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FOR THE PROTECTION OF SOCIETY'S MOST VULNERABLE, THE ADA SHOULD APPLY TO ARRESTS

*Thomas J. Auner**

I. INTRODUCTION

Violent confrontations between police and mentally ill suspects sparked a national discussion about officers' treatment of the mentally ill.¹ In Fullerton, California, officers severely beat and killed mentally ill suspect Kelly Thomas.² In Los Angeles, California, officers shot and killed the unarmed and mentally ill suspect Ezell Ford.³ Indeed, studies show that nearly half of all people police kill are mentally ill.⁴

Fortunately, courts began taking this disproportionate figure into account by providing mentally ill people with additional legal protections.⁵ In *Sheehan v. City and County of San Francisco*,⁶ the

* J.D. Candidate, May 2016, Loyola Law School, Los Angeles. Thank you to Professor Levenson for her guidance on this Comment and throughout law school. Special thanks to the members of the *Loyola of Los Angeles Law Review* for all of their hard work this year.

1. See Isabelle Chapman, *Los Angeles Police Department Shoots Unarmed, Mentally Ill Man*, AOL (Aug. 13, 2014, 10:40 AM), <http://www.aol.com/article/2014/08/13/los-angeles-police-department-shoots-unarmed-mentally-ill-man/20946396/>; Brian Levin, *Fed Charges Eyed After Police Cleared in Homeless Man's Death*, HUFFINGTON POST (Jan. 14, 2014, 3:02 AM), http://www.huffingtonpost.com/brian-levin-jd/fed-charges-eyed-after-ca_b_4593296.html?utm_hp_ref=kelly-thomas; Jules Suzdaltsev, *Most of the People Killed By San Francisco Cops Are Mentally Ill*, VICE (Oct. 10, 2014), <http://vice.com/read/most-of-the-people-killed-by-the-san-francisco-police-department-were-mentally-ill>.

2. Levin, *supra* note 1.

3. Chapman, *supra* note 1.

4. Kelly Bouchard, *Across Nation Unsettling Acceptance When Mentally Ill in Crisis Are Killed*, PORTLAND PRESS HERALD (Dec. 9, 2012), <http://pressherald.com/2012/12/09/shoot-across-nation-a-grim-acceptance-when-mentally-ill-shot-down/>; see also Michael Avery, *Unreasonable Seizures 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, 264–65 (2003).

5. 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, 159 (2005).

6. 743 F.3d 1211 (9th Cir. 2014).

Ninth Circuit held that the Americans with Disabilities Act (ADA) applies to arrest situations involving mentally ill persons.⁷ The Ninth Circuit's holding significantly furthers the other circuit courts' momentum and fundamentally changes how police officers approach the mentally ill. However, not all circuits apply the ADA to arrest situations, leading to unequal federal protections for the mentally ill.

Part II of this Comment discusses the facts of *Sheehan*. Part III provides an overview of the problematic policies affecting the mentally ill. The ADA's objectives and its application to public entities are also discussed. Part IV provides an overview of the Ninth Circuit's reasoning in *Sheehan*. Part V shows why excessive force claims under the Fourth Amendment and 42 U.S.C. § 1983 are deficient for protecting the mentally ill. Part V also analyzes the approaches taken by other circuits regarding the ADA and shows how *Sheehan* directly impacts mentally ill persons' safety.

II. STATEMENT OF THE CASE

What began as a typical day for Teresa Sheehan ended with violence and injuries. After performing a routine check at Plaintiff Teresa Sheehan's assisted living facility, and determining her to be gravely disabled, social worker Heath Hodge notified the San Francisco Police Department.⁸ The police department dispatched Officer Katherine Holder and Sergeant Kimberly Reynolds.⁹ The dispatch informed the officers that Sheehan was known to make violent threats and claimed to have a knife.¹⁰ Outside the group home, Hodge informed the officers of Sheehan's mental illness and showed them his completed section 5150 application to involuntarily commit Sheehan for a seventy-two hour evaluation.¹¹ The application stated that Sheehan's health was deteriorating, she had worn the same clothes for days, and she threatened Hodge after he attempted to check on her.¹² Near the bottom of the application, Hodge checked the boxes indicating that Sheehan was gravely

7. *Id.* at 1232.

