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ARTICLE

Policing Under Disability Law

Jamelia N. Morgan*

Abstract. In recent years, there has been increased attention to the problem of police violence against disabled people. Disabled people are overrepresented in police killings and, in a number of cities, police use-of-force incidents. Further, though police violence dominates the discussion of policing, disabled people also disproportionately experience more ordinary forms of policing that can lead to police violence. For example, disabled people, particularly those with untreated psychiatric disabilities, are vulnerable to policing even in medical facilities—the very places they seek to access care. Many are also arrested pursuant to aggressive enforcement policies aimed at removing so-called unwanted persons or regulating those labeled disruptive or disorderly. Though they pose no risk of physical harm, some are arrested and taken to jail, at times simply because they have no place else to go.

This Article centers disability theory as a lens for understanding the problems of policing and police violence as they impact disabled people. In doing so, the Article examines how federal disability law addresses these ongoing problems. Disabled plaintiffs have alleged disability discrimination and challenged policing and police violence under both Title II of the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973, another federal disability law and the precursor to the ADA. The Supreme Court has yet to decide whether Title II of the ADA applies to arrests, and federal appellate courts are split on whether and to what extent Title II's antidiscrimination provisions apply to street encounters and arrests. Although the Court granted certiorari to a case presenting the question, *City & County of San Francisco v. Sheehan*, it subsequently dismissed that question as improvidently granted. There is no telling when the question will reach the Supreme Court again, but before it does, it is important to develop a theory not just of liability but

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also of disability under Title II that is consistent with the text, history, and animating goals of the ADA.

Courts are already adopting a theory of disability that informs how they decide policing cases under Title II: the medical model of disability. However, that theory is inconsistent with that reflected by the ADA and the ADA Amendments of 2008, and it leads courts to pay insufficient attention to disability as a social construction. I examine cases showing how the ADA—contrary to its celebrated goals of access and social inclusion—has been interpreted to exclude a class of individuals from civil rights protection and from the entitlement to an accommodation by law enforcement. Ultimately, I show how the medical model of disability in policing cases serves to limit the broad scope of protections available under the ADA that could otherwise be used to push back against such disability-based subordination.

Adopting and incorporating a social model of disability—that is, viewing disability as a social construction—requires a reexamination of extant legal standards regarding causation, intentional discrimination, disparate impact, and deference to law enforcement under the ADA. As I argue, the social model of disability is not only more consistent with the animating goals of the ADA but also more attuned to the social meanings at play that work to expose disabled people to policing and police violence. By centering a social model of disability in cases challenging disability-based discrimination under federal disability laws—and by incorporating disability law into ongoing public activism, discourse, and policymaking on policing—we can better identify and redress the harms stemming from the policing of disability along with the long-standing social problem of police violence.

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Introduction

In recent years there has been increased activism around, and public attention to, the problem of police violence as it affects disabled people and, in particular, the disproportionate number of Black disabled people killed by the police each year.[1] In the wake of social uprisings in response to the police killings of George Floyd and Breonna Taylor,[2] calls to defund or abolish the police have included movements for both disability rights and disability justice.[3] Such calls for transformative change reflect the need for urgent solutions to address the problem of policing as it affects disabled people. Disabled people are overrepresented in police killings and, in a number of cities, are involved in a significant proportion of police use-of-force incidents.[4]

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1. *See, e.g.*, *Disability Solidarity: Completing the "Vision for Black Lives,"* TUMBLR: HARRIET TUBMAN COLLECTIVE (Sept. 7, 2016), https://perma.cc/Y44B-6WZ6 (criticizing the Movement for Black Lives for "ignor[ing] the violence experienced by Black Disabled and Deaf people"). Consistent with disability-rights and disability-justice movements, this Article recognizes the importance of language in shaping how we think about disability—how language choices can be imbued with ableism and both reveal and reinforce subordination on the basis of disability. *See* Lydia X.Z. Brown, *Ableism/Language*, AUTISTIC HOYA, https://perma.cc/WMN8-HKYX (last updated Feb. 27, 2021); Labib Rahman, Disability Language Guide (2019), https://perma.cc/7XLG-R5B9; *Disability Language Style Guide*, NAT'L CTR. ON DISABILITY & JOURNALISM, https://perma.cc/4Z28-PRZU (archived Apr. 17, 2021). In my discussion of individuals with disabilities, I use identity-first language to refer to disabled people as a group or class. *See* Rahman, *supra* ("Putting the person first, as in 'people with disability,' is called people-first language. It is commonly used to reduce the dehumanization of disability. Another popular linguistic prescription is the identity-first language, as in 'disabled people.'"). As a general matter, preferences as to whether to use people-first or identity-first language should be set by the person with a disability. *See id.*

2. *See* Helier Cheung, *George Floyd Death: Why US Protests Are So Powerful This Time*, BBC NEWS (June 8, 2020), https://perma.cc/U8GD-NCJT; *"There Are Breonnas Everywhere": Protests for Breonna Taylor in Pictures*, N.Y. TIMES (updated Sept. 25, 2020), https://perma.cc/L4NR-SDTK.

3. *See, e.g.*, Talila "TL" Lewis, *Disability Justice Is an Essential Part of Abolishing Police and Prisons*, LEVEL (Oct. 7, 2020), https://perma.cc/MS2M-N5AW; JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH L., "DEFUNDING THE POLICE" AND PEOPLE WITH MENTAL ILLNESS 1 (2020), https://perma.cc/8PD7-RHF4.

4. *See* DAVID M. PERRY & LAWRENCE CARTER-LONG, RUDERMAN FAM. FOUND., THE RUDERMAN WHITE PAPER ON MEDIA COVERAGE OF LAW ENFORCEMENT USE OF FORCE AND DISABILITY: A MEDIA STUDY (2013-2015) AND OVERVIEW 1 (2016), https://perma.cc/9DYK-2E28; C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 80-85 (2016) [hereinafter BALTIMORE REPORT], https://perma.cc/PUN5-SVZJ (finding that Baltimore police officers "routinely use[d] unreasonable force against individuals with mental health disabilities"); C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2, 28 (2015) [hereinafter FERGUSON REPORT], https://perma.cc/Z37X-3YLF (finding that Ferguson police records "suggest a tendency to use unnecessary force against . . . people with mental health conditions or cognitive disabilities"); C.R. DIV., U.S. DEP'T. OF JUST. & W. DIST. OF WASH., U.S. ATT'Y'S OFF., INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT 4 (2011),

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Moreover, disabled people experience more ordinary forms of policing at disproportionate rates—policing that can escalate to deadly police violence. For example, disabled people, particularly those with untreated psychiatric disabilities, are vulnerable to policing in medical facilities—the very places they seek to access care.[5] Many are arrested pursuant to aggressive enforcement policies aimed at removing so-called "unwanted" persons or persons labeled "[d]isruptive" or "disorderly."[6] Though in most cases they pose no risk of physical harm, disabled people are arrested and taken to jail, at times simply because there is no place else for them to go.[7]

Since the mid-1990s, disabled plaintiffs have relied on federal disability-rights laws to challenge police violence and raise claims alleging disability discrimination during arrests.[8] These cases have included claims under the Americans with Disabilities Act of 1990 (ADA) challenging the lawfulness of arrests and the failure to accommodate disabilities during the course of a lawful arrest.[9] Despite the growth of these claims since the ADA's passage, the Supreme Court has yet to decide whether Title II of the ADA applies to on-the-street arrests, and federal appellate courts are split on whether and to what extent Title II's antidiscrimination provisions apply to street arrests.[10] Although the Court granted certiorari to a case presenting the question, *City & County of San Francisco v. Sheehan*, it subsequently dismissed that question as improvidently granted.[11] There is no telling when the question will reach the Supreme Court again. Before it does, it is important to develop a theory not just of liability, but also of disability under Title II, that is consistent with the text, history, and animating goals of the ADA. Yet some courts have already

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https://perma.cc/4GUP-C45L (noting that the Seattle Police Department estimates that 70% of its use-of-force encounters involve persons with mental illnesses or who are under the influence of drugs or alcohol).

5. *See, e.g.*, Taylor v. Hartley, 488 F. Supp. 3d 517, 524 (S.D. Tex. 2020) ("Taylor was arrested for assault while receiving treatment for his disabilities at a hospital in February 2017.").

6. DISABILITY RTS. OR., THE "UNWANTEDS": LOOKING FOR HELP, LANDING IN JAIL 3-4, 15 (2019), https://perma.cc/9XFK-89DJ (discussing the practice of hospitals "dumping their 'unwanteds' into jail"); Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. (forthcoming 2021) (manuscript at 15), https://perma.cc/BAE6-AP2P (discussing the use of disorderly-conduct laws to arrest and remove individuals in mental crisis from public spaces).

7. *See* DISABILITY RTS. OR., *supra* note 6, at 6, 15-16 (analyzing the arrests of those navigating the mental-healthcare system and often struggling in the housing system).

8. *See, e.g.*, sources cited *infra* note 143.

9. Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 and scattered sections of 47 U.S.C.).

10. *See, e.g.*, sources cited *infra* note 143.

11. City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1773 (2015).

begun to adopt a theory of disability in Title II policing cases that is inconsistent with the ADA and its 2008 Amendments and to adopt a view of disability that limits relief for plaintiffs: the medical model of disability.[12]

The medical model of disability frames disability as an "individual medical problem"—a succinct description I adopt from Elizabeth Emens.[13] Michael Ashley Stein writes that the medical model "views a disabled person's limitations as naturally (and thus, properly) excluding her from the mainstream."[14] Under the medical model, Mary Crossley writes, "'disability' is understood as a personal trait of an individual: an innate, biological trait that leaves the disabled individual in need of assistance to remediate the effects of the disability."[15] Bradley Areheart explains that the medical model of disability "relies on normative categories of 'disabled' and 'non-disabled,' and presumes that a person's disability is 'a personal, medical problem, requiring but an individualized medical solution; that people who have disabilities face no "group" problem caused by society or that social policy should be used to ameliorate.'"[16] In short, the medical model defines disability with a focus on the individual rather than society and with a focus on medicalized meanings of disability rather than sociopolitical meanings.[17]

Despite the predominance of the medical model in court opinions, I argue that the ADA embodies a *social model* of disability.[18] In the social model of

12. *See* Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 600 (2021) (explaining that the ADA Amendments Act understands "disability as a matter of social construction"); Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the* Goldilocks *Dilemma*, 83 IND. L.J. 181, 185-86, 209 (2008) (explaining that the medical model, which is "focus[ed] on the physiological condition of disability," creates paradoxical situations in the legal sphere).

13. Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1401.

14. Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 599 (2004).

15. Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 876 (2004).

16. *See* Areheart, *supra* note 12, at 185-86 (footnotes omitted) (quoting MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS 27 (2003)); *see also* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 401 (2000) ("'Disability' is a condition in which people—because of present, past, or perceived 'impairments'—are viewed as somehow outside of the 'norm' for which society's institutions are designed and therefore are likely to have systematically less opportunity to participate in important areas of public and private life.").

17. *See* SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 10-11 (1998).

18. *See* Areheart, *supra* note 12, at 190-92 (outlining the purpose of the statute and noting that the drafters of the ADA seem to have understood that disability has "sociological dimensions" and that "[t]he ADA was explicitly intended to cover those who had been subjected to a history of unequal *treatment*" on the basis of their disability (citing 42 U.S.C. § 12101(b))); *see also* Eyer, *supra* note 12, at 600 (discussing the ADA Amendment

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disability, "disability is viewed not as a physical or mental impairment, but as a social construction shaped by environmental factors, including physical characteristics built into the environment, cultural attitudes and social behaviors, and the institutionalized rules, procedures, and practices of private entities and public organizations."[19] Doron Dorfman and Rabia Belt write that "[t]he social model of disability distinguishes between an 'impairment,' which is a biological condition, and 'disability,' which is the social meaning given to the impairment."[20]

Treating disability as a social construction helps to emphasize its relational, contingent, fluid, and subjective nature.[21] As Subini Ancy Annamma, David Connor, and Beth Ferri maintain, "all dis/ability categories, whether physical, cognitive, or sensory, are also subjective," which suggests that "societal interpretations of and responses to specific differences from the normed body are what signify a dis/ability."[22] Similarly, as Nirmala Erevelles

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Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101-12213 and 29 U.S.C. §§ 705-706)).

19. Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 214 (2000); *see also* Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1051-52 (2004) ("[P]roponents of the socio-political model of disability view disadvantages encountered by people with disabilities not as the unfortunate result of a defective body, but rather as resulting from an at least inhospitable—if not hostile—environment." (footnote omitted)). Jacobus tenBroek published one of the earliest articulations of the social model of disability in his canonical article *The Right to Live in the World: The Disabled in the Law of Torts*. Stein, *supra* note 14, at 600. According to Michael Ashley Stein, "[t]enBroek argued that disabled people's own physical limitations had far less to do with their ability to participate in society than did 'a variety of considerations related to public attitudes,' many of which were 'quite erroneous and misconceived.'" *Id.* (quoting Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 842 (1966)).

20. Rabia Belt & Doron Dorfman, *Disability, Law, and the Humanities: The Rise of Disability Legal Studies*, *in* THE OXFORD HANDBOOK OF LAW AND HUMANITIES 145, 147 (Simon Stern, Maksymilian Del Mar & Bernadette Meyler eds., 2020).

21. Rabia Belt & Doron Dorfman, Response, *Reweighing Medical Civil Rights*, 72 STAN. L. REV. ONLINE 176, 186-87 (2020) ("A contemporary concept of disability that draws from the 'classic' social model views the term as complex and 'fluid' rather than a dichotomous process of presence or absence. It is multidimensional, dynamic, bio-psycho-social, and interactive in nature. Disability is therefore formulated through a complex interaction between the impairment and the social environment." (footnotes omitted)); Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 90-91 (2000).

22. Subini Ancy Annamma, David Connor & Beth Ferri, *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, 16 RACE ETHNICITY & EDUC. 1, 2-3 (2013); *see also* Areheart, *supra* note 12, at 188-89 ("One upshot of the social model is that the experience of disability is not inherent or inevitable given a particular medical condition; rather, it depends upon the particular social context in which one lives and functions." (emphasis omitted) (footnote omitted)).

explains, disability is "a socially constructed category that derives meaning and social (in)significance from the historical, cultural, political, and economic structures that frame social life."[23] Though the social model of disability recognizes socially constructed categories of difference, it does not reject the obvious existence of corporeal differences among people.[24] Rather, the social model locates the meaning and import of those differences and perceived limitations in societal barriers, attitudes, and responses to disability, not solely in the individual's biological attributes.[25]

A contemporary view of the social model rejects an account of disability that views corporeal differences or impairments as fixed traits that remain static over time and across persons, favoring a view that instead recognizes the fluid, dynamic, interactive nature of disability.[26] A social model of disability recognizes that disability is more than medical diagnoses and biological traits; rather, disability includes social meanings that attach to physical and mental impairment—meanings that are influenced by race, gender, and class.[27] In the policing context, the medical model identifies the basis for a wrongful arrest as occurring (primarily) when physical, visible disabilities, or their medical symptoms, are both perceived and misinterpreted as criminal conduct by police.[28] Unlike the social model, the medical model fails to appreciate how nonapparent or intermittently apparent disabilities[29] can be misinterpreted as or conflated with criminal conduct, particularly when these traits are presented in individuals with psychiatric disabilities or intellectual and

23. Nirmala Erevelles, *Crippin' Jim Crow: Disability, Dis-location, and the School-to-Prison Pipeline*, *in* DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA 81, 85 (Liat Ben-Moshe, Chris Chapman & Allison C. Carey eds., 2014).

24. Emens, *supra* note 13, at 1401 ("The social model does not necessarily reject the idea of biological impairment—in the sense of variations from a value-neutral idea of species-typical or normal functioning—but thinking through the frame of the social model makes it much harder to see limitations caused by those variations as inherent. Even if one accepts some impairments as inherently undesirable, the social model shifts the focus from whatever physical or mental variation an individual might bear, to the ways that the environment renders that variation disabling." (footnote omitted)).

25. *Id.*

26. *See* Belt & Dorfman, *supra* note 21, at 186.

27. LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 28 (2020) ("[A race-ability framework] is also an understanding that antiblack racism is composed of pathologization and dangerousness, which lead to processes of criminalization and disablement, for instance, constructing people as Other or as deranged, crazy, illogical, unfathomable, or scary.").

28. *See infra* Part II.B.1.

29. SAMI SCHALK, BODYMINDS REIMAGINED: (DIS)ABILITY, RACE, AND GENDER IN BLACK WOMEN'S SPECULATIVE FICTION 123 (2018); Margaret Price, *The Bodymind Problem and the Possibilities of Pain*, 30 HYPATIA 268, 272 (2015).

developmental disabilities. The failure to recognize and perceive disabilities makes it easier to perceive non-normative behaviors as criminal, in part due to social meanings, myths, and stereotypes that construct disabled people—particularly those from negatively racialized and historically marginalized groups—as criminals.[30] Similarly, in failure-to-accommodate cases, a medical model provides an individualized account of the arrestee or suspect.[31] It obscures pathways to police violence shaped by historical and contemporary associations between disability and criminalization.[32] A medical model omits the role of ableism throughout history in constructing disabled people, particularly disabled people of color, as deviant, disordered, or risky, and it can work to shape perceptions of disabled people as undeserving or presumptively too threatening to accommodate during police encounters.

This Article demonstrates how the medical model of disability predominates in Title II policing cases. The medical model of disability informs how courts conceive of disability and informs their reasoning and assessments as to whether public entities are liable under Title II. In the Parts that follow, I demonstrate how the medical model of disability predominates in judicial interpretations of disability within Title II cases challenging arrests and how such interpretations limit prospects for relief for disabled plaintiffs.

The predominance of the medical model of disability leads courts to pay insufficient attention to disability as a social construction and to the myriad ways in which conduct by disabled "suspicious persons" and arrestees may be misinterpreted as criminal. Moreover, these cases demonstrate how the ADA has been interpreted—contrary to its celebrated goals of access and societal inclusion—to exclude a class of individuals from civil rights protections by distinguishing those disabled persons who warrant accommodation by law enforcement from those who do not. I maintain that Title II's doctrinal development in the policing context has constructed a class of undeserving disabled people—those persons deemed too disruptive, too threatening, and so forth—and leaves them unprotected from policing and deadly police violence, even in cases in which the alleged threat posed by the disabled people could be mitigated by reasonable modifications. Thirty years after the passage of the ADA, policing remains a principal site for disability-based discrimination and exclusion. Ultimately, the medical model of disability provides one potential reason for this ordering, serving to limit the broad scope of protections available under the ADA that could otherwise be used to push back against disability-based subordination in policing.

