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Touro Law Review

Volume 37 | Number 1 Article 16

2021

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Recommended Citation
Carroll, Katherine R. (2021) "The Deliberate Indifference Standard: A Broken Promise to Protect and Serve the Mentally Ill," *Touro Law Review*: Vol. 37 : No. 1 , Article 16.
Available at: https://digitalcommons.tourolaw.edu/lawreview/vol37/iss1/16

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THE DELIBERATE INDIFFERENCE STANDARD: A BROKEN PROMISE TO PROTECT AND SERVE THE MENTALLY ILL

Katherine R. Carroll[*]

I. INTRODUCTION

I arrived at the office at around 4:30 AM. It was a cold, wet morning in April 2018. A dream of mine was finally coming true. I landed a journalism job at a major news network in Manhattan, and today was my first day. I was going to learn how to work behind the camera and show corners of my city to the world. A mix of emotions washed over me on the train ride into the city. Excitement, nervousness, pride, elation, and exhaustion all at once. Was I ready for this? I had no camera operating experience, but I did have a passion for advocating for people through storytelling. I felt compelled to tell all kinds of human stories. The good, the bad, and the ugly. I was not prepared to see so much bad and ugly on that first morning. I got in the car with the news assistant who was going to train me that day and learned our assignment. A police-involved shooting of a man with mental illness in Brooklyn. This tragedy was for me, a firsthand look at how law enforcement procedures fail to accommodate the disability of mental illness at their point of contact with the community. This Note will argue that when municipalities are sued for law enforcement's use of violent or deadly force against a person with mental illness or emotional disturbance the benign

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[*] Second year law student at Touro College Jacob D. Fuchsberg Law Center, Class of 2022, State University of New York at New Paltz Class of 2017. I would like to thank Professor Dorian Glover and my mentor Jackie Gross for their guidance and direction, my notes editor Mike Petridis for helping me cross the finish line, and the entire *Law Review* staff for continuously inspiring me through their own hard work. I would also like to thank my mother, Jennifer, for her unending love and cheers from the sideline. I dedicate this Note to the families of those who have lost their lives due to a broken policing system in this country. We can and must do better.

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neglect standard of the Americans with Disabilities Act should be used.[1]

The corner of Montgomery Street and Utica Avenue was still roped off with yellow tape when we arrived. Bullet shell casings sat on the sidewalk near a darkened brown stain where 34-year-old Saheed Vassell was shot the day before.[2] Mr. Vassell suffered from bipolar disorder and had been hospitalized and arrested several times before.[3] Police said they had classified him as emotionally disturbed before that day.[4] On April 4th, 2018, Mr. Vassell had picked up a silver pipe and was pointing it at people as if it were a gun.[5] When police arrived, they say he pointed it at them as well.[6] Then, the four responding officers fired ten shots at Mr. Vassell.[7] He died a short time later at a local hospital.[8] Neighbors, family, and friends all echoed a similar sentiment as they spoke to the media the next morning: police in Crown Heights knew Mr. Vassell was mentally ill but harmless.[9] The officers who fired were not wearing body cameras, and never faced criminal charges for Mr. Vassell's death.[10] I spoke with grieving family members that cold morning and again weeks later at Mr. Vassell's packed memorial service. The memory of their faces in pain and anguish over this tragedy stays with me to this day.

The events of Mr. Vassell's death were shocking but not surprising. If the NYPD had proper crisis intervention training or worked with a mobile crisis intervention team made up of mental health professionals, it is possible Mr. Vassell's life could have been spared that day. Instead, each day law enforcement officers

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[1] 42 U.S.C. § 12101.

[2] Benjamin Mueller & Nate Schweber, *Police Fatally Shoot a Brooklyn Man, Saying They Thought He Had a Gun*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/nyregion/police-shooting-brooklyn-crown-heights.html.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Angi Gonzalez, *No Charges for NYPD Officers Who Shot Man, Seen in Video, Pointing Object at Pedestrians,* NY1 (Mar. 29, 2019), https://www.ny1.com/nyc/brooklyn/news/2019/03/29/sources--no-charges-for-officers-who-shot-man-seen-in-video-pointing-object-at-pedestrians.

encounter people with mental illness or emotional disturbance on the streets and carry out confrontational arrest procedures that fail to accommodate the fact that mental illness is a disability. The officers in Mr. Vassell's case may not have faced criminal charges, but there is hope for recourse and accountability in the civil courts.

This Note will detail how law enforcement officers across the United States are inadequately equipped to handle mental health emergencies and argue that municipalities are liable for "benign neglect" under the language of the Americans with Disabilities Act (ADA).[11] The Note will describe how the available civil deprivation of rights cause of action under 42 U.S.C. § 1983, which requires litigants to reach the near impossible standard of "deliberate indifference," is an improper, unjust, and inappropriate avenue of relief for these tragic encounters.[12] Law enforcement officers have inadequate resources and insufficient training in de-escalatory tactics and practices designed to accommodate mentally ill and emotionally disturbed persons. Mentally ill people suffer more indignity and injury in the process of their arrest than other arrestees may suffer.[13]

To obtain a civil remedy under § 1983, litigants must prove that the municipality was "deliberate[ly] indiffer[ent]" to their protection from unreasonable searches and seizures granted by the Fourth Amendment to the U.S. Constitution.[14] When municipalities fail to make reasonable accommodations for those with mental illness in their arrest procedures and protocols, they should instead be liable for nonfeasance and "benign neglect."[15] As federal disability law has evolved, the Supreme Court has found that most discrimination against individuals was the result of apathy and ignorance rather than intentional unfairness.[16] To eradicate discrimination based on disability, the Court found that it must protect against both intentional and unintentional inequity.

People suing under § 1983 are often unable to meet the deliberate indifference standard because they are unable to prove that a municipality failed to react after repeated constitutional deprivation claims or that the death or serious injury was a foreseeable

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[11] 42 U.S.C. § 12101.
[12] *Id.*§ 1983.
[13] *See* infra notes 30-43 and accompanying text.
[14] *See* § 1983; U.S. CONST. amend. IV.
[15] *Infra* note 136 and accompanying text.
[16] *Infra* notes 136-39 and accompanying text.

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consequence of insufficient police training. Law enforcement agencies across the country are not intentionally discriminating against mentally ill people in their arrest procedures. However, their apathetic attitudes towards remedying this problem by instituting crisis intervention training and creating alternative community patrols makes them guilty of the exact type of discrimination that the ADA sought to eradicate.