8. *Id.* at 1217.

9. *Id.* at 1217-18.

10. *Id.* at 1218.

11. *Id.*

12. *Id.*

disabled and a danger to others.¹³ He did not indicate that Sheehan was a threat to herself.¹⁴

Hodge further told the officers that Sheehan had been off her medication for months and that her condition was deteriorating.¹⁵ He also informed the officers that he cleared the building of all other residents and that Sheehan could not use her bedroom window as a means for escape without a ladder.¹⁶

The officers, followed by Hodge, proceeded to contact Sheehan by knocking on her door at the end of the second-floor hallway.¹⁷ Sheehan did not respond and the police entered her apartment using a key Hodge furnished.¹⁸ Sheehan was initially lying on her bed with a book on top of her.¹⁹ The officers startled Sheehan, and she then grabbed a knife, made verbal threats, and stepped toward the officers.²⁰ The officers quickly shut Sheehan's door and retreated to the hallway where they called for backup.²¹

The officers drew pepper spray and guns, and asked Hodge to go downstairs.²² Rather than waiting for backup to arrive, the officers forcibly reentered Sheehan's room to prevent her from escaping and to protect themselves and others.²³ While there is dispute as to exactly what occurred, the officers testified that Sheehan approached them while holding a knife, and thus, they pepper sprayed her.²⁴ The officers claim that despite this, Sheehan continued towards them.²⁵ Sheehan admitted to holding the knife "to defend herself."²⁶ Officers then shot Sheehan, severely injuring her.²⁷

The state prosecuted Sheehan for two counts of assault with a deadly weapon, two counts of assaulting a police officer with a

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 1218–19.

21. *Id.* at 1219.

22. *Id.*

23. *Id.*

24. *Id.* at 1219–20.

25. *Id.*

26. *Id.* at 1220.

27. *See id.*

deadly weapon, and one count of making criminal threats.²⁸ The jury did not convict Sheehan on any of the charges.²⁹ In the Northern District, Sheehan then filed this suit against the City and County of San Francisco, Police Chief Heather Fong, and the officers, claiming the officers acted unreasonably, used excessive force, and—among other claims—that the ADA applies to arrest situations and the officers failed to accommodate reasonably Sheehan’s mental illness.³⁰

The District Court granted summary judgment for the defendants.³¹ On appeal, the Ninth Circuit held that the officers were justified initially entering into Sheehan’s room because it was an emergency situation.³² However, as an issue of first impression, the Ninth Circuit held that ADA should apply to arrest situations and that there were triable issues of fact in determining whether the officers failed to reasonably accommodate Sheehan during the officer’s second entry.³³

III. HISTORICAL OVERVIEW

A. *Mental Health Policy in the United States*

The United States largely criminalizes mentally ill people, resulting from policies implemented in the 1970s favoring deinstitutionalization.³⁴ Advocates initially proposed deinstitutionalization with noble intentions to combat the inhumane conditions found in mental institutions.³⁵ Advocates planned to provide the mentally ill with community-based treatment, but this never fully materialized.³⁶ This failure has resulted in more mentally ill persons on the street and, thus, a higher probability of being arrested.³⁷ One study showed that 42 to 50 percent of the mentally ill

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1216.

33. *Id.* at 1217.

34. Jennifer Fischer, *The Americans with Disabilities Act: Correcting Discrimination of Persons with Mental Disabilities in the Arrest, Post-Arrest, and Pretrial Processes*, 23 LAW & INEQ. 157, 161–62 (2005).

35. *Id.* at 163.

36. *Id.* at 163–64.