30. *See* BEN-MOSHE, *supra* note 27, at 26-28 (discussing racial criminal pathologization); *see also infra* Part I.A.

31. *See infra* Part II.B.2.

32. *See infra* Part I.A.

Examining the policing of disabled people and the limits of Title II liability in the policing context is timely and important. The disproportionate exposure of disabled people to police violence warrants an examination of what Devon Carbado calls "pathways to police violence" and how the law fails to protect disabled people harmed by police violence.[33] Moreover, "transinstitutionalization," which describes the shift of disabled people from psychiatric hospitals to jails and prisons,[34] demonstrates how the carceral state functions as a mechanism of social control vis-à-vis disabled people. By highlighting disability as a lens through which to examine policing and deadly police violence, this Article offers an in-depth analysis of the nature and function of policing, shifting the focus to its social control purposes as it relates to disabled people.[35]

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33. *See generally* Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017) [hereinafter Carbado, *Stopping Black People*]; Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. REV. 1508 (2017).

34. James Gilligan, *The Last Mental Hospital*, 72 PSYCHIATRIC Q. 45, 46 (2001) (defining "trans-institutionalization" as the "transferring [of] the location in which we confine the mentally ill in our society from large, neglected and isolated state hospitals to equally large, neglected, and isolated—but much more violent—state prisons" (emphasis omitted)); *see* Natalie A. Pifer, *Policing the Mentally Ill in Los Angeles on the Frontlines of Transinstitutionalization*, *in* THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 432, 434 (Tamara Rice Lave & Eric J. Miller eds., 2019); Keramet Reiter & Thomas Blair, *Punishing Mental Illness: Trans-institutionalization and Solitary Confinement in the United States*, *in* EXTREME PUNISHMENT: COMPARATIVE STUDIES IN DETENTION, INCARCERATION AND SOLITARY CONFINEMENT 177, 179-83 (Keramet Reiter & Alexa Koenig eds., 2015); Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1784 (2006); Ellen Hochstedler Steury, *Specifying "Criminalization" of the Mentally Disordered Misdemeanant*, 82 J. CRIM. L. & CRIMINOLOGY 334, 338 (1991); *see also* Michael Ollove, *Getting the Mentally Ill Out of Jails*, PEW CHARITABLE TRS.: STATELINE (Apr. 7, 2017), https://perma.cc/79MF-EJDN; THE SENT'G PROJECT, MENTALLY ILL OFFENDERS IN THE CRIMINAL JUSTICE SYSTEM: AN ANALYSIS AND PRESCRIPTION 3 (2002), https://perma.cc/ES95-PJP4. For a substantive critique of criminalization theory, see E. Lea Johnston, *Reconceptualizing Criminal Justice Reform for Offenders with Serious Mental Illness*, 71 FLA. L. REV. 515, 523-36 (2019). While I reject claims that seek to cast the problems of policing and deadly police violence as unintended consequences of deinstitutionalization, it is true that the failure to invest in community mental health, social services, and affordable housing following deinstitutionalization created conditions that led to policing and criminalization of disabled people. *See, e.g.*, *id.* at 535-36 (suggesting that "insufficient [mental-health] treatment has contributed to a population's criminal justice involvement" but noting that this "does not mean that adequate treatment will reduce its overrepresentation").

35. *See generally* BEN-MOSHE, *supra* note 27, at 4 (tracing the history of deinstitutionalization in the United States and critiquing "able-racial-gendered capitalist" constructions of inclusion); Erevelles, *supra* note 23 (discussing the role of disability in sites of incarceration and exclusion).

In Part I, I discuss the medical model of disability in a historical context. I also show how society polices "disability in public" and discuss the predominance of the medical model of disability in law enforcement's responses to non-normative, offensive, disorderly, or disruptive public manifestations of disability. In Part II, I show how the medical model of disability features in court opinions. I also explain how courts have, by relying predominantly on the medical model of disability, limited the potential reach of Title II's protections against disability-based discrimination during the course of an arrest. In Part III, I offer possible doctrinal reforms that would both recognize disability as a social construction and strengthen protections for disabled people in policing cases in a manner consistent with the statutory text and overall purposes of the ADA. Finally, I provide a brief Conclusion.

I. The Medical Model in Historical and Contemporary Context

The medical model is a way of conceptualizing disability. It informs how society views disability—and how it responds to disability. When certain outward manifestations of disability are viewed as social problems, pathologies, dangers, or threats, society will respond to disability with punitive measures, whether by managing disability through aggressive policing or by incapacitating disabled persons in prisons and jails. This response occurs even when those behaviors may directly link to disability. Thus, it is not surprising that the medical model of disability is the dominant framework in Title II ADA cases. The medical model of disability is both the dominant way of thinking about disability in society and, frequently, the default way of thinking about disability in cases in which disability is alleged to have improperly served as the basis for suspicion or arrest. The medical model also appears in cases in which the plaintiff claims not that the arrest is unlawful, but that law enforcement did not accommodate that person's disability during the course of the arrest. In the latter context, the medical model surfaces as a partial justification for why an accommodation during the course of the arrest would be unreasonable and thus not required under Title II. Subpart A aims to link these constructs to a brief history of disability. By providing this brief history, I offer ways to understand the predominance of the medical model in Title II cases, particularly where disability and criminality are in close proximity. In Subpart B, I discuss how the medical model predominates in contemporary law-enforcement responses to disabled people in public spaces.

A. Historical Context

In passing the ADA, Congress acknowledged the long history of segregation and exclusion that characterized societal treatment of disabled people.[36] Beginning in the second half of the nineteenth century, U.S. cultural and social norms shifted the care of disabled people from the purview of local families and local jurisdictions to state-run asylums and large congregate facilities.[37] The story of how the United States shifted from privatized forms of care centered in local communities to holding people with disabilities in large asylums and state-run facilities is complicated, but seismic shifts in American social life offer a partial explanation. As Gerald Grob explains in his account of the treatment and care of people with psychiatric disabilities in the United States, "[t]he dramatic growth in population was accompanied by a proportionate increase in the number of insane persons."[38] Population growth in urban, densely populated areas made people labeled as insane more visible, a phenomenon that raised public-safety concerns while disrupting existing care models that relied on strong social cohesion within neighborhoods.[39] These dramatic social changes shifted norms involving the treatment of people with physical disabilities and persons with what we refer to today as cognitive disabilities. In the same period, state institutions for the "crippled," "feeble-minded," and the "epileptic," along with almshouses for low-to-no-income persons, were formed to house, control, and correct individuals with physical and cognitive disabilities—or those labeled as such.[40]

Social policies aimed at segregating and containing disability developed alongside laws and policies aimed at regulating disabled people in public spaces. Beginning in the early nineteenth century, local municipalities passed a number of laws regulating persons deemed to pose a risk to public health, often with the goal of preserving and promoting the public health. Those targeted for enforcement included not only persons labeled as sick, abnormal, and insane, but also racialized "others"—foreigners and immigrants—depicted as vectors of disease.[41] As William Novak explains, "[a]t the center of public

36. *See* 42 U.S.C. § 12101(a).

37. GERALD N. GROB, THE MAD AMONG US: A HISTORY OF THE CARE OF AMERICA'S MENTALLY ILL 40 (1994); Jefferson D.E. Smith & Steve P. Calandrillo, *Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After* Olmstead v. L.C., 24 HARV. J.L. & PUB. POL'Y 695, 706 (2001) ("Before the proliferation of institutions in the mid-1800s, the care of mentally disabled individuals was left to families, jails, poorhouses, and ad hoc community arrangements.").

38. GROB, *supra* note 37, at 24.

39. *Id.*

40. SUSAN M. SCHWEIK, THE UGLY LAWS: DISABILITY IN PUBLIC 67 (2009).

41. *Id.* at 165-68; WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 216 (1996).

health discourse was a series of dichotomies separating the healthy from the unhealthy, the clean from the unclean, the safe from the dangerous, and the normal from the abnormal."[42] Yet as Novak notes, "[s]uch distinctions were not simply the objective products of science or medicine," but "[a]ll too often, the line between wellness and sickness closely followed established hierarchies of social difference: class, ethnicity, and race."[43]

During the same period, local jurisdictions passed a bevy of laws aimed at preserving order in public and private spaces, from public squares and streets to so-called bawdy and disorderly houses, ridding these places of so-called disorderly and disordered persons, including persons labeled as vagrants, beggars, and panhandlers.[44] Susan Schweik explains that during the late-nineteenth and early twentieth centuries, some municipalities enacted laws that expressly prohibited the public appearance of certain "unsightly" people with disabilities.[45] In some localities, disabled people were subjected to removal and criminal sanction for simply appearing in public with physical disabilities such as blindness, deformities, and other "unsightly" features.[46] Taken together, the so-called ugly laws reflected social policies and practices aimed at containing, regulating, and curtailing the public visibility of physical disability and disfigurement, which connoted social deviance based on medicalized understandings of disability.

In the early twentieth century, scientific racism and social policy reinforced associations between disability and criminality. Eugenicists sought to avoid or minimize the risks of social danger through closely regulating individuals deemed to be morally, physically, and mentally deviant.[47] Most notably, eugenicists promoted social policies that encouraged procreation among favored races while discouraging procreation—through forcible sterilization and institutionalization—of those deemed to have "hereditary defects."[48] Hereditary defects included a mix of physical, mental, material, and moral attributes believed to cause criminality in persons, and eugenicists believed that procreation by persons with such defects would risk an outbreak

42. NOVAK, *supra* note 41, at 216.

43. *Id.*

44. *Id.* at 152-71.

45. SCHWEIK, *supra* note 40, at 1-2, 33.

46. *Id.* at 31-33, 35-36.

47. *See* ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 60-61 (2016).

48. *Id.* at 5; *see also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 369 n.6 (2001) ("The record does show that some States, adopting the tenets of the eugenics movement of the early part of this century, required extreme measures such as sterilization of persons suffering from hereditary mental disease.").

of criminal activity in broader society.[49] As Adam Cohen explains, hereditary defects included so-called "'defective' traits such as epilepsy, criminality, alcoholism, or 'dependency'—another word for poverty."[50] Eugenicists also sought to regulate sexuality and gender, enacting policies aimed at restricting the reproductive capacities of those women labeled as deviant because of their alleged sexual promiscuity.[51] According to Cohen, eugenicists' "greatest target was the 'feebleminded,' a loose designation that included people who were mentally [disabled], women considered to be excessively interested in sex, and various other categories of individuals who offended the middle-class sensibilities of judges and social workers."[52] Those labeled as deviant, dependent, or morally deficient became vulnerable to various forms of institutionalization—in penitentiaries, asylums, institutions for the "feebleminded," almshouses, or poorhouses.[53]

In a cruel feedback loop, eugenics policies brought about ideologies and shaped social norms and policies that in turn justified institutionalization and other forms of exclusion and marginalization.[54] Social policies that segregated disabled people reinforced ideologies that persons with disabilities *should be* segregated in institutions to correct and contain their supposed physical, psychological, and moral deficiencies and abnormalities.[55] Disability itself was conceived of as a social contagion or pathology to be contained through policing and carceral control.[56]

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49. *See* Jonathan Simon, Essay, *"The Criminal Is to Go Free": The Legacy of Eugenic Thought in Contemporary Judicial Realism About American Criminal Justice*, 100 B.U. L. REV. 787, 794, 797-98 (2020); *see also* COHEN, *supra* note 47, at 19.

50. *Id.* at 6.

51. *Id.* at 81.

52. *Id.* at 6.

53. *See* Chris Chapman, Allison C. Carey & Liat Ben-Moshe, *Reconsidering Confinement: Interlocking Locations and Logics of Incarceration*, *in* DISABILITY INCARCERATED, *supra* note 23, at 3, 7-8 ("Although early asylums were intended to provide temporary sanctuary and rehabilitation to those who were first time offenders, recently mad, temporarily impoverished, newly orphaned, and so on, they began housing those with long-term psychiatric disabilities, people serving life sentences, and children becoming adults in poorhouses and orphanages." (citation omitted)).

54. *See* Tennessee v. Lane, 541 U.S. 509, 534 (2004) (Souter, J., concurring) ("Laws compelling sterilization were often accompanied by others indiscriminately requiring institutionalization, and prohibiting certain individuals with disabilities from marrying, from voting, from attending public schools, and even from appearing in public.").

55. *See* PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 15-19 (2008).

56. *See* Martin v. Taft, 222 F. Supp. 2d 940, 965 (S.D. Ohio 2002) ("[M]edical professionals and academics of the time advocated the need to protect society based on their perception that individuals with mental disabilities were more likely to be criminal, immoral, and a menace to society.").

B. Contemporary Law-Enforcement Responses to "Disability in Public"

The medical model predominates in contemporary law-enforcement responses to what Susan Schweik aptly terms "disability in public."[57] When I refer to "disability in public," I am referring to public manifestations of disability—such as appearances and behaviors —along with the social attitudes, norms, social meanings, and aesthetics that attach to those manifestations.[58] In the Subparts below, I discuss two main brands of policing "disability in public": policing in and around hospitals and quality-of-life policing.

1. Policing in and around hospitals

Jeanetta Riley was a thirtysomething, Native American, pregnant mother of four.[59] In the months leading up to her death, Riley had struggled with substance abuse, including addictions to methamphetamine and alcohol.[60] On the day of her death, Riley's husband reported that he drove her to a local hospital in Sandpoint, Idaho, because she sounded delirious and expressed intentions to harm herself and others.[61] When they arrived at the hospital's parking lot, Riley reportedly lifted a three-and-a-half-inch fillet blade from underneath the car seat, which prompted Riley's husband to run into the hospital for help.[62] A staff member reported that Riley's husband told her to call the police and that his wife had a knife and was threatening to harm people.[63] When police arrived, Riley was sitting in her car with a half-empty bottle of vodka, holding the knife.[64] Video footage of the incident shows that after arriving, officers drew their weapons and moved towards Riley's vehicle.[65] Riley then walked in the officers' direction and did not respond to

57. *See generally* SCHWEIK, *supra* note 40 (discussing the regulation of low-income disabled people in public).

58. *See* Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 945 (2019) (noting that law enforcement and civilians may "perceive people with particular markers or engaged in non-normative behaviors to be engaged in 'suspicious,' potentially criminal behavior").

59. Stephanie Woodard, *The Police Killings No One Is Talking About: A Special Investigation*, IN THESE TIMES (Oct. 17, 2016), https://perma.cc/S89E-D2S7.

60. Cameron Rasmusson, *The Death of Jeanetta Riley: What Went Wrong and How Can We Do Better?*, SANDPOINT READER (June 24, 2015), https://perma.cc/465W-36R3.

61. Paul Lewis, *A Tale of Two Killings: What Happened When Idaho Police Shot a Dog and a Pregnant Woman in One Day*, GUARDIAN (Apr. 3, 2015, 8:17 AM EDT), https://perma.cc/TF98-BWX7.

62. *Id.*

63. *Id.*

64. *Id.*

65. *See* Sandpoint Police, *Idaho Police Shoot Pregnant Woman, in 15 Seconds, with an AR-15 Rifle—Video*, GUARDIAN (Apr. 3, 2015, 7:16 AM EDT), https://perma.cc/Y6HM-WMTE.

police orders to drop the knife. Seconds later, officers shot Riley; she was hit four times, and later died.[66]

Riley's death at the hands of police demonstrates the danger involved in law-enforcement responses to mental crises. "Welfare checks," also known as "wellness checks," are often prompted by calls from concerned relatives and friends, yet they also often result in people with psychiatric disabilities being killed by law enforcement rather than receiving access to treatment, care, and support.[67] Decades-long failures to invest in community-based mental-health treatment have rendered disabled people particularly vulnerable to criminalization in private and public spaces and even in the places charged with providing medical and mental-health care.[68] Many unsheltered people are also dealing with disabilities.[69] As a result, they are rendered vulnerable to arrests through the policing of so-called quality-of-life offenses that target not only signs of physical and social disorder but also people deemed disorderly.[70] A full discussion of the myriad ways disabled people are rendered vulnerable to policing is beyond the scope of this Article. Instead, I focus here on the policing and overcriminalization of disabled people in and around places of care—including medical and mental-health hospitals, clinics, and nursing homes.

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66. Lewis, *supra* note 61.

67. *See, e.g.*, Shaun King, *If You Are Black and in a Mental Health Crisis, 911 Can Be a Death Sentence*, INTERCEPT: VOICES (Sept. 29, 2019, 5:00 AM), https://perma.cc/76HR-U2KX; Sigal Samuel, *Calling the Cops on Someone with Mental Illness Can Go Terribly Wrong. Here's a Better Idea*, VOX: FUTURE PERFECT (updated June 15, 2020, 12:10 PM EDT), https://perma.cc/2VN8-T38J; Jake Pearson, *Actors, Mentally Ill Aid NYC Police Training Meant to Calm*, ASSOCIATED PRESS (Sept. 13, 2015), https://perma.cc/869F-DG4G (noting that police "received more than 130,000 so-called 'emotionally disturbed person' calls [in 2014], about 23,000 more than in 2011").

68. *See, e.g.*, DISABILITY RTS. OR., *supra* note 6, at 6-9; Heidi Schultheis, *Lack of Housing and Mental Health Disabilities Exacerbate One Another*, CTR. FOR AM. PROGRESS (Nov. 20, 2018, 9:01 AM), https://perma.cc/3LQS-8W4B.

69. *See, e.g.*, *Mental Health by the Numbers*, NAT'L ALL. ON MENTAL ILLNESS, https://perma.cc/9KZU-K4EK (last updated Mar. 2021) ("20.5% of people experiencing homelessness in the U.S. have a serious mental health condition."); Angela Lemus-Mogrovejo, *Homelessness Is a Disability Justice Issue*, ROOTED IN RTS. (Oct. 9, 2018), https://perma.cc/GEZ5-TTJW; *Chronically Homeless*, NAT'L ALL. TO END HOMELESSNESS, https://perma.cc/8RXK-ZLYV (last updated Mar. 2021).

70. *See, e.g.*, C.R. DIV., U.S. DEP'T OF JUSTICE & DIST. OF N.J., U.S. ATT'Y'S OFF., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 21 n.20 (2014), https://perma.cc/L9FA-J8BX ("Community members and groups also raised concerns that the [Newark Police Department (NPD)] inappropriately uses Quality of Life citations to target people with mental illness, people with disabilities, and seniors. . . . [M]embers of the NPD command staff lacked a sufficient understanding and sophistication about issues related to mental illness and disabilities, highlighting the need for training on these issues."). *See generally* Morgan, *supra* note 6 (discussing quality-of-life policing of disabled people).

