

ENOUGH! ELIMINATING POLICE ABUSE OF INDIVIDUALS OF COLOR WITH DISABILITIES

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INTRODUCTION

The murder of George Floyd by police officers in Minneapolis incited not only activists in the Black Lives Matter movement but also tens of thousands of Americans and persons across the globe of all races and ages who now realize that police reform is necessary to achieve real equality among all persons in the United States and elsewhere.¹ For as long as most Black Americans can remember, police have abused people of color in this country.² In fact, police forces were originally created in the United States to catch and return escaped slaves to their “rightful” owners.³ But only with the recently-required use of police body cameras as well as the proliferation of cell phones that enable videos shot by bystanders have many other Americans recognized how dire the situation is.⁴ This recognition has led to inter-racial marches in the streets of major cities,⁵ charges against individual police officers for murder,⁶ and demands for new legislation on both federal and state levels to reform police practices, to limit police departments’ jurisdiction, and even to defund or abolish police departments and to redirect funds to social services for poor people.⁷ No question

¹ See, e.g., Anthony Zurcher, *George Floyd Death: Three Police Reform Plans Compared*, BBC NEWS (June 17, 2020), <https://www.bbc.com/news/world-us-canada-53083560> [<https://perma.cc/FM2Q-94KT>]; Weihua Li & Humera Lodhi, *The States Taking on Police Reform After the Death of George Floyd*, FIVETHIRTYEIGHT (June 18, 2020, 3:00 PM), <https://fivethirtyeight.com/features/which-states-are-taking-on-police-reform-after-george-floyd/> [<https://perma.cc/J66Z-5RMH>]; Abdi Latif Dahir et al., *George Floyd’s Killing Prompts Africans to Call for Police Reform at Home*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/03/world/africa/george-floyd-protests-police-africa.html> [<https://perma.cc/V5TV-FQRZ>].

² Anna North, *How Racist Policing Took over American Cities, Explained by a Historian*, VOX (June 6, 2020, 8:00 AM), <https://www.vox.com/2020/6/6/21280643/police-brutality-violence-protests-racism-khalil-muhammad> [<https://perma.cc/83DQ-8T58>].

³ *Id.*

⁴ See Nicol Turner Lee, *Where Would Racial Progress in Policing Be Without Camera Phones?*, BROOKINGS (June 5, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/05/where-would-racial-progress-in-policing-be-without-camera-phones/> [<https://perma.cc/U2RK-AJ9C>].

⁵ *A Timeline of the George Floyd and Anti-Police Brutality Protests*, ALJAZEERA (June 11, 2020), <https://www.aljazeera.com/news/2020/6/11/a-timeline-of-the-george-floyd-and-anti-police-brutality-protests>; *In Pictures: A Racial Reckoning in America*, CNN (July 9, 2020, 9:35 PM), <https://www.cnn.com/2020/05/27/us/gallery/george-floyd-demonstrations/index.html> [<https://perma.cc/5NUM-4APV>]; *George Floyd: Videos of Police Brutality During Protests Shock US*, BBC NEWS (June 5, 2020), <https://www.bbc.com/news/world-us-canada-52932611> [<https://perma.cc/M58W-VSFX>].

⁶ Brittany Shammis et al., *Murder Charges Filed Against All Four Officers in George Floyd’s Death as Protests Against Biased Policing Continue*, WASH. POST (June 3, 2020, 8:45 PM), <https://www.washingtonpost.com/nation/2020/06/03/george-floyd-police-officers-charges/> [<https://perma.cc/F4NR-M9N7>].

⁷ Rashawn Ray, *What Does ‘Defund the Police’ Mean and Does It Have Merit?*, BROOKINGS (June 19, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/19/what-does->

major reform is necessary. Without it, this country cannot move forward as a nation that espouses equal treatment of all.

As efforts to reform police practices and to consider redirecting funding to social service agencies continue, we must understand that individuals with disabilities, especially mental health, intellectual, and sensory perception disabilities, also suffer serious abuse at the hands of police officers.⁸ Just as a person's race increases the risk of arrest, so does a person's disability.⁹ In fact, the intersection of Black or Latinx race and disability elevates the risk of arrest and injury dramatically.¹⁰ In too many tragic cases, family members of an individual with bipolar disorder, schizophrenia, or other mental health disability call police for help transporting the individual to the hospital, but police escalate the tense situation, leaving the individual dead or seriously injured.¹¹ In other cases, police shoot deaf individuals who unknowingly fail to follow their directions.¹² Given this reality, it is imperative that supporters of the Black Lives Matter movement consider the intersection of race and disability when making legal and policy recommendations for change.

This Article discusses the intersectional harms caused by the police to persons of color with disabilities and analyzes the potential use of Title II of the Americans with Disabilities Act (ADA)¹³ to hold police departments liable for

defund-the-police-mean-and-does-it-have-merit/ [https://perma.cc/2B4A-SH3A] (stating that "defund the police" does not mean abolish the police, but rather means to re-direct funding to other social service agencies, etc. that should have jurisdiction over many of the matters police get involved with); Scottie Andrew, *There's a Growing Call to Defund the Police. Here's What It Means*, CNN (June 17, 2020, 10:32 AM), https://www.cnn.com/2020/06/06/us/what-is-defund-police-trnd/index.html [https://perma.cc/TG23-N5SF] (noting that different people mean different things when they say "defund the police;" some mean redirecting resources from the police to social services agencies while others mean disbanding or abolishing the police force).

⁸ Even when not looking at police violence specifically, persons with disabilities are 2.5 times more likely to be victims of violent crimes, and those with cognitive disabilities suffer the most violent crimes of those with disabilities. See ERIKA HARRELL, BUREAU JUST. STATS., NCJ 250632, CRIME AGAINST PERSONS WITH DISABILITIES, 2009–2015 STATISTICAL TABLES 3–4 (2017), https://www.bjs.gov/content/pub/pdf/capd0915st.pdf [https://perma.cc/BU7R-9M2E]; *Police Violence*, AMNESTY INT'L, https://www.amnesty.org/en/what-we-do/police-brutality/ [https://perma.cc/CV48-T5AL].

⁹ Susan Kelley, *People With Disabilities More Likely to Be Arrested*, CORNELL CHRON. (Nov. 30, 2017), https://news.cornell.edu/stories/2017/11/people-disabilities-more-likely-be-arrested [https://perma.cc/DBD9-8H8F].

¹⁰ See *infra* notes 18–27 and accompanying text.

¹¹ See, e.g., *Hall v. City of Walnut Creek*, No. C 19-05716, 2020 WL 408989, at *1 (N.D. Cal. Jan. 24, 2020); *Sheehan v. City of San Francisco*, 743 F.3d 1211, 1215 (9th Cir. 2014).

¹² See, e.g., Shaun King, *North Carolina Police Kill Unarmed Deaf Man Who Was Using Sign Language*, N.Y. DAILY NEWS (Aug. 22, 2016, 10:49 AM), https://www.nydailynews.com/news/national/king-n-police-kill-unarmed-deaf-mute-man-sign-language-article-1.2760714 [https://perma.cc/P74N-ZY29].

¹³ 42 U.S.C. § 12132.

injuries and deaths suffered during and immediately following arrests.¹⁴ First, it discusses the research establishing that persons of color with disabilities suffer serious harms at the hands of the police.¹⁵ Second, it explores varying interpretations of Title II of the ADA as well as possible amendments to the Act that would make it more responsive to the needs of those who are wrongfully injured by the police.¹⁶ Finally, it recognizes the limitations of lawsuits and encourages others to solve this problem not only through this law, but also through community alternatives such as redirecting police funding towards resources that support individuals with mental health and other disabilities.¹⁷ The Article concludes that police reform must focus not only on race but also on the intersectional harms caused by race and disability in detailing how to interpret and change policy and law. Moreover, it recognizes that changes in law alone likely will not provide the relief we need, but that a concerted approach to changing law and policies on federal, state, and local levels combined with efforts at cultural change may promise important relief from the disregard for life and limb of our citizens that is now taking place.

I. DIS/ABLED, OF COLOR, AND VULNERABLE TO POLICE ENCOUNTERS: DATA AND STORIES

Accurate information about how many people of color with disabilities are arrested, harmed, and/or killed by police is relatively difficult to find, but there is no question that police are more dangerous to individuals of color than to white people.¹⁸ And, the research and commentary demonstrate that police violence poses even greater danger to persons of color with disabilities.¹⁹ A recent public health study calculates the cumulative possibility of being arrested by the age of twenty-eight.²⁰ The study found that while 27.55 percent of whites have a cumulative probability of arrest before the age of twenty-eight, Blacks have a cumulative probability of arrest of 37.30 percent during the same time period.²¹ The cumulative probability of arrest of persons without disabilities is 29.68 percent, and for those with disabilities the cumulative probability of arrest rises to 42.65 percent.²² When we look at persons with disabilities who are

¹⁴ To the extent that the abusive police officers are employees of federal agencies, rather than of state, county, and city agencies, Section 504 of the Rehabilitation Act of 1973 would be applicable. 29 U.S.C. § 794(a). The same standards are applicable to both Section 504 and the ADA. *Barnes v. Gorman*, 536 U.S. 181, 185 (2002).

¹⁵ See discussion *infra* Part I.

¹⁶ See discussion *infra* Section II.B.

¹⁷ See discussion *infra* Section II.B.2, Conclusion.

¹⁸ 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, 1977–78 (2017).

¹⁹ *Id.* at 1978 tbl.1.

²⁰ *Id.* at 1977.

²¹ *Id.* at 1978 tbl.1.

²² *Id.*

Black, the cumulative probability of arrest is 55.17 percent (as opposed to 39.70 percent for whites with disabilities).²³ Being male and Black raises the cumulative probability of arrest for persons with disabilities to 65.73 percent.²⁴ For Latinx individuals, the cumulative probability of arrest of persons without disabilities is 31.37 percent, and for those with disabilities, it rises to 46.12 percent.²⁵ For Latinx males with disabilities, the percentage rises to 57.69%.²⁶ Clearly, this study demonstrates that at least when it comes to arrests, there is an intersectional effect on persons of color with disabilities, with even higher arrest rates for males in these categories. It is likely, given these numbers, that intersectional disadvantage applies to killings by the police as well.²⁷

Unfortunately, there is no governmentally-operated national database that catalogues all killings of civilians by police that reports race and disability statistics.²⁸ There are a number of databases, however, operated by the federal government and news organizations that catalogue deaths of civilians by police, most of which report race of the victims and at least one (potential) disability

²³ *Id.*

²⁴ *Id.* The raw numbers are based on a study of nearly 9,000 individuals who had completed data on race, gender, and disability for longitudinal surveys from 1997–2014, conducted by the U.S. Bureau of Labor Statistics. *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PNAS 16793, 16783 (2019).

