TO REMEDY POLICE MISCONDUCT, FEDERAL DISABILITY LAW IS MORE EFFECTIVE THAN THE CONSTITUTION

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Abstract

People with disabilities are overpoliced and, as a result, disproportionately suffer injuries caused by police misconduct. Section 1983 is the primary vehicle for remedying injuries caused by police misconduct, but the cause of action is increasingly encumbered. Practitioners, scholars, and courts alike have criticized the doctrinal barriers that systematically disadvantage § 1983 plaintiffs, including the immunities framework, municipal liability doctrine, and the exclusion of federal officers. In light of these restrictions on constitutional claims, and given the high proportion of people with disabilities among those injured by the police, federal disability law is often a preferrable cause of action for civil rights claimants in the policing context. Title II of the Americans with Disabilities Act applies to police agencies and emergency response services, and it poses several distinct advantages for plaintiffs relative to § 1983. Civil rights litigators should raise disability discrimination claims in the policing context more often, as consistent with recent high-profile actions by organizational plaintiffs and the Department of Justice aiming to reform systemic police practices.

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INTRODUCTION

On November 12, 1984, Dethorne Graham felt ill.[1] Mr. Graham was a Black man from Charlotte, North Carolina and an employee of the North Carolina Department of Transportation. He was also a diabetic. He recognized his symptoms as the onset of a diabetic insulin reaction caused by low blood sugar. Simply eating something with sugar would treat the issue, but the matter was urgent because an insulin reaction left untreated can quickly escalate.

Mr. Graham asked a friend, William Berry, to drive him to a nearby convenience store for orange juice. He entered the store only to find a lengthy check-out line, so he turned around and headed back to the car. A nearby police officer—Officer Connor—observed Mr. Graham's quick entry and exit from the store and found it suspicious. He stopped their car around half a mile down the road. Mr. Berry urgently explained Mr. Graham's condition, but Officer Connor insisted on corroborating with the store and radioed for back-up.

Meanwhile, Mr. Graham's condition worsened. Symptoms of an insulin reaction can include dizziness, confusion, and neurological dysfunction, which Mr. Graham began to exhibit. As more squad cars arrived at the scene, Mr. Berry pleaded for help and asked for any sugary food, but the officers insisted Mr. Graham must be drunk. "Lock the S.O.B. up," one said.[2] When Mr. Graham urged the officers to check for the "diabetic decal" he carried in his wallet, an officer told him to "shut up." A friend arrived at the scene with orange juice for Mr. Graham, "but the officers refused to let him have it."[3] While Mr. Graham was going in and out of consciousness, the officers used aggressive force to handcuff him, slam his head, and throw him headfirst into the back of a squad car.

"Finally, Officer Connor received a report that Graham had done nothing wrong at the convenience store," and the officers released him.[4] But the force used during the stop left Mr. Graham with significant injuries: a broken foot, cut wrists, a bruised forehead, an injured shoulder, and a "loud ringing in his right ear" that continued for years.[5] Not to mention the suffering he endured from exacerbation of his

1. This Introduction draws inspiration from the writing of disability rights advocate and ADA expert William Goren, *e.g.*, William Goren, *Reconsider Using Graham v. Connor as the Basis for Training Police on Excessive Force*, UNDERSTANDING THE ADA (Sept. 12, 2018), https://www.understandingtheada.com/blog/2018/09/12/graham-v-connor-excessive-force-compliance-ada-compliance, and disability rights scholar Jamelia Morgan, *e.g.*, Jamelia Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489, 491–92 (2022). Except when otherwise cited, the facts presented here are drawn from the Supreme Court's opinion and the Plaintiff-Appellant's briefing in *Graham v. Connor*. 490 U.S. 386, 388–90 (1989); Brief for the Petitioner, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571), 1988 WL 1025786, at *3–6.

2. Brief for the Petitioner, *supra* note 1, at *4.

3. *Graham*, 490 U.S. at 389. More specifically, per Mr. Graham's brief, an officer took the orange juice, Mr. Graham asked for it, and the officer said, "I'm not giving you shit." Brief for the Petitioner, *supra* note 1, at *5.

4. *Graham*, 490 U.S. at 389.

5. *Id.* at 390.

diabetic insulin reaction, and the trauma and humiliation of being stopped and subjected to grievous force by the police without justification.

Yet when Mr. Graham sued the officers responsible under 42 U.S.C. § 1983, he lost—repeatedly. First, the district court ruled for the officers after analyzing Mr. Graham's excessive force claim under Fourteenth Amendment substantive due process doctrine.[6] Then, the Supreme Court reversed, but only to correct the applicable standard: in a landmark decision, the Court held that cases challenging use of force during a police stop should instead be analyzed under the Fourth Amendment's objective "reasonableness" standard.[7]

Although the Court did not reach the ultimate merits, it did provide some defendant-friendly dicta to guide the lower courts, which is now iconic among police officers and civil rights litigators alike:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . [and] [t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving —about the amount of force that is necessary in a particular situation."[8]

On remand, the case went to trial and, under the Supreme Court's new test, a jury found the officers' conduct was "reasonable" under the circumstances.[9] After nearly a decade of litigation, Mr. Graham was left with no remedy at all for the abuse he suffered.

Notably, Mr. Graham's disability did not factor into his legal claims. As Jamelia Morgan puts it, disability in *Graham v. Connor* is "at once hypervisible and yet still somewhat invisible."[10] Under § 1983, the focus was on the objective reasonableness of the officers' decision to use force in the "split-second" moments in which they did.[11] The excessive force rubric laid out by the Supreme Court left no room for consideration of the broader context—that Mr. Graham was in a medical crisis, pleading for assistance from his local government's emergency responders. Today, the *Graham v. Connor* reasonableness test is pilloried by critics for its restrictive framing, and it is one of several significant limitations on § 1983 that make remedying police misconduct an uphill battle.[12]

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6. *Graham v. City of Charlotte*, 644 F. Supp. 246, 248–49 (W.D.N.C. 1986).

7. *Graham*, 490 U.S. at 392–99.

8. *Id.* at 396–97.

9. Charles Lane, Opinion, *A 1989 Supreme Court Ruling is Unintentionally Providing Cover for Police Brutality*, WASH. POST (June 8, 2020), https://www.washingtonpost.com/opinions/a-1989-supreme-court-ruling-is-unintentionally-providing-cover-for-police-brutality/2020/06/08/91cc7b0c-a9a7-11ea-94d2-d7bc43b26bf9_story.html.

10. Morgan, *supra* note 1, at 491.

11. *Graham*, 490 U.S. at 396–97.

12. *See, e.g.*, Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521, 556–57 (2021); Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment*, *in Graham v. Connor*,

Had Mr. Graham's case instead been presented through the lens of disability rights and disability discrimination, the outcome should have been different. This Article contends that, given the rampant overpolicing of people with disabilities, disability law is an underutilized tool among civil rights litigators taking on the police, especially relative to the increasingly encumbered § 1983. Part I explores the correlation between disability and police abuse; Part II explains how § 1983 doctrine is rife with judicial restrictions that, more and more, limit its utility for remedying police misconduct; and Part III explores the comparative advantages of federal disability law.

I. OVERPOLICING PEOPLE WITH DISABILITIES

People with disabilities are overpoliced.[13] They face severely disproportionate rates of arrest,[14] and as a result, they are disproportionately incarcerated.[15] The disabled are also much more likely to face police violence.[16] Most significantly, people with disabilities make up a dramatically disproportionate percentage of those killed by the police.[17] Although accurate data is hard to come by, experts estimate that at least a third, and likely closer to *half*, of people killed by the police each year are disabled.[18] "People with psychiatric disabilities, particularly those who lack treatment and support, are more than sixteen times more likely to be killed in encounters with law enforcement than nondisabled persons."[19]

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112 NW. UNIV. L. REV. 1465, 1475–81 (2018); Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 217–18 (2017); Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 120–28 (2009); Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. UNIV. L. REV. 1119, 1130 (2008); *see infra* Part. II.D.

13. Overpolicing refers to the targeting of strict and aggressive law enforcement practices on a particular geographic area or social group, often based upon relatively minor alleged infractions, that results in disproportionately high arrest rates, encounters with law enforcement, and, inevitably, incidence of police violence, while paradoxically leaving the policed population deprived of the benefits of police services. *See generally* Sarah L. Swan, *Discriminatory Dualism*, 54 GA. L. REV. 869, 876–79 (2020) (discussing overpolicing of people of color); United States v. Curry, 965 F.3d 313, 331–34 (4th Cir. 2020) (Gregory, J., concurring) (same).

14. *See* Erin J. McCauley, *The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender*, 107 AM. J. PUB. HEALTH 1977, 1978–80 (2017) (finding the arrest probability for persons without disabilities is 29.68%, while for people with disabilities it is 42.65%).

15. Two-thirds of incarcerated people in the U.S. report having a disability. Laurin Bixby, Stacey Bevan & Courtney Boen, *The Links Between Disability, Incarceration, and Social Exclusion*, 41 HEALTH AFFS. 1460, 1462–63 (2022), https://www.healthaffairs.org/doi/10.1377/hlthaff.2022.00495.

16. Carlyn O. Mueller, Anjali J. Forber-Pratt & Julie Sriken, *Disability: Missing from the Conversation of Violence*, 75 J. SOC. ISSUES 707 (2019) (collecting sources); Ann C. McGinley, *Enough! Eliminating Police Abuse of Individuals of Color with Disabilities*, 21 NEV. L.J. 1081, 1084–93 (2021) (same); Abigail Abrams, *Black, Disabled and at Risk: The Overlooked Problem of Police Violence Against Americans with Disabilities*, TIME (June 25, 2020, 8:56 AM), https://time.com/5857438/police-violence-black-disabled (same).

17. McGinley, *supra* note 16, at 1085–91.

18. DAVID M. PERRY & LAWRENCE CARTER-LONG, THE RUDERMAN WHITE PAPER ON MEDIA COVERAGE OF LAW ENFORCEMENT USE OF FORCE AND DISABILITY 1, 4, 7–9 (2016); *see also* McGinley, *supra* note 16, at 1085–91 (discussing available data sources regarding police use of force against people with disabilities).

19. Morgan, *supra* note 1, at 504–05.

This disparity is even more pronounced as to disabled people of color.[20] All the factors that lead people of color to face overpolicing in general are compounded for people of color with disabilities.[21] Black and Latinx people with disabilities face arrest, violence, and death by police at severely higher rates than white people with disabilities, especially among men.[22]

Many multifaceted, compounding factors contribute to these disparities, but at the heart of the issue is the social construction of disability.[23] During the late-nineteenth century, cultural norms and social policy "shifted the care of disabled people from the purview of local families and local jurisdictions to state-run asylums and large congregate facilities."[24] "In the same period, state institutions for the 'crippled,' 'feeble-minded,' and the 'epileptic,' along with almshouses for low-to-no-income persons, were formed to house, control, and correct individuals with physical and cognitive disabilities—or those labeled as such."[25]

As people with disabilities were increasingly "segregate[ed] and contain[ed]," a corresponding legal system developed to "regulat[e] disabled people in public spaces."[26] Localities passed laws, ostensibly to regulate the public health, that restricted the freedoms of those labeled "sick, abnormal, and insane"— labels also applied to "racialized 'others'. . . depicted as vectors of disease."[27] Similar laws were passed to "preserv[e] order in public and private spaces" by regulating "disorderly and disordered persons" or facilitating the "removal and criminal sanction" of physically disabled people "for simply appearing in public."[28] These systems continued into the twentieth century, gaining cachet among the ascendant eugenics movement.[29]

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20. McGinley, *supra* note 16, at 1084–93; Abrams, *supra* note 16; *see also* Vilissa Thompson, *Understanding the Policing of Black, Disabled Bodies*, CTR. FOR AM. PROGRESS (Feb. 10, 2021), https://www.americanprogress.org/article/understanding-policing-black-disabled-bodies.

