# INDIFFERENT TO OUR WELLBEING: HOW LEGAL STANDARDS CONTROLLING MENTAL ILLNESS DISCRIMINATION LAWSUITS PREVENT ACCOUNTABILITY AND PROGRESS

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## INTRODUCTION

Detroit police fatally shoot man after mental health call.[1]
Woman Fatally Shot by DC Police Had Mental Health Crisis at Work.[2]
Florida Cop Shot Man With Mental Health Issues on Third Day In Job.[3]
Man Shot by Trooper Among Many With Mental Illness History.[4]
Black man shot dead by NYPD officers was mentally ill, not dangerous.[5]

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[1] *Detroit police fatally shoot man after mental health call*, WDIV LOCAL 4 (Oct. 2, 2022), https://www.clickondetroit.com /news/local/2022/10/02/deadly-police-involved-shooting/.

[2] Jackie Bensen & Darcy Spencer, *Woman Fatally Shot by DC Police Had Mental Health Crisis at Work: Authorities,* NBC4 WASHINGTON (Apr. 26, 2022), https://www.nbcwashington.com/news/local/woman-fatally-shot-by-dc-police-had-reportedly-experienced-mental-health-crisis-at-work-authorities/3035915/.

[3] Chloe Mayer, *Florida Cop Shot Man with Mental Health Issues on Third Day in Job*, NEWSWEEK (May 26, 2022), https://www.news week.com/new-police-officer-shot-suspect-mental-health-1704269.

[4] Ben Finley, *Man Shot by Trooper Among Many With Mental Illness History*, U.S. NEWS (Nov. 12, 2021), https://www.usnews.com/news/best-states/virginia/articles/2021-11-12/man-shot-by-trooper-among-many-with-mental-illness-history.

[5] Tom Hays, *Black man shot dead by NYPD officers was mentally ill, not dangerous: Father*, GLOBAL NEWS (Apr. 5, 2018), https://globalnews.ca/news/4125562/saheed-vassell-nypd-shooting-mental-health/.

Jury Says Dallas Cop Who Shot and Killed Mentally Ill Man Did Not Use Excessive Force.[6]
No charges in fatal police shooting of mentally ill Black man.[7]
Dallas Police Officer gets 2 years of probation for 2013 shooting of mentally ill man.[8]
'Gonna lose my gun again,' Idaho deputy said minutes after fatally shooting man in mental health crisis.[9]
Judge clears Newton police who shot and killed man in mental health crisis last year.[10]

All of the phrases above appeared in headlines of pieces reporting on the deaths of individuals with mental illness at the hands of police officers. This list of tragic examples illustrates the trend of seemingly endless failures of accountability and displays a national pattern of deadly encounters between the police and individuals with mental illness. One particularly moving article regarding a similar incident asks the question, "Did Anthony Hill Have to Die?"[11] It begs this question in response to defenses of an officer who shot and killed Anthony Hill who the officer said he feared was dangerous because

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[6] Kevin Krause, *Jury Says Dallas Cop Who Shot and Killed Mentally Ill Man Did Not Use Excessive Force*, THE DALLAS MORNING NEWS (Mar. 14, 2022), https://www.nbcdfw.com/news/local/jury-says-dallas-cop-who-shot-and-killed-mentally-ill-man-did-not-use-excessive-force/2914943/.
[7] Dakin Andone & Josh Campbell, *No charges in fatal police shooting of mentally ill black man, district attorney says*, CNN (May 9, 2021), https://www.cnn.com/2021/05/07/us/miles-hall-police-no-charges/index.html.
[8] Stephen Young, *Dallas Police Officer Gets 2 Years of Probation for 2013 Shooting of Mentally Ill Man*, THE DALLAS OBSERVER (Nov. 27, 2017), https://www.dallasobserver.com/news/dallas-cop-gets-probation-for-shooting-mentally-ill-man-in-2013-10110445.
[9] Tim Stelloh, *'Gonna lose my gun again,' Idaho deputy said minutes after fatally shooting man in mental health crisis*, NBC NEWS (Jun. 17, 2022), https://www.nbcnews.com/news/us-news/gonna-lose-gun-idaho-deputy-said-minutes-fatally-shooting-man-mental-h-rcna33601.
[10] The Associated Press, *Judge Clears Newton police who shot and killed man in mental health crisis last year*, WBUR NEWS (May 18, 2022), https://www.wbur.org/news/2022/05/18/judge-police-newton-killed-man.
[11] Steve Fennessy, *Did Anthony Hill have to die?*, ATLANTA MAGAZINE (Sep. 5, 2019), https://www.atlantamagazine.co m/great-reads /an-unarmed-man-the-cop-who-killed-him-and-the-challenge-of-policing-mental-illness/.