Some data show that individuals with disabilities are vulnerable to citation, arrest, and even prosecution for behaviors that occur within and around hospitals, clinics, and other treatment sites. For instance, in 2019, an investigative report in the *Anchorage Daily News* found that, as of November 14, 2019, police had been called to the Alaska Psychiatric Institute 144 times in that year alone; the facility housed fewer than fifty patients.[71] Court records from that year showed that dozens of patients were criminally charged with a range of offenses, including harassment and assault.[72]

Although patient-on-staff and patient-on-patient assault make for sensational media headlines,[73] violent behaviors do not always serve as the basis for arrest.[74] Indeed, they may not even constitute the majority of arrests.[75] For example, in 2019, Disability Rights Oregon surveyed arrest records in which the primary offense was trespass in emergency departments and found that only 26% of the police reports reviewed involved facts suggesting the person may have been acting violently or threateningly.[76] Troublingly, in almost a third of the cases surveyed, the individual arrested was in a state of mental distress. Thirty percent of the police reports indicated that the arrestee had a "mental health related concern" and that the majority of the individuals with mental-health concerns (32 out of 42) were in the process of obtaining medical care or had been "discharged from care immediately prior to their arrest."[77] Of the total arrested, 94% ended up in jail.[78] In another study,

71. Michelle Theriault Boots, *Dozens of Patients at Alaska's Only State-Run Psychiatric Hospital Have Been Arrested This Year for Assaults Inside the Facility. Is There a Better Way for Authorities to React?*, ANCHORAGE DAILY NEWS (updated Dec. 14, 2019), https://perma.cc/FHU4-E8CH.

72. *Id.*

73. *See, e.g.*, James Fanelli, *NYC Psych Ward Worker Who Was Attacked by Patient Says She Can't Bear Idea of Returning to Job as Violent Residents Go Unpunished*, N.Y. DAILY NEWS (June 14, 2017, 4:00 AM), https://perma.cc/T5LV-FZ6Z.

74. ROBERT BERNSTEIN, IRA BURNIM & MARK J. MURPHY, JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH L., DIVERSION, NOT DISCRIMINATION: HOW IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT CAN HELP REDUCE THE NUMBER OF PEOPLE WITH MENTAL ILLNESS IN JAILS 8 (2017), https://perma.cc/RY93-S4U4 ("Most people with mental illness who are incarcerated in the nation's jails are charged with less serious offenses. This may include off-putting behaviors associated with untreated mental illness, such as disorderly conduct, 'crimes of survival' while homeless, offenses associated with co-occurring substance use, or administrative offenses (such as failing to appear for a hearing or technically violating probation or parole).").

75. *See id.*

76. DISABILITY RTS. OR., *supra* note 6, at 13-15.

77. *Id.* at 15.

78. *Id.* at 16.

researchers found that 21% of encounters between nonspecialized police and individuals with an apparent mental disability ended in arrest.[79]

This mental-distress-to-arrest pipeline is exacerbated by a lack of adequate community-based, nonemergency healthcare services. According to the National Alliance on Mental Illness, individuals with mental illnesses and substance-use dependencies made up about one out of every eight emergency department visits by a U.S. adult in 2007—an estimated 12 million visits total.[80] Disability Rights Oregon emphasized the connection between lack of healthcare, frequent emergency-room visits, and frequent arrests for "low-level behavioral health-related charges."[81] Its claim is supported by a 2019 Council of State Governments study that found that Oregon residents with state health insurance who had "frequent criminal justice involvement" were 150% more likely than other state health-insurance recipients to have visited an emergency department.[82] These reports demonstrate how instead of receiving treatment, individuals with disabilities are arrested and tracked into the criminal legal system. Enforcement policies and practices—for example, hospital "no-tolerance" policies or practices that encourage staff to summon law enforcement to respond to reports of assault, which can include low-level misdemeanors[83]—are pathways to arrest for disabled people even when healthcare is sought.

Medical and mental-health facilities serve patients with serious and complex injuries and conditions that warrant close attention and care. Given these realities, medical professionals reasonably work to maintain hospital environments that are as calm, quiet, and orderly as possible in order to deliver timely, efficient, and effective medical and mental-health services. Yet problems arise when medical and mental-health facilities choose criminal law enforcement as a way of maintaining such environments. Several states have laws that provide security forces stationed in hospitals with legal authority to make arrests in their efforts to maintain order and security.[84] News reports

79. H. Richard Lamb, Linda E. Weinberger & Walter J. DeCuir Jr., *The Police and Mental Health*, 53 PSYCHIATRIC SERVS. 1266, 1268 (2002).

80. *Mental Health by the Numbers*, *supra* note 69.

81. DISABILITY RTS. OR., *supra* note 6, at 3; *see, e.g.*, Dotson v. Bexar Cnty. Hosp. Dist., No. 19-cv-00083, 2019 WL 6311375, at *1 (W.D. Tex. Nov. 25, 2019) (noting that the plaintiff had a "decades-long history of mental illness," a history of numerous visits to the San Antonio State Hospital, and a history with the San Antonio Police Department, including multiple "emergency mental health detentions" and an arrest for trespass).

82. STEVE ALLEN & GRACE CALL, JUST. CTR., COUNCIL OF STATE GOV'TS, BEHAVIORAL HEALTH JUSTICE REINVESTMENT IN OREGON: PRESENTATION TO THE SENATE AND HOUSE COMMITTEES ON JUDICIARY 5 (2019), https://perma.cc/QL4R-JWCT.

83. *See* Boots, *supra* note 71.

84. *See, e.g.*, ALA. CODE §§ 11-47-22, 22-50-21 (2021); CAL. WELF. & INST. CODE §§ 4313, 4493 (West 2021).

and cases contain numerous accounts of order-maintenance laws—including nuisance, disorderly conduct, loitering, public-intoxication, and criminal-trespass laws—being deployed in medical and mental-health facilities.[85] Investigative reporting into the private police force at the renowned Cleveland Clinic, for example, revealed disparities in policing around the hospital's facilities.[86] Courts, too, have recognized that hospitals in particular are highly sensitive areas and have deferred to public and private entities that find it appropriate to closely regulate these spaces with criminal law enforcement.[87]

That aggressive order-maintenance enforcement policies disproportionately target disabled persons—often unsheltered and low-income persons in need of care and with no place to go—is apparent in calls from hospital staff asking law enforcement to remove so-called unwanted persons.[88] In one case, police officers in Portland, Oregon, arrested a woman wandering in the waiting area of the Legacy Good Samaritan Hospital.[89] Officers arrived at the scene around midnight. When they arrived, hospital staff informed them that there was "an unwanted woman" with no medical need who refused to leave the waiting area. Yet the police report describing the incident noted that the woman was seventy-six years old, "partially blind, experiencing pain due to 'lingering injuries' sustained during an assault at a homeless shelter, hardly able to walk, and 'most likely suffering from the onset of Dementia.'"[90] After attempts to obtain help from Adult Protective Services and to engage mental-health

85. *See, e.g.*, Commonwealth v. Accime, 68 N.E.3d 1153, 1154-55 (Mass. 2017); State v. Crumal, 659 P.2d 977, 978 (Or. Ct. App. 1983); Maxine Bernstein, *Report: Hospital Calls About "Unwanted" People Trespassing Leads to Jail, Criminalizing Mental Illness*, OREGONIAN (updated June 18, 2019), https://perma.cc/RJ7E-R5S7.

86. David Armstrong, *The Startling Reach and Disparate Impact of Cleveland Clinic's Private Police Force*, PROPUBLICA (Sept. 28, 2020, 5:00 AM EDT), https://perma.cc/NE9F-BDHB.

87. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 470-71 (1980) ("In sum, 'no mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes, wherein they can escape the hurly-burly of the outside business and political world, or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals.'" (quoting Gregory v. Chicago, 394 U.S. 111, 118 (1969) (Black, J., concurring))); United States v. Agront, 773 F.3d 192, 196-76 (9th Cir. 2014); *cf.* Radford v. State, 627 N.E.2d 1331, 1334 (Ind. Ct. App.) (Staton, J., dissenting) (discussing the defendant's "abusive and harmful speech" as invading the right of hospital patients to a quiet and peaceful environment), *aff'd on reh'g*, 640 N.E.2d 90 (Ind. Ct. App. 1994).

88. *Cf.* Rael Jean Isaac & D.J. Jaffe, *Toward Rational Commitment Laws: Committed to Help*, MENTAL ILLNESS POL'Y ORG. (Jan. 29, 1996), https://perma.cc/F6WV-VVJ6 (discussing so-called "mercy bookings," in which police will "charg[e] individuals with small crimes just to get them intojail [sic] and treatment" (quoting researcher Fuller Torrey)).

89. DISABILITY RTS. OR., *supra* note 6, at 4.

90. *Id.*

professionals had failed, police arrested the woman and booked her in the Multnomah County jail.[91]

In another case, police arrested Susan Kiscoan at a local hospital in Omaha, Nebraska, when she refused to leave the facility.[92] Kiscoan had been diagnosed with Addison's disease, an adrenal disease, and had walked to the Omaha airport in search of medical assistance. Paramedics tended to Kiscoan and, noticing that she appeared dehydrated, a symptom of Addison's disease, transported her to the hospital for further treatment.[93] When the paramedics arrived at the hospital, they notified the emergency room staff of Kiscoan's possible mental illness.[94] Yet mental-health services were not provided. After Kiscoan refused treatment and refused to leave the premises, emergency room staff called the Omaha Police Department. Police arrested Kiscoan for trespassing and booked her at the Douglas County Correctional Center.[95] She died fourteen days later while in the custody of the correctional center at the age of forty-five.[96]

Frequently, persons who are arrested for violating order-maintenance laws are seeking treatment for diagnoses or conditions that may contribute to the alleged criminal conduct that serves as the basis for arrest.[97] Law-enforcement policies target the places where people seek mental care, and the result is the criminalization of conduct linked to the condition for which individuals are seeking care. At least one court has recognized this irony. Richie Accime was arrested for disorderly conduct after he was admitted as a patient in the psychiatric unit of the emergency department in a Boston-area hospital.[98] After Accime was informed that he would be held against his will for two or three days, Accime allegedly started to yell and resisted forcible medication by medical staff.[99] Officers dispatched to the scene reported that

91. *Id.*

92. Duggin v. City of Omaha, No. 19-cv-453, 2020 WL 406361, at *1, *5 (D. Neb. Jan. 24, 2020) (denying a motion to dismiss plaintiffs' claim that the City of Omaha "failed to train its employees to handle situations involving mentally ill persons").

93. *Id.* at *1; *Addison's Disease*, MAYO CLINIC, https://perma.cc/6LQA-F23Q (last updated Nov. 24, 2020).

94. *Duggin*, 2020 WL 406361, at *1.

95. *Id.*

96. Todd Cooper, *In Jail for Trespassing, Mentally Ill Omaha Woman Never Made It Out*, OMAHA WORLD-HERALD (Oct. 7, 2018), https://perma.cc/5KRZ-U4PH. A state grand jury was convened to investigate Kiscoan's in-custody death. *Id.*

97. *See, e.g.*, Commonwealth v. Accime, 68 N.E.3d 1153, 1154 (Mass. 2017) (detailing the arrest of a patient in psychiatric care); DISABILITY RTS. OR., *supra* note 6, at 14-15.

98. *Accime*, 68 N.E.3d at 1154.

99. *Id.* at 1155.

Accime became aggressive and threatened to assault them.[100] When Accime refused to comply with officers' commands to desist, the several officers sprayed Accime with pepper spray.[101] The Supreme Judicial Court, Massachusetts's highest court, later overturned Accime's conviction for disorderly conduct. The court emphasized that Accime's actions to avoid detention and forcible medication "would seem to be the kind of disruption a psychiatric area in the hospital's emergency department is designed to absorb."[102] "To decide otherwise," the court stated, "risks criminalizing mental illness in the very treatment centers where help must be available."[103]

The facts of *Commonwealth v. Accime* also highlight a common pathway to arrests for individuals with psychiatric disabilities or in psychiatric crises: civil commitment.[104] Civil-commitment processes may be voluntary (as when the individual in a psychiatric crisis voluntarily seeks treatment and hospitalization) or involuntary (when the person does not). According to a report by the Treatment Advocacy Center, "[a]n estimated 1 in 3 individuals transported to hospital emergency rooms in psychiatric crisis are taken there by police."[105] For involuntary admissions, police officers may be dispatched to take a person experiencing psychiatric crisis into custody for further assessment and possibly emergency hospitalization.[106] When civil-commitment procedures involve law enforcement, they can risk subjecting persons in psychiatric crisis to criminalization and create pathways to police violence.

Some may argue that the medical model of disability—that is, disability as an innate, biological, or psychological trait to be cured or rehabilitated—is

100. *Id.*

101. *Id.* at 1155-56.

102. *Id.* at 1159-61 ("[C]riminal charges of disorderly conduct in the context of mental health treatment in the emergency department of a large urban hospital, although not per se unavailable, should be rare.").

103. *Id.* at 1160. The court distinguished this case from a case where a defendant assaults hospital staff or "intentionally or recklessly cause[s] a substantial disruption to other patients or hospital operations." *Id.*

104. *See* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM: HISTORICAL TRENDS AND PRINCIPLES FOR LAW AND PRACTICE 1 (2019), https://perma.cc/P83E-YTZE (defining and describing involuntary civil commitment).

105. DORIS A. FULLER, H. RICHARD LAMB, MICHAEL BIASOTTI & JOHN SNOOK, OFF. OF RSCH. & PUB. AFFS., TREATMENT ADVOC. CTR., OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS 1 (2015), https://perma.cc/JKV8-C9FQ.

106. *See, e.g.*, NAT'L ALL. ON MENTAL ILLNESS VA., GUIDE TO PSYCHIATRIC CRISIS AND CIVIL COMMITMENT PROCESS IN VIRGINIA 3 (2016), https://perma.cc/Z2SD-V7PN (describing the role of police in situations where a person is in psychiatric crisis but refusing treatment).

more common (if not understandable) in situations in which a person is attempting to access medical treatment. Of course, rejecting a medical model of disability does not mean rejecting the individual's decision to seek medical treatment,[107] or the obvious existence of "corporeal differences among humans."[108] Rather, I maintain that rejecting the medical model requires rejecting a view of disability focused on curing, controlling, or containing individuals in mental crisis—those with minds labeled as non-normative, deviant, disordered, or pathological. These constructs of disability can justify pathways to medical coercive treatment.

2. Public safety and disability policing

Zero-tolerance enforcement policies and practices aimed at maintaining order or even promoting public safety do not just target persons engaged in allegedly disruptive conduct, some of whom may be disabled. These policies and reliance on law enforcement to manage disruptive persons on hospital grounds are also touted as necessary to protect staff from harm.[109] Protecting staff from harm is a valid concern, and I do not intend to diminish the importance of protecting healthcare providers from actual physical harm. But I challenge the overuse of criminal sanctions to arrest individuals for order-maintenance offenses where that risk is de minimis, speculative, or abstract, because zero-tolerance enforcement policies and practices risk criminalizing and punishing disability-related behaviors.

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107. There is a tension between resisting medicalization (and its connection with pathologization) and the desire of some to access medical care and treatment. This tension is particularly strong for disabled people of color, given disparities in access to healthcare. As Liat Ben-Moshe notes:

> The desire to depathologize dis/ability from notions of deficiency, which is at the core of a critical disability studies stance, gets complicated when an intersectional analysis taking account of race, gender, sexuality, class, and other constructs is being introduced. It is important to highlight the tension between the desire to untangle disability from medicalization and diagnostic categories and reclaim it as an identity and culture—and the ability (and sometimes desire) to even become a subject under the medical gaze. . . . [F]or many people of color or those who have no access to quality medical care, not being diagnosed is due less to viewing disability as a source of pride or as a fluid state and more to disparities in service provision and the ability to access doctors and medical services, such as therapy, medication, and early detection, because of inequalities based on class, color, language, or geographical barriers.

See BEN-MOSHE, *supra* note 27, at 29.

108. *See* Annamma et al., *supra* note 22, at 10.

109. *See, e.g.*, Mallory Moench, *Defund the Police? Debate Rages at SF General Hospital over Use of Sheriff's Deputies*, S.F. CHRON. (updated Aug. 8, 2020, 2:16 PM), https://perma.cc/UN2X-D789; Jennifer Tsai, *Get Armed Police Out of Emergency Rooms*, SCI. AM. (July 14, 2020), https://perma.cc/6XN2-RR5F.

In one case, security-camera footage showed one hospital security guard tackling sixteen-year-old Hayden Long to the ground when his mother asked the guards to help Long into the emergency room.[110] Guards then tased Long.[111] Minutes later, four North Carolina sheriff's deputies arrived, and after Long spat at one officer, that officer then punched Long twice while the other officers attempted to pin him to the ground.[112] Following the incident, prosecutors charged Long with felony malicious conduct (and two lesser charges) for allegedly spitting in an officer's face *after* he had already been tackled and tased.[113] Long later pled guilty to two misdemeanor charges: assault and underage drinking.[114] When asked by local reporters about her son's pleas, Long's mother stated that pleading guilty to the lesser charges was "just the easiest and the safest route to take" given the felony charge he would face if he were to go to trial as an adult.[115]

Then there are cases where efforts to promote public safety create conditions whereby disability itself provides a justification for criminalization, which in turn provides a justification for use of force (if not deadly force) and any failures to accommodate.[116] In these cases, disability may be criminalized explicitly, particularly when it is present in the bodies of negatively racialized persons and individuals with marginalized genders.[117] Social responses to

110. *Dramatic Hospital Video Shows Officers Tackle, Tase and Punch Teenager*, CBS NEWS (Feb. 17, 2020, 9:54 AM), https://perma.cc/H56Z-GS45.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Teen Who Was Violently Arrested During Mental Health "Crisis" Strikes Plea Deal*, CBS NEWS (Feb. 18, 2020, 7:37 AM), https://perma.cc/E2JV-H453.