21. McGinley, *supra* note 16, at 1083; Abrams, *supra* note 16; *see also* Jamelia Morgan, *Disability, Policing & Punishment: An Intersectional Approach*, 75 OKLA. L. REV. 169, 170–71 (2022) (noting Khalil Gibran Muhammad's discussion of racism itself being rooted in a disability construct—the "pseudo-biological theories" and "social scientific theories" of Black inferiority (quoting KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 20–21 (2011))).

22. *See* McGinley, *supra* note 16, at 1084–91 (discussing arrest rates and collecting available data sources to discuss rates of violence and death).

23. In contrast to the medical model of disability, which treats the limitation of disability as innate to an impairment, the social model recognizes limitation as the result of social structures. *See* Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 552 n.12 (2021); *see* Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 214 (2000); Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1401 (2012); Rabia Belt & Doron Dorfman, Response, *Reweighing Medical Civil Rights*, 72 STAN. L. REV. ONLINE 176, 186–87 (2020), https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/10/72-Stan.-L.-Rev.-Online-Belt-Dorfman.pdf.

24. Jamelia Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1412 (2021).

25. *Id.* (quoting SUSAN M. SCHWEIK, THE UGLY LAWS: DISABILITY IN PUBLIC 67 (2009)).

26. *See id.*

27. *See id.*

28. *Id.* at 1413.

29. *Id.* at 1413–14.

The result was a system of social control that reinforced "established hierarchies of social difference: class, ethnicity, race"[30] and perpetuated a link between disability and criminality. "In a cruel feedback loop, ... [s]ocial policies that segregated disabled people reinforced ideologies that persons with disabilities *should be* segregated in institutions to correct and contain their supposed physical, psychological, and moral deficiencies and abnormalities."[31] "Disability itself was conceived of as a social contagion or pathology to be contained through policing and carceral control."[32]

The same system of social control, enforced through policing and incarceration, churns along to this day, albeit under more attenuated pretenses. People with disabilities continue to face systemic barriers to inclusion, making them socially stigmatized and disproportionate constituents of the unemployed, housing-unstable and unhoused, and uninsured.[33] Modern American policing targets those populations with aggressive enforcement, often for relatively minor offenses, resulting in the increased rates of arrest, incarceration, and violence identified above.[34] "In short, the policing of disorder renders these groups more susceptible to forms of police intrusion—stops, quests, frisks, and arrests—that produce pathways to police violence."[35]

As in the nineteenth and twentieth centuries, disability status and expressions of disability continue to serve as explicit grounds for police response today. What Professor Jasmine Harris identifies as the "aesthetics of disability"—"visible sensory and behavioral markers that trigger particular aesthetic and affective judgments about marked individuals"—continues to cause police to "perceive people with particular markers or engaged in non-normative behaviors to be engaged in 'suspicious,' potentially criminal behavior."[36] Manifestations of disability, especially when intersecting with markers of other identities, like race, gender, and class, are perceived as threatening, leading to increased police response.

Professor Jamelia Morgan has identified two common contexts in which "disability in public" generates police response.[37] First, people with disabilities "are

30. *Id.* at 1413 (quoting WILLIAM J. NOVAK, THE PEOPLE'S WELFARE 216 (1996)).

31. *Id.* at 1414.

32. *Id.*

33. *See* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 418–45 (2000) (collecting authority regarding the subordination and stigmatization of the disabled class); Michelle Maroto & David Pettinicchio, *Twenty-Five Years After the ADA: Situating Disability in America's System of Stratification*, DISABILITY STUDS. Q. (Sept. 2, 2015), https://dsq-sds.org/index.php/dsq/article/view/4927 (discussing the relative economic inequity faced by people with disabilities); Armantine M. Smith, *Persons with Disabilities as a Social and Economic Underclass*, 12 KAN. J.L. & PUB. POL'Y 13, 18–36 (2002) (summarizing the social and economic marginalization of people with disabilities).

34. *See* Morgan, *supra* note 1, at 498–509.

35. *Id.* at 508.

36. Jasmine E. Harris, *Aesthetics of Disability*, 119 COLUM. L. REV. 895, 897–98, 945–46 (2019) (discussing the example of Connor Leibel, a teenager with Autism Spectrum Disorder whose repetitive "stimming" movements and lack of eye-contact were mistaken by a police officer as "suspicious," drug-induced behavior, justifying the use of force).

37. Morgan, *supra* note 24, at 1415–25 (quoting SCHWEIK, *supra* note 25).

vulnerable to citation, arrest, and even prosecution for behaviors that occur within and around hospitals, clinics, and other treatment sites."[38] All too often, when people with mental health disabilities seek out healthcare while in a state of mental distress, or experience mental distress while receiving care, they end up facing a police response, arrest, and sometimes incarceration—what Morgan labels the "mental-distress-to-arrest pipeline."[39] Police rely on "order-maintenance laws," like "nuisance, disorderly conduct, loitering, public-intoxication, and criminal-trespass," to "disproportionately target disabled persons" in and around hospitals.[40]

Second, the criminal enforcement of policies "aimed at maintaining order or even promoting public safety" provides a common avenue for over-policing persons with disabilities.[41] "[T]here are cases where efforts to promote public safety create conditions whereby disability itself provides a justification for criminalization."[42] Because the manifestations of some disabilities are still perceived as "threatening and dangerous" in the eyes of the modern public, "it is not surprising when law enforcement responds with force."[43] Yet, such enforcement often targets people with disabilities who, in fact, pose only "de minimis, speculative, or abstract"[44] risk of harm to anyone.

II. THE LIMITS OF SECTION 1983

Because people with disabilities are overpoliced, they are disproportionately subject to police misconduct. The federal cause of action commonly used by those subjected to police misconduct is 42 U.S.C. § 1983, which authorizes plaintiffs to claim violations of federal rights by state actors.[45] The modern history of § 1983 is marked by judge-made restrictions. Since the statute's reinvigoration in the 1960s as a vehicle for civil rights enforcement, the judiciary has enacted an array of limitations on Congress's straightforward right of action, creating many potential pitfalls for claims against the police.[46]

38. *Id.* at 1417.
39. *Id.* at 1418.
40. *Id.* at 1418–19.
41. *Id.* at 1422–25.
42. *Id.* at 1423 & n.116 (collecting cases).
43. *Id.* at 1423–24.
44. *Id.* at 1422.
45. *See generally* MARTIN A. SCHWARTZ, FED. JUD. CTR., SECTION 1983 LITIGATION 1–3 (Kris Markarian ed., 3d ed. 2014), https://www.govinfo.gov/content/pkg/GOVPUB-JU13-PURL-gpo54237/pdf/GOVPUB-JU13-PURL-gpo54237.pdf (explaining how § 1983 "emerge[d] as a tool for checking abuses by state officials" after the Supreme Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961), which "open[ed] the door to the federal courthouse" for "constitutional litigation against state and local officials").
46. *See generally* Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, DISSENT (Fall 2017), https://www.dissentmagazine.org/article/supreme-court-assault-civil-rights-section-1983 (explaining how, since the 1961 decision in *Monroe v. Pape* "breathed life into the statute," "the Supreme Court has not been friendly to the statute, consistently narrowing it and making it harder for individuals whose constitutional rights have been violated to prevail in lawsuits"); Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of* Monroe v. Pape, 78 UMKC L. REV. 889, 910 (2010) ("In the nearly fifty years that have passed since *Monroe*,

> There is a growing consensus among practitioners, scholars, and judges that Section 1983 is no longer serving its original and intended function as a vehicle for remedying violations of constitutional rights, that it is broken in many ways, and that it is sorely in need of repairs.[47]

The following limitations make § 1983 an increasingly ineffective tool, in stark contrast to claims that instead arise under disability rights statutes.

A. Immunities

The Judiciary has immunized various governmental actors and entities from § 1983 liability, rendering many violations of federal rights remediless.[48] A complex web of immunity doctrine and corresponding legal fictions now guide, and restrict, § 1983 litigation.[49]

Through interpretation of the text of § 1983 and application of the Eleventh Amendment and sovereign immunity doctrines, the Supreme Court has held that States are absolutely immune from § 1983 claims.[50] Further, the Court has held that claims against state agencies and state officials are effectively claims against the State itself, such that immunity extends to those defendants as well.[51] Two judge-made legal fictions allow narrow paths forward for § 1983 claims, but these paths face high hurdles to success, including the infamous qualified immunity doctrine.

First, the capacity pathway: a state official sued in their official capacity is immune, but a state official sued in their "personal" or "individual" capacity is not entitled to immunity.[52] This pathway limits the viability of § 1983 claims in that the suit must focus on individual conduct, the plaintiff must be able to identify the defendant(s) who personally engaged in the violation(s) at issue, and potential recovery may be more limited.[53]

Second, the *Ex parte Young* pathway: state officials in their official capacity are exposed to § 1983 liability solely for prospective, injunctive relief.[54] This pathway

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the Supreme Court has issued a series of decisions that have gradually diminished § 1983 in ways that make damages recovery both costly and difficult.").

47. Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 913–14 (2015).

48. *See generally* Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701 (2022); *see also* JOANNA C. SCHWARTZ, SHIELDED 29 (2023) (citing reports from attorneys that § 1983 cases are becoming "increasingly difficult to win").

49. *See generally* Blum, *supra* note 47.

50. Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989); *see also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996).

51. *Will*, 491 U.S. at 71; Kentucky v. Graham, 473 U.S. 159, 165–66 (1985); Brandon v. Holt, 469 U.S. 464, 471 (1985).

52. *See* Hafer v. Melo, 502 U.S. 21, 30–31 (1991).

53. *See, e.g.*, Teressa Ravenell, *Unidentified Police Officials*, 100 TEX. L. REV. 891, 912–17 (2022) (discussing challenges in litigating the responsibility of individual police officers for constitutional violations); Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305, 330–36 (2020) (discussing recovery limitations in individual-capacity suits).

