

Accommodating the Violent: Analyzing Title II of the Americans With Disabilities Act Relevant to Arrests of the Armed, Violent, and Mentally Ill

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“There is no nice way to arrest a potentially dangerous, combative suspect. The police are our bodyguards; our hired fists, batons and guns. We pay them to do the dirty work of protecting us. The work we’re too afraid, too unskilled, or too uncivilized to do ourselves. We expect them to keep the bad guys out of our business, out of our cars, out of our houses, and out of our faces. We just don’t want to see how it’s done.”

- Charles H. Webb

In the 54-block area of downtown Los Angeles lies an infamous area known as Skid Row. Tantamount for poverty and homelessness, Skid Row appears as a chaotic avenue with people transporting their belongings in noisy shopping carts, along with yelling and screaming from all around. For many individuals, this is home; makeshift shelters and tents line the streets while the constant sounds of sirens are nothing out of the ordinary.

During the early hours of a brisk March afternoon, a robbery occurs on Skid Row. The Los Angeles Police Department immediately respond to the call. Upon arrival, they question the robbery victim, who points the officers to the direction of a homeless man. The man, who had recently finished a 10-year stint in a mental health institution, resides in a tent on Skid Row. This man, however, was no stranger to the police and

similar to many residents on Skid Row, he has a past blemished with mental illness and crime.

The officers attempt to question the man, who retreats into his tent. A scuffle soon ensues as the officers attempt to bring the man out. The man refuses to comply and begins to fight the officers. In an attempt to subdue the man, one officer deploys his taser. The taser has minimal effect on the man and he continues to violently resist the officers and their commands.

As the struggle transpires, more officers arrive on scene to help bring the man into custody. An angry crowd of bystanders immediately surround the officers. One officer drops his nightstick during the altercation, which is promptly picked up by a bystander. The bystander raises the baton at two of the officers as the remaining officers continue to grapple with the man nearby. Realizing they are in danger, the officers wrestle the baton out of the woman's hands and arrest her immediately. Meanwhile, the remaining officers continue to struggle to detain the robbery suspect and take him into custody.

Amongst the struggle, one of the officers' suddenly yells, "He has my gun! He has my gun!" Perceiving a threat and the possibility of harm to themselves and the bystanders, the officers react within that split second and in response to the officer's recital, the officers open fire. The robbery suspect is shot and subsequently dies from his injuries.¹

¹ This is a true story that happened in March of 2015 and was recorded by a bystander.

INTRODUCTION

During the course of their daily tasks, law enforcement officials often encounter situations such as the one described above where they are confronted with a person with a mental illness.² In fact, contact with law enforcement is frequent among persons with a mental illness³, as they are likely to encounter law enforcement officials under very diverse circumstances.⁴ For example, some of these individuals are confronted by law enforcement because they have actually committed a crime, while others are simply seen

² Peter C. Patch & Bruce A. Arrigo, *Police Officer Attitudes and Use of Discretion in Situations Involving the Mentally Ill*, 22 INT'L. J.L. & PSYCHIATRY 23, 24 (1999); *See also Mental Health Conditions*, NATIONAL ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/Learn-More/Mental-Health-Conditions> (A person with a mental illness is one who suffers from any condition that impacts a person's thinking, feeling or mood and may affect his or her ability to relate to others and function on a daily basis.)

³ *See* <http://www.azpowerpaws.org/pdf/politically-correct-terms.pdf> (stating that although there is not technically a universal politically correct term for describing an individual with a mental illness, one way to describe such individuals is "persons with a mental illness," which refers to the person first, rather than defining them by their disability.)

⁴ Sarah L. Desmarais, *Police Perceptions and Contact Among People With Mental Illnesses: Comparisons With a General Population Survey*, 20 PSYCHOL. PUB. POL'Y & L. 431, 431 (2014).

as a nuisance by the members of the public thus prompting them to call the police.⁵ However, the vast majority of persons with a mental illness whose contact with law enforcement results in a use of force application are armed and more often than not, many of the calls were made by relatives, neighbors, or bystanders who were worried because the individual was behaving erratically.⁶ Furthermore, the majority of persons with a mental illness who are actually arrested are charged with misdemeanors such as trespassing, disorderly conduct, and alcohol or drug charges.⁷ Unfortunately, many of us in today's society are left unexposed to the actual facts that lie behind many of these challenging encounters.

Today's generation is constantly exposed to alarming headlines such as, "17-Year-Old Girl with Mental Illness Shot and Killed in Police Station Lobby After She Picked

⁵ See Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 264 (2003);

⁶ See Wesley Lowery, *Distraught People, Deadly Results*, WASHINGTON POST, (June 30, 2015), <http://www.washingtonpost.com/sf/investigative/2015/06/30/distraught-people-deadly-results/>

⁷ Dr. E. Fuller Torrey, *Criminalization of Individuals with Severe Psychiatric Disorders*, MENTAL ILLNESS POLICY ORG., <http://mentalillnesspolicy.org/index.html>

Up a Knife,”⁸ or “We called for help and they killed my son, North Carolina man says.”⁹ Regrettably, the media often illustrates law enforcement in a negative light¹⁰, thus fueling the fire of hate towards law enforcement and leaving the dangers they encounter unexposed, leaving society to form their own conclusions about how the officers should have responded. Many of us are cloaked from the danger that law enforcement officials often face when dealing with persons with a mental illness who are armed and dangerous to others. However, rarely do instances of fatal law enforcement encounters with persons with a mental illness make headline news. Yet this does not mean that the problem does not exist.¹¹

⁸ See Maddie Bradsher, *17-Year-Old Girl with Mental Illness Shot and Killed in Police Station Lobby After She Picked Up a Knife*, IJREVIEW, <http://www.ijreview.com/2015/01/239901-mentally-ill-17-year-old-girl-shot-killed-lobby-police-department>, (last visited April 14, 2015).

⁹ Michael Pearson et al., *‘We Called for Help, and They Killed My Son,’ North Carolina Man Says*, CNN, (Jan 7, 2014), <http://www.cnn.com/2014/01/07/justice/north-carolina-teen-killed>

¹⁰ Kevin M. Gilmartin, Ph.D, *Emotional Survival for Law Enforcement*, 17, (Melanie Mallon 2002) (stating that the media typically reports from an anti-police perspective as “vilifying the cops” is always a good strategy to sell papers.)

¹¹ See Stuart Tomlinson, *Daniel Butts, Accused of Killing Rainier Chief Ralph Painter, Makes Court Appearance*, OREGONLIVE, (Jan. 7, 2011),

Occurrences with law enforcement and persons with mental illnesses has intensified over the years, with approximately ninety-two percent of officers having at least one encounter with a person with a mental illness who is experiencing a crisis in the previous month, with an average of six encounters per month.¹² In fact, police

http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/01/ling_rainier_chief_ralphPainter_makes_first_court_appearance.html ; See also, Julie Parr, *Trial Delayed for Man Accused of Killing a Bowie County Deputy*, KTBS, (Aug. 1, 2014, 3:59 PM), <http://www.ktbs.com/story/26177051/trial-delayed-for-man-accused-of-killing-a-bowie-county-deputy> (stating that mentally ill man shot and killed deputy with her own gun).

¹² See Fernanda Santos & Erica Goode, *Police Confront Rising Number of Mentally Ill Suspects*, NY Times, (April 1, 2014), <http://www.nytimes.com/2014/04/02/us/police-shootings-of-mentally-ill-suspects-are-on-the-upswing.html> ; See generally Gary Cordner, *People With Mental Illness*, in PROBLEM-ORIENTED GUIDES FOR POLICE PROBLEM-SPECIFIC GUIDES SERIES, GUIDE 40 (U.S. Department of Justice, 2006) (stating that approximately 92 percent of patrol officers had at least one encounter with a mentally ill person in a crisis in the previous month).

interactions with persons with a mental illness are among the most dangerous types of calls for officers and can be equally dangerous for persons with a mental illness.¹³

Many of these run-ins can result in the use of force by law enforcement. However, when police use any kind of force, the safety for both officers and others is always paramount.¹⁴ Although a law enforcement officer's job is maintaining public safety and restoring order, society now demands that officers' double as mental health proxies, counselors, and hospital transportation for persons with a mental illness.¹⁵

¹³ Amy Kerr, *Police Encounters, Mental Illness and Injury: An Exploratory Investigation*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, (Jan. 1, 2010), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2991059/> ; See also Treatment Advocacy Center. Briefing Paper: Law enforcement and people with severe mental illnesses. 2005. February, Retrieved January 5, 2010 from Treatment Advocacy Center: http://www.popcenter.org/problems/mental_illness/PDFs/TAC_2005a.pdf [Ref list]

¹⁴ Amy N. Kerr, *Police Encounters, Mental Illness and Injury: An Exploratory Investigation*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, (Jan. 1, 2010), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2991059/>

¹⁵ See Philip Morris, *Policing the Mentally Ill is Often a Question of Life or Death: Phillip Morris*, CLEVELAND.COM, (March 10, 2015), http://www.cleveland.com/morris/index.ssf/2015/03/policing_the_mentally_ill_is_o.html

Often the 24/7 resources for responding to mental health crisis, law enforcement officers are sometimes characterized as “streetcorner psychiatrists.”¹⁶ In fact, individuals with both developmental disabilities and other mental issues are seven times more likely to come in contact with law enforcement officers than others.¹⁷ However, these encounters are often problematic for law enforcement for many reasons, mainly because individuals suffering from mental illnesses do not respond well to traditional police tactics.¹⁸ For example, tactics that involve intimidation and force do not deescalate a

¹⁶ Amy C. Watson & Beth Angell, *The Role of Stigma and Uncertainty in Moderating the Effect of Procedural Justice on Cooperation and Resistance in Police Encounters With Persons With Mental Illnesses*, 19 PSYCHOL. PUB. POL’Y & L. 30 (2013); See also Melissa Reuland, *Police Approaches That Improve the Response to People with Mental Illnesses: A Focus on Victims*, THE POLICE CHIEF (November 2003), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=145&issue_id=112003

¹⁷ Lance Eldridge, *EDPS and Cops: Knowledge can go a long way*, POLICEONE NEWS (February 17, 2012), <http://www.policeone.com/emotionally-disturbed-persons-edp/articles/5017987-EDPs-and-cops-Knowledge-can-go-a-long-way> ; See also Michael Avery, *Unreasonable Searches of Unreasonable People: Defining the Totality of the Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 262 n. 3 (2003).