115. *Id.*

116. *See, e.g.*, Edgar Sandoval, *Daniel Prude Was in "Mental Distress." Police Treated Him Like a Suspect.*, N.Y. TIMES (updated Apr. 16, 2021), https://perma.cc/NPW2-BCDZ (describing how the police officers arresting Daniel Prude, a Black man with mental disabilities who later died from asphyxia incurred during the arrest, knew that Prude was acting "in a fashion consistent with an individual in some form of mental distress" (quoting a police lieutenant on the scene)); Michael Wilson & Edgar Sandoval, *Documents Reveal How the Police Kept Daniel Prude's Death Quiet*, N.Y. TIMES (updated Oct. 8, 2020), https://perma.cc/H4A6-G2ZR (noting that the police report written by the officers who arrested Prude included the notation "[m]ake him a suspect"); *see also* Press Release, Disability Rts. Wis., DRW Condemns Use of Restraints on Jacob Blake (Aug. 28, 2020), https://perma.cc/E2UK-LNRH (arguing that the Kenosha Sheriff's Department policy to restrain all detainees did not justify shackling Jacob Blake to his hospital bed and denying him reasonable accommodations for his spinal-cord injury); *cf.* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 35, 50-56 (reprt. 2019) (demonstrating how crime statistics were deployed to "wr[i]te crime into race" or construct Black people as criminal).

117. *See generally* ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR 88-94 (2017) (discussing policing and criminalization

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disability construct certain disabilities, and disabilities in certain bodies, as threatening and dangerous. Thus, it is not surprising when law enforcement responds with force, and even excessive force, to subdue the perceived threat or danger. Such responses reinforce racist and ableist notions of disability—actual or not—in justifying the use of force, serving to locate the *social* problem of police violence in the diseased, defective, or deviant bodies and minds of disabled people and, in particular, Black or Indigenous disabled people and other disabled people of color.[118] As Camille Nelson explains, "[r]ace and disability morph into one another to construct the perfect criminal who is perceived as requiring the use of disciplinary force and punishment."[119] Moreover, trans or gender-nonconforming racialized people with disabilities are at particularly heightened risk of policing and police violence.[120] This is in part because the perceived threats posed by their disabilities are co-constituted with the perceived threats posed by their apparent racial and gender identities.[121] In this way, police function not only to identify or respond to what dominant culture determines is criminal but also to reproduce social hierarchies that subjugate bodies along disability, race, gender, and class dimensions, resulting in persons with disabilities being exposed to physical force, violence, and premature death.[122]

That people with disabilities—particularly disabled people of color—are vulnerable to policing and deadly police violence should not be taken to mean that their disabilities were the primary cause of the resulting injuries or deaths. For example, recent mass protests against police violence and private violence targeting Black people have once again featured calls for justice for Black people with disabilities, even where their disabilities served as a justification for force or an explanation for their death. The preliminary autopsy report for George Floyd concluded that his death was due to a preexisting heart condition, a finding that critics noted minimized Officer Derek Chauvin's role

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at the intersection of gender, race, and disability); Jyoti Nanda, *The Construction and Criminalization of Disability in School Incarceration*, 9 COLUM. J. RACE & L. 265, 271-72 (2019) (describing "the criminalization of some children, largely Black and Latinx, through the construct of disability").

118. India Thusi makes a similar claim about the social problem of police violence in her discussion of the policing of sex workers in South Africa. I. India Thusi, *On Beauty and Policing*, 114 NW. U. L. REV. 1335, 1397 (2020). Thusi explains how the discourse of beauty and aesthetics provided a justification for "qualitatively different types of police interactions based on where sex workers stood on the social hierarchy." *Id.* at 1398.

119. Camille A. Nelson, *Frontlines: Policing at the Nexus of Race and Mental Health*, 43 FORDHAM URB. L.J. 615, 618 (2016).

120. RITCHIE, *supra* note 117, at 93-94.

121. *Id.*

122. *See* Nelson, *supra* note 119, at 618-19.

in killing Floyd by kneeling on his neck for nearly nine minutes.[123] Here, medicalization serves both to limit liability and, as discussed above, to locate the problem of police violence in the bodies of its negatively racialized victims—whether Black people, Indigenous people, or people of color.

I have attempted to show how the medical model of disability is situated in a historical and contemporary context. The medical model's predominance in Title II ADA cases should be read in that context. This Article does not offer a theory as to why the medical model predominates, but history suggests that medicalization and its link with institutionalization, criminalization, and incarceration may offer a partial explanation for the medical model's dominance. One primary—though of course not the only—way of responding to disability has been through these systems of coercive social control.[124] In order to justify these forms of coercive social control, disabilities were not only medicalized but also pathologized.[125] Medicalization provides pathways to criminalization in part because it positions disability as a problem to be cured—through medication, treatment, therapy, and containment.[126]

In the Parts below, I offer reasons why it matters that courts are examining the problems of policing and policing's impact on disabled people based on a medical model of disability. The medical model is an unduly narrow understanding of disability, and it also narrows legal liability, excluding certain disabled people from coverage who would likely be entitled to it under a social model of disability—the model embodied in the ADA itself.

II. Federal Disability Law and the Limits of the Medical Model in Challenges to Policing

In this Part, I argue that existing theories of liability under Title II incorporate a medical model of disability. I then demonstrate how the medical model informs ongoing disputes in case law about whether and how the ADA applies to arrests, limiting relief for plaintiffs under Title II. The Part concludes

123. Ian Millhiser, *New Autopsy Finds George Floyd Died of Asphyxiation, Conflicting with Official Report*, VOX (June 1, 2020, 5:07 PM EDT), https://perma.cc/PPS3-7CUP. *But see* Maggie Koerth, *The Two Autopsies of George Floyd Aren't as Different as They Seem*, FIVETHIRTYEIGHT (June 8, 2020, 12:54 PM), https://perma.cc/B7QT-3RB7.

124. Other ways of responding to disability include the charity model, also referred to as the pity model. Eli Clare, *Stolen Bodies, Reclaimed Bodies: Disability and Queerness*, 13 PUB. CULTURE 359, 359-60 (2001); *see also Models of Disability: An Overview*, MOBILITY INT'L USA, https://perma.cc/PUT4-UC7Y (archived Apr. 28, 2021) (comparing the charity, medical, and social and human rights models).

125. *See* Belt & Dorfman, *supra* note 21, at 183.

126. *Cf. id.* at 185 (discussing how disability can result in social alienation such as "deportation, barriers to immigration entry, loss of child custody, institutionalization, committal, forced medication, and sterilization" (footnotes omitted)).

by explaining how incorporating a social model of disability in Title II arrest cases is consistent with the ADA and may be used to better protect disabled people from policing and police violence.

A. Disability Law and Policing: The Statutory Framework

In policing cases alleging disability discrimination by police officers and police departments, claims under the Rehabilitation Act of 1973[127] tend to accompany ADA claims.[128] Congress passed the Rehabilitation Act to protect disabled people from discrimination in federal programs and other programs receiving federal funding, such as those administered by state and local governments.[129] It served as an important precursor to the ADA, providing a "regulatory foundation" and "enabl[ing] the ADA to withstand Congressional scrutiny."[130] The ADA states that the related federal regulations, which implement the statute's requirements, do not apply a "lesser standard" than the protections under the Rehabilitation Act.[131] In other words, protections under the ADA must be at least as comprehensive as those that protect disabled people under the Rehabilitation Act.[132] Because the Rehabilitation Act and ADA standards are largely coextensive, I focus here on the ADA.

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127. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-796*l*).

128. *See, e.g.*, Young v. Sunbury Police Dep't, 160 F. Supp. 3d 802, 805 (M.D. Pa. 2016).

129. The Rehabilitation Act provides that:

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a).

130. Marca Bristo & Gerben DeJong, *Foreword, July 26, 1997* to NAT'L COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT, at xv, xvii (reprt. 2010) (1997), https://perma.cc/NP4W-345B.

131. 42 U.S.C. § 12201(a) ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title.").

132. *See* Elaine Gardner, *The Legal Rights of Inmates with Physical Disabilities*, 14 ST. LOUIS U. PUB. L. REV. 175, 192 (1994) ("Because Title II of the ADA essentially extends the antidiscrimination prohibition embodied in Section 504 [of the Rehabilitation Act of 1973] to all actions of State and local governments, the standards adopted in this part are generally the same as those required under Section 504 for federally assisted programs." (quoting Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 35,694, 35,696 (July 26, 1991) (codified at 28 C.F.R. pt. 35))).

Congress enacted the ADA after "conclud[ing] that there was a 'compelling need' for a 'clear and comprehensive national mandate' to both eliminate discrimination *and* to integrate disabled individuals into the social mainstream of American life."[133] The ADA defines disability as (1) "a physical or mental impairment that substantially limits one or more major life activities of such individual," (2) "a record of such an impairment," or (3) "being regarded as having such an impairment."[134] In response to a string of Supreme Court decisions that narrowly construed the definition of disability under the ADA,[135] Congress passed the ADA Amendments Act of 2008 (ADAAA), reaffirming congressional commitment to expansive protections for people with disabilities.[136] In passing the ADAAA, Congress made clear that the definition of disability "shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter."[137]

"Title II of the ADA commands that 'no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.'"[138] Public entities have an affirmative duty under Title II to make "'reasonable modifications'" to policies, practices, or procedures where necessary to avoid discrimination on the basis of disability, but only where doing so "would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service."[139] Furthermore, public entities are not required to provide accommodations to individuals that pose a

133. Nat'l Fed'n of the Blind v. Lamone, 813 F.3d 494, 505-06 (4th Cir. 2016) (quoting PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001)).

134. 42 U.S.C. § 12102(1).

135. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 487 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 525 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565-66 (1999); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002). All of these cases were superseded by the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 29 and 42 U.S.C.).

136. ADAAA, § 2(a)(4)-(b)(5), 122 Stat. at 3553-54 (codified at 42 U.S.C. § 12101 note).

137. 42 U.S.C. § 12102(4)(A); *see also id.* § 12102(4)(E)(i) ("The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures . . . ."); *id.* § 12102(3)(A) ("An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.").

138. City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1772 (2015) (quoting 42 U.S.C. § 12132).

139. Tennessee v. Lane, 541 U.S. 509, 531-32 (2004) (quoting 42 U.S.C. § 12131(2)); *see also* 28 C.F.R. § 35.130(b)(7) (2020).

direct threat.[140] Regulations define "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services."[141]

The Supreme Court has not decided whether Title II applies to arrests,[142] and federal courts of appeals are split as to whether and how Title II applies to arrests.[143] When courts of appeals have held that Title II applies to arrests, they

140. 28 C.F.R. § 35.139(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."). The direct-threat defense does not appear often in Title II policing cases, although the argument was raised by the defendants in *Sheehan* in their briefs to the Supreme Court. Reply Brief at 3-9, *Sheehan*, 135 S. Ct. 1765 (No. 13-1412), 2015 WL 1138422 (arguing that when the officers forced entry into Sheehan's room, they reasonably believed she posed a significant risk because of her use of threatening language and her alleged advancement toward them with a knife).

141. 28 C.F.R. § 35.104.

142. *Sheehan*, 135 S. Ct. at 1773 (declining to decide whether Title II applies to arrests because all parties had accepted that it does in their briefing); *see also* Petition for Writ of Certiorari at i, City of Newport Beach v. Vos, 139 S. Ct. 2613 (2019) (mem.) (No. 18-672), 2018 WL 6169241 (stating that the first question presented is whether Title II requires reasonable accommodations for persons being brought into custody); *Vos*, 139 S. Ct. at 2613 (denying certiorari).

143. *See* King v. Hendricks Cnty. Comm'rs, 954 F.3d 981, 989 (7th Cir. 2020) ("[W]e may assume without deciding that Title II applies to the officers' interaction with Bradley."); Gray v. Cummings, 917 F.3d 1, 17 (1st Cir. 2019) ("For present purposes, it is sufficient for us to assume, favorably to Gray, that Title II of the ADA applies to ad hoc police encounters (such as the encounter here) and that exigent circumstances may shed light on the reasonableness of an officer's actions."); Haberle v. Troxell, 885 F.3d 170, 180 (3d Cir. 2018) ("[P]olice officers may violate the ADA when making an arrest by failing to provide reasonable accommodations for a qualified arrestee's disability, thus subjecting him to discrimination."); Gohier v. Enright, 186 F.3d 1216, 1221 (10th Cir. 1999) ("This court need not decide whether this case is better analyzed under a wrongful-arrest or reasonable-accommodation-during-arrest theory. . . . [T]he first does not apply to the facts of this case, and Gohier has expressly declined to invoke the second. Accordingly, this court merely clarifies that a broad rule categorically excluding arrests from the scope of Title II . . . is not the law."); Roell v. Hamilton County, 870 F.3d 471, 489 (6th Cir. 2017) (declining to decide whether Title II applies in the context of arrests); Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014) ("[T]he ADA . . . applies to arrests, though we agree with the Eleventh and Fourth Circuits that exigent circumstances inform the reasonableness analysis under the ADA, just as they inform the distinct reasonableness analysis under the Fourth Amendment."), *cert. dismissed in part, rev'd in part*, 135 S. Ct. 1765 (2015); Seremeth v. Bd. of Cnty. Comm'rs, 673 F.3d 333, 338 (4th Cir. 2012) (holding that Title II applies to police interrogations); Bahl v. County of Ramsey, 695 F.3d 778, 784 (8th Cir. 2012) (explaining that "[e]ven if the ADA applied to [a] traffic stop," there was no duty to accommodate given "the exigencies of the traffic stop"); Bircoll v. Miami-Dade County, 480 F.3d 1072, 1085 (11th Cir. 2007) ("The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance."); Hainze v.

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have identified two theories of liability. First, liability may be based on the "wrongful-arrest theory," which occurs when police officers "misperceive lawful conduct caused by [an arrestee's] disability as criminal activity and then arrest [the person] for that conduct."[144] Second, under the failure-to-accommodate theory, as the name suggests, plaintiffs with disabilities may seek relief when officers fail to provide accommodations during the course of an investigation or arrest.[145]

Even in the first ten years after the ADA was passed, courts debated the question of whether the ADA applied to arrests at all.[146] Early on, some courts suggested a reading of the ADA that narrowed the nature of the inquiry in failure-to-accommodate cases. Rather than asking whether the public entity was required to provide a reasonable accommodation to qualified individuals with disabilities during or leading up to arrests, the courts suggested an exception to coverage in the policing context. This narrowed reading posed the relevant inquiry as whether a qualified individual with a disability was denied the benefits of a public entity's services, programs, and activities and then construed criminal conduct as the "program or activity."[147] Based on such a reading, a few courts noted that if Title II applied, the eligibility requirements of such program or activity could be essentially (and absurdly) the elements of the crime.[148] Yet as the Eleventh Circuit noted in *Bircoll v. Miami-Dade County*, "the final clause of § 12132 'protects qualified individuals with a disability from being "subjected to discrimination by any such entity," and is not tied directly

Richards, 207 F.3d 795, 801 (5th Cir. 2000) ("Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life.").

144. *Gohier*, 186 F.3d at 1221-22. The court in *Gohier* considered "arrests" to include arrests, pre-arrest investigations, and "violent confrontations not technically involving an arrest." *Id.* at 1220 n.2; *see also Hainze*, 207 F.3d at 800 n.28 (noting the same definition of "arrest").

145. Steeves v. City of Rockland, 600 F. Supp. 2d 143, 179 (D. Me. 2009) (citing *Gohier*, 186 F.3d at 1220-21).

146. *See, e.g.*, Rosen v. Montgomery County, 121 F.3d 154, 157 (4th Cir. 1997) ("[C]alling a drunk driving arrest a 'program or activity' of the County, the 'essential eligibility requirements' of which (in this case) are weaving in traffic and being intoxicated, strikes us as a stretch of the statutory language and of the underlying legislative intent." (citing Gorman v. Bartch, 925 F. Supp. 653, 655 (W.D. Mo. 1996), *aff'd in part, rev'd in part*, 152 F.3d 907 (8th Cir. 1998))). More recent cases contain similar debates. *See, e.g.*, Foley v. Klickitat County, No. cv-08-3068, 2009 WL 5216992, at *4 (E.D. Wash. Dec. 30, 2009) ("[C]ategorizing a criminal suspect's arrest as a denial of the benefit of 'a service or activity' strains the language of the ADA past its breaking point.").

147. *See, e.g.*, *Rosen*, 121 F.3d at 157.

148. *See, e.g.*, *id*; *see also supra* note 146.

to the "services, programs, or activities" of the public entity.'"[149] Given this language in § 12132, the denial-of-benefits statutory provision should not be construed as limited to criminal activity, and eligibility should not be based on criminal conduct.

Though courts in these very early cases relied on statutory interpretation to resolve the question, judicial interpretations relied on the medical model of disability—which more often than not led courts to conclude that the ADA did not apply to arrests.[150] For example, in *Rosen v. Montgomery County*, the Fourth Circuit affirmed the defendant county's motion for summary judgment on the plaintiff's ADA claims for failure to accommodate. In that case, a police officer pulled over Jeffrey Rosen for erratic driving.[151] Rosen failed the field sobriety test, consented to a breath test, and then failed the breath test.[152] Police transported Rosen to a station where he signed another form and gave consent to a chemical test to measure his blood-alcohol content, which was measured above the legal limit.[153] Relevant to his ADA claim, Rosen was deaf and had expressed to police both his need for a sign language interpreter and for a teletypewriter (TTY) so that he could call his lawyer.[154] Rosen alleged that the police ignored these requests and "made no attempt to communicate in writing."[155]

The district court found that the ADA did not require police to provide arrestees with accommodations such as interpreters or TTYs.[156] The court also found that the officers received training on communicating with deaf people and "that the arresting officers reasonably thought that they could communicate with Rosen without auxiliary aids."[157] Rosen argued on appeal

149. Bircoll v. Miami-Dade County, 480 F.3d 1072, 1085 (11th Cir. 2007) (quoting Bledsoe v. Palm Beach Cnty. Soil & Water Conservation Dist., 133 F.3d 816, 821-22 (11th Cir. 1998)).

150. *See, e.g.*, *Rosen*, 121 F.3d at 157-58; *Gorman*, 925 F. Supp. at 655-56. A number of courts did, however, find that the ADA applied to arrests. *See, e.g.*, Lewis v. Truitt, 960 F. Supp. 175, 178-79 (S.D. Ind. 1997) (holding that a genuine issue of material fact existed regarding whether the officers arrested Lewis because of his disability); Barber v. Guay, 910 F. Supp. 790, 802 (D. Me. 1995) (determining that the officer's conduct toward arrestee and arrestee's psychological condition were sufficient to state a claim under the ADA); Jackson v. Inhabitants of Sanford, No. cv-94-12, 1994 WL 589617, at *6 (D. Me. Sept. 23, 1994) (holding that Title II of the ADA applied to acts of discrimination by a public entity, including a police force, against a disabled individual).

151. 121 F.3d at 156.

