accompanying text.

1. Theories of Liability Under the ADA in the Context of Police Encounters

Originally, courts were reluctant to apply Title II of the ADA—which provided that “no qualified individual with a disability . . . [would] be denied the benefits of the services, programs, or activities of a public entity, or [would] be subjected to discrimination by any such entity”⁸⁹—to police encounters with persons with disabilities.⁹⁰ Courts found it hard to imagine an applicant being “eligible” for arrest, or that an arrest or its aftereffects were a protected “benefit” or “program or activity.”⁹¹ This changed, however, in 1998 when a unanimous Supreme Court in *Pennsylvania Department of Corrections v. Yeskey* held that state prisons came within the definition of public entity and therefore must comply with the provisions of the ADA.⁹² As the Court put it, “the ADA plainly covers state institutions *without any exception*” based on the context of the services provided.⁹³

Following *Yeskey*'s interpretation of the scope of the ADA's application, many courts have developed a three-part test to determine whether a public entity or its officer—such as a police officer—interacts with a person with a disability in such a way that it imposes liability under the ADA.⁹⁴ Under this test, a claim will lie where a plaintiff proves the following:

89. Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (2006). A “public entity” is defined as “any department, agency, special purpose district, or other instrumentality of a State or States or local government” *Id.* § 12131(1)(B).

90. 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, 167 (2005).

91. See, e.g., *Rosen v. Montgomery County*, 121 F.3d 154, 157 (4th Cir. 1997); *Gorman v. Bartch*, 925 F. Supp. 653, 655 (W.D. Mo. 1996), *aff'd in part and rev'd in part*, 152 F.3d 907 (8th Cir. 1998).

92. 524 U.S. 206, 209 (1998). On remand, the district court granted summary judgment to defendants, holding that participation in a penal boot camp was not a “major life activity” under the ADA. *Yeskey v. Pa. Dep't of Corr.*, 76 F. Supp. 2d 572, 578 (M.D. Pa. 1999).

93. 524 U.S. at 209.

94. Brodin, *supra* note 90, at 183–84. Of course, the principles of governmental immunity and qualified immunity usually protect public entities and employees from liability; however, under certain circumstances an ADA discrimination claim arguably allows plaintiff to get around these protections. See *id.* at 185–98 (presenting an in-depth examination of this argument).

that he is a qualified individual with a disability;

that he was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and

that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.⁹⁵

Federal courts that have considered the issue have held law enforcement officers liable for disability-related discrimination under two theories.⁹⁶ First, the Wrongful Arrest theory operates where "police wrongly arrested someone with a disability because they misperceived the effects of that disability as criminal activity."⁹⁷ Second, the Failure to Accommodate During Arrest theory⁹⁸ operates where police "arrested a person with a disability for a crime unrelated to that disability . . . [but] failed to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees."⁹⁹

a. Wrongful Arrest Theory

A Wrongful Arrest claim arises when a person with a disability is arrested because a characteristic of her disability is mistaken for criminal behavior, where the arresting officer knew or should have known that the behavior was related to the disability, not criminal activity. The earliest case to recognize a federal claim of discrimination under the ADA in a police encounter was *Jackson v. Town of Sanford*.¹⁰⁰

95. *Tyler v. City of Manhattan*, 849 F. Supp. 1429, 1439 (D. Kan. 1994); see also *Weinrich v. L.A. County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997); *Patrice v. Murphy*, 43 F. Supp. 2d 1156, 1159 (W.D. Wash. 1999); *Lewis v. Truitt*, 960 F. Supp. 175, 178 (S.D. Ind. 1997) (all applying similar tests).

96. *Gohier v. Enright*, 186 F.3d 1216, 1220 (10th Cir. 1999) (summarizing cases representing each theory).

97. *Id.*

98. *Id.* Note that "arrest" in this context is taken to encompass "several different scenarios: arrests; investigations potentially involving an arrest . . . ; and violent confrontations not technically involving an arrest." *Id.* at n.2.

99. *Id.* at 1220-21.

100. *Jackson v. Town of Sanford*, No. 94-12-P-H, 1994 WL 589617 (D. Me. Sept. 23, 1994).

In *Jackson*, a police officer arrested a man after mistaking a characteristic of his disability for criminal behavior.¹⁰¹ Following a motor vehicle accident, one driver told police that he thought the other driver, Roland Jackson, the plaintiff in this case, was drunk.¹⁰² The officer observed that Jackson's speech was slurred, he was visibly unsteady on his feet, and he swayed noticeably.¹⁰³ When asked whether he had been drinking, Jackson explained that he had not been drinking. He further explained that he had previously suffered a stroke which left him with some physical difficulties and that he was using a prescription medication for high blood pressure.¹⁰⁴ When Jackson failed the field sobriety tests due to his disability, the police officer assumed that the impairment was due to the medication and arrested Jackson for "operating under the influence."¹⁰⁵ The officer handcuffed Jackson and took him to the police station, where tests to detect the presence of alcohol and the influence of drugs were administered; both were negative.¹⁰⁶ At no time did the officer inquire further about Jackson's disability.¹⁰⁷ After nearly two hours, Jackson was released with a "summons to appear in court on a charge of operating under the influence of intoxicating drugs," and the arresting officer filed an "adverse driver's report" requesting that Jackson's driving skills be re-evaluated.¹⁰⁸ Jackson had been "found to be a safe driver by certified driving instructors, both before and after the incident."¹⁰⁹

Jackson sued the arresting officer and the city for, among other things, arresting him without probable cause, detaining him unlawfully, and failing to train its police officers in recognizing disabilities.¹¹⁰ The court granted summary judgment in favor of the defendants on all the claims, except for Jackson's Americans with Disabilities Act claim.¹¹¹ The court observed that

101. *Id.* at *1.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at *2, *4.

111. *Id.* at *3-*6.

Title II of the ADA clearly applies to acts of discrimination by a public entity against a disabled individual. The Town and its police force are a public entity and the plaintiff is a qualified individual with a disability The legislative history of the ADA demonstrates that Congress was concerned with unjustified arrests of disabled persons such as Jackson alleges here.¹¹²

Lewis v. Truitt represents another example of a wrongful arrest due to a disability.¹¹³ A deaf man's inability to understand and respond appropriately to police was perceived as resisting law enforcement.¹¹⁴ Charles Lewis objected to the arrival of police at his home without a court order or warrant to investigate the welfare of his granddaughter.¹¹⁵ Because of Lewis's deafness, he could not understand the officers' explanation that no warrant was needed.¹¹⁶ Other people present tried to explain that Lewis was deaf and that the best way to communicate was to "write down questions on a piece of paper."¹¹⁷ However, the officers "refused to believe that [Lewis] was deaf and would not write down any questions for him."¹¹⁸ When Lewis left his yard and went into his house, the officers followed him, uninvited.¹¹⁹ An altercation followed, in which the officers pulled Lewis "to the floor by his hair, handcuffed him, placed him under arrest, and proceeded to kick and hit him."¹²⁰ When a bystander offered to prove that Lewis was deaf by using the teletype system in the house, one officer "told [her] to shut-up and threw her into a large piece of furniture."¹²¹ Lewis was arrested and charged with the misdemeanor of resisting law enforcement.¹²² Lewis subsequently filed an action alleging that the police violated the ADA in their treatment of

112. *Id.* at *6 (citations omitted).

113. 960 F. Supp. 175 (S.D. Ind. 1997).

114. *Id.* at 176-77.

115. *Id.* at 176, 178.

116. *Id.* at 176. The police were unaware that another officer previously had left the nine-month-old child in the custody of Lewis's son following her mother's suicide that morning. *Id.* Lewis's son had already agreed to cooperate with the police. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 177. One of the officers involved in the altercation had been personally involved in the installation of Lewis's teletype system. *Id.* at 176. That officer knew or should have known that Lewis was deaf. *Id.*

122. *Id.* at 177.

him.¹²³ The court denied the police officers' motion for summary judgment, noting that there was a genuine issue of material fact on the question of whether the officers arrested Lewis because of his disability.¹²⁴

In *Jackson*, the officer had not been trained to distinguish the effects of a stroke from the effects of intoxication, and therefore he made a wrongful arrest. Similarly, officers charged Lewis with resisting law enforcement, even though they knew or should have known that his deafness was responsible for his apparent lack of cooperation. Where a police officer has been made aware of an individual's disability but has not been trained to distinguish between criminal behavior and the effects of that disability, or ignores that distinction, and thus makes a wrongful arrest, the officer or the police department may be held liable for discrimination under the ADA.

b. *Failure to Accommodate Theory*

During a pre-arrest, arrest, or post-arrest encounter with a person with disabilities, if a law enforcement officer fails to make reasonable accommodations for the disabilities, some courts have found that the officer may be liable for discrimination for Failure to Accommodate under the ADA.¹²⁵ The Eighth Circuit discussed a Failure to Accommodate claim in *Gorman v. Bartch*.¹²⁶

Jeffrey Gorman, a paraplegic, was removed from a bar for trying to enter the dance floor on his wheelchair, then arrested for trespassing.¹²⁷ The police transport vehicle was not equipped for wheelchairs, so the officers lifted Gorman into the back of the van and strapped him to a bench and a mesh net,

123. *Id.*

124. *Id.* at 179.