¹⁸ See *Id.*

situation, but rather makes it worse when a person with a mentally illness is involved.¹⁹ Although many of these individuals are more likely to be victims and have not actually committed a crime when law enforcement officers come into contact with them, sometimes these individuals can be a threat both to themselves and others²⁰, including the law enforcement officers responding to the incident.

As the process of deinstitutionalization²¹ of persons suffering from a mental illness began in the 1960's, many have been forced to live without help, medication, or support.²² Chronically and severely mentally ill persons present unique challenges for society, with an estimated twenty-six percent of homeless adults who live in shelters living with a mental illness and an estimated forty-six percent who are not homeless, but

¹⁹ Gary Cordner, *The Problem of People With a Mental Illness*, Center for Problem Oriented Policing, (2006), http://www.popcenter.org/problems/mental_illness/print/

²⁰ See *Id.*

²¹ Avery, *supra* note 4, at 263; See also Nancy K. Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory*, 31 EMORY L.J. 375, 377 (1982).

²² See Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing The Police Use of Force Against Emotionally Disturbed People*, COLUM. HUM. RTS. L. REV. 261, 263.

living with a mental illness.²³ The widespread presence of persons with a mental illness left on the streets and prisons has led California to reevaluate their state's mental health policy.²⁴ However, since the United States Supreme Court's double remands in *Lessard v. Schmidt*²⁵, where the Supreme Court found that an order which held individuals involuntarily to the Wisconsin involuntary-commitment laws was unconstitutional, society's lack of resources for those suffering from a mental illness has been left at the hands of law enforcement.²⁶ While there is a definite need to ensure the safety of persons suffering from a mental illness, there is also a need to ensure officer safety when responding to calls dealing with armed and violent persons with a mental illness. Law enforcement officials are not psychiatrists and the inadequate lack of services available to support persons with a mental illness leaves the responsibility to these law enforcement

²³ *Mental Illness Facts and Numbers*, NATIONAL ALLIANCE ON MENTAL ILLNESS, http://www2.nami.org/factsheets/mentalillness_factsheet.pdf (last visited April 14, 2015).

²⁴ David A. Zaheer, *Expanding California's Coerced Treatment For The Mentally Ill: Is The Promise of Caring Treatment In the Community a Lost Hope?* 10. S. CAL. INTERDISC. L.J. 385, 385 (2001).

²⁵ *Lessard v. Schmidt*, 94 S.Ct. 713 (1974).

²⁶ Lance Eldridge, *EDPS and Cops: Knowledge can go a long way*, POLICEONE NEWS (Feb. 17, 2012) <http://www.policeone.com/emotionally-disturbed-persons-edp/articles/5017987-EDPs-and-cops-Knowledge-can-go-a-long-way/>

officials.²⁷ This responsibility includes taking individuals to the hospital, deescalating situations where they become irritable with family, suicide, and public disturbances, among other things.²⁸ The shifting of the responsibility for persons with a mental illness from mental health officials to law enforcement is not only irrational because officers are not trained mental health professionals, but poses harm to both the individuals and the officers.²⁹

Lower courts have declined to make a specific rule for excessive force claims regarding persons with a mental illness,³⁰ which has resulted in an unfortunate ambiguity for law enforcement. Officers are often forced to make split decisions in potentially

²⁷ *See Id.*

²⁸ *See supra* note 19.

²⁹ *Justifiable Homicides by Law Enforcement Officers: What is the Role of Mental Illness?* TREATMENT ADVOCACY CENTER AND NATIONAL SHERIFFS' ASSOCIATION (September 2013), <http://tacreports.org/storage/documents/2013-justifiable-homicides.pdf> ; *See also* Chicago story from Fresno Bee (Mother says, "We're thinking the police are going to service us, take him to the hospital. They took his life," she said. She said her son "didn't have a gun. He had a bat.")

³⁰ *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th. Cir. 2001) ("We do not adopt a per se rule [for excessive force] establishing two different classifications of suspects: mentally disabled persons and serious criminals.").

deadly encounters³¹ which would make it near impossible to make accommodations to persons with a mental illness who are armed and violent.³²

The legal analysis that the trial courts are currently battling with in respect to this issue has caused quite a conflict among the circuits.³³ For example, in *Waller v. City of Danville, Virginia*,³⁴ the United States District Court of Virginia found that the police officers were acting under exigent circumstances and were not required to reasonably

³¹ [*Graham v. Connor*](#), 490 U.S. 386, 396-97 (1989) (explaining that the reasonableness of force must encompass an allowance for that fact that officers are often forced to make split-second judgments in rapidly evolving circumstances);

³² See Caryn Rousseau, *Teen, 55-year-old Mom of 5 Fatally Shot as Chicago Officers Respond to Call*, Associated Press, (Dec. 26, 2015, 7:26 PM), http://hosted.ap.org/dynamic/stories/U/US_CHICAGO_POLICE_FATAL_SHOOTING?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT Chicago story from Fresno Bee (Mother declares, “We’re thinking the police are going to service us, take him to the hospital. They took his life,” she said. She said her son “didn’t have a gun. He had a bat.”).

³³ See e.g. *Waller v. City of Danville, Virginia*, 515 F.Supp. 2d 659 (2007); *Hainze v. Richards*, 207 F.3d 795 (2000); *Alexander v. City and County of San Francisco*, 29 F.3d 1355 (1994).

³⁴ *Waller v. City of Danville, Virginia*, 515 F.Supp.2d 659 (2007).

accommodate the suspect's mental disability during the course of their investigation.³⁵ This was mirrored in *Hainze v. Richards*.³⁶ which the parties argued for during oral argument. In *Hainze*, the Fifth Circuit found that the county did not fail to reasonably accommodate plaintiff's disability and held that Title II does not apply to an officer's on-the-go street response, regardless of whether the calls involve suspects with mental disabilities, prior to the officer's securing of the scene that there is no threat to the public.³⁷ However, this is in conflict with other circuits, such as *Alexander v. City and County of San Francisco*,³⁸ where the Ninth Circuit found that the decedent's Fourth Amendment rights were violated when officers entered the individuals' house to arrest him without an arrest warrant.³⁹ The plaintiff asserted that defendants used excessive force in creating the situation, which subsequently caused decedent to take the actions he did.⁴⁰ This conflict has not made it easy among the district courts in dealing with such a sensitive issue. Unfortunately, this disarray among the circuits has created a demand by the public for a policy change. *Sheehan v. City & County of San Francisco* was the possible solution to the current problem society is facing. Until *Sheehan*, the Supreme

³⁵ See generally *id.*

³⁶ *Hainze v. Richards*, 207 F.3d 795 (2000).

³⁷ *Id.* at 801.

³⁸ *Alexander v. City and County of San Francisco*, 29 F.3d 1355 (1994).

³⁹ *Id.* at 1358.

⁴⁰ *Id.* at 1357.

Court had not determined whether the ADA applies to arrests, let alone whether it applied to violent and armed persons with a mental illness. Ask yourself this question: When individuals are armed and acting in a violent manner, is it fair to force the officer to accommodate the individual and consequently forgo their own safety because the individual suffers from a mental illness?

While this crucial issue raises major societal concerns with an impact that goes beyond the scope of encounters of persons with a mental illness and law enforcement officials, the Supreme Court granted this issue as improvidently granted.⁴¹ The dismissal of this question has denied society at large the privilege of receiving an answer to a growing and tragic epidemic, which will continue to occur while we wait for another case to come before the Court again.

Part I of this article provides an overview of *Sheehan v. City & County of San Francisco*, the leading case that was originally centered around the issue of whether Title II of the Americans with Disabilities Act⁴² applies to armed, violent, and persons with a mental illness. This section will also address why the Supreme Court dismissed the issue

⁴¹ *City and County of San Francisco, California v. Sheehan*, 135 S.Ct. 1765, 1773 (2015) (“Our decision not to decide whether the ADA applies to arrests is reinforced by the parties’ failure to address a related question: whether a public entity can be liable for damages under Title II for an arrest made by its police officers.”)

⁴² Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 (2004) [hereinafter ADA].

as improvidently granted. Part II provides a historical framework of the *Commonwealth of Pennsylvania v. Yeskey*, the case that paved the way for claims under Title II of the ADA against law enforcement activities and services. Part III explains bringing forth claims under the ADA and section 1983 of the United States Code. Part IV provides an analysis of the oral arguments presented before the Supreme Court and how the Court can rule in the future that would be fair and safe for both law enforcement officials as well as persons with a mental illness. This section also touches on different solutions various agencies have used to solve the current public policy issue regarding the rising number of confrontations of police and persons with a mental illness as well as how lower courts can strengthen their analysis in their decisions while waiting for this issue to come before the Supreme Court again.