37. *Id.* at 165.

will be arrested in their lives, compared with 7 to 8 percent of the general population.³⁸

B. *The ADA*

In 1990, Congress passed the Americans with Disabilities Act.³⁹ The ADA's purpose is to remedy the following problems: (1) that individuals with disabilities continually encounter discrimination, including failure of public services to make modifications to existing facilities and practices; and (2) that people who have experienced discrimination on the basis of disability often have no legal recourse to address such discrimination.⁴⁰

Title II of the ADA prohibits discrimination by all public entities.⁴¹ This ensures that public entities provide reasonable accommodations for people with disabilities.⁴² A public entity must reasonably accommodate by modifying policies, practices, and procedures, unless the modifications would result in a fundamental alteration of the entity's activity.⁴³ The House Committee Report specifically suggests that in order to reasonably accommodate and comply with the ADA, public officials, including police officers, should receive training on how to handle people with disabilities.⁴⁴

In order to bring a Title II claim, the plaintiff must demonstrate: (1) she has a disability; (2) she is otherwise qualified to participate in or receive the benefit of a public entity's services; (3) she is either excluded from participation or denied benefits of the public entity's services, programs, or activities or was otherwise discriminated

38. *Id.* at 165–66.

39. Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101–213 (2012).

40. *Id.*

41. *Id.*

42. *Id.*

43. Fischer, *supra* note 34, at 179.

44. Elizabeth Hervey Osborn, *What Happened to "Paul's Law"? Insights on Advocating for Better Training and Better Outcomes in Encounters Between Law Enforcement and Persons with Autism Spectrum Disorders*, 79 U COLO. L. REV. 333, 346 (2008) ("In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for [these disabilities] . . . Such discriminatory treatment based on disability can be avoided by proper training." (citing H.R. REP. NO. 101-485, pt. III, at 50 (1990))).

against by the public entity; and (4) such discrimination occurs by reason of her disability.⁴⁵

Courts were initially hesitant to force law enforcement agencies to reasonably accommodate people with mental disabilities.⁴⁶ However, in 1998, the Supreme Court's decision in *Pennsylvania Department of Corrections v. Yeskey*⁴⁷ rejected the notion that mentally disabled persons subject to law enforcement were not receiving a benefit from the government.⁴⁸ Since *Yeskey*, courts have been more receptive to applying the ADA to law enforcement activities.⁴⁹

IV. NINTH CIRCUIT'S REASONING

In *Sheehan*, the Ninth Circuit addressed for the first time whether the ADA applies to arrest situations.⁵⁰ The court examined Title II of the ADA and stated that discrimination includes "a failure to reasonably accommodate a person's disability."⁵¹

The court proceeded to address the approaches of the other circuits.⁵² The court noted the Fifth Circuit's approach that "Title II does not apply to an officers on-the-street responses to reported disturbances . . . prior to the officer's securing the scene and ensuring that there is no threat to human life."⁵³ The court then looked to Tenth, Eleventh, and Fourth Circuits' holdings that the ADA applies and that exigent circumstances bear materially on the reasonableness analysis under the ADA.⁵⁴

The court then proclaimed that Title II applies to arrest situations because the ADA applies broadly to public services,

45. *Sheehan v. City & Cnty. of S.F.*, 743 F.3d 1211, 1232 (9th Cir. 2014).

46. Brodin, *supra* note 5, at 170.

47. 524 U.S. 206 (1998).

48. *See* Brodin, *supra* note 5, at 170.

49. *Id.* at 171.

50. *Sheehan*, 743 F.3d at 1231.

51. *Id.* The Ninth Circuit further noted the Justice Department's regulation that public entities must make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination unless the public entity demonstrates the modifications would fundamentally alter the nature of the program, service, or activity. *Id.* (citing 28 C.F.R. § 35.130(b)(7) (2011)).

52. *Id.*

53. *Id.*; *see infra* Part V.B.