Hill was in the midst of a Bipolar manic episode.[12] The list above is only a small selection of similar encounters. There are many more that have ended in serious harm but not death. Moreover, an even smaller sector of society is disproportionately impacted by fatal force at the hands of police officers when mental illness intersects with race, as despite Black individuals making up just 12.4% of the U.S. population, over 28% of officer-involved shootings resulting in death had Black victims.[13]

Legal accountability is difficult to obtain in cases like the ones referenced in the headlines above, especially in criminal cases against police officers. Outside of the criminal system, victims and their families can seek accountability through civil suits against police officers, their law enforcement departments, and the governing municipality.[14] One of the ways that a suit can be brought is by alleging that a municipality failed to train the officer in question adequately. However, the legal standard which controls these suits—"deliberate indifference"—is extremely restrictive and forces plaintiffs to meet a high bar that does not consider the particular complexities of mental illness.[15] And even if the requirements of this standard are met, plaintiffs who are individually suing police officers still have to overcome the qualified immunity hurdle.[16]

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[12] *Id*. (quoting the shooter, Officer Robert Olsen, who said "I know from my training that when people are in a state like this, excited delirium or high on PCP or having a psychotic mental break, they often disrobe and become naked. I also know from my training that they can be impervious to pain. They are very dangerous individuals. They act irrationally and can exhibit superhuman strength when encountered").

[13] *See Fatal force,* WASHINGTON POST, https://www-washingtonpost-com.proxygt-law.wrlc.org/graphics/investigations/police-shootings-database/ (last visited Oct. 3, 2022); Nicholas Jones, Rachel Marks, Roberto Ramirez & Merarys Rios-Vargas, *2020 Census Illuminates Racial and Ethnic Composition of the Country*, UNITED STATES CENSUS BUREAU (Aug. 12 2021), http://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html.

[14] *See e.g.*, *A look at big settlements in US police killings*, AP NEWS (Mar. 12, 2021), https://apnews.com/article/shootings-police-trials-lawsuits-police-brutality-2380f38268a504ae689ad5b64b5de2e7.

[15] *See* Shenequa L. Grey, *There's A Better Way: Why the United States Supreme Court's Connick v. Thompson Decision Is Not Absolutely Outrageous*, 13 LOY. J. PUB. INT. L 469, 479–81 (2012).

[16] Raffi Melkonian, *Suing cops takes forever because they get 3 chances to appeal. Why should they?,* U.S.A. TODAY (Nov. 23 2021),

This topic is near and dear to my heart as I have struggled with mental illness since I was a teenager. While I have learned to cope in healthy ways and now lead a fully functioning adult life, I once worried about my ability to live for another day and had difficulties caring for myself. I came to be in the position I am today because of pure luck. I was lucky enough to be born into a family that not only wanted to provide me with resources to treat my mental illness but also could afford the health care that allowed me to get treated.

The day that I was first admitted to a hospital for suicidal ideations and drug abuse, I was at school. I had taken several pills of which I was not prescribed and had self-harmed the night prior. When a teacher saw my injuries, I broke down and was soon taken to the school psychologist who contacted my parents. I was also lucky at that moment that my school employed mental health professionals. I was not reported to the school resource police officer for illegal drug use nor were officers called to assist with my removal from the school premises. While some of this may be because I was being cooperative, I also recognize the immense privilege I had and still have as a white, able-bodied individual. The symptoms of my illness presented entirely within my brain, and therefore I was not perceived as a danger.

But this is not the experience of many people I knew facing similar challenges. I had friends and acquaintances whose parents or school contacted law enforcement in response to similar situations, and who were physically handled by law enforcement officers who placed them in juvenile hall rather than a hospital.[17] Our lives have diverged in significant ways from those key moments. Contact with the criminal justice system can alter one's life forever and the trauma of violent or forceful police encounters can haunt individuals with mental illness for the rest of their lives. This only became more obvious to me several years ago when a seventeen-year old boy from my hometown, John Albers, was shot thirteen times by a police officer after Albers'

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https://www.usatoday.com/story/opinion/columnist /2021/11/23/why-is-it-hard-to-sue-police-qualified-immunity/6121261001/.