54. *See Ex parte* Young, 209 U.S. 123, 159–60 (1908); *Will*, 491 U.S. at 70 n.10.

rests on the legal fiction that the state-official suit is effectively a suit against the state itself, which would be barred by sovereign immunity; yet, under the *Young* pathway, § 1983 plaintiffs are able to "enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury."[55] Considering that monetary relief is unavailable in official-capacity suits, and individual-capacity suits face significant barriers, injunctions under *Ex parte Young* "are therefore quite important."[56] But plaintiffs face significant challenges along the *Ex parte Young* pathway, too. They must meet the especially stringent criteria for injunctive relief: an ongoing violation, causing irreparable injury, that cannot be adequately redressed by legal remedies, favored by the balance of hardships and the public interest. They must also meet the similarly stringent criteria for standing and show that a particular defendant-official or government entity "had some level of responsibility for the challenged law or practice."[57]

The controversial, judge-made doctrine of qualified immunity further protects police officers in personal capacity suits under § 1983. An individual-capacity defendant may raise qualified immunity as an affirmative defense to a § 1983 lawsuit, and the Court must determine as early as possible (usually at the motion-to-dismiss stage, prior to discovery) whether the plaintiff has plausibly alleged: (1) a violation of (2) a "clearly established" federal right.[58]

The Supreme Court has applied that latter prong in favor of immunity by taking a highly fact-dependent approach to deciding whether rights were clearly established.[59] The Court defines the right at issue narrowly, effectively requiring "an appellate precedent in a case with nearly identical facts" to overcome immunity.[60] Following the Supreme Court's lead, lower courts "appear to latch upon the slightest of factual distinctions to excuse a defendant government officer from being held to respond to a civil charge of constitutional wrongdoing."[61] The resulting doctrine "has proved to be a mare's nest of complexity and confusion,"[62] but its most consistent feature is robust protection for § 1983 defendants.

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55. Milliken v. Bradley, 433 U.S. 267, 289 (1977). Professor Sharon Brett has observed:

> Although everyone seems to recognize that properly pled prospective relief lawsuits against state officials are, in fact, lawsuits against the state agency itself, courts still insist on the formality of naming the state official in his or her official capacity as defendant, rather than the agency or component of state government that the official runs.

Sharon Brett, *Policing State Police: System Reform within the "Fiction" of* Ex parte Young, 59 HARV. C.R.-C.L. L. REV. 175, 202–05 (2024).

56. Brett, *supra* note 55, at 204.

57. *See id.* at 210–13 (discussing barriers in *Ex parte Young* suits, including the defendant-friendly standing decision in *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983)).

58. Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982); *see also, e.g.*, Tolan v. Cotton, 572 U.S. 650, 655–56 (2014) (per curiam).

59. *See* Adelman, *supra* note 46; Blum, *supra* note 47, at 945–61 (collecting cases).

60. Gregory Sisk, *How Qualified Immunity Condones Rogue Behavior by Government Officers*, 19 U. ST. THOMAS L.J. 364, 365 (2023).

61. *Id.* at 368.

62. John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010).

Collectively, these immunities and narrowed interpretations have drastically undermined the practical viability of § 1983 claims in remedying constitutional violations. The Supreme Court's series of "extremely aggressive" qualified immunity decisions since 2000 "make it very hard for lower courts to deny immunity," with lower courts being "regularly reversed for erring on the side of liability but almost never for granting immunity."[63] "The Supreme Court's message to lower courts is clear: think twice before allowing a government official to be sued for violating an individual's constitutional rights," and consequently, the federal courts "dispos[e] of cases based on qualified immunity at an astonishing rate."[64]

B. Limitations on Municipal Liability

While state government is largely beyond the reach of § 1983, the Supreme Court in *Monell v. Department of Social Services* reached a different conclusion as to municipal governments.[65] "The Court relied on legislative history and the general understanding, at the time of the enactment of Section 1983, that municipal corporations were susceptible to suit."[66] At the same time, however, the Court specified that municipal liability cannot arise "*solely* because [the municipal defendant] employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory."[67] Instead, the municipality itself must be responsible for the violation: "action pursuant to official municipal policy of some nature [must] cause[] a constitutional tort."[68] In *City of Canton v. Harris*, the Court glossed *Monell*'s requirement for an official "policy" or "custom" into a "deliberate indifference" intent requirement: municipal liability claims arising on a failure-to-train theory are cognizable only when the claimed violation "reflects deliberate indifference to the constitutional rights of [the municipality's] inhabitants."[69]

In the decades since, *Monell*, *Harris*, and their progeny have made it "extremely difficult for plaintiffs to prevail on [§ 1983 municipality] claims challenging police policies and practices."[70] Courts and commentators alike have criticized *Monell*'s "official policy or custom" requirement as amorphous and nearly impossible to satisfy.[71] In effect, the *Monell* doctrine serves to "inoculate[] local governments from

63. Adelman, *supra* note 46.

64. *Id.*

65. 436 U.S. 658, 690 (1978).

66. Nancy Leong, *Constitutional Accountability Through State Tort Law*, 2023 WIS. L. REV. 1707, 1722 (2023).

67. *Monell*, 436 U.S. at 691.

68. *Id.*

69. 489 U.S. 378, 389–92 (1989).

70. Joanna C. Schwartz, *Municipal Immunity*, 109 VA. L. REV. 1181, 1187, 1197–98 (2023); Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 414–15 (2016).

71. *See, e.g.*, Schwartz, *supra* note 70, at 1207–10 (criticizing doctrine based on data analysis showing that *Monell* claims are predominantly dismissed, most commonly "for failing to satisfy the *Monell* [official policy] standard"); Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*,

accountability, including for conduct that would render them liable for violations of state law."[72] Indeed, based on an empirical analysis of over one thousand § 1983 cases, Professor Joanna C. Schwartz found that "[i]t is far more difficult for plaintiffs to prove *Monell* claims against municipalities than it is for plaintiffs to defeat qualified immunity when raised by individual government defendants."[73] While the promise of *Monell* is a pathway to relief under § 1983 against local governments, its high intent requirement and elimination of *respondeat superior* liability inhibit § 1983's utility.[74]

C. Federal Exclusion

Section 1983 is also inherently limited by its textual restriction to violations of federal rights by *state* officials. The cause of action cannot reach police misconduct by agents of federal law enforcement agencies,[75] even as the number of federal law enforcement officers has steadily increased over time.[76] Ordinary people are more likely than ever to have regular encounters with federal police officials, especially in communities close to federal property or the border.[77] Still, § 1983 provides no right of action to those who suffer from the police violence flowing from these

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1987 SUP. CT. REV. 249, 250 ("The policy rule has been extremely difficult to apply coherently, and there is no reason to continue the exercise."). Even almost-thirty years ago, four Justices called for a "reexamination" of *Monell*'s heightened standard. Bd. of Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 430–37 (1997) (Breyer, J., dissenting) (criticizing *Monell* for "produc[ing] a highly complex body of interpretive law" and "suggest[ing] that we should reexamine the legal soundness" of its basic assumptions); *id.* at 416–30 (Souter, J., dissenting) (criticizing majority for allowing municipality to "escape[] from liability" through an "untoward application of [*Monell*'s] enhanced fault standard to a record of inculpatory evidence showing a contempt for constitutional obligations," and endorsing Justice Breyer's "powerful call to reexamine § 1983 municipal liability").

72. Schwartz, *supra* note 70, at 1200 & n.96 (quoting Smith, *supra* note 70, at 414–15).

73. Schwartz*, supra* note 70, at 1187.

74. *See, e.g.*, Blum, *supra* note 47, at 962–63 (collecting opinions of scholars identifying the elimination of *respondeat superior* liability as the greatest limitation on § 1983's effectiveness); *see also* Crocker, *supra* note 48, at 1737 ("[R]econsidering qualified immunity without also reconsidering sovereign immunity and related protections for government entities would fail to uproot the real-life problems plaguing the constitutional-tort system."); Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 791 (1999) (positing vicarious liability as the missing linchpin to § 1983's effectiveness); Charles A. Rothfeld, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 954 (1979) (concluding that application of *respondeat superior* principles would better facilitate municipal liability in § 1983 cases).

75. District of Columbia v. Carter, 409 U.S. 418, 424–25 (1973).

76. *See generally* JEFF BUMGARNER, FEDERAL AGENTS: THE GROWTH OF FEDERAL LAW ENFORCEMENT IN AMERICA (2006).

77. *See, e.g.*, KATHERINE HAWKINS, PROJECT ON GOV'T OVERSIGHT, THE BORDER ZONE NEXT DOOR, AND ITS OUT-OF-CONTROL POLICE FORCE 3 (Jan. 10, 2023), https://s3.amazonaws.com/docs.pogo.org/testimony/2022/The-Border-Zone-Next-Door-and-its-Out-of-Control-Police-Force-01_10_23.pdf (discussing how federal policing of border zones leads to increased police encounters and surveillance); AM. IMMIGR. COUNCIL, THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY 2 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/cost_of_immigration_enforcement_factsheet_2024.pdf (discussing increase in budget for federal policing in border regions); Wadie E. Said, *Law Enforcement in the American Security State*, 2019 WISC. L. REV. 819, 827–28 (2019) (discussing the expansive federal interpretation of the "border region" surrounding the entire United States geographically).

increased encounters with federal law enforcement. To fill the gap, the Supreme Court held the Constitution itself implies a cause of action against federal officers in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[78] Much like the history of § 1983, however, the *Bivens* action has been consistently limited by the Supreme Court in the decades since its inception.[79] Today, *Bivens* is so restricted as to be of little use in the vast run of cases: if there is "*any reason* to think that Congress might be better equipped to create a damages remedy" than the judiciary, the Court will not imply a cause of action for damages.[80]

D. Narrow Frames of Reference

One cumulative effect of the judicial restrictions on § 1983 is a narrowing of the frame of reference in claims against the police. The immunity framework predicates § 1983 case theory on the acts and intent of individual officials at specific moments in time.[81] As Teressa Ravenell puts it, "a § 1983 plaintiff cannot win by just showing 'the police' violated the Constitution"; they must establish individual defendants' "personal responsibility" for the singular moment of violation.[82] Likewise, the qualified immunity analysis requires a narrow, fact-bound identification of the violated federal right at issue. The § 1983 jurisprudence that results is anathema to systemic injuries or systemic theories of causation, instead requiring a highly individualistic approach to every element.

One prominent example of § 1983's narrow frame of reference is in the excessive force context. Under the landmark *Graham v. Connor* decision,[83] the excessiveness of force must be considered from the officer's perspective at the "split-second" moment in which force was deployed. The plaintiff must "isolate the precise constitutional violation with which the defendant is charged."[84] The plaintiff must also show "that the officer *intended* (*i.e.*, consciously chose) to seize the victim and, in the process of the seizure, used an *unreasonable* level of force."[85] Because the test

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78. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

79. Henry Rose, *The Demise of the* Bivens *Remedy is Rendering Enforcement of Federal Constitutional Rights Inequitable But Congress Can Fix It*, 42 N. ILL. U. L. REV. 229, 232–237 (2022) (surveying "the fall of the *Bivens* remedy" in federal jurisprudence); *see generally* AZIZ HUQ, THE COLLAPSE OF CONSTITUTIONAL REMEDIES 105–36 (2021) (same); Alexander J. Lindvall, *Gutting* Bivens*: How the Supreme Court Shielded Federal Officials from Constitutional Litigation*, 85 MO. L. REV. 1014, 1022–37 (2020) (same).