This article concludes with both clarifications and safety concerns that arise for both officers and persons with a mental illness and why the Court should meet middle ground for both parties. By ruling that the ADA does not apply to persons with a mental illness who are a direct threat, and therefore creating exigent circumstances to law enforcement personnel, the Court can reach middle ground for both law enforcement and persons with a mental illness.

I. SHEEHAN V. CITY & COUNTY OF SAN FRANCISCO

In August of 2008, Teresa Sheehan lived in a cooperative housing program for people in need of mental health support located in San Francisco.⁴³ Sheehan, who suffered from schizophrenia, had her own private room in the home, but shared common areas with other residents.⁴⁴

On August 5, 2008, a social worker attempted to make contact with Sheehan due to his concern for her health.⁴⁵ Sheehan failed to respond.⁴⁶ The social worker returned two days later on August 7 and knocked on Sheehan's door and explained that he wanted to check on her and would enter the room if she did not respond.⁴⁷ Again, the social worker received no response.⁴⁸ After receiving no response, the social worker, with the help of the property manager, opened Sheehan's door.⁴⁹ Once he was inside and able to observe Sheehan, he noticed her lying on her bed with a book on her face, in which he

⁴³ *Sheehan v. City and County of San Francisco*, 2011 WL 1748419, at 1 (N.D. California May 6, 2011).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Sheehan v. City and County of San Francisco*, 2011 WL 1748419, at 1 (N.D. California May 6, 2011).

⁴⁹ *Id.*

then attempted to engage Sheehan to see if she was ok.⁵⁰ Sheehan did not respond for a while, but soon thereafter, she left out of her bed and yelled at the social worker and told him to leave her room, and threatened to kill him with a knife if he did not leave.⁵¹

Responding to Sheehan's threat, the social worker left the room immediately and cleared the building of other residents.⁵² Knowing he would need help transporting Sheehan to the hospital for a 5150, he called police to assist him and completed an application under California Welfare & Institutions Code §5150,⁵³ which sought a 72-hour detention of Sheehan for a psychiatric evaluation and treatment.⁵⁴

Officer Holder was the first to arrive to the scene, however, since she had never helped a social worker effectuate a 5150 arrest, she called her sergeant for help.⁵⁵ Once the sergeant arrived, the social worker showed them the §5150 application, which reads as following:

Client has been without psychotropic meds times one and a half years. Has been presenting with increased symptoms for several weeks. Housemates reported that client has been coming and going at odd hours and reportedly said she had stopped eating. It was also reported that client has been wearing the same clothing for several days. Writer conducted outreach to client and was not responsive... Upon opening the door, client was found lying in her bed with a book over her face, eyes open and was not responsive...Client suddenly got up...and yelled at writer

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See generally* CAL. WELF. & INST.CODE §5150 (West 2014).

⁵⁴ *Sheehan*, 743 F.3d at 1217.

⁵⁵ *Id.*

violently, “Get out of here! You don’t have a warrant! I have a knife and I’ll kill you if I have to!” Client then slammed her door and locked it behind her.⁵⁶

Two boxes near the bottom of the application form were checked indicating the resident was a danger to others and was gravely disabled.⁵⁷ However, the social worker did not check the box to indicate that Sheehan was a danger to herself, nor did he give the officers any other reason to believe she was suicidal or likely to injure herself.⁵⁸

Believing that it was best to make contact with Sheehan to verify that she met the criteria for a 5150 hold, Sergeant Kimberly Holder decided to make contact with Sheehan.⁵⁹ However, after repeated attempts of knocking and announcing their presence, the officers were unable to get Sheehan to open the door.⁶⁰ The officers, accompanied by the social worker, used the key given to them by him and opened the door, while announcing that they are the police and want to help.⁶¹ Consequent to opening the door, Sheehan sat up and reached over with her left hand very quickly and grabbed a knife from a plate and immediately walked towards the officers in an aggressive and threatening manner saying, “Get out of here. I’m going to kill you.”⁶² The officers

⁵⁶ *Id.* at *1-2.

⁵⁷ *Id.* at *2.

⁵⁸ *Sheehan v. City and County of San Francisco*, 743 F.3d 1211, 1218 (2014).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Sheehan*, 743 F.3d at 1218-19.

withdrew and retreated backwards.⁶³ Sheehan closed the door, leaving her in the room alone, and the officers and the social workers out in the hallway.⁶⁴

The officers called for backup,⁶⁵ drew their service-weapons, and reentered the resident's room, with weapons drawn due to the exigent circumstances and possible situations that could ultimately arise from the escalating situation.⁶⁶

Sheehan emerged from the room brandishing the knife and advanced upon the officers, all the while raising the knife and telling them that she is going to kill them.⁶⁷ In response and out of fear, the officer sprayed her with pepper spray into her eyes, but to no avail.⁶⁸ Sheehan continued to advance towards officers and reached between two to four feet from one of the officers, who fired her weapon and ultimately hit Sheehan five or six times, causing her to fall to the ground.⁶⁹ Even after being shot, Sheehan continued to

⁶³ *Id.* at 1219.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Sheehan v. City and County of San Francisco*, 2011 WL 1748419 at *2 (N.D. California, May 6, 2011).

⁶⁸ *Sheehan v. City and County of San Francisco*, 743 F.3d 1211, 1220 (2014).

⁶⁹ *Id.*

swing the knife at the officers until a backup officer arrived and was able to kick the knife out of Sheehan's hand.⁷⁰

Sheehan survived and filed a complaint against both officers, the San Francisco Police Chief, and the City and County of San Francisco, asserting causes of action under 42 U.S.C. §1983, the American with Disabilities Act, and California state law.⁷¹ Under the ADA, Sheehan asserted that the city violated her rights under the Act by failing to reasonably accommodate her disability when they forced their way back into her room without taking her mental illness into account.⁷² Ultimately, the district court granted summary judgment for the defendants as to all of Sheehan's claims because it concluded that the officers did not violate the Constitution and because officers making an arrest are not required to determine whether their actions would comply with the ADA before protecting themselves and others.⁷³ Sheehan appealed.⁷⁴

⁷⁰ *Id.*

⁷¹ *Id.*; Sheehan alleged state law claims for assault and battery, negligence, intentional infliction of emotional distress and violation of California Civil Code § 52.1. *Id.* For purposes of this article, I will focus solely on the Title II of the ADA claim.

⁷² *Id.* at 1232.

⁷³ *Sheehan v. City and County of San Francisco*, 2011 WL 1748419 at *11 (N.D. California, May 6, 2011).

⁷⁴ *Sheehan v. City and County of San Francisco*, 743 F.3d 1211, 1220 (2014).

On appeal, the Ninth Circuit Court of Appeals held that the district court erred in granting summary judgment on Sheehan's ADA claim.⁷⁵ The Court ultimately affirmed the judgment in part vacated in part, and remanded it for further proceedings due to the reasonableness of an accommodation is ordinarily a question of fact.⁷⁶ Vacating in part, the Ninth Circuit held that the ADA applied and that it was up to a jury to decide whether San Francisco should have to accommodate Sheehan.⁷⁷ After granting a writ of certiorari, the United States Supreme Court took on two separate issues: 1) whether Title II of the Americans with Disabilities Act requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody and 2) whether it was clearly established that even where an exception to the warrant requirement applied an entry into a residence could be unreasonable under the Fourth Amendment by reason of the anticipated resistance of an armed and violent suspect within.⁷⁸

Regrettably, counsel for both parties chose to rely on different arguments than what they originally set forth when arguing the issue of whether the ADA should have applied to Ms. Sheehan. Counsel for the officers chose to combine the statutory phrase, “

⁷⁵ *Id.* at 1217

⁷⁶ *Id.* at 1233.

⁷⁷ *Id.* at 1232.

⁷⁸ See *City and County of San Francisco v. Sheehan*, SUPREME COURT OF THE UNITED STATES BLOG, <http://www.scotusblog.com/case-files/cases/city-and-county-of-san-francisco-california-v-sheehan> (last visited April 14, 2015).

qualified individual” of §12132⁷⁹ with another regulation which expresses that Title II “does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.”⁸⁰ Combining these two regulations with the definition of a direct threat, counsel for the officers argued that a person who poses a direct threat to the health and safety of others is not qualified for accommodations under the ADA.⁸¹ Alas, due to this change in direction and an absence of adversarial briefing⁸², the Supreme Court chose not to address the question, but rather addressed whether both officers were entitled to qualified immunity.⁸³ Although the issue of whether the ADA

⁷⁹ 42 U.S.C.A. §12132

⁸⁰ 28 C.F.R. §35.139

⁸¹ *City and County of San Francisco, California v. Sheehan*, 135 S.Ct. 1765, 1773 (2015).

⁸² See *Id.* (Throughout both the opinion as well as the concurrence, different Justices’ make remarks on their shock of counsels’ arguments with Justice Scalia commenting, “Imagine our surprise, then, when petitioners’ principal brief, reply brief, and oral argument had nary a word to say about the subject.)

⁸³ *Id.* at 1774. See also *Sheehan v. City & County of San Francisco*, 135 S.Ct. 1765, 1780 (2015) (Justice Scalia assertedly states that the only fair way to address this uncertworthy question was to decline to decide it in order to deter future snookering.)

applies to law enforcement related activities has slowly evolved over the years, the Court has not quite solved the question of whether it applies to arrests, let alone the arrests of a violent, mentally ill, armed individual.