[17] In my experience, if family or schools in my area called the police on a student in crisis, they were admitted into a private, adolescent psychiatric ward unless the student could not afford the treatment, or they had committed a crime during crisis. I knew multiple people taken to juvenile detention facilities, similar to adult jails, for days or weeks after disagreements with parents or drug use in school.

mother called police for help when Albers threatened suicide.[18] While the officer was not prosecuted federally or locally, he was fired. Though the family did not get justice criminally, they did reach a civil settlement for $2.3 million with the municipality which was held liable for the officer's actions. Hearing about this tragedy made me consider the ways in which families can recover civilly for their losses at the hands of police officers.

This is not just a personal anecdote. It is plainly apparent through social science research that this is the experience of individuals with mentally illnesses nationally. Approximately twenty-one percent of all police-involved fatal shootings concern an individual with mental illness, and nearly 1,700 people with mental illness have been fatally shot by police since 2015.[19] In fact, other studies have found that in comparison to the general population, people with untreated mental illness are at a 16 times greater risk of being killed by the police.[20] Other methods of force, such as physical strikes, batons, tasers, flashlights and pepper spray are also disproportionately used against people with mental illness at a rate of seventeen percent as compared to five percent of the general population.[21]

Studies have implicated several potential causes for this disparate approach to dealing with persons with mental illness. First, police officers often perceive persons with mental illness to be inherently more dangerous than the general population which leads to exaggerated perceptions of threats that end in escalations of violence.[22] Second, police officers have limited skills in recognizing

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[18] *See* Tom Jackman, *Kansas city pays $2.3 million to family of teen slain by police officer*, WASHINGTON POST (Jan. 16 2019), https://www.washingtonpost.com/crime-law/2019/01/16/kansas-city-pays-million-family-slain-by-police officer/; Erik Ortiz, *Family of Kansas teen fatally shot by police during wellness check blasts investigation*, NBC NEWS (Apr. 30 2021), https://www.nbcnews/us-news/family-kansas-teen-fatally-shot-police-during-wellness-check-blasts-n1265881.

[19] *See Fatal force*, *supra* note 13.

[20] *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters,* OFFICE OF RESEARCH AND PUBLIC AFFAIRS: TREATMENT ADVOCACY CENTER (Dec. 2015), https://www.treatmentadvocacycenter.org/overlooked-in-the-undercounted.

[21] Richard Johnson, *Suspect mental disorder and police use of force*, 38 CRIM. JUST. & BEHAV. 127, 134, 137 (2011).

[22] Jim Ruiz & Chad Miller, *An Exploratory Study of Pennsylvania Police Officers' Perceptions of Dangerousness and Their Ability to Manage Persons with Mental*

and managing persons with mental illness, and thus many non-violent responses are a result of having clear observations of obvious symptoms of mental illness or preexisting knowledge of the person's illness.[23] Lastly, police officers frequently report or are found to have inadequate training on encounters with people who are mentally ill.[24] An officer's limited skill in approaching individuals with mental illness is affected by the amount of training they receive. Studies have shown that specific types of training, like Crisis Intervention Teams ("CIT"), can increase officers' knowledge, perceptions, and attitudes towards individuals with mental illness.[25] Despite the studies which prove that CIT training can significantly improve an officer's response to those with mental illness, lawsuits alleging failure-to-train police are adjudicated according to standards which suggest there are no current training solutions which can effectively address this issue.[26]

This Essay will argue that while society endeavors to move forward and leave behind its legacy of ableism, the legal standards that govern municipal liability for police misconduct against the mentally ill have not adapted to society's evolving understanding of mental illness. Part I will explore the complex matrix of rules and standards that plaintiffs must face when filing lawsuits against municipalities for failing to train their officers adequately to safely interact with the mentally ill population. This Part will focus on municipal liability specifically as officers are often indemnified and as such, the lawsuits

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*Illness.* 7 POLICE Q., 367, 367–68 (2004); Amy Watson, Patrick Corrigan & Victor Ottati, *Police officer attitudes and decisions regarding persons with mental illness*, PSYCHIATRIC SERVICES 55, 52 (2004).

[23] Amy Watson, Patrick Corrigan & Victor Ottati, *Police responses to persons with mental illness: does the label matter?,* 32 J. OF THE AM. ACADEMY OF PSYCHIATRY & THE L., 378, 384 (2004).

[24] J.R. Husted, R.A. Charter & B. Perrou, *California law enforcement agencies and the mentally ill offender*, 23 THE BULL. OF THE AM. ACADEMY OF PSYCHIATRY & THE L., 319 (1995).