54. *Sheehan*, 743 F.3d at 1231–32; *see infra* Part V.B.

encompassing “anything [that] a public entity does.”⁵⁵ The court also agreed with other circuits that exigent circumstances inform the reasonableness analysis under the ADA.⁵⁶ Furthermore, the court noted that Title II encompasses both wrongful arrest claims and claims based on a police officer’s failure to reasonably accommodate a person during the investigation or arrest resulting in the disabled person suffering greater injury or indignity than other arrestees.⁵⁷ The court identified Sheehan’s claim as the latter because officers forced their way back into Sheehan’s room without employing tactics that would have reduced the likelihood of her injury.⁵⁸ The court stated that “[i]t [was] undisputed that Sheehan had a disability and that officers knew it at the time they encountered her.”⁵⁹

When confronting the question of whether the police discriminated against Sheehan, the court emphasized that a reasonable jury could find that discrimination occurred during the second entry.⁶⁰ The court noted Sheehan’s assertions that officers should have accommodated her disability by respecting her comfort zone, using nonthreatening communications, and allowing time to defuse the situation before reentering her room.⁶¹ After acknowledging the difficult split-second decisions the officers were forced to make, the court found a dispute of fact as to whether the situation had sufficiently diffused after the officer’s initial retreat.⁶² The court reasoned that a jury may find that the officers should have waited for backup and employed less confrontational tactics, including Sheehan’s requested accommodations relating to her disability.⁶³ Therefore, the court held that since reasonableness of accommodation is a question of fact, the city was not entitled to judgment as a matter of law on Sheehan’s ADA claim.⁶⁴

55. *Sheehan*, 743 F.3d at 1232 (quoting *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002)).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 1233.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

V. ANALYSIS

Excessive force claims stemming from the Fourth Amendment and section 1983 of the Civil Rights Act provide insufficient protection for the mentally ill as applied. To reduce injuries the mentally ill disproportionately face when encountering the police, all circuits should render the ADA applicable to arrest situations. This will incentivize proper police training and provide uniform federal protections for the mentally ill.

First, this Comment will explain why excessive force claims arising under the Fourth Amendment and section 1983 provide insufficient protection for mentally ill persons. Second, Part V.B discusses the split among federal circuits regarding the ADA's application to arrest situations. Presently, the Fifth Circuit holds that the ADA does not apply to arrest situations, thus creating unequal federal protections for the mentally ill.

Third, Part V.C illustrates how the Ninth Circuit's holding directly impacts mentally ill persons in society. This decision provides police departments with additional incentive to implement programs to adequately train officers for encounters with the mentally ill. Part V.C highlights an example of a successful training program implemented by a police department and show how the violent confrontation with Sheehan could have been avoided.

This Comment concludes with the grim reality that a mentally ill person living within a circuit that does not apply the ADA to arrest situations faces a greater risk of violent encounters with the police.

*A. Both 42 U.S.C § 1983 and the Fourth Amendment
Provide Insufficient Protection for the Mentally Ill*

To succeed in a section 1983 claim, the plaintiff must prove that someone acting under the color of state law deprived her of a constitutional right.⁶⁵ Several issues arise when mentally ill plaintiffs bring section 1983 civil rights claims alleging police misconduct: qualified immunity for officers, interlocutory appeals from the denial of qualified immunity, municipal immunity, and appellate courts' review of factual situations.⁶⁶

65. Brodin, *supra* note 5, at 178.

66. JAMES C. HARRINGTON, A RE-BIRTH FOR CIVIL RIGHTS USING THE AMERICANS WITH DISABILITIES ACT TO OVERCOME SECTION 1983 HURDLES AND TO OVERCOME SECTION 1983 HURDLES AND HOLD GOVERNMENT AND POLICE ACCOUNTABLE (2007), *available at* <https://www.aicr.org/wp-content/uploads/2007/07/James-C-Harrington-A-Re-Birth-for-Civil-Rights-Using-the-Americans-with-Disabilities-Act-to-Overcome-Section-1983-Hurdles-and-to-Overcome-Section-1983-Hurdles-and-Hold-Government-and-Police-Accountable.pdf>

Furthermore, when bringing a section 1983 claim of excessive force, the plaintiff faces the burden of proving that the officer's actions constituted a "seizure" under the Fourth Amendment.⁶⁷ Courts look to the totality of the circumstances and give much weight to the officer's perceived emergency, while failing to require that the officer use the least intrusive means to resolve the situation.⁶⁸ This has proven, "inadequate in deterring police conduct and in providing remedies for mentally and emotionally disturbed [plaintiffs]."⁶⁹

