

A Use of Deadly Force: People with Mental Health Conditions and Encounters with Law Enforcement

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Law enforcement officials are trained to de-escalate tensions and refrain from the use of lethal force when possible. Yet during police encounters, people with disabilities, and particularly those with mental health conditions, experience fatal violence at a disproportionate rate compared to other populations. The federal Courts of Appeals are split on whether the Americans with Disabilities Act (“ADA”) applies to police arrests, and in 2015 the United States Supreme Court declined an opportunity to address the question directly. Now, in 2019, the Court may once again consider the question. This Note attempts to explain why people with mental health conditions have such frequent and violent encounters with police. It also argues that while federal courts remain divided on what the ADA requires, this uncertainty creates space for state and local police departments to serve as “laboratories” and develop progressive procedures that respect the rights and dignities of people with mental health conditions.

INTRODUCTION

In recent years, social media posts have highlighted encounters between law enforcement officials and people of color which have often ended in the use of deadly force and generated considerable public outcry across the United States.¹ The debate on police violence has focused less attention on people with disabilities, and particularly those with mental health condi-

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1. See, e.g., *Police Brutality at Harvard*, April 13, 2018, HARVARD BLACK LAW STUDENTS ASSOCIATION (Apr. 14, 2018), <https://orgs.law.harvard.edu/blsa/media-gallery/police-brutality-at-harvard-april-13-2018/> [<https://perma.cc/MP6Z-6XRB>] (noting “[t]he broader issues of police violence against Black and Brown people . . . [are] a symptom of a larger, systemic problem.”); Sarah Almkhatar et al., *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, N.Y. TIMES (Apr. 19, 2018), <https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html> [<https://perma.cc/2V4Z-GTKG>] (“Raw videos that show officers shooting and beating unarmed black people have stirred outrage and prompted disbelief. Captured by cellphones or police cameras, footage has spread through social media, shining a light on disturbing police encounters . . . The videos have led to nationwide protests and federal investigations.”).

tions,² who also encounter law enforcement and the criminal justice system at disproportionate rates.³

This Note examines the initial stage of interaction between law enforcement officers and people with mental health conditions. Part I reviews the scant empirical evidence on people with mental health conditions and police violence. It also examines media reports of police shootings and shows that confrontations between police and people with mental health conditions often arise because of breakdowns in communication between the officers and the people they are supposed to help. Part II analyzes the Supreme Court's consideration of whether the Americans with Disabilities Act ("ADA")⁴ requires law enforcement officers to provide people with mental health conditions reasonable accommodations during arrest.⁵ While the Court declined to answer that question in 2015, it will have another opportunity to clarify this uncertainty in 2019, as the lower federal courts continue to grapple with the issue. Finally, Part III explores the policy responses which some municipal police departments have implemented to reduce the risk of escalation when responding to people with mental health

2. This Note uses the National Alliance on Mental Illness ("NAMI") definition of mental health condition as "[a] condition that affects a person's thinking, feeling or mood. Such conditions may affect someone's ability to relate to others and function each day. Each person will have different experiences, even people with the same diagnosis." *Mental Health Conditions*, NATIONAL ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/learn-more/mental-health-conditions> [https://perma.cc/Q7V3-AGNS].

3. Bazelon Ctr. for Mental Health Law, *Law Enforcement Responses to Disabled Americans: Promising Approaches for Protecting Public Safety*, Testimony submitted to the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights, at 1 (Apr. 29, 2014), https://oocomc.org/wp-content/uploads/2014/04/Statement_Law-Enforcement-Disability-Hearing_4-28-14.pdf [https://perma.cc/4663-G9VC] ("Individuals with mental illness are much more likely to be arrested and studies have found that rates of arrest among public mental health service recipients are 'roughly 4.5 times higher than those observed in the general population.'") (citations omitted); REBECCA VALLAS, CENTER FOR AMERICAN PROGRESS, *DISABLED BEHIND BARS: THE MASS INCARCERATION OF PEOPLE WITH DISABILITIES IN AMERICA'S JAILS AND PRISONS*, at 1–2 (July 18, 2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/07/18000151/2CriminalJusticeDisability-report.pdf> [https://perma.cc/G9TW-VW9J].

People with disabilities are thus dramatically overrepresented in the nation's prisons and jails today. According to the Bureau of Justice Statistics, people behind bars in state and federal prisons are nearly three times as likely to report having a disability as the nonincarcerated population, while those in jails are more than four times as likely. Cognitive disabilities—such as Down syndrome, autism, dementia, intellectual disabilities, and learning disorders—are among the most commonly reported: Prison inmates are four times as likely and jail inmates more than six times as likely to report a cognitive disability than the general population. People with mental health conditions comprise a large proportion of those behind bars, as well. The Bureau of Justice Statistics reports that fully 1 in 5 prison inmates have a serious mental illness.

4. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (2013) (amended 2008).