²⁸ See Kelly Gates, *Counting the Uncounted: What the Absence of Data on Police Killings Reveals*, in DIGITAL MEDIA AND DEMOCRATIC FUTURES 121, 121 (Michael X. Delli Carpini ed., 2019) (discussing on the overall lack of statistics); see also DAVID M. PERRY & LAWRENCE CARTER-LONG, THE RUDERMAN WHITE PAPER ON MEDIA COVERAGE OF LAW ENFORCEMENT USE OF FORCE AND DISABILITY 2 (2016), https://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf [<https://perma.cc/GZ3G-W3AA>]. The U.S. House of Representatives recently passed a bill (on 6/25/20) that would fill this gap. George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. § 223 (2d Sess. 2020). The bill would require reporting of “the national origin, sex, race, ethnicity, age, disability, English language proficiency, and housing status of each civilian against whom a local law enforcement officer or tribal law enforcement officer used force.” *Id.* Section 341 requires regulations for data collection that “provide[s] that the data collected shall—(A) be disaggregated by race, ethnicity, national origin, gender, disability, and religion.” *Id.* § 341. Section 114 includes a provision for Law Enforcement Grants that describes pilot programs that must include “policies, practices, and procedures addressing training and instruction to comply with accreditation standards in the areas of . . . (G) interactions with— . . . (ii) individuals with disabilities.” *Id.* § 114. It also requires “uniform standards on youth justice and school safety” to consider “adolescent development and any disability . . .” *Id.* Section 364 “Peace Act” requires the Attorney General to provide guidance to Federal law enforcement agencies on “how a Federal law enforcement officer can— . . . (ii) use the least amount of force when interacting with— . . . (IV) persons with mental, behavioral, or physical disabilities or impairments.” *Id.* § 364. The Senate did not vote on this bill before the end of the last session. *Actions Overview of H.R.7120—George Floyd Justice in Policing Act of 2020*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/7120/actions> [<https://perma.cc/3MLS-K2JX>] (showing the last action taken on the bill prior to the end of session was the Senate placing the bill on calendar as a general order).

category—“mental illness.”²⁹ The information in these data sources is derived from police and media reports and may widely undercount persons with disabilities because the databases categorize only by what they call “mental illness” and do not categorize by other disabilities including hidden emotional and mental disabilities and all physical disabilities such as sensory perception disabilities.³⁰ Moreover, even in the category of “mental illness,” the databases report “mental illness” only when it has been mentioned specifically in a police report or in the news media.³¹ It is likely, therefore, that the data on those with “mental illness” undercount those with psychiatric, intellectual, and emotional disabilities. Nonetheless, these databases, combined with other sources of data, including reports by foundations and advocacy organizations for persons with disabilities, give us some idea of the prevalence of police violence against persons with disabilities. And, while they provide no empirical data that helps us crunch the numbers, lawsuits alleging police brutality against persons with disabilities vividly illustrate police mistreatment of individuals with disabilities.³² Acknowledging that this information, even when combined, is not perfect, this Part collects the data that is available. Based on the data catalogued and the stories told by the lawsuits, it is safe to say that there is a serious problem for not only Black and Latinx individuals but more particularly for those individuals of color who also have mental health disabilities (and particularly, for men of color with mental health disabilities).

A. *Federal Database—The National Violent Death Reporting System*

In 2002, the Center for Disease Control and Prevention (CDC) created the federal database, the National Violent Death Reporting System (NVDRS),

²⁹ See, e.g., Julie Tate et al., *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [<https://perma.cc/2QMW-GXGT>]; *Use of Force*, BUREAU OF JUST. STAT., <https://www.bjs.gov/index.cfm?ty=tp&tid=84> [<https://perma.cc/S8KX-NKCJ>]. “Mental illness” used as a broad term does not always give us a clear idea whether an individual has a disability or not. And, if so, what that disability is. See Emily Bulthuis, *Mental Illnesses: Terms to Use. Terms to Avoid.*, HEALTH PARTNERS, <https://www.healthpartners.com/blog/mental-illnesses-terms-to-use-terms-to-avoid/> [<https://perma.cc/6Y66-5W5N>]. The preferred term is “psychiatric disability.” See PERRY & CARTER-LONG, *supra* note 28, at 26.

³⁰ See Tate et al., *supra* note 29; CONNOR BROOKS, ET AL., FEDERAL DEATHS IN CUSTODY AND DURING ARREST, 2016–2017—STATISTICAL TABLES, 3, 4, 7, 8, 13 (2020), <https://www.bjs.gov/content/pub/pdf/fdcda1617st.pdf> [<https://perma.cc/D6BQ-3V9V>] (showing and describing the methodology used by the Bureau of Justice).

³¹ See Tate et al., *supra* note 29; A person with “mental illness” as reported by police or media may or may not necessarily be a person with a disability, but, given that the reports mention “mental illness” the behavioral issues identified by these reports likely come from disabilities such as a person with unmedicated bipolar disease, or schizophrenia. These would most likely qualify as disabilities under the ADA.

³² See, e.g., *Estate of Saylor v. Regal Cinemas, Inc.*, 54 Supp. 3d 409, 412–14 (D. Md. 2015).

which reports shooting deaths of civilians by police.³³ By 2015, it covered only twenty-seven states, but more recently, there is data from fifty states, the District of Columbia and Puerto Rico.³⁴ Nonetheless, because of a lag in analyzing the data and categorizing it, this information is currently available only from thirty-four states up to 2017.³⁵ A research report that analyzed the individual data reported in the NVDRS for 2015 against five open sourced databases found that the information in NVDRS coincides closely to that available on the open source databases, and therefore the authors concluded the NVDRS is comprehensive and largely accurate.³⁶ While only general information is available to the public that does not include mental health status of individuals, with special permission, researchers working on academic projects may at times access individual information that would include the mental health status of the individual.³⁷ Because I did not have access to the NVDRS individual data, I take the research report noted here seriously and conclude that a good source (or perhaps the best source right now) is the news service databases because not only are they consistent with one another, but research demonstrates that the data in these databases is also consistent with the data reported in the NVDRS.³⁸

B. News Service Databases

As noted, historically, there has been no official count of individuals killed by the police nationwide.³⁹ This failure has led to a number of open source materials published mainly by media. *The Washington Post* and *The Guardian* have databases of persons shot and killed by the police for certain years.

The Washington Post's database includes fatal shootings by on-duty police officers of civilians from January 1, 2015 to the present.⁴⁰ As of February 10, 2021, this national database reports, police had killed 6,032 civilians.⁴¹ Twenty-

³³ CDC, CDC'S NATIONAL VIOLENT DEATH REPORTING SYSTEM (NVDRS), <https://www.cdc.gov/violenceprevention/pdf/NVDRS-factsheet508.pdf> [<https://perma.cc/GSR9-SPTC>].

³⁴ *Id.*

³⁵ *National Violent Death Reporting System*, CDC (Mar. 31, 2021), <https://www.cdc.gov/injury/wisqars/nvdrs.html> [<https://perma.cc/3VAN-W54R>].

³⁶ See Andrew Connor et al., *Validating the National Violent Death Reporting System as a Source of Data on Fatal Shootings of Civilians by Law Enforcement Officers*, 109 AM. J. PUB. HEALTH 578, 578–83 (2019) (concluding that the NVDRS' reporting of twenty-seven states at the time of their research provided a "comprehensive count of fatal police shootings," but because it takes nearly eighteen months for information to appear in the NVDRS and it does not include other fatal encounters with the police, crowdsourcing materials from the media should also be consulted for comprehensive information).

³⁷ See, CDC, *supra* note 33.

³⁸ See, e.g., Tate et al., *supra* note 29; CDC, *supra* note 33.

³⁹ See *supra* notes 33–36 and accompanying text.

⁴⁰ See Tate et al., *supra* note 29.

⁴¹ *Id.* As of February 10, 2021, police had killed 990 persons nationwide since February 10, 2020. *Id.* This number includes not only shootings but also police-related deaths caused by

four percent of those shot and killed were black, seventeen percent were Latinx, and forty-six percent were white.⁴² Black and Latinx civilians were killed at a much higher rate than were white civilians: Blacks were killed at a rate of thirty-four per million; Latinx at a rate of twenty-six per million; and whites at a rate of fourteen per million.⁴³

As with the NVDRS, while there is no category for persons with disabilities as a comprehensive group, the *Washington Post* database allows a search for persons with “mental illness” who have been killed by police.⁴⁴ The definition of “mental illness” is not given, and the database includes this category only if the media reports from which the database draws its information have noted that the person had a mental illness.⁴⁵ Nonetheless, using the “mental illness” filter, the database reports that 1,397 people or 23 percent of persons of all races killed over the past five and one-half years have been identified as experiencing “mental illness.”⁴⁶ Two hundred twenty-two individuals or 4 percent of those shot and killed by police were Black and identified as having a mental illness; of those 220 individuals, 209 were male.⁴⁷ One hundred eighty individuals or 3 percent of those shot and killed by police were Latinx and identified as having a mental illness over the same time period; of those 180 individuals, 172 were male.⁴⁸ These numbers very likely underestimate not only Black and Latinx citizens with disabilities but all persons with disabilities who have been shot and killed because the source of the information, police reports and media reports, do not always mention that a person killed has a “mental illness” unless it is obvious. Moreover, a “mental illness” as categorized here likely underestimates those with psychiatric, emotional, and intellectual disabilities and does not even attempt to count those with physical disabilities who are killed by police.

The Guardian’s database covers 2015 and 2016 only, but it is more comprehensive in that it includes all persons who were killed by police whether during arrest or in custody, by guns, taser, or other method.⁴⁹ In the most recent year recorded, 2016, according to this database, 1,093 persons were killed by

other means such as tasers and vehicles. *Id.*; see also Samuel Sinyangwe et. al., *Mapping Police Violence*, MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/planning-team> [<https://perma.cc/JXZ9-3LH5>].

⁴² Tate et al., *supra* note 29.

⁴³ *Id.*; see also Sinyangwe et. al., *2020 Police Violence Report*, MAPPING POLICE VIOLENCE, <https://policeviolencereport.org/> [<https://perma.cc/B32Y-DS76>] (“Black people were more likely to be killed, more likely to be unarmed and less likely to be threatening someone when killed.”). The graph demonstrates the same for Latinx people. *Id.*

⁴⁴ See Tate et al., *supra* note 29.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Jon Swaine et. al., *The Counted: People Killed by Police in the US*, GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/about-the-counted> [<https://perma.cc/8N9H-TP6R>].

the police in the United States, 266 (253 male) of whom were Black, 183 (181 male) of whom were Latinx, and 574 (532 male) of whom were white.⁵⁰ These numbers, which loosely track those found in the *Washington Post* database, demonstrate that Blacks were killed at a disproportionate rate to their percentage of the population.⁵¹

C. *Foundation and Advocacy Organization Reports*

A report by the Ruderman Family Foundation⁵² estimates that persons with disabilities account for one-third to one-half of all use-of-force incidents committed by the police.⁵³ The Ruderman White Paper examines individual cases and how they are reported by the media.⁵⁴ It concludes that disability, along

⁵⁰ *Id.*

⁵¹ In 2019, the census estimates that non-Hispanic white persons represent about 60% of the population, while Black and Latinx persons represent 13.4% and 18.5% of the population. See *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/AGE9-GG63>]. According to *The Guardian's* data, whites killed by police equaled 53% of the total; Blacks killed by police equaled 24% of the total; Latinx persons killed by the police equaled 17% of the total. See Jon Swaine & Ciara McCarthy, *Young Black Men Again Faced Highest Rate of US Police Killings in 2016*, THE GUARDIAN (Jan. 8, 2017, 7:00 EST), <https://www.theguardian.com/us-news/2017/jan/08/the-counted-police-killings-2016-young-black-men> [<https://perma.cc/M7U2-R2F3>]. Other databases that track police killings of citizens exist as well. They include: Sinyangwe et. al., *supra* note 41 (crowd sourced database that catalogues police killings of civilians by any means and records police department, geography, race, whether the victim was armed, and means of death); D. Brian Burghart, *Methodology*, FATAL ENCOUNTERS (Jan. 29, 2019), <https://fatalencounters.org/methodology> [<https://perma.cc/B2JM-CVNM>] (database whose goal is to record every police killing whether intentional or accidental from January 1, 2000 to the present; categories include: name, city, county, state, race, age, gender, year, date of injury resulting in death, cause of death, and the police agencies involved); *Gun Violence Archive*, GVA, <https://www.gunviolencearchive.org/> [<https://perma.cc/6EMH-WFJ3>] (The archive records all gun violence deaths including those perpetrated by police. The website states, “Gun violence and crime incidents are collected/validated from 7,500 sources daily— Incident Report and their source data are found at the [gunviolencearchive.org](https://www.gunviolencearchive.org) website.”).

⁵² *Our Story*, RUDERMAN FAMILY FOUND., <https://rudermanfoundation.org/about-us/our-story/> [<https://perma.cc/G6QD-BRMB>]. The Ruderman Family Foundation is a philanthropic organization with the following mission:

The Ruderman Family Foundation believes that inclusion and understanding of all people is essential to a fair and flourishing community. Guided by our Jewish values, we advocate for and advance the inclusion of people with disabilities throughout our society; strengthen the relationship between Israel and the American Jewish Community; and model the practice of strategic philanthropy worldwide. We operate as a non-partisan strategic catalyst in cooperation with government, private sectors, civil society, and philanthropies.