II. HISTORICAL VIEW: COMMONWEALTH OF PENNSYLVANIA V. YESKEY⁸⁴

Prior to the United States Supreme Court decision in *Yeskey*⁸⁵, courts had not yet ruled that Title II of the ADA applied to law enforcement activities. This part examines the United States Supreme Court's decision in *Yeskey* and how the Supreme Court's broad reading of Title II curtailed the reasoning that had prevented lower courts from allowing ADA claims to apply to police actions.

Plaintiff Ronald Yeskey was imprisoned in a detention facility that operated a boot camp that was part of the Pennsylvania's Motivational Boot Camp Act.⁸⁶ The boot camp allowed a qualifying inmate to complete a six-month program of physical activity, intensive regimentation and discipline, in addition to manual labor on public projects in a

⁸⁴ *Pennsylvania Department of Corrections v. Yeskey*, 118 S.Ct. 1952 (1998).

⁸⁵ See 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, 168 (2005) (noting that prior to 1998, claims brought under the Title II of the ADA which sought to apply to police activities were usually rejected).

⁸⁶ *Yeskey* 524 U.S. at 208.

wilderness area around the boot camp.⁸⁷ In return for their service, an inmate is given parole at the end of the six months, regardless of any minimum sentence that was imposed prior.⁸⁸ Yeskey was denied the opportunity to apply for the boot camp program because of his high blood pressure diagnosis, and the boot camp selection committee maintained that they could not override a doctor's medical diagnosis.⁸⁹

With Justice Scalia writing for the majority, the Supreme Court of the United States held that state prisons fall within the statutory definition of a public entity.⁹⁰ The Court ultimately concluded that the plain meaning of Title II includes state prisons and prisoners within its coverage.⁹¹ This was significant in that it now meant that all state prisons, as well as prisoners were entitled to the protections afforded under the ADA. The Court noted that the statutory text of Title II contains no exception that could cast the coverage of prisons into doubt.⁹²

The Court also addressed the argument asserting that the words “eligibility” and “participation” connote voluntariness on behalf of the individual seeking a benefit from the state, which does not apply to prisoners because they are being held against their

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 209.

⁹¹ *Id.* at 213.

⁹² *Id.* at 209.

will.⁹³ The Court struck down this argument stating that these words do not signify voluntariness, and even if they did connote voluntariness, prison “services, “programs,” and “activities” are excluded from the ADA because participation in them is not voluntary, which includes the boot camp.⁹⁴ The Court reasoned that the ADA is not ambiguous and therefore, the Court was required to interpret the statute to avoid “grave and doubtful constitutional questions.”⁹⁵

The *Yeskey* ruling that Title II did not require voluntariness broke down an extraordinary obstacle to ADA claims concerning arrests. Due to *Yeskey*’s ruling that state prisons fall within the statutory definition of a governmental entity, lower courts soon followed in its footsteps and began construing the ADA to apply to law enforcement officials, since law enforcement agencies are considered a governmental entity.⁹⁶ Furthermore, the lower court in *Yeskey*, noted that Congress had instructed Title II to be interpreted consistently with the Rehabilitation Act⁹⁷ which indicated that the terms

⁹³ *Id.* at 211.

⁹⁴ *Id.*

⁹⁵ *Id.* at 212.

⁹⁶ Rachel E. Brodin, *Remedying a Particularized Form of Discrimination*, 154 U. PA. L. REV. 157, 172 (2005).

⁹⁷ Rehabilitation Act, 29 U.S.C.A. §794 (West 2014).

“program or activity” are to be all-encompassing,⁹⁸ and was meant to include operations of a “department, agency, special purpose district, or other instrumentality of a State or of a local government.”⁹⁹ Once *Yeskey* was decided and a broader reading of Title II of the ADA was accepted, courtrooms soon became a place for mentally disabled plaintiffs to be heard when discriminated against by law enforcement agencies.

III. SECTION 1983 VS. TITLE II OF THE AMERICANS WITH DISABILITIES ACT

Traditionally, when an individual feels they have been wronged by a police officer and excessive force has been used against them, they bring a claim under section 1983 of the United States Code,¹⁰⁰ the primary channel used to remedy violations of constitutional rights.¹⁰¹ Section 1983 provides a civil remedy for individuals who feel their rights have been violated by persons acting “under color of”¹⁰² law.¹⁰³ Persons with mental disabilities face even greater challenges in pursuing this remedy mainly because

⁹⁸ Rachel E. Brodin, *Remedying a Particularized Form of Discrimination*, 154 U. PA. L. REV. 157, 172 (2005).

⁹⁹ *See Id.*

¹⁰⁰ *See generally* 42 U.S.C. §1983.

¹⁰¹ David Achtenburg, *A “Milder Measure of Villainy”: The Unknown History of 42 U.S.C. §1983 and the Meaning of “Under Color of” Law*, 1999 UTAH L. REV. 1, 2 (1999).

¹⁰² *Id.* at 53 (stating that under color of law means pretense of law).

¹⁰³ *Id.*

the Supreme Court does not give them any greater constitutional protections than what it gives the average person.¹⁰⁴ The Americans with Disabilities Act is a civil remedy alternative for those suffering from mental disabilities that goes beyond what is granted by §1983.¹⁰⁵ This section of the paper explains the difference between bringing a claim under the ADA rather than a claim under §1983.

A. TITLE II OF THE AMERICANS WITH DISABILITIES ACT

Title II of the ADA provides that “ no qualified individual with a disability shall, by reason of such disability, be excluded form participation in or be denied the benefit of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”¹⁰⁶ To be concise, Title II governs every service, program, and

¹⁰⁴ James C. Harrington, *The ADA and Section 1983: Walking Hand in Hand*, 19 REV. LITIG. 435, 436 (2000); *See also City of Cleburne v. Cleburne Living Center Inc.*, 473 U.S. 432 (holding that the Fourteenth Amendment does not guarantee constitutional protection for the mentally ill.)

¹⁰⁵ *Id.*

¹⁰⁶ 42 U.S.C. §12132.

activity that is sponsored by public entities.¹⁰⁷ Currently, there is a conflict between the circuits of whether an arrest is considered an activity under the ADA.¹⁰⁸

There is a considerable amount of attention currently focused on the exchange between Title II and police activities such as areas of police accommodation involving accommodation of the appropriate use of force, calls involving individuals with a mental illness, and when there is a need for an interpreter.¹⁰⁹

Plaintiffs who suffer from a mental illness are now bringing claims under Title II of the ADA¹¹⁰ either instead of, or in conjunction with §1983 claims.¹¹¹ In order to

¹⁰⁷ Franklin L. Ferguson, Jr., *A New Ride: Using Title II As a Civil Rights Vehicle to American Society's Elusive "Level Playing Fields,"* 27 AM. J. TRIAL ADVOC. 517, 525 (2004).

¹⁰⁸ See *Hainze v. Richards*, 207 F.3d 795 (2000); *Rosen v. Montgomery County Maryland*, 121 F.3d 154 (1997); *Thomas v. Davis*, 295 F.3d 809 (2002).

¹⁰⁹ See James C. Harrington, *The ADA and Section 1983*, 19 REV. LITIG. at 453.

¹¹⁰ 42 U.S.C.A. § 12131 (2001) (stating the ADA defines a qualified individual with a disability as, an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”)

¹¹¹ *Id.* at 445

effectively state a claim under the ADA, a plaintiff must prove that (1) he or she is an individual with a disability¹¹², (2) he or she is qualified to participate in or receive the benefit of the public entity's services, programs, or activities, (3) he or she was excluded from participation in or denied the benefits of the public entity's services, programs, or activities or was discriminated against by the public entity, (4) and that this exclusion or denial of benefits or discrimination was by reason of his or her disability.¹¹³

Bringing suit under Title II serves as an alternative to §1983 and provides relief in situations where §1983 may not.¹¹⁴ For instance, a claim under the ADA does not contain a “totality of the circumstances” test or implicate constitutional principles like §1983 claim does¹¹⁵, which gives ADA claimants more freedom and less restrictions because such elements do not have to be met. Bringing a claim under Title II also frees plaintiffs of proving the state of mind element of proof in which they must prove that the

¹¹² Franklin L. Ferguson, Jr., *A New Ride*, 27 AM. J. TRIAL ADVOC, at 547 (defines an individual with a disability as someone who “with or without reasonable modification to rules, policies, or practices,...meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”).

¹¹³ *Sheehan v. City & County of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014)

¹¹⁴ Harrington, *supra* note 69, at 437.

¹¹⁵ Rachel E. Brodin, *Remedying a Particularized Form of Discrimination*, 154 U. PA. L. REV. at 184.

defendant consciously deprived them of their rights protected by the Constitution.¹¹⁶

Further, because Title II claims can only be brought against government entities and not individual defendants, the qualified immunity defense is unavailable.¹¹⁷

1. Wrongful Arrest Theory

Courts have developed two different theories under which an individual may bring an ADA claim that is based on a police officer's actions when executing an arrest:¹¹⁸ the "wrongful arrest theory," and "reasonable accommodation theory."¹¹⁹

An individual may bring a claim under the wrongful arrest theory "if police have arrested her because of her lawful conduct that she has participated in as a result of her disability."¹²⁰ Often, this arrest is due to a misconception of an individuals' disability as criminal activity.¹²¹ Some of the most common problems involve unexpected actions

¹¹⁶ Franklin L. Ferguson, Jr., *A New Ride*, 27 AM. J. TRIAL ADVOC. at 518.