80. Egbert v. Boule, 596 U.S. 482, 483 (2022) (emphasis added); *see also* Rose, *supra* note 79, at 237 ("It is apparent that, under these Supreme Court precedents, few persons whose federal constitutional rights are violated by federal actors will have judicial recourse to seek damages to compensate them for the harm that they suffer due to these violations."); *Constitutional Remedies*—Bivens *Actions*—Ziglar v. Abbasi, 131 HARV. L. REV. 313, 317–18 (2017) (discussing how *Bivens* and its progeny have "slowly become mere ghosts of their former selves, barely clinging to existence" (quoting WILLIAM O. DOUGLAS, WE THE JUDGES 199 (1956))).

81. *See supra* notes 53, 57–60 and accompanying text.

82. Ravenell, *supra* note 53, at 892.

83. *See supra* note 1 and accompanying text.

84. Graham v. Connor, 490 U.S. 386, 394 (1989).

85. John F. Preis, *Officer Intent and Excessive Force*, OHIO ST. L.J. (forthcoming 2025) (manuscript at 5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4742150.

is "objective," evidence of the actual defendant-officer's state of mind, motive, statements, and other "subjective" factors is irrelevant, however damning it may be.[86] This doctrine requires courts to "slosh [their] way through the factbound morass of 'reasonableness,'" based on "the individual facts of the case and an officer's objective beliefs."[87] While some courts countenance a broader approach, many courts consider the totality of the circumstances *only* in "the moments before the need for force arises"; "who or what created the need" does not factor into the equation.[88]

This approach allows the police to escape accountability even when their own actions contributed to a "state-created need" for force. If objectively *un*reasonable conduct by officers gives rise to an encounter between police and plaintiff, but objectively reasonable factors justify the use of force at a later, "split-second" moment, the plaintiff's § 1983 excessive force claim is likely to fail.[89] For example, courts have held that officers acted "reasonably" in using deadly force based on a subject's movements while held at gunpoint—allegedly reaching under a car seat or attempting to flee a stop by car—despite the fact that the officers acted objectively unreasonably in creating the circumstances by which the subject was held at gunpoint.[90] Many federal courts treat the "seizure" imparted by deadly force as occurring at the precise moment in which a fatal bullet is fired by the police, such that "[a]ll conduct before [the plaintiff] was struck, including failure to follow police protocol, [is] beyond the scope of the totality of the circumstances governing reasonableness."[91]

The narrow frame of reference required in excessive force analysis "can be affirmatively misleading, overemphasizing considerations that are of little relevance

86. Anthony M. Triola, *Reasonably Unreasonable: American Use of Force Jurisprudence and Police Impunity*, 32 SOC. & LEG. STUD. 257, 260 (2022) (explaining that *Graham* and its progeny "are an important point of departure from prior use of force jurisprudence because they impart an 'objective standard' which explicitly does not consider the intent or motivations of police").

87. Jennifer Bauer, Comment, *Unreasonable, Unfair, Unaccountable*, 128 PA. STATE L. REV. 987, 996 (2024) (quoting Scott v. Harris, 550 U.S. 372, 383 (2007)).

88. Stephanie Bing, Comment, *Lawful but Awful*, 47 VT. L. REV. 283, 288 (2022). In a May 2025 decision, the Supreme Court affirmed the standard established in *Graham v. Connor* but rejected the Fifth Circuit's strict "moment-of-threat" rule, pursuant to which courts considered only "the circumstances existing at the precise time an officer perceived the threat inducing him to shoot." Barnes v. Felix, No. 23-1239, 2025 WL 1401083, at *2 (U.S. May 15, 2025). With respect to the reasonableness of an officer's action, the Supreme Court clarified, "a court must consider all the relevant circumstances, including facts and events leading up to the climactic moment." *Id.* The impact of this ruling on excessive force claims, however, is unclear. Although the Supreme Court held there is no "time limit" when analyzing reasonableness, it also noted that "the situation at the precise time of the shooting will often be what matters most" and did not address "whether or how an officer's own creation of a dangerous situation factors into the reasonableness analysis." *Id.* at *4–5 (internal quotation marks and citation omitted).

89. Bing, *supra* note 88, at 288–89 (collecting cases); *see generally* Cynthia Lee, *Officer-Created Jeopardy: Broadening the Time Frame for Assessing a Police Officer's Use of Deadly Force*, 89 GEO. WASH. L. REV. 1362 (2021).

90. Bing, *supra* note 88, at 288–89 (discussing Greenidge v. Ruffin, 927 F.2d 789 (4th Cir. 1991); Cole v. Bone, 993 F.2d 1328, 1332 (8th Cir. 1993); Malbrough v. Stelly, 814 F. App'x 798, 803 (5th Cir. 2020)).

91. Bing, *supra* note 88, at 289.

and overlooking what can be critical information."[92] Even though "almost every incident of police violence is the ultimate result of 'a contingent sequence of decisions and resulting behaviors—each increasing or decreasing the probability of an eventual use of . . . force'"—the analysis under § 1983 often does not reach that entire sequence.[93] Section 1983 doctrine requires the court to assess the circumstances with blinders on, adopting a highly narrow frame of reference that almost always benefits the defendant's case.[94]

III. THE ADVANTAGES OF DISABILITY-BASED CLAIMS IN REMEDYING POLICE MISCONDUCT

Section 1983 is not the only cause of action available to remedy injuries caused by police misconduct. Title II of the ADA generally applies to law enforcement and emergency response activities, requiring governments to make those programs and services accessible to people with disabilities. Where the inaccessibility of emergency response services or the failure to provide reasonable modifications contributes to an injury caused by the police, a claim for disability discrimination under Title II may be available. Because people with disabilities are overrepresented among people injured by the police, these potential claims are available in many police misconduct cases, and they pose distinct litigation advantages for plaintiffs relative to the limitations of § 1983.

A. ADA Title II Framework and Policing

Congress passed the ADA in 1990 "after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities."[95] In the ADA's text, Congress noted that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[96] Despite these lofty goals, Congress continued, "discrimination against individuals with disabilities persists," including with respect to "access to public services,"[97] and "individuals who have experienced discrimination on the

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92. Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521, 549 (2021) ("Focusing on the nature of the subject's actions in the abstract distracts from more pertinent considerations: did the subject's actions, whatever they were, threaten to frustrate a legitimate government interest and, if so, to what extent?").

93. *Id.* at 558 (quoting Arnold Binder & Peter Scharf, *The Violent Police-Citizen Encounter*, 452 ANNALS AM. ACAD. POL. & SOC. SCI. 111, 116 (1980)).

94. Paradoxically, courts are much more willing to expand the aperture of the analysis when it comes to the *plaintiff's* actions prior to the use of force. *Id.* at 558–59. After all, the factors in *Graham* expressly direct courts to consider "the severity of the crime" underlying the police encounter, for example, regardless of when that crime may have taken place. *Id.* Courts also "routinely include in the analysis actions that the subject engaged in previously but had stopped doing by the time officers used force." *Id.*

95. Tennessee v. Lane, 541 U.S. 509, 516 (2004).

96. 42 U.S.C. § 12101(a)(7).

97. *Id.* § 12101(a)(3).

basis of disability have often had no legal recourse to redress such discrimination."[98] The ADA was expressly intended to remedy these wrongs. It sought "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[99]

Of course, Congress was not starting from scratch. Most notably, the Rehabilitation Act of 1973 served as a precursor to the ADA.[100] For example, the regulations implementing Section 504 of the Rehabilitation Act ("Section 504," codified at 29 U.S.C. § 794)—the key provision of that statute—first "introduced the concept of reasonable accommodation, which is the idea that some affirmative step, as opposed to strictly equal treatment, may be necessary to ensure equal access for people with disabilities to jobs, facilities, and programs."[101] Similarly, "[m]any of the terms in the ADA are derived directly from the Rehabilitation Act and its accompanying regulations."[102] However, the ADA expanded upon protections in the Rehabilitation Act in a variety of ways through the ADA's various sections, or "titles."[103] Title II of the ADA bars disability discrimination by "public entities," meaning "any State or local government" as well as "any department, agency, special purpose district, or other instrumentality of a State or States or local government."[104] The broad definition of "public entity" under Title II of the ADA means that state and local police departments are covered.[105] The anti-discrimination provisions of the Rehabilitation Act, by contrast, did not apply to state and local police departments unless they received federal funding.[106]

In general, Title II "requires that the services, programs, and activities of public entities be accessible to people with disabilities."[107] Critically, that means the ADA imposes an affirmative obligation on police departments and other public entities to ensure individuals with disabilities are not subjected to

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98. *Id.* § 12101(a)(4).

99. *Id.* § 12101(b)(1)-(2).

100. PETER BLANCK, EVE HILL, CHARLES D. SIEGAL & MICHAEL WATERSTONE, DISABILITY CIVIL RIGHTS LAW AND POLICY: CASES AND MATERIALS 26, 30 (2d ed. 2009).

101. *Id.* at 31.

102. *Id.* at 33.

103. For example, Title I of the ADA bars employers from discriminating on the basis of disability against their employees, while Title III prohibits discrimination by certain privately-run businesses known as "public accommodations." 42 U.S.C. §§ 12112, 12181.

104. *Id.* § 12131(l).

105. *See id.* (defining "public entity" as including "State or local government[s]" and any governmental "department," "agency," or "instrumentality"); *see also* CONG. RSCH. SERV., LSB10606, THE AMERICANS WITH DISABILITIES ACT (ADA) AND ON-THE-STREET POLICE ENCOUNTERS 2 (2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10606 (collecting authority, including DOJ interpretive guidance regulations, to conclude that the phrase "public entity" under Title II refers to "all activities of State and local governments" and "virtually anything a public entity does," and therefore reaches police and emergency response services).

106. *See* 29 U.S.C. § 794(a).

107. BLANCK ET AL., *supra* note 100, at 364.

discrimination,[108] even if such discrimination is "the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect."[109] Under Title II, a police department or other public entity "cannot stand idly by while people with disabilities attempt to utilize programs and services designed for the able-bodied," but rather "may very well need to act affirmatively to modify, supplement, or tailor their programs and services to make them accessible to persons with disabilities."[110] As a general matter, this means that police departments may be liable for failing to assist individuals with disabilities if the disability and the need is apparent, even if the individual never requests an accommodation.[111] For instance, police officers are required to take steps to ensure effective communication with individuals with disabilities, including individuals with mental disabilities.[112] And not any accommodation will do—it must be effective and give an individual with a disability "an opportunity to participate in or benefit from the aid, benefit, or service" the public entity provides that is "equal" to that afforded to individuals without disabilities.[113] Similarly, a public entity may not provide an individual with a disability "an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to" individuals without disabilities.[114]

The key provision of Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[115] Accordingly, to establish a discrimination claim under Title II, a plaintiff must show: (1) they are a qualified individual with a disability, (2) they are being excluded from participation in, or denied benefits, services, programs, or other activities of that public entity, or is otherwise being subjected to discrimination by the public entity, and (3) the

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108. *See, e.g.*, 42 U.S.C. § 12131(2); 28 C.F.R. § 35.150(a) (2024); 28 C.F.R. § 35.150 (2024); 28 C.F.R. pt. 35, app. b (2024) ("The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities.").

109. *See* Alexander v. Choate, 469 U.S. 287, 295 (1985) (discussing Section 504).