Id.

⁵³ PERRY & CARTER-LONG, *supra* note 28, at 7.

⁵⁴ *Id.* at 1. This source, which is relied on heavily by researchers, is not accepted by all. Activists for persons of color with disabilities fault the report for not giving activists the credit for their views and work. See Leroy F. Moore, Jr., et. al., *Accountable Reporting on Disability, Race, & Police Violence: A Community Response to the “Ruderman White Paper on the Media Coverage of the Use of Force and Disability,”* HARRIET TUBMAN COLLECTIVE 1–3 (2016), <https://docs.google.com/document/d/117eoVeJVP594L6-1bgL8zpZrzgojfsveJweWu>

with race and class, create a higher incidence of intersectional harm caused by the police, but even so, the fact that a victim has a disability is often ignored by the press.⁵⁵ When the media reports a disability, the Report notes, it evokes sympathy for the victim or blames victims for their own deaths.⁵⁶ Simultaneously, the Report concludes, the media represent Blacks as dangerous and violent, a depiction that affects (and likely reflects) implicit biases.⁵⁷

The Report, which covers the period of 2013 through 2016, analyzes not only empirical evidence of persons with disabilities who are injured or killed by the police, but also stories of victims whose disabilities were either ignored or used to distort the truth and blame the victim for their deaths.⁵⁸ Examples include well-known cases: Eric Garner, who was severely asthmatic and morbidly obese, and who died in an illegal police chokehold in New York City;⁵⁹ Freddie Gray, who had severe lead poisoning as a child that likely caused intellectual disabilities, and who died at the hands of Baltimore police who gave him a “rough ride” to the police station;⁶⁰ and Sandra Bland, who had depression and epilepsy, and who may have been suffering from withdrawal from her epilepsy medications at the time of her death by suicide in a police holding cell.⁶¹ All three of these victims were Black, and the intersection of race and disability was hardly noted by the media.

The Report also discusses the cases of less well-known victims, like John Williams, a deaf First Nation member who, when ordered by police coming from behind him to drop a small knife he had in his hand, did not react, and was gunned down by the police with five shots;⁶² like DeV Vaughn Frierson,

HpkNcs/edit [https://perma.cc/K2VA-PYGC]. They also note that the Report, by its failure to recognize the importance of race to disability abuse by the police furthers a white supremacist agenda. *Id.* at 6. They state that the Report mentions intersectionality but does not do a complete intersectional analysis, and that the two authors are white men, one of whom does not have a disability. *Id.* at 1–2. This critique demonstrates that the Report lacks a deep analysis of the important intersection of race and disability and of the work of persons of color in the disability community. The critique, however, does not seem to dispute many of the facts and the statistics presented in this empirical study. *See generally id.*

⁵⁵ PERRY & CARTER-LONG, *supra* note 28, at 1.

⁵⁶ *Id.* at 6. A meta-study of research studies on police use of force and persons with disabilities concluded that the terminology used by the studies can be not only discriminatory but can also affect reality and the allocation of power. *See* Tyler Frederick et al., *Police Interactions with People Perceived to Have a Mental Health Problem: A Critical Review of Frames, Terminology, and Definitions*, 13 VICTIMS & OFFENDERS 1037, 1046–48 (2018). It noted that different terminology was used without clear definitions and the most common use of “persons with mental illness” raises questions of validity and precision. *See id.*

⁵⁷ *See* PERRY & CARTER-LONG, *supra* note 28, at 4.

⁵⁸ *Id.* at 1. The Report states: “‘The Counted’ tracks 27% of all individuals killed by police in 2015 as having ‘mental health’ issues, or 270 people. *The Washington Post* currently reports 235 individuals with ‘signs of mental illness’ shot by police.” *Id.* at 7.

⁵⁹ *Id.* at 15–16.

⁶⁰ *Id.* at 16.

⁶¹ *Id.* at 17.

⁶² *Id.* at 18.

Dwight Harris, Nicholas Kincade, and Brian Sterner, all of whom were wheelchair users who were dumped to the ground by police from their wheelchairs;⁶³ and like Kajieme Powell and Kristiana Coignard, both of whom had psychiatric disabilities, who were gunned down by police.⁶⁴

The Ruderman Report also noted that the Treatment Advocacy Center estimates that one in four persons involved in fatal encounters with the police has a severe mental illness; those with severe mental illness are sixteen times more likely to be killed during an encounter with the police.⁶⁵

These findings by The Ruderman Report confirm concerns about underreporting of persons with disabilities and their encounters with police. The next subsection describes the allegations in court cases brought under both the ADA and Section 1983 that tell vivid stories about police abuse of persons of color (and white people as well) with disabilities.

D. Legal Stories

Stories abound in lawsuits against police and police departments that escalated dangerous situations in response to persons with disabilities. Here are only a few of them:

Miles Hall was a twenty-three-year-old black man who lived with his family in Walnut Creek, California.⁶⁶ Diagnosed with schizoaffective disorder after his family called the police for help transporting him to the hospital for an involuntary commitment proceeding, Hall was known to the police as a person with a mental health disability and the police placed a “hazard” on his address.⁶⁷ The hazard meant that if the police were called in the future to this address, officers would work to de-escalate the situation.⁶⁸ The complaint alleged that no responding officer followed the hazard when the family called subsequently to ask the police to transport Hall to the hospital.⁶⁹ Instead, the officers shot and killed Hall as he ran toward them with a gardening rod in his hand.⁷⁰

Teresa Sheehan was a Japanese-American woman in her fifties with a psychiatric disability who lived in a group home.⁷¹ Her social worker became con-

⁶³ *Id.* at 19.

⁶⁴ *Id.* at 20–21.

⁶⁵ *Id.* at 8; DORIS A. FULLER ET AL., *OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS 1* (2015).

⁶⁶ *Hall v. City of Walnut Creek*, No. C 19-05716, 2020 WL 408989, at *1 (N.D. Cal. Jan. 24, 2020) (denying in part and granting in part the defendants’ motion to dismiss); *see also Walnut Creek Police Facing Lawsuit Over Fatal Shooting of Mentally Ill Man*, CBS S.F. (Sept. 12, 2019, 7:00 PM), <https://sanfrancisco.cbslocal.com/2019/09/12/miles-hall-walnut-creek-police-department-lawsuit-officer-involved-shooting/> [<https://perma.cc/K84S-PDY3>].

⁶⁷ *Hall*, 2020 WL 408989, at *1.

⁶⁸ *Id.*

⁶⁹ *Id.* at *6.

⁷⁰ *Id.* at *1.

⁷¹ *Sheehan v. City of San Francisco*, 743 F.3d 1211, 1215 (9th Cir. 2014), *rev’d in part, cert. dismissed in part*, *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600 (2015); *see also*

cerned that her mental health was deteriorating because she stopped taking her medications and eating; he thought she was a danger to herself and to others when she threatened him when he attempted to perform a welfare check on her.⁷² He called the police for help transporting Sheehan to the hospital for an involuntary commitment under California law.⁷³ When two police officers arrived, they opened Sheehan's door with a key, and Sheehan threatened them with a knife; the police retreated to outside Sheehan's room.⁷⁴ Rather than waiting for backup to de-escalate the situation even though they could hear the sirens of the backup officers, the officers broke down Sheehan's door and pepper-sprayed her in the face.⁷⁵ Sheehan threatened them with a knife again, and they shot her five or six times.⁷⁶ Sheehan survived the shooting but was gravely injured.⁷⁷

Gary Roell had schizoaffective disorder and paranoid delusions for years.⁷⁸ He stopped taking his medication regularly, and when his wife was out of town, he went to the neighbor's house and threw a plant through her window.⁷⁹ The neighbor's son called 911, and when officers arrived at the scene, Gary was in a state of delirium and yelling something about water.⁸⁰ The officers attempted to control Gary a number of times and ultimately tasered him to the ground.⁸¹ Roell stopped breathing, and the paramedics were unable to revive him.⁸²

Gerrit Vos, a young white man, was acting "erratically" and waving scissors when police were called to the scene at a 7-Eleven.⁸³ Vos ran around the store and yelled as other customers in the store continued to mill around; an employee tried to remove Vos's scissors and was cut.⁸⁴ Police were aware that, at one point, Vos simulated having a gun behind his back.⁸⁵ Vos went into a back room, and all of the employees and customers left the store.⁸⁶ Police made no attempt to communicate with Vos, but when police opened the front doors,

Sandra Allen, *The Trials of Teresa Sheehan*, *CTR. FOR L., BRAIN & BEHAV.* (July 9, 2015), <https://clbb.mgh.harvard.edu/the-trials-of-teresa-sheehan/> [<https://perma.cc/G6VR-VVUL>].

⁷² *Sheehan*, 743 F.3d at 1215; Allen, *supra* note 71.

⁷³ *Sheehan*, 743 F.3d at 1215.

⁷⁴ *Id.*; Allen, *supra* note 71.

⁷⁵ *Sheehan*, 743 F.3d at 1215–16, 1219–20; Allen, *supra* note 71.

⁷⁶ *Sheehan*, 743 F.3d at 1216.

⁷⁷ *Id.* at 1215–16.

⁷⁸ *Roell v. Hamilton County*, 870 F.3d 471, 476 (6th Cir. 2017) (upholding lower court's grant of summary judgment to the defendants).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 477–78.

⁸² *Id.* at 478.

⁸³ *Vos v. City of Newport Beach*, 892 F.3d 1024, 1028 (9th Cir. 2018) (overturning the lower court's grant of summary judgment, which held that the defendant's action was objectively reasonable as a matter of law).

⁸⁴ *Id.* at 1028–29.

⁸⁵ *Id.* at 1029.

⁸⁶ *Id.*

Vos ran out with something in his hand above his head, and within seconds was killed by two officers who shot Vos with AR-15s, even though there was another policeman who had a less-lethal weapon.⁸⁷ Vos died on the scene.⁸⁸ Only eight seconds elapsed from the time that Vos left the back room until the time when he was shot in front of the building.⁸⁹ Officers at the scene were aware that Vos was likely “mentally unstable” or under the influence of drugs, and they discussed using non-lethal force.⁹⁰ Vos had been diagnosed earlier with schizophrenia;⁹¹ after his death, his blood tested positive for amphetamine and methamphetamine.⁹² The object in his hand turned out to be a metal display hook.⁹³

These stories put human faces on the victims of police action that may or may not result from good intentions but that cause more harm than good. The question is: How do we reduce police abuse of individuals of color with disabilities? The next Part describes the law, which to date has been inadequate in solving this problem. But it also suggests the use of the ADA as a possible, partial solution to police brutality.

II. THE LAW AS REMEDY: CONSTITUTIONAL FAILURES AND THE ADA

A. *The Fourth Amendment Search and Seizure Law and Qualified Immunity*

Countless law review articles argue for changes in the federal judiciary’s interpretation of the U.S. Constitution’s Fourth Amendment search and seizure law and the doctrine of qualified immunity as potential remedies to killings and maimings by police of individuals suspected of criminal behavior.⁹⁴ These articles, which analyze civil rights cases brought under 42 U.S.C. § 1983⁹⁵ for violation of constitutional rights of the victims, clearly demonstrate that the federal

⁸⁷ *Id.* at 1029–30.

⁸⁸ *Id.* at 1030.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1029.

⁹¹ *Id.* at 1030.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 48, 51, 88 (2018) (concluding that the doctrine of qualified immunity has no basis in common law and, therefore, is illegal); Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 52–53, (1989); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1519–22 (2016) (arguing that one cause of police violence is qualified immunity).