¹¹⁷ Rachel E. Brodin, *Remedying a Particularized Form of Discrimination*, 154 U. PA. L. REV. at 184. (Defense of qualified immunity available under §1983 does not apply.)

¹¹⁸ *Id.* at 161-62

¹¹⁹ *Id.* at 162

¹²⁰ *Id.*

¹²¹ Martha S. Stonebook, *Title II of the Americans with Disabilities Act: The Potential for Police Liability and Ways to Avoid It*, THE POLICE CHIEF

taken by the individual that is perceived by officers as suspicious or illegal activity, slurred speech as a result of the disability, or a speech or hearing impairment that prevents the individual from responding to directions.¹²² However, for a claim to arise under this theory, the officer must have known or should have known that the behavior was related to the disability.¹²³

2. Reasonable Accommodation Theory

Courts have also recognized the “reasonable accommodation theory,”¹²⁴ which is directed at a pre-arrest, arrest, or post arrest encounters with a person with a mental illness.¹²⁵ In making the arrest, officers do not take the proper steps needed to reasonably

http://www.policchiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1004&issue_id=92006 . (last visited April 14, 2015).

¹²² *Id.*

¹²³ Elizabeth Hervey Osborn, Comments and Casenote, *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, 348 (2008).

¹²⁴ See generally *Gorman v. Bartch*, 152 F.3d 907(8th Cir. 1998) (noting that officers failed to accommodate an arrestee in a wheelchair upon his transfer to police station).

¹²⁵ Elizabeth Hervey Osborn, *What Happened to “Paul’s Law”?*, 79 U. COLO. L. REV. at 351.

accommodate an individual's disability.¹²⁶ While many courts have recognized this theory, many have failed to apply it to on-the-street responses to exigent circumstances.¹²⁷ However, not all cases fit directly into either of the theories.

3. Somewhere Outside the Two Theories

Outside of the scope of either aforementioned theory is the quasi-theory that states that¹²⁸ if a mentally disabled person engages in illegal activity and thus creates an exigent circumstance¹²⁹, police are obligated to secure the scene and ensure the safety of others before being responsible of their duty to accommodate the disability under the ADA.¹³⁰

¹²⁶ Martha S. Stonebook, *Title II of the Americans with Disabilities Act The Potential for Police Liability and Ways to Avoid It*, THE POLICE CHIEF, http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1004&issue_id=92006 (last visited April 14, 2015).

¹²⁷ *Id.*

¹²⁸ See generally *Gohier v. Enright*, 186 F.3d 1216 (10th Cir. 1999) (stating officer neither used force because he misinterpreted the lawful effects of the suspect's disability as criminal activity or failed to accommodate his disability when arresting him).

¹²⁹ See Jacob Y. Chen, *Exigency and Emergency: Understanding the Warrantless Non-Consensual Home Entry*, 48 No. 5 Crim. Law Bulletin ART 6 (defines exigency as a circumstance that requires immediate attention).

¹³⁰ Elizabeth Hervey Osborn, *What Happened to "Paul's Law"?*, 79 U. COLO. L. REV. at 352.

B. TRADITIONAL §1983 CLAIM- CIVIL RIGHTS STATUTE

A §1983 claim protects people from unconstitutional governmental acts.¹³¹ Its purpose is to protect certain rights that are “secured by the Constitution and laws.”¹³² To effectively establish a prima facie case under 42 U.S.C. 1983 for excessive force, a plaintiff must prove (1) deprivation of a federal constitutional right (2) by an individual or entity acting under color of state law (3) during an arrest (4) by excessive force rising to the level of a constitutional deprivation.¹³³ For most plaintiffs, including persons with a mental illness, there are major barriers that impede success in a typical §1983 claim. Such barriers include qualified immunity¹³⁴ and interlocutory appeals from the denial of qualified immunity.¹³⁵

¹³¹ Hon. Harvey Brown & Sarah V. Kerrigan, *42 U.S.C. §1983: The Vehicle for Protecting Public Employees’ Constitutional Rights*, 47 BAYLOR L. REV. 619, 620 (1995).

¹³² *Id.* at 621.

¹³³ See Kathleen L. Daeer-Bannon, *Cause of Action Under 42 USC §1983 for Use of Excessive Force by Police in Making Arrest*, 59 CAUSES OF ACTION 2D 173 (2013).

¹³⁴ See Mark R. Brown, *Qualified Immunity and Interlocutory Fact-Finding in the Court of Appeals*, 114 PENN ST. L. REV. 1317, 1319 (2010) (stating qualified immunity protects officers from money damages and the burden of litigation).

¹³⁵ James C. Harrington, *The ADA and Section 1983*, 19 REV. LITIG., at 436.

The biggest obstacle that a plaintiff must overcome in proving an excessive force claim under Section 1983 is qualified immunity. This judicially created affirmative defense is applicable to claims of excessive force¹³⁶ and provides officers immunity from damages “unless a reasonable officer would have known that his actions would violate clearly established constitutional rights of the plaintiff.”¹³⁷ In addition to providing officers with an affirmative defense, qualified immunity protects society as a whole from costs caused by lawsuits against public officers.¹³⁸ The doctrine recognizes that officers will indeed make errors, yet deserve protection to prevent them from fearing to take any action at all due to fear.¹³⁹

If a qualified immunity defense is denied, officers may seek an interlocutory appeal, which is a tool for public officials “to terminate insubstantial suits promptly.”¹⁴⁰

¹³⁶ See Kathryn R. Urbonya, *Interlocutory Appeals from Orders Denying Qualified Immunity: Determining the Proper Scope of Appellate Jurisdiction*, 55 WASH. & LEE L. REV. 3, 11 (1998).

¹³⁷ Rachel E. Brodin, *Remedying a Particularized Form of Discrimination*, 154 U. PA. L. REV. at 180

¹³⁸ 59 AM. JUR. 3D *Proof of Facts* §291 (2000)

¹³⁹ *Id.*

¹⁴⁰ Alexander A. Reinert, *Does Qualified Immunity Matter?* 8 U. ST. THOMAS L.J. 477, 487 (2011).

Therefore, if there is a denial of a claim prior to trial of qualified immunity that turns into an issue of law, it will be appealable on an interlocutory basis.¹⁴¹

IV. ANALYSIS: ORAL ARGUMENTS BEFORE THE SUPREME COURT

On May 18, 2015, the United States Supreme Court issued an opinion in *Sheehan v. City & County of San Francisco*.¹⁴² Unfortunately, due to the subsequent change in arguments by both parties, the Court chose to rule solely on the issue of qualified immunity. The language throughout the opinion makes it immediately apparent that the nation's highest court felt that the issue was one that definitely needed to be answered, but due to judicial discretion¹⁴³, they chose not to. This part will analyze the arguments of both parties and language of the Court that hinted at their position on the issue. Also, this section will explore how the Court should rule in the future if this issue comes before it again. Furthermore, this section will explore possible solutions within the law enforcement field to help combat the current epidemic and also portrays the trauma these types of encounters leave on peace officers that can possibly help strengthen the Court's analysis.

¹⁴¹ Michael Avery et al., §3:21. *Procedural Issues in the Litigation of the Qualified Immunity Defense---Interlocutory Appeals*, POLICE MISCONDUCT: L. & LITIG, 1, 6 (2014).

¹⁴² *Sheehan v. City & County of San Francisco*, 135 S.Ct. 1765, 1774 (2015).

¹⁴³ *Id.* at 1774.

A. ORAL ARGUMENTS

Both parties changed their initial question of whether Title II applies to armed, violent mentally ill suspects, and strayed upon a different path, a path which afforded them little recovery. Both parties argued that Title II does in fact apply to arrests, but does not require accommodations for armed and violent suspects who are disabled,¹⁴⁴ and essentially failed to brief the issue of what discrimination means in this context.¹⁴⁵ Counsel for both parties maintained that “the circuits are unified that Title II applies to arrests,¹⁴⁶” which in fact is a question that the Court has never actually answered.¹⁴⁷

¹⁴⁴ Transcript of Oral Argument at 4, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412).

¹⁴⁵ Transcript of Oral Argument at 8, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412) (Justice Alito stated, “If discrimination means what it means in ordinary parlance, which means treating people differently, then there would be no basis for those regulations.”)

¹⁴⁶ Transcript of Oral Argument at 9, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412)

¹⁴⁷ Transcript of Oral Argument at 12, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412)

Both parties agreed that the relevant statutory provision at issue was 42 U.S.C.A. §12132.¹⁴⁸ Counsel for the officers argued that if an individual presents a significant threat, then no accommodation is required.¹⁴⁹ Counsel further stated rather profoundly that exigency is very, very important, but there will be times when the exigency is an unstable equilibrium, where the officers where have an obligation to “back off.”¹⁵⁰ In closing, Counsel asserted that any accommodation that increases a safety risk isn’t reasonable as a matter of law.¹⁵¹ Counsel for Sheehan essentially argued along the same lines by stating that the direct threat defense, Section 139 of the ADA regulations, addressed the issues before the Court.¹⁵² Counsel further stated that Section 139 did not apply in this situation because there was not a substantial risk to the public.¹⁵³ Counsel

¹⁴⁸ Transcript of Oral Argument at 7, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412)

¹⁴⁹ Transcript of Oral Argument at 14, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412)

¹⁵⁰ Transcript of Oral Argument at 27 of San Francisco, *Sheehan v. City & County*, 743 F.3d 1211 (2014) (No. 13-1412)

¹⁵¹ Transcript of Oral Argument at 56, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412)

¹⁵² Transcript of Oral Argument at 30, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412)

¹⁵³ *Id.*

further elaborated that there is another part to Section 139, in which there may be a duty by the officer to mitigate the risk with reasonable accommodations.¹⁵⁴ As one might expect, the Court had quite a reaction to both arguments.