110. Pierce v. District of Columbia, 128 F. Supp. 3d 250, 266–67 (D.D.C. 2015) (citing 42 U.S.C. § 12131 (2)).

111. *See* Robertson v. Las Animas Cnty. Sheriff's Dep't, 500 F.3d 1185, 1197–98 (10th Cir. 2007) ("[A] public entity is on notice that an individual needs an accommodation when it knows that an individual requires one, either because that need is obvious or because the individual requests an accommodation."); Duvall v. County of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001) ("When the plaintiff has alerted the public entity to his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation), the public entity is on notice that an accommodation is required. . . .").

112. 28 C.F.R. § 35.160 (2024).

113. *Id.* § 35.130(b)(1)(ii).

114. *Id.* § 35.130(b)(1)(iii).

115. 42 U.S.C. § 12132; *see also* 28 C.F.R. § 35.130(b)(1)(i) (2024). Section 504 of the Rehabilitation Act similarly states that "[n]o otherwise qualified individual with a disability . . . 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[.]" 29 U.S.C. § 794(a).

exclusion, denial of benefits, or discrimination is by reason of their disability.[116] But in many cases, including cases involving police encounters with individuals with disabilities, the first and third prongs are not the focus of litigation. With respect to the first prong, the ADA defines "disability" broadly to include, *inter alia*, any "physical or mental impairment that substantially limits one or more major life activities of [an] individual."[117] In light of Congress's explicit instruction that the definition of "disability" be construed "in favor of broad coverage . . . to the maximum extent permitted by the terms of [the ADA],"[118] many cases will not heavily litigate the issue of whether an individual has a "disability." Similarly, with respect to the third prong, state and local police departments likely will not contest that they qualify as "public entities."[119]

Instead, litigation under Title II often centers on the second prong of the analysis, which itself raises two discrete sub-considerations. In particular, an individual with a disability may not be "excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity"; further, an individual with a disability also must not otherwise be "subjected to discrimination by any such entity."[120] Because the second prong is "framed in the alternative," liability should not turn on whether a specific police action (e.g., an interrogation) is a "service, program, or activity," but rather on whether the individual with a disability suffered discrimination.[121] And, under that second "catch-all" provision, a public entity's "failure to make reasonable accommodations [is] a form of disability-based discrimination."[122]

Title II's anti-discrimination mandate applies broadly. Not only does it apply to public entities[123]—it applies to virtually everything a public entity does.[124] According to the Department of Justice (DOJ), "[t]he ADA affects virtually everything that officers and deputies do."[125] Circuit courts similarly agree that Title II broadly applies to police activity.[126] That said, circuit courts differ with respect to

116. *E.g.*, Pierce v. District of Columbia, 128 F. Supp. 3d 250, 267 (D.D.C. 2015).

117. 42 U.S.C. § 12102(1)(A); 29 C.F.R. § 1630.2(g)(i) (2024).

118. 42 U.S.C. § 12102(4)(a).

119. Bircoll v. Miami-Dade County, 480 F.3d 1072, 1083 (11th Cir. 2007) ("The parties do not contest that [the plaintiff] is a 'qualified individual with a disability' under the first prong, or that Miami-Dade is a 'public entity' under the second prong.").

120. 42 U.S.C. § 12132.

121. Haberle v. Troxell, 885 F.3d 170, 180 (3d Cir. 2018).

122. Patten v. District of Columbia, 9 F.4th 921, 928 (D.C. Cir. 2021).

123. *E.g.*, Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998); U.S. Dep't of Just., C.R. Div., Disability Rts. Section, *Commonly Asked Questions About the ADA and Law Enforcement*, ADA.GOV (Feb. 28, 2020) [hereinafter *Commonly Asked Questions*], https://www.ada.gov/resources/commonly-asked-questions-law-enforcement/.

124. *See, e.g.*, Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty., 673 F.3d 333, 338–39 (4th Cir. 2012); Babcock v. Michigan, 812 F.3d 531, 540 (6th Cir. 2016); *Haberle*, 885 F.3d at 180.

125. *Commonly Asked Questions*, *supra* note 123.

126. *See, e.g.*, Gray v. Cummings, 917 F.3d 1, 16 (1st Cir. 2019) (concluding "the . . . activities of a municipal police department are generally subject to the provisions of Title II"); *Haberle*, 885 F.3d at 180 ("[W]e believe that [Title II of] the ADA can indeed apply to police conduct . . . ."); *Seremeth*, 673 F.3d at 338 ("[T]he ADA

whether and how Title II applies in the specific context of on-the-street encounters and arrests. Most notably, the Fifth Circuit has held that "Title II does not apply to an 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."[127] In its view, requiring officers "to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents."[128] Other circuits, however, have reasoned that Title II applies even when police officers are making an arrest[129] but exigent circumstances "inform the reasonableness analysis under the ADA."[130]

In the context of arrests, assuming that Title II applies, there are two distinct and well-recognized theories of liability. First, liability may attach because police officers "wrongly arrested someone with a disability because they misperceived the effects of that disability as criminal activity."[131] For instance, an ADA claim may arise if an individual with an intellectual disability does not understand and respond to police directions and is therefore deemed uncooperative by police.[132] Second, liability may attach if police officers "properly investigated and arrested a person with a disability for a crime unrelated to that disability, [but] they failed to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees."[133]

B. Advantages of Disability-Based Claims

While the ADA is not implicated by *every* instance of police misconduct, it is implicated far more often than current case law reflects. The social construction of disability leads to people with disabilities having disproportionate encounters with law enforcement, especially violent encounters.[134] Vulnerable populations, such as those experiencing homelessness or substance use disorders, are often subjects of

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applies to police interrogations . . . ."); Bircoll v. Miami-Dade County, 480 F.3d 1072, 1084–85 (11th Cir. 2007) (Title II applies to police officers).

127. Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000).

128. *Id.*

129. *See, e.g.*, *Haberle*, 885 F.3d at 180 ("[P]olice officers may violate the ADA when making an arrest by failing to provide reasonable accommodations for a qualified arrestee's disability."); Gohier v. Enright, 186 F.3d 1216, 1221 (10th Cir. 1999) (stating that "a broad rule categorically excluding arrests from the scope of Title II . . . is not the law").

130. *E.g.*, Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part, cert. dismissed in part sub nom.* City & County of San Francisco v. Sheehan, 575 U.S. 600 (2015); *see also* Roell v. Hamilton County, 870 F.3d 471, 489 (6th Cir. 2017) (declining to decide whether Title II applies to arrests but finding exigent circumstances rendered the desired accommodations unreasonable).

131. *Gohier,* 186 F.3d at 1220.

132. *Commonly Asked Questions*, *supra* note 123.

133. *Gohier*, 186 F.3d at 1220–21.

134. *See supra* Part II.

calls to 911 for police response related to behavior arising from disability.[135] When these encounters result in excessive force, unjustified arrest or incarceration, or other similar injuries, Title II of the ADA—and not just § 1983—may be available to provide a remedy.

An ADA claim poses several distinct advantages for the plaintiff relative to the challenges with § 1983 claims.[136] Most fundamentally, because Title II of the ADA imposes an affirmative obligation on state and local governments to make their services and programs accessible, its cause of action to enforce this obligation runs against the governmental entity itself.[137] The defendant is the government and can be held responsible for its collective action or inaction.[138] That fundamental distinction makes the ADA claim dramatically distinct from the § 1983 claim, on which a plaintiff must navigate the thicket of judge-made immunities. Sovereign immunity protects the state, and *Monell* imposes an exceedingly high standard to protect local governmental entities.[139] While the § 1983 plaintiff can elect to pursue injunctive relief from the state under *Ex parte Young*, damages are only available from the individual officer-defendants, which requires overcoming qualified immunity.[140] The ADA claim imposes none of these barriers and fictions: the plaintiff can sue the government for violating their rights and can seek a variety of remedies, injunctive and monetary alike.[141]

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135. TRANSFORM911, TRANSFORMING 911: ASSESSING THE LANDSCAPE AND IDENTIFYING NEW AREAS OF ACTION AND INQUIRY 40 (2022), https://bpb-us-w2.wpmucdn.com/voices.uchicago.edu/dist/e/2911/files/2022/07/Transforming-911_-Assessing-the-Landscape-and-Identifying-New-Areas-of-Action-and-Inquiry.pdf.

136. *See supra* Part II.

137. Derek Warden, *A Helping Hand: Examining the Relationship Between (1) Title II of the ADA's Abrogation of Sovereign Immunity Cases and (2) the Doctrine of Qualified Immunity in § 1983 and* Bivens *Cases to Expand and Strengthen Sources of "Clearly Established" Law in Civil Rights Actions*, 29 GEO. MASON U. C.R. L.J. 43, 72 (2018) ("The ADA, specifically Title II of the ADA, deals explicitly with government conduct, and specifically calls out the unlawful actions of 'public entities.'" (quoting ADA of 1990, 42 U.S.C. § 12131 (1990))).

138. *See* 42 U.S.C. §§ 12131–12132; *see, e.g.*, Tennessee v. Lane, 541 U.S. 509, 524–26 (2004). The *Lane* Court explained:

> It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights[,] . . . [which] persisted despite several federal and state legislative efforts to address it.

Id.; *see, e.g.*, Edison v. Douberly, 604 F.3d 1307, 1308 (11th Cir. 2010) ("Only public entities are liable for violations of Title II of the ADA.").

139. *Supra* Part II.B.

140. *Supra* Part II.A.

141. Warden, *supra* note 137, at 44–45 ("[C]ourts have held that because qualified immunity in the § 1983 context is only applicable to individual capacity suits, then qualified immunity has no application to Title II of the ADA, because Title II does not allow for individual capacity actions, only actions against the entity itself." (citation omitted)); *id.* at 45 ("One further distinction between § 1983 and the ADA is that Title II of the ADA has been specifically held on numerous occasions to be a valid abrogation of State sovereign immunity, meaning that an action for injunctive relief, damages, and declaratory relief may be raised against the States." (citation omitted)).

Similarly, when there is a violation of Title II's affirmative obligations, the injury—the denial of an equal opportunity to benefit from governmental services and programs—is inherently broader and more encompassing than the injury in a typical § 1983 police misconduct claim. For example, where the allegation is excessive force, a § 1983 claim often must focus on the narrow moment in time in which force was used, and the court must determine whether a reasonable officer would have an objective, lawful basis to use force in that specific moment.[142] By contrast, an ADA claim challenging the use of excessive force may frame the question more generally, asking, for instance, whether the plaintiff was denied equal opportunity to benefit from the government's emergency response services and programs.[143] That broader focus allows the plaintiff to raise arguments based on the entirety of the police response that ultimately culminated in the use of force, rather than exclusively the moment in which force was used.

Collectively, the inclusion of a Title II ADA claim allows the plaintiff to widen the aperture of their lawsuit. Whereas the § 1983 claim must identify individual actors and challenge specific, individualized actions (or else meet the stringent requirements for a *Monell* claim against the entity), the ADA claim allows the plaintiff to challenge the systemic policies and practices of the government and the collective conduct of its officers.[144] The ADA was explicitly designed to enforce reforms at the systemic level, whereas § 1983 has been increasingly limited to individualized remedies for individualized harm.[145] Rather than identifying the

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142. Cynthia Lee, *Officer-Created Jeopardy: Broadening the Time Frame for Assessing a Police Officer's Use of Deadly Force*, 89 GEO. WASH. L. REV. 1362, 1367 (2021). Professor Lee explains:

> If an officer is charged criminally or sued civilly for his use of force and the trier of fact is limited to considering only the moment at which the officer used force, not prior conduct of the officer that increased the risk of a deadly confrontation, the verdict in such cases will be skewed in favor of the officer from the start.