This Note proposes that the civil standard for people with mental illness to obtain a remedy from a municipality for instances of death or serious injury resulting from an arrest by an untrained or insufficiently trained law enforcement officer should be the benign neglect discrimination standard of the ADA. Part II of this Note will explain the racial, ethnic, and socioeconomic disparities of mental health care and the cycle of generational trauma related to aggressive policing of these communities. Part III will analyze cases that deal with the "deliberate indifference" standard for civil actions filed under 42 U.S.C. § 1983 and highlight the often unreachable burden of proof for litigants in these cases. Part IV will explain how Title II of the ADA applies to arrests and provide examples of how this statute's language can aid in formulating new legal claims to address this problem. Part V will describe the ADA's "benign neglect" standard and argue that it should be applicable to find municipalities liable where death or substantial bodily injury occurs to a person with mental illness during an arrest. Part VI will analyze why the mandate of the ADA requires that those with a mental illness disability be protected under the "benign neglect" standard instead of under the "deliberate indifference" standard of § 1983. Part VII will describe practical solutions for how a municipality can satisfy the mandate of the ADA with training and alternative community patrols.

II. THE CYCLE OF VULNERABILITY

Paramount in understanding any critical societal problem and developing a purposeful strategy to combat it, is a comprehensive data compilation. Disturbingly, there are hardly any complete statistics tracking fatal encounters with law enforcement.[17] There

[17] TREATMENT ADVOCACY CTR., OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS, at 1 (2015), https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf [hereinafter TREATMENT ADVOCACY CTR.].

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was no mandate from the federal government for states to report civilian arrestee or incarceration deaths until the Death in Custody Reporting Act (DCRA) became law in 2014.[18] Legislation by the same name passed in 2001, but the data reporting efforts faced significant hurdles due to lack of funding and no active enforcement.[19] As a result, the Bureau of Justice Statistics relied solely on police departments and correctional facilities to voluntarily submit their data.[20]

The DCRA enacted in 2014 requires police departments to report the manner and surrounding circumstances of death of "any person who is detained, under arrest, or is in the process of being arrested, is en route to be incarcerated, or is incarcerated," or risk losing ten percent of their federal funding.[21] The new law faced the same old problem: it neglected to provide funding for streamlined data collection, and completely avoided creating or choosing an agency at the Department of Justice to enforce it.[22] In December 2016, the Obama administration directed the Bureau of Justice Assistance to source data from media reports and public records.[23] This plan, however, was put on hold by the Trump administration due to lobbying from law enforcement organizations.[24] Today, six years after its re-enactment, the DCRA is not fully enforced, and the Department of Justice collects no arrest-related death statistics.[25] The federal government keeps record of "everything from 'how many people were victims of unprovoked shark attacks . . . to the number of hogs and pigs living on farms in the [United States],'" and yet we have no idea how many people die at the hands of police each year.[26] As a result of this fragmented system of reporting, crowdsourcing through local news outlets has become the only consistent tracking measure of police involved deaths.[27] The Bureau of Justice Statistics

[18] Death in Custody Reporting Act of 2013, Pub. L. No. 242, 128 Stat. 2860 (2014).
[19] Ethan Corey, *How The Federal Government Lost Track of Deaths in Custody,* THE APPEAL (Jun. 24, 2020), https://theappeal.org/police-prison-deaths-data/.
[20] *Id.*
[21] Death in Custody Reporting Act of 2013, Pub. L. No. 242, 128 Stat. 2860 (2014).
[22] Corey, *supra* note 19.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 118 (2016) (arguing that the federal government should keep better records of police behavior).
[27] TREATMENT ADVOCACY CTR. *supra* note 17, at 2.

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admits that absent a uniform data collection system, thirty one to forty one percent of likely fatal law enforcement encounters are still not counted.[28]

Videos of violent police encounters spread across social media like wildfire and incite outrage among people across the country.[29] For this reason, the issue of violent police encounters is at the forefront of our national political dialogue. The data gaps in this issue leave many questions unanswered. In order to understand why civilians die at the hands of police, we must know the surrounding circumstances of each individual death. What are aggravating factors that lead to these outcomes? This question must be accurately answered in order to address this problem and better equip community members and law enforcement agencies alike to prevent future tragedies.

Civilians with mental illness, whether diagnosed or undiagnosed, are at a greater risk of having a violent or deadly encounter with law enforcement.[30] A recent study found through crowdsourced news data that an untreated mentally ill person is sixteen times more likely to be killed by police than a person without mental illness.[31] Police officers frequently encounter mentally ill people.[32] At least one in every four fatal law enforcement encounters involves a person with serious mental illness.[33] This statistic is particularly staggering when you consider that one in every ten law enforcement responses involves a person with serious mental illness, but only four in every 100 Americans are mentally ill.[34]

Socioeconomic injustices impacting minority communities foster disparities in physical health and mental health.[35] It follows then that the impact of police interactions with the mentally ill is uneven across racial and ethnic groups in the United States.[36]

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[28] *Id.*

[29] Yarimar Bonilla, *#Ferguson: Digital Protest, Hashtag Ethnography, And The Racial Politics Of Social Media In The United States,* 42 AMERICAN ETHNOLOGIST 4, 6 (2015).

[30] TREATMENT ADVOCACY CTR. *supra* note 17. at 1.

[31] *Id.* at 1.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 2.

[35] Annelle B. Primm, MD, et al., *The Role Of Public Health In Addressing Racial And Ethnic Disparities In Mental Health And Mental Illness*, PREVENTING CHRONIC DISEASE Vol. 7 No. 1, at 5 (2009).

[36] *See id.*at 5; *see also* TREATMENT ADVOCACY CTR., *supra* note 17.

Specific social determinants contribute significantly to disparate mental health outcomes; such as poverty, housing status, education, access to resources, institutionalization, inequity, stress, and physical health status.[37] These determinants contribute to outcomes of increased mortality and morbidity in these communities, which perpetuates a cycle of community trauma and generational trauma.[38] Additionally, racial and ethnic minorities face barriers in accessing mental health care, making it more likely that they have undiagnosed mental illness.[39]

Reinforcing this vicious cycle of mental illness, trauma, and disparate outcomes, is the theory that repeated encounters with police have a detrimental impact on both physiological and emotional outcomes. A recent statistical study found that prevalence of police victimization was higher in non-white and queer respondents surveyed in Baltimore, New York, Philadelphia, and Washington, D.C.[40] Participants in the study reported instances where they were subject to physical violence, sexual victimization, or psychological victimization during encounters with police or neglect by police when called.[41] The survey found that police victimization exposure and a strong likelihood of exposure to future victimization was causally associated with depression and psychological distress.[42] In their findings, the authors noted that individuals with mental health issues may be specifically targeted by police in some instances, and more likely to engage in illegal activities, such as drug use.[43]