[25] Horace Ellis, *Effects of a Crisis Intervention Team (CIT) training program upon police officers before and after Crisis Intervention Team training,* 28 ARCHIVES OF PSYCHIATRIC NURSING, 1, 13 (2014); Randy Borum, Martha William, M.A. Deane, Henry J. Steadman & Joseph Morrissey, *Police perspectives on responding to mentally ill people in crisis: perceptions of program effectiveness*, 16 BEHAV. SCI. & THE L., 393–405 (1998).

[26] *See* Andrew C. Hanna, *Municipal Liability and Police Training for Mental Illness: Causes of Action and Feasible Solutions*, 14 IND. HEALTH L. REV. 221, 251–52, 264–266 (2017).

end up being against the municipalities rather than the individual officers themselves.[27] Part II will then discuss why one specific standard for these suits, "deliberate indifference," is too strenuous for plaintiffs dealing with highly varied and complicated presentations of mental illness. Finally, in Part III, this Essay will propose several possible solutions, including mandating training programs like CIT, lowering the legal standard from "deliberate indifference" to gross negligence, and creating a cause of action for failure to train claims under the Americans with Disabilities Act ("ADA"). Some of these solutions may return to older standards and may seem to lack modern legal support. However, as courts in the past have agreed with a lower legal standard, this Essay will argue that the modern approach is extremely stringent and out-of-touch with modern principles.

## I. THE DELIBERATE INDIFFERENCE STANDARD

While there are a few ways to recover for individual injury at the hands of police, there is only one way to recover for claims asserting a failure to train police or city employees to safely interact with individuals who have mental illnesses. An individual officer is not held responsible for the inadequacy of their own training. The controlling statute, 42 U.S.C. § 1983, is the procedural mechanism by which civil liability of any municipality, or any of its officers, which violates a citizen's civil rights is enforced.[28] The statute reads in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

[27] *See* Joanna C. Schwartz, *Police Indemnification*, 83 N.Y.U. L. REV. 885 (2014) (finding that between 2006 and 2011, "governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement").

[28] *See* 42 U.S.C. § 1983. Notably, states and their governments as well as territories and their governments are not "persons" and thus not subject to this statute. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 69 (1997); Ngiraingas v. Sanchez, 495 U.S. 182, 192 (1990).

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[29]

This has been interpreted to mean that municipalities are liable for the actions of their employees if the employee was applying a valid municipal policy and was not adequately trained, and this failure to be trained resulted in a violation of the plaintiff's constitutional rights[30]

Importantly, before reaching the question of the city's liability as described above, the plaintiff has to establish that they suffered a constitutional violation. Plaintiffs in police misconduct cases commonly allege unreasonable searches and seizures which are prohibited by the Fourth Amendment; cruel and unusual punishment which is prohibited by the Eighth Amendment; and failures of due process and equal protection which are prohibited by the Fourteenth Amendment. However, these claims are difficult to establish in instances of police misconduct against people with mental illnesses.

The police misconduct alleged by plaintiffs, like in the cases mentioned in the introduction of this Essay, occurs prior to detention. These plaintiffs tend to claim improper arrest or use of force during police-citizen interactions, and thus, the claims are usually governed by either Fourth or Fourteenth Amendment standards. This Essay will not discuss Eighth Amendment claims because they deal with punishment, so they are, by their nature, occurring only once the individual is detained. For example, a plaintiff could allege that the police unconstitutionally seized their person during an arrest in violation of the Fourth Amendment by proving that the use of force by, or actions of, the officer were not objectively reasonable given the information the officer had at the time of the interaction.[31] In cases of arrest of individuals with mental illness, this standard can be difficult to meet because the officer might not have sufficient information to understand that the individual is acting in a manner consistent with their mental illness. However, one could argue that proper training should lead an objectively reasonable officer to act differently when

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[29] 42 U.S.C. § 1983.
[30] City of Canton, Ohio v. Harris, 489 U.S. 378, 387 (1989).
[31] *See* Kingsley v. Hendrickson, 576 U.S. 389, 396–97 (2015).

approaching a mental health call or interacting with someone who may be exhibiting mental illness symptoms.