B. THE COURT’S OPINION AND ITS ANTICIPATION OF WHAT IT WOULD HAVE RULED

In its opinion, the Court addressed both oral arguments and the Ninth Circuit opinion. Like most opinions involving excessive force, the Court noted that the Ninth Circuit had quoted *Graham v. Conner*¹⁵⁵ in its opinion; however the Supreme Court irrefutably condemned this comparison. Per the Court, “there is a world of difference between needlessly withholding sugar from an innocent person who is suffering from an insulin reaction and responding to a perilous situation Holder and Reynolds confronted.”¹⁵⁶ The Court didn’t stop there; it proceeded to shut down the Ninth Circuit’s comparison to two more of its cases dealing with excessive force and individuals suffering from a mental illness.

The Court started off discrediting *Deorle v. Rutherford*¹⁵⁷, which involved an emotionally disturbed individual who was unarmed and in the officer’s plain view.¹⁵⁸ The court viciously distinguishes this case with Sheehan because she was explicitly

¹⁵⁴ *Id.*

¹⁵⁵ *Graham v. Conner*, 490 U.S. 386 (1989).

¹⁵⁶ *Sheehan* at 1776.

¹⁵⁷ *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2009).

¹⁵⁸ *Sheehan* at 1776.

armed, dangerous, and out of sight.¹⁵⁹ The Court then continued on to distinguish *Alexander v. City & County of San Francisco*¹⁶⁰, another case involving a person with a mental illness, where a jury concluded that excessive force was used and reasoned that the officers provoked the confrontations due to the absence of exigent circumstances.¹⁶¹ Again, the Court strikes down this argument as a bad analogy because “competent officers could have believed the second entry was justified under both continuous search and exigent circumstances rationale.”¹⁶² The Court further reasoned that Sheehan could not establish a constitutional violation comprised merely of bad tactics.¹⁶³ With these three cases in hand, the Supreme Court concluded that overall, no precedent exists that states that there is not an objective need for immediate entry in this situation, and accordingly, exigent circumstances were apparent¹⁶⁴ Lastly, the Court makes it known that despite the fact that both parties seemed to agree that a public entity can be held vicariously liable for the purposeful or deliberately indifferent behavior of its

¹⁵⁹ *Id.*

¹⁶⁰ *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994).

¹⁶¹ *Sheehan* at 1776.

¹⁶² *Id.* at 1777.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

employees,¹⁶⁵ it has *never* made a decision saying this was correct, and they declined to do so because of the absence of adversarial briefing.¹⁶⁶

In spite of the fact that the Court declined to answer whether Title II of the ADA applies to armed, violent mentally ill individuals, the opinion issued by Justice Alito seems to suggest that the Court *would* have ruled that Title II of the ADA does not apply to armed, violent mentally ill individuals, had adversarial briefing on the issue been completed. In fact, there are various comments made by the Justices' throughout both the opinion and the concurrence that portray that the Court would have liked to resolve this issue.¹⁶⁷

The Court first hinted at what it would have perhaps liked to rule in its qualified immunity analysis. The Court seems to use a Fourth Amendment reasonableness standard, and consequently declines to create a special rule for an analysis due to Sheehan's mental illness.¹⁶⁸ The Court further reinforces this by candidly stating, "Nor is there any doubt that had Sheehan not been disabled, the officers could have opened her door the second time without violating any constitutional rights."¹⁶⁹ Ultimately, the "nail

¹⁶⁵ *Id.* at 1773.

¹⁶⁶ *Id.* at 1774.

¹⁶⁷ *See Sheehan v. City & County of San Francisco*, 135 S.Ct. 1765, 1773, 1779 (2015).

¹⁶⁸ *Id.* at 1775.

¹⁶⁹ *Id.* at 1775.

in the coffin” seems to be the Court’s distinguishing of the case law that the Ninth Circuit cites to. Although the Ninth Circuit cited to cases involving mentally ill individuals, the Court still finds a way to distinguish these cases from *Sheehan* because of the intensity of the situation that the officers encountered.¹⁷⁰ The Court constantly compares Sheehan’s violent actions and the fact that she was armed and dangerous.¹⁷¹ A closer reading manifests the fact that the Court disregards the fact that Sheehan suffers from a mental illness, but rather is focused on the safety of the officers.

In its closing, the Court acknowledges that there seems to not be in existence any cases that could itself establish the federal right that the respondent conceded.¹⁷² To bolster this indication, the Court ends its analysis with two quotes from two cases that deal with a violent and armed individual suffering from a mental illness.¹⁷³ In addition, during oral arguments, Justice Scalia mirrors the Court’s Fourth Amendment

¹⁷⁰ *Id.* at 1776.

¹⁷¹ *Sheehan v. City & County of San Francisco*, 135 S.Ct. 1765, 1776 (2015).

¹⁷² *Id.* at 1778.

¹⁷³ *Bates v. Chesterfield County*, 216 F.3d 367, 372 (4th Cir. 2000)(“Knowledge of a person’s disability cannot foreclose officers from protecting themselves, the disabled person, and the general public.”); *Menuel v. Atlanta*, 25 F.3d 990 (11th Cir. 1994)(upholding the use of deadly force to assist in the apprehension of a mentally ill man who was armed with a knife and hiding behind a door.)

reasonableness analysis in which he states, “ It doesn’t apply---it doesn’t apply in one particular circumstance, where the person is armed and dangerous.”¹⁷⁴ From there, the Court goes on to state, “Nor is there any doubt that had Sheehan not been disabled, the officers could have opened her door the second time without violating any constitutional rights.”¹⁷⁵ It is here that the Court seems to anticipate why the ADA should not apply in these types of situations, as it analyzed them as they would any other Fourth Amendment issue, regardless of the mental state of the individual. Lastly, the court reinforces the notion that officers are forced to make split-second decisions and may make some mistakes,¹⁷⁶ and ultimately displays that they believe in giving officers the benefit of the doubt.¹⁷⁷ A small but significant indication of what the Court would have initially ruled

¹⁷⁴ Transcript of Oral Argument at 26, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412); see also Transcript of Oral Argument at 25, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412) (Justice Scalia states, “That seems to me a fairly sensible statement. It is never reasonable to accommodate somebody who is armed and violent, period.”)

¹⁷⁵ *Sheehan* at 1775.

¹⁷⁶ *Id.*

¹⁷⁷ See also Transcript of Oral Argument at 39, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412) (Justice Kagan discusses the need to give officers the benefit of the doubt in uncertain situations such as this one.)

lies in the fact that the Court makes it a point to address the fact that basically, the question presented was whether, despite the dangerous consequences, the officers violated the Fourth Amendment when they reopened Sheehan's door, not whether they accommodated her disability.¹⁷⁸

C. HOW THE PARTIES' ARGUMENTS COULD PAVE THE WAY FOR FUTURE CASES

During oral argument, Counsel for the officers proposed for the Court to resolve the case by holding that the direct threat regulation applies to situations like this one because the significant risk had not yet been eliminated.¹⁷⁹ However, although counsel did not parrot the statute but rather cited to *Hainze*¹⁸⁰ the Court could possibly combine both the direct threat regulation and the rule the Fifth Circuit laid out in *Hainze*.

1. Direct Threat Exception

Pursuant to the Code of Federal Regulations, “a public entity is not required to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of

¹⁷⁸ *Id.* at 1775.

¹⁷⁹ Transcript of Oral Argument at 15, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412)

¹⁸⁰ *Hainze v. Richards*

others.”¹⁸¹ A direct threat is defined as any significant risk to either the health or safety of others that cannot be eliminated by a reasonable accommodation.¹⁸²

As counsel pointed out during oral argument, the direct threat exception gives weight to what and how the ADA should apply to arrests.¹⁸³ Counsel for the officers argued that one way for the Court to resolve this case was to hold that the direct threat regulation applies to situations like this one because the significant risk had not been eliminated in this case.¹⁸⁴ Therefore, such an exception would allow accommodations to be met under circumstances where the safety of others is not at issue.

For example, it is without a doubt that it is reasonable for the ADA to apply to the arrests of a deaf individual, so long as this individual is not armed and violent and a direct threat to officers. This is evidenced in *Gorman v. Bartch*,¹⁸⁵ in which the Eighth Circuit held that the arrestee’s allegations fell within the framework of the ADA provisions in regards to public services. Making these type of reasonable accommodations are more along the lines of how officers can accommodate a person with a mental illness and does

¹⁸¹ 28 C.F.R. §35-139

¹⁸² 42 U.S.C.A. §12111

¹⁸³ Transcript of Oral Argument at 21, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412)

¹⁸⁴ Transcript of Oral Argument at 15, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412)

¹⁸⁵ *Gorman v. Bartch*, 536 U.S. 181 (2002)

not force them to jeopardize their safety or the safety of others. Further, the direct threat exception can help ensure that persons with a mental illness are also safe and accommodated. In addition to the direct threat exception, the *Hainze* analysis from the Fifth Circuit can also be combined to ensure the safety of both officers and persons with a mental illness.