It is clear from the available data that socioeconomic problems faced by racial and ethnic minorities contribute to policing issues and vice versa. Within those communities, people with mental illness and emotional disturbance are distinctly more vulnerable, as they are more likely to die during an encounter with police.[44] Policing in the United States needs comprehensive reform, particularly within policies and procedures for apprehending,

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[37] Primm, *supra* note 35, at 3.
[38] *Id.* at 4.
[39] *Id.* at 2.
[40] J.E. DeVlyder et al., *Prevalance, Demographic Variation And Psychological Correlates Of Exposure To Police Victimisation In Four U.S. Cities*, 26 EPIDEMIOLOGY & PSYCHIATRIC SCI. 466-67, 474 (2017).
[41] *Id.* at 466.
[42] *Id.* at 474.
[43] *Id.*
[44] Rushin, *supra* note 26.

approaching, and arresting a person with mental illness. Local law enforcement agencies should at the very least, adopt a holistic approach and ensure that its police officers have sufficient crisis intervention training.[45]

III. DELIBERATE INDIFFERENCE: TOO LITTLE, TOO LATE

People sue municipalities for deprivations of constitutional protections under Title 42, § 1983 of the United States Code, or a civil action for deprivation of rights.[46] Under a § 1983 suit, the plaintiff bears the burden of proving that the "municipal policy or custom exhibited a deliberate indifference to his or her constitutionally protected rights."[47] The courts have set a high burden because a lesser standard "would open municipalities to unprecedented liability."[48]

The Supreme Court held in *Monell v. Department of Social Services*[49] that municipalities could be held liable under 42 U.S.C. § 1983 where the alleged unconstitutional action is an execution of a local government policy or unapproved custom by that government's officers.[50] Petitioners, a class of female employees at the Department of Social Services and Board of Education of New York City, alleged that the city's official policy requiring pregnant employees to take an unpaid leave of absence violated their rights.[51] The Court reasoned that Congress intended local governments to be held civilly liable where "action pursuant to official municipal policy of some nature caused a constitutional tort."[52] Specifically, a municipality cannot be held liable under a "respondeat superior theory."[53] The Court reasoned that even though "accidents might nonetheless be reduced if

[45] Alexis D. Campbell, *Failure On The Front Line: How The Americans With Disabilities Act Should Be Interpreted To Better Protect Persons In Mental Health Crisis From Fatal Police Shootings*, 51 COLUM. HUM. RTS L. REV. 313, 367 (2019) (arguing that Title II of the Americans with Disabilities Act applies to arrests of mentally ill persons).
[46] 42 U.S.C. § 1983, U.S. CONST. amend. IV.
[47] Amit Singh, *Accountability Matters: An Examination of Municipal Liability in § 1983 Actions*, 47 THE U. OF PAC. L. REV. 105, 109 (2015).
[48] City of Canton v. Harris, 489 U.S. 378, 391 (1989).
[49] 436 U.S. 658 (1978).
[50] *Id.* at 690.
[51] *Id.* at 660.
[52] *Id*. at 691.
[53] *Id.*

employers had to bear the cost of accidents,"[54] municipalities should not be held liable "under § 1983 for an injury inflicted solely by its employees or agents."[55]

The Court later determined that a plaintiff may state a claim for deprivation of rights against a municipality for failure to train police officers in *City of Canton v. Harris*.[56] In *Canton*, the plaintiff alleged that police violated her rights by failing to get her medical attention after she was arrested.[57] City policy designated that "shift commanders were authorized to determine, in their sole discretion, whether a detainee required medical care," and evidence showed that shift commanders had no special medical training to equip them in making those decisions.[58] The Court again rejected a "respondeat superior" theory for municipalities and decided that constitutional violations by one "unsatisfactorily trained [officer] will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program."[59] To prove that the injury was not a one-off mistake of one untrained officer, a litigant must prove that the injury is the causal result of and is closely related to the municipality's insufficient training.[60] Adopting a lesser standard would "open municipalities to unprecedented liability under § 1983," and freely permit plaintiffs to "point to something the city 'could have done' to prevent" the constitutional violation.[61] The Court held that only where a failure to train is a "deliberate" or "conscious" choice by a municipality can that municipality be held liable under 42 U.S.C. § 1983.[62] A deliberate or conscious choice was, according to the Court, evidenced when the "inadequate training" could justifiably be representative of "city policy,"[63] and where those policies "are the 'moving force [behind] the constitutional violation.'"[64]

[54] *Id.* at 693.
[55] *Id.* at 694.
[56] 489 U.S. 378 (1989).
[57] *Id.* at 381.
[58] *Id.* at 381-82.
[59] *Id*. at 390-92.
[60] *Id.* at 391.
[61] *Id.* at 391-92.
[62] *Id.* at 387-89.
[63] *Id.* at 390.
[64] *Id.* at 389.

Essentially, the single event in Canton was enough to show the police department failed to train its officers and the municipality showed a deliberate indifference to the consequences of the insufficient training In more nuanced or complicated situations, a plaintiff must prove that the municipality was "on notice" of the need for a new training program to protect constitutional rights.[65] In *Board of County Commissioners v. Brown*,[66] a police officer used excessive force while arresting a vehicle passenger.[67] The plaintiff sued under § 1983, alleging that because the officer had a criminal history of multiple assault charges, the decision to hire him was a deliberate indifference of constitutional rights.[68] According to the Supreme Court, the decision to hire the officer amounted to an indifference of consequences, but not a deliberate one.[69] Deliberate indifference can also be proven through evidence of a pattern of "tortious conduct by inadequately trained employees."[70] The Court explained:

> Existence of a "program" makes proof of fault and causation at least possible in an inadequate training case. If a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action--the "deliberate indifference"--necessary to trigger municipal liability.[71]

Thus, by continuing to implement a training program that inadequately equips its employees for situations they will certainly face, municipalities may be liable under § 1983.

[65] Bd. of Cty. Comm'rs. v. Brown, 520 U.S. 397, 407 (1997).
[66] 520 U.S. 397 (1997).
[67] *Id.* at 400.
[68] *Id.* at 401.
[69] *Id.* at 409.
[70] *Id.* at 407.
[71] *Id.* (citing City of Canton v. Harris, 489 U.S. 378, 390 n.10 (1989); *id.* at 397 (O'Connor, J., concurring in part and dissenting in part)).