Fourteenth Amendment equal protection standards are phrased differently amongst the federal circuits,[32] but generally plaintiffs must prove they are a member of a protected class and similarly situated persons or groups are treated differently by the government; that the government acted with an intentionally discriminatory purpose; and that the government acted without a justification that passes constitutional scrutiny.[33] Discriminatory purpose cannot be proven by the mere existence of disparate impact or negligence, but these factors can be relevant to establish intent.[34] Individuals with mental illness will likely not be able to prove a policy was discriminatory on its face but can argue that it disparately impacted others in their class and led to negligent use of force against them to prove intentional discrimination. Lastly, plaintiffs could assert due process violations and argue that the injury inflicted upon individuals with mental illness at the hands of law enforcement interfered with their fundamental rights and "shocked the conscience."[35] Additionally, Fourteenth

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[32] *Compare* Freeman v. Town of Hudson, 714 F.3d 29 (1st Cir. 2013) (quoting Rubinovitz v. Rogato, 60 F.3d 906, 909–10 (1st Cir.1995)) ("An equal protection claim requires "proof that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person."), *with* McPhaul v. Bd. of Com'rs of Madison Cnty., 226 F.3d 558, 564 (7th Cir. 2000), *overruled on other grounds by* Hill v. Tangherlini, 724 F.3d 965 (7th Cir. 2013) ("To state a prima facie case under the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must demonstrate that she: (1) is a member of a protected class; (2) is otherwise similarly situated to members of the unprotected class; (3) suffered an adverse employment action; (4) was treated differently from members of the unprotected class; and (5) the defendant acted with discriminatory intent").

[33] *See e.g.*, Keenan v. City of Philadelphia, 983 F.2d 459, 465 (3d Cir. 1992) (quoting Andrews v. Philadelphia, 895 F.2d 1469, 1478 (3d Cir.1990)).

[34] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977).

[35] *See* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 845-47 (1998). This is a "substantive due process" theory which was recently implicated by Dobbs v. Jackson Women's Health. *Id.* at 842. The right to be free from police misconduct is, however, arguably a right "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *See* Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2242 (2022).

Amendment due process claims are subject to their own stringent standard which makes them particularly difficult to prove.[36]

While these types of constitutional claims laid out above have their own challenges for plaintiffs with mental illness, this Essay focuses instead on the issues plaintiffs face after they clear this first hurdle but are blocked by the municipal liability hurdles laid out by the Court in *City of Canton*.

The text of § 1983 does not give guidance on the legal standards which should be applied in failure-to-train claims.[37] However, the Supreme Court has held that when a failure-to-train claim is asserted under this statute, the proper legal standard is deliberate indifference. In the landmark case *City of Canton, Ohio v. Harris*, the Court ruled that while failure to train claims can be asserted against municipalities and law enforcement agencies under §1983, they must meet a deliberate indifference standard which requires plaintiffs to prove that the training program was inadequate and could be said to "justifiably represent city policy." [38] In other words, a training program is inadequate under the deliberate indifference standard if the municipality disregarded a known or obvious consequence of continuing to train in a way that was likely to result in the violation of constitutional rights.[39] This could mean that the municipality did not include content which could have prevented the constitutional violation or included content which caused the violation. Usually, this requires a showing of a pattern of incidents involving the same policy, but single incidents can also be the root of a claim if the consequences of failing to train are "patently obvious."[40] Once this is established, the plaintiff must prove that the failure to train was closely related to or actually caused the injury.[41]

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[36] *See* Daniels v. Williams, 474 U.S. 327, 331 (1986).
[37] *See* 42 U.S.C. § 1983.
[38] *See Canton* 489 U.S. at 389-92. The Court ruled that Harris had a right to sue under the statute after she was denied adequate first aid treatment by law enforcement. *Id.* This was because she alleged the police department failed to train its officers to accommodate her medical need. *Id.* However, the court ruled that Harris had not established deliberate indifference and the case was remanded for further proceedings. *Id.*
[39] *See id*. at 389–90; Bd. of Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 410 (1997).
[40] See Connick v. Thompson, 563 U.S. 51, 61, 63–64 (2011).
[41] *Canton* 489 U.S. at 391.

## II. DELIBERATE INDIFFERENCE AND MENTAL ILLNESS

Deliberate indifference is a stringent standard that is a significant barrier to the success of plaintiff recovery, especially where the plaintiff has a mental illness. Several parts of the standard require that training be an "obvious" need before liability can be enforced.[42] This allows circumstances of egregious conduct to go unpunished because mental illnesses are so individualized and particular to the person who experiences them. Each illness has a range of symptoms which in turn have a range of severity.[43] It would be very difficult to determine what situations "obviously" required an increase in training. An "obvious" encounter with any particular illness or any particular presentation of an illness would essentially require clairvoyance on the part of the officer. Therefore, a frequently successful argument for defendants under the current standard is that municipalities could not have foreseen that there would be an obvious need for training regarding interactions with any person with mental illnesses. Because of this difficulty, single incident liability cases are rarely successful. In fact, most of the cases regarding single-incident liability refer to a hypothetical case posed in *Canton* and do not cite any examples of successful cases at all.[44] Some cases even seem to disregard the possibility of single incident liability all together.[45] The current law

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[42] See *Bd. of Comm'rs of Bryan Cnty.*, 520 U.S. at 410 (finding that the constitutional violation must be a "known and obvious consequence" of the failure to train); *Canton* 489 U.S. at 390, n.10 (finding single incident liability when the need for further training must have been plainly obvious to the city policymakers).