⁹⁵ 42 U.S.C. § 1983 states in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

judiciary's interpretation of the law does little to protect individuals of color from the excesses of the police.⁹⁶ In fact, scholars perceive that a significant number of these suits result in grants of defendants' motions to dismiss and summary judgment, leaving plaintiffs without remedies and police with little disincentive to continue their methods of policing.⁹⁷

I will not repeat the arguments contained in these articles, but instead I briefly summarize the law as applied and critiques advanced by other legal scholars. A search or seizure by the police is unconstitutional if it is held to be unreasonable by the courts.⁹⁸ There are a number of limitations on lawsuits brought by individuals under Section 1983, however, which provides a federal civil remedy for constitutional violations committed "under color of state law."⁹⁹ First, in the context of a police brutality claim, the Supreme Court in *Graham v. Connor*¹⁰⁰ held that the standard for judging whether a police officer's behavior is unconstitutional is "objective reasonableness," and requires consideration of the conditions at the time when the police officer who engaged in a challenged search confronted the alleged victim.¹⁰¹ This standard has been criticized repeatedly by law professors¹⁰² because it precludes consideration of

⁹⁶ See Carbado, *supra* note 94, at 1519–23 (arguing that police are not deterred from acting violently because of the interpretation of the qualified immunity doctrine, including the fact that: 1) courts avoid determining whether there was a constitutional violation (the police behavior was unreasonable) and move directly to analyze whether the right was "clearly established;" 2) courts conclude the right was not clearly established unless nearly every police officer would know about it; 3) courts look to similar cases and many require near identical facts to the case at bar to determine that the right was clearly established; and 4) nearly all officers who are found to have violated the plaintiffs' civil rights are indemnified by police departments for the damages); see also Jamison v. McClendon, 476 F. Supp. 3d 386, 402–05 (S.D. Miss. 2020) (noting that qualified immunity and other limitations were added by the courts to a statute whose purpose was to protect the people from the government but that now with these restrictions the courts are protecting the government from the people).

⁹⁷ See, e.g., Roell v. Hamilton County, 870 F.3d 471, 476 (6th Cir. 2017) (upholding lower court's grant of summary judgment to the defendants).

⁹⁸ See Carbado, *supra* note 94, at 1520.

⁹⁹ A similar action against federal employees (including, for example U.S. border patrol) who violate the U.S. Constitution or federal law was approved by the U.S. Supreme Court. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389, 427 (1971).

¹⁰⁰ *Graham v. Connor*, 490 U.S. 386 (1989).

¹⁰¹ *Id.* at 388, 396–97 ("The 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.").

¹⁰² See, e.g., Frank Rudy Cooper, *Intersectionality and Policing: Class and Excessive Force*, 89 GEO. WASH. L. REV. (forthcoming 2021) (proposing intersectionality theory analysis that emphasizes the class structure to reveal excessive force doctrine as a means of boundary management); Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 951, 998, 1000–04 (2020) (finding in an empirical study of police shootings and comparing the circumstances of the shootings that twice as many blacks are killed under the same circumstances as whites, and suggesting that the "objective reasonableness" standard is not actually objective as applied).

an officer's state of mind while simultaneously setting the default as no liability on grounds that an officer is acting hastily.¹⁰³

Moreover, because of the Eleventh Amendment, there is no remedy in damages if the state (rather than a city or municipality) is the defendant.¹⁰⁴ Most police departments are municipal or county entities rather than state entities, however, and therefore they can be sued for damages under Section 1983.¹⁰⁵ But there is an important limitation on plaintiffs' ability to prevail in these suits: plaintiffs in a Section 1983 suit against a city or county must prove the existence of an unconstitutional policy or custom.¹⁰⁶ Thus, the behaviors of a rogue police officer may not lead to a sustainable lawsuit against the police department unless it was caused by the city or county's policy, custom, or practice.

Individual police officers, however, may also be sued under Section 1983.¹⁰⁷ The problem with these suits from the plaintiffs' perspective is that the

¹⁰³ Cooper, *supra* note 102.

¹⁰⁴ The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Bradford R. Clark & Vicki C. Jackson, *The Eleventh Amendment*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xi/interps/133> [<https://perma.cc/8DFD-853H>]. The Supreme Court has interpreted it broadly to prohibit damages actions against states brought under federal law or the U.S. Constitution, including by citizens of the state in question. *Id.* The Eleventh Amendment bars federal lawsuits against states for damages unless the suits are brought pursuant to a statute that validly abrogated the Eleventh Amendment immunity. *Id.* Even where the state has immunity to damages lawsuits, plaintiffs may bring individual claims against state police officers for damages. *Id.* Under Title II of the ADA, Eleventh Amendment immunity likely depends on the type of claim brought by the plaintiffs. *See* *Tennessee v. Lane*, 541 U.S. 509, 513–14, 530–34 (2004) (The Supreme Court held that Congress properly abrogated the state's Eleventh Amendment immunity when it comes to cases of denial of access to the courts for persons with disabilities. *Id.* at 533–34. The plaintiffs were persons with paraplegia, one a criminal defendant and one a court reporter, who could not appear in court because of the stairs in the courthouse. *Id.* at 513–14. The Court emphasized that Title II protects a number of different rights that derive from the constitution as well as other rights that may be considered less important (such as the availability of seating for a hockey game), and it refused to hold that in every instance Title II validly abrogated the Eleventh Amendment immunity. *Id.* at 530–31. Nonetheless, it appears that when a statute protects the underlying Fourth Amendment right to be free of unreasonable searches and seizures, as Title II does in the context of police abuse of citizens with disabilities, *Lane* should govern.

¹⁰⁵ *Canton v. Harris*, 489 U.S. 378, 385–390 (1989).

¹⁰⁶ *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978) (holding that a suit against the city for constitutional violations requires a showing of either a finalized policy or a custom that has not been adopted as a policy); *see also* *Lowry v. City of San Diego*, 858 F.3d 1248, 1255 (9th Cir. 2017) (holding that under *Monell*, a city is liable if the plaintiff proves an unreasonable use of force and that the city's policy caused the constitutional wrong).

¹⁰⁷ Teressa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 VILL. L. REV. 839, 840 (2017).

courts have granted broad qualified immunity to individual police officers.¹⁰⁸ A Section 1983 suit against an individual police officer can proceed only if the right violated was “clearly established” at the time of the alleged violation.¹⁰⁹ Although this formula appears sensible because its purpose is seemingly to give notice to police officers before holding them liable, courts have interpreted “clearly established” extremely narrowly, focusing on slight differences in fact patterns between the earlier police behavior that was deemed unreasonable and the police behavior that is before the courts, and concluding that these differences mean that the constitutional right was not clearly established in the case at bar.¹¹⁰ This constitutional factual nitpicking has guaranteed that many police officers faced with an alleged violation may not be held civilly liable unless the circumstances are substantially similar to others in the past that courts have deemed unconstitutional.¹¹¹

Because of all these limitations, the potential for civil liability both of the police departments and individual police based on violations of the Fourth Amendment have had little apparent effect on deterring police misbehavior.¹¹² Currently, there is a movement in Congress to abolish qualified immunity for individual police officers.¹¹³ This solution would hold more police officers individually liable for unreasonable searches and seizures under the Fourth Amendment.¹¹⁴ It appears, however, that absent a Democratic majority in both

¹⁰⁸ See Kit Kinports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 62–65 (2016). *But see* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9–10 (2017) (agreeing that Supreme Court and lower court jurisprudence has favored defendants on qualified immunity but finding in a comprehensive empirical study across five federal district courts that qualified immunity causes cases to be dismissed on motions to dismiss or summary judgment in only 3.9% of cases).

¹⁰⁹ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

¹¹⁰ See Tyler Finn, Note, *Qualified Immunity Formalism: “Clearly Established Law” and the Right to Record Police Activity*, 119 COLUM. L. REV. 445, 447–48 (2019).

¹¹¹ See generally *Jamison v. McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020). *Cf.* Schwartz, *supra* note 108, at 10 (concluding based on a comprehensive empirical project studying cases in five federal court circuits that qualified immunity does not necessarily protect police officers from discovery and trials in civil lawsuits).

¹¹² See Carbado, *supra* note 94, at 1519–24.

¹¹³ H.R. 7085, 116th Cong. (2020).

¹¹⁴ A number of states have introduced bills limiting or abolishing qualified immunity. See, e.g., Robert Storace, *Police Accountability Bill Curbing Qualified Immunity Advance in State Senate*, LAW.COM (July 27, 2020, 6:35 PM), <https://www.law.com/ctlawtribune/2020/07/27/police-accountability-bill-curbing-qualified-immunity-advances-to-state-senate/> [<https://perma.cc/X73B-USV7>] (Connecticut); Nicollette J. Zulli, *Destined for Demise? The Fate of the Qualified Immunity Doctrine Remains Uncertain Amid Newest Federal and State Policing Reform Efforts*, WHITE-COLLAR CRIM. LAW (July 13, 2020), <https://www.mondaq.com/unitedstates/constitutional-administrative-law/965334/destined-for-demisethe-fate-of-the-qualified-immunity-doctrine-remains-uncertain-amid-newest-federal-and-state-policing-reform-efforts> [<https://perma.cc/3P3C-LCN5>] (describing the federal bill introduced in the Senate as well as bills introduced into the state legislatures in Massachusetts, Colorado, and New York). There are also police departments that are prohibiting certain police practices such as chokeholds. See Kimberly Kindy et al., *Half of the Nation’s Largest Police Departments*

houses of Congress or even a filibuster-proof sixty vote super-majority, this bill will not be enacted into law.¹¹⁵

To summarize Fourth Amendment law and its consequences, first, it is very difficult to prove that a search or seizure is unreasonable. Second, even where it is considered unreasonable, however, most governments employing the police are not liable unless the police are acting pursuant to a policy or custom, and third, although lawsuits against individual police are possible, the courts have liberally permitted individual police officers to claim qualified immunity.

An alternative to lawsuits for police abuse by persons with disabilities based on constitutional violations is potentially Title II of the Americans with Disabilities Act, which I discuss in the next subsection. This alternative, however, may be ineffective, depending on how courts interpret Title II in the circumstances of police arrests of persons with disabilities. If the courts interpret Title II to give the broadest scope of coverage and the greatest protection to persons with disabilities against police discrimination and brutality, Title II is capable of providing needed relief in damages, and creating a disincentive for police abuse of individuals with disabilities. If not, Title II may deny rights or grant rights without remedies for individuals injured or killed by the police's failure to reasonably accommodate individuals with disabilities during arrests and after.

The next Section analyzes Title II, how it has been applied by various courts, and the web of barriers most of those courts create for individuals with disabilities who seek to redress the police's failure to grant Title II rights. It explains how the courts should rule properly under Title II to afford rights and maximum deterrence of police abuse. Given that I am not confident that the courts, as currently configured, will follow this broad coverage, in the alternative, this Section encourages Congress to once again revise the ADA to assure the broad coverage that was envisioned first when the law was passed in 1990, and second, when it was amended in 2008.¹¹⁶

Have Banned or Limited Neck Restraints Since June, WASH. POST (Sept. 6, 2020, 10:47 PM), <https://www.washingtonpost.com/graphics/2020/national/police-use-of-force-chokehold-carotid-ban/> [https://perma.cc/P7AE-69Y4] (noting that at least thirty-two of the sixty-five largest police departments in the U.S. have banned or strengthened prohibitions on neck holds since Floyd's death).

¹¹⁵ Eric Boehm, *Senate Republican Police "Reforms" Won't Touch Qualified Immunity*, REASON (June 10, 2020, 5:30 PM), <https://reason.com/2020/06/10/senate-republican-police-reforms-wont-touch-qualified-immunity/> [https://perma.cc/LLE4-6AF6]. *But see* Jordain Carney, *GOP Senator Introducing Bill to Scale Back Qualified Immunity for Police*, THE HILL (June 23, 2020, 10:40 AM), <https://thehill.com/homenews/senate/504065-gop-senator-introducing-bill-to-scale-back-qualified-immunity-for-police> [https://perma.cc/56YH-8GPM].

¹¹⁶ *See infra* notes 119–127 and accompanying text for a brief description of the history of the ADA and its amendments.