Id.; *see, e.g.*, Greenidge v. Ruffin, 927 F.2d 789, 791–92 (4th Cir. 1991) (citing *Graham*'s "split-second judgments" language to justify exclusion of evidence that allegedly showed officer-defendant "recklessly created a dangerous situation during the arrest," and instead restricting analysis to the "very moment" when officer-defendant shot plaintiff in the face based on mistaken belief that plaintiff was reaching for a firearm).

143. *See, e.g.*, Durr v. Slator, 558 F. Supp. 3d 1, 32–33 (N.D.N.Y. 2021) (considering, on Title II ADA claim challenging the use of force by police against a person experiencing mental health crisis, the entire course of the law enforcement encounter, including the plaintiff's "exhibiting signs of an emotionally disturbed person" as the officer-defendants arrived on the scene); *see also id.* (discussing similar cases); DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE CITY OF PHOENIX POLICE DEPARTMENT 86–100 (2024), https://www.justice.gov/crt/media/1355866/dl?inline [hereinafter DOJ PHOENIX REPORT] (concluding that police department frequently violated Title II of the ADA based on City's failure "to identify when callers need[ed] help with behavioral health issues" at the very outset of the call for service to the 911 communications center).

144. *See, e.g.*, DOJ PHOENIX REPORT, *supra* note 143, at 86–100 (finding that municipality violates Title II of the ADA "by discriminating against people with behavioral health disabilities when providing emergency response services" based on systemic failures in emergency communications center, alternative response programs, use-of-force and crisis-response practices).

145. *Compare* 42 U.S.C. § 12101(a)(2) (finding, in preamble to ADA, that the Act's purpose was to reform the historic "isolat[ion] and segregat[ion] [of] individuals with disabilities" which "continue[s] to be a serious and pervasive social problem"), *and* Steven Schwartz & Kathryn Rucker, *The Commonality of Difference: A Framework for Obtaining Class Certification in ADA Cases After Wal-Mart*, 71 SYRACUSE L. REV. 841, 849–52

individual officers who violated the plaintiff's constitutional rights at an individual moment, the plaintiff can claim the government itself violated their ADA rights through its entire provision of emergency services. This more expansive perspective reaches governmental conduct from the moment 911 was called through the resulting encounter with law enforcement and into any imposition of consequences like arrest or incarceration. The same claim can also reach the policies and practices underlying the encounter, like departmental rules, training practices, and customs.

Consider two recent examples in the caselaw. First, in *Peña v. City of Lancaster*, a mother brought claims under § 1983 and the ADA after a police officer shot and killed her son in the midst of a mental health crisis.[146] Ricardo Muñoz was twenty-seven years old, lived with schizophrenia and bipolar disorders, and had frequent encounters with the local police arising from his disabilities.[147] In September 2020, when he began experiencing a crisis in his mother's home, his sister called 911 and informed the operator of Mr. Muñoz's mental illness, requesting help with getting Mr. Muñoz to the hospital.[148] The 911 operator relayed this to the responding police officers. When the first officer arrived and approached the house, Mr. Muñoz ran off the front porch while holding a knife, and the officer shot him four times, killing him.[149] Mr. Muñoz's mother sued under both § 1983 and the ADA, claiming that the city and the officer had notice of Mr. Muñoz's disability and should have: waited for back-up before approaching the home, implemented de-escalation techniques, and, if necessary, used non-lethal force.[150]

With respect to the § 1983 excessive force claim against the individual officer-defendant, the district court held the officer was protected by qualified immunity.[151] Although the plaintiff sufficiently alleged an unreasonable use of force, the officer-defendant was nevertheless immune because the right was not clearly established:

> [T]his Court cannot say that the Third Circuit has "clearly established" that a police officer violates the constitutional rights of an individual experiencing a mental health crisis when that officer fails to wait for backup—potentially in contravention of police policies—and that decision contributes to the need for deadly force.[152]

(2021) ("The ADA's dualistic statutory structure demands that litigation strategies and procedural tools at least equally serve its systemic goals and provide for individualized remedies."), *with* Hon. Marsha S. Berzon, *Rights and Remedies*, 64 LA. L. REV. 519, 525 (2004) (surveying § 1983 decisions to support that federal courts have been "reluctant" to provide "broad structural remedies"), *and* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, U. ILL. L. REV. 1199, 1235–41 (2005) (surveying § 1983 decisions to conclude that the Supreme Court "has imposed procedural hurdles that substantially erode the availability of the equitable remedy").

146. 690 F. Supp. 3d 494, 500–501 (E.D. Pa. 2023).
147. *Id.*
148. *Id.* at 501.
149. *Id.*
150. *Id.* at 501–02.
151. *Id.* at 507–11.
152. *Id.* at 511.

This reasoning is a stark example of how § 1983 doctrine often undermines even meritorious claims, while strictly narrowing the frame of reference in the litigation. Here, the court acknowledged that a constitutional violation was plausibly alleged, but it still held the officer-defendant immune from litigation because of the high degree of specificity required by the "clearly established" prong of the qualified immunity analysis.

By contrast, the court could take a much broader approach to the circumstances of the plaintiff's ADA claim. The court first emphasized that the officer-defendant allegedly received notice about Mr. Muñoz's disability.[153] If the officer had been informed that "Mr. Muñoz dealt with mental illness" and "there were no weapons . . . involved," as his sister had told the 911 operator, then "it remained an option . . . to await backup and develop a plan to deescalate the situation—in other words, pursue a reasonable accommodation of Mr. Muñoz's mental health emergency."[154] With that, the court held the ADA claim was sufficient to survive the motion to dismiss stage: the plaintiff plausibly alleged that he was denied equal opportunity to benefit from the City's emergency response services when he was killed by the police for behavior arising from his behavioral health disability, where alternative approaches were reasonably available. Considering the entire scope of the City's response to the plaintiff's mental health crisis, the ADA claim allowed a pathway forward on the same conduct that failed to support a § 1983 excessive force claim.

Second, a similarly instructive outcome was reached by the Ninth Circuit in *Vos v. City of Newport Beach*.[155] There, Gerritt Vos entered a 7-Eleven convenience store and engaged in behavior that reasonably indicated a behavioral health crisis: he "ran around the store cursing at people" and "shouting things like, 'kill me already'"; he brandished a metal object, thought to be scissors by witnesses; he "grabbed and immediately released a 7-Eleven employee, yelling 'I've got a hostage!'"[156] The first arriving officer could see Mr. Vos "behind the 7-Eleven's glass doors yelling, screaming, and pretending to have a gun," and he reported over his police radio that he believed Mr. Vos was "asking [the officer] to shoot him."[157] As time went by, a total of eight officers responded, one armed with a "less-lethal" projectile weapon and two armed with AR-15 rifles.[158] Eventually, Mr. Vos emerged from the back of the 7-Eleven and ran towards the perimeter of officers while holding and pointing the metal object.[159] One officer said, "Shoot him," and later claimed to have been commanding only the officer holding the less-lethal weapon.[160] However, both the officer with the less-lethal weapon and the two

153. *Id.* at 519–20.
154. *Id.*
155. 892 F.3d 1024 (9th Cir. 2018).
156. *Id.* at 1028–29.
157. *Id.* at 1029.
158. *Id.*
159. *Id.*
160. *Id.* at 1029–30.

officers with rifles all fired at Mr. Vos, who was shot four times.[161] Mr. Vos collapsed in front of the officers on the sidewalk and died from his wounds.[162] Subsequently, Mr. Vos's blood tested positive for amphetamine and methamphetamine and his medical history revealed a schizophrenia diagnosis.[163]

Mr. Vos's parents filed suit against the City and several individual officers, bringing claims including excessive force under § 1983 and disability discrimination under the ADA and Rehabilitation Act.[164] The district court granted summary judgment to the defendants on all counts.[165] Applying the *Graham* factors, the Ninth Circuit diverged from the district court by holding that a jury could reasonably conclude that "the force employed was greater than is reasonable under the circumstances," meaning that the plaintiffs sufficiently established a constitutional violation.[166] Nevertheless, the Ninth Circuit held that qualified immunity applied because the "existing precedent [did not] place[] the conclusion that officers acted unreasonably in these circumstances 'beyond debate.'"[167] Here too, the court parsed precedent at a highly narrow factual level. Past cases, such as one involving a "mentally ill woman holding a kitchen knife by her side standing in close proximity to her roommate," were distinguishable because, in this case, "Vos acted aggressively."[168] The court cited three recent precedents involving a subject with a mental health disability who also acted "aggressively," and where qualified immunity applied, to conclude that the violated right at issue was still not "clearly established" here, or else that, "even if [the] officers were mistaken, that mistake was reasonable."[169] Accordingly, the Ninth Circuit affirmed summary judgment for the defendants on plaintiffs' § 1983 excessive force claim.

The outcome on plaintiffs' ADA claim was different.[170] Plaintiffs argued that the defendants failed to reasonably accommodate Mr. Vos's apparent disability by failing to de-escalate the encounter and deploying specialized resources for mental health calls.[171] The defendants argued that because the police did not provoke the violent encounter with Mr. Vos, they could not be said to have failed to accommodate Mr. Vos's disability.[172] Notably, the Ninth Circuit rejected that argument for relying on precedent that "addresses provocation in the context of a plaintiff's excessive force claim," whereas "the *reasonableness of accommodation* under the circumstances *is an entirely separate fact question*."[173] Agreeing with the

161. *Id.*
162. *Id.*
163. *Id.* at 1030.
164. *Id.*
165. *Id.*
166. *Id.* at 1030–34 (citation omitted).
167. *Id.* at 1034–36 (citation omitted).
168. *Id.* at 1035–36 (citing Kisela v. Hughes, 584 U.S. 100, 104–08 (2018)).
169. *Id.*
170. *Id.* at 1036–37.
171. *Id.*
172. *Id.* at 1037.
173. *Id.* (emphases added).

plaintiffs, the court held that "the officers here had the time and opportunity to assess the situation and potentially employ the accommodations identified by [Vos's] [p]arents, including de-escalation, communication, or specialized help."[174] While the district court had linked its "earlier determination that the officers' actions were objectively reasonable" to its conclusion that the officers did not discriminate on the basis of disability, the Ninth Circuit concluded that "[t]he same fact questions that prevent a reasonableness determination inform an accommodation analysis."[175] The only difference, then, is that the officer-defendants were nevertheless entitled to qualified immunity on the § 1983 claim on "clearly established" grounds, whereas the disability-based claims were not subject to that defense.