125. Brodin, *supra* note 90, at 164.

126. *Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998). After the Eight Circuit partially reversed the district court's grant of summary judgment against Gorman, *id.* at 916, Gorman's claim under the ADA succeeded at jury trial on remand, and he was awarded both compensatory and punitive damages. *Gorman v. Easley*, No. 95-0475-CV-W-3, 1999 U.S. Dist. LEXIS 23537, *1 (W.D. Mo. Oct. 28, 1999). However, the punitive damages portion was eventually overturned by the U.S. Supreme Court, which, while specifically recognizing that a private action to enforce the ADA was permissible, ruled that punitive damages are not permitted. *Barnes v. Gorman*, 536 U.S. 181, 184-85, 189 (2002).

127. *Gorman*, 152 F.3d at 909.

using Gorman's belt and the seatbelt.¹²⁸ During the trip to the station, "the belts came loose, and Gorman fell to the floor."¹²⁹ As a result, Gorman suffered serious injuries to his shoulder and back, and his urine collection bag burst and soaked him.¹³⁰ In considering Gorman's appeal of the district's court dismissal of his claim, the court recognized the applicability of the ADA to the transport of arrestees and noted that the "benefit' Gorman sought in this case was to be handled and transported in a safe and appropriate manner consistent with his disability."¹³¹

Courts have generally been more receptive to claims based on Wrongful Arrest than to claims involving a Failure to Accommodate.¹³² However, if police conduct results in increased harm to the person because of a Failure to Accommodate the disability, the disabled person may have a claim under Title II of the ADA.¹³³

c. Outside the Two Theories: Exigent Circumstances

Although the protection of the ADA has been held to apply in situations of Wrongful Arrest and Failure to Accommodate, many unfortunate encounters between persons with mental or other disabilities and law enforcement do not fall within either of these categories. When a disabled person's actions create "exigent circumstances" in which public safety appears to be endangered, law enforcement personnel are obliged to "secur[e] the scene and ensur[e] that there is no threat to human life," before coming under a duty to accommodate the disability under the ADA.¹³⁴ In these circumstances, courts have concluded that "the person with the mental disability denied herself the benefits of police protection through her own criminal acts,"¹³⁵ and thus has not suffered discrimination based on her disabil-

128. *Id.* at 910.

129. *Id.*

130. *Id.*

131. *Id.* at 913.

132. See Brodin, *supra* note 90, at 163-64.

133. *Id.* at 164. For further discussion of these issues, see Jennifer Fischer, *The Americans with Disabilities Act: Correcting Discrimination of Persons with Mental Disabilities in the Arrest, Post-Arrest, and Pretrial Processes*, 23 L. & INEQ. 157, 181-82 (2005).

134. *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000); see also Fischer, *supra* note 133, at 186.

135. Fischer, *supra* note 133, at 181.

ity.¹³⁶ The Tenth Circuit Court of Appeals did not find discrimination in such a circumstance in *Gohier v. Enright*.¹³⁷

The plaintiff in *Gohier* claimed that police had used excessive force resulting in death during an attempt to arrest a man suffering from schizophrenia and that this use of force represented a failure to "treat and protect" the decedent "in light of his disability."¹³⁸ A police officer was called to investigate reports of a man damaging car windows with a baseball bat or a pipe.¹³⁹ Shortly after, the officer encountered a man who, although not fitting the description of the suspect sought, was behaving in a somewhat unusual manner.¹⁴⁰ As the officer pulled over and tried to get the man's attention, the man swung what looked like a knife and then approached the police vehicle.¹⁴¹ Although the officer decided that the man was mentally ill, he did not call for backup.¹⁴² Apparently attempting to steal the idling police car, the man "lunged toward [the officer], making a stabbing motion with the object."¹⁴³ The officer shot him twice, killing him.¹⁴⁴

The court believed the facts in *Gohier* to be "logically intermediate" between the Wrongful Arrest and Failure to Accommodate claims.¹⁴⁵ The officer neither used force "because he misconceived the lawful effects of [the man's] disability as criminal activity" nor "fail[ed] to accommodate [the man's] disability while arresting him for 'some crime unrelated to his disability.'"¹⁴⁶ Instead, the court observed that the officer "used force on [the man] while [the man] was committing an

136. The question follows, then, whether it was the individual's act or the police officer's failure to accommodate that created the apparent exigent circumstance. Some lower courts recently have begun to recognize that, in a Failure to Accommodate claim, the issue of whether an exigent circumstance existed at the time police acted may be a materially disputed fact precluding summary judgment in favor of the law enforcement entity. See, e.g., *Morais v. City of Philadelphia*, No. 06-582, slip op. 12-13 (D. Pa. March 19, 2007) (discussing several cases in which reasonable accommodation under exigent circumstances was examined).

137. *Gohier v. Enright*, 186 F.3d 1216, 1220-22. (10th Cir. 1999).

138. *Id.* at 1217.

139. *Id.*

140. *Id.* He was walking down the middle of an unlit street, clutching something to his chest with his right hand. *Id.*

141. *Id.* at 1218.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 1221.

146. *Id.* (quoting *Patrice v. Murphy*, 43 F. Supp. 2d 1156, 1159 (W.D. Wash. 1999)).

assault *related to his disability*.”¹⁴⁷ The lethal force was not used in response to the disability itself but in response to the dangerous circumstances created by the acts of the disabled person; therefore, the officer was not liable under the ADA for the man’s death.¹⁴⁸

2. Application to Persons with ASD

While *Jackson*, *Lewis*, *Gorman*, and *Gohier* did not involve individuals with ASD, they illustrate the scope of rights under the ADA that apply in the context of encounters between individuals with disabilities like ASD and law enforcement personnel. Law enforcement officers may be held liable for discrimination in making an arrest if a manifestation of ASD is mistaken for criminal behavior.¹⁴⁹ Law enforcement officers also have an obligation to provide appropriate accommodations for individuals with ASD following an arrest.¹⁵⁰ Because behaviors associated with ASD are easily mistaken for criminal behavior, and because the communication and sensory processing difficulties of ASD require accommodation, law enforcement officers must be trained to recognize ASD and respond appropriately in order to avoid liability for discrimination under the ADA.

II. A CLOSER LOOK AT WHAT GOES WRONG

The ADA offers little protection for a person with ASD in situations where an untrained officer’s actions unnecessarily create an exigent circumstance. The few courts that have confronted the issue have held that law enforcement officers are not required to make accommodations for any disability during exigent circumstances.¹⁵¹ Unfortunately, the social processing deficits and escalation associated with ASD under conditions of

147. *Id.* (emphasis added).

148. *Id.* at 1222. The court noted that the city of Colorado Springs might have been liable for failing to train its officers to “investigate and arrest [disabled] persons in a manner reasonably accommodating their disability.” *Id.* However, because the plaintiff did not make this argument at trial, the appeals court did not reach a decision on the matter. *Id.*

149. *See supra* Part I.C.1.a.

150. *See supra* Part I.C.1.b; *see also* DEBBAUDT, *supra* note 28, at 34–36 (emphasizing importance of communication and safety for a person with ASD in the post-arrest phase).

151. *See supra* Part I.C.1.c.

stress prevent a person with ASD from responding in conformance with law enforcement expectations, creating a situation easily mistaken for an exigent circumstance. This Part looks closely at how such situations arise and identifies three areas in which "better training" would lead to "better outcomes."

A. *Anguished Outcry*

Paul's mother, Helen Childs, said, "I told them, 'He's a special-needs child. Just talk to him and get the knife away.'"¹⁵² "I want to know why they shot my baby," she cried.¹⁵³ "I told that officer, 'Don't shoot!' and he shot and killed him anyway."¹⁵⁴

Officer Turney would later explain that he was "hoping" and "expected" that Paul would drop the knife.¹⁵⁵ But this was an unrealistic expectation: Paul, like others with his disability,¹⁵⁶ "had trouble understanding commands and often had to be told multiple times to do something."¹⁵⁷ Heartbroken, Paul's family sought to change this unrealistic expectation, endorsing legislation they named "Paul's Law," which would require that law enforcement officers be trained to "more effectively deal with the growing number of mentally ill or disabled people who live in the community and cross paths with police."¹⁵⁸ The training would be intended to "keep officers from firing their weapons at developmentally disabled suspects who may be confused about the confrontation they find themselves in."¹⁵⁹

152. Spencer, *Not Prepared*, *supra* note 3. However, the police officers at the scene claim that they were not told anything of Paul's disabled condition. *Id.*

153. Kelly, *911 Tape*, *supra* note 9.

154. *Id.*

155. Kelly, *Cop Recounts Slaying*, *supra* note 13. No charges were pressed against Turney as a result of Childs's death. Kelly, *Cop Cleared*, *supra* note 10. Then-Denver District Attorney Bill Ritter explained: "Turney had a reasonable belief that he was in imminent danger." *Id.*

156. See Spencer, *Not Prepared*, *supra* note 3 ("After a seizure, you're confused, not responding . . .").

157. Kelly, *911 Tape*, *supra* note 9.

158. Simpson & Ingold, *supra* note 1.

159. Hector Gutierrez, *Teen's Death Spurs "Paul's Law" Plan*, ROCKY MTN. NEWS, Aug. 13, 2003, at 20A (quoting Colorado State Representative Terrance Carroll, a co-sponsor of the bill along with State Representative Rosemary Marshall).