B. Title II of the Americans with Disabilities Act: A Partial Solution

A possible, partial solution to the courts' cramped interpretation of Fourth Amendment jurisprudence is Title II of the Americans with Disabilities Act.¹¹⁷ The ADA was passed in 1990 with a broad mission to eliminate discrimination against and grant positive rights to persons with disabilities in employment, public services, and public accommodations.¹¹⁸

Title II of the ADA applies to state, county, and city governmental entities and makes it illegal to exclude from participation in government services or to discriminate against individuals with disabilities in the provision of public services, programs, or activities.¹¹⁹ Title II requires that the government entity make reasonable modifications to policies, practices, or procedures to assure the participation of persons with disabilities unless the defendant can demonstrate that the requested modifications fundamentally alter the nature of the service, program, or activity.¹²⁰ This aspect of the law creates affirmative obliga-

¹¹⁷ 42 U.S.C. § 12132 states: "Subject to the provisions of this subchapter, 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."

42 U.S.C. § 12131 states:

As used in this subchapter:

(1) Public entity

The term "public entity" means—

- (A) any State or local government;
- (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
- (C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of Title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Id.

¹¹⁸ *What is the Americans with Disabilities Act (ADA)?*, ADA NAT'L NETWORK (Jan. 2021), <https://adata.org/learn-about-ada> [<https://perma.cc/89M4-2646>].

¹¹⁹ *See supra* note 117. The pertinent regulation states: "No qualified individual with a disability shall, on the basis of 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 public entity." 28 C.F.R. § 35.130(a) (2008).

¹²⁰ The pertinent regulation states: "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (2008).

Besides the defense of a fundamental alteration, in this situation, police departments argue that individuals pose a direct threat to the health or safety of themselves or others and are therefore not qualified under Title II. The direct threat language states:

tions that extend beyond the requirements of the other civil rights laws that merely forbid discrimination.¹²¹ Because there are many social and physical barriers to persons with disabilities and equal treatment requires removal of those barriers wherever possible, the law requires affirmative action to do so.¹²²

Early in the history of the ADA, the Supreme Court interpreted coverage of the ADA narrowly—specifically in its definition of who qualifies as a person with a disability.¹²³ In response to these limiting decisions, in 2008, Congress amended the ADA by passage of the Americans with Disabilities Act Amendment Act (ADAAA) to assure broad coverage of the Act.¹²⁴ The Amendments broadly define who is a person with a disability and clearly were intended to expand the coverage beyond the courts' interpretation of the Act.¹²⁵

(a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

28 C.F.R. § 35.139 (2016).

¹²¹ See Ann C. McGinley & Frank Rudy Cooper, *Intersectional Cohorts, Disability, and Class Actions*, 47 *FORDHAM URB. L.J.* 293, 319, 324–25 (2020) (explaining that the ADA's reasonable accommodation requirement goes beyond the anti-discrimination requirements of other civil rights laws).

¹²² *Id.*

¹²³ See Nicole Buonocore Porter, *Explaining “Not Disabled” Cases Ten Years after the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 *GEO. J. ON POVERTY L. & POL'Y* 383, 384–89 (2019).

¹²⁴ See *infra* note 125.

¹²⁵ Congress stated in its Findings and Purposes of the ADA:
FINDINGS AND PURPOSES OF PUB. L. 110–325 Pub. L. 110–325, §2, Sept. 25, 2008, 122 Stat. 3553, provided that:

(a) FINDINGS.—Congress finds that—

(1) in enacting the Americans with Disabilities Act of 1990 (ADA) [42 U.S.C. 12101 et seq.], Congress intended that the Act “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and provide broad coverage;

(2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973 [29 U.S.C. 701 et seq.], that expectation has not been fulfilled;

(4) the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

While the ADAAA did not explicitly amend Title II of the Act, which applies to governmental bodies other than the federal government, it did amend the definition of “person with a disability,” and Congress instructed judges to pay more attention to the defendant’s behavior (rather than the plaintiff’s status) to determine whether a violation of the Act has occurred.¹²⁶ In essence, Congress made clear that the ADAAA’s purpose was to assure broader protec-

(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;

(7) in particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term “substantially limits” to require a greater degree of limitation than was intended by Congress; and

(8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term “substantially limits” as “significantly restricted” are inconsistent with congressional intent, by expressing too high a standard.

(b) PURPOSES—The purposes of this Act [see Short Title of 2008 Amendment note above] are—

(1) to carry out the ADA’s objectives of providing “a clear and comprehensive national mandate for the elimination of discrimination” and “clear, strong, consistent, enforceable standards addressing discrimination” by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court’s reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms “substantially” and “major” in the definition of disability under the ADA “need to be interpreted strictly to create a demanding standard for qualifying as disabled,” and that to be substantially limited in performing a major life activity under the ADA “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives”;

(5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for ‘substantially limits’, and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis; and

(6) to express Congress’ expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term “substantially limits” as ‘significantly restricted’ to be consistent with this Act, including the amendments made by this Act.

ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3553-55 (2008).

¹²⁶ *Id.*

tion for individuals with disabilities and to make proof of a disability easier to accomplish.¹²⁷

Individuals with disabilities (or the executors of their estates) have used Title II to argue that their deaths or injuries caused by the police violated the ADA.¹²⁸ The courts that hold that Title II applies to the police actions have generally recognized three potential causes of action: wrongful arrest;¹²⁹ failure to reasonably accommodate (or make reasonable modification);¹³⁰ and failure to adequately train the police force.¹³¹ A failure adequately to train likely would be a failure of the defendant city, county, or police force, but a failure to reasonably accommodate or modify policies and wrongful arrests likely will occur during policing at the level of the individual police themselves. While all of the circuits deciding the issue have agreed that Title II governs police interactions with individuals with disabilities, there are a number of circuit splits and other differences about how the lower courts interpret Title II and its relationship to police behavior.¹³² An analysis of these issues appears in the next subpart.

¹²⁷ *Id.*

¹²⁸ *See, e.g.*, cases cited *infra* notes 133–37, 138, 178–81; *supra* notes 66–93.

¹²⁹ This is a cause of action for an arrest of an individual for behavior that is not criminal that the police mistake. An example is the situation where the police arrest for drunk driving an individual who is driving erratically but the individual is not drunk but a diabetic who needs insulin.

¹³⁰ This is the most common cause of action, and it is commonly described as failure to reasonably accommodate rather than failure to make reasonable modifications in policies, practices or procedures. While the “reasonably accommodate” language comes from Title I, the employment title of the ADA, the correct language is the “reasonable modification” language appearing in Title II. Nonetheless, it appears that the courts are analyzing the cases the same way whether they are using the “reasonable modification” language or the “reasonable accommodation” language. Another possible cause of action would hold the government liable for its failure to provide auxiliary aids and services, a cause of action that is described in *Liese v. Indian River County Hospital District*, 701 F.3d 334, 336 (11th Cir. 2012).

¹³¹ This is a cause of action that is less recognized by the courts but should also be a potential cause of action under Title II given that the defendants in Title II cases will always be the city or other governmental entity for which the officers work and there is no cause of action against individual defendants. The failure to adequately train the force takes into account the failure to recognize the issues that arise with persons with disabilities and to instruct police officers on how to reasonably modify their behaviors when faced with the situation of a person with disabilities. The legislative history of Title II of the ADA clearly demonstrates that Congress contemplated that public services (governments) will be liable under the ADA if they fail properly to train the police. For example, in a congressional hearing describing the Act, Representative Steny Hoyer stated:

[T]itle II covers the range of services, benefits, and programs offered by State and local governments. It also includes providing training to public employees in order to ensure that discriminatory actions do not occur. For example, persons who have epilepsy are sometimes inappropriately arrested because police officers have not received proper training to recognize seizures and to respond to them. In my (sic) situations, appropriate training of officials will avert discriminatory actions.

101 Cong. Rec. E1913, E1916 (daily ed. June 13, 1990).

¹³² There are a number of good student notes on the topic of the different standards used by different circuits. *See generally*, Robyn Levin, Note, *Responsiveness to Difference: ADA Accommodations in the Course of an Arrest*, 69 STAN. L. REV. 269 (2017); Andrew J.

1. *Application of Title II to Police Conduct*

All courts dealing with the issue of whether Title II applies to police conduct look to the broad language of the statute, the legislative history, or both, to conclude that police or other security forces' conduct during arrests, interrogation, and imprisonment is covered by Title II of the ADA. These cases rely on *Pennsylvania Department of Corrections v. Yeskey*¹³³ in reaching this conclusion. In *Yeskey*, the Supreme Court rejected the state's argument that Title II does not apply to prisons because residing in a prison is not voluntary and held that Title II applies to conditions, programs, and services in imprisonment.¹³⁴ Using a textualist approach, Justice Scalia, writing for the Court, dismissed the argument that Congress did not intend for the ADA to apply to state prisons stating, "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"¹³⁵

Although the Supreme Court has not spoken on whether Title II can be used to attack police misconduct during the arrest stage, lower courts have applied *Yeskey* to conclude that Title II applies to police misconduct in arrests, interrogations, and investigations.¹³⁶ A number of issues have developed among the federal courts as to application of the law. These issues include:

Lohmann, Note, *Arrests and Title II of the ADA: Framework of Claims for Monetary Damages*, 56 WASHBURN L. J. 559 (2017). Because my space is limited, I will not repeat elaborate descriptions of the cases discussed in the student notes and the standards used by these courts but will instead analyze how the courts apply those standards, and other pertinent issues regarding this topic that are not discussed in the student notes.

¹³³ Pa. Dep't. of Corr. v. *Yeskey*, 524 U.S. 206, 208 (1998); see, e.g., *Haberle v. Troxell*, 885 F.3d 170, 178 (3d Cir. 1985) (concluding that police can violate the ADA by failing to make reasonable accommodations to an individual's disability during an arrest); *Seremeth v. Bd. of Cnty. Comm'rs.*, 673 F.3d 333, 336–7 (4th Cir. 2012) (holding that while the ADA is applicable during arrests and officers are obligated to give a reasonable accommodation to persons with disabilities, in the case at bar the officers acted reasonably as a matter of law). *But see Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) (holding that the ADA does not protect individuals with disabilities in their dealings with police; the ADA is not applicable to officers' on-the-street responses to disturbances).

¹³⁴ *Yeskey*, 524 U.S. at 209–11.

¹³⁵ *Id.* at 212 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)). This language was recently reaffirmed in a Title VII case, *Bostock v. Clay County*, 140 S. Ct. 1731, 1754 (2020), holding that discrimination "because of sex" includes discrimination based on an individual's sexual orientation and/or transgender identity or status even though at the time Title VII was passed Congress was likely not considering that sexual orientation or trans identity would be protected from discrimination. Moreover, even without the decision in *Yeskey*, lower courts could have relied on the legislative history, which makes clear that in the very least a failure to train police would create liability under Title II. See *supra* note 131.

¹³⁶ The major case holding that Title II does not apply until the police secure the scene is *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000). This is the minority view. In *City of San Francisco v. Sheehan*, 575 U.S. 600, 608–09 (2015), the Supreme Court dismissed the Title II portion of the case because the City and County of San Francisco filed a cert petition defining the issue as whether Title II applies to police behavior during an arrest, but in its

- Whether Title II applies to police conduct occurring during an arrest or seizure before the police “secure the scene;”
- Whether plaintiffs must prove intentional discrimination (discriminatory animus or deliberate indifference) to establish liability and/or to collect damages under Title II of the ADA; and
- Whether in a Title II suit against a governmental unit the defendant is vicariously liable in respondeat superior for discriminatory acts by officers when engaged in arrests or investigations.¹³⁷

In the next subsections, I analyze these three issues and ultimately conclude that under a proper, broad reading of the ADA, one sanctioned by the drafters of the ADAAA Amendments, exigency should be analyzed as part of the “reasonable modifications” analysis; that plaintiffs need not prove intentional discrimination (discriminatory animus or deliberate indifference) of the police in order to recover damages against the governmental entity; and that governmental entities should be liable vicariously in respondeat superior for the illegal actions of its officers who act within the scope of their employment. To the extent that courts disagree with these conclusions, I encourage Congress to amend Title II of the ADA to accord necessary protection to individuals with disabilities who deal with the police.

a. Reasonable Modifications Analysis: Applying Yeskey Before the “Scene is Secured”

Given *Yeskey*, all lower courts deciding whether the ADA applies to police conduct in the field have agreed that it does.¹³⁸ But there is a difference among the courts as to *when* Title II comes into play with policing. A majority of the courts of appeals deciding this issue conclude that Title II is applicable to arrests, and that exigency arising during the arrest can be considered in determining whether a modification of policy, practice, or procedure is reasonable or not.¹³⁹ A small minority of federal courts conclude that Title II is not applicable during arrest until after the police “secure the scene,” concluding that before the scene is secured that exigency exists and applying Title II would not be reasonable as a matter of law.¹⁴⁰

The majority is the better view because there is no specific “exigency” exception in the statutory language of Title II itself, and because, as a practical matter, exigency will be considered in determining whether proposed modifica-

briefs did not challenge whether police behavior during arrests is covered by Title II but argued on narrower grounds that the plaintiff was not a “qualified” individual with a disability because she posed a direct threat to the health and safety of others. In dismissing certiorari on the Title II issue, the Court made clear that the question of whether Title II applies to arrests is not a settled question, at least when it comes to the time before the police secure the scene. *Id.* at 610.