[43] *See e.g.* Krishna R. Patel, Jessica Cherian, Kunj Gohil & Dylan Atkinson, *Schizophrenia: Overview and Treatment Options*, 39 PHARM. & THERAPEUTICS 638, 639–40 (2014) (stating "individuals with [schizophrenia] can present with a variety of manifestations" like social withdrawal, delusions, hallucinations, disorganized speech and diminished emotional expression).

[44] *See e.g.*, Ouza v. City of Dearborn Heights, Michigan, 969 F.3d 265, 287 (6th Cir. 2020); Saenz v. City of El Paso, 637 Fed. Appx. 828 (5th Cir. 2016); *Connick* 563 U.S at 63. *See also Canton* 489 U.S. at 390 n.10 (noting that training police officers in the constitutional limits of deadly force is "so obvious" a need that failure to do so would be "deliberate indifference" and could result in single incident liability).

[45] *See* Gray v. Cummings, 917 F.3d 1, 14 (1st Cir. 2019) (ruling that use of force on a mentally ill patient was not deliberate indifference because the town was not "on notice" from other incidents that their training was faulty).

effectively requires a plaintiff to show that a municipality had notice of a prior pattern of similar constitutional violations in that municipality.[46] However, this is entirely too high of a bar. Municipalities do not exist in a vacuum and are made up of individual employees who can access media and other resources. It is an incredibly low standard for a municipality to have to experience multiple instances of harm to persons with mental illness prior to being required to make any change. One simply can research or listen to the news to find a plethora of cases of similar conduct. The way the law currently stands, training can be almost completely absent, and the municipality would have plausible deniability.

## III. ALTERNATIVES TO DELIBERATE INDIFFERENCE

The deliberate indifference standard is established precedent, meaning there might be a risk of judicial inefficiency and inconsistency if it is disrupted. Thus, rather than eliminate the standard entirely and argue for strict liability, this Essay argues for three potential changes that would better protect people with mental illnesses against police misconduct: 1) legislatures could mandate training programs which have been proven to improve police interactions with people who are mentally ill; 2) the standard could be relaxed to gross negligence or 3) failure-to train claims could be allowed under related statutes better suited to this dispute.

### *A. Mandating Training Programs*

Federal legislation mandating training programs is likely not an option because of Congress's extremely limited powers over state and local government administration. However, Congress can and does play a role in this area of law by providing federal funding for training programs and placing conditions on current and future funding to law enforcement entities that encourage the use of these programs.[47]

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[46] See *Grey*, *supra* note 15 at 479, 490 (2012) (referring to claims which allege single incident liability as "extremely tenuous" and only "imposed in limited circumstances"); *Bd. of Comm'rs of Bryan Cnty*, 520 U.S. at 409 (stating that proof of repetitive policy is "ordinarily necessary").

[47] *See* NATHAN JAMES, CONG. RSCH. SERV., WHAT ROLES MIGHT THE FEDERAL GOVERNMENT PLAY IN LAW ENFORCEMENT REFORM? (2020); JOANNA LAMPE,

Moreover, state legislatures can and have introduced measures that mandate certain types of training.[48] While there are many different approaches to training officers to respond properly in situations with persons with mental illness, the Crisis Intervention Team ("CIT") model is identified as a best practice by the National Alliance on Mental Health, the Department of Justice, and the Substance Abuse and Mental Health Services Administration within the Department of Health and Human Services ("SAMHSA").[49] CIT is a model that emphasizes collaborative efforts between medical providers and law enforcement and includes law enforcement specific training.[50] CIT improves police officers' understanding of mental illness,[51] reduces the likelihood of arrest of mentally ill individuals,[52] and increases the likelihood of transportation to treatment for such individuals.[53] Because of these promising results, legislatures should consider mandating CIT training, and the federal government should continue to provide funding to localities wishing to implement the model.

Additionally, courts should recognize that municipalities that do not adopt training programs like CIT are deliberately deciding to train their officers in a manner that risks the violation of constitutional rights. In this way, failure to implement CIT could be seen itself as a deliberately indifferent choice on the part of the municipalities.