B. *Unrealistic Expectations*

The “mindblindness” of ASD puts affected persons at great risk in encounters with law enforcement because they are unlikely to react to instructions in ways that officers expect. “The best thing people can do [during an encounter] is do what they are told within reason,” explained one Colorado law enforcement officer.¹⁶⁰ They should “keep their hands in full view, let officers know of any moves they intend to make, remain polite and follow all directions the officers give,” remembering that “officers are trained to consider every interaction as though it is threatening.”¹⁶¹ An officer responds to a failure to comply with these expectations with an increased assertion of authority and force.¹⁶²

A law enforcement officer bases her expectations on the assumption that most people understand the social role the officer is playing, but the mind of a person with ASD may be unequipped to understand that role.¹⁶³ A person with ASD may take a longer time to mentally process the officer’s instructions,¹⁶⁴ or may respond to the officer in a socially inappropriate manner.¹⁶⁵ If the situation presents a stimulus on which the person with ASD has an obsessive fixation (such as wheels, buttons, or a shiny vehicle), he or she may be drawn to the stimulus, oblivious to instructions to stop.¹⁶⁶ Worse, the new-

160. Pierette J. Shields, *Behavior Key When Pulled Over: Police Offer Tips on How to Act, What to Do During Encounter*, DAILY TIMES-CALL (Longmont, Colo.), Sept. 24, 2006, at B1.

161. *Id.*

162. *Id.*

163. See NAT’L AUTISTIC SOC’Y, *supra* note 30, at 2.

164. Brown, *supra* note 38, at slide 20.

165. NAT’L AUTISTIC SOC’Y, *supra* note 30, at 7. One person offered a personal account of a police stop:

A police car indicated to me to stop and I got out of the car. I had only just received a diagnosis of Asperger syndrome and didn’t have a card on me about the disability. When I spoke to the police, in my usual, rather direct way, they thought I was being rude. I told the police I had Asperger syndrome and asked if I could get a friend who could help me to explain myself, but they did not seem to understand the condition and I was told that I couldn’t. At this stage I became very nervous and tried to get away. In response, they called for back-up and tried to arrest me I felt anxious and so the situation worsened. They shoved me into a van. I felt so scared that I responded by biting an officer.

Id.

166. Brown, *supra* note 38, at slide 22. Recall also the girl attracted to the leather tags on jeans. NAT’L AUTISTIC SOC’Y, *supra* note 46.

ness or strangeness of an encounter with police—flashing lights, a barking dog, or shouting voices—may overwhelm the sensory processing ability of the person with ASD. In response, she may flee, scream, cry, or drop to the ground and rock back and forth, in an attempt to escape the unwanted stimuli.¹⁶⁷ A gentle touch may cause the person with ASD to reflexively lash out.¹⁶⁸ Law enforcement officers unfamiliar with ASD may misinterpret these responses as non-cooperation justifying the use of increased force, resulting in escalation toward tragedy.¹⁶⁹

C. *Unfortunate Encounters with Law Enforcement Officers*

The paradoxical interaction between a person with ASD and law enforcement officers—the more force that is applied to control the situation, the more irretrievably out-of-control the situation becomes—too frequently results in “exigent circumstances,” in which both the officer and the person with ASD are placed at great risk of harm. Sometimes, these circumstances arise from situations which, without the resulting exigent circumstance, might have qualified as Wrongful Arrests because the suspicious behavior which initiated the encounter was a manifestation of ASD, rather than a criminal act. Other times, the actions of police untrained in dealing with a person with ASD unnecessarily push a bad situation into one much worse. The following five examples illustrate how law enforcement officers untrained in recognizing and responding to ASD can provoke unnecessarily an escalating response from a person with ASD.

167. DEBBAUDT, *supra* note 28, at 24. While most people would feel some apprehension in an encounter with police, the fear felt by a person with ASD may be differentiated from the fear a non-ASD person might feel in a similar situation. *Id.* A person with ASD fears because she has little or no ability to make sense of the actions of the police or the events surrounding her, or to predict how her behavior relates to the behavior of others, and is helpless to make the overwhelming torrent of sensory input stop. *Id.* However, a non-ASD person recognizes something of the social meaning of an arrest, and therefore feels fear resulting from predicting the social consequences of what will happen next, such as punishment, embarrassment, expense, or deprivation of freedom. *Id.*

168. *Id.* at 26; see also Brown, *supra* note 38, at slide 14.

169. See DEBBAUDT, *supra* note 28, at 24.

1. Guido Rodriguez

Guido Rodriguez, an eighteen-year-old autistic man, lost a kidney after an encounter with police.¹⁷⁰ He was riding a bicycle on a Sunday afternoon on a street in his neighborhood, when a patrol officer drove up behind him.¹⁷¹ The officer became suspicious when the man looked over his shoulder at her patrol car and then hopped off the bike and began to run away, pushing the bike.¹⁷² Believing that the man may have stolen the bike, she began to slowly follow him down the street, using the car's loudspeaker to order him to stop.¹⁷³ When he remounted his bicycle and continued to ride away, she called for assistance, thinking he was "possibly on drugs."¹⁷⁴ When a second officer approached the man, he jumped off the bike and ran away.¹⁷⁵ As the man ran, the second officer heard him "yell[ing] statements that were incoherent and unintelligible."¹⁷⁶ A third officer joined the pursuit, following the man up the driveway of a home and into the garage.¹⁷⁷ The officers forcibly removed the man from the garage, continuing to yell at him as they wrestled him down on the front lawn.¹⁷⁸

Although neighbors and the woman living in the house tried to explain that the man had a disability and could not understand the officers' commands,¹⁷⁹ it was not until the man's father arrived that officers understood that the bicycle he had been riding was his own, that the garage he had entered was that of his home, and that the woman living inside the house was his mother.¹⁸⁰ The man had run away from the officers because they were strangers to him and his autism limited

170. *Irvine to Settle Suit over Arrest of Autistic Man*, L.A. TIMES (Orange County ed.), Apr. 6, 1986, at Metro-5 [hereinafter *Irvine to Settle Suit*].

171. His attorney stated that the man was "legally and lawfully riding" the bicycle. Mark I. Pinsky & Bobbie Rodriguez, *Irvine to Probe Seizure of Youth; Autism Victim, 18, Lost Kidney after Tussle with Officers*, L.A. TIMES, Apr. 27, 1985, at Metro-1; see also DEBBAUDT, *supra* note 28, at 13.

172. DEBBAUDT, *supra* note 28, at 13.

173. *Id.*

174. *Irvine to Settle Suit*, *supra* note 170.

175. DEBBAUDT, *supra* note 28, at 13.

176. Pinsky & Rodriguez, *supra* note 171.

177. DEBBAUDT, *supra* note 28, at 13.

178. Pinsky & Rodriguez, *supra* note 171 (relating that his attorney described the take-down as "brutal," and carried out with "anger and rage" at the man's failure to obey the officer's commands); *Irvine to Settle Suit*, *supra* note 170.

179. *Irvine to Settle Suit*, *supra* note 170.

180. *Id.*

his ability to understand the social role expected in an encounter with police.¹⁸¹ His flight was an attempt to get to a "safe haven where he was understood and accepted."¹⁸² In the process of the arrest, the man suffered serious injury to his kidney and underwent surgery to remove it two days later.¹⁸³

2. Brian Bates

Brian Bates, a seventeen-year-old boy with ASD, wandered two miles from his home and noticed some kittens in a cage in an open garage.¹⁸⁴ He walked over to the kittens and began babbling at them.¹⁸⁵ When the homeowner raised his voice to ask the boy to leave, Bates shrank away from him and began making growling animal noises and screaming out the names of professional wrestlers.¹⁸⁶ The homeowner managed to walk Bates off his property and called police to report the incident as Bates ran off into an adjacent wooded lot.¹⁸⁷ The call was dispatched as a "suspicious person" call.¹⁸⁸

A motorcycle officer who had been working radar patrol nearby quickly responded, and a neighbor who saw the incident told him: "I don't know if this boy is on drugs or drunk but he is real weird and just went running through the woods."¹⁸⁹ The officer soon located Bates jumping up and down in the road and asked the boy to come talk with him.¹⁹⁰ Bates came to the officer and attempted to sit sideways on the police motorcycle, but

181. DEBBAUDT, *supra* note 28, at 14.

182. *Id.*

183. Pinsky & Rodriguez, *supra* note 171. The city agreed to an out-of-court settlement that would pay the man's family between \$200,000 and \$400,000 for the damages suffered in the arrest. *Irvine to Settle Suit*, *supra* note 170. The police department also initiated a program—Operation Mainstream—which introduced children with developmental disabilities to law enforcement officers, to help the children learn to not fear police officers and how to behave on meeting one, and to help the officers develop skills and sensitivity to deal with developmentally disabled people. DEBBAUDT, *supra* note 28, at 14. It is not clear whether this program is still in effect in Irvine.

184. Bates *ex rel.* Johns v. Chesterfield County, 216 F.3d 367, 369 (4th Cir. 2000).

185. *Id.*

186. *Id.*

187. *Id.*

188. Brief of Appellee at 5, Bates *ex rel.* Johns v. Chesterfield County, 216 F.3d 367 (4th Cir. 2000) (No. 99-1663), 1999 WL 33613067.