Allen v. Muskogee[72] provides an example where the deliberate indifference standard was met. In *Allen*, the Tenth Circuit Court of Appeals found the city of Muskogee, Oklahoma liable for failing to train their police officers on proper de-escalatory tactics after an officer tried to grab a gun from a known emotionally disturbed suicidal person.[73] The Tenth Circuit found that the officers in this instance used excessive force and that it was common for the police to deal with mentally ill or emotionally disturbed people.[74] The court determined that the city's training policy for dealing with mentally ill and emotionally disturbed people armed with firearms was inadequate and constituted deliberate indifference.[75] An expert testified that proper policing tactics would have educated the officers to take cover behind cars and communicate with the suicidal person from a safe distance instead of approaching him and trying to take his gun away.[76] The fact that the officers, acting in accordance with their training, approached the victim provoking a violent response was proof that the city's training policy was inadequate.[77] Lastly, the court found that there was a "causal link between the officers' training and the constitutional deprivation."[78] In this case, the plaintiff did not have to demonstrate multiple instances of constitutional deprivation stemming from the policy of inadequate training because there was "other evidence of inadequate training."[79] The observation from a testifying expert that the officers' training was completely opposite of proper de-escalatory tactics and the "likelihood that officers will frequently have to deal with armed emotionally upset persons" with improper technique was sufficient as this "other evidence."[80]

The deliberate indifference standard has also been defined in the context of the Eighth amendment protection from cruel and unusual punishments.[81] The Sixth Circuit Court of Appeals held in

[72] 119 F.3d 837 (10th Cir. 1997).
[73] *Id.* at 839.
[74] *Id.* at 842.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 842-43.
[78] *Id.* at 844.
[79] *Id.* at 845.
[80] *Id.*
[81] U.S. CONST. amend. VIII.

Wright v. Taylor[82] that correctional facility staff did not violate an inmate's constitutional rights by delaying a dental procedure for a decaying tooth by five weeks. The court defined deliberate indifference as "the reckless disregard of risk of serious harm; mere negligence, or even gross negligence will not suffice."[83] Under the current precedent, a municipality is shielded from liability of both intentional and unintentional tort in these contexts.

Police should be better trained to handle their encounters with mentally ill people. The current high burden of proof required to hold municipalities liable for untrained officers does not reflect the severity of the current situation on the ground. The statistics show that a mentally ill person has a high chance to be seriously injured or killed by a police officer.[84] However, there is a remedy. The ADA already applies to mentally ill people in other circumstances and should apply to encounters with the police.

IV. APPLICABILITY OF THE ADA

The Americans with Disabilities Act was enacted in 1990 to protect persons with disabilities from isolation, segregation, and discrimination in American society.[85] The ADA is applicable in areas of employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.[86] The statute describes a disability as a mental impairment that substantially limits one or more of the major life activities of a person.[87] Major life activities include in part: caring for oneself, performing manual tasks, seeing, hearing, walking, standing, speaking, breathing, learning, thinking, communicating, and working.[88] The ADA requires public entities to make "reasonable accommodation" to allow the disabled person to receive the services or to participate in the programs provided by the public entity.[89]

[82] 79 Fed. Appx. 829 (6th Cir. 2003).
[83] *Id.* at 831.
[84] TREATMENT ADVOCACY CTR, *supra* note 17.
[85] 42 U.S.C. § 12101(a).
[86] *Id.*
[87] *Id.* at § 12102 (1).
[88] *Id.* at § 12102 (2).
[89] 28 C.F.R. § 35.130 (Lexis through the September 21, 2020 issue of the Federal Register).

Carroll: The Deliberate Indifference

Title II of the ADA applies broadly to municipal services, programs, and activities administered by police.[90] Courts have determined that Title II of the ADA can be read to include anything that a public entity does, and therefore applies to arrests of persons with disabilities by law enforcement officers.[91] Courts have also recognized two distinct circumstances where Title II of the ADA applies to an arrest: "(1) wrongful arrest, where police arrest a suspect based on his disability, not for any criminal activity; and (2) reasonable accommodation, where police properly arrest a suspect but fail to reasonably accommodate his disability during the investigation or arrest, causing him to suffer greater injury or indignity than other arrestees."[92]

Reasonable accommodations are not required in every arrest situation. Public entities do not have to provide reasonable accommodation where there are "exigent circumstances" at work.[93] In *Hainze v. Richards*,[94] police approached a young man holding a knife who had been reported as suicidal and under the influence of anti-depressants and alcohol.[95] The man approached the officers, who told him to stop approaching them before shooting him two times in the chest.[96] The entire encounter lasted a total of twenty seconds.[97] The Fifth Circuit Court of Appeals found that Title II of the ADA does not apply to a law enforcement officer's "on-the-street responses to reported disturbances or other similar incidents . . . prior to the officer's securing the scene and ensuring that there is no threat to human life."[98] The court reasoned that to require compliance of the ADA prior to securing "the safety of themselves, other officers, and any nearby civilians would pose an unnecessary risk to innocents."[99] The court explained that the officers' safety needed to

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[90] 42 U.S.C. § 12131 (2).
[91] Sheehan v. City & Cty. of S.F., 743 F.3d 1211, 1217 (9th Cir. 2014); Zavec v. Collins, 2017 U.S. Dist. LEXIS 117664, at *39 (M.D. Pa. July 27, 2017).
[92] Waller v. City of Danville, 556 F.3d 171, 174 (4th Cir. 2009); *see also* Gorman v. Bartch, 152 F.3d 907, at 912 (8th Cir. 1998) (holding that a physically disabled arrestee injured in a police van without wheelchair restraints could bring a reasonable accommodation claim under the ADA).
[93] Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000).
[94] 207 F.3d 795 (5th Cir. 2000).
[95] *Id.* at 797.
[96] *Id.*
[97] *Id.* at 801.
[98] *Id.*
[99] *Id.*

be secured first before they were required to reasonably accommodate the disturbed young man.[100] Essentially, the plaintiff's emotional disturbance and mental disability was irrelevant until after he was subdued, in this case, by two bullets to the chest.[101] Thus, in high-intensity situations where an officer has to make "split-second decisions" to detain a person and secure the threat they pose to others, the officer does not need to reasonably accommodate the person's disability.[102]