2. Hainze exception – 5th Circuit

Counsel for the officers reasoned that the ADA does not apply when there is an exigency as in *Hainze*.¹⁸⁶ In *Hainze v. Richards*, a mentally disabled man brought claims under both §1983, the ADA, and the Rehabilitation Act that arose from a shooting with police. A 911 call was made by the respondent's aunt for police to transport her suicidal nephew, Kim Michael Hainze, to a hospital for mental health treatment.¹⁸⁷ Hainze, who had a history of depression and was under the influence of alcohol and anti-depressants, was armed with a knife.¹⁸⁸ Officers dispatched were given this information.¹⁸⁹

Upon arrival, Hainze was found barefoot in cold temperatures standing next to an occupied truck.¹⁹⁰ Officers immediately ordered Hainze away from the truck, in which Hainze responded with profanities and began to walk towards one of the officers, who

¹⁸⁷ *Hainze* at 797.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

had his gun drawn.¹⁹¹ Hainze was ordered to stop twice but ignored the officers' commands and once Haxnze was within four to six feet, the officer fired two shots into Hainze's chest.¹⁹² Fortunately, Hainze survived.¹⁹³

Hainze claimed that he was denied both the benefits and protections of the mental health training provided to the county's deputies when the officer that shot him acted contrary to his training because he never engaged in conversation to calm him, did not try to give him space, did not attempt to diffuse the situation, did not use less than lethal force, and did not attempt to create an opportunities for the foregoing to occur.¹⁹⁴ The Court ultimately found that Hainze's assault of the officer with a deadly weapon denied him the benefits of that program under the ADA.¹⁹⁵ The court further iterated that Title II of the ADA does not apply to an officer's "on-the go 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."¹⁹⁶ The court further stated,

"law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Hainze* at 798.

¹⁹⁵ *Id.* at 801

¹⁹⁶ *Id.*

potentially life-threatening situations. To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents.”

The Court in *Hainze* reiterated the fact that they did not believe Congress intended that the fulfillment of the objective of the ADA is to be attained at the expense of the safety of the general welfare of others. However, once the area was secure and there was no longer a threat to human safety, the deputies would then have been under a duty to reasonably accommodate *Hainze* and his disability.

The “*Hainze*” approach, as counsel referred to during oral argument,¹⁹⁷ should be applied to the Supreme Courts’ future ruling. As argued during oral argument, no accommodation is reasonable under exigent circumstances, which was the conflict counsel asked the Court to resolve.¹⁹⁸ Further, counsel argued that the reason in not providing an accommodation is that the fundamental government activity occurring is protecting public safety.¹⁹⁹

Opposing counsel also brought up a good point when discussing the *Hainze* approach: according to counsel, *Hainze* got it wrong because it basically said that any

¹⁹⁷ Transcript of Oral Argument at 24, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412)

¹⁹⁸ Transcript of Oral Argument at 6, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412)

¹⁹⁹ Transcript of Oral Argument at 16, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412)

time there is a confrontation out in the open, the ADA should not apply.²⁰⁰ Similar to the direct threat exception, the *Hainze* approach ensures that the safety of others is the main concern. This approach should be combined with the direct threat exception, which would then satisfy both parties and help protect public safety.

In thinking of the situation in hindsight, requiring officers to choose the correct accommodation would require them to exercise judgment that may be beyond their scope in that given moment. In the heat of battle with lives potentially on the line, an officer would not be able to rely on their training and common sense to decide what the best possible accommodation would be in that instance. However, in making this determination, there are other things the Court should look to.

C. THINGS THE COURT SHOULD TAKE INTO CONSIDERATION TO HELP STRENGTHEN ITS ANALYSIS

The Court has gone through great lengths over the years to take into consideration the difficulty of officers' jobs. However, times change and opinions may change. Therefore, there are various consequences that the Court should consider when making this determination.

Every law enforcement officer must go through POST, in which they learn various aspects about the job. One of the specific things that law enforcement officers are taught

²⁰⁰ Transcript of Oral Argument at 30, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412)

is how to deal with the mentally ill, which is stated in learning domain 37.²⁰¹ In Learning Domain 37, law enforcement personnel are taught that they should treat a person who has a disability with the same caution they would use with any other suspect regarding judgments about enforcement of the law and personal safety.²⁰² Furthermore, it is also stressed that although the individual may have a disability, that individual may still be capable of injuring the officer.²⁰³

Another thing that the Court should take into consideration are the obstacles and emotional struggles that law enforcement officers often face. For example, often the stars of primetime news when a highly publicized occurrence happens, officers often have no choice but to get defensive in their actions rather than be constructive in their actions.²⁰⁴ Further, it should be duly noted that once an officer becomes an officer, changes occur; they are now a cop and see the world differently.²⁰⁵ For example, while most individuals would think of a “scout leader” as a leader, when an officer sees the word

²⁰¹ See generally Legislative Mandated Training Program, COMMISSION ON POST, (C.A. 2015), <https://post.ca.gov/legislatively-mandated.aspx>

²⁰² *Id*

²⁰³ *Id.*

²⁰⁴ Kevin M. Gilmartin, Ph.D, *Emotional Survival for Law Enforcement*, 16-17, (Melanie Mallon 2002)

²⁰⁵ Kevin M. Gilmartin, Ph.D, *Emotional Survival for Law Enforcement*, 21-22, (Melanie Mallon 2002)

“scout leader” they automatically think pedophile. This can be analogized to how officers view an individual who is armed and dangerous; while most people would see an individual behaving erratically, an officer will see this individual as a threat to their life.

In the world of a street police officer, being distrustful of human nature and motive keeps cops alive.²⁰⁶ Further, from the academy through their career as an officer, officers must learn to perceive the world differently than normal individuals; they must perceive the world as potentially hazardous in order to survive the streets,²⁰⁷ which is due mainly to the fact that the series of events they respond to each day can be either harmless or lethally dangerous. Unfortunately, this causes officers to initially guess which event will be safe and which will be dangerous.²⁰⁸ Therefore, forcing them to accommodate to a knife-wielding woman for the ADA is unfounded and unsafe. It is hard for citizens who are observing hyper vigilance to understand why officers acted the way they did during any given police encounter.²⁰⁹

²⁰⁶ Kevin M. Gilmartin, Ph.D, *Emotional Survival for Law Enforcement*, 24, (Melanie Mallon 2002) (“It is highly essential that every police officer---making every call for service, making every traffic stop---practice excellent officer safety skills, which translates into being distrustful.”)

²⁰⁷ Kevin M. Gilmartin, Ph.D, *Emotional Survival for Law Enforcement*, 33, (Melanie Mallon 2002)

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 41.

Lastly, the Court should never forget the emotional aspects that come with the job. No cop ever wants to have to take the life of another, whether it be in self-defense or not. In fact, many officers experience trauma and shock after the fact of realizing they have taken another human beings life. For example, a highly publicized video of an officer's reaction to killing a man became widely viewed and gave outsiders' a look into the trauma officers endure.²¹⁰ In the video, dash cam footage portrays a police officer breaking down in tears after he shoots and kills a man that he later learns was unarmed.²¹¹ The officer can be heard sobbing and saying, "I thought he was going to pull a gun on me."²¹² Such a video portrays to the Court and others that officers do what is needed to protect themselves, regardless of that persons' mental status.

***D. WHAT THE RULING MEANS FOR FUTURE CASES AND SOLUTIONS TO THE RISING
NUMBER OF INJURIES AMONG ENCOUNTERS OF POLICE AND PERSONS SUFFERING
FROM MENTALLY ILLNESSES***

It has been reported that sixty-eight percent of all officer-related justifiable homicides are precipitated by attacks on the officers; many, if not most of these

²¹⁰ See *VIDEO: Mont. Cop breaks down after killing unarmed man*, CBS, Jan. 13, 2015, <http://www.cbsnews.com/news/video-montana-cop-breaks-down-after-killing-unarmed-man/>

²¹¹ *Id.*

²¹² *Id.*

individuals are seriously mentally ill.²¹³ Clarity for officers in regards to their obligations under federal law is extremely necessary and also ties in for the need of public safety.²¹⁴ The law should not require law enforcement officers to consider the needs of an individual who is armed and violent, especially when officers are confronted with unpredictable and ever changing violent behavior and are forced to make split second decisions.²¹⁵ While there are accommodations that can be met under Title II during the course of an arrest,²¹⁶ any exigencies surrounding the police activity should be put into account in determining whether a modification is reasonable.²¹⁷ In spite of the fact that the Court did not rule on whether the ADA applies to violent armed mentally ill

²¹³ *Justifiable Homicides by Law Enforcement Officers: What is the Role of Mental Illness?* TREATMENT ADVOCACY CENTER AND NATIONAL SHERIFFS' ASSOCIATION (September 2013)

²¹⁴ Caleb Pershan, *Supreme Court Takes Case of SFPD Shooting of Mentally Disabled Woman*, SFIST, (Nov. 26, 2014), http://sfist.com/2014/11/26/supreme_court_to_hear_appeal_in_pol.php

²¹⁵ See Bob Egelko, *High Court to hear S.F. Appeal of Ruling in Police-Shooting Suit*, SF Gate, (Nov. 24, 2014, 3:14 PM), <http://www.sfgate.com/bayarea/article/High-court-to-hear-S-F-appeal-of-ruling-in-5917609.php>

²¹⁶ See *supra* notes 86-87 and accompanying text.