These cases demonstrate that disability-based claims for police misconduct cover ground that § 1983 leaves exposed. They also demonstrate the analytical differences between the claims: where the *Graham* factors and the qualified immunity analysis both require highly fact-intensive inquiries to the specific circumstances in which force was used, the disability-based claims widen the aperture for a more holistic approach. Both cases illustrate the qualified immunity barrier, but the relative advantages of a disability claim play out on other § 1983 issues as well.[176]

Other recent actions highlight the potential of disability-based claims to support more systemic theories of relief. In *Bread for the City v. District of Columbia*, a Washington D.C.-based nonprofit organization that provides behavioral health services sued the city under Title II for systematically responding to 911 calls involving people with behavioral health disabilities by dispatching police "who are mainly trained to arrest and detain people suspected of crimes, not to handle mental health emergencies."[177]

The nonprofit alleges that the city's overreliance on police response to mental health crises causes a negative impact on its services, an organizational harm:

> The hours that Bread's staff members have spent de-escalating crises to avoid calling 911, the revenue Bread has lost, and the funds it has spent on training, have diverted Bread's resources away from its mission of proactively assisting clients with their basic needs: primary healthcare services, legal services, food, clothing, and social services.[178]

174. *Id.*

175. *Id.*

176. *See, e.g.*, Thomas v. Town of Lloyd, 711 F. Supp. 3d 122, 138–40 (N.D.N.Y. 2024) (dismissing § 1983 *Monell* claim against municipality because plaintiff failed to "plausibly allege the existence of an official policy or custom that caused him to be denied a constitutional right," but declining to dismiss ADA claim against municipality because plaintiff "plausibly alleged that the Officers were aware . . . that they were dealing with a mentally ill person" when they made an allegedly false arrest with excessive force).

177. Compl. at ¶ 2, Bread for the City v. District of Columbia, No. 1:23-cv-01945 (D.D.C. July 7, 2023) ("As a result, when [D.C. police] officers arrive at a mental health crisis, they frequently aggravate the emergency and increase the trauma experienced by the individual in crisis by, for instance, needlessly handcuffing the person or using excessive force.").

178. *Id.* at ¶ 14 ("If calling 911 resulted in mental health professionals responding promptly to a mental health crisis, Bread would be able to reroute significant resources back to its core programs.").

Likewise, in *Disability Rights Oregon v. Washington County*, the Protection and Advocacy System[179] organization for the State of Oregon is suing an Oregon municipality under Title II on a similar theory.[180] Plaintiffs' complaint alleges that people suffering medical crises receive a medical emergency response from the county, but when someone in the county:

> experiences a mental health crisis and they call Defendants for emergency help, Defendants respond to their health emergency in the same manner and means they would a crime or a public safety threat—sending tactically-trained and armed law enforcement officers who are more likely to exacerbate, rather than resolve, the mental health crisis they were sent to address.[181]

Rather than arguing an organizational harm, as in *Bread for the City*, the Oregon lawsuit alleges an associational harm on behalf of the plaintiffs' membership.[182]

The ADA enables these organizational plaintiffs to assert systemic claims and seek injunctive relief that would reform emergency response services across a municipality without having to jump through the hoops imposed on § 1983 claims, like the *Monell* doctrine and heightened restrictions on standing. Take *City of Los Angeles v. Lyons* as an example of § 1983's limitations.[183] There, the Supreme Court held that an individual plaintiff who had been put in an unlawful choke hold by a group of police officers lacked Article III standing for an injunction under § 1983 because he could not show sufficient likelihood that he would personally be placed in a chokehold again in the future.[184] Decisions like *Lyons* "have made it virtually impossible to seek reform of law enforcement agencies" via § 1983, "even when the policies or practices at issue are illegal or plainly discriminatory."[185] The Supreme Court has extended *Lyons* even to cases brought by

179. Under the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801, federal law mandates that each state maintain a federally-funded, independent organization to "ensure that the rights of individuals with mental illness are protected," *id.* § 10801(b)(1), with the authority to "pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State," *id.* § 10805(a)(1)(B).

180. *See generally* Compl., Disability Rights Oregon v. Washington County, No. 3:24-cv-00235-SB (D. Or. Feb. 5, 2024).

181. *Id.* at ¶ 2.

182. *See id.* at ¶¶ 26–28.

183. 461 U.S. 95, 105–06 (1983).

184. *Id.* (explaining that Lyons would have had not only "to allege that he would have another encounter with the police" but also "to make the incredible assertion either, (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they have an encounter, . . . or, (2) that the City ordered or authorized police officers to act in such manner").

185. MICHELLE ALEXANDER, THE NEW JIM CROW 128–30 (The New Press 2012); *see also* Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 808–09 (2016) ("[T]he Supreme Court [in *Lyons*] strongly curtailed the ability of private litigants to challenge police brutality and abuse at a structural level."); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1398–99 (2000) ("The [*Lyons*] Court's application of this 'equitable standing' bar has ensured that victims of police brutality will rarely be allowed to enjoin injurious police practices.").

organizational plaintiffs, rather than individuals.[186] As Professor Susan Bandes has put it, the judge-made restriction of § 1983 standing "rejects or vulgarizes motivations based on linked fate, or membership in a community," and "transforms them into individualized interests in the plaintiff's own welfare or aggrandizement."[187] The *Bread for the City* and *Disability Rights Oregon* cases exemplify plaintiffs making the strategic decision to rely exclusively on the ADA to seek systemic injunctive relief against a municipality for police misconduct and avoid the limitations of § 1983. At the time of authorship, both cases remained pending at the motion to dismiss stage, so the success of the strategic choice remains to be seen. Still, the exclusive assertion of ADA claims in these cases, rather than those grounded in § 1983, shows how civil rights attorneys increasingly recognize Title II as a pathway for achieving systemic reform of police departments.

The DOJ—the federal agency charged with enforcement of the ADA—endorses this approach. Two recent DOJ civil rights investigations into police departments found violations of Title II on essentially the same theories as put forward by these organizational plaintiffs.[188] In a 2023 Report finding a pattern or practice of civil rights violations in two Louisville, Kentucky police departments, the DOJ focused not only on constitutional violations like excessive force and race discrimination, but also on disability discrimination under Title II.[189] The DOJ found that Louisville repeatedly violated the ADA in part because "[police] officers are the primary and generally the sole responders to situations involving behavioral health issues in Louisville, even in instances where safety does not require a law enforcement presence."[190] Likewise, a 2024 DOJ report found a pattern or practice of ADA violations in the Phoenix, Arizona police department on similar bases: the Phoenix 911 call center "routinely fails to identify when callers need help with behavioral health issues" and "default[s] to sending regular patrol officers" instead of "clinical specialists" or "a specially trained team."[191] Echoing the central theory in the two organizational cases discussed above, the DOJ used a simple analogy to explain disability discrimination in emergency response: "[j]ust as a person in Phoenix experiencing a heart attack or other medical emergency receives a response from trained EMTs, in many circumstances a person experiencing the

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186. *See* Summers v. Earth Island Inst., 555 U.S. 488, 495–96 (2009) (holding organizational plaintiff lacked standing to assert § 1983 claim on behalf of its membership based on likelihood of future injury, by the U.S. Forest Service's allegedly illegal salvage sales of fire-damaged timber, because that theory "present[ed] a weaker likelihood of concrete harm than that which [the Court] found insufficient in *Lyons*").

187. Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1308–09, 1334–35 (1999) (citation omitted) (discussing, in particular, the standing restrictions of *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), which is one case among several that "represent the Court's own refusal to acknowledge or act on patterns of police abuse").

188. *See* DOJ PHOENIX REPORT, *supra* note 143; DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE LOUISVILLE METRO POLICE DEPARTMENT AND LOUISVILLE METRO GOVERNMENT 59 (2023), [hereinafter DOJ LOUISVILLE REPORT], https://www.justice.gov/opa/press-release/file/1573011/dl.

189. DOJ LOUISVILLE REPORT, *supra* note 188, at 9–10, 59–66.

190. *Id.* at 59–60 (finding that "[u]nnecessary" police response "is often ineffective and harmful").

191. DOJ PHOENIX REPORT, *supra* note 143, at 86–105.

effects of a behavioral health disability should receive a health-centered response," yet the City's police fail "to make important modifications necessary to avoid discriminati[on]."[192]

C. Potential Disadvantages for Disability-Based Claims

While claims against the police rooted in disability law pose distinct advantages, they do also face unique challenges of their own. As a starting point, disability discrimination plays out in far too many police encounters, but it is not a factor in every instance of police misconduct, meaning sometimes § 1983 alone is available. Further, there is some divergence among the federal courts as to the extent to which the ADA applies to certain encounters between police and the public, so in some jurisdictions plaintiffs need to litigate the applicability of federal disability law to the factual circumstances.[193]

A few other issues commonly arise as defenses to disability-based claims against the police. Defendants may seek to limit damages by arguing the failure to provide equal opportunity to benefit from government services and programs—through a failure to make reasonable modifications or to provide effective communication—did not cause all of the injuries plaintiffs suffered from police misconduct.[194] Defendants may challenge causation by arguing that the alleged accessibility barriers are too attenuated from ultimate outcomes of the police encounter, or that some conduct by the disabled plaintiff was a superseding cause of the injury.[195] Still, causation is a fact-laden inquiry that is ultimately the jury's to resolve.[196] So long as a plaintiff alleges facts to support a causation theory strong enough to survive the motion to dismiss stage and can then put forward evidence to create a sufficient factual dispute at summary judgment, the plaintiff has a strong argument that the ultimate determination of causation must be made by a jury at trial. Moreover, such causation

192. *Id.* at 87.

193. *See supra* notes 128–33 and accompanying text.

194. Morgan, *supra* note 24, at 1453–57 (summarizing the challenges that disability-plaintiffs face on the causation element in policing cases); Prianka Nair, *The ADA Constrained: How Federal Courts Dilute the Reach of the ADA in Prisons Cases*, 71 Syracuse L. Rev. 791, 815–21 (2021) (same, in the context of prisons litigation).

195. *See, e.g.*, Waller v. City of Danville, 515 F. Supp. 2d 659, 664–66 (W.D. Va. 2007) (holding that disability discrimination via failure to train city police officers was not "the proximate cause of [the plaintiff's] death" because "exigent circumstances" and the plaintiff's own conduct towards officers functioned as "the superseding cause" of the police killing him); Jones v. Lacey, 108 F. Supp. 3d 573, 589–91 (E.D. Mich. 2015) (considering defendants' argument that plaintiff could not establish wrongful arrest based on disability discrimination because plaintiff's possession of cannabis justified defendants' conduct, and collecting cases discussing similar arguments).