5. This Note uses the term "arrest" because courts have framed the issue of whether the ADA applies in that context. See *infra* Section II, B pp. 6–9. Specifically, the Supreme Court framed the Question Presented as whether the ADA applies to officers bringing an "armed, violent, and mentally ill . . . suspect into custody." See Sheehan *infra* note 37. However, in many cases the individual with a mental health condition has not committed any crime and the police are summoned on a non-emergency basis to provide medical or other assistance. An alternative way to frame the issue might ask whether the ADA applies to law enforcement activities, including arrests.

conditions in their communities. Absent a decision that the ADA does not apply, these jurisdictions have space to serve as “laboratories” to pilot new, inclusive procedures. Overall, this Note reveals that while there are steps in the right direction, much work is still necessary to promote the social model of disability⁶ and sensitize law enforcement officials to the rights and needs of people with mental health conditions.

I. QUANTITATIVE DATA AND MEDIA REPORTS

At over 1 billion, people with disabilities comprise the world’s largest minority group.⁷ In the United States, over 9.8 million people, or one in twenty-five adults, experience a serious mental health condition which substantially interferes with a major life activity.⁸ Yet the quantitative data available on police shootings and people with mental health conditions is scant. While at least five federal databases share responsibility for tracking fatal law enforcement encounters, a combination of factors—absence of standardized definitions, lack of universal participation, inconsistent data collection and reporting methods, and lack of central oversight—have produced little hard data.⁹ Although better data is available at the state and municipal level, none of the datasets track mental health indicators as a discrete category.¹⁰

Nonetheless, the available data paints a bleak picture. According to the Ruderman Foundation, about one-half to one-third of all individuals police kill have a disability.¹¹ Similarly, based on data from 2015, the *Washington Post* reported that about a quarter of the people police killed had some type of mental health condition.¹² At the very least, this evidence suggests a risk

6. See *infra* note 56.

7. *World Report on Disability, Factsheet: main messages and recommendations*, WORLD HEALTH ORGANIZATION http://www.who.int/disabilities/world_report/2011/factsheet.pdf [https://perma.cc/WLG3-NPXH] (“There are over one billion people with disabilities in the world, of whom between 110–190 million experience very significant difficulties. This corresponds to about 15% of the world’s population and is higher than previous World Health Organization (WHO) estimates, which date from the 1970s and suggested a figure of around 10%.”).

8. *Mental Health by the Numbers*, NATIONAL ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/Learn-More/Mental-Health-By-the-Numbers> [https://perma.cc/Z2FR-JEJ7] (“Approximately 1 in 25 adults in the U.S.—9.8 million, or 4.0%—experiences a serious mental illness in a given year that substantially interferes with or limits one or more major life activities.”).

9. See TREATMENT ADVOCACY CENTER, *OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS 6–7* (Dec. 2015), <http://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf> [https://perma.cc/VG55-XU69].

10. *Id.* at 8 (“Not one of these databases collects or reports mental health factors.”).

11. DAVID M. PERRY & LAWRENCE CARTER-LONG, *RUDERMAN FOUNDATION, THE RUDERMAN WHITE PAPER ON MEDIA COVERAGE OF LAW ENFORCEMENT USE OF FORCE AND DISABILITY: A MEDIA STUDY (2013–2015) AND OVERVIEW*, at 1, 7–8 (Mar. 2016), http://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf [https://perma.cc/XSB6-43DL].

12. *995 People Shot Dead By Police in 2015*, WASH. POST (July 2016), <https://www.washingtonpost.com/graphics/national/police-shootings/> [https://perma.cc/FU2Y-ZHP8] (noting 257 “yes” for and 738 “no” for “signs of mental illness”). *The Guardian* reports similar figures for 2015, with 270 of 1,146 or

of violence that is often lethal when people with mental health conditions encounter law enforcement. Examining a few of the many news reports on police shootings of people with mental health conditions helps to demonstrate what occurs during these encounters.

In California, thirty-four-year-old Errol Chang had schizophrenia and was in a mental health crisis when his parents called the police in Pacifica and Daly City for help.¹³ After the police informed Chang that they were simply there to talk to him, he rejected their offer of assistance and barricaded himself inside his home.¹⁴ A SWAT team, armed with assault rifles, arrived and instructed Chang to exit the building, throwing flash-bang grenades into the home to scare him.¹⁵ After six hours, the SWAT team entered the home, found Chang holding a knife, and shot and killed him after he stabbed an officer in the arm.¹⁶

In Boston, the police killed Terrence Coleman, who had a mental health condition, after his mother called police to take him to the hospital.¹⁷ According to his mother, Coleman was calm but became agitated when he saw the flashing blue police lights and told EMTs he did not want to receive treatment.¹⁸ When they heard a scuffle between Coleman and the EMTs, police officers tackled and shot Coleman.¹⁹

In New York City, police recently shot and killed Saheed Vassell, a man with bipolar disorder, because they believed he was holding and pointing a gun.²⁰ In fact, the object turned out to be a metal pipe.²¹ Neighbors said those in the area knew about Vassell's disability. Some witnesses said the police gave no commands before shooting, while others claim Vassell and an officer exchanged words before the shooting began.²²

A common pattern emerges from these stories: a family or community member calls the police to assist a person with a mental health condition

about 20 percent of those killed by police having a mental health condition. See *The Counted*, THE GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> [https://perma.cc/MY56-JC63].

13. Alex Emslie & Rachel Bale, *More Than Half of Those Killed by San Francisco Police Are Mentally Ill*, KQED NEWS (Sept. 30, 2014), <https://www.kqed.org/news/147854/half-of-those-killed-by-san-francisco-police-are-mentally-ill> [https://perma.cc/VNK3-NAAB].