189. *Id.* at 6.

190. *Id.*

the officer pushed the boy off.¹⁹¹ Bates shoved the officer in return and walked away.¹⁹² The officer ran after and tried to grab him, but Bates fought the officer off.¹⁹³ As the struggle escalated, Bates scratched, bit, kicked, and spit at the officer.¹⁹⁴ Subsequently, three other law enforcement officers arrived on the scene and began to assist.¹⁹⁵ The officers wrestled Bates to the ground and handcuffed him.¹⁹⁶ During this struggle, Bates kicked at the officers.¹⁹⁷ Two officers required medical treatment for their injuries.¹⁹⁸ Bates suffered cuts, bruises, and scrapes.¹⁹⁹

3. Calvin Champion

Calvin Champion, a thirty-two-year-old autistic man who required full-time care because he was non-responsive and unable to speak, accompanied his new caregiver on an errand.²⁰⁰ As they left a store, Champion began to exhibit a "behavior," a tantrum-like disturbance at having to leave a place of interest to him.²⁰¹ The caregiver failed to seatbelt Champion, and he began thrashing around in her minivan, hitting himself in the face and biting himself, and in the process also striking the caregiver's three-year-old son on the head and hands.²⁰² The caregiver stopped the van, and both she and Champion got

191. *Id.* at 7.

192. *Id.*

193. Brief of Appellant at 7–8, *Bates ex rel. Johns v. Chesterfield County*, 216 F.3d 367 (4th Cir. 2000) (No. 99-1663), 1999 WL 33613065.

194. *Bates ex rel. Johns v. Chesterfield County*, 216 F.3d 367, 369 (4th Cir. 2000).

195. *Id.* at 369–70.

196. *Id.* at 370.

197. *Id.*

198. *Id.* (explaining that one officer had to be tested for diseases due to the bites and scratches he suffered, and another officer was treated for a groin injury).

199. *Id.* Bates brought claims against the local police for discrimination based on his disability and for violation of his Fourth Amendment rights. Affirming the lower court's dismissal, the 4th Circuit Court of Appeals found that Bates's behavior gave the officer a reasonable suspicion to believe that "criminal activity [was] afoot." *Id.* at 371 (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). The Court of Appeals also found that the force used by the officers was justified because the boy was "resisting arrest." *Id.* at 371–72.

200. *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 896 (6th Cir. 2004).

201. *Id.* Recall that a person with ASD may demonstrate obsessional interests and is unable to adapt well to changes in routine or location. See NAT'L AUTISTIC SOC'Y, *supra* note 30, at 2.

202. *Champion*, 380 F.3d at 896.

out.²⁰³ Champion grabbed her hand and began rubbing it all over his head, an action that had helped calm him in the past.²⁰⁴ The new caregiver did not understand this response, and, frightened by the behavior, locked herself and her son in the van, leaving Champion outside.²⁰⁵

Arriving in response to calls from other customers at the store,²⁰⁶ a police officer approached the caregiver and asked about the situation.²⁰⁷ The caregiver told the police officer that Champion was mentally ill, but she did not mention that he was non-responsive and unable to speak.²⁰⁸ The police officer approached Champion, who was biting and hitting himself, and asked him to tell his name and why he was so upset.²⁰⁹ Champion did not respond but instead began walking toward the officer.²¹⁰ When Champion did not comply with an order to stop his advance and grabbed the officer's shirt, the officer applied a "short burst of pepper spray to Champion's face."²¹¹ Champion then walked into the store, and the officer followed, ordering him to leave.²¹² Champion then turned toward the exit and once outside the store, another officer approached.²¹³ The two officers together tried to arrest him, but they were unsuccessful in getting him to comply with their instructions.²¹⁴ When a third officer arrived, they "decided to take Champion to the ground."²¹⁵ Placed face down, he began to struggle and kick.²¹⁶ Several witnesses said that during this time, the officers asserted control by "laying on top of" Champion and by continuing to use pepper spray.²¹⁷ After some minutes, Champion began to vomit; when the paramedics arrived, he had no pulse

203. *Id.*

204. *Id.*

205. *Id.*

206. DEBBAUDT, *supra* note 28, at 25 ("The call was dispatched as a domestic disturbance involving a man with mental retardation.")

207. *Champion v. Outlook Nashville, Inc.*, 380 F. 3d 893, 896 (6th Cir. 2004).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 896–97. The officer had retreated fifty feet through the parking lot at this time. *Id.* at 896.

212. *Id.* at 897.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 898.

and was in cardiac arrest.²¹⁸ Medical personnel were unable to revive him.²¹⁹

4. Raymond Mitchell

In July 2006, Raymond Mitchell, a twenty-one-year-old autistic man, died in the bedroom of his home after his mother called police to get help controlling her son's tantrum.²²⁰ "He's trying to get outside to break somebody's windshield,"²²¹ his mother, Wanda Mitchell, told the dispatcher, as she explained that her son was autistic.²²² She also told the two sheriff's deputies when they arrived that her son was autistic,²²³ and that she was "afraid he might hurt himself."²²⁴ Raymond was frightened when he saw the officers come into the house, and he hid himself in a bedroom closet, shouting "No police. I'm OK."²²⁵

Accompanied by the deputies, the mother was able to coax her son from the closet and convinced him to sit on the bed.²²⁶ When Raymond reached for a shirt from his mother, the two deputies "jumped on him and told [his mother] to leave the

218. *Id.* at 897.

219. *Id.* at 898. The plaintiffs filed § 1983 claims against defendant officers for violation of Champion's Fourth Amendment rights to be free from use of excessive force, and the defendants filed a motion for summary judgment, alleging qualified immunity. *Id.* In affirming the lower court's denial of defendants' motion for summary judgment, the 6th Circuit ruled that the evidence presented in the light most favorable to the plaintiff demonstrated that the officers had "unreasonably applied excessive force" to Champion in violation of his "clearly established rights." *Id.* at 904-05.

220. Douglas Quan, Meghan Lewit & Kimberly Trone, *Sheriff: Deadly Encounter Provoked*, PRESS-ENTERPRISE (Riverside, Cal.), July 22, 2006, at B1.

221. *Id.* Although he had once broken a neighbor's windshield during a tantrum, Raymond was not outside at the time of this episode. *Id.*

222. *Id.*

223. *Id.* There was also a sticker near the front door alerting visitors that a resident of the house had autism. Max & Quan, *supra* note 64. An example of such a sticker is found at *NewsBrief: Autism Society of America Initiative Keeps Families "Safe and Sound,"* AUTISM SPECTRUM Q., Spring 2006, at 50, 50 (announcing campaign to distribute "Safe and Sound" decals to alert safety personnel of the presence of an autistic person).

224. Quan, Lewit & Trone, *supra* note 220, at B1. Deputies had been called to the house in May, and when they arrived with the paramedics, they "spoke calmly with [her son] and were able to transport him to the hospital." *Id.*

225. Max & Quan, *supra* note 64, at A1. Family members explain that the man was "unable to carry on a conversation but could express when he wanted things." Quan, Lewit & Trone, *supra* note 220, at B1.

226. Max & Quan, *supra* note 64, at A1.

room,"²²⁷ and "they went right into a fight."²²⁸ Shortly thereafter, "several more deputies" entered the bedroom to assist and "dove on top of" the young man.²²⁹ He died a short time later.²³⁰

5. Cody Brother

On September 8, 2006, the police were Peggy Brother's last resort.²³¹ Her fifteen-year-old son, Cody, who had autism and several other physical and mental disabilities, was now homebound, having been bullied by peers at school and church.²³² Cody was too young to qualify for Medicaid-paid services, which could help him learn to manage his emotions and to participate in society.²³³ Counselors at the regional mental health center instructed her to "call 911 when his anger escalated, to help build a case for placement in a group home."²³⁴

On this day, Cody was upset that his mother had denied him something he wanted; he grabbed a mop as his tantrum spun out of control.²³⁵ His mother called the police.²³⁶ En

227. Quan, Lewit & Trone, *supra* note 220, at B1.

228. *Id.* (quoting Riverside County Sheriff Bob Doyle). "They were basically trying to physically restrain him with their hands." Max & Quan, *supra* note 64, at A1.

229. Quan, Lewit & Trone, *supra* note 220, at B1. The sheriff later explained that a third deputy arrived to assist in handcuffing the young man, but the fourth and fifth deputies came to "provide medical aid and to perform CPR." *Id.*

230. *Id.* It is not clear from publicly available sources whether Raymond died of injuries resulting from the bedroom altercation or from positional asphyxia associated with being handcuffed and placed in a face-down position. *See supra* text accompanying note 66 (discussing the dangers of placing a person with ASD in a face-down position). The coroner's and toxicology reports on Mitchell's death have been placed on hold by the sheriff's office. Burge, *supra* note 67, at B1. In its response to the lawsuit, sheriff's officials claim that Mitchell's death was the result of "excited delirium syndrome," a controversial condition that apparently "almost always involve[s] police." *Id.*

231. *See* Melissa DeLoach, *Suit Filed over Police Treatment of Autistic Teen*, SPRINGFIELD NEWS-LEADER (Springfield, Mo.), Sept. 26, 2006, at 1A [hereinafter DeLoach, *Suit Filed*].