Exigent circumstances do not exist solely in incidents requiring a split-second decision.[103] In *Waller v. City of Danville*,[104] police responded to the home of an emotionally disturbed man, Rennie Hunt, who was holding his girlfriend hostage.[105] For two hours, officers tried negotiating with Hunt, until he verbally threatened the hostage negotiator from inside the house, saying "I'm going to blow your goddamned head off."[106] Officers then forcibly entered the residence and shot Hunt, killing him.[107] The plaintiff, the administrator of Hunt's estate, claimed the police department failed to reasonably accommodate Hunt during the two hour standoff by banging on his door, likely agitating him, and failing to call in mental health professionals or attempt to administer medication.[108] The Fourth Circuit Court of Appeals relied on the holding in *Hainze*[109] and expanded the concept of exigency to "unstable situations."[110] The court clarified that Title II of the ADA only applies during nonvolatile arrests, and that "accommodations that might be expected when time is of no matter become unreasonable to expect when time is of the essence."[111] Assuming there existed a duty to reasonably accommodate, the court says that the accommodations requested by the plaintiff were unreasonable because "officers would be second-guessed for pursuing one over the other, on grounds that there was

[100] *Id.*
[101] *Id.* at 797.
[102] *Id.* at 801-02.
[103] Waller v. City of Danville, 556 F.3d 171, 175 (4th Cir. 2009).
[104] 556 F.3d 171 (4th Cir. 2009).
[105] *Id.* at 172.
[106] *Id.* at 173.
[107] *Id.*
[108] *Id.* at 175.
[109] *See supra* notes 94-102 and accompanying text.
[110] *Waller*, 556 F.3d at 175.
[111] *Id.*

always something more or different that could have been done."[112] The court found that the officers involved satisfied their duty of reasonable accommodation in consideration of the complexities and impediments of a hostage situation.[113] It is important to note that even in the midst of a dangerous hostage situation, the court noted that there are still minimum standards that law enforcement must follow in order to reasonably accommodate a person under the ADA.[114]

The issue of whether Title II of the ADA applies to arrests of an armed, violent, and mentally ill suspect was passed on and thus not decided by the Supreme Court in *City and County of San Francisco v. Sheehan*.[115] In *Sheehan,* a resident of a home for people with mental illness was shot after grabbing a knife inside her room as police tried to escort her to a facility for treatment.[116] After the Court granted certiorari, appellees, the city and county of San Francisco, effectively conceded that "the relevant provision of the ADA, 42 U.S.C. § 12132, *may* 'requir[e] law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody.'"[117] Regardless of whether the individual is armed and violent, the language of the ADA prevents public entities from "'exclud[ing] a qualified individual with a disability from 'participat[ing] in,' and may not 'den[y]' that individual the 'benefits of[,] the services, programs, or activities of a public entity,'" and an arrest would qualify as an activity if the individual would benefit from it.[118] The Court declined to rule on this argument in *Sheehan*, because the parties effectively agreed on it.

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[112] *Id.* at 176.
[113] *Id.*
[114] *Id.* at 177.
[115] 135 S. Ct. 1765, 1772 (2015).
[116] *Id.* at 1771.
[117] *Id.* at 1773 (citing Pet, for Cert. i). Appellees conceded that there "may be circumstances in which any 'significant risk' presented by 'an armed, violent, and mentally ill suspect' can be 'eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.'" *Id.*
[118] *Id.* (citing 42 U.S.C. § 12132) (the municipality agreed that the ADA governs arrest procedures of individuals with disabilities).

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V. APATHETIC ATTITUDES AND BENIGN NEGLECT

Before the ADA was enacted, Congress first provided federal protections for disabled people through the Rehabilitation Act of 1973.[119] The Rehabilitation Act prohibited discrimination against those with physical or mental disabilities in federal employment and federally funded programs conducted by executive agencies.[120] The landmark Act provided that: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[121]

The Rehabilitation Act also provided a framework for executive and state agencies to administer their programs to "meet the current and future needs of handicapped individuals so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities."[122] The Act's protections for people with disabilities came after a vigorous fight by disabled World War I and World War II veterans for rehabilitation and vocational training.[123] In preceding decades, disabled people were cast aside as unfit to participate in society and many were forced to enter institutions or be sterilized.[124] Protecting disabled people was a novel legislative idea. Therefore, the courts had to strike a balance between providing ample protection and being careful not to burden administrative agencies and government.

The Supreme Court first addressed this balance of considerations in *Southeastern Community College v. Davis,*[125] where the Court found that a school did not need "to lower or to effect substantial modifications of standards to accommodate a handicapped person."[126] In *Davis*, a young woman with a severe hearing

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[119] Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355 (1973).
[120] *A Brief History of the Disability Rights Movement,* ADL, www.adl.org/education/resources/backgrounders/disability-rights-movement (last visited Feb. 27, 2021); *see* Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355 (1973).
[121] Rehabilitation Act § 504.
[122] *Id.* § 100.
[123] AD, *supra* note 120.
[124] *Id.*
[125] 442 U.S. 397 (1979).
[126] *Id.* at 414.

impairment sought to train as a nurse.[127] In order for the student to succeed in her clinical placement, the school required the student to understand verbal communication without lip reading.[128] Though the Court conceded that there may be some circumstances "where a refusal to modify an existing program might become unreasonable and discriminatory," it held that the school was under no requirement to "lower or effect substantial modifications of standards" for its nursing program under the Rehabilitation Act.[129]

In *Alexander v. Choate*,[130] the issue before the Court was whether a discriminatory effect or disparate impact of a policy on a protected group was discrimination under the Rehabilitation Act.[131] The Court held that an inequitable result was not sufficient to be actionable under the Act.[132] In *Alexander,* Tennessee made significant cuts to the benefits of its Medicaid program by lowering the number of annual days for inpatient hospital care from twenty to fourteen.[133] Medicaid recipients brought a class action suit alleging violation of the Rehabilitation Act.[134] They alleged that the change would have a "discriminatory effect on the handicapped" because statistical evidence showed that a higher percentage of handicapped Medicaid recipients required more than fourteen days of inpatient care than non-handicapped recipients.[135]

The Court noted that the history of discrimination against the disabled was "most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect,"[136] causing the handicapped to "live among society 'shunted aside, hidden, and ignored.'"[137] The Court explained that by requiring a finding of discriminatory intent in all cases, much of the discrimination the legislature sought to remedy through the Rehabilitation Act "would be difficult if not impossible to reach,"[138]

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[127] *Id.* at 400.
[128] *Id.* at 403.
[129] *Id.* at 412-13.
[130] 469 U.S. 287 (1985).
[131] *Id.*
[132] *Id.*
[133] *Id.* at 289.
[134] *Id.*
[135] *Id.* at 290.
[136] *Id.* at 295.
[137] *Id.* at 296 (citing 117 Cong. Rec. 45974 (1971)).
[138] *Id.* at 296-97.