14. *Id.*

15. *Id.*

16. *Id.*

17. Alanna Durkin Richer, *Boston sued over 2016 police shooting of mentally ill man: The suit seeks to force a change in how first responders deal with people with mental illnesses*, ASSOCIATED PRESS (Apr. 4, 2018), <https://www.boston.com/news/local-news/2018/04/04/boston-sued-over-2016-police-shooting-of-mentally-ill-man> [https://perma.cc/5U62-AFZK].

18. *Id.*

19. *Id.*

20. Brandon E. Patterson, *A Mentally Ill New Yorker Was Killed After Four Cops Shot at Him Ten Times. He Was Holding a Pipe*, MOTHER JONES (Apr. 5, 2018), <https://www.motherjones.com/crime-justice/2018/04/a-mentally-ill-new-yorker-was-killed-after-four-cops-shot-at-him-ten-times-he-was-holding-a-pipe/> [https://perma.cc/4ZX6-XXXG].

21. *Id.*

22. *Id.*

who is in crisis and holding a weapon (or perceived weapon); the police arrive; the individual becomes agitated; and the police respond with force. One explanation might be that law enforcement personnel demand and are accustomed to compliance when they arrive at a new, unfamiliar situation. However, a person with a mental health condition may not always understand the officers' commands in a tense, time-sensitive encounter. In turn, the officers perceive the individual as non-compliant and respond with force.²³ Thus, to prevent these tragic outcomes, law enforcement officials should accommodate a person's disability when engaging with them during an arrest. However, the source of a legal obligation to do so and the precise contours of that obligation remain unclear.

II. ADA TITLE II AND THE SUPREME COURT'S DECISION IN *SHEEHAN*

A. *The Statutory Scheme Under the ADA*

The ADA is Congress's attempt to ameliorate broad discrimination against people with disabilities²⁴ that persists in almost every aspect of daily life at the federal, state, and local levels, and in the realm of public accommodation provided by private entities.²⁵ It is the "gold standard" national disability rights law. Governments around the world have adopted or modified its provisions as model legislation for their own countries.²⁶

Title II of the ADA, which applies to state and local governments,²⁷ commands that "no qualified individual with a disability shall, by reason of

23. See David M. Perry & Lawrence Carter-Long, *How Misunderstanding Disability Leads to Police Violence: Americans with disabilities are victims of violent crimes at nearly three times the rate of their peers*, THE ATLANTIC (May 6, 2014), <https://www.theatlantic.com/health/archive/2014/05/misunderstanding-disability-leads-to-police-violence/361786/> [<https://perma.cc/RJ44-YEHQI>] ("While specific details vary by case, the common threads that link these stories together are often disconcerting. Law enforcement officials expect and demand compliance, but when they don't recognize a person's disability in the course of an interaction, the consequences can be tragic. Misconceptions or assumptions can lead to overreactions that culminate in unnecessary arrest, use of pepper spray, or individuals being tasered.")

24. In civil rights cases, plaintiffs often bring parallel claims under both the ADA and the Rehabilitation Act since the statutes provide identical "remedies, procedures and rights." See *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000). The ADA provides a tri-part definition of disability: "The term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))." 42 U.S.C. § 12102(1).

25. See 42 U.S.C. § 12101(a)(3) (noting "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services").

26. ARLENE B. MAYERSON & SILVIA YEE, DISABILITY RIGHTS DEFENSE & EDUCATION FUND, *THE ADA AND MODELS OF EQUITY*, <https://dredf.org/news/publications/disability-rights-law-and-policy/the-ada-and-models-of-equality/> [<https://perma.cc/Q3ZK-FTYJ>] ("The Americans with Disabilities Act[] has been a hallmark around the world encouraging the development of disability civil rights in international forums and in countries everywhere. The ADA is being studied and used as a model internationally. Many foreign activists have come here to talk to many of us, and American disability activists have been invited to speak to activists and governmental policymakers around the world.")

27. See 42 U.S.C. § 12131(1)(B) (defining "public entity" in part as "any department, agency, special purpose district, or other instrumentality of a State or States or local government").

such disability, be excluded from participating in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”²⁸ Title II defines a “qualified individual with a disability” as “an individual with a disability who, with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”²⁹

Discrimination includes the failure to accommodate a person’s disability. According to the United States Department of Justice, the federal agency with statutory authority to issue regulations under Title II, “[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”³⁰ However, while the ADA’s statutory framework provides a wide mandate to stop public entities from discriminating on the basis of disability, case law is divided on whether it applies to arrests by law enforcement officials.

B. *The Circuit Split on Accommodation During Arrest*

The federal Courts of Appeals are split on the question of whether ADA Title II requires law enforcement officials to accommodate a person with a disability during arrest and to what degree the level of danger (or perceived danger) a person displays impacts whether the ADA applies.

On the one hand, at least two circuits have categorically held that police officers do not need to make reasonable accommodations for a qualified individual in light of safety concerns. The Fifth Circuit determined that “Title II does not apply to an officer’s on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer’s securing the scene and ensuring that there is no threat to human life.”³¹ The Sixth Circuit likewise argued that “[w]e rely on and expect law enforcement officers to respond fluidly to changing situations and individuals they encounter. Imposing a stringent requirement under the ADA is inconsistent with that expectation, and impedes their ability to perform their duties.”³² Thus, these circuits indicate that Title II’s requirement of reasonable accommoda-

28. 42 U.S.C. § 12132.