232. Sarah Overstreet, *Seemingly Simplest of Special Needs Goes Unfilled*, SPRINGFIELD NEWS-LEADER (Springfield, Mo.), Nov. 27, 2005, at 1B.

233. *Id.*

234. DeLoach, *Suit Filed*, *supra* note 231, at 1A. As a result, family members had called police often enough that "the family [knew] many officers by name." *Id.* According to Peggy Brother, "Usually, [the officers] can just talk to him and he'd be OK." *Id.*

235. Melissa DeLoach, *Lawsuit over Teenager's Arrest Triggers Police Probe*, SPRINGFIELD NEWS-LEADER (Springfield, Mo.), Sept. 27, 2006, at 2B [hereinafter DeLoach, *Lawsuit over Teenager's Arrest*].

route to the home, the officers understood that a child was “out of control where a weapon had been used.”²³⁷ By the time officers arrived, Peggy Brother recalls that Cody had calmed down and “had nothing in his hands.”²³⁸ The officers approached Cody and attempted to handcuff him.²³⁹ When one of the officers grabbed Cody by the arms,²⁴⁰ he physically resisted.²⁴¹ In the ensuing struggle, Cody “str[uck the] officers with his fists and boots.”²⁴² The officers shoved Cody to the ground and punched him repeatedly in the face, neck, and head.²⁴³ One officer suffered injuries to his “right wrist, elbow and knee.”²⁴⁴ Cody required surgery for several broken bones and lost the sight in his right eye.²⁴⁵

D. *What These Scenarios Reveal*

These unfortunate encounters, like the tragic events of Paul Childs’s death, highlight three key areas in which “better training” for law enforcement personnel could lead to “better outcomes”: communication, recognition and response, and caregiver support. First, in an encounter with a person with ASD, police officers do not receive clear, accurate communication regarding the nature of the individual’s disability. Second, officers untrained to recognize signs identifying ASD are unable to respond with safe and appropriate tactics. Third, overwhelmed caregivers in crisis often have no means for relief besides turning to police for assistance.

The first key problem is poor communication to law enforcement personnel of information about the situation, the individual, and the disability. In many of the unfortunate encounters described above, someone tried to alert the law enforcement officer to the individual’s condition, saying he has a “mental problem,”²⁴⁶ has “special-needs,”²⁴⁷ is “mentally

236. DeLoach, *Suit Filed*, *supra* note 231, at 1A.

237. DeLoach, *Lawsuit over Teenager’s Arrest*, *supra* note 235, at 2B.

238. *Id.*

239. *Id.*

240. DeLoach, *Suit Filed*, *supra* note 231, at 1A.

241. DeLoach, *Lawsuit over Teenager’s Arrest*, *supra* note 235, at 2B.

242. *Id.* The officers also claimed that the boy “attempted to gain control of one officer’s pistol and knife.” *Id.*

243. *Id.*

244. *Id.*

245. DeLoach, *Suit Filed*, *supra* note 231, at 1A.

246. Kelly, *Cop Recounts Slaying*, *supra* note 13, at B1.

ill,"²⁴⁸ or "has a disability."²⁴⁹ But these words were not specific enough to signal to the officer that a different approach or more subtle tactics may have been required. Indeed, describing someone as mentally ill may suggest tactics, concerns, and fears to the mind of an officer very different from the ones appropriate to a situation involving a person with ASD.²⁵⁰ Furthermore, in the haste to convey information quickly, the descriptions provided are subject to generalization: the call from the kitten-owner that described Brian Bates as having "something obviously wrong with him" was passed along to the police as a "suspicious person" call,²⁵¹ and the mop handle in Cody Brother's hands became "a weapon."²⁵²

Another aspect of the communication problem amounts to who is heard by police officers during the encounter. As illustrated in the Wrongful Arrest cases of *Jackson* and *Lewis*, law enforcement officers appear to hear and internalize the opinions of third-party witnesses over the explanations offered by people who know the person with a disability or the disabled person himself.²⁵³ Vital explanations to police or dispatchers may be interrupted or discarded as irrelevant in the heat of the

247. Spencer, *Not Prepared*, *supra* note 3, at B1.

248. *Champion v. Outlook Nashville, Inc.*, 380 F. 3d 893, 896 (6th Cir. 2004).

249. *Irvine to Settle Suit*, *supra* note 170, at Metro-5. Only Mrs. Mitchell used the word "autism" to describe her son's condition, but even with this information, the deputies were unaware or mindless of the special tactics necessary to deal with a person with ASD. Quan, Lewit, & Trone, *supra* note 220.

250. DEBBAUDT, *supra* note 28, at 23. Modell & Cropp, *supra* note 51, at 61. Modell and Cropp observe that "police officers tend to develop attitudes of apprehension, fear, and anxiety based upon their perception that [the mentally ill] population is primarily represented by those with illnesses such a[s] paranoid schizophrenia." Modell & Cropp, *supra* note 51, at 61.

251. Brief of Appellee, *supra* note 188, at 4-5.

252. DeLoach, *Lawsuit over Teenager's Arrest*, *supra* note 235, at 2B. Note that these generalizations are not inaccurate in themselves, but to an officer who is arriving on the scene without knowing the full situation, the descriptions paint a different mental picture from the one originally related.

253. See also Bates *ex rel.* Johns v. Chesterfield County, 216 F.3d 367, 369 (4th Cir. 2000) (A neighbor who had witnessed the kitten encounter, but who had not spoken to Bates, described Bates to the officer: "I don't know if this boy is on drugs or drunk but he is acting weird or crazy." *Id.* However, the officer did not speak to the kitten owner, who would have been better able to describe the kind of behavior Bates was demonstrating, in other words, the inability to respond appropriately to questions and repeating the names of professional wrestlers.); *Irvine to Settle Suit*, *supra* note 170, at Metro-5 (police ignored Guido Rodriguez's mother and neighbors explanations that Rodriguez could not understand the officer's commands).

situation.²⁵⁴ Of course, the nature of ASD itself may leave the individual utterly unable to identify himself or to express what is wrong.²⁵⁵

The second key problem is that officers are unprepared to recognize and respond appropriately to signs that the contacted individual has ASD. Because the individual may be unable to communicate effectively with the officer and may not even understand why the officer is there, a person with ASD is particularly at risk for experiencing discrimination in the form of a Wrongful Arrest or a Failure to Accommodate and for the subsequent involvement in an Exigent Circumstance. For example, the *Bates* court observed that “in the midst of a rapidly escalating situation, the officers cannot be faulted for failing to diagnose Bates’s autism.”²⁵⁶ However, the case briefs suggest that at the time the officer first encountered Bates, there was no “rapidly escalating situation.”²⁵⁷ Instead, Bates “jumped up and down in the road,” and was unresponsive to commands.²⁵⁸ Furthermore, according to the Appellant’s brief, “[Bates’s] eyes were not bloodshot, his breath did not smell, he did not smell like marijuana, and he did not exhibit any other signs of intoxication.”²⁵⁹ The absence of those indicators coupled with the unusual behavior could have suggested to the officer—had he been trained to recognize the signs—that his initial suspicion of intoxication was incorrect and that another explanation for the behavior, such as ASD, might require an alternative approach to the situation.²⁶⁰ Certainly, an ASD-accommodating approach would not include shoving the boy off the motorcycle.²⁶¹ Similarly, if the officers encountering Champion and Mitchell had recognized the signs of ASD, they might have avoided the risk of death associated with placing a person with ASD on his

254. See, e.g., Kelly, *911 Tape*, *supra* note 9, at A1 (explaining that dispatcher twice cut off caller when she tried to explain her brother’s disability).

255. See *Champion v. Outlook Nashville, Inc.*, 380 F. 3d 893, 896 (6th Cir. 2004) (describing Champion as nonverbal and nonresponsive).

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

257. Brief of Appellee, *supra* note 188, at 6–7.

258. *Id.*

259. *Id.* at 25.

260. See *DAVIS & SCHUNICK*, *supra* note 27, at 66–67 (distinguishing ASD behaviors from intoxication or acts having criminal intent).

261. Brief of Appellee, *supra* note 188, at 7.

stomach²⁶² and could have avoided the encounters' tragic outcomes.

The third key problem is that caregivers in crisis often turn first to police for relief that police officers are ill-equipped to provide. The presence of a person with ASD places immense stresses on a household.²⁶³ The scenes described above make clear that as children diagnosed with ASD reach adolescence and adulthood, many caregivers find themselves overwhelmed in moments of crisis by the person's size and strength.²⁶⁴ As with many people facing a situation that is out of control, the caregivers often call on law enforcement for help. Unfortunately, many law enforcement officers are not properly equipped, either by training or temperament, to give the kind of support that is needed.²⁶⁵ Clearly, in order to preserve the rights of people with ASD in encounters with law enforcement officers, their special needs require improved communication, response and recognition, and caregiver support.

262. See DEBBAUDT, *supra* note 28, at 27 ("Never place a person with autism on his or her stomach."); see also *supra* note 66 and accompanying text.

263. See, e.g., Sheila Jennings, *Autism in Children and Parents: Unique Considerations for Family Court Professionals*, 43 FAM. CT. REV. 582 (2005) (describing extremely high rate of divorce among parents with an autistic child).