¹³⁷ See *infra* Sections II.B.1.a; II.B.1.b; & II.B.1.c, respectively.

¹³⁸ The U.S. Supreme Court questioned this analysis. See *supra* note 136.

¹³⁹ See Levin, *supra* note 132, at 285–294.

¹⁴⁰ *Id.* at 287.

tions would have been reasonable under the specific circumstances.¹⁴¹ This is an intensely fact-based analysis that should take account of how the scene unfolded and the how police officers' actions affected the scene or perhaps even caused more danger to the alleged victim. In fact, in a number of the reported cases, it is the *police's* aggressive behavior and failure to adapt procedures to the individual with a known disability that creates the exigency in the first place.¹⁴² In other words, it is the police's failure to grant the victim a reasonable modification that increases the danger that things will go astray. If we do not consider police behavior at this stage, many unnecessary police-imposed deaths and injuries will occur.

City and County of San Francisco v. Sheehan provides an example. In that case, the officers seem to have acted reasonably when they first entered the victim's room, and, when faced with Ms. Sheehan's threats with a knife, the officers retreated, and called for backup.¹⁴³ But for an unknown reason, even though backup was on its way and the backup's sirens could be heard by the officers at the scene, minutes after retreating, the officers decided to re-enter the victim's room by breaking down her door.¹⁴⁴ Because the victim was alone in her room on the second floor, there was little chance that she would be a danger to herself or others during the time it would take for specially-trained backup officers to arrive at the scene.¹⁴⁵ Therefore, there was at least a genuine issue of material fact as to whether waiting for the trained backup would constitute a reasonable modification of a policy or practice (assuming there was a policy or practice that would encourage immediate re-entry), especially given that the officers knew that the victim was a person having a mental health crisis.¹⁴⁶

The only defenses available to the reasonable modification requirement are that the modification would "fundamentally alter" the public service¹⁴⁷ or that the alleged victim was not qualified under the ADA because she imposed a direct threat to health and safety of herself or others.¹⁴⁸ If the public service here is the police response to a call for help for a person experiencing a psychiatric

¹⁴¹ As explained in *supra* note 120, there is a defense if the modification would fundamentally alter the nature of the service; moreover, in order to be a qualified individual with a disability, one must not pose a direct threat to the health or safety of the individual or others.

¹⁴² See e.g., *City of S.F. v. Sheehan*, 575 U.S. 600, 602–605 (2015).

¹⁴³ See *id.* at 604. The facts recited in this section come from the courts' opinions in response to the defense motion for summary judgment, and, therefore are described in the light most favorable to the plaintiff. *Id.* at 603. I do not know whether these facts are all true, but this lack of knowledge proves my point. Determining the facts and inferences drawn from them is the factfinder's job, and, given those facts, the jury should conclude whether there was a reasonable modification that the officers should engage.

¹⁴⁴ *Id.* at 605.

¹⁴⁵ *Id.* at 603.

¹⁴⁶ *Id.*

¹⁴⁷ See *supra* note 120 for the language of Title II relating to the "fundamental alteration" defense.

¹⁴⁸ While the other titles of the ADA (such as Title I) have an explicit direct threat defense, the defense to a Title II violation appears in the regulations. See *supra* note 120.

crisis, there is little question that reasonably modifying the police's ordinary aggressive responses in order to de-escalate the conflict would not fundamentally alter the nature of their service. Moreover, the officers knew Ms. Sheehan's condition as they were briefed by the social worker when they arrived on the scene.¹⁴⁹ Even though Ms. Sheehan had threatened them with a knife, they also knew that the threat arose when and because they invaded her space.¹⁵⁰ There was at least a question of fact as to whether the police officers had a reasonable concern that she would escape or was in imminent danger of harming herself in her room. For this reason, and given that the officers could hear their counterparts arriving at the location, a reasonable jury could conclude that it was unreasonable for them to aggravate Ms. Sheehan's fear by escalating the violence of the police action and breaking down her door to re-enter, which they should have expected would re-trigger her fearful reaction. A reasonable modification of their policies and procedures that would accommodate Ms. Sheehan and decrease the danger to both Ms. Sheehan and the officers would have been, a jury could conclude, to wait the few minutes for backup to arrive and to plan with their more experienced counterparts how to de-escalate the situation.¹⁵¹

Certainly, when the police create the circumstances that lead to the exigency, the department should not be able to defend against a civil lawsuit under the ADA by claiming that it would have been unreasonable for them not to use lethal force against the alleged victim. In other words, the police's role in creating the exigency needs to be taken into account in determining whether the police should have reasonably accommodated Ms. Sheehan or made reasonable modifications to their policies and procedures. It is for this reason that the exigency of the situation needs to be analyzed to determine whether there was a plausible reasonable modification available. Police officers' inappropriate rushing into a scene and making the matter worse must be considered in determining whether the police's response violated Title II.

The next Subsection discusses what state of mind of the actors is necessary to impose liability and/or damages under Title II. An intricately related ques-

¹⁴⁹ *Sheehan*, 575 U.S. at 603–04.

¹⁵⁰ *Id.*

¹⁵¹ The federal district court granted the defendant's motion for summary judgment on both the Fourth Amendment unreasonable search and seizure claim and the ADA Title II count, which alleged that the police officers failed to make a reasonable modification of their procedures even though they were fully aware that the plaintiff was experiencing a psychiatric crisis. *Sheehan v. City of S.F.*, No. C 09-03889, 2011 WL 1748419, at *7, *10–11 (N.D. Cal. May 6, 2011). The Ninth Circuit reversed the lower court's grant of summary judgment, concluding that, in the Title II claim, there was a genuine issue of material fact whether the officers reasonably accommodated the alleged victim. *Sheehan v. City of S.F.*, 743 F.3d 1211, 1233 (9th Cir. 2014). The U.S. Supreme Court granted certiorari on both counts, reversed on the Fourth Amendment claim, and dismissed the certiorari on the ADA claim when the defendants took a different position than they had taken in the cert petition. *Sheehan*, 575 U.S. at 606. The petition for certiorari dismissal by the Supreme Court means that the Ninth Circuit's interpretation of Title II of the ADA is still good law in the circuit.

tion follows in Subsection c, which addresses whether municipalities or other government agencies operating police departments should be subject to vicarious liability for the police officers' actions under Title II, and if so, the guiding principles for liability.

b. Requiring Proof of Intent for Liability? Damages?

Although Title II of the ADA does not mention intent, many courts have adopted an intent requirement for liability of the public services under Title II and all appear to require an intent showing for damages under Title II.¹⁵² The majority of courts seem to agree that the proper intent standard is “deliberate indifference,” rather than discriminatory animus.¹⁵³ The deliberate indifference standard is drawn from the Supreme Court’s standard in Title VI and Title IX cases.¹⁵⁴ The reasoning is complicated, but appears simple. The text of Title II of the ADA states, “[t]he remedies, procedures, and rights set forth in [Section 504 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.”¹⁵⁵ In turn, the Rehabilitation Act incorporates “[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964.”¹⁵⁶ Title VI uses the same remedies as those available in Title IX.¹⁵⁷ The Court has held that both Title VI and Title IX use the “deliberate indifference” standard for liability of the government entity.¹⁵⁸ Therefore, the argument goes, Section 504 of the Rehabilitation Act and Title II of the ADA use the intent standard, which is usually adopted as a “deliberate indifference” standard.¹⁵⁹

¹⁵² Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C.L. REV. 1417, 1417–18 (2015); *see also* Hildreth v. Butler, 960 F.3d 420, 431 (7th Cir. 2020); Silberman v. Mia. Dade Transit, 927 F.3d 1123, 1134 (11th Cir. 2019) (holding that in order to collect damages, there must be a showing of deliberate indifference in a Title II or Section 504 case); Liese v. Indian River Cty. Hosp. Dist., 701 F.3d 334, 345 (11th Cir. 2012) (holding that deliberate indifference rather than discriminatory animus is the proper state of mind for liability under Title II); Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1138 (9th Cir. 2001) (holding that deliberate indifference must be shown before the plaintiff may collect damages under Title II); Meagley v. City of Little Rock, 639 F.3d 384, 390 (8th Cir. 2011) (holding that deliberate indifference required for compensatory damages under Title II of the ADA and Section 504).

¹⁵³ *See, e.g., Liese*, 701 F.3d at 345; *Duvall*, 260 F.3d at 1138–39.

¹⁵⁴ *See* Alexander v. Sandoval, 532 U.S. 275, 280 (2001); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 224, 274 (1998).

¹⁵⁵ 42 U.S.C. § 12133.

¹⁵⁶ 29 U.S.C. § 794(a)(2).

¹⁵⁷ *See* Jones v. City of Detroit, No. 17-11744, 2019 WL 2355377, at *5 (E.D. Mich. June 4, 2019); Weber, *supra* note 152, at 1436.

¹⁵⁸ *See* Alexander, 532 U.S. at 280 (Title VI); Gebser, 524 U.S. at 274 (Title IX).

¹⁵⁹ According to the court in *Jones*:

[W]hen analyzing the ADA’s remedial scheme, the law operates like a matryoshka doll. To determine whether a particular remedy is available under the ADA, the Court looks at its remedial scheme, which looks to the Rehabilitation Act, which looks to Title VI, which looks *like* Title

The Eleventh Circuit in *Liese v. Indian River County Hospital District* defined “deliberate indifference.” It occurs when “the defendant *knew* that harm to a federally protected right was substantially likely and . . . *failed* to act on that likelihood.”¹⁶⁰ The court noted that deliberate indifference goes beyond gross negligence,¹⁶¹ and it stated that “discriminatory animus,” which is not required to prove a violation, would require “a showing of prejudice, spite, or ill will.”¹⁶² In *Duvall v. County of Kitsap*, the Ninth Circuit, like all other circuits deciding these cases, held that in order to *collect damages* under Title II, the plaintiff must prove intentional discrimination; the court then adopted the deliberate indifference standard to fulfill the intent requirement.¹⁶³

In the face of the courts’ adoptions of an intent requirement for liability and/or damages under Title II, Professor Mark Weber, a well-respected academic and scholar of the ADA, argues convincingly that, at least for some of the Title II causes of action, proof of intent should not be required. Weber makes a sophisticated argument based on Title II’s statutory language and Supreme Court caselaw. In *Accidentally on Purpose: Intent in Disability Discrimination Law*,¹⁶⁴ Weber argues that the lower courts’ reasoning rests on erroneous assumptions.¹⁶⁵ Weber relies on *Alexander v. Choate*¹⁶⁶ and *Barnes v. Gorman*¹⁶⁷ to demonstrate that a showing of intent (or deliberate indifference) should not be required for damages or monetary relief under Title II in reasonable modifications cases.¹⁶⁸ He explains that it makes sense to apply the Title VI and Title IX requirements of “deliberate indifference” in order to assess monetary relief and/or damages under certain Title II provisions—those that require a showing of intent in order to prove liability.¹⁶⁹ But with Title II provi-

IX. Consequently, precedent interpreting the remedies available under Title VI or Title IX must be considered when analyzing the ADA’s remedial scheme.