29. 42 U.S.C. § 12131(2).

30. 28 C.F.R. § 35.130(b)(7).

31. Hainze, 207 F.3d at 801.

32. *Tucker v. Tennessee*, 539 F.3d 526, 536 (6th Cir. 2008 abrogated on other grounds by *Anderson v. City of Blue Ash*, 798 F.3d 338, 357 (6th Cir. 2015)); see also *Roell v. Hamilton Cty.*, Ohio, 870 F.3d 471, 489 (6th Cir. 2017) (“In the context of the exigent circumstances surrounding [decendent] Roell’s arrest, [plaintiff] Nancy Roell cannot make out a viable ADA claim under her failure-to-accommodate theory.”).

tion for qualified individuals does not apply in situations where an officer perceives a threat to human life.

By contrast, other circuits have rebuffed the Fifth and Sixth Circuit approaches. For instance, the Eleventh Circuit held that:

[T]he question is not so much one of the applicability of the ADA because Title II prohibits discrimination by a public entity by reason of [a qualified individual's] disability. The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance.³³

The Eighth Circuit similarly found that an:

[i]nquiry into whether officers reasonably accommodated the individual is 'highly fact-specific and varies depending on the circumstances of each case, including the exigent circumstances presented by criminal activity and safety concerns' and that 'we will not second guess [an officer's] judgments, where . . . an officer is presented with exigent or unexpected circumstances.'³⁴

The Fourth Circuit agreed that "exigency is one circumstance that bears materially on the inquiry into reasonableness under the ADA."³⁵ Finally, the Tenth Circuit succinctly declared that "a broad rule categorically excluding arrests from the scope of Title II . . . is not the law."³⁶ Thus, for these circuits,³⁷ the ADA applies to arrests in all circumstances, but "exigent" circumstances may inform the reasonableness of the accommodation a law enforcement official must provide the qualified individual with a disability. In 2015, the Supreme Court had an opportunity to resolve the split but declined, leaving the circuit-specific approach in place.

C. *The Supreme Court's Missed Opportunity in Sheehan*

The facts of Teresa Sheehan's story resemble many of the stories discussed above, except that her ordeal was not fatal. Sheehan has a schizoaffective

33. *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1085 (11th Cir. 2007) (further noting "the question is whether, given criminal activity and safety concerns, *any modification of police procedures is reasonable* before the police physically arrest a criminal suspect, secure the scene, and ensure that there is no threat to the public or officer's safety") (emphasis added).

34. *De Boise v. Taser Int'l, Inc.*, 760 F.3d 892, 899 (8th Cir. 2014) (quoting *Bahl v. Cty. of Ramsey*, 695 F.3d 778, 784–85 (8th Cir. 2012)).

35. *Waller ex rel. Estate of Hunt v. City of Danville*, 556 F.3d 171, 175 (4th Cir. 2009).

36. *Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir. 1999).

37. The Ninth Circuit joined the Eleventh and Fourth Circuits in this view, and as explained below, the Supreme Court did not address the issue in its Opinion but reversed on the second Question Presented about qualified immunity for police officers. See *Sheehan v. City and Cty. of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd*, 135 S. Ct. 1765, 1773–74 (2015).

disorder and lived in a group home with other people with disabilities.³⁸ At the time of the incident, she had no criminal record but was off her medication and reportedly not eating or changing her clothes.³⁹ Her social worker, Heath Hodge, became concerned enough to order an involuntary medical intervention authorized under the California Civil Code.⁴⁰ When Hodge approached her room, Sheehan sprang from her bed and demanded he leave, shouting “I have a knife, and I’ll kill you if I have to.”⁴¹ Hodge exited the room, evacuated other residents in the building, and placed a non-emergency call to the San Francisco police department requesting assistance to take Sheehan to the hospital.⁴²

Two officers arrived and knocked on Sheehan’s door, announcing themselves as police and indicating they wanted to help her.⁴³ Sheehan did not respond, so the officers opened her door using a key Hodge provided them and confronted her.⁴⁴ In response, Sheehan grabbed a kitchen knife and told the officers she would kill them if they did not leave.⁴⁵ The officers exited the room, closing the door behind them, and waited for other officers trained in de-escalation techniques to arrive.⁴⁶

At this point, the officers had a choice to make. Knowing that Sheehan was agitated, they could have waited for the specially-trained unit to arrive and de-escalate the situation. After all, a door separated them from Sheehan and they were aware of her disability. Indeed, this is what an accommodation under Title II of the ADA might look like—officers considering a person’s disability and taking measures to account for it. The building was empty of other residents, the City of San Francisco had already invested resources to create, train, and dispatch the de-escalation unit, and Sheehan presented no present danger to the officers. But they did not make that choice. Instead, the two officers entered the room and confronted Sheehan.⁴⁷ Predictably, Sheehan yelled at them to leave and one officer hit her with pepper spray.⁴⁸ When this failed to stop her, the officer switched from pepper spray to a gun and shot Sheehan multiple times.⁴⁹

Sheehan brought statutory claims against the City of San Francisco under the ADA for failing to accommodate her disability and constitutional claims against the officers in their personal capacities for violating her

38. Sheehan, 135 S. Ct. at 1769.

39. *Id.*

40. *Id.*; see also Cal. Welf. & Inst. Code Ann. § 5150 (West 2015 Cum. Supp.) (authorizing temporary detention of an individual who “as a result of a mental health disorder, is a danger to others, or to himself or herself, or gravely disabled”).