196. *See, e.g.*, Finley v. Huss, 102 F.4th 789, 828 (6th Cir. 2024) (Gilman, J., concurring) ("Whether a less isolated cell in administrative segregation would have permitted [the plaintiff] to avoid discrimination on the basis of his disability thus remains a question of fact for a jury."); Brown v. County of Nassau, 736 F. Supp. 2d 602, 620 (E.D.N.Y. 2010) (considering defendant's arguments on sufficiency of plaintiff's expert evidence on causation at summary judgment stage, and concluding the defendant "is entitled to have this fact-specific inquiry determined at trial").

arguments should not operate as a complete defense to liability itself; rather, they are only relevant to the scope of damages. A public entity may be held liable for failing to ensure effective communication or failing to grant an individual an equal opportunity to participate in its programs, services, and activities, irrespective of whether the individual suffered additional harms (e.g., physical injuries) as a result.[197]

Relatedly, courts are split on whether the ADA encompasses vicarious liability. Most courts have affirmatively held that vicarious liability *is* available, so a plaintiff can assert that the governmental entity is vicariously liable for the acts of disability discrimination carried out by its employees.[198] The DOJ's position in enforcing Title II of the ADA is that vicarious liability is authorized.[199] But a minority of courts have imported doctrine from other civil rights statutes that prohibit vicarious liability and have accepted arguments from defendants that the plaintiff's disability claim impermissibly seeks to hold the municipality-employer liable for the acts of its individual employees.[200] In the view of these authors, the cases imposing a bar on vicarious liability to Title II of the ADA are wrongly decided.[201] If facing a vicarious liability-based challenge, disability-rights plaintiffs should emphasize that their claim challenges the entire response provided by the governmental entity, which necessarily acts through its individual officers, as opposed to challenging only the individual acts by specific officers that most directly caused the ultimate injury.

Finally, while disability-rights claims are especially well-suited for obtaining injunctive relief to reform a municipality's policing practices, there may be distinct

197. *See* Silva v. Baptist Health S. Fla., Inc., 856 F.3d 824, 834 (11th Cir. 2017) (explaining that, if a patient alleges a hospital failed to comply with the ADA, the relevant issue is not "whether [the] patient ultimately receives the correct diagnosis or medically acceptable treatment" but whether the plaintiff "has been denied the equal opportunity *to participate* in healthcare services," and that such a plaintiff has been denied an equal opportunity "whenever he or she cannot communicate medically relevant information effectively with medical staff").

198. *See, e.g.*, T.O. v. Fort Bend Indep. Sch. Dist., 2 F.4th 407, 417–18 (5th Cir. 2021); Duvall v. County of Kitsap, 260 F.3d 1124, 1141–42 (9th Cir. 2001); Rosen v. Montgomery County, 121 F.3d 154, 157 n.3 (4th Cir. 1997).

199. *See, e.g.*, Statement of Interest of the United States of America, A.V. v. Douglas Cnty. Sch. Dist. RE-1, No. 21-cv-00704-WJM-SKC (D. Colo. May 31, 2022), *available at* https://archive.ada.gov/av_douglas_co_soi.html. The Statement of Interest argues:

> The Sheriff's Office is wrong when it argues that "neither Title II nor Section 504 can be construed to impose vicarious liability on a public entity based on the conduct of its employees." In fact, the plain text of the implementing regulation and the weight of the caselaw establish that Title II imposes liability on a public entity for the discriminatory conduct of its employees, agents, contractors, licensees, and others.

Id. (internal citation omitted).

200. *See, e.g.*, Jones v. City of Detroit, 20 F.4th 1117, 1119–22 (6th Cir. 2021) (holding, based on analysis of Title VI and Title IX of the Civil Rights Act, that Title II of the ADA "does not allow vicarious liability").

201. *See id.* at 1123–27 (Moore, J., dissenting) (explaining why *Jones* majority's reliance on Title VI and Title IX authority was misapplied as to Title II of the ADA, where vicarious liability is more consistent with Congress's broad remedial intent).

challenges in obtaining extensive damages relief. Title II of the ADA imposes an affirmative obligation on public entities to make their services and programs accessible, which means they can be liable for failing to do so *regardless of* whether the plaintiff can show any discriminatory intent.[202] To obtain damages as a remedy, however, courts generally require the plaintiff to show that the government acted with "deliberate indifference" to the plaintiff's rights under the ADA in committing the violation.[203] The "deliberate indifference" standard does not require a showing of discriminatory animus, which would be an even more demanding requirement.[204] Rather, a showing of deliberate indifference "requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that . . . likelihood."[205] Notice is established when the plaintiff alerts the governmental defendant to their need for a modification or where the need is sufficiently apparent, and a failure to act requires showing some "element of deliberateness" that is "more than negligent."[206] Still, showing deliberate indifference for purposes of a damages remedy under Title II of the ADA is a less onerous burden than establishing deliberate indifference for purposes of a § 1983 *Monell* claim against a municipality.[207]

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202. *See* Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417, 1418 (2015) ("Demanding that disability discrimination claimants prove intent imposes a burden found nowhere on the face of section 504 or Title II of the ADA.").

203. *See, e.g.*, Barber *ex rel.* Barber v. Colo. Dep't of Revenue, 562 F.3d 1222, 1228–29 (10th Cir. 2009) ("[I]ntentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights."). For a survey of each circuit's slightly distinct approach to the deliberate indifference intent requirement for compensatory damages under Title II, see generally Derek Warden, *Ending the Charade: The Fifth Circuit Should Expressly Adopt the Deliberate Indifference Standard for ADA Title II and RA Section 504 Damages Claims*, 9 TEX. A&M L. REV. 437, 443–50 (2022). Note, however, that some scholars argue that the cases importing the deliberate indifference standard from Titles VI and IX of the Civil Rights Act to Title II of the ADA and § 504 of the Rehabilitation Act are wrongly decided. *See, e.g.*, Weber, *supra* note 202, at 1417–18, 1432–49; McGinley, *supra* note 16, at 1107–11.

204. *See, e.g.*, Lacy v. Cook County, 897 F.3d 847, 863 (7th Cir. 2018) ("[T]he deliberate indifference standard is better suited to the remedial goals of the . . . ADA than is the discriminatory animus alternative."); Bartlett v. N.Y. State Bd. of L. Exam'rs, 156 F.3d 321, 331 (2d Cir. 1998), *cert. granted, judgment vacated on other grounds*, 527 U.S. 1031 (1999) ("In the context of the Rehabilitation Act, intentional discrimination against the disabled does not require personal animosity or ill will.")

205. Duvall v. County of Kitsap, 260 F.3d 1124, 1138–39 (9th Cir. 2001); *Barber*, 562 F.3d at 1228–29.

206. *Duvall*, 260 F.3d at 1138–40.

207. *See* McGinley, *supra* note 16, at 1106–11 (explaining that deliberate indifference under Title II is derived from Titles VI and IX of the Civil Rights Act, distinguishing it from the rules set out in *Monell*); Weber, *supra* note 202, at 1444 & n.165 (explaining, in discussing vicarious liability, that liability under Title II does not necessarily require showing "a policy or its equivalent on the part of the defendant," and citing to *Monell*'s contrasting rule to exemplify this point); Rachel E. Brodin, Comment, *Remedying a Particularized Form of Discrimination: Why Disabled Plaintiffs Can and Should Bring Claims for Police Misconduct Under the Americans with Disabilities Act*, 154 U. PA. L. REV. 157, 193 n.230 (2005) (explaining that, for at least some claims, deliberate indifference under *Monell* is "more difficult for a plaintiff to meet than the intentional discrimination standard under Title II because courts have found that the City of Canton requirement of a *policy or custom* of deliberate indifference is unnecessary to prove Title II intentional discrimination" (emphasis added) (citing Delano-Pyle v. Victoria County, 302 F.3d 567, 575 (5th Cir. 2002); Rosen v. Montgomery County, 121 F.3d 154, 157 n.3 (4th Cir. 1997))); *see, e.g.*, Jackson v. Inhabitants of Sanford, Civ. No. 94-12-P-H, 1994 WL

The other hurdle for disability-based claims seeking damages comes from the Supreme Court's recent decision in *Cummings v. Premier Rehab Keller, P.L.L.C.*[208] There, the Court held that emotional distress damages are unavailable in § 504 Rehabilitation Act claims.[209] Although *Cummings* is silent as to Title II of the ADA, defendants have been quick to argue that its reasoning extends equally to the ADA, and so far, courts have generally accepted that rationale.[210] However, *Cummings* does not preclude the damages remedy in Title II actions—far from it. Plaintiffs may continue to recover damages pursuant to a broad array of viable theories, including damages for the "loss of opportunity" and "consequential damages" an individual suffered due to the ADA violation.[211] Importantly, in the police misconduct context, even after *Cummings*, physical injuries and economic harms (e.g., the cost of treating physical injuries) remain recoverable, along with any other resulting economic harms, such as interrupted or lost employment, decreased future earnings potential, and damaged property. As in all civil rights litigation, ADA plaintiffs often face an uphill battle, but in the view of these authors, the obstacles to a Title II claim often are preferable to those imposed on § 1983 litigation.

CONCLUSION

When Dethorne Graham pursued a § 1983 claim for the excessive force used against him by police officers while he suffered a diabetic insulin reaction, he lost. He lost because the standard and factors laid out by the Supreme Court for assessing the objective perspective of a reasonable police officer—at the "split-second" moment in which force was used, strictly without the benefit of hindsight—stacked the deck against his claim. The judge-made restrictions on § 1983 claims have only become more stringent since then.

Under Title II of the ADA, however, the facts of *Graham* would support a strong case. As Mr. Graham was in the midst of oncoming diabetic shock, the local government owed him equal opportunity to benefit from its emergency response services. By treating him as a criminal suspect and using unnecessary force against him, instead of taking steps to get him medical care, the responding police officers denied Mr. Graham that equal opportunity, committing disability discrimination. The officers were also obliged to at least make a reasonable modification to their

589617, at *6 (D. Me. Sept. 23, 1994) (granting summary judgment on § 1983 *Monell* claim because the plaintiff "offer[ed] no evidence that [municipality] policymakers were . . . deliberately indifferent to inadequate training policies likely to result in constitutional violations," but denying summary judgment on Title II ADA claim asserting essentially same theory).

208. 596 U.S. 212 (2022).

209. *Id.* at 221–30.

210. *See, e.g.*, Doherty v. Bice, 101 F.4th 169, 173–75 (2d Cir. 2024); Smith v. Kalamazoo Pub. Schs., 703 F. Supp. 3d 822, 828–29 (W.D. Mich. 2023).

211. *See, e.g.*, Montgomery v. District of Columbia, No. 18-1928, 2022 WL 1618741, at *25–27 (D.D.C. May 23, 2022).

approach to ensure Mr. Graham's equal access—such as by merely allowing Mr. Graham to consume the orange juice that a neighbor eventually brought for him. Mr. Graham would surely have a strong argument that the officers' use of force and failure to modify caused the injuries he suffered by their beating. He would also have a strong argument that their conduct amounted to deliberate indifference to his rights, allowing for damages. Even under *Cummings*, Mr. Graham's damages claim could be substantial, especially in light of the extensive and long-lasting physical injuries he sustained. And the officers likely could not support an "ignorance" defense as to the disability: Mr. Graham and his friend explicitly stated that his conduct was arising from his diabetes, he was carrying a diabetic decal that he asked them to check, and, regardless, the circumstances and Mr. Graham's conduct were likely sufficient to put the officers on notice.

Today, for many people with disabilities who suffer police misconduct like Dethorne Graham did, especially those with mental and behavioral health disabilities who are distinctly overpoliced, disability-rights claims pose distinct advantages over § 1983 suits. Disability advocates and police reformers alike should leverage disability law to obtain both individual remedies for victims of discrimination and to create systemic change in police departments and emergency response services for the benefit of people with disabilities.