because most discrimination is the "result of apathetic attitudes rather than affirmative animus."[139] The balance of discriminatory impact and manageable administrative burden requires that there is not "boundless" liability for all showings of disparate-impact upon the disabled.[140] The test is whether an "otherwise qualified handicapped individual" has been "provided with meaningful access to the benefit that the grantee offers."[141] The *Alexander* Court found that the fourteen day inpatient hospital visit limitation did not impede the handicapped from "meaningful access" to state Medicaid services.[142] Compliance with the Rehabilitation Act does not require a "guarantee the handicapped [get] equal results"[143] from the provision impacting them, just that they are "'afforded . . . equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement.'"[144] In order to reach that equal opportunity, the courts have held that an employer must "take significant affirmative measures beyond that of mere nondiscrimination."[145]

The statutory language in the Rehabilitation Act proved mostly ineffective for eradicating discrimination and segregation of disabled people.[146] Prior to the enactment of the ADA, disability nondiscrimination statutes were brief and did not contain any statutory basis for important terms such as "reasonable accommodation" and "discriminatory qualification standards," leaving their interpretation up to various courts and preventing uniformity.[147] Recognizing the inadequacy of the anti-discrimination

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[139] *Id.* at 296.
[140] *Id.* at 299.
[141] *Id.* at 301.
[142] *Id.* at 302.
[143] *Id.* at 304.
[144] *Id.* at 305 (quoting 45 CFR § 84.4(b)(2) (1984)).
[145] Easley v. West, 1994 U.S. Dist. LEXIS 17789 at *19 (E.D. Pa. Dec. 13, 1994) (holding that summary judgment could not be granted to a federal employer who failed to accommodate a visually impaired employee).
[146] *See* Timothy M. Cook, *The Americans With Disabilities Act: The Move to Integration*, 64 TEMP. L.R. 393, 394-408 (1991) (describing how disability advocates seeking to end systemic segregation struggled to obtain civil remedies under the Rehabilitation Act); *see also* Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute,* 26 HARV. C.R. - C.L. L. REV. 413, 430 n.93 (1991) (suggesting that the statutory language of the Rehabilitation Act permits discrimination against the disabled if it is coupled with some other motivation).
[147] Burgdorf, *supra* note 146, at 431 n.93.

laws and the need to integrate disabled persons into mainstream society,[148] Congress enacted the ADA in 1990.[149] Title II of the ADA draws from the Rehabilitation Act and extends the "non-discrimination principles . . . to state and local governments."[150] It also directs the Attorney General to promulgate regulations that are necessary to enforce the ADA, creating uniformity in enforcement.[151]

One area where the ADA is still severely lacking in its efficacy is its protection of people with "invisible disabilities."[152] Those with mental illness or intellectual and developmental disabilities may have a difficult time expressing what their handicap is or what it prevents them from doing.[153] A mental handicap or intellectual disability is less understood and less likely to be communicated than, for example, a physical disability requiring someone to use a wheelchair.[154] Though they are very different types of handicaps, persons with intellectual disabilities and mental illness both have issues "relating to others . . . [and] functioning on a daily basis."[155] For example, a person with mental illness might exhibit signs during an arrest such as "verbal abuse, belligerence, and disrespect."[156] Similarly, a person with autism spectrum disorder

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[148] Cook, *supra* note 146, at 409.

[149] 42 U.S.C. § 12101.

[150] Helen L. v. DiDario, 46 F.3d 325, 331 (3d Cir. 1995) (holding that a public welfare department segregating a partially paralyzed woman into a nursing home violates the ADA).

[151] *Id.*

[152] Ariana Cernius, *Enforcing the Americans with Disabilities Act for the "Invisibly Disabled": Not a Handout, Just a Hand*, 25 GEO. J. POVERTY L. & POL'Y 35, 39 (2017) (discussing the difficulty of enforcing the ADA for individuals with mental illness and intellectual or developmental disabilities who cannot communicate their handicap).

[153] *Id.* at 40.

[154] *See id.* The introduction of this article paints a clear picture of the varying degrees and manifestations of mental illness and intellectual/developmental disabilities as people wait to file for public assistance at the department of social services. A man with anxiety devolves into a panic and has seizures at the sight of building security. Another crawls underneath a desk for hours while he waits for his name to be called. Meantime, a man in a wheelchair articulates his access requirements and is pointed in the direction of a building ramp. *Id.* at 36.

[155] *Id.* at 55.

[156] Linda A. Teplin, *Keeping the Peace: Police Discretion and Mentally ill Persons*, 244 NAT'L INS. JUST. J. 9, 12 (2000) (describing the implications of deinstitutionalization and a higher arrest rate for mentally ill persons).

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may experience agitation and anxiety induced by sensory overload in a similar situation.[157]

VI. SUPPLANTING DELIBERATE INDIFFERENCE WITH BENIGN NEGLECT

As we make progress in our understanding of disabilities and embrace the disabilities that impact the lives of people across the United States, it is imperative that the law follow suit. Congress understood the need to expand the embracive nature of the ADA when it enacted the ADA Amendments Act of 2008.[158] Congress found that the courts had begun to restrict what constituted a disability after the Supreme Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[159] where the Court decided that an individual seeking protection had to show that their impairment "*severely restrict[ed]"* them from performing a major life activity.[160] Congress redefined disability as a "physical or mental impairment that *substantially limits* one or more major life activities."[161] Mental illness, whether diagnosed or undiagnosed, is a disability that can limit an individual in caring for themselves, performing manual tasks, concentrating, thinking, and communicating.[162]

Judicial precedent makes it abundantly clear that the deliberate indifference standard under 42 U.S.C. § 1983 is difficult to meet and that courts are very selective about what facts satisfy it.[163] By definition, deliberate indifference is a carefully weighed or considered lack of interest or concern.[164] In the court's view,

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[157] Cernius, *supra* note 152, at 56.

[158] ADA Amendments Act Of 2008, Pub. L. 110-325, 122 Stat. 3553 (2008).

[159] 534 U.S. 184 (2002).

[160] *Id.* at 198 (emphasis added).

[161] ADA Amendments Act Of 2008, Pub. L. 110-325, 122 Stat. 3553 (2008).

[162] *See generally* Lewis v. Hill, 2005 U.S. Dist. LEXIS 1747 (S.D.N.Y Feb. 1st, 2005) (holding that depression may constitute a mental impairment); Braggs v. Dunn, 383 F. Supp. 3d 1218 (M.D. Ala. 2019) (holding the department of corrections had a constitutional obligation to prevent inmate suicides due to serious mental illnesses).

[163] *See supra* notes 56-80 and accompanying text.