41. Sheehan, 135 S. Ct. at 1770.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 1771.

48. *Id.*

49. *Id.*

Fourth Amendment rights.⁵⁰ The district court granted summary judgment for the City, holding that police officers are not first required to determine whether their actions would comply with the ADA before protecting themselves and that neither officer violated the Fourth Amendment.⁵¹ The Ninth Circuit reversed, holding that it was for a reasonable jury to determine whether the City should have accommodated Sheehan's disability,⁵² and that while the officers' entry into Sheehan's room was lawful, a reasonable jury could nonetheless find they "provoked" her by forcing the second confrontation.⁵³

The Supreme Court granted certiorari on two questions.⁵⁴ The first was a reasonable accommodation question, and it asked whether ADA Title II "requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody."⁵⁵ The form of the question offers insight into how the Court thinks about disability. Clearly embracing a medical model framework,⁵⁶ the question uses the term "mentally ill" and assumes the person with a disability is a suspect. However, in this case, Hodge summoned the officers to facilitate Sheehan's civil commitment, without any implication of criminal conduct at the time he made the call. Moreover, this phrasing reinforces the negative stereotype that people with mental health conditions are "armed" and "violent."

Rather than resolving the question, the Court dismissed it as improvidently granted.⁵⁷ According to the majority, the City of San Francisco switched arguments in its merits briefing after the Court had granted certiorari and argued that, because Sheehan posed a "direct threat" to the health or safety of others, she was not a "qualified individual" under the ADA and

50. *Id.* Sheehan brought the constitutional claims under 42 U.S.C. § 1983.

51. *Id.*

52. Sheehan, 743 F.3d at 1233 ("A reasonable jury nevertheless could find that the situation had been defused sufficiently, following the initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics, including the accommodations that Sheehan asserts were necessary.")

53. Sheehan, 135 S. Ct. at 1772.

54. *Id.* at 1774. The question of qualified immunity is whether the officers can be held personally liable for the injuries that Sheehan suffered. *Id.*

55. *Id.* at 1772.

56. The medical model of disability assumes disability is a "condition" that can be "cured" (or at least cared for if incurable) through medical intervention. By contrast, the "social model" of disability: [P]osits that disability is not something that is inherent in the body of the person with a disability; instead, disability results from the interaction between an individual's physical or mental characteristics and the social choices and attitudes that attach disadvantage to those characteristics. In this view, the inability to walk is not what makes paraplegia disabling; paraplegia is disabling only because so much of the built environment—buildings with stairs, and with doorways that are too narrow, for example—is inaccessible to people with that condition. To be sure, the recognition that disability results from an interaction between individual and society carries no logical implications about the proper policy response.

SAMUEL R. BAGENSTOS, *DISABILITY RIGHTS LAW CASES AND MATERIALS* 4 (2d ed. 2013).

57. Sheehan, 135 S. Ct. at 1774.

the City therefore faced no obligation to accommodate her. The City failed to present this position below in the Ninth Circuit.⁵⁸

The Court did express interest in deciding the question at a future time if the right case were to come along,⁵⁹ but this case was the wrong vehicle because “San Francisco, the United States as *amicus curiae*, and Sheehan all argue (or at least accept) that §12132 applies to arrests. No one argues the contrary view. As a result, we do not think that it would be prudent to decide the question in this case.”⁶⁰ Bringing its dismissal to a close, the Court concluded that because “certiorari jurisdiction exists to clarify the law, its exercise ‘is not a matter of right, but of judicial discretion’ . . . Exercising that discretion, we dismiss the first question presented”⁶¹ On the second question, the Court determined the officers were entitled to qualified immunity.⁶²

The Supreme Court’s exercise of discretion was a missed opportunity. The Court’s dismissal of a case as improvidently granted is exceptionally rare, occurring on average about three times per term.⁶³ Moreover, if “certiorari jurisdiction exists to clarify the law,”⁶⁴ the Court could easily have exercised its discretion to clarify whether state and municipal law enforcement agencies owe a legal obligation to accommodate people with mental health conditions during arrest. Instead, the scope of those obligations remains obscure, with life and death decisions resulting each day. As the Ninth Circuit stated, Sheehan’s case is about the balance “between a person’s right to be left alone in the sanctity of her home and the laudable efforts of the police to render emergency assistance, but in a way that does not turn the

58. *Id.* at 1773. In particular, the Court states:

Though, to be sure, this “qualified” argument does appear in San Francisco’s certiorari petition, San Francisco never hinted at it in the Ninth Circuit. The Court does not ordinarily decide questions that were not passed on below. More than that, San Francisco’s new argument effectively concedes that the relevant provision of the ADA, 42 U.S.C. § 12132, may “requir[e] law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody.” This is so because there may be circumstances in which any “significant risk” presented by “an armed, violent, and mentally ill suspect” can be “eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services.” *Id.* (citations omitted).