152. *Id.*

153. *Id.*

154. *Id.* at 155-56.

155. *Id.* at 156.

156. *Id.*

157. *Id.*

that existing factual disputes should have precluded granting the defendant's motion for summary judgment.[158] Yet the Fourth Circuit disagreed, affirming the district court on slightly different grounds.[159] The court of appeals noted that the central problem with Rosen's claims was the notion that the ADA applied to arrests at all.[160] While noting that "Rosen clearly ha[d] a disability," the court determined that the ADA did not apply to arrests: "[C]alling a drunk driving arrest a 'program or activity' of the County, the 'essential eligibility requirements' of which (in this case) are weaving in traffic and being intoxicated, strikes us as a stretch of the statutory language and of the underlying legislative intent."[161]

In reaching its decision, the Fourth Circuit adopted a medical model of disability, partly centering its analysis of the nature of the injury on Rosen's physical limitations—not his disparate treatment by the officers. The court identified the source of the alleged discrimination as the fact that Rosen "could not follow everything the officers were telling him."[162] Such a characterization ignores the actual nature of the injury that Rosen alleged, namely the deprivation of the ability to communicate as effectively as another arrestee who did not have disabilities.[163] Rosen's claim was that officers discriminated against him because they made no attempt to communicate with him using auxiliary aids and services that would have made their communications effective, despite Rosen's repeated requests.[164] The district court's analysis, adopted approvingly by the Fourth Circuit, centers Rosen's disability discrimination claim not in the officers' failure to accommodate Rosen's

158. *Id.* at 157.

159. *Id.*

160. *Id.*

161. *Id.*

162. *See id.* at 158.

163. *See* 28 C.F.R. § 35.160(a)(1) (2020) ("A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others."); *see also* Catlett v. Jefferson Cnty. Corr. Dep't, No. 00-cv-00340, 2000 WL 35547524, at *7 (W.D. Ky. Nov. 3, 2000) ("[Plaintiff] further alleges that 'individuals without disabilities are provided effective communication with Defendants' employees and other inmates' and that she 'did not enjoy the same level of communication afforded other individuals without disabilities.'" (quoting plaintiff's complaint)). Public entities are not required to provide communications that "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164. But even when one action does result in a fundamental alteration, public entities are required to "take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity." *Id.*

164. *See Rosen*, 121 F.3d at 156.

disability but in Rosen's own limitation.[165] However, the nature of the alleged injury should not have been centered on Rosen's limitations (what he could or could not hear) but rather the unequal treatment he received on account of his disability.

In *Gorman v. Bartch*, plaintiff Jeffrey Gorman—who used a wheelchair due to paraplegia—brought a lawsuit challenging the failure of Kansas City police officers to accommodate his disability during transport.[166] Specifically, Gorman alleged that the officers lacked training and procedures for detaining and transporting arrestees with disabilities and that "the manner in which [he] was detained and transported" violated the ADA.[167] The district court granted summary judgment for the defendants.[168] "It strains the statute," the court reasoned, "to talk about Plaintiff's 'eligibility' to be arrested and taken to jail or to 'participate' in being arrested," and the court stated that "[t]o the extent there are 'eligibility requirements' for being arrested, it seems those standards are established by laws defining crimes and the Fourth Amendment."[169] The ADA simply did not apply to the plaintiff's case.[170]

Here again, shades of the medical model informed the court's reasoning. In ruling against the plaintiff, the court distinguished a case where the arrest occurred because of the arrestee's disability from Gorman's case, which the court noted involved a valid arrest.[171] As the court maintained, "had Plaintiff been arrested because he was handicapped, his arguments would more clearly satisfy the statutory requirements."[172] The court's view of disability was rooted in police reactions to individual physiological behaviors that provide probable cause for an arrest, albeit for noncriminal conduct that is linked to

165. *Id.* at 156-58.

166. 925 F. Supp. 653, 654-55 (W.D. Mo. 1996), *aff'd in part, rev'd in part*, 152 F.3d 907 (8th Cir. 1998).

167. *Id.* at 655. Gorman's case went to the Supreme Court on the question of whether punitive damages are available under Title II. *See* Barnes v. Gorman, 536 U.S. 181, 183 (2002) (holding that they are not).

168. *Gorman*, 925 F. Supp. at 658.

169. *Id.* at 655.

170. *Id.* at 655-56. The court similarly disposed of Gorman's Rehabilitation Act claim. *Id.* at 657 ("When read in conjunction with the other provisions of the Rehabilitation Act, the concept of 'program or activity' does not readily encompass a police department's function of arresting lawbreakers and transporting them to the police station.").

171. *Id.* at 655.

172. *Id.* The Eighth Circuit later rejected the argument that participation in a public entity's program, service, or activity had to be voluntary for an individual to be eligible to receive an accommodation, relying on the Supreme Court's opinion in *Pennsylvania Department of Corrections v. Yeskey*, in which the Court held that Title II applied to state prisons. Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998) (citing Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 210 (1998)).

disability.[173] That, for the court, was all that constituted disability discrimination under the ADA during the course of an arrest. Missing from the analysis was a recognition that by failing to provide a reasonable accommodation for Gorman's disability, the police discriminated against him on the basis of his disability.[174]

B. Limits of the Medical Model in Theories of Liability Under the ADA

As noted, the medical model of disability frames the problem of policing as one rooted in a medical condition or disorder. An examination of the case law demonstrates how the medical model limits relief for plaintiffs in the policing context. More specifically, the medical model results in insufficient attention to disability as a social construction. Below, I explain how the two theories of Title II arrest liability use a medical model of disability in lawsuits challenging arrests.

1. Wrongful arrest

Arrests are unlawful under the "wrongful-arrest theory" when officers "misperceive lawful conduct caused by [an arrestee's] disability as criminal activity and then arrest [that person] for that conduct."[175] The prototypical example of wrongful-arrest theory under Title II involves misperceptions of physiological reactions by law enforcement. For example, when officers arrest a deaf man for allegedly resisting arrest when he does not heed an officer's command that he cannot hear[176] or arrest a sober man for drunk driving because they interpret slurred speech and an unsteady gait as drunkenness

173. *Gorman*, 925 F. Supp. at 656 ("To the extent the legislative history discusses arrests of handicapped individuals, it evinces a concern that disability-related conduct (e.g., an epileptic seizure) is confused with criminal activity, leading to the arrest of the disabled individual. This describes a situation . . . wherein a person was arrested because of his disability; it does not describe the present situation, and Plaintiff has identified no part of the legislative history that clearly addresses the present situation." (citations omitted)).

174. The court's analysis also fails to consider how, as proscribed by statute, Gorman was otherwise "subjected to discrimination by any such entity." *See* 42 U.S.C. § 12132.

175. Gohier v. Enright, 186 F.3d 1216, 1221-22 (10th Cir. 1999); *see also* Roberts v. City of Omaha, 723 F.3d 966, 973 (8th Cir. 2013) (describing the wrongful-arrest theory as when officers "unreasonably mistake an innocent, disability-related behavior for criminal conduct").

176. *See, e.g.*, Sacchetti v. Gallaudet Univ., 181 F. Supp. 3d 107, 115-16, 127 (D.D.C. 2016); Lewis v. Truitt, 960 F. Supp. 175, 176-79 (S.D. Ind. 1997); *see also* Amiel Fields-Meyer, *When Police Officers Don't Know About the ADA*, ATLANTIC (Sept. 26, 2017), https://perma.cc/8H29-S99W; Talila A. Lewis, *Police Brutality and Deaf People*, ACLU (Mar. 21, 2014, 1:13 PM), https://perma.cc/3ZPN-DTNK.

rather than as symptoms of a past stroke,[177] these officers are misperceiving disability as criminality.[178]

Within the wrongful-arrest theory of liability, the medical model of disability limits prospects for relief in several ways. First, courts often require plaintiffs to trace specific actions or responses by law enforcement—for example, the decision to stop, the use of force, or conduct during an arrest—to specific diagnosed medical symptoms.[179] If plaintiffs cannot identify specific symptoms and link them to discrete decisions by law enforcement, courts presume that police were acting for legitimate reasons and not on the basis of disability. When an officer misperceives conditions, responses, or behaviors as criminal, courts focus on identifying the plaintiff's specific medical conditions—not the officer's reaction to disabled persons more generally or the social meaning of particular disability-related behaviors or conduct.

For example, in *Montae v. American Airlines, Inc.*, Mariyah Montae filed a pro se complaint against American Airlines (AA) and the Massachusetts State Police (MSP) alleging ADA violations and other claims, including discrimination on the basis of gender, race, and religion.[180] Montae was arrested at a bar at Boston's Logan Airport.[181] Montae alleged that prior to her

177. *See, e.g.*, Orr v. Cal. Highway Patrol, No. 14-cv-00585, 2015 WL 848553, at *1-2 (E.D. Cal. Feb. 26, 2015); Jackson v. Inhabitants of Sanford, No. 94-cv-00012, 1994 WL 589617, at *1 (D. Me. Sept. 23, 1994); *see also* Disability Rts. Section, U.S. Dep't of Just., *Commonly Asked Questions About the Americans with Disabilities Act and Law Enforcement*, ADA.gov, https://perma.cc/3FY8-K6T9 (last updated Feb. 25, 2020) (discussing a hypothetical scenario in which an officer concludes a driver is drunk, when in fact the symptoms are caused by a neurological disability); SARAH FECH & GREGORY MURRAY, AM. DIABETES ASS'N, INAPPROPRIATE LAW ENFORCEMENT RESPONSE TO INDIVIDUALS WITH DIABETES: AN INTRODUCTION AND GUIDE FOR ATTORNEYS 63 (2014), https://perma.cc/TXQ4-TZN8 (discussing scenarios in which police officers misinterpret diabetes symptoms, especially hypoglycemia, as signs of intoxication); *My Disability Is Mistaken for Drunkenness*, BBC NEWS (Apr. 12, 2019) https://perma.cc/XN3C-8PTV (describing similar policing problems outside of the United States).

178. *See, e.g.*, Young v. Sunbury Police Dep't, 160 F. Supp. 3d 802, 811 (M.D. Pa. 2016) (finding that the plaintiff, who was arrested when his seizure was mistaken for criminal conduct, stated a wrongful-arrest claim).

179. *See, e.g.*, Montae v. Am. Airlines, Inc., 757 F. Supp. 2d 47, 53 (D. Mass. 2010) ("[B]ecause the plaintiff does not connect her arrest to any symptoms of PTSD, she does not allege sufficient facts to support a finding of ADA liability under the first theory of wrongful arrest."); Steeves v. City of Rockland, 600 F. Supp. 2d 143, 179-80 (D. Me. 2009) (granting summary judgment for defendants where there was "no cognizable evidence that the conduct that [the officer] perceived as unlawful . . . stemmed from bipolar disorder or from any other disability").

180. 757 F. Supp. 2d at 50, 56 ("The plaintiff asserts that both AA and the MSP discriminated against her on the basis of gender, disability (she suffers from PTSD), race (she is of partial Mexican descent), religion (she is a 'student of many religions, including Islam') and political beliefs (she is a 'well-known peace activist').").

181. *Id.* at 49-50.

flight, she had visited the AA Admirals Lounge and had a drink.[182] While at the bar, Montae mentioned to a bartender that she had post-traumatic stress disorder (PTSD).[183] Soon after, Montae alleged, an American Airlines employee approached her and "began to 'harass and discriminate against [her][,] telling her bizarre things in a loud tone so the whole room could hear.'"[184] As Montae exited the lounge, she alleged, she was accosted by two officers and arrested with no explanation.[185] Montae was later taken to a holding cell and charged with disorderly conduct and assault and battery the following morning.[186] The charges were later dropped.[187]

The district court dismissed the complaint.[188] While pleading deficiencies may have led to the outcome,[189] the district court's analysis nonetheless centered on the medical model of disability. The court determined that Montae failed to state a claim under either theory of ADA liability—wrongful arrest or failure to accommodate.[190] With respect to the wrongful-arrest theory, the court determined that Montae failed to "attribute her arrest to the MSP officers' misperception of the effects of [PTSD] as criminal activity."[191] The court determined that because Montae did not "connect her arrest to any symptoms of PTSD, she [did] not allege sufficient facts to support a finding of ADA liability under the first theory of wrongful arrest."[192] The requirement that Montae connect her wrongful arrest to distinct and discrete symptoms related to her disability reflected a medicalized understanding of disability, one that failed to account for the social meanings of her disability—social meanings that may have informed the labeling of Montae's public manifestations of disability as deviant, disorderly, and disruptive.

Second, the court determined that the officer's awareness of Montae's disability cut in the direction of finding that the officer was *not* acting on the basis of Montae's disability during the course of her arrest, contrary to

182. *Id.* at 49.

183. *Id.*

184. *Id.* (first alteration in original).

185. *Id.* at 50.

186. *Id.*

187. *Id.*

188. *Id.* at 56.

189. *See id.*

190. *Id.* at 53.

191. *Id.* at 52.

192. *Id.* at 53; *see also* Steeves v. City of Rockland, 600 F. Supp. 2d 143, 179-80 (D. Me. 2009) ("[T]here is no cognizable evidence that the conduct that [the officer] perceived as unlawful . . . stemmed from bipolar disorder or from any other disability. The record thus is devoid of a basis on which a reasonable trier of fact could conclude that [the officer] misperceived the effects of a disability as criminal activity.").

Montae's claim.[193] But the court paid little attention to how officers' decisions to arrest and determinations as to probable cause may be shaped by social norms, implicit biases, and cultural attitudes about perceived impairments or behaviors by disabled persons of color like Montae. These discretionary decisions are driven by social meanings of impairment—meanings that are more consistent with a social model of disability.

2. Failure to accommodate

Police have a limited duty to accommodate qualified individuals with disabilities. First, a public entity is not required to provide an accommodation if it would fundamentally alter a program, service, or activity.[194] Though this limitation features prominently in Title II cases outside the policing context, only a few reported cases include a police entity raising the fundamental-alteration defense.[195] Second, Title II regulations do "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."[196] Defendants have raised the direct-threat defense in recent cases involving failure-to-accommodate claims brought by disabled plaintiffs.[197] For a public entity to be exempt from duties under the ADA's direct-threat exception, the public entity must prove that the determination that a person poses a direct threat is based on a "reasonable judgment that relies on current medical knowledge or on the best available objective evidence."[198] The public entity must make a reasonable judgment as to "[t]he 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."[199]

193. *See Montae*, 757 F. Supp. 2d at 52-53.

194. 28 C.F.R. § 35.130(b)(1)(7)(i) (2020).

195. *See, e.g.*, Answer Brief for Defendant-Appellee at 23 n.6, Bircoll v. Miami-Dade County, 480 F.3d 1072 (11th Cir. 2007) (No. 06-11098), 2006 WL 4243527 (arguing that the fundamental-alteration rule applies); *see also* Memorandum in Support of Motion for Summary Judgment & Response to Plaintiffs' Motion for Summary Judgment at 35, Seremeth v. Bd. of Cnty. Comm'rs, No. 09-cv-00058, 2010 WL 2025551 (D. Md. May 18, 2010), 2010 WL 4785688, at *20 (stating that providing accommodations during an investigation at the scene of an alleged crime would be a fundamental alteration).

196. 28 C.F.R. § 35.139(a).

197. *See, e.g.*, City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1772-73 (2015); Sage v. City of Winooski, No. 16-cv-00116, 2017 WL 1100882, at *4 (D. Vt. Mar. 22, 2017) ("Defendants next argue that Mr. Sage was not entitled to ADA protection because he presented a direct threat.").

198. 28 C.F.R § 36.208.

199. *Id.*

The dominant view in court opinions involving failure-to-accommodate claims is that police encounters with disabled people often involve split-second decisions, allowing no time to recognize disabilities, let alone accommodate disabilities.[200] In other words, these courts view the nature of policing itself—and the risks posed by the alleged suspect—as a limitation on the duty to accommodate. This view of policing shows up in court opinions, even in cases where the police had actual or constructive notice of disability and arguably advance notice to develop a way to accommodate disabilities—for example, cases where police were originally called in to respond to a "welfare check"[201] or return a person who had absconded from involuntary hospital commitment.[202] Some courts treat the potential risk posed by arrestees as an absolute bar to their entitlement to an accommodation without inquiring as to whether a reasonable modification could have mitigated the alleged risk and eliminated the need for the use of force altogether.[203] This means that even while most courts of appeals have held that the ADA applies to arrests and police use of force, many superimpose this dominant view of policing onto the ADA's statutory requirements to create a doctrine that effectively functions as a ready-made defense for defendant police officers and municipalities. This view of policing, along with the medical model, makes it likely that disabilities that are perceived as dangerous or threatening will serve to justify the use of force and that courts will doubt the reasonableness of possible accommodations that could have mitigated the alleged danger or threat. Additional requirements informed by this dominant view of policing serve to limit relief for plaintiffs.

200. *See, e.g.*, Hainze v. Richards, 207 F.3d 795, 801-02 (5th Cir. 2000); De Boise v. Taser Int'l, Inc., 760 F.3d 892, 899 (8th Cir. 2014) (citing *Hainze*, 207 F.3d at 801-02).

201. *See, e.g.*, Moore v. City of Berkeley, No. 14-cv-00669, 2018 WL 1456628, at *1-2 (N.D. Cal. Mar. 23, 2018), *aff'd*, 801 F. App'x 480 (9th Cir. 2020).

202. *See, e.g.*, Gray v. Cummings, 917 F.3d 1, 6-7 (1st Cir. 2019).