²¹⁷ Brief for Petitioner, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412), 2015 WL 254640, at *7.

individuals, its ruling has both good and bad outcomes for future cases for various reasons.

First and foremost, the Courts' ruling continues to leave unanswered questions for law enforcement officers throughout the United States on whether or not they must accommodate individuals who are not only armed and violent, but are also suffering from a mental illness, which could exacerbate the situation. Officers will be forced to make split second decisions in hopes of not violating Title II of the ADA. Furthermore, the Court leaves unanswered questions in areas concerning this issue, such as exactly what it means to accommodate an individual in this type of encounter. However, the Justices somewhat addressed this issue during oral arguments.

In particular, Chief Justice Roberts candidly states, "I don't know why you wouldn't think the pepper spray, instead of weapons, in the first instance wasn't a reasonable accommodation."²¹⁸ Justice Sotomayer further addresses this reasoning indicating that CIT and back up were called, hence hinting that this may be a form of accommodation.²¹⁹ Does this imply that an accommodation can go as far as calling for CIT teams or resorting to less lethal force? Or could an officer be held liable for not accommodating an individual in this type of encounter if they fail to delay their initial

²¹⁸ Transcript of Oral Argument at 33-34, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412)

²¹⁹ Transcript of Oral Argument at 35, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412)

response and an injury occurs? Such a ruling leaves many questions looming, which initially could be dangerous for both officers and persons suffering from a mental illness.

Fortunately, with the bad comes the good. The Court's ruling that an alleged failure by officers to follow their training does not itself negate qualified immunity can reasonably be understood as good news. As the Court states, "a plaintiff cannot avoid summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless."²²⁰ This is fortunate for law enforcement officers, mainly due to the fact that many individuals are now suing under a failure to train theory.²²¹

Regardless of the fact that the Court declined to decide such an important issue, in order to solve the actual issue of the rising number of injuries and deaths from encounters between officers and mentally ill persons, different policy measures need to occur throughout the United States. Unfortunately, there is not just one magic solution to help America with this growing issue. However, with multiple solutions, such a goal may be achievable.

1. Training

²²⁰ Billington v. Smith, 292 F.3d 1177, 1189 (9th Cir. 2002).

²²¹ Michael A. Rosenhouse, Annotation, *Application of Title II of Americans with Disabilities Act With Disabilities Act (42 U.S.C.A. §12132), Prohibiting Discrimination in Public Services, to Police Investigations*, 72 A.L.R. FED. 2D 503, *2 (2015).

One of the theories plaintiffs often invoke when suing under the ADA has been that either the defendant city or other entity employing the officer did not adequately train its officers or that it did not have proper protocols in place for dealing with individuals with disabilities.²²² While it may be true that some officers may receive more training than others, depending on how long they have been on the force, it is not true that officers do not receive any training. Training begins in the early years as a police cadet and continues as the officer's career continues.

Police cadets in California who are going through the police academy are required to take a specified number of hours of legislatively mandated training,²²³ which are allocated to 41 individual topics, including persons with disabilities. Learning Domain 37, titled Persons with Disabilities, consists of 4 Chapters, which include the following: Disability laws, Developmental Disabilities, Physical Disabilities, and Mental Illness.²²⁴

²²² *Id.*

²²³ See generally Legislative Mandated Training Program, COMMISSION ON POST, (C.A. 2015), <https://post.ca.gov/legislatively-mandated.aspx> (CA legislature submits Public Safety Training Bills to the Governor which require the Commission on Peace Officer Standards and Training (POST) to develop or make available that type of training to the field).

²²⁴ See generally, POST, Basic Course Workbook Series, Learning Domain 37 Persons with Disabilities, (Jan. 2006).

Once officers pass the academy, training is not over, as they are required to continue training in various areas throughout their career, which includes dealing with persons with disabilities. One such training program that offers training in this specific area is offered by Embassy Consulting Services, LLC. The four-hour course starts off with an introductory video,²²⁵ where officers witness what a schizophrenic individual goes through on a daily basis. The course then proceeds to teach officers how to define the various types of mental illness, how to dispel myths about mental illness, how to determine the causes and definitions of various mental illnesses, and how to identify symptoms of bi-polar and schizophrenia.²²⁶ In addition, officers are taught effective de-escalation and active listening skills and how to recognize the “many faces of defiance” and respond appropriately.²²⁷ After learning the basics in mental illness, officers are then given the opportunity to interact and engage in a question and answer session with an individual living with a mental illness.²²⁸ Furthermore, officers engage in role-playing scenarios that involve an individual with mental illness and also learn the most

²²⁵ Luke Murphy, *Types of Schizophrenia- A Day in the Life of*, YouTube (July 21, 2011) <https://www.youtube.com/watch?v=LWYwckFrksg>

²²⁶ *Keeping Your Officers Safe and Out of the Headlines: Interacting Effectively with the Mentally Ill*, EMBASSY CONSULTING SERVICES LLC (document given to author by Embassy Consulting).

²²⁷ *Id.*

²²⁸ *Id.*

appropriate disposition.²²⁹ The solution is therefore not the need to train officers because they are already trained and are continuously receiving training on how to deal with mentally ill persons.

It must be cautioned that training is not the complete answer to the problem, but is a tool to help the improvement of police response to incidents that involve those individuals who suffer from a mental illness.²³⁰ A possible solution is to therefore perhaps increase the amount of training. For example, if officers are currently required to take training in dealing with the mentally ill once a year, it could possibly be increased to two to three times a year due to the urgency of the issue at hand.

2. Crisis Intervention Teams

For the past 20 years, various law enforcement agencies throughout the nation have begun developing programs and practices to serve those suffering from mental illness.²³¹ Specifically, these programs are aimed at improving their response to people

²²⁹ *Id.*

²³⁰ Gary Cordner, *People with Mental Illness*, COMMUNITY ORIENTED POLICING SERVICES U.S. DEPARTMENT OF JUSTICE (May 2006), http://www.popcenter.org/problems/mental_illness/print/

²³¹ Melissa Reuland, *A Guide to Implementing Police-Based Diversion Programs for People With Mental Illness*, Department of Health and Human Services (Jan. 2004), at

with mental illness.²³² The most effective model of this specialization has been the Crisis Intervention Team, which is a group of officers who receive extra training and then serve as specialists and officers.²³³ With that being said, another possible solution is to enact more CIT groups throughout America in each police department.²³⁴ These officers still perform the regular duties of an officer, yet respond immediately whenever a situation occurs involving a person with a mental illness.²³⁵ Research has shown that CIT programs not only save money, but arrest rates of people with mental illness have declined, police-caused injuries suffered by persons suffering from a mental illness are down, and officer injury rates are down as well.²³⁶ However, many agencies have decided against the CIT program due to inadequate funds.²³⁷

²³² *Id.*

²³³ *Id.* at 11.

²³⁴ See Transcript of Oral Argument at 34, *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (2014) (No. 13-1412) (noting that a CIT had been called by one of the officers).

²³⁵ Melissa Reuland, *A Guide to Implementing Police-Based Diversion Programs for People With Mental Illness*, Department of Health and Human Services (Jan. 2004), at 12-13.

²³⁶ See generally Melissa Reuland, *A Guide to Implementing Police-Based Diversion Programs for People With Mental Illness*, Department of Health and Human

3. Teaming Mental Health Professionals With Police

Another popular approach that has been used by various agencies involves teaming mental health officials with officers on calls involving mentally ill persons. Having a mental health specialist assist in these types of calls are beneficial because they are trained in this specific field and will likely have effective techniques in dealing with a person with a mental illness. For example, the Hamilton Police Department is now ensuring that individuals suffering from a mental illness receive the required assistance they need by providing mental health officials to accompany officers in

VI. CONCLUSION

There is no doubt that officers are frequently in contact with persons suffering from a mental illness. As one commentator put it, “the public repeatedly calls on law enforcement officers for assistance with people who are mentally ill...because peace officers alone combine free, around-the-clock service, with unique mobility, a legal

Services (Jan. 2004), at 4-9 (noting the outcomes of police departments using the CIT model approach).

²³⁷ See Philip Morris, *Policing the mentally ill is often a question of life or death*, CLEVELAND.COM, (March 10, 2015, 6:34 PM), http://www.cleveland.com/morris/index.ssf/2015/03/policing_the_mentally_ill_is_o.html

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obligation to respond, and legal authority to detain,”²³⁸ However, these encounters can be uncertain and at times result in officers dealing with an armed and violent mentally ill person.²³⁹

As the Supreme Court noted, there is a need for officer and public safety when dealing with accommodating a violent and armed mentally ill person.²⁴⁰ Denying to make a decision on such an important issue leaves nothing but unanswered queries that not only deserve answers, but for the safety of our officers and persons suffering from a mental illness, require answers. There is no telling when this question will come before the Court again, but when and if it does, society can only hope that the Court considers the direct threat and *Hainze* combination which will meet a common ground for the safety of both our officers and persons with a mental illness. *Sheehan* has portrayed that police encounters with the mentally ill is a growing epidemic that must be faced and dealt with immediately. In order to solve the public policy issue at hand, we must look to outside sources, other than the police themselves, to solve the problem and meet middle ground to keep both our officers and the mentally ill safe.

²³⁸ Melissa Reuland, *A Guide to Implementing Police-Based Diversion Programs for People With Mental Illness*, Department of Health and Human Services (Jan. 2004), at 2.

²³⁹ *Id.* at 3.

²⁴⁰ *See supra* note 113.