59. *Id.* (“Whether the statutory language quoted above applies to arrests is an important question that would benefit from briefing and an adversary presentation.”).

60. *Id.*

61. *Id.* at 1774.

62. *Id.* at 1778 (“We hold that qualified immunity applies because these officers had no “fair and clear warning of what the Constitution requires.” . . . Because the qualified immunity analysis is straightforward, we need not decide whether the Constitution was violated by the officers’ failure to accommodate Sheehan’s illness.”) (citations omitted).

63. See Michael E. Solimine & Rafael Gely, *The Supreme Court and the Sophisticated Use of DIGs*, 18 SUP. CT. ECON. REV. 155, 165 (2010) (“From 1954 to 2004, the Court DIGged 155 cases, about three per Term. This represents 2% of all cases decided by the Court during that period.”); see also Michael E. Solimine & Rafael Gely, *The Supreme Court and the Dig: An Empirical and Institutional Analysis*, 2005 WIS. L. REV. 1421, 1421 (2005) (“Few cases are DIGged. In the past fifty years, the Court has on average only DIGged about two or three cases per Term.”).

64. Sheehan, 135 S. Ct. at 1774.

intended beneficiary into a victim or a criminal.”⁶⁵ Now, five years after *Sheehan*, the Court may determine how to strike that balance.

D. *The ADA Question Reconsidered?*

In early 2019, the Court signaled its interest in a case that would reconsider the ADA question which it had avoided in *Sheehan*. The case, *Vos v. City of Newport Beach* arose after police in Newport Beach, California fatally shot Gerritt Vos, who had schizophrenia, outside a 7-Eleven.⁶⁶ Vos’ parents brought ADA and Rehabilitation Act claims, along with other constitutional and state tort law claims against the officers.⁶⁷ The district court granted summary judgment on the parents’ ADA and Rehabilitation Act claims, holding the officers did not fail to accommodate Vos because they did not provoke or initiate the confrontation.⁶⁸ A divided panel of the Ninth Circuit reversed.⁶⁹ The majority found that the ADA applies to arrests and that summary judgment was inappropriate because the officers “had the time and the opportunity to assess the situation and potentially employ the accommodations . . . including de-escalation, communication, or specialized help.”⁷⁰

Following this decision, the City of Newport Beach sought *en banc* review, which the Ninth Circuit denied.⁷¹ The City of Newport Beach then filed a Petition for Writ of Certiorari in November 2018 with the same question presented as in *Sheehan*.⁷² The Court distributed the case for conference and requested briefing from respondents in January 2019.⁷³ At the time of writing, it is unclear whether the Court will in fact grant review in *Vos*. However, the case does seem to be a strong vehicle to review the ADA question.

Since the Court has not yet decided whether to review and decide *Vos*, the confusion from *Sheehan* remains in the lower federal courts. Nonetheless, the absence of a precise prescription of what the ADA requires also leaves progressive law enforcement agencies with freedom to test new policies, serv-

65. *Sheehan*, 743 F.3d at 1215.

66. *Vos v. City of Newport Beach*, 892 F.3d 1024, 1028 (9th Cir. 2018).

67. *Id.* at 1030.

68. *Id.* at 1037.

69. *Id.*

70. *Id.*

71. See *Vos v. City of Newport Beach*, 2018 U.S. App. LEXIS 24411, at *1 (9th Cir. Aug. 28, 2018).

72. Petition for Writ of Certiorari at 16, *City of Newport Beach v. Vos* (No. 18-672), https://www.supremecourt.gov/DocketPDF/18/18-672/72857/20181120180346882_petitionforcertiorari.pdf [<https://perma.cc/52XY-RPAM>] (“This case presents the Court with an opportunity to resolve the question on which it granted certiorari in *Sheehan II*. The Court dismissed the question in *Sheehan II* because the petitioner did not properly brief it. The parties here will brief that question.”) (citations omitted).

73. See *City of Newport Beach, California v. Vos*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/city-of-newport-beach-california-v-vos/> [<https://perma.cc/9F4E-KMQH>].

ing as “laboratories of experimentation” that could influence the rest of the country.⁷⁴

III. POLICY RESPONSES FROM STATE AND LOCAL LAW ENFORCEMENT AGENCIES

Recognizing the need to provide better training and ways to de-escalate encounters between officers and people with mental health conditions, some law enforcement agencies have begun to implement sound policies. For instance, police departments in Texas, Tennessee, and Florida have instituted crisis intervention trainings (“CIT”).⁷⁵ The Miami-Dade County police department in Florida has trained over 4,600 officers in how to identify and assist people with mental health conditions.⁷⁶ This investment has already reduced the use of force. Based on some estimates, “[f]or every 5,000 CIT police calls, typically 10 to 20 lead to arrests, according to program data. By comparison, for every 5,000 regular police calls, there are typically 400 to 500 arrests.”⁷⁷

The New York City Police Department explained that CIT training is “provided in a four-day class that teaches active listening skills. Officers learn how to demonstrate empathy and build rapport with subjects, slowing down situations and de-escalating the subject’s negative emotions.”⁷⁸ Moreover, CIT uses actors to test officers in real life situations:

[The actors] portray emotionally disturbed people[] . . . in different stages of crisis. The actors challenge officers with various scenarios, threatening harm to themselves, the officers, or others, simulating the possible life-and-death consequences of this kind of stand-off. The officers’ responses are judged at class sessions by a clinical psychologist and the course’s other instructors.⁷⁹

74. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

75. Susan Mizner, *The Supreme Court Leaves Americans with Disabilities Act Intact*, AMERICAN CIVIL LIBERTIES UNION (May 20, 2015), <https://www.aclu.org/blog/disability-rights/disability-rights-and-criminal-justice/supreme-court-leaves-americans> [https://perma.cc/2NV9-AG8V].