[164] *Deliberate,* DICTIONARY.COM, https://www.dictionary.com/browse/deliberate?s=t (Last visited Feb. 27, 2021); *In-*

ignoring an inmate's decaying tooth for five weeks does not rise to a considered lack of interest or concern.[165] Frankly, if knowledge that someone's tooth is rotting for five weeks, knowing it is your responsibility to fix it, and not doing anything about it is not a considerate lack of interest for someone's well-being, it is difficult to predict what is. The mandate of the ADA is such that individuals should be protected under its standards not only from intentional discrimination, but also from failure to accommodate due to "benign neglect."[166] The courts have made it clear that ADA protections encompass municipal services, programs, and activities administered by police, including arrests.[167] Therefore, in instances where law enforcement deprives a mentally ill person of their protection from unreasonable seizure by using violent or deadly force, the applicable standard should be benign neglect, and not deliberate indifference. The mentally ill person's legal claim against a municipality in these instances should be analyzed under the benign neglect standard of the ADA. Under this analysis, municipalities may be more inclined to implement accommodations to benefit those with the disability of mental illness. The result will be an arrest and crisis intervention procedure that is more inclusive, holistic, and safer for all parties involved.

The available statistics clearly demonstrate that people with mental illness suffer inequitable outcomes in the contexts of an arrest or an encounter with police.[168] An apathetic attitude toward protecting those with mental illness or emotional disturbance, particularly when there are often co-occurring social determinants at play such as substance abuse, poverty, and homelessness,[169] is arguably a conscious choice at this point. It is neglect of those in our communities who are continuously ignored and underserved.

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difference, DICTIONARY.COM, https://www.dictionary.com/browse/indifference?s=t (Last visited Feb. 27, 2021).

[165]Wright v. Taylor, 79 Fed. Appx. 829 (6th Cir. 2003).

[166] Alexander v. Choate, 469 U.S. 287, 295 (1985); Easley v. West, CIVIL ACTION NO. 93-6751, 1994 U.S. Dist. LEXIS 17789, at *20 (E.D. Pa. Dec. 13, 1994).

[167] Sheehan v. City & Cty. of S.F., 743 F.3d 1211, 1217 (9th Cir. 2014); Zavec v. Collins, 2017 U.S. Dist. LEXIS 117664, at *39 (M.D. Pa. July 27, 2017).

[168] *Supra* notes 30-34 and accompanying text.

[169] Primm, *supra* note 35, at 3.

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VII. A NEW WAY FORWARD

The courts have reasoned that the deliberate indifference standard insulates municipalities from "unprecedented liability" for deprivation of rights.[170] They may also find that the benign neglect standard would open the floodgates for litigation in this area. However, there are practical and proven solutions that municipalities can employ to accommodate disabled persons. One example is the implementation of Crisis Intervention Training (CIT).[171] CIT includes "specialized crisis intervention, such as mental illness education, de-escalation training, partnerships with relevant health professionals, and information on designated facilities for emergency psychiatric needs and appropriate policy change."[172] The introduction of CIT in the Baltimore Police Department lead to a significant change in attitudes of law enforcement officers and in some cases, a novel sense of empathy for people with mental and behavioral health issues.[173] The officers who participated in a survey before and after the CIT viewed the people with mental health issues as less of a danger to the community after they went through CIT, and felt more adequately trained to deal with these people in the midst of a mental health crisis.[174] One officer said "I feel more confident since I've had the training that I'm probably less likely to have to use force . . . I might be able to talk my way, talk the person into going to the hospital . . . rather than having to force them to go."[175] All officers who participated in the survey mentioned that their performance, confidence, and satisfaction in these encounters with mentally ill persons is all heavily impaired by less than ideal internal law enforcement operations and policies, such as short staffing, which sometimes forces the officers to work fifteen hour shifts.[176] The officers noted that their tolerance for people they encounter while working is significantly lower when they are

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[170] City of Canton v. Harris, 489 U.S. 378, 391 (1989).
[171] Marisa D. Booty, *Evaluation of a Crisis Intervention Team Pilot Program: Results from Baltimore, MD*, 56 CMTY. MENTAL HEALTH J. 251, 252 (2019).
[172] *Id.*
[173] *Id.* at 254.
[174] *Id.*
[175] *Id.* at 255.
[176] *Id.*

overworked, creating a dangerous situation for both the officer carrying a lethal weapon and the person with mental illness.[177]

Another alternative proving to be effective at handling mental health crises are mobile mental health crisis intervention teams. Mobile crisis intervention teams (MCITs) are made up of mental health professionals, such as psychiatric nurses or social workers, and police officers trained to respond to calls involving a person experiencing a mental health crisis.[178] A study of five hospitals in an urban environment dispatching MCITs to mental health crises calls found that the program met "its key goals of responding to individuals in crisis in the community and preventing unnecessary hospitalization and criminalization."[179] An MCIT has been operating with great success in Eugene and Springfield, Oregon since 1989.[180] CAHOOTS, which stands for Crisis Assistance Helping Out On The Streets, responded to nearly 23,000 calls in 2018.[181] CAHOOTS team members respond and de-escalate instances of substance abuse, mental health emergency, housing crises and much more.[182] Denver, Colorado launched its own MCIT in June 2020 modeled directly after CAHOOTS, called Support Team Assisted Response, or STAR.[183] Between June 1st and November 30th, 2020, STAR responded to 748 calls, connected hundreds to the appropriate social services, and most importantly: made zero arrests.[184] Most of the calls involved "low-level incidents, like trespassing and mental health episodes, that

[177] *Id.* at 255-56.
[178] Maritt Kirst et al., *Examining implementation of mobile, police-mental health crisis intervention teams in a large urban center,* 24(6) J. OF MENTAL HEALTH, 369 (2015).
[179] *Id.* at 373.
[180] Omar Villafranca, *An alternative to police: Mental health team responds to emergencies in Oregon,* CBS NEWS (Oct. 23, 2019, 6:48 PM), https://www.cbsnews.com/news/mental-health-team-responds-to-emergencies-oregon-alternative-to-police-2019-10-23/.
[181] *Id.*
[182] CAHOOTS, https://whitebirdclinic.org/cahoots/ (last visited Feb. 5, 2021).
[183] Li Cohen, *Health care workers replaced Denver cops in handling hundreds of mental health and substance abuse cases — and officials say it saved lives*, CBS NEWS (Feb. 6th, 2021, 12:04 AM), https://www.cbsnews.com/news/denver-health-professionals-replaced-cops-in-handling-hundreds-of-low-level-incidents-for-6-months-and-successfully-did-so-with-no-arrests/.
[184] David Sachs, *In the first six months of health care professionals replacing police officers, no one they encountered was arrested,* DENVERITE (Feb. 2, 2021, 5:00 AM), https://denverite.com/2021/02/02/in-the-first-six-months-of-health-care-professionals-replacing-police-officers-no-one-they-encountered-was-arrested/.