264. Consider the situations with Raymond Mitchell and Cody Brother. Recall that a crisis may be unpredictable and can arise from many sources, including frustration, inability to comprehend a situation, the need to satisfy an obsession, overwhelming sensory stimulus, illness, or a sudden change in routine or surroundings. Some crises have no observable cause. See, e.g., DEBBAUDT, *supra* note 28, at 23; see also National Center for Mental Health and Juvenile Justice, *Blueprint for Change: A Comprehensive Model for the Identification and Treatment of Youth with Mental Health Needs in Contact with the Juvenile Justice System, Program Description*, <http://www.ncmhjj.com/Blueprint/programs/Colorado.shtml> (last visited Sept. 23, 2007) ("[I]n 2003, crisis calls involving youth accounted for 14% of responses in Denver and 19% in Jefferson County.") [hereinafter *Blueprint for Change*].

265. See, e.g., DeLoach, *Suit Filed*, *supra* note 231, at A1 (quoting Springfield, Missouri, Police Department criminal investigation divisions commander, Steve Ijames, "[T]here is no special set of options for what to do when officers encounter someone both mentally disabled and violent."). Law enforcement and autism training specialist Dennis Debbaudt notes that even in a peaceful resolution to an encounter between a person with ASD and law enforcement, there may be additional risks to the person and his caregivers. If the officer is not trained to recognize ASD and has no resources with which to understand the situation, the officer may interpret the unusual safety precautions that a caregiver must take to protect a person with ASD from wandering, the evidence of self-inflicted bruising or the existence of clothing inappropriate to the weather, as signs of abuse or neglect. Dennis Debbaudt & Matt Brown, *The Autism Response Team: A Concept Whose Time Has Come*, AUTISM SPECTRUM Q., Spring 2006, at 8, 9-10.

III. THE SEARCH FOR SOLUTIONS

The “mindblindness” and behavior escalation characteristic of ASD, together with the ADA prohibition on disability-based discrimination, justify the call for “better training.” Examples of unfortunate law enforcement encounters make plain the desperate need for “better outcomes.” The next question is how to answer this call and satisfy the need. This Part evaluates and suggests means for achieving both “better training” and “better outcomes,” beginning with the proposal advocated by Paul Childs’s family, “Paul’s Law.”

A. *The City of Denver’s Response*

Shortly after Paul Childs’s death, his family hired Johnnie Cochran to pursue a claim for excessive force resulting in death against the City of Denver.²⁶⁶ The district attorney declined to file charges against Officer Turney,²⁶⁷ but in a move that roused the resentment of the city police,²⁶⁸ the city’s Manager of Safety suspended the officer for ten months without pay for making numerous tactical errors at the scene, including not “shut[ting] the security screen door in front of the home and back[ing] away.”²⁶⁹

266. *Johnnie Cochran Meets with Mayor over Paul Childs Case*, THE DENVER CHANNEL, Feb. 17, 2004, <http://www.thedenverchannel.com/news/4081046/detail.html>. Best known for his “If the glove doesn’t fit, you must acquit” defense of O.J. Simpson, it was said of Mr. Cochran that his name alone was often “enough to cause the other side to initiate settlement discussions.” Adam Liptak, *Obituary, Johnnie L. Cochran Jr., Trial Lawyer Defined by O.J. Simpson Case, is Dead at 67*, N.Y. TIMES, Mar. 30, 2005, at A15. The Paul Childs case was among the last in which Mr. Cochran personally would be involved. The city soon settled the case with the Childs family for a reported \$1.3 million. Harrison, *supra* note 10.

267. Kelly, *Cop Cleared*, *supra* note 10.

268. Sean Kelly, *Angry Cops Set to Visit Mayor: Threats of ‘Blue Flu’ Follow Penalty for Officer*, DENVER POST, Apr. 19, 2004, at A1.

269. *Suspension Overturned in Paul Childs Shooting*, THE DENVER CHANNEL, Jan. 13, 2005, <http://www.thedenverchannel.com/news/4081046/detail.html>. It was the “most severe penalty any Denver officer ha[d] received in connection with a shooting in the past decade.” *Id.* However, the suspension would later be overturned by a Civil Service Commission hearing officer, who found that the officer had violated no policies in the shooting. *Id.* The City of Denver appealed this ruling. Jim Kirksey, *Cop Penalty Case Moves Forward: Appeal Heard in Childs Shooting*, DENVER POST, Mar. 17, 2006, at 3B. On April 11, 2007, the Civil Service Commission overturned the hearing officer’s decision, reinstating Turney’s suspension. John C. Ensslin, *Officer’s Suspension Upheld in Death of Disabled Teenager*, ROCKY MTN. NEWS, Apr. 11, 2007, at 8. The commission faulted Turney for failing to take into account “the totality of the situation, [and] therefore disre-

The City of Denver and its mayor initiated significant police reforms to ensure that the city's "use of force policy and training indeed reflected best practices."²⁷⁰ The preamble to the use of force policy was amended to emphasize the police department's "commitment to preserving life," and the language of the policy was changed to clarify that officers would, "when practicable, employ tactics to de-escalate confrontations."²⁷¹ The department also stepped up its acquisition, distribution, and training in the use of Tasers and other "less lethal" weapons and began certifying its officers in Krav Maga, a self-defense system of martial arts.²⁷² In August of 2003, dispatchers and call-takers were trained to deal more effectively with special populations, including the mentally ill, developmentally disabled, and others experiencing emotional crisis.²⁷³

At the same time, the City began working with the State Department of Criminal Justice and the Greater Denver Ministerial Alliance to develop a "community-based mental health intervention program" which would assist in "getting people in crisis the professional help they need instead of placing them into the criminal justice system."²⁷⁴ By October 2003, the city raised its goal of administering Crisis Intervention Team ("CIT") training to the patrol division from 25% of the force to 50% of the force, twice the number required by the State of Colorado guidelines.²⁷⁵ In December of that year, the mayor announced that the City would require all future recruits to have a certificate in CIT and that the police department would hire a "mental health case manager to assist with the expansion of the CIT program."²⁷⁶

Meanwhile, the legislators sponsoring "Paul's Law" planned to meet with the state attorney general and other law enforcement officials.²⁷⁷ The resolution mandating special

gard[ing] the opportunity to de-escalate [his] force" *Id.* During the continuing appeals process, Turney had been assigned to the police property bureau. He may appeal the Civil Service Commission ruling. *Id.*

270. Letter from Gerald R. Whitman, *supra* note 14.

271. *Id.*

272. *Id.* However, while Tasers and martial arts training give officers a valuable alternative to employing lethal force, they are not necessarily helpful when the tactical situation calls for *de-escalation* of force.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. See Gutierrez, *supra* note 2.

training for all law enforcement officers regarding encounters with developmentally disabled persons was laid aside, however, when the parties involved agreed that the expanded crisis intervention team training satisfied the purposes of “Paul’s Law.”²⁷⁸ State police and sheriffs’ associations promised to make crisis-response training a priority,²⁷⁹ and basic crisis-management and “interaction with special populations” principles were included in the Peace Officers Standards and Training (“POST”) Board’s Basic Academic Training for all new law enforcement officers in the state.²⁸⁰ Additionally, the state legislature revised a statute in the summer of 2004 to allow a portion of the fees received for committing and discharging county prisoners to be used for training of local law enforcement officers, which “may include a crisis intervention training component to meet the needs of offenders with mental illness.”²⁸¹

B. Insights for ASD Advocates

The City of Denver’s response to the death of Paul Childs and the outcome of the “Paul’s Law” resolution do not completely satisfy the concerns of people with loved ones with ASD. However, the city’s reforms do touch on each of the main areas of concern. First, the issue of communication was addressed by the specialized training offered to dispatchers.²⁸² Second, getting more officers trained in crisis intervention and requiring new recruits to have received crisis intervention team certification²⁸³ increases the likelihood that an officer encountering a

278. E-mail from Michael Breeskin, Legal Counsel to Arc of Denver, to author (Oct. 13, 2006, 14:12:39 MST) (on file with author). Neither legislative sponsor of “Paul’s Law” responded to my inquiries on the subject.

279. *Id.*

280. COLORADO DEPARTMENT OF LAW, COLORADO PEACE OFFICER STANDARDS AND TRAINING MANUAL 2006, at C-20 to C-21, <http://www.ago.state.co.us/post/2006POSTMANUAL.pdf> (2006) [hereinafter POST MANUAL 2006]. The Peace Officer Standards and Training Board was created in 1992 by the Colorado General Assembly to “approve and revoke the approval of [peace officer] training programs and training academies, and to establish reasonable standards pertaining to [such training].” COLO. REV. STAT. § 24-31-303(1)(a) (2007).

281. COLO. REV. STAT. § 30-1-119 (2)(b) (2007).

282. See text accompanying note 273, *supra*.

283. See text accompanying note 271, *supra*. See POST MANUAL 2006, *supra* note 280, at F-3 (describing student law enforcement officer learning goal: “The student will explain the concept of ‘de-escalation of force.’”); *Blueprint for Change*, *supra* note 264. CIT has addressed the needs of persons having a mental health crisis:

person with a mental disability has been trained in the use of crisis de-escalation techniques. Finally, the development of community-based crisis-intervention centers²⁸⁴ offers the possibility of effective assistance to overwhelmed caregivers.