203. *See, e.g.*, Thompson v. Williamson County, 219 F.3d 555, 558 (6th Cir. 2000) (dismissing the plaintiff's ADA claim for failure to show that the officers acted because of the decedent's disability and reasoning that "if the decedent was denied access to medical services it was because of his violent, threatening behavior, not because he was mentally disabled"); Waller v. City of Danville, 515 F. Supp. 2d 659, 663-64 (W.D. Va. 2007) (treating "exigent circumstances" as a per se exception to the duty to provide reasonable accommodations to arrestees), *aff'd*, 556 F.3d 171 (4th Cir. 2009); Sudac v. Hoang, 378 F. Supp. 2d 1298, 1306 (D. Kan. 2005) (recognizing that "officers should not be expected to make reasonable accommodations when faced with exigent circumstances"). *But see* Sage v. City of Winooski, No. 16-cv-00116, 2017 WL 1100882, at *4 (D. Vt. Mar. 22, 2017) (denying the defendants' motion to dismiss in which they argued that the plaintiff posed a direct threat but where accommodation may have mitigated that threat).

a. Knowledge requirement

To receive an accommodation, an individual with a disability either must notify officers that they have a disability and need a particular accommodation or must present in such a way so as to obviate the need to request the accommodation.[204] Because officers are required to accommodate *known* disabilities, a knowledge requirement is built into the inquiry as to whether a person with a disability is entitled to an accommodation.[205] In determining whether an officer had knowledge, most courts have applied an inquiry that appears more subjective than objective, and one court has expressly described the inquiry as subjective.[206] However, the Fifth Circuit in *Windham v. Harris County* noted that this was a question it had not addressed and declined to do so there, so the question of whether knowledge is a subjective or an objective determination may be disputed in future litigation.[207] Courts also disagree as to whether officers must be aware of the specific disability only or the specific

204. Windham v. Harris County, 875 F.3d 229, 236-37 (5th Cir. 2017) ("Mere knowledge of the disability is not enough; the service provider must also have understood '[any] limitations [the plaintiff] experienced . . . *as a result* of that disability.' . . . Thus, because '[t]he ADA does not require clairvoyance,' the burden falls on the plaintiff 'to specifically identify the disability and resulting limitations,' and to request an accommodation in 'direct and specific' terms." (second, third, and fifth alterations in original) (citations omitted) (first quoting Taylor v. Principal Fin. Grp., Inc., 93 F.3d 155, 164 (5th Cir. 1996); then quoting Hedberg v. Ind. Bell Tel. Co., 47 F.3d 928, 934 (7th Cir. 1995); then quoting *Taylor*, 93 F.3d at 165; and then quoting Reed v. LePage Bakeries, Inc., 244 F.3d 254, 261 (1st Cir. 2001))).

205. *See, e.g.*, *Windham*, 875 F.3d at 236-37 ("A critical component of a Title II claim for failure to accommodate, however, is proof that 'the disability and its consequential limitations were known by the [entity providing public services].'" (alteration in original) (quoting Jin Choi v. Univ. of Tex. Health Sci. Ctr. at San Antonio, 633 F. App'x 214, 215 (5th Cir. 2015) (per curiam))).

206. *See* Trujillo v. Rio Arriba County *ex rel.* Rio Arriba Cnty. Sheriff's Dep't, 319 F.R.D. 571, 633-34 (D.N.M. 2016) (concluding that "the obviousness of Trujillo's need for accommodations depends on the extent to which [the officer and county] . . . subjectively understood the effects of Trujillo's impairment on his ability to perform field sobriety tests and on his needs after his arrest"). In *Lawman v. City & County of San Francisco*, the Northern District of California did not expressly use the words subjective or objective, but the inquiry appears more subjective than objective. 159 F. Supp. 3d 1130, 1148 (N.D. Cal. 2016) (concluding that "a reasonable jury could determine that the arresting officers knew that Lawman was not intoxicated, and should have known that Lawman's strange behavior was caused by a mental disability"). Similarly, in *Robertson v. Las Animas County Sheriff's Department*, the Tenth Circuit held that whether an individual's need for an accommodation is obvious depends on a public entity's "knowledge of the individual's disability and his need for, or attempt to participate in or receive the benefits of, a certain service." 500 F.3d 1185, 1197 (10th Cir. 2007).

207. *Windham*, 875 F.3d at 237.

disability *and* limitations that may stem from that disability.[208] For example, in assessing whether an officer was aware of a particular disability, the Fifth Circuit emphasized that the focus of the inquiry should be on the *limitation* imposed by the disability—not the disability per se.[209]

In cases in which a plaintiff does not verbally request an accommodation, some courts have held that to prevail, the plaintiff must show that the disability, limitation, and necessary accommodations were "open, obvious, and apparent," or some combination thereof.[210] The "open, obvious, and apparent" assessment reinforces the medical model of disability in failure-to-accommodate cases. Requiring "open, obvious, and apparent" disabilities, like the requirements under the wrongful-arrest theory, reinforces the idea that disability is only an apparent, corporeal, and physical limitation. Furthermore, the requirement suggests a false binary between cases in which officers are unaware of (or plaintiffs fail to alert officers to) the need for the accommodation and ones in which the disability is visibly clear; it fails to recognize that officers may be aware and still fail to accommodate (for example, by responding with force) for reasons such as implicit or explicit biases. This test also requires that an individual with a disability make an outward demonstration of the need for an accommodation: To receive an accommodation, an individual with a disability bears the burden of alerting officers unequivocally that the person either has a disability and needs a particular accommodation or presents in such a way (depending on the evidentiary showing) so as to obviate the need to request the accommodation. In this way, the "open, obvious, and apparent" requirement can limit the relief available to plaintiffs.

208. *Compare id.* at 236-37 (requiring that a plaintiff specifically identify their disability and resulting limitations and request a specific accommodation), *with* Gray v. Cummings, 917 F.3d 1, 18 (1st Cir. 2019) (noting that the officer must have "particularized knowledge about the nature or degree" of the disability).

209. *Windham*, 875 F.3d at 236 n.10 ("As we have explained, 'the ADA requires [public entities] to reasonably accommodate limitations, not disabilities.' . . . A hearing-impaired worker may require significant accommodations while working as a telephone operator, but have no difficulty working in an assembly line, despite the same disability. Similarly, a police detainee with a broken leg may suffer unnecessary pain if required to perform the one-leg-stand sobriety test, but face no limitations in tracking a pen with his eyes." (first alteration in original) (citations omitted) (quoting *Taylor*, 93 F.3d at 164)).

210. *Id.* at 237 (quoting *Taylor*, 93 F.3d at 165); *see also Robertson*, 500 F.3d at 1197 (collecting cases across circuits); *id.* at 1198 (noting that a reasonable jury could conclude that the deaf arrestee's inability to participate meaningfully in a probable cause hearing was sufficiently obvious to put officers on notice of the need for a hearing-aid accommodation); Duvall v. County of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001) ("When the plaintiff has alerted the public entity to his need for accommodation (or *where the need for accommodation is obvious* . . .), the public entity is on notice that an accommodation is required . . . ." (emphasis added)).

In *Windham*, for example, police arrived to investigate an automobile accident allegedly caused by an intoxicated driver.[211] According to an eyewitness account, plaintiff William Windham—who had cervical stenosis, which caused his neck to involuntarily assume a downward-looking position—looked "under the influence of drugs or alcohol and had fallen asleep behind the wheel while waiting for the police."[212] When the officers arrived, Windham explained that he had taken a prescription painkiller and been awake for twenty hours.[213] An officer asked Windham for permission to administer a series of field sobriety tests.[214] Windham presented a stack of papers that contained a doctor's note, declined some of the tests and performed one, and informed another officer that he would not be able to perform any other tests.[215] He agreed to and eventually performed a number of tests.[216] The officers concluded that there was no justification for an arrest and eventually released Windham.[217] Windham sustained neck injuries during the gaze nystagmus test—during which an officer moves a stimulus in front of the arrestee to track eye movements—and filed suit alleging an ADA violation based on the officer's failure to accommodate his disability.[218]

The Fifth Circuit ultimately ruled against Windham on his failure-to-accommodate claim.[219] Windham, the court determined, never requested an accommodation and did not fit within the "narrow exception applicable only to people whose disabilities, limitations, and necessary accommodations are 'open, obvious, and apparent.'"[220] The court determined that Windham's doubts about being able to perform the test did "not constitute the kind of clear and definite request for accommodations that would trigger the duty to accommodate under the ADA."[221] The doctor's note similarly failed to

211. 875 F.3d at 232.

212. *Id.* at 233.

213. *Id.*

214. *Id.*

215. *Id.* at 233-34 ("The note stated that Windham's stenosis 'place[d] him at risk for strenuous activities and particularly for driving in the unpredictable event of an accident.' It added that '[b]ecause of [Windham's] risk of neurologic injury from neck extension, he should also consider delaying his thyroid surgery until such time as his cervical spine issues have been addressed.' And it concluded by asking the reader to '[k]indly afford [Windham] the opportunity to address these issues in whatever way that you can help him.'" (alterations in original) (quoting Windham's doctor's note)).

216. *Id.*

217. *Id.* at 234.

218. *Id.* at 232-34, 239.

219. *Id.* at 239.

220. *Id.* (quoting Taylor v. Principal Fin. Grp., Inc., 93 F.3d 155, 165 (5th Cir. 1996)).

221. *Id.* at 237.

"apprise[] the officers of Windham's limitation or how that limitation should be accommodated."[222] In its reasoning as to why Windham did not fall within the narrow exception to the notice requirement, the Fifth Circuit distinguished another case, *Delano-Pyle v. Victoria County*,[223] which involved a deaf arrestee:

> Although we upheld a jury finding of disability discrimination where police officers failed to accommodate a deaf arrestee even *without an explicit request for accommodation*, that holding says little about whether Windham's need for accommodation was similarly obvious. For one, the officers in *Delano-Pyle* testified that *they understood* that the plaintiff's disability prevented him from hearing, yet they continued to give him oral instructions regardless. Windham points to no similar evidence here. And, more importantly, the *Delano-Pyle* plaintiff's disability was *far more readily apparent*. That deafness limits a person's ability to understand oral commands is plain; that cervical stenosis limits a person's ability to look straight ahead for a period of forty-five seconds is not.[224]

The Fifth Circuit relied in part on a medical model of disability in finding that the plaintiff's "[v]ague statements" and "generic doubts about his ability to perform the test" did not make it so that the plaintiff's "limitations and necessary accommodation were 'open, obvious, and apparent.'"[225] The *Windham* court's reliance on *Delano-Pyle* is telling and suggests that only limitations linked to physical or biological traits are open, obvious, and apparent to officers. Furthermore, in *Delano-Pyle*, the Fifth Circuit determined that the question of whether the need for an accommodation is obvious was pegged to the officer's awareness of that need.[226] In that case, Aubary Delano-Pyle alleged that Victoria County deputies failed to accommodate his auditory disability during a field sobriety test in violation of the ADA and the Rehabilitation Act. Delano-Pyle failed to comply with the litany of verbal instructions involved in several roadside sobriety tests and was arrested for driving under the influence.[227] Though the Fifth Circuit affirmed the district court's denial of Victoria County's motion for judgment as a matter of law on the ADA and Rehabilitation Act claims,[228] the court's view of disability reinforces the medical model of disability because its conclusion was based on a

222. *Id.* at 238.

223. 302 F.3d 567 (5th Cir. 2002).

224. *Windham*, 875 F.3d at 239 (emphasis added) (citations omitted).

225. *Id.* at 238 (quoting *Taylor*, 94 F.3d at 165).

226. *See Delano-Pyle*, 302 F.3d at 575-76.

227. *Id.* at 570-71 ("With his head still tilted, [Victoria County Deputy] Daniel requested that Pyle touch his nose six times. Pyle performed the task as demonstrated, however, due to his failure to understand Daniel's instructions, he touched his nose approximately twenty-five times.").

228. *Id.* at 570, 576.

view of Delano-Pyle's deafness as the paradigmatic open, obvious, and apparent disability—a fixed, physical trait or condition that produced limitations that should have been readily apparent to the officer.[229]

b. Communication

The ADA's Title II regulations require public entities to provide qualified disabled individuals with effective communications. The regulations provide that "[a] public entity shall take appropriate steps to ensure that communications with . . . members of the public . . . with disabilities are as effective as communications with others,"[230] which includes providing "appropriate auxiliary aids and services" to "afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity [conducted by] a public entity."[231] "Auxiliary aids and services" include providing "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments."[232] In addition, Title II's implementing regulations state that "auxiliary aids and services" include "[q]ualified interpreters" and "telecommunications devices" for deaf persons.[233] Finally, the regulations provide that "[i]n determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities."[234]

Assessments as to whether a person with a sensory disability was provided with *ineffective* communications turn on whether the individual was provided with communications equal to those provided to individuals without sensory disabilities.[235] This equality framework can reinforce a medical model of disability in cases alleging failure to provide effective communications to disabled individuals and limit opportunities for relief for plaintiffs. For example, the Eleventh Circuit in 2007 rejected an ADA claim by deaf arrestee Steven Bircoll.[236] Though Bircoll alleged that he requested an interpreter

229. *See id.* at 575 ("It is clear from the videotape of the accident that no matter how many times [Victoria County Deputy] Daniel repeated himself and no matter how loudly he spoke, Pyle could not understand most of what he was saying.").

230. 28 C.F.R. § 35.160(a)(1) (2020).

231. *Id.* § 35.160(b)(1).

232. 42 U.S.C. § 12103(1)(A).

233. 28 C.F.R. § 35.104(1).

234. *Id.* § 35.160(b)(2).

235. *Cf.* Kornblau v. Dade County, 86 F.3d 193, 194 (11th Cir. 1996) (noting in the accessibility context that "[t]he purpose of the [ADA] is to place those with disabilities on an equal footing, not to give them an unfair advantage").

236. Bircoll v. Miami-Dade County, 480 F.3d 1072, 1087-88 (11th Cir. 2007).

"many times," the Eleventh Circuit focused on the facts that Bircoll could read lips and could "understand about half of what is said when he is lipreading," that he responded to the officer's instructions that he get out of the car and provide his driver's license and insurance, and that the officer performed physical demonstrations in addition to providing verbal instructions.[237] The Eleventh Circuit noted that "[w]hile the communication may not have been perfect, Bircoll, by his own admission, understood that he was being asked to perform field sobriety tests" and "actually tried to perform at least three of those tests."[238] Of course, perfect communication is not required, but Bircoll did not allege that he was entitled to perfect communication; he argued he was denied communications that were equally effective to those provided to individuals without sensory disabilities.[239]

Though concluding that police were "required to take appropriate steps to ensure" effective communications with Bircoll, the court ultimately determined the police did indeed provide effective communication.[240] Although recognizing that Bircoll was able to retain only half of what was communicated under the method deployed, the court nonetheless found the communication equal to what an individual without a sensory disability would receive.[241] In doing so, the Eleventh Circuit's assessment incorporated a medical model of disability.

The medical model explains how the court's assessment of the facts could lead to its perplexing result: If disability inheres in the body, then equality is not possible in every situation, as differences between different bodies and minds will produce varying levels of communication access. For example, in concluding that Bircoll failed to state an ADA claim challenging the field sobriety test performed prior to his arrest, the court noted that Bircoll's existing sensory limitations and his ability to retain 50% of what the officer communicated to him did not render the communications "so ineffective that an oral interpreter was necessary to guarantee that Bircoll was on equal footing with hearing individuals."[242]

However, effective communications are not just about physical parity with hearing individuals; they are about ensuring that communications with disabled people are as effective—as clear and understandable—as communications with nondisabled people are. Under the ADA, effectiveness is determined by the

237. *Id.* at 1079, 1086-88.

238. *Id.* at 1086.

239. *See* Initial Brief of Appellant at 30-31, *Bircoll*, 480 F.3d 1072 (No. 06-11098), 2006 WL 4243526.

240. *Bircoll*, 480 F.3d at 1087-88.

241. *Id.* at 1086-88.

242. *Id.* at 1086.

extent to which an individual with a disability is provided with "an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity [conducted by] a public entity."[243] Indeed, Title II's regulations require the public entity to "furnish appropriate auxiliary aids and services where necessary to afford" disabled individuals equal opportunity.[244]

An effectiveness inquiry based on the medical model asks what accommodations are needed for deaf individuals like Bircoll to receive equal communication. Under this formulation, any indication that Bircoll complied with, or fully or partially understood, communications with the officers serves as evidence that communications were effective. By contrast, a social model would measure effectiveness based on the nature of the communications made to disabled people and whether they are as clear and understandable as communications made to nondisabled people. An inquiry based on the social model would recognize that auxiliary aids and services are required where *necessary to* establish effective communications. And necessity would be measured from the standpoint of the disabled individual's access needs rather than by the quality and quantity of communications provided or the individual's ability (successful or not) to comply with the communications that were provided.

C. Intentional Discrimination

Several courts of appeals have held that a plaintiff must show intentional discrimination to recover compensatory damages in Title II cases against public entities.[245] Where courts have found that Title II provides for money

243. 28 C.F.R. § 35.160(b)(1) (2020).

244. *Id.*

245. *See, e.g.*, McCullum v. Orlando Reg'l Healthcare Sys., Inc., 768 F.3d 1135, 1146-47 (11th Cir. 2014) ("To prevail on a claim for compensatory damages under either the [Rehabilitation Act] or the ADA, a plaintiff must show that a defendant violated his rights under the statutes and did so with discriminatory intent."); Nieves-Márquez v. Puerto Rico, 353 F.3d 108, 126 (1st Cir. 2003); Delano-Pyle v. Victoria County, 302 F.3d 567, 574 (5th Cir. 2002); Duvall v. County of Kitsap, 260 F.3d 1124, 1138 (9th Cir. 2001); *see also* Hans v. Bd. of Shawnee Cnty. Comm'rs, 775 F. App'x 953, 956 (10th Cir. 2019) ("Title II of the ADA provides for remedies available under the Rehabilitation Act, which in turn provides for remedies available under Title VI of the Civil Rights Act of 1964. And the Supreme Court has held that plaintiffs cannot 'recover compensatory damages under Title VI except for intentional discrimination.'" (citations omitted) (quoting Alexander v. Sandoval, 532 U.S. 275, 283 (2001))); Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 110-11 (2d Cir. 2001) ("Title II itself is silent as to the parameters of when a monetary recovery may be had. Instead, Title II simply incorporates the remedial scheme of the Rehabilitation Act of 1973, which in turn incorporates the remedial scheme of Title VI of the Civil Rights Act of 1964." (citations omitted)).

damages under a theory of respondeat superior,[246] courts have required that plaintiffs, to hold public entities vicariously liable for the conduct of employees, must prove discriminatory purpose or deliberate indifference.[247] Similarly, in lawsuits against state entities, courts require plaintiffs seeking money damages to show intentional discrimination that constitutes a valid abrogation of state sovereign immunity.[248] But there is no single definition of intentional discrimination in Title II cases.[249]

The requirement of intentional discrimination has been justified by courts as necessary to ensure that damages claims against states are not construed to exceed Congress's powers under the Fourteenth Amendment.[250] And because the remedies under Title II are coextensive with those under Title VI of the

246. *See, e.g.*, *Duvall*, 260 F.3d at 1141 ("When a plaintiff brings a direct suit under either the Rehabilitation Act or Title II of the ADA against a municipality . . . , the public entity is liable for the vicarious acts of its employees.").