76. Daniel Chang, *Criminal mental health program in Miami-Dade seen as a model for nation*, MIAMI HERALD (May 21, 2016), <http://www.miamiherald.com/news/health-care/article79004057.html> [https://perma.cc/G6TV-QASY].

77. *Id.*; see also Norm Ornstein & Steve Leifman, *How Mental-Health Training for Police Can Save Lives—and Taxpayer Dollars But only if officials at all levels of government are willing to invest in it up front*, THE ATLANTIC (Aug. 11, 2017), <https://www.theatlantic.com/politics/archive/2017/08/how-mental-health-training-for-police-can-save-livesand-taxpayer-dollars/536520/> [https://perma.cc/KZH5-HWCG] (“A key component was the CIT training of over 5,400 police officers in Miami-Dade, representing all 36 police departments, using a 40-hour program crafted initially in Memphis, Tennessee, in the late 1980s.”).

78. *NYPD Crisis Intervention Team (CIT) Training*, N.Y. POLICE DEPARTMENT, <http://nypdnews.com/cit/> [https://perma.cc/S8EJ-REPL].

79. *Id.*

About 2,800 CIT programs operate across the country.⁸⁰ CIT is an important tool to sensitize law enforcement officials on how to address people with mental health conditions. However, the trainings should be sure to incorporate a social model of disability framework that emphasizes the rights of people with mental health conditions.

In addition, the course should work alongside people with mental health conditions—not hire actors to portray them.⁸¹ One program in Prince George’s County, Maryland took exactly these steps, inviting people with disabilities to act in short scenes designed to train police officers.⁸² In one scene, a mother calls police after her son, who has autism, refuses to stop playing video games and threatens to hurt her.⁸³ Once the officers arrive they take the time to talk to the boy, calm him down, and refrain from using force.⁸⁴ Although the mother, son, and officers were acting, “[t]he scene was unscripted, the officers are actual police officers and the man playing the son does have autism.”⁸⁵ Other law enforcement agencies can learn from Maryland’s example and design trainings addressing a variety of disabilities.

However, while CIT is a positive step, challenges remain with program implementation. A candid report by the New York Police Department Office of the Inspector General identified a number of weaknesses with CIT rollout.⁸⁶ For instance, according to the report “[t]he Department has yet to devise a process by which NYPD communications personnel can direct CIT-trained officers to CIT incidents. Currently, when 911 call takers receive a call for service involving a person in mental crisis, *any available*

80. Liza Lucas, *Changing the way police respond to mental illness*, CNN (Sept. 28, 2016), <https://www.cnn.com/2015/07/06/health/police-mental-health-training/index.html> [https://perma.cc/ZAY3-A4LP].

81. The trend of hiring actors to portray people with disabilities goes beyond CIT trainings and even extends into Hollywood. See Tre’vell Anderson, *Study shows lack of opportunity for disabled actors*, L.A. TIMES (July 18, 2016), <https://www.latimes.com/entertainment/movies/la-et-mn-disabled-actors-hollywood-20160717-snap-story.html> [https://perma.cc/6ZXF-AXGJ] (“A recent study by the Ruderman Family Foundation revealed that, despite those with disabilities representing nearly 20% of the country’s population, about 95% of characters with disabilities on television are played by able-bodied actors.”). This trend is also true for characters with disabilities. See Alyssa Rosenberg, *In Hollywood, people with disabilities are almost nonexistent*, WASH. POST (Sept. 7, 2016), <https://www.washingtonpost.com/news/act-four/wp/2016/09/07/in-hollywood-people-with-disabilities-are-almost-nonexistent/> [https://perma.cc/Z85Y-AVGS] (“[J]ust 2.4 percent of characters in the top 100 movies who spoke or had actual names had disabilities.”).

82. Meg Anderson, *Why Police In Prince George’s County Are Being Trained With Improv*, WAMU (Dec. 13, 2018), <https://wamu.org/story/18/12/13/why-police-in-prince-georges-county-are-being-trained-with-improv/> [https://perma.cc/39YC-JYP6].

83. *Id.*

84. *Id.*

85. *Id.*

86. NEW YORK CITY DEPARTMENT OF INVESTIGATION, *PUTTING TRAINING INTO PRACTICE: A REVIEW OF NYPD’S APPROACH TO HANDLING INTERACTIONS WITH PEOPLE IN MENTAL HEALTH CRISIS* 12–33 (Jan. 2017), http://www1.nyc.gov/assets/oignypd/downloads/pdf/Reports/CIT_Report_0119_2017.pdf [https://perma.cc/CH8W-YEER] (identifying programmatic and training deficiencies in NYPD’s CIT model).

officer can respond, whether the officer is CIT trained or not.”⁸⁷ CIT resources are only effective if they reach the person in mental health crisis. Rather than training a limited number of officers in CIT, the NYPD could make the process mandatory training for all new recruits so any officer would have the tools to respond during a mental health call.