Specifically, courts find a public official is subject to qualified immunity when they have operated in a reasonable fashion under developing laws.⁷⁰ This places a high burden on the plaintiff, requiring the plaintiff to prove that the public official's conduct was egregious or shocking.⁷¹ For example, in *Sheehan*, the court held that a jury could find that Sheehan's Fourth Amendment rights were violated by the officers' use of deadly force.⁷² Nevertheless, the court upheld summary judgment for the officers as individuals because they were protected by qualified immunity.⁷³

For section 1983 claims under *Monell v. Department of Social Services of New York*,⁷⁴ to surpass the high hurdle of municipal immunity, the plaintiff must prove that the municipality's policy or long-standing practice caused the constitutional injury.⁷⁵ For Sheehan's *Monell* claims, the Ninth Circuit upheld the district court's holding of summary judgment for the defendants.⁷⁶ The court reasoned that merely showing that the officers may have disregarded their training during the incident, and that the city failed to discipline

[//www.prisonlegalnews.org/news/2007/jul/15/a-re-birth-for-civil-rights-litigation-using-the-amerians-with-disabilities-act-to-overcome-section-1983-hurdles-and-hold-government-and-police-accountable/](http://www.prisonlegalnews.org/news/2007/jul/15/a-re-birth-for-civil-rights-litigation-using-the-amerians-with-disabilities-act-to-overcome-section-1983-hurdles-and-hold-government-and-police-accountable/).

67. Brodin, *supra* note 5, at 179.

68. *Id.*

69. *Id.* (quoting Avery, *supra* note 4, at 268).

70. *Id.* at 180.

71. *See id.*

72. *Sheehan v. City and Cnty. of S.F.*, 743 F.3d 1211, 1228 (9th Cir. 2014).

73. *Id.* at 1230.

74. 436 U.S. 658 (1978) (holding that local governments may be sued under the Civil Rights Acts of 1871).

75. Harrington, *supra* note 64, at *2.

76. *Sheehan*, 743 F.3d at 1230.

the officers after the incident, does not surpass the hurdle of municipal immunity.⁷⁷

The officer-favored totality of the circumstances requirement under the Fourth Amendment does not apply to ADA claims.⁷⁸ Furthermore, the plaintiff files ADA actions against state and local governments, rendering the barriers of qualified and municipal immunity inapplicable.⁷⁹

B. *The Circuit Split*

The circuit courts are split as to whether the ADA applies to arrest situations. This became more pronounced by the Ninth Circuit's decision in *Sheehan*, which contradicts the Fifth Circuit's holding in *Hainze v. Richards*.⁸⁰ As with any split, the federal application of the ADA is not uniform among the circuits.

In *Hainze*, the Fifth Circuit held that the ADA does not apply to arrest situations.⁸¹ In *Hainze*, police officers arrived at the scene to find the mentally ill and disturbed plaintiff.⁸² The plaintiff approached the officers with a knife and officers shot him.⁸³ The plaintiff brought a claim under the ADA for discrimination on the basis of his disability because of the police department's failure to establish policies protecting mentally ill persons.⁸⁴ The court held that Title II of the ADA does not apply to on-the-street responses to reported disturbances before officers secure the scene and ensure that there is no threat to human life.⁸⁵ The court reasoned that the ADA should not apply at the expense of public safety and that officers should not have to consider other possible actions when making split second decisions.⁸⁶

Other circuits have taken a more inclusive view of "public safety" and found that the ADA applies to arrest situations.⁸⁷ In

77. *Id.* at 1231.

78. Brodin, *supra* note 5, at 184.

79. *Id.* at 185.

80. 207 F.3d 795 (5th Cir. 2000).

81. *Id.* at 797.

82. *Id.*

83. *Id.*

84. *Id.* at 797–98.

85. *Id.* at 801.

86. *Id.*

87. *See, e.g.,* Gohier v. Enright, 186 F.3d 1216 (10th Cir. 1999); Tucker v. Tennessee, 539 F.3d 526, 534 (6th Cir. 2008).