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CONG. RSCH. SERV., CONGRESS AND POLICE REFORM: CURRENT LAW AND RECENT PROPOSALS (2020); U.S. DEP'T OF JUST., COMMUNITY ORIENTED POLICING SERVICES, COMMUNITY POLICY DEVELOPMENT: IMPLEMENTING CRISIS INTERVENTION TEAMS (last visited Oct 9, 2022), https://cops.usdoj.gov/cit.

[48] *See e.g.* UTAH CODE ANN. § 53-6-202 (West 2022) (requiring crisis intervention training for police officers); MINN STAT. ANN. § 626.8469 (West 2022) (requiring crisis intervention training for police officers).

[49] Margaret Ahern, "*Defunding" the Criminality of Mental Illness by Funding Specialized Police Training: How Additional Training and Resources for Dealing with Mental Health will be Beneficial for All Sides,* 35 J.L. & HEALTH 181, 195 (2021) (citing *Overview of CIT*, U. Of Memphis, http://www.cit.memphis.edu/overview.php (last visited on Oct. 8 , 2022)).

[50] *Id*.

[51] Mellissa Smith & Tracy Tully, *Officer Perceptions of Crisis Intervention Team Training Effectiveness*, 88 POLICE J. 51, 61 (2015).

[52] Stephanie Franz & Randy Borum, *Crisis Intervention Teams may prevent arrests of people with mental illnesses, 8* POLICE PRACTICE AND RESEARCH 1, 5–6, (2010).

[53] Michael T. Compton et al., *The police-based crisis intervention team (CIT) model: II. Effects on level of force and resolution, referral, and arrest*, 65 PSYCHIATRIC SERV. 523, 524–25 (2014).

Despite the movement towards CIT, the implementation of this training and its spread nationally will take a significant amount of time. There could be localities that never adopt this model, and incidents deserving of recovery that arise from these localities could continue to go unpunished. Therefore, the CIT model is not a complete solution and needs to be utilized in conjunction with improving the legal standards which govern civil recovery in these cases.

### *B. Changing the Legal Standard*

The first potential manner of adjusting the current legal landscape is altering the standard applied under § 1983 from deliberate indifference to gross negligence. Prior to *City of Canton v. Harris*, several circuits allowed claims to be asserted under § 1983 by establishing either gross negligence or deliberate indifference.[54] Gross negligence, in these cases, was defined as "failing to implement a training program for its officers" or "implementing a program grossly inadequate to prevent the type of harm suffered."[55] Here, the municipality does not have to consciously disregard a risk or known consequence but rather, must have a policy that fails to prevent the type of harm suffered. This is an important difference because plaintiffs do not have to prove that municipalities intentionally chose to discriminate or knew that the specific harm would result.

There are several reasons why lowering standards specifically for those with mental illness is a desirable legal avenue. For plaintiffs with mental health issues, the lower standard mitigates the difficulty discussed in *supra* Part II of proving that the individualized mental health situation was predictable from a pattern of police conduct.

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[54] *See* Haynesworth v. Miller, 820 F.2d 1245, 1261 (D.C. Cir. 1987), *abrogated by* Hartman v. Moore, 547 U.S. 250 (2006); Bergquist v. Cnty. of Cochise, 806 F.2d 1364, 1370 (9th Cir. 1986), *abrogated by* City of Canton, Ohio v. Harris, 489 U.S. 378 (1989); Wierstak v. Heffernan, 789 F.2d 968, 974 (1st Cir. 1986), *abrogated by* Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989). Changing the legal standard for city liability does not change the standard for the root constitutional claims, meaning many claims would still have to meet the more than "mere negligence" threshold before arriving to the lowered standard proposed above; *see e.g.* Daniels v. Williams, 474 U.S. 327 (1986) (ruling that due process claims cannot be established by proving negligence).

[55] *Bergquist*, 806 F.2d at 1370.

However, the *Canton* Court rejected this approach because it felt that a lower standard than deliberate indifference would "open municipalities to unprecedented liability" and "engage the federal courts in an endless exercise of second-guessing municipal employee-training programs."[56] These concerns are arguably less relevant today when there are credible training models which evidently address many of the issues related to police contact with the population with mental illness. CIT improves these responses, and thus courts do not have to subjectively rule about each individual municipal program. There is an objective standard in the form of CIT that can serve as a comparison for the training programs being challenged. Thus, a gross negligence standard which compares CIT to the training programs available in the municipality would recognize that municipalities are on notice with the national trend towards CIT and the scholarly support for the efficacy of the program. Therefore, municipalities would be negligent if they did not improve their training to reflect the same results created by the adoption of CIT.