While these solutions are all excellent advances in the interaction between law enforcement officers and the developmentally disabled, they do not address the unique needs of people with ASD specifically. Although the dispatchers are now trained to better handle mental health crisis calls, it is not clear that there is any system of precisely inquiring about ASD or communicating that information to police. As observed in the real-life situations described above, conveying accurate and specific information about an individual's autism is of vital importance to the safety of both the officers and the individual.²⁸⁵

Furthermore, the sweeping reforms apply only in the City of Denver, not to the whole state of Colorado. For example, the "community-based crisis intervention program" supported in part by the State Department of Justice would be centered in Denver.²⁸⁶ As of January 2006, the state was still seeking funding for statewide expansion of the program.²⁸⁷ Also, by June 2004, officers from only just over 60% of the law enforcement agencies in the state received crisis intervention team training.²⁸⁸ Crisis intervention team training requires forty-five hours of an officer's time; the cost of increased crisis intervention training in Denver alone was estimated in 2004 to be \$450,000.²⁸⁹ Not all law enforcement agencies can afford this expense under Colorado's voter-mandated tight fiscal policy.²⁹⁰

[A]s of June 2004, over 1,250 officers from 46 local law enforcement agencies had been trained by Colorado's CIT program. Reports from CIT officers indicate that over 74 percent of CIT calls have resulted in transport to treatment, only 4 percent of responses involving a CIT officer have resulted in an arrest, and for over 97 percent of calls, no civilian or officer injuries occurred.

Id.

284. See *supra* note 274 and accompanying text.

285. See discussion, *supra* Part II.D..

286. See text accompanying note 274, *supra*.

287. *Blueprint for Change*, *supra* note 264.

288. *Id.* At that time, only forty-six agencies had received CIT training. *Id.* In 2006, there were 302 law enforcement agencies in the state. OFFICE OF THE ATTORNEY GENERAL (COLO.), ANNUAL REPORT 20 (2006).

289. Letter from Gerald R. Whitman, *supra* note 14.

290. See Editorial, *Cops Need Training on the Disabled*, DENVER POST, July 31, 2003, at B6 [hereinafter *Cops Need Training*]. The Taxpayers Bill of Rights, or TABOR, implemented by voter initiative in 1992, imposes strict limits on the

However, the changes in the POST basic training standards will eventually influence the entire state, because all law enforcement officers are required to be POST certified.²⁹¹

Even with POST certification, however, the exposure of trainees to the particular needs of persons with ASD is limited. The Basic Academic Training Program requires 546 hours of training of future law enforcement officers, only two hours of which are devoted to studying “Interaction with Special Populations,” through which the student is expected to “understand the laws protecting the rights of persons with disabilities in order to serve all individuals to whom the law[s] apply.”²⁹² The special populations covered “include but are not limited to the mentally ill, the elderly and the physically impaired,” persons with disabilities under the ADA, and persons requiring the aid of service animals.²⁹³ Obviously, there is not much time in the two hours to devote to the unique needs of persons with ASD.²⁹⁴

Of greater concern to ASD advocates is whether Colorado law enforcement training includes ASD as a disability. The POST “Interaction with Special Populations” module requires the student to identify and apply “state laws enacted to protect the rights of persons with disabilities,” and specifies provisions of the Colorado statutes defining the responsibility of state institutions regarding persons with mental illness.²⁹⁵ Colorado law expressly declines to apply the federal definition of “developmental disability.”²⁹⁶ Instead, in specifying the responsibility of state institutions regarding persons with developmental disabilities, Colorado defines developmental disability as a “substantial disability . . . attributable to mental retardation or

amount of revenue that can be collected or spent by state and local governments. See COLO. CONST., art. X, § 20.

291. See POST MANUAL 2006, *supra* note 280, at A-6; see also COLO. REV. STAT. §§ 16-2.5-102 (2007).

292. See POST MANUAL 2006, *supra* note 280, at C-20.

293. *Id.* at C-20 to C-21.

294. Compare COUNCIL OF STATE GOV'TS JUSTICE CTR., *Training Practitioners and Policymakers and Educating the Community*, in CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT REPORT 204, 213–14 (2002) (recommending that training in ASD and other neurological disorders be part of twenty-hour in-service and forty-hour advanced training programs; also emphasizing the need for regular refresher training).

295. POST MANUAL 2006, *supra* note 280, at C-20 (referencing COLO. REV. STAT. § 27-10-102, 105).

296. COLO. REV. STAT. § 27-10.5-102(11)(a) (2007).

related conditions which include . . . autism . . . when such conditions result in impairment of general intellectual functioning or adaptive behavior similar to that of a person with mental retardation."²⁹⁷

Although the definition expressly mentions autism, the qualifying conditions which follow are a poor fit for the unique characteristics of ASD. The statute fails to clarify which status—functional impairment or mental retardation—qualifies an individual for inclusion within the definition. Most individuals with ASD have normal or high intelligence, but “mindblindness” nevertheless significantly impairs their intellectual or adaptive behavior,²⁹⁸ particularly in the kinds of socially-structured responses expected by law enforcement officers.²⁹⁹ Thus, for the purposes of having their needs addressed by the state-directed police training curriculum, many persons with ASD might not be considered developmentally disabled because they are not mentally retarded.³⁰⁰ Without a clear understanding that social and sensory processing difficulty, rather than mental retardation, gives rise to the behavioral impairment associated with ASD,³⁰¹ police training contemplated under current Colorado law is unlikely to be effective in producing “better outcomes” for encounters between these people and police.

To supplement law enforcement officers’ training, especially in the area of dealing with ASD, volunteers have made a grassroots effort to get vital information about ASD to local law enforcement officers.³⁰² Without this information to help officers recognize and specifically respond to the unique needs of

297. COLO. REV. STAT. § 18-6.5-102(3)(d) (2007) (applying definition in COLO. REV. STAT. § 27-10.5-102(11)(a) (2007)).

298. See STROCK, *supra* note 29, at 25.

299. Recall the behavioral expectations described by Shields, *supra* note 160.

300. Very recent research has suggested that because traditional measures of intelligence depend on functional social processing systems, “intelligence has been underestimated” in persons with ASD. Michelle Dawson, et.al, *The Level and Nature of Autistic Intelligence*, 18 PSYCHOL. SCI. 657, 661 (2007). Indeed, when intelligence was assessed using tools that did not demand functional social processing systems, as few as five percent of persons with ASD would have scored within the “range of mental retardation.” *Id.* at 659.

301. See discussion, *supra* I.B.1.

302. See, e.g., Message from Theresa K. Wrangham, President, Autism Society of Boulder County, to members (2006) (on file with author) (2006 goal included purchasing and presenting to Boulder Police a field book and video to educate officers about the difference between ASD behavior in comparison to threatening behavior).

people with ASD, these people remain at risk of a Wrongful Arrest or a Failure to Accommodate their disability in an encounter with police. Additionally, crisis intervention training is not a guarantee of a safe resolution in an “exigent circumstance”; recall that one CIT-trained officer was present at the shooting of Paul Childs.³⁰³ “The CIT officers are trained to de-escalate and communicate,” explained one Denver officer, “[b]ut that doesn’t mean they won’t be forced to use lethal means to resolve a situation.”³⁰⁴

1. What Can Friends and Family of People with ASD Do?

The outcome of the “Paul’s Law” proposal, along with an understanding of how the ADA does and does not protect the rights of people with ASD³⁰⁵ suggests that there are three things that friends and family of persons with ASD should do. First, as far as it is practical, they should encourage “law enforcement awareness” in the person with ASD by familiarizing the individual with local police officers: who they are, what their vehicles and uniforms look like, and why it is important to follow their instructions.³⁰⁶ They should practice “scripts” and “social stories” with the individual, helping him develop a rote response for use in a contact with police.³⁰⁷ Where possible, the script or story should include appropriate ways to call for help in an emergency and a method by which the individual can inform a police officer about his ASD, either orally or by sign or card.³⁰⁸ Second, caregivers and family members should make local police aware of the presence of a person with ASD and should consider participating in a local database which

303. *Cops Need Training*, *supra* note 290. Officer Turney was not CIT-trained. *Id.*

304. Simpson & Ingold, *supra* note 1.

305. As discussed in *I.C.*, *supra*, the officer’s responsibility to protect the rights of the disabled individual depends largely on whether the officer is or should have been aware of the disability or not at the time of the encounter, before any escalation of behavior has taken place.

306. DEBBAUDT, *supra* note 28, at 99.

307. DAVIS & SCHUNICK, *supra* note 27, at 110–13. A script is a pattern of what to say or do in a given situation, learned through repetition. A social story is a story-telling description of possible events, suited to the individual’s lifestyle, repeated often to familiarize the person with what to expect in foreseeable circumstances.