Bircoll v. Miami-Dade County,⁸⁸ the Eleventh Circuit held that there is no question that the ADA applies to arrest situations.⁸⁹ The Eleventh Circuit also recognized the difficulty police officers face in the field by allowing for exigent circumstances to inform the reasonableness of the officers' accommodation.⁹⁰ Furthermore, the court held that officers do not need to take every step to reasonably accommodate a mentally ill person.⁹¹ Rather, the court will analyze any accommodations the police made.⁹²

Similarly, in *Waller ex rel. Estate of Hunt v. City of Danville*,⁹³ the Fourth Circuit held that the ADA applies to arrest situations.⁹⁴ There, the court shot down the district court's holding that there was an "exigent circumstances exception" to the ADA and found that exigent circumstances were part of the reasonableness analysis.⁹⁵ The court reasoned that the officers' actions—of calling in a hostage negotiator and waiting over two hours for the situation to diffuse—were reasonable.⁹⁶

C. Impact of Sheehan

When courts deem the ADA applicable to specific situations, public and private entities typically respond by making the necessary changes to comply with the law. For example, in 1986, prior to the passage of the ADA, 51 percent of employers made efforts to reasonably accommodate employees with disabilities.⁹⁷ In 1995, after Congress enacted the ADA, this figure rose to 81 percent.⁹⁸ Yet, some entities have resisted complying with the ADA until they are sued.⁹⁹ For example, disabled transportation users sued the

88. 480 F.3d 1072 (11th Cir. 2007).

89. *Id.* at 1085.

90. *Id.*

91. *Id.* at 1186.

92. *Id.*

93. 556 F.3d 171 (4th Cir. 2009).

94. *Id.* at 175.

95. *Id.* at 174–75.

96. *Id.* at 177.

97. THE NAT'L COUNCIL ON DISABILITY, THE IMPACT OF THE AMERICANS WITH DISABILITIES ACT: ASSESSING THE PROGRESS TOWARD ACHIEVING THE GOALS OF THE AMERICANS WITH DISABILITIES ACT (2007) [hereinafter IMPACT], available at <http://www.ncd.gov/publications/2007/07262007#toc90>.

98. *Id.*

99. Robert L. Burgdorf, Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. C.L. & C.R. 241, 253 (2008).

paratransit program¹⁰⁰ in Los Angeles County for failing to reasonably accommodate riders by frequently arriving late.¹⁰¹ The litigation provided the paratransit system with the necessary incentive to change, which resulted in substantial improvements.¹⁰²

Similarly, police departments located within jurisdictions that apply the ADA to arrest situations will be forced to substantially improve training, or face potential liability under the ADA.¹⁰³ Programs that train police officers to respond appropriately to mentally ill persons allow police departments to comply with the ADA, but more importantly, will tangibly improve the safety of the mentally ill.¹⁰⁴

But this does not deny the reality that police officers face many on-the-street challenges when dealing with mentally ill persons. Police officers are often society's first response to the mentally ill, referred to as "street-corner psychiatrists."¹⁰⁵ Police officers are often expected to make quick decisions and to choose the appropriate accommodations for all whom they encounter, which is difficult without adequate training.¹⁰⁶ Police officers themselves recognize that they lack training to appropriately manage mentally ill persons.¹⁰⁷

Police officers also face a variety of calls involving the mentally ill.¹⁰⁸ Among the most problematic situations to handle are those

100. "Complementary ADA paratransit is a federally mandated civil right for persons with disabilities who cannot ride the accessible public fixed route buses and trains." *About Us*, ACCESS SERVS., http://accessla.org/about_us/overview.html (last visited Oct. 24, 2014).

101. IMPACT, *supra* note 97.

102. *See id.* ("[Eighty-nine] percent of riders in Los Angeles were picked up within 20 minutes of their scheduled appointment.").

103. *See generally* Brodin, *supra* note 5, at 171–72, 176 (discussing a settlement agreement that included police officer training in dealing with mentally ill individuals).

104. *See* Arthur J. Lurigio et al., *The Challenge of Responding to People with Mental Illness: Police Officer Training and Special Programmes*, 81 POLICE J. 295, 295 (2008).