### *C. Creating a New Cause of Action*

Alternatively, courts could recognize failure to train claims under Title II of the Americans with Disabilities Act ("ADA").[57] This would give plaintiffs a second route to pursue claims of this nature. In a similar vein, Congress also could amend the ADA to include the ability to sue based on training programs, but this strategy faces several large obstacles including the influence of police unions and the tradition of federalism present in the current party system.[58] Title II of the ADA prevents state and local governments from discriminating against individuals with disabilities.[59] Currently, many courts generally permit causes of action under Title II in two situations: claims of "wrongful arrest" and "failure to make a reasonable

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[56] *See Canton*, 489 U.S. at 391–92.
[57] *See* Hanna, *supra* note 26 at 245–47.
[58] *See* Joanna Lampe, *supra* note 47; Noam Scheiber, Farah Stockman & J. David Goodman, *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (Jun. 6 2020), https://www.nyti mes.com/2020/06/06/us/police-unions-minneapolis-kroll.html.
[59] *See* 42 U.S.C. § 12132.

accommodation."[60] Failure to train claims, however, are not recognized by most courts.[61] When they are recognized, failure-to train claims under the ADA seem to be held to a deliberate indifference standard as well.[62] This is because the ADA's remedies under the applicable section are said to be coextensive with those of Title VI of the Civil Rights Act which requires a showing of "intentional discrimination" on behalf of the state actor.[63] But, some courts have declined to dismiss the possibility that claims like these could be rooted in "disparate impact" or "reasonable need for accommodation," theories which have been recognized in other cases as methods to prove claims under the ADA.[64] Courts should shift to allowing failure-to-train claims under the disparate impact theory because an entity-wide training program by its nature implicates the treatment of an entire group of people rather than an individual. People with disabilities will be disproportionately affected, as compared to the general population, by policies which do not mandate the suggested type of training. Disparate impact claims are the ideal vehicle for systemic change when training programs fail.

## CONCLUSION

Accountability for law enforcement violence is at the top of the public consciousness due to the incredibly public nature of recent incidents of police brutality. One area of particular concern is police

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[60] *See* Gohier v. Enright, 186 F.3d 1216, 1220 (10th Cir. 1999); Roberts v. City of Omaha, 723 F.3d 966, 973 (8th Cir. 2013).

[61] *See e.g.*, Sacchetti v. Gallaudet Univ., 181 F. Supp. 3d 107, 130 (D.C. Cir. 2016) (noting that several district courts outside the jurisdiction have "declined to recognize the existence of [a failure to train claim] or avoided addressing the question").

[62] *See e.g.,* Roberts v. City of Omaha, 723 F.3d 966, 976 (8th Cir. 2013) (holding that plaintiff's failure-to-train claim could proceed under the ADA if the plaintiff showed the defendant's "deliberate indifference to his alleged right to be free from discrimination.").

[63] *See* Haberle v. Troxell, 885 F.3d 170, 181 (3d Cir. 2018) (citing S.H. ex rel. Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 261 (3d Cir. 2013)).

[64] *See* J.V. v. Albuquerque Pub. Schools, 813 F.3d 1289 (10th Cir. 2016) (ruling that plaintiff failed to establish failure-to-train claim based on failure to accommodate as a matter of fact without ruling on whether it failed as a matter of law); Cinnamon Hills Youth Crisis Ctr., Inc. v. St. George City, 685 F.3d 917 (10th Cir. 2012).

treatment of individuals with mental illness. Social science has shown that increased training can help police respond more effectively to individuals with mental illness, but not every jurisdiction seems eager to commit to adoption of new training programs. Thus, these incidents keep occurring and victims are left to address their injuries through the legal system. While change to overall police culture and nation-wide legislation is slow-moving, there are fundamental legal improvements which can be made to encourage transparency and reform. Civil liability provides victims a method to redress their injuries and publicly rebuke the behavior of discriminatory police. But the current standards for these civil lawsuits are preventing recovery for individuals with mental illness because they rely on predicting the unpredictable presentation of mental illnesses. Deliberate indifference is an outdated and ineffective standard that fails to hold bad actors accountable for disability discrimination. A shift towards mandating CIT training, applying a gross negligence standard for § 1983 claims, or embracing failure to train claims under the ADA could help solve this issue. This Essay argued that these solutions allow for increased accountability by lowering the burden on the plaintiff to show an "obvious" need for the training. Thus, an individual plaintiff's varied and complex presentation of mental illness is not ignored by requiring their symptoms to be common knowledge amongst law enforcement.