would have otherwise fallen to patrol officers with badges and guns."[185] The city plans to expand the program with $3 million worth of additional vans and social workers, paid for by Denver's sales-tax funded mental health fund.[186]

As was clear from the six-month implementation and study of the STAR program in Denver, most people who the team encountered while responding to calls were simply in need of connection to social services.[187] Sixty-eight percent of the people the STAR team responded to were experiencing homelessness.[188] In one example, the STAR team was able to handle a woman trespassing at a 7-Eleven, and even told the police they weren't needed:

> The woman, who was unhoused, was upset about some issues she was having on her prepaid Social Security card. Sailon helped her into the van where the two "game-planned" a solution before the STAR crew drove her to a day shelter for some food, she said. "So we were sort of able to solve those problems in the moment for her and got the police back in service, dealing with a law enforcement call," Sailon said.[189]

As mentioned earlier, police officers are often forced to work long shifts and respond to dozens of calls, which causes frequent burnout and makes a tenuous situation like a mental health emergency even more dangerous.[190] Officers are constantly exposed to these traumatic and sometimes violent situations, which can cause exhaustion and cynicism, as one officer explained: "We're carrying weapons. And when you start getting somebody that's tired and you start getting an officer that's tired, his tolerance level is going to be very short with a person."[191] The tragic repercussions of this dichotomy played out recently in Killeen, Texas, where a man was shot and killed by a police officer responding to a mental health

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[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] Booty, *supra* note 171, at 255.
[191] *Id.* at 256.

emergency.[192] Patrick Warren Sr.'s family called 911 requesting a mental health professional on a Saturday, and the city sent one who helped Mr. Warren agree to go to the hospital.[193] The very next day, when the family called for another mental health professional's help, the city sent an officer who ended up shooting Mr. Warren on his front lawn.[194] Mr. Warren died later at the hospital.[195] Mr. Warren's tragic death is a vivid example of how a municipality failing to accommodate can lead to deadly consequences.

Besides the initial cost of acquiring personnel, administrators, and resources, as well as the growing pains of collaboration between very different professions such as nurses and police,[196] it is clear that the positive outcomes outweigh any negative consequences of implementing CIT and MCITs. Given the significant inequitable outcomes of police interactions with mentally ill persons,[197] the refusal of cities to modify their approaches to include CIT and MCITs is arguably unreasonable, discriminatory, and therefore violative of the ADA.[198] Additionally, it is clear from the case studies discussed above, that when a city implements alternative community policing such as CIT and MCITs, there is a decrease in hospitalization, criminalization, injuries, and fatalities.[199] Implementation of these community policing alternatives would ensure that people with mental illness are afforded meaningful access to the benefit of an encounter with community patrols that reasonably accommodates their disability.[200] Moreover, the benefit of

[192] Minyvonne Burke, *Texas man fatally shot by police during mental health check, family calls for officer's arrest,* NBC NEWS (Jan. 14, 2021, 2:29 PM) https://www.nbcnews.com/news/us-news/texas-family-calls-officer-s-arrest-after-man-fatally-shot-n1254297.
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] Kirst et al., *supra* note 178, at 372.
[197] *Supra* notes 30-34 and see accompanying text.
[198] *See* Southeastern Cmty. College v. Davis, 442 U.S. 397 (1979) (holding that an entity is required to modify existing programs where the financial and administrative burdens would not be excessive, and refusal to do so would become unreasonable and discriminatory).
[199] *See* Kirst et al., *supra* note 178; *see also* Booty, *supra* note 171 (finding that diverting mentally ill individuals from criminal justice system transfers costs onto health care system).
[200] The balance between preventing discrimination and shielding government from undue burden requires that the individual is "provided with meaningful access to the benefit that the grantee offers." Alexander v. Choate, 469 U.S. 287, 301 (1985).

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implementing alternative community policing strategies like CIT and MCITs heavily outweighs the burdens: it gets harmless people with mental illness the support and resources they need while simultaneously freeing up police to handle local crime.[201]

VIII. CONCLUSION

Not all police officer encounters with mentally ill or emotionally disturbed individuals will end in tragedy. However, for those that do, the burden of requisite proof for any legal recourse against a municipality is nearly impossible to reach. Arguably, if all local law enforcement agencies across the country were jointly liable for each other's actions in these contexts, the deliberate indifference standard would be met in a moments time. The Supreme Court made it clear that the ADA gives municipal entities an affirmative duty to act and protect the disabled from discrimination, whether the discrimination is purposeful or simply a result of apathy.[202] Because the ADA applies to municipalities in most other contexts, it follows that it should apply when police officers deal with mentally ill or emotionally disturbed people. The requisite showing of repeated incidents in order to prove municipal liability under 28 U.S.C. § 1983 has become a judicial shield, protecting cities from the reality that their law enforcement officers are not adequately equipped to deal with all the societal issues that disproportionately manifest in the impoverished, underserved, undiagnosed, and untreated of our country.

By not implementing CIT and MCITs into an alternative policing strategy to handle people experiencing a mental health emergency, municipalities should be liable for nonfeasance.[203] The available statistics clearly show that people with mental illness are subject to disparate outcomes in the contexts of an arrest or an encounter with police.[204] Based on the success of CIT and MCITs at

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[201] Sachs, *supra* note 184. Denver Police Chief Paul Pazen touts the STAR program for "solving two problems at once: getting harmless residents the help they need while letting police focus on other things." *Id.*
[202] *Alexander*, 469 U.S. at 296-99.
[203] Nonfeasance is the failure to act when a duty to act exists. *Nonfeasance,* BLACK'S LAW DICTIONARY (11th ed. 2019).
[204] *Supra* notes 30-34 and see accompanying text.

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addressing emergency calls without criminalizing, unnecessarily hospitalizing, or injuring citizens,[205] it is clear that municipal failure to implement these alternatives is causally linked to inequitable outcomes. Those with mental illness are provided with meaningful access to municipal activities when they are met in their moment of crisis by someone who can de-escalate their emergency, provide them with assistance, and connect them to social services. Apathy toward protecting and serving these members of the community is unproductive and dangerous. It is past time for municipalities to implement solutions with proven track records such as CIT and MCITs to truly protect and serve *all* members of the community.

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[205] Villafranca, *supra* note 180; Cohen, *supra* note 183; Sachs, *supra* note 184; Kirst et al., *supra* note 178; Booty, *supra* note 171.