105. *See supra* Part III.A.; Linda A. Teplin, *Keeping the Peace: Police Discretion and Mentally Ill Persons*, NAT'L INST. OF JUST. J., July 2000, at 9, available at <http://ncjrs.gov/pdf/files1/jr000244c.pdf>.

106. *See* Diane Courselle et al., *Suspects, Defendants, and Offenders with Mental Retardation in Wyoming*, 1 WYO. L. REV. 1, 5 (2001) (stating that law enforcement officers are given tremendous responsibility of understanding and accommodating those with mental illness, usually with very little training).

107. H. Richard Lamb et al., *The Police and Mental Health*, 53 PSYCHIATRIC SERVICES 1266 (2002), available at <http://ps.psychiatryonline.org/doi/full/10.1176/appi.ps.53.10.1266>.

108. 40 GARY CORDNER, U.S. DEP'T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., PEOPLE WITH MENTAL ILLNESS 1 (2006), available at <http://www.popcenter.org/problems/PDFs/MentalIllness.pdf>. A Texas study found the five most common types of calls

where mentally ill persons exhibit nuisance behaviors and calls where mentally ill persons threaten suicide.¹⁰⁹ Moreover, many people suffering from mental illnesses exhibit verbally abusive and belligerent behaviors—those behaviors can trigger an officer to respond more punitively.¹¹⁰ Training officers to handle situations involving the mentally ill boils down to two main challenges: (1) the sheer number of stops involving the mentally ill; and (2) the near impossibility impossible of training officers to respond to every type of mental illness.¹¹¹

However, even while facing seemingly insurmountable obstacles, police departments can implement successful programs to reduce violent encounters with the mentally ill. For example, Memphis enacted a program that departments can implement to comply with the ADA.¹¹² Memphis's Crisis Intervention Team (CIT) program created a team of highly-trained officers who are taught to recognize mental illnesses and verbally deescalate situations.¹¹³ Furthermore, CIT members learn how to lower a mentally ill person's agitation and anxiety levels.¹¹⁴ Memphis dispatches the CIT officers to all active scenes involving mentally ill persons.¹¹⁵ Once on the scene, the CIT officer assumes control and implements a response tailored to the disabled person's needs.¹¹⁶ Furthermore, rank-and-file police officers receive basic training on how best to handle the mentally ill.¹¹⁷

Since enacting the CIT, Memphis has arrested fewer mentally ill persons.¹¹⁸ Furthermore, only 1 percent of calls involving the mentally ill result in injuries to officers or civilians.¹¹⁹ Memphis is

involving the mentally ill are: (1) a family member, friend, or other concerned person calls the police for help during a psychiatric emergency; (2) a person with mental illness feels suicidal and calls the police as a cry for help; (3) police officers encounter a person with mental illness behaving inappropriately in public; (4) citizens call the police because they feel threatened by the unusual behavior or the mere presence of a person with mental illness; (5) a person with mental illness calls the police for help because of imagined threats. *Id.*

109. *Id.*

110. Teplin, *supra* note 105, at 12.

111. *See id.* at 12.

112. *See* Lurigio, *supra* note 104, at 307.

113. *Id.* at 308.

114. *Id.*

115. *Id.*

116. *Id.* at 308–09.

117. *Id.* at 308.

118. *Id.* at 309.

119. *Id.*

not alone. Jurisdictions that implement similar training programs demonstrate a decline in fatal police encounters with the mentally ill.¹²⁰ In addition, jurisdictions that have these programs also arrest fewer mentally ill people where treatment is the better course of action.¹²¹

At the time of *Sheehan*, San Francisco had a training program in place.¹²² However, in 2001, officials declined to implement a full CIT program and simply ordered a department-wide basic training of officers.¹²³ Furthermore, this program did not include training for how to properly handle a mentally ill person armed with a knife.¹²⁴ *Sheehan's* violent encounter indicates that San Francisco implemented an insufficient solution prior to the Ninth Circuit's direction.¹²⁵