247. *See, e.g.*, *id.* at 1138-41; Gray v. Cummings, 917 F.3d 1, 18 (1st Cir. 2019); *see also* City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1773-74 (2015) ("Only public entities are subject to Title II, and the parties agree that such an entity can be held vicariously liable for money damages for the purposeful or deliberately indifferent conduct of its employees. But we have never decided whether that is correct . . . ." (citations omitted)); King v. Hendricks Cnty. Comm'rs, 954 F.3d 981, 989 (7th Cir. 2020) (assuming without deciding that the defendant county could be held vicariously liable under Title II for its employee conduct and that "deliberate indifference" is the standard that applies to the employee's conduct).

248. *See, e.g.*, *Garcia*, 280 F.3d at 111 ("The question, therefore, is how Title II monetary claims against the states can be limited so as to comport with Congress's § 5 authority. The answer, we believe, is to require plaintiffs bringing such suits to establish that the Title II violation was motivated by discriminatory animus or ill will based on the plaintiff's disability."). In *United States v. Georgia*, the Supreme Court held that "Title II validly abrogates state sovereign immunity" insofar as it "creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment." 546 U.S. 151, 159 (2006). *But see id.* (remanding to the lower court to determine, "insofar as [the state's] misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid").

249. The prevailing framework for intentional discrimination under Title II allows for two theories: "discriminatory animus" and "deliberate indifference." Lacy v. Cook County, 897 F.3d 847, 862-63 (7th Cir. 2018) (noting that most circuits have adopted a two-part test for deliberate indifference, "'requiring both (1) "knowledge that a harm to a federally protected right is substantially likely," and (2) "a failure to act upon that likelihood"'" (quoting S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 263 (3d Cir. 2013))); *Duvall*, 260 F.3d at 1139 ("When the plaintiff has alerted the public entity to his need for accommodation (or where the need for accommodation is obvious . . .), the public entity is on notice that an accommodation is required, and the plaintiff has satisfied the first element of the deliberate indifference test."). *But see Delano-Pyle*, 302 F.3d at 575 (holding that a deliberate-indifference standard does not apply to public entities for purposes of the ADA and that a plaintiff must show intentional discrimination).

250. *See, e.g.*, *Garcia*, 280 F.3d at 111.

Civil Rights Act,[251] courts have interpreted intentional discrimination as a requirement under Title II at least since the Supreme Court held in *Alexander v. Sandoval* that intentional discrimination is required for compensatory damages under Title VI.[252] However, as Mark Weber has argued, intentional discrimination is not required by the text of section 504 of the Rehabilitation Act or by the Supreme Court's interpretation of it in *Alexander v. Choate*.[253] In *Choate*, the Supreme Court recognized that "[d]iscrimination against [disabled persons] was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect."[254] Though the court did not expressly hold that section 504 allows a claim for all forms of disparate impact, it assumed without deciding that section 504 reaches at least some forms of disparate impact.[255] As Weber explains, "[w]hen Congress enacted the ADA a few years after *Choate*, it incorporated the disparate-impact interpretation into Title II."[256] And "[t]he legislative history also endorses judicial decisions requiring reasonable accommodations and forbidding a practice with a disparate impact on people with disabilities."[257] Since *Choate*, some courts of appeals have not required a showing of discriminatory intent in disparate impact and reasonable accommodation cases under Title II and section 504.[258]

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251. *See, e.g.*, Ferguson v. City of Phoenix, 157 F.3d 668, 673-74 (9th Cir. 1998) ("Title II and § 504 [of the Rehabilitation Act] are expressly linked to Title VI [of the Civil Rights Act of 1964].").

252. 532 U.S. 275, 283 (2001); *see also* Hans v. Bd. of Shawnee Cnty. Comm'rs, 775 F. App'x 953, 956 (10th Cir. 2019); Windham v. Harris County, 875 F.3d 229, 235 n.5 (5th Cir. 2017) ("To recover compensatory damages for disability discrimination under Title II of the ADA, a plaintiff must also show that the discrimination was 'intentional' in the sense that it was more than disparate impact. This requirement exists because Title II incorporates the remedies in Title VI of the Civil Rights Act of 1964 and because 'private individuals c[annot] recover compensatory damages under Title VI except for intentional discrimination.'" (alteration in original) (citations omitted) (first quoting *Delano-Pyle*, 302 F.3d at 574; and then quoting *Sandoval*, 532 U.S. at 282-83)).

253. Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417, 1418 (2015).

254. Alexander v. Choate, 469 U.S. 287, 295 (1985).

255. *Id.* at 299 ("While we reject the boundless notion that all disparate-impact showings constitute prima facie cases under § 504, we assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped.").

256. *See* Weber, *supra* note 253, at 1442.

257. *Id.* (footnote omitted).

258. *Id.*

A number of courts of appeals have held that intentional discrimination can be shown through deliberate indifference.[259] As the Tenth Circuit put it, "intentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights."[260] Similarly, as the Ninth Circuit explained, "[d]eliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that the [sic] likelihood."[261]

The deliberate-indifference standard is easier to meet than the discriminatory-purpose standard.[262] Even so, as currently applied, the deliberate-indifference standard poses a formidable barrier to plaintiffs seeking relief for reasonable-accommodations claims. The First Circuit's decision in *Gray v. Cummings* demonstrates the high bar that the deliberate-indifference standard poses to plaintiffs seeking damages in Title II arrest cases. In that case, Judith Gray sued the police and Town of Athol after being tased during what she alleged was a manic episode.[263] Gray was admitted to the hospital under an involuntary-commitment order, and later that day escaped from the facility on foot.[264] The hospital called the police, and Officer Cummings was dispatched to bring Gray back to the hospital.[265] That effort turned violent: Gray refused to go back and physically resisted Cummings, and in response Cummings tased her before eventually arresting her.[266] The First Circuit assumed both that Title II of the ADA applied to "ad hoc police encounters" and that "a showing of deliberate indifference is enough to support recovery of money damages under Title II."[267] Under First Circuit case law, deliberate indifference requires "proof

259. *See, e.g.*, J.V. v. Albuquerque Pub. Schs., 813 F.3d 1289, 1298 (10th Cir. 2016); Duvall v. County of Kitsap, 260 F.3d 1124, 1138 (9th Cir. 2001) ("We now determine that the deliberate indifference standard applies."). The vast majority of courts agree that the proper standard of review for discrimination under the Rehabilitation Act is deliberate indifference. Liese v. Indian River Cnty. Hosp. Dist., 701 F.3d. 334, 345 (11th Cir. 2012); *Duvall*, 260 F.3d at 1138-39.

260. *J.V.*, 813 F.3d at 1298 (quoting Barber *ex rel.* Barber v. Colo. Dep't of Revenue, 562 F.3d 1222, 1228-29 (10th Cir. 2009)).

261. *Duvall*, 260 F.3d at 1138-39.

262. *Cf.* Derek W. Black, *The Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533, 575 (2006) (arguing for the deliberate-indifference standard rather than the intent standard in equal-protection jurisprudence in part because it "overcomes the problems of proof that limit the intent standard").

263. Gray v. Cummings, 917 F.3d 1, 6-7 (1st Cir. 2019).

264. *Id.* at 6.

265. *Id.*

266. *Id.* at 6-7.

267. *Id.* at 17.

that the defendant knew that an ADA-protected right was likely to be abridged, yet neglected to take available preventative action notwithstanding such knowledge."[268] Here, the court distinguished alleged criminal conduct from disability-related conduct and imposed a limitation on the officer's duty to accommodate. As the court put it, to prevail under the wrongful-arrest and failure-to-accommodate theories of liability, Gray would 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)" or that the officer "knew that there was a reasonable accommodation, which he was required to provide."[269]

The First Circuit acknowledged that Cummings was aware that Gray had a disability because the officer was dispatched to initiate an involuntary commitment. However, the court declined to find deliberate indifference on the ground that Gray failed to show that "Cummings had any particularized knowledge about the nature or degree of Gray's disability."[270] In other words, that Gray was involuntarily committed as a patient to the hospital "served only to put Cummings on notice that she had been deemed a danger to herself or to others."[271] The court concluded that there was "insufficient evidence to suggest that Cummings knew either that Gray suffered from bipolar disorder or that she was experiencing a manic episode" and that, therefore, "[w]ithout such particularized knowledge, Cummings had no way of gauging whether the conduct that appeared unlawful to him was likely to be a manifestation of the symptoms of Gray's mental illness."[272] The court also decided that Cummings "had no way of gauging what specific accommodation, if any, might have been reasonable under the circumstances."[273]

The court also declined to find deliberate indifference sufficient to hold the Town of Athol directly liable for money damages under Title II.[274] To hold the town liable, Gray would have to show that Athol's "'existing policies caused a failure to "adequately respond to a pattern of past occurrences of injuries like [hers]"'" or "'that the risk of . . . cognizable harm was "so great and so obvious" as to override the requirement of demonstrating a pattern.'"[275] The court held

268. *Id.* at 18 (citing Haberle v. Troxell, 885 F.3d 170, 181 (3d Cir. 2018); and Duvall v. County of Kitsap, 260 F.3d 1124, 1139-40 (9th Cir. 2001)).

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 17, 19.

275. *Id.* at 19 (alterations in original) (quoting Haberle v. Troxell, 885 F.3d 170, 181 (3d Cir. 2018)).

that Gray did not meet her burden, determining that she failed to "adduce[] any evidence showing that Cummings knew of the existence of [national police] standards" involving interactions with individuals with psychiatric disabilities.[276] However, it appeared that the court would have been willing to find deliberate indifference if Gray had argued that Cummings had tased her in contravention of the town's policy prohibiting officers from using tasers against those "known to be suffering from severe mental illness."[277] The officer could have been found deliberately indifferent for violating the department policy and failing to accommodate Gray by using the taser.[278] Yet even this analysis pegs deliberate indifference to whether the specific police department policies contained provisions addressing the treatment of people with, for example, psychiatric disabilities—not to the individual actions, responses, or reactions to Gray's disability.

In *Haberle v. Troxell*, the Third Circuit determined that the plaintiff similarly failed to establish deliberate indifference.[279] The court held that Haberle "fail[ed] to allege that the Borough was aware that its existing policies made it substantially likely that disabled individuals would be denied their federally protected rights under the ADA."[280] In so holding, the court reasoned that Haberle failed to allege either "facts suggesting that the existing policies caused a failure to 'adequately respond to a pattern of past occurrences of injuries like the plaintiffs'" or "facts indicating that she could prove 'that the risk of . . . cognizable harm was "so great and so obvious that the risk and the failure . . . to respond will alone" support finding' deliberate indifference."[281] Specifically, Haberle alleged that the Borough Council, mayor, and police department drafted but failed to adopt policies that would have guided officers' interactions with people with mental disabilities and people in crisis situations.[282] The court determined that to prevail, Haberle would have had to allege "facts indicating that the policies were drafted *because of* an awareness that the pre-existing policies were substantially likely to lead to a violation of citizens' rights."[283] Without such a showing, the court concluded, "a

276. *Id.* at 18, 19.

277. *Id.* at 18 n.12 (quoting the Town of Athol policy).

278. *Id.*

279. *Haberle*, 885 F.3d at 181.

280. *Id.*

281. *Id.* (alterations in original) (quoting Beers-Capitol v. Whetzel, 256 F.3d 120, 136-37 (3d Cir. 2001)).

282. *Id.* at 182.

283. *Id.* (emphasis added).

municipality cannot be found to be deliberately indifferent merely for considering but not yet adopting new policies or amendments to old ones."[284]

The Third Circuit also determined Haberle's complaint did not "allege that the risk of harm was 'so great and so obvious,' as to obviate the need for her to allege facts pertaining to the Borough's knowledge," even if her allegation was that the Borough failed to meet the national standards for police interactions for people with mental illnesses.[285] The court was not persuaded that failing to meet these standards amounted to deliberate indifference: "[F]alling below national standards does not, in and of itself, make the risk of an ADA violation in such circumstances 'so patently obvious that a [municipality] could be held liable' without 'a pre-existing pattern of violations.'"[286] For the court, the risks driven by uncertainty and exigent circumstances—not the risk of discrimination with respect to the failure to accommodate—motivated the determination as to deliberate indifference:

> [T]he failure to train police officers to refrain from doing so much as knocking on the door when they receive a call that a mentally ill individual has stolen a firearm, is contemplating suicide, and may be in the presence of others whose status is unknown is not so obvious [a deficiency] that the Borough could be said to have been deliberately indifferent to the need for that training.[287]

The court was not convinced that the national standards governing de-escalation for individuals in mental crises made the risk of an ADA violation for failure to accommodate so obvious.[288] Instead, and in a manner consistent with the medical rather than social model of disability, the alleged danger posed by the plaintiff with a psychiatric disability and in crisis alone controlled—not whether the police department's response to plaintiff's disability could have mitigated the alleged danger.

Plaintiffs may have a difficult time meeting the intentional-discrimination standard in wrongful-arrest cases, even when officers have knowledge of the arrestee's disability. For example, in *Everson v. Leis*, police arrested Kevin Everson—a disabled man—shortly after he suffered an epileptic seizure at a local mall in Hamilton County, Ohio.[289] The deputies responding to the scene to provide assistance were notified that Everson was having a seizure.[290]

284. *Id.*

285. *Id.* (quoting *Beers-Capitol*, 256 F.3d at 136).

286. *Id.* (second alteration in original) (quoting Connick v. Thompson, 563 U.S. 51, 64 (2011)).

287. *Id.* at 182-83 (second alteration in original) (quoting Haberle v. Troxell, No. 15-cv-02804, 2016 WL 1241938, at *8 (E.D. Pa. Mar. 30, 2016), *aff'd in part, vacated in part*, 885 F.3d 170).

288. *Id.* at 182.

289. Everson v. Leis, 412 F. App'x 771, 772 (6th Cir. 2011), *abrogated in part by* Lewis v. Humboldt Acquisition Corp., 681 F.3d 312 (6th Cir. 2012) (en banc).

290. *Id.*

According to the officers, Everson was combative during the encounter, pushing, kicking, and swinging at officers and emergency medical service (EMS) responders.[291] Everson was charged with assault and disorderly conduct, but the charges were dismissed when Everson provided medical documentation of his disability, which he explained led to "involuntary muscle movements during and after seizures."[292] Everson later brought a Title II claim against the responding officers for arresting him for disability-related behaviors.[293]

The Sixth Circuit determined that to hold the officer liable, Everson would have to show that the officer's arrest constituted intentional discrimination.[294] The court concluded, viewing the facts in the light most favorable to Everson, that Everson had epilepsy and that his epilepsy caused him to enter a semiconscious state during which he used physical force against the officers.[295] The officer also knew that Everson could have another seizure, as Everson told the officer that he was going to have another seizure during the encounter.[296] Still, in granting the defendants' motion for summary judgment, the Sixth Circuit held that Everson failed to demonstrate that the arrest by the responding officer constituted intentional discrimination. The court held that there was insufficient evidence that "[Officer] Wittich knew that Everson's conduct was caused by his disability or that Wittich acted because of—rather than in spite of—Everson's disability. . . . Everson alleges no facts that could support his bare conclusion that Wittich *knew* that Everson's seizure was ongoing during the relevant time period."[297]

The court's intent standard follows the Supreme Court's familiar formulation in *Personnel Administrator v. Feeney*—a heavily criticized decision[298]—in which the Court held that a plaintiff must prove discriminatory intent by showing that a decisionmaker selected a course of action "'because of,' not merely 'in spite of,' its adverse effects upon an

291. *Id.* at 773.

292. *Id.*

293. *Id.* at 773-75.

294. *Id.* at 776-77.

295. *Id.* at 775.

296. *Id.*

297. *Id.* at 778.

298. *See, e.g.*, Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 181-83 (2016); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1828-38 (2012); Ivan E. Bodensteiner, *The Supreme Court as the Major Barrier to Racial Equality*, 61 RUTGERS L. REV. 199, 213-14 (2009); Bruce E. Rosenblum, Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment After* Feeney, 79 COLUM. L. REV. 1376, 1386-403 (1979).

identifiable group."[299] Given this heightened standard, unsurprisingly, the Sixth Circuit was not persuaded that there was any evidence of intentional discrimination: "Everson threatened to swing at officers and EMS professionals and actually did kick, swing, and spit on the officers and EMS professionals. . . . [O]ur inquiry is not whether Everson's attacks were purposeful, but whether Wittich *knew that they were not purposeful*."[300]

The Sixth Circuit's reading limits liability to situations in which the officer intentionally arrests a disabled person for conduct that is the result of disability and not labeled as criminal. The court noted that Wittich had "no prior training dealing with epilepsy," that the officer believed Everson's seizure had ended, and, importantly, that an EMS professional had told Wittich that Everson's seizure had ended.[301] The court weighed all facts against Everson, though arguably only the statement by the EMS professional cut in favor of finding that Wittich lacked knowledge sufficient to meet the Sixth Circuit's standard.[302] As the majority noted, Everson did inform the officer that he was not only at risk of another seizure but also prone to punching people during the course of a seizure.[303] Thus, even if the officer believed that the seizure had ended, there were facts—taken in the light most favorable to Everson—to support his claim that Wittich was on notice that Everson was prone to punching while having a seizure.[304] Taken together, the previous cases indicate that the intentional-discrimination standard, when coupled with the medical model of disability, poses formidable barriers for plaintiffs even when officers know of a disability and have an opportunity to provide a reasonable accommodation.

299. Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979).

300. *Everson*, 412 F. App'x at 778 (emphasis added) ("[B]ecause Everson can not establish that Wittich knew that Everson's conduct was caused by his seizure, we hold that Everson can not establish that, by arresting him for that conduct, Wittich intentionally discriminated against him because of his disability.").

301. *Id.*

302. The facts also presented a genuine issue of material fact, making the court's denial of the motion for summary judgment inappropriate. *Id.* at 779 (Moore, J., dissenting) ("Because I believe that there is a genuine issue of material fact with respect to whether Wittich knew that Everson's conduct was related to his disability, I respectfully dissent.").

303. *Id.* at 775 (majority opinion).

304. *Id.* at 781 (Moore, J., dissenting) ("In the light most favorable for Everson, the statement put Wittich on notice not only that Everson was prone to having another seizure but also that the seizures come with punches—i.e., that his seizures are related to his violent behavior.").

D. Causation

Courts interpret causation in Title II policing cases in ways that set high standards for liability. In addition, and as I maintain below, such interpretations tend to align with a medical model of disability, or at least downplay a view of disability that is consistent with the social model of disability.