308. *Id.* at 99, 101.

alerts law enforcement and other first responder personnel to the presence, description, and characteristic habits of the individual.³⁰⁹ The use of such a database, while sacrificing some privacy, will help to ensure that accurate information about the individual and his ASD is relayed during a crisis.³¹⁰ Third, caregivers and family members should prepare a handout or card describing the individual, along with basic information about ASD, to aid in quickly explaining to a law enforcement officer what to do and what to expect in a contact with the individual.³¹¹

Even when officers are aware that an individual has ASD, however, they will not know to modify their law enforcement techniques unless they have been trained in the unique needs and particular dangers faced by persons with ASD.³¹² The training must promote understanding and attitudes that help police officers recognize and respond effectively, including opportunities to interact with individuals with ASD in positive situations.³¹³ Parents and friends of persons with ASD can and should create more opportunities for officers to receive this vital training by encouraging community ASD-awareness campaigns, by participating in national advocacy organizations, and by becoming a trainer in ASD-awareness presentations.³¹⁴

309. *Id.* at 39–43; DAVIS & SCHUNICK, *supra* note 27, at 95. The Pensacola, Fla. Police Department "Take Me Home Program" program is an example of such a database. See Pensacola Police Dep't, Take Me Home Video, available at http://www.ci.pensacola.fl.us/ppd/pages.asp?pg_id=5551 (last visited Sept. 24, 2007).

310. Indeed, because of federal privacy regulations such as the Health Insurance Portability and Accountability Act and the Family Educational Rights Privacy Act, which severely restrict the release of personally identifiable medical and educational information, the only way an ASD-response database can be created is by voluntary participation. Families and caregivers must weigh the benefit of hopefully better outcomes against the price of reduced privacy. See JOINT STUDY COMMITTEE, *supra* note 14, at 6.

311. DAVIS & SCHUNICK, *supra* note 27, at 109–10; DEBBAUDT, *supra* note 28, at 40–41; see also NAT'L AUTISTIC SOC'Y, *supra* note 30, at 14, 18 (describing the 'Autism Alert' card, a wallet-sized guide to ASD designed to assist people with ASD in explaining the condition).

312. Consider that Mrs. Mitchell informed the 911 dispatcher that her son was autistic. Max & Quan, *supra* note 64.

313. See Modell & Cropp, *supra* note 51, at 63.

314. DEBBAUDT, *supra* note 28, at 113–27.

2. Legislative Solutions

In Colorado, a state-level legislative solution may be necessary because reforms like those instituted following Paul Childs's death did not reach the entire state and did not ensure that every law enforcement officer is made aware of the special needs of people with ASD. Although the sponsors of "Paul's Law" ultimately decided not to present the bill to the Colorado General Assembly, other states recently have considered similar legislation. In the summer of 2006, the state of Delaware recognized the need for law enforcement officer training regarding mental disabilities by unanimously passing House Bill 443, which required specific police "training to assist them in identifying symptoms of mental illness, mental disability and/or physical disability and in responding appropriately to situations involving persons having a mental illness, mental disability, and/or physical disability."³¹⁵

At about the same time, a bill in Maine met a fate similar to "Paul's Law." The bill, "An act to Require Mandatory Training for Law Enforcement Officers and Prosecutors Regarding Interaction with People with Developmental Disabilities, Including Autism Spectrum Disorders," was introduced to the legislature in late 2005 by State Senator Philip Bartlett at the request of a constituent who had a daughter with ASD and had encountered difficulties getting a local prosecutor to understand how best to deal with someone with ASD.³¹⁶ The training proposed was based on a training program offered by Matt Brown, a federal probation officer whose son has ASD.³¹⁷ The strong support for the legislation evidenced at its public hearing convinced the director of the state Criminal Justice Academy to directly implement the training program into the standard curriculum.³¹⁸ With most of the purpose of the bill accomplished by this move, the bill was withdrawn from consideration.³¹⁹

Any legislation in Colorado regarding specialized police training likely would be met with concerns similar to those ex-

315. DEL. CODE ANN. tit. 11, § 8405 (2006) (effective Jan. 1, 2007).

316. E-mail from Philip Bartlett, Maine State Senator, to author (July 12, 2006, 06:36:49 PDT) (on file with author).

317. Brown, *supra* note 38, at slide 2.

318. E-mail from Philip Barlett, *supra* note 316.

319. *Id.*

pressed by critics of "Paul's Law." Concerns about financing the training are likely to be paramount.³²⁰ Another criticism of a training law such as "Paul's Law" might be that it would "second-guess"³²¹ officers in the field, making them ineffective at their primary responsibility of "uphold[ing] the law and ensur[ing] public safety."³²² A third major objection would be that such a law would be "soft on crime"³²³ or "coddle"³²⁴ wrong-doers. These issues likely would complicate the passage of an ASD awareness-training law, so advocates need to show how the desired solution addresses these concerns.³²⁵ For example, advocates can argue that training officers to recognize communication disabilities and thereby adjust tactics in the long run results in taxpayer savings, because it reduces the risk of defending against a heartbreaking and expensive wrongful death or disability discrimination claim.³²⁶ Advocates can also point out that effective training promotes the mental health of officers, by alleviating officer fear and anxiety and by encouraging a practical balance between threat readiness and social service.³²⁷ Finally, advocates can emphasize that concerns about "coddling wrong-doers" reflect the mistaken equation of socially-atypical ASD behavior with criminal wrong-doing, a mistake particularly susceptible to correction by education.³²⁸

320. See *supra* text accompanying notes 289–93.

321. See Kelly, *911 Tape*, *supra* note 9; see also *Graham v. Connor*, 490 U.S. 386, 387 (1989) (holding that reasonableness of an officer's actions in a situation "must be judged from the perspective of a reasonable officer on the scene," rather than with the 20/20 vision of hindsight).

322. *Bates ex rel. Johns v. Chesterfield County*, 216 F.3d 367, 372 (4th Cir. 2000).

323. See *Gutierrez*, *supra* note 159.

324. See *Simpson & Ingold*, *supra* note 1, at 7A.

325. It should not be overlooked, however, that the people of the State of Colorado reserve to themselves the right to legislate by initiative. COLO. CONST. art V, § 1(2). A direct appeal to the electorate could achieve the desired legislation, and simultaneously raise ASD awareness.

326. Recall that the City of Denver settled the Paul Childs claim for a reported \$1.3 million. *Harrison*, *Settlement Reached*, *supra* note 10.

327. See *Modell & Cropp*, *supra* note 51, at 62 ("It is critical that police stay prepared for physical threats; however it is equally important to balance the warrior attitude [the mindset that one is in a battle zone] with [the attitude] of social service.").

328. *Id.* at 63 ("Effective training is one way to address perceptions and attitudes, thereby affecting predictable behavior to be more consistent with best practices . . .").

Recognizing the critical need for accurate information about ASD, sensitive response in police encounters, and improved caregiver support, ASD advocates recently advanced another approach. In 2006, law enforcement and autism-awareness experts Dennis Debbaudt and Matt Brown introduced the idea of Autism Response Teams (“ARTs”). These teams would be groups of volunteers serving at state and local levels who are specially tasked to ensure that law enforcement officers have immediate access to information and resources about ASD.³²⁹ An ART would:

Develop state-certified law enforcement and first response training models with test modules to be used at roll call, pre-shift, academy, and in-service training sessions.

Assist and consult [first responder] and [criminal justice system] personnel either on-site or via telephone or radio, and remain involved throughout every step of the case.

Develop and disseminate information that adults [with ASD], family members, educators, and professional care providers can use to avoid and/or prepare themselves for an emergency, first response, or criminal justice contact.

Promote partnerships among those in the law enforcement professions, [persons with ASD, ASD service providers], and the community at-large.

Assist in the creation of 9-1-1 database alerts. Families whose loved ones wander can participate by volunteering information that can be placed in the database so that dispatchers could alert first responders to specialized needs before they arrive on scene.³³⁰

The need for specialized response teams for incidents beyond the scope of ‘normal’ police activities has long been acknowledged in the law enforcement community.³³¹ Officers are trained first to recognize signs indicating that a special re-

329. Debbaudt & Brown, *supra* note 265.

330. *Id.*

331. Jarrod J. Smith, *Liability Issues of Developing and Maintaining a Special Response Team*, 3 (Mar. 7, 2005) (unpublished thesis, School of Law Enforcement Supervision, Criminal Justice Institute), *available at* <http://www.cji.edu/CJI/CenterInfo/lemc/papers/SpecialResponseTeam.pdf>.

response is necessary and then to call for assistance from the appropriate team. ARTs would support police in their duty to protect the community by providing access to accurate and immediate information and tactics for use in an encounter with a person with ASD. Efforts to establish and fund ARTs are currently underway in Maine. Colorado and other states would do well to follow Maine's lead.

CONCLUSION

Persons with ASD have very special needs that make them vulnerable to discriminatory treatment and increase the risk of a dangerous "exigent circumstance" situation in an encounter with police. Too many law enforcement officers are not trained to recognize the signs of this increasingly common disability, and they are therefore unable to use effective tactics in response, resulting in harm to the individual, the police officer, and the community.

However, this unfortunate situation can be changed. Those who recognize this problem can take action to safeguard the rights of their loved ones. First, ASD advocates can encourage training—both for their loved ones and for local police officers—regarding ASD-police interaction. Second, advocates can work toward establishing methods, including Autism Response Teams, for communicating timely and precise information to police about the presence and needs of people with ASD in the community. Third, advocates can promote changes in the law that enhance the support available to caregivers and that clarify that impairment of function—rather than mental retardation—characterizes the developmental disability of ASD. With the protection of "better training" in place, we can enjoy the "better outcome": increased safety for our loved ones, our valiant police officers, and our communities.