Had a CIT-type program been implemented in San Francisco, it is possible that the police would have avoided shooting *Sheehan*. One of *Sheehan's* main assertions was that the officers did not provide her with a sufficient cooling off period before reentering her apartment.¹²⁶ Under the CIT program, officers Holder and Reynolds would have approached *Sheehan's* room with a highly-trained CIT officer. The CIT officer would have evaluated the situation, identified that *Sheehan* was suffering from a mental health crisis, and possibly taken verbal steps to deescalate the situation prior to the officers' first entry. Furthermore, before the second entry, a CIT officer could have implemented his or her training to reduce *Sheehan's* agitation. Rather than waiting a mere few minutes before reentering her apartment, a trained CIT officer could have waited the necessary time and employed tactics to defuse the situation, possibly

120. See Deborah L. Bower & W. Gene Pettit, *The Albuquerque Police Department's Crisis Intervention Team: A Report Card*, FBI L. ENFORCEMENT BULL., Feb. 2001, at 1, 2, available at http://www.au.af.mil/au/awc/awcgate/fbi/crisis_interven.pdf. Since the inception of CIT, police shootings involving individuals in crisis also have decreased incrementally since 1997, as the CIT program has developed. From 1994 through 1996, six individuals were killed in crisis-related police shootings. From 1997 through 1999, four individuals were killed. *Id.*

121. See Fischer, *supra* note 34, at 191–92.

122. See Shoshana Walter, *SF Police to Train Crisis Team for Mentally Ill*, THE BAY CITIZEN (Feb. 10, 2011, 4:17 PM), <https://www.baycitizen.org/news/policing/sf-police-train-crisis-team-mentally-ill/>.

123. *Id.*

124. *Id.*

125. See generally Suzdaltsev, *supra* note 1 (explaining that between March 2007, and December 2010, nearly every person the San Francisco police killed had a mental illness).

126. *Sheehan v. City & Cnty. of S.F.*, 743 F.3d 1211, 1233 (9th Cir. 2014).

rendering the officers' second entry unnecessary. Thus, Sheehan might have avoided being peppered sprayed and shot. Police could have then transported Sheehan to the 5150 holding facility, where she would have received the care her social worker determined necessary.

Unfortunately, many police departments in the Fifth Circuit do not have adequate training programs, putting mentally ill persons at greater risk.¹²⁷ The Fifth Circuit's decision in *Hainze* has further insulated police departments from ADA liability.¹²⁸ Plaintiffs asserting claims arising from police misconduct based on mental illness are forced to overcome the difficult barriers of section 1983 and the Fourth Amendment.¹²⁹ This creates less incentive for police departments located within the Fifth Circuit to implement programs such as the CIT. Thus, without the court's direction, a mentally ill person within the Fifth Circuit may not have the opportunity to be part of Sheehan's non-violent, alternate scenario.

VI. CONCLUSION

The Ninth Circuit's approach to the ADA's applicability to arrest situations in *Sheehan* should be a model for all circuits. Holding the ADA applicable to arrest situations furthers the ADA's objectives and forces law enforcement agencies to implement improved training programs. Training programs implemented by police departments in order to comply with the ADA will likely lead to increased safety among those with mental illnesses. Thus, the Supreme Court has a duty to ensure that a mentally ill person living within in the Fifth Circuit is subject to the same federal protections as a mentally ill person living within the Ninth Circuit. In addition to making the federal law uniform, it is the right thing to do for the mentally ill.

127. See generally Jenny Gold, *Mental Health Cops Help Reweave Social Safety Net in San Antonio*, NPR (Aug. 19, 2014, 3:34 AM), <http://www.npr.org/blogs/health/2014/08/19/338895262/mental-health-cops-help-reweave-social-safety-net-in-san-antonio> ("We had absolutely no training 20 years ago in the police academy on how to deal with mental health disturbances.").

128. William S. Helfand, *Title II of the ADA and Law Enforcement Activities: The Clash of the Need to Enforce the Law and the Requirement to Accommodate Disabilities*, GOV'T LAW SEC. 1, 2 (July 18–19, 2013), available at <http://txgovernmentlaw.org/Portals/0/Title%20II,%20ADA,%20and%20Law%20Enforcement%20Activities.pdf>.

129. See *supra* Part V.A.