Id. at *5.

¹⁶⁰ *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 344 (11th Cir. 2012) (quoting *T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cnty.*, 610 F.3d 588, 604 (11th Cir. 2010)).

¹⁶¹ *Id.* at 344.

¹⁶² *Id.*

¹⁶³ *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001). For other cases holding that a showing of deliberate indifference is necessary to recover damages in a Title II case, see *supra* note 152.

¹⁶⁴ See Weber, *supra* note 152 at 1450–64 (2015) (explaining the three errors that lower courts have committed when requiring a showing of intent for reasonable modifications cases under Title II: 1) Misguided analogies to Title VI and Title IX cases; 2) Reliance on dicta from a 1982 education case despite a legislative overruling of the dicta; and 3) A misstatement as to a perceived (but non-existent) conflict between the IDEA (Individuals with Disabilities Education Act) and Section 504 of the Rehabilitation Act and the ADA).

¹⁶⁵ *Id.*

¹⁶⁶ *Alexander v. Choate*, 469 U.S. 287, 294 (1985).

¹⁶⁷ *Barnes v. Gorman*, 536 U.S. 181, 189 (2002) (holding that the plaintiff in a Title II suit could recover compensatory damages but not punitive damages without proof of intent in a failure to accommodate case).

¹⁶⁸ See Weber, *supra* note 152, at 1448–50.

¹⁶⁹ In *Barnes*, the Supreme Court stated:

sions that do *not* require such a showing for proving liability, such as the reasonable modifications requirement, it does not follow that intent must be proved for a damages award.¹⁷⁰ This is the case because Titles VI and IX, unlike Title II, *always* require a showing of intent *for liability* because they do not recognize either disparate impact or reasonable modifications causes of action, both of which do not require a showing of intent for liability.¹⁷¹ Title II, in contrast, provides for disparate impact and reasonable modifications/accommodations causes of action in addition to intentional violations.¹⁷² As Professor Weber explains, *Barnes*¹⁷³ and the legislative history of the ADA lend strong support to his argument.¹⁷⁴ In *Barnes*, a reasonable modifications case involving police transportation of an individual with paraplegia, the Supreme Court held that because Titles VI and IX were passed pursuant to the Spending Clause of the Constitution, and ADA and Section 504 of the Rehabilitation Act remedies are *coextensive* with those available in a Title VI private cause of action, contract remedies are appropriate.¹⁷⁵ Thus, compensatory damages are available under the ADA and Section 504 of the Rehabilitation Act when the plaintiff proves the underlying requirements for liability, but punitive damages are not.¹⁷⁶ This conclusion fits with the legislative history of both the ADA and Section 504 of the Rehabilitation Act. Professor Weber concludes:

Thus, broad remedies, consistent with concepts of reasonable expectations of loss, and including compensatory damages and other monetary relief, are available for violations of section 504 and the ADA's reasonable accommodations and disparate impact discrimination provisions. The legislative history of Title II emphasizes that a wide range of remedies exists for violations of the statute. The House Committee Report states that Congress intended to make the "full panoply of [section 504] remedies available" in Title II cases, and cited a case providing damages against a governmental unit under section 504.¹⁷⁷

[T]he remedies for violations of § 202 of the ADA and § 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, which prohibits racial discrimination in federally funded programs and activities.

536 U.S. at 185.

¹⁷⁰ Weber, *supra* note 152, at 1441–44.

¹⁷¹ *Id.* at 1440.

¹⁷² *Id.* at 1445–49.

¹⁷³ *Barnes*, 536 U.S. at 181.

¹⁷⁴ Professor Weber also argues, by analogy, that the remedies under Title I of the ADA, which vary depending on the state of mind required for proof of liability, support his argument. *See* Weber, *supra* note 152, at 1429.

¹⁷⁵ *Id.* at 1448–49.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1449 (quoting H.R. REP. NO. 101–485, pt.3, at 52 n.62, as reprinted in 1990 U.S.C.C.A.N. at 475 n.62 (citation omitted)).

Professor Weber's reasoning is correct. The court in *I.L. through Taylor v. Knox County Board of Education*¹⁷⁸ relied on Weber's reasoning when it explained:

People can sue only for intentional violations of Title VI. So one might think that people can sue only for intentional violations of Title II and § 504. Not so. While the Supreme Court has not outright said that § 504 covers unintentional discrimination, it has rejected the idea that § 504 covers only intentional discrimination. And Title II, for its part, "concerns more than intentional discrimination." Thus—despite the "remedies, procedures, and rights" language linking Title II, § 504, and Title VI—the first two diverge from Title VI at this point. They all contain an implied right to sue, but only Title II and § 504 cover both intentional and unintentional discrimination. Title II and § 504 provide greater rights than does Title VI. . . .

The next question—the real question here—is what a plaintiff must show to win an injunction, and what she must show to win damages. *Barnes v. Gorman* is instructive. In *Barnes*, the Supreme Court ruled that Title II and § 504 plaintiffs can win injunctions and compensatory damages but not punitive damages. The plaintiff had sued for failure to accommodate his disability. . . .

The defendant had unintentionally violated the plaintiff's Title II and § 504 rights, and so had to make good the wrong done by giving him damages. *This suggests that a plaintiff can recover damages under Title II and § 504 without proving intent.* . . .

It follows that a plaintiff can win an injunction under Title II and § 504 without proving intent. Intent does not separate injunctions from damages. What really separates them is that injunctions may be awarded when damages would not be adequate to make up for the plaintiff's harm. . . . What a plaintiff must prove at the merits stage is independent of what she must prove at the remedies stage.

And that is the key here: *at the remedies stage*. Eight courts of appeals require that a plaintiff prove some mental state before winning damages under Title II and § 504. . . .

T[heir] reasoning, however, reads *Guardians* and *Sandoval* too narrowly. True, the Court did hold that intentional discrimination is required for damages under Title VI. But the Court held that intentional discrimination is required for *any* remedy under Title VI, as Title VI protects against only intentional discrimination. So a Title VI plaintiff must prove intentional discrimination to win on the merits, not to get a specific remedy. And by reading *Sandoval* and *Guardians* too narrowly, courts have taken this element of a Title VI claim and made it the standard for Title VI damages. So these courts now say that intentional discrimination is the standard for Title II and § 504 damages. . . .

There is nothing to indicate that a plaintiff must ever prove intentional discrimination—or deliberate indifference—under Title II and § 504. What's more, the Supreme Court has upheld a damages award in a Title II case involving no intent element. And . . . eight courts of appeals . . . have misconstrued Supreme Court case law.¹⁷⁹

¹⁷⁸ *I.L. v. Knox Cnty. Bd. of Educ.*, 257 F. Supp. 3d 946, 967–69 (E.D. Tenn. 2017).

¹⁷⁹ *Id.* (citations & footnote omitted) (emphasis and indentations added).

Unfortunately, it appears that no other courts have agreed. Nonetheless, Title II should not require a showing of intent in reasonable modifications cases for either equitable relief or compensatory damages. To make matters worse, the courts have applied the “deliberate indifference” standard unevenly, with the majority of published opinions interpreting “deliberate indifference” to be an “exacting” standard.¹⁸⁰

*Gray v. Cummings*¹⁸¹ is a good example of this trend. In *Gray*, the plaintiff experienced a “manic episode” and called the police.¹⁸² She was transported to the hospital and held there pursuant to statute against her will.¹⁸³ A few hours later, the plaintiff escaped from the hospital, and the hospital called the police.¹⁸⁴ Officer Cummings responded, saw Gray walking on the sidewalk, and approached her.¹⁸⁵ When she did not follow his instructions and cursed at him repeatedly, he took her down to the ground, and when she continued to be uncooperative, he tased her in drive-stun mode.¹⁸⁶ Gray suffered extreme pain from the tasing, and ultimately sued the police department and Cummings under various statutes.¹⁸⁷ In the Section 1983 claim for a Fourth Amendment violation, the First Circuit held that a reasonable jury could find that Cummings engaged in the unconstitutional use of excessive force against the plaintiff, but it also held that as a matter of law, the defendant Cummings was protected by qualified immunity.¹⁸⁸ In the ADA claim, the court held, assuming that deliberate indifference was a necessary showing for damages, that there was insufficient evidence from which one could conclude that Cummings demonstrated deliberate indifference.¹⁸⁹ The court set out the standard:

[T]o hold the Town vicariously liable under Title II based on Cummings’s deliberate indifference, Gray would have to show that Cummings knew that Gray had a disability that required him to act differently than he would otherwise have acted, yet failed to adjust his behavior accordingly. Thus, to prevail on her version of the “effects” theory, Gray would at least have to show that Cummings knew that her failure to follow his orders was a symptom of her mental illness rather than deliberate disobedience (warranting criminal charges). Similarly, to prevail on her version of the “accommodation” theory, Gray would at least have to show that Cummings knew that there was a reasonable accommodation, which he was required to provide.¹⁹⁰

¹⁸⁰ See, e.g., *McCullum v. Orlando Reg’l Healthcare Sys., Inc.*, 768 F.3d 1135, 1147 (11th Cir. 2014).

¹⁸¹ *Gray v. Cummings*, 917 F.3d 1, 18 (1st Cir. 2019).

¹⁸² The following description of the facts is written in the light most favorable to the plaintiff because of the procedural posture of the case. These facts appear in *id.* at 6–7.

¹⁸³ *Id.* at 6.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 6–7.

¹⁸⁷ *Id.* at 7.

¹⁸⁸ *Id.* at 8, 13.

¹⁸⁹ *Id.* at 17 (citing *Nieves-Márquez v. Puerto Rico*, 353 F.3d 108, 126 (1st Cir. 2003)).

¹⁹⁰ *Id.* at 18 (citation omitted).

Curiously, the court concluded that even though Cummings knew of the plaintiff's mental illness, and that it was sufficiently severe for her to be hospitalized against her will, there was no evidence of Gray's "particularized knowledge about the nature or degree of Gray's disability."¹⁹¹ And, according to the court,

[w]ithout such particularized knowledge, Cummings had no way of gauging whether the conduct that appeared unlawful to him [her verbal resistance to arrest] was likely to be a manifestation of the symptoms of Gray's mental illness. . . . [and he] had no way of gauging what specific accommodation, if any, might have been reasonable under the circumstances.¹⁹²

Moreover, the court held, that without evidence that Cummings knew of the existence of national police standards of dealing with individuals with mental illness the plaintiff's case would fail.¹⁹³ In essence, the court ruled " 'falling below national standards does not, in and of itself, make the risk of an ADA violation' so obvious as to eliminate the knowledge requirement."¹⁹⁴

Gray demonstrates the difficulty of proving deliberate indifference of the police, at least as the court interprets it. This case, on whose panel sat former Justice Souter of the Supreme Court, raises serious questions about whether the ADA, as currently interpreted to require deliberate indifference, could ever be used to assure rights of persons with disabilities in police confrontations.¹⁹⁵ Cummings clearly knew of the mental disability of his subject, but nonetheless, he tasered her, even though she was presenting no threat to herself or others, and he got away with it.

c. Vicarious Liability? Respondeat Superior and Other Tests

Closely related to the question of whether intent is required for liability and/or damages under the reasonable modifications requirement of Title II of the ADA are other questions that courts have addressed concerning government liability—including the proper standard for attributing liability to the government entity for its police officers' behavior.¹⁹⁶

In answering these questions, it is crucial to understand that under Title II of the ADA there is no right to a suit against individual defendants.¹⁹⁷ The de-

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 18–19.

¹⁹⁴ *Id.* at 19 (quoting *Haberle v. Troxell*, 885 F.3d 170, 182 (3d Cir. 2018)).

¹⁹⁵ *See id.* at 5.