In addition, CIT training needs to incorporate all members of law enforcement, not just police officers. In New York, the dispatchers who respond to emergency calls receive a forty-five-day training course which “incorporates only two hours of material related to people in crisis, coupled with a limited number of practice scenarios addressing that content.”⁸⁸ Making matters worse, “the Department has no timeline or written plan to start any such training, and it has maintained that it does not intend to provide call takers or dispatchers with any aspects of the CIT training itself.”⁸⁹

Properly integrating CIT-trained officers and providing CIT training for dispatch personnel is essential for the program to work effectively. Eventually every officer should be trained in CIT, but until that happens dispatching officers equipped with the tools to de-escalate a situation might mean the difference between use of force and a peaceful outcome.

Other policy tools are also available to divert law enforcement intervention altogether. For instance, some municipalities use mobile response units which take a holistic approach to meet the needs of people with mental health conditions. These mobile crisis teams “meet individuals in the community at the time of crisis and include psychiatric nurses, social workers, and paraprofessionals. Rather than involve law enforcement, mobile teams can assess an individual and use a variety of interventions designed to de-escalate crises.”⁹⁰ These innovative tools can help people with mental health conditions to remain where they belong: in the community. According to one study, “[m]obile services prevented hospitalization 55 percent of the time compared to only 28 percent for regular police intervention.”⁹¹ Moreover, mobile services “cost, on average, 23 percent less than police involvement and the subsequent higher rate of hospitalization.”⁹²

This model is a strong alternative to traditional police encounters because the person with a mental health condition can avoid forced institutionalization, which may threaten a number of other human rights,

87. *Id.* at 12 (emphasis added). In addition, “[a]ccording to NYPD, more than a year-and-a-half into the training, dispatchers still cannot assign CIT-trained officers to crisis calls because they have no way of determining which patrol cars in the field contain CIT-trained officers. This is highly problematic. Deploying CIT-trained officers to mental health emergencies is a basic and critical component of the effective implementation of CIT.” *Id.*

88. *Id.* at 31 (emphasis added).

89. *Id.*

90. Bazelon Ctr. for Mental Health Law, Law Enforcement Responses to Disabled Americans, *supra* note 3, at 3 (citing Roger Scott, *Evaluation of a Mobile Crisis Program: Effectiveness, Efficiency, and Consumer Satisfaction*, 51 PSYCHIATRIC SERV. 1153 (Sept. 2000)) (internal citations omitted).

91. *Id.*

92. *Id.*

including the right to be free from forced treatment, deprivation of liberty, and the right to bodily integrity.⁹³

One challenge will be to educate the general public about mobile crisis teams. If loved ones and community members remain unaware that they exist, the common response of calling law enforcement to assist a person with a mental health condition in crisis will continue.

In sum, local municipalities are beginning to create and implement new policy solutions that either better train law enforcement on how to approach a person with a mental health condition or remove law enforcement involvement entirely. These innovative policies represent what accommodations under Title II of the ADA might accomplish if police officers begin their training by working with people with mental health conditions and other disabilities to recognize a crisis, develop the skills to de-escalate a conflict, and respond to feedback from the community.

CONCLUSION

This Note examined encounters between law enforcement officials and people with mental health conditions that often end in violent confrontation. Part I traced how these encounters begin with a call for help but end with fatal or near-fatal use of force. Part II addressed how the Supreme Court missed a critical opportunity to clarify whether the ADA requires law enforcement to accommodate people with mental health conditions during arrest. While the question may reappear on the Court's docket in 2019, at the time of writing the question is still unresolved. Finally, Part III showed that even without a decision from the Supreme Court, law enforcement agencies have policy tools available to mitigate the use of force. Moving forward, people with disabilities and their representative organizations should continue to engage with law enforcement to educate officers and push for progressive policies that respect the dignity, agency, and lives of people with mental health conditions.

93. For this reason, Article 14(1)(b) of the United Nations Convention on Rights of Persons with Disabilities provides that "the existence of a disability shall in no case justify a deprivation of liberty." See Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. (Dec. 13, 2006), <http://www.un.org/disabilities/convention/conventionfull.shtml> [<https://perma.cc/2ZKZ-489P>]; see also HUMAN RIGHTS WATCH, "TREATED WORSE THAN ANIMALS": ABUSES AGAINST WOMEN AND GIRLS WITH PSYCHOSOCIAL OR INTELLECTUAL DISABILITIES IN INSTITUTIONS IN INDIA (2014), <https://www.hrw.org/report/2014/12/03/treated-worse-animals/abuses-against-women-and-girls-psychosocial-or-intellectual> [<https://perma.cc/LJU5-XK35>] ("The prevalent mindset is that people with disabilities, particularly women and especially those with intellectual or psychosocial disabilities, are incapable, weak, and lack the capacity to make any meaningful decisions about their lives. Institutions to which they are sent are overcrowded and poorly managed: all women and girls with psychosocial or intellectual disabilities currently or formerly living in institutions interviewed by Human Rights Watch experienced forced institutionalization; most faced a range of abuses in institutional care, including neglect, physical or verbal abuse, and involuntary treatment.").