¹⁹⁶ *See, e.g., Ravenna v. Vill. of Skokie*, 388 F. Supp. 3d 999, 1004–07 (N.D. Ill. 2019) (discussing debate over imposing respondeat superior or vicarious liability in Title II ADA cases where there is no individual liability).

¹⁹⁷ The U.S. Supreme Court has not decided this issue, but nearly all lower courts facing this question have concluded (based on analysis of Title VII and the ADEA) that there is no individual liability under the ADA. *See City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 610 (2015) ("Only public entities are subject to Title II"); *Walker v. Snyder*, 213 F.3d 344, 346 (7th Cir. 2000) ("Under Title II of the ADA . . . the proper defendant is that 'entity.' . . . [A]s

pendant in ADA suits, therefore, unlike those in lawsuits brought under Section 1983, will *always be* the government entity controlling the police department, not individual police officers. And, because employers are commonly responsible under respondeat superior for the negligent acts of their employees committed in the scope of employment, one could argue that it follows that the government body that directs the police department should be liable not only directly for injuries caused by their own violations of the ADA but also vicariously for violations of individual police officers who engage in wrongful arrest or a failure to accord reasonable modifications to citizens with disabilities in the field.¹⁹⁸ Nothing in the ADA contravenes this fact.

Furthermore, unlike lawsuits filed under Section 1983, those filed under the ADA against police departments should not necessarily require a showing of a departmental policy or practice. Title II explicitly creates affirmative obligations on the public entities, requiring them to make reasonable modifications to policies and practices unless doing so would fundamentally alter the service rendered. Moreover, Title II:

expressly provides that a disabled person is discriminated against when an entity fails to “*take such steps as may be necessary* to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.” A plain reading of the ADA evidences that Congress intended to impose an affirmative duty on public entities to create policies or procedures to prevent discrimination based on disability. Thus, although it is true that for claims asserted under § 1983, an official policy must be identified, the same rule cannot be reconciled with Congress’s legislative objectives in enacting the ADA and the [Rehabilitation Act]. . . .¹⁹⁹

Despite this difference between lawsuits under Section 1983 and Title II of the ADA, courts have apparently transported concepts from Section 1983 suits into Title II actions. Some courts have required a policy or custom of the gov-

a rule there is no personal liability under Title II[.]”); *see, e.g.*, *Albra v. Advan, Inc.*, 490 F.3d 826, 829–30 (11th Cir. 2007) (holding that there is no individual liability under Title I of the ADA); *Mason v. Stallings*, 82 F.3d 1007, 1009–10 (11th Cir. 1996) (holding that in Title II cases of the ADA there is no qualified immunity because there is no individual liability; only the agency is liable under the Act); *E.E.O.C. v. A.I.C. Sec. Investigations, Ltd.*, 55 F.3d 1276, 1279–82 (7th Cir. 1995) (holding that under Title I of the ADA there is no individual liability because the purpose of the statute was to impose *respondeat superior* liability on the employer for the agents’ acts). *But see* *Shotz v. City of Plantation*, 344 F.3d 1161, 1164, 1186 (11th Cir. 2003) (holding that there is individual liability in a retaliation suit under the ADA). Individual liability may exist, however, under state disability discrimination statutes.

¹⁹⁸ *But see* *Ravenna*, 388 F. Supp. 3d at 1005 (stating that in the Seventh Circuit if there is no individual liability there is no vicarious liability of the governmental entity).

¹⁹⁹ *Delano-Pyle v. Victoria County*, 302 F.3d 567, 575 (5th Cir. 2002) (citations omitted) (also noting that although there is no intent standard for proving violations of Title II, it is necessary to prove intentional discrimination to collect damages under Title II).

ernmental unit to allocate responsibility to it.²⁰⁰ Others, as analyzed above, have required a showing of deliberate indifference on the part of officers involved, either to prove liability or to collect compensatory damages.²⁰¹ Moreover, some courts add an additional requirement. They require not only a showing of deliberate indifference of the employees who are on the front lines, but also evidence that the employees' acts can be attributable to the government entity. In *Liese*, for example, the court referred to *Gebser v. Lago Vista Independent School District*,²⁰² a Title IX case, and concluded that respondeat superior was not the proper standard under Title II for the governmental liability.²⁰³ For liability to attach to the hospital, there must be an official involved in the discriminatory practice who "[has] the knowledge of and the authority to correct [the hospital's] . . . discriminatory practices."²⁰⁴ In that case, then, doctors, who had the authority to overrule nurses' behaviors, would create liability on the part of the county when operating in the county hospital, but nurses would not.²⁰⁵

In contrast, in *Duvall*, the Ninth Circuit held that the county was vicariously liable for the actions of its employees in *respondeat superior* and did not go through the same analysis as *Liese* in determining the organizational liability for its employees' behaviors.²⁰⁶ In other words, under *Duvall*, it is not necessary to demonstrate that an officer who violates a civilian's Title II rights is an official who has the responsibility to affirmatively act to correct the error. It is sufficient that the officer failed to make reasonable modifications to policies and practices of the public service in order to accommodate the civilian with a disability. This is true to find a violation by the public service or governmental organization of Title II. But—and this is an important exception—*Duvall*, as noted above, also held that a showing of deliberate indifference is required for

²⁰⁰ *But see* *Rosen v. Montgomery County*, 121 F.3d 154, 157 n.3 (4th Cir. 1997) (policy or custom not required for ADA liability); *Patton v. Dumpson*, 498 F. Supp. 933, 942 (S.D.N.Y. 1980) (holding that the doctrine of respondeat superior applies to actions under § 504 of Rehabilitation Act and specifically distinguishing Section 504 claims from § 1983 claims).

²⁰¹ *See supra* Section II.B.1.b.

²⁰² *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 276, 290–91 (1998) (concluding in a Title IX case that deliberate indifference is the proper standard for determining whether a school is responsible for sex discrimination by its staff or students).

²⁰³ *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 349 (11th Cir. 2012).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 350.

²⁰⁶ *Duvall v. County of Kitsap*, 260 F.3d 1124, 1141 (9th Cir. 2001); *see also*, *T.W. ex rel. Wilson v. School Bd.*, 610 F.3d 588, 604 (11th Cir. 2010) (stating that the ADA allows for vicarious liability of the governmental organization under a theory of respondeat superior); *Delano-Pyle*, 302 F.3d at 574–75 (holding that proof of a policy or that the actor in question was a policymaker is not required under the ADA, and that there is respondeat superior liability, but that plaintiffs must prove that there was discriminatory intent to collect damages); *Gray v. Cummings*, 917 F.3d 1, 17 (1st Cir. 2019) (concluding that whether the government is liable under Title II of the ADA only for actions of employees who are officials with power to change the situation or whether respondeat superior is the proper standard is an open question).

the plaintiff to collect damages. Given the near impossibility of attaining injunctive relief, *Duvall*'s ruling on respondeat superior may be an empty victory for plaintiffs.²⁰⁷

When Congress passed the ADA and then years later amended the ADA with the ADAAA in order to assure greater coverage of the Act and protection of persons with disabilities, it communicated a vision for broad coverage of the Act. Given this legislative purpose, it is difficult to reconcile these cases that make it nearly impossible to grant a remedy to victims of police abuse. Therefore, without openly addressing the fact, these cases interpret Title II to provide a right without a remedy. This cannot be how Congress intended that the courts interpret the Act.²⁰⁸

2. *Potential Judicial? Congressional? Solutions*

An ideal scenario would be for the Supreme Court to grant certiorari on these difficult, interpretive Title II issues and to hold, consistent with the congressional purpose of granting broad rights to persons with disabilities under both the original ADA and as amended under the ADAAA that: 1) Title II covers police encounters with civilians and the issue of danger is ordinarily a question of fact that bears on the reasonableness of potential accommodations and/or modifications; 2) Because intent is not required in a Title II reasonable accommodation/modification case to prove liability, neither is it required to recover compensatory damages under *Barnes v. Gorman*;²⁰⁹ 3) Government entities employing police are vicariously liable for the Title II violations that police engage in when acting in the scope of their employment; and 4) Government entities employing police are directly liable without a showing of custom or practice for their negligence in failing to train or supervise police if it causes injury to civilians.

²⁰⁷ For persons with disabilities who are stopped illegally by the police, it will be nearly impossible to prove that they are entitled to an injunction because in order to receive injunctive relief they must prove that they will be subject to the same treatment again. As the court in *Gray v. Cummings* stated,

Past injury, in and of itself, "is an insufficient predicate for equitable relief." To have standing to pursue injunctive relief, a plaintiff must "establish a real and immediate threat" resulting in "a sufficient likelihood that [s]he will again be wronged in a similar way." . . . Gray cannot clear this hurdle. When all is said and done, it is not enough for Gray to show that because she has bipolar disorder, she is likely to encounter the police again. She must show that she is likely to be tased once more, and she has not managed any such showing.

917 F.3d at 19 (citations omitted).

²⁰⁸ The U.S. Supreme Court raised without deciding the question of whether the city and county are vicariously liable for police officers' behavior that occurs with deliberate indifference. See *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 608–10, (2015) (dismissing the grant of certiorari as improvidently granted in the Title II portion of the case); discussion *supra* note 151.

²⁰⁹ The Court should conclude, based on Professor Weber's analysis that *this is so even though Title VI and Title IX cases do not permit compensatory damages absent a showing of deliberate indifference*.

Given the current composition of the Supreme Court and the lower federal courts as well as the federal courts' history of cutting back unreasonably on the rights of persons with disabilities granted by the ADA, I have little confidence that either the lower courts or the Supreme Court will decide these issues in an appropriate manner. If the Court does not decide these issues favorably to plaintiffs in the near future, and other circuits continue to hold that damages are not available where there is no showing of intent, Congress should take action again.

Congress should amend the statute to clarify that Title II remedies include damages upon a showing of a violation of the statute in the reasonable accommodation/modifications context. Congress should make clear that those portions of the statute do not require intent for liability, and, therefore, do not require proof of intent for damages. Moreover, Congress should make clear that: 1) In suits against the city, county or police department, governmental immunity is waived by Title II and there is no need to prove a policy, custom, or practice of discrimination in order to recover; 2) Government employers are liable vicariously in respondeat superior for the actions of employees acting within the scope of their employment under Title II; and 3) There is no requirement under Title II for liability or the recovery of damages or other monetary or equitable relief for proof of an intent to discriminate or deliberate indifference on the part of the government or its employees.

CONCLUSION: POTENTIAL SOLUTIONS

There is plenty of room in Title II law to alleviate the severe problem of police abuse of people of color with disabilities. I have outlined how courts should interpret Title II of the ADA to assure more careful and respectful treatment of the most vulnerable members of our society in the policing context. If the ADA is not interpreted as I suggest, it is not doing the job envisioned by Congress when it first enacted the ADA in 1990 and when it amended the Act to assure broad coverage for individuals with disabilities in 2008. If courts refuse to heed this argument, Congress should once again take action to amend the ADA to clearly protect persons with disabilities from police misconduct. Even if the courts refuse to rethink their interpretation of Title II and Congress chooses not to act, individual states have laws that protect persons with disabilities that could be interpreted in a broader fashion than the federal law. And, state legislatures can assure such broad interpretations by amending their laws to clearly protect individuals with disabilities in contact with police. Police departments can institute new policies and procedures to protect the most vulnerable among us.

But even if all of the interpretations of the laws and amendments to the laws suggested are followed, more is necessary to assure safety of persons of color with disabilities. We need structural changes to police organizations, including the ways that police departments are organized and how police are trained. We need increased monetary support for social service agencies that

take the lead in assuring that all members of society—including the most vulnerable persons—will be treated fairly and with respect. In essence, legal, organizational, and societal change must occur before this problem is solved. While I leave for another day a discussion of the organizational and social changes that should take place, it is important that not only legal, but also social reform occur. In the meantime, both the courts and state and federal legislatures should take the mantle of interpreting existing law and drafting new legal provisions that will assure broad protections of persons with disabilities. These protections will aid not only those who are of color but also those who are white, and they will go a long way to creating models in training and regulations for how police should act with the most vulnerable civilians.