To establish that an individual with a disability was denied access to a program, service, or activity of a public entity or otherwise subjected to discrimination during the course of an arrest, a plaintiff must prove such actions were "by reason of such disability."[305] The Supreme Court has yet to squarely decide which standard for causation—but-for or motivating-factor—applies under the ADA.[306] Some courts have held that "by reason of disability" requires that plaintiffs prove that the alleged discriminatory action was done *solely* on the basis of disability—a high standard for liability.[307] More often, courts employ a but-for causation standard.[308] For example, in *Haberle*, the

305. 42 U.S.C. § 12132.

306. Several circuit courts have applied the Supreme Court's holding in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175 (2009)—that mixed-motive analysis does not apply in the context of the Age Discrimination in Employment Act of 1967—to the ADA context. *Compare* Murray v. Mayo Clinic, 934 F.3d 1101, 1104-05 (9th Cir. 2019) (applying the but-for standard to an ADA Title I claim and declining to follow earlier Ninth Circuit precedent using the motivating-factor test in part because of the Supreme Court's decision in *Gross*), Gentry v. E.W. Partners Club Mgmt. Co., 816 F.3d 228, 235-36 (4th Cir. 2016) (applying the but-for standard to an ADA Title I claim), Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 314, 321 (6th Cir. 2012) (en banc) (citing *Gross*, 557 U.S. at 176) (applying the but-for standard to an ADA Title I claim), Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961-62 (7th Cir. 2010) (citing *Gross*, 557 U.S. 167) (same), *and* Bolmer v. Oliveira, 594 F.3d 134, 148 (2d Cir. 2010) (questioning whether the mixed-motive theory can apply to ADA Title II claims after *Gross*), *with* Parker v. Columbia Pictures Indus., 204 F.3d 326, 336-37 (2d Cir. 2000) (applying the motivating-factor test to a pre-*Gross* ADA Title I claim), *and* Baird *ex rel.* Baird v. Rose, 192 F.3d 462, 468, 470 (4th Cir. 1999) (applying the motivating-factor test to a pre-*Gross* ADA Title II claim).

307. Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261, 1264-65 (4th Cir. 1995); *see also Everson*, 412 F. App'x at 776; Jones v. City of Monroe, 341 F.3d 474, 477 (6th Cir. 2003), *abrogated in part by Lewis*, 681 F.3d 312. *Lewis* abrogated both *Everson* and *Jones* on the issue of causation. *Lewis* was a Title I case, but in the opinion the Sixth Circuit noted that "[t]he [sole-cause] standard does not apply to claims under the ADA." 681 F.3d at 317. Later Sixth Circuit cases have stated that *Lewis* applies to Title II cases. *See* Anderson v. City of Blue Ash, 798 F.3d 338, 357 n.1 (6th Cir. 2015).

308. *See, e.g.*, Schwarz v. City of Treasure Island, 544 F.3d 1201, 1212 n.6 (11th Cir. 2008) (noting that while the Rehabilitation Act requires disability to be the sole reason for the discrimination against plaintiff, "the ADA requires only the lesser 'but for' standard of causation" (citing McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1073-74 (11th Cir. 1996))); Natofsky v. City of New York, 921 F.3d 337, 349 (2d Cir. 2019) (holding that the ADA requires a but-for standard).

Third Circuit characterized the question to be whether "the arrestee's disability was a 'but for' cause of the deprivation or harm [the arrestee] suffered."[309]

Similarly, the Seventh Circuit applied a but-for standard in *King v. Hendricks County Commissioners*.[310] That case involved the death of Bradley King, a twenty-nine-year-old man with paranoid schizophrenia who was shot by a police officer.[311] What started as a welfare check ended with King being killed in a confrontation with two Hendricks County reserve deputies. The officers testified that when they arrived at King's home, King exited his home and approached them while carrying a ten-inch knife. The officers reported that they "backpedaled, drew their service firearms, and yelled at [King] to stop and drop the knife."[312] King refused and, according to the officers, ran toward Officer Jason Hays with the knife raised.[313] Hays fired his weapon when King was approximately eight feet away, killing him.[314]

The Seventh Circuit determined that the King estate failed to "show that '"but for" [King's] disability, he would have been able to access the services or benefits desired.'"[315] In reaching this conclusion, the court noted that there was "no competent evidence contradicting Hays's account that he shot [King] because [King] ran at him with a knife," and that the evidence provided "no reason to believe that Hays's response would have been different had someone not suffering from a mental illness done the same thing."[316] Further, the court reasoned, King's estate did not "propose anything that Hays should have done differently to accommodate [King's] mental illness."[317] The court determined that the failure to accommodate—for example, by using de-escalation tactics—did not occur because the officer was inadequately trained to respond to individuals with psychiatric disabilities. Instead the failure to accommodate occurred because King threatened the officer with deadly force "before the [officer] could subdue [King]."[318] Ultimately, the court held that King's estate

309. Haberle v. Troxell, 885 F.3d 170, 179 (3d Cir. 2018) (citing CG v. Pa. Dep't of Educ., 734 F.3d 229, 236 n.11 (3d Cir. 2013)).

310. 954 F.3d 981, 989 (7th Cir. 2020).

311. *Id.* at 983.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at 989-90 (quoting Wis. Cmty. Servs., Inc. v. City of Milwaukee, 465 F.3d 737, 754 (7th Cir. 2006) (en banc)).

316. *Id.* at 989.

317. *Id.*

318. *Id.* (quoting Thompson v. Williamson County, 219 F.3d 555, 558 (6th Cir. 2000)).

had failed to show that "but for alleged discrimination on the basis of his disability, [King] would still be alive."[319]

The Seventh Circuit's framing of the causation inquiry demonstrates why the but-for standard is inappropriate in the policing context. The inquiry should not be whether King would be alive but-for the alleged disability-based discrimination, but rather whether he was denied access to services or benefits due to the officer's failure to provide him with a reasonable accommodation—a denial that constitutes discrimination under Title II.[320] Under the ADA, the failure to provide a reasonable accommodation constitutes discrimination "by reason of disability"—so in failure-to-accommodate cases, the causal inquiry should be whether the accommodation denied to the qualified individual with a disability was reasonable or *un*reasonable. To determine whether a person was denied a reasonable accommodation, the correct inquiry is whether the accommodation could have been provided without requiring a fundamental alteration to a public entity's program, service, or activity.[321] Where, as in *King*, defendants argue that the individual with a disability posed a threat, an accommodation is still required in order to avoid disability discrimination if the plaintiff can show that the threat would have been removed or mitigated by providing the accommodation.

The court's application of the but-for standard in *King* focused on the reason for the officer's use of force. According to the court, King's conduct posed a risk to the officer, and even though the officer's use of force led to King's death, an accommodation could not have saved King's life because his death was caused by the physical threat he posed—even though this threat was likely caused by his disability. Given the way the Seventh Circuit applied the causation test, it is not surprising that the court found no duty to accommodate—and thus no discrimination by reason of disability. The focus was on King's behavior, not the responses to his disability that may have, leading up to the use of force, created the conditions in which the use of force seemed inevitable. Consistent with a medicalized understanding of disability, such analysis ignores social responses to disability (here, the officer's use of force and the possibility of bias) and focuses instead on King's behavior—his inherent, biological limitations.

Medicalized understandings of disability also creep into Title II wrongful-arrest cases. Wrongful-arrest claims, both as they are argued by litigants and decided by courts, focus on specific medicalized understandings of disability—

319. *Id.*

320. *See* 28 C.F.R. § 35.130 (2020); *cf.* Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999) (explaining that, under Title I of the ADA, "any failure to provide reasonable accommodations for a disability is necessarily 'because of a disability'").

321. 28 C.F.R. § 35.130(b)(7)(i).

whether symptoms, diagnoses, or physiological responses.[322] As a result, the wrongful-arrest theory of liability is unduly narrow; as currently applied, it does not capture the broader social meanings of disability that attach to disability-related conduct and construct such conduct as criminal. Indeed, social meanings connected to manifestations of disability in public can justify reasonable suspicion for a stop, probable cause for an arrest, or a call from a local resident that invites police intervention. These are just a few of the ways that seemingly innocuous disability-related behaviors are labeled as suspicious, threatening, or criminal.[323]

For ADA claims based on the wrongful-arrest theory of liability, the but-for standard does not adequately capture the social meanings connected to disability. In the context of disability discrimination, a but-for counterfactual goes something like this: Would the discriminatory conduct have occurred if a disabled plaintiff had been nondisabled? But as a general matter, the but-for counterfactual may be an ineffective way of identifying the social meanings of disability that inform policing decisions leading up to and during arrests.[324]

For example, imagine police are called to respond to a reportedly intoxicated person who is dancing in a residential street. When the police approach the individual, the individual has slurred speech. The police arrest the person for public intoxication. It turns out, though, that the individual is a stroke survivor with speech and mobility disabilities. This is a clear wrongful-arrest claim.[325] Changing the hypothetical, assume now that the person is not a stroke survivor but has psychiatric disabilities. Police officers arrest the person, but this time for disorderly conduct. In this case, there is conduct and there is disability, but the arrest does not fit under the wrongful-arrest theory because, on the surface, the person was not arrested because the officers misperceived the effects of disability. The person was arrested because his

322. *See* Part II.B.1.

323. *See, e.g.*, Charlie De Mar, *New Video Shows Off-Duty Chicago Police Sergeant Shooting Teenager Ricardo Hayes*, CBS CHI. (Oct. 16, 2018, 10:10 PM), https://perma.cc/YR4N-F69C (describing the police shooting of Ricardo Hayes, a Black teen with a developmental disability, after an off-duty officer spotted Hayes running).

324. *Cf.* Robin Dembroff, Issa Kohler-Hausmann & Elise Sugarman, Essay, *What Taylor Swift and Beyoncé Teach Us About Sex and Causes*, 169 U. PA. L. REV. ONLINE 1, 3 (2020) (arguing that the but-for counterfactual inquiry in sex discrimination cases "confuse[s] more than [it] clarif[ies] a legal inquiry into whether or not something is discriminatory"). Robin Dembroff, Issa Kohler-Hausmann, and Elise Sugarman note that it is incorrect to proceed as though "questions of whether or not something is an instance of discrimination" can be answered with a focus on "individual-level causation . . . which centers on inherent traits or attributes of individual plaintiffs." *Id.* (emphasis omitted). Instead, the authors propose a social explanation and approach for identifying discriminatory conduct that focuses on "social generalizations, stereotypes, norms, and expectations"—that is, their social meanings. *Id.*

325. *See* notes 176-78 and accompanying text.

conduct—dancing in the street—was labeled as disorderly. That his conduct happens to stem from disability, perhaps, is of no concern for the purposes of a wrongful-arrest claim. Part of the reason successful wrongful-arrest claims involve facts more like the ones in the first scenario than in the second is that disability in the first scenario is consistent with the medical model, while disability in the second scenario is not. The second scenario involves a wrongful-arrest claim based on social meanings and understandings that attach to disability—the social model of disability. Although discrimination because of disability occurs in the second scenario, recognizing it requires a different conceptualization of disability and disability discrimination. Long-standing associations between criminality and disability require a more robust wrongful-arrest theory of liability—one that is rooted not just in medicalized understandings of disability but also in socially constructed meanings.

In the prior Parts of this Article, I have described how the medical model pervades Title II policing cases and how this model of disability works to deny or limit relief to plaintiffs. A review of cases including wrongful-arrest and failure-to-accommodate claims demonstrates how the view of disability as linked to biological traits, medical conditions, and inherent impairments dominates. In the next Part, I argue that courts should adopt the social model of disability in policing cases to expand the scope of protections for disabled people harmed by policing and police violence.

III. Toward a Social Model of Disability in Disability Law Policing Cases

Congress's findings and purpose—and the legal entitlements and duties the ADA provides—demonstrate a departure from the medical model of disability.[326] Congress enacted the ADA to counter and eradicate social discrimination, exclusion, and marginalization that is based on physical barriers, hostile attitudes, irrational prejudices, and stereotypes—social conditions that exist outside of the individual or are beyond the individual's

326. *See* 42 U.S.C. § 12101(a)(1)-(2) ("Congress finds that . . . physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; . . . historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem . . . ."); *supra* note 18 and accompanying text. *But see* McGowan, *supra* note 21, at 93 ("Admittedly, the ADA's rejection of the medical model and embrace of the functional and social model is not complete. It does define disability as a result of a 'physical or mental impairment,' and the EEOC regulations define impairments in terms of medical disorders. Yet, in most respects the ADA surely strides toward a functional approach." (footnotes omitted) (quoting 42 U.S.C. § 12102(2) (1994))).

control and outside the scope of the individual's personal responsibility.[327] No longer would problems of access to employment, public services, public accommodations, transportation, and communication be framed as "physiological impairments . . . [based on] individual problems."[328] Although the historical connections between institutionalization and criminalization were not fully explored in the congressional record, Congress did take note of forms of criminalization that were based on wrongful arrests of disabled persons due to misperceptions of criminal activity.[329] Consistent with this view, a social model of disability acknowledges the criminalization and policing that reinforce the social status of disabled people—particularly Black, Latinx, and Indigenous disabled people, low-to-no-income disabled people, and trans people with disabilities.[330] Consistent with this approach, in the following Subparts, I outline doctrinal reforms that incorporate a social model of disability.

A. Causation

Courts should adopt a broader causation standard than the but-for test, one that can incorporate social meanings of disability and can provide a basis for liability when disability is a motivating factor in the allegedly discriminatory conduct.[331] Policing remains a site of disability-based discrimination and subordination. Though not always explicit, long-standing associations between criminality and disability—or centuries-old practices of responding punitively to disability in public or to persons in need of mental-health treatment or in crisis—warrant broader legal protections for disabled people as a class. Courts should recognize that "by reason of disability" should be interpreted with an eye toward the long-standing associations between criminality and disability—one that incorporates a view of disability

327. *See supra* note 18 and accompanying text; McGowan, *supra* note 21, at 90-91 ("Disability . . . is described in the purpose section [of the ADA] as a situational, contingent condition, not an inherent condition arising inevitably from a physical or mental impairment. That is why the ADA concentrates on changing and restructuring the configuration of things around us, like buildings, services, public transportation, offices, and jobs, so that a person can work and participate in American life regardless of his disability." (emphasis omitted)).

328. Areheart, *supra* note 12, at 190-91.

329. *See, e.g.*, H.R. REP. NO. 101-485, pt. 3, at 50 (1990).

330. Furthermore, the ADA's accommodation mandate reflects an antisubordination approach to remedying the institutional and social practices that reinforce the historical oppression of disabled people. *See* Bagenstos, *supra* note 16, at 452.

331. Of course, *Gross v. FBL Financial Services, Inc.* calls into question whether the motivating-factor standard applies in the ADA context. 557 U.S. 167, 175-76 (2009); *see supra* note 306.

discrimination rooted not only in medical, diagnostic understandings of disability but also in social meanings, stereotypes, and myths.

B. Deliberate Indifference

In damages actions, intentional discrimination is often defined as deliberate indifference, rather than as discriminatory animus or purpose.[332] "Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely[] and a failure to act upon that the likelihood," and as the Ninth Circuit has reasoned, this standard is "better suited to the remedial goals of Title II of the ADA than is the discriminatory animus alternative."[333]

When assessing whether defendants had the required knowledge under this standard, courts should, consistent with a social model, factor in knowledge of disability based on actual *or* constructive notice, rather than knowledge of specific symptoms or diagnoses. Importantly, this assessment should focus on whether an officer failed to take preventative action to respond to the risk that disability-related behaviors would be misperceived as criminal conduct. *Gray*, discussed above, provides a helpful illustration. The First Circuit determined that the appropriate inquiry for the plaintiff's wrongful-arrest claim was whether the officer knew Gray's failure to follow orders was a "symptom of her mental illness rather than deliberate disobedience (warranting criminal charges)."[334] As to this claim, the court found Gray failed to meet her burden. The court's inquiry employs a medical model because it requires that Gray demonstrate that the officer have "particularized knowledge about the nature or degree of Gray's disability" or provide evidence to show that he knew she had bipolar disorder or was in the middle of a manic episode.[335]

By contrast, an inquiry more aligned with a social model of disability would have asked not whether the officer had particularized knowledge about the precise nature or degree of Gray's disability but rather whether the officer had knowledge (actual or constructive) that Gray had a disability and whether there was a heightened risk that the responding officer would misperceive

332. *See, e.g.*, Duvall v. County of Kitsap, 260 F.3d 1124, 1138 (9th Cir. 2001) (noting the choice between a "deliberate indifference" or "discriminatory animus" standard before "determin[ing] that the deliberate indifference standard applies"); D.E. v. Cent. Dauphin Sch. Dist., 765 F.3d 260, 269 (3d Cir. 2014) (requiring that the plaintiff make a showing of deliberate indifference); Meagley v. City of Little Rock, 639 F.3d 384, 389 (8th Cir. 2011) (same).

333. *Duvall*, 260 F.3d at 1139.

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

335. *Id.*

disability-related behaviors as criminal. Such an inquiry does not obviate the knowledge requirement, but it shifts the focus away from individual symptoms and whether the officer recognized them. Instead, the focus is on whether the officer had reason to know there was a risk that apparently unlawful conduct was actually the result of a psychiatric disability.

Failure-to-accommodate claims could be evaluated in similar fashion. In her case, Gray also alleged that the officer failed to accommodate her disability.[336] The First Circuit framed the inquiry as whether Gray demonstrated that the officer knew that there was a reasonable accommodation that he was required to provide but failed to do so.[337] In ruling against Gray, the court again emphasized that Gray failed to show that the officer had particularized knowledge of the nature or degree of her disability or that Gray had bipolar disorder or was experiencing a manic episode.[338] In contrast, an inquiry consistent with the social model would have asked whether the officer had knowledge (or reason to know) of Gray's disability and that Gray had an ADA-protected right to receive an accommodation—a right that was likely to be abridged if preventive action was not taken. Liability for money damages would follow if the officer failed to take preventative action despite knowledge of disability status or need for an accommodation, unless providing an accommodation would be unreasonable because it posed an undue burden or fundamental alteration to a program, service, or activity.

C. Disparate Impact

Courts should recognize disparate-impact claims that challenge a police department's failure to, for example, provide reasonable accommodations to disabled people, and some courts have already done so. Courts have recognized disparate-impact liability in ADA Title II claims outside the unlawful-arrests and police-use-of-force contexts.[339] Disparate-impact claims do not require proof of intention to discriminate, but they require the plaintiff to show "'that "a specific policy caused a significant disparate effect on a protected group."'"[340]

336. *Id.* at 16.

337. *Id.* at 18.

338. *Id.*

339. *See, e.g.*, Fulton v. Goord, 591 F.3d 37, 43 (2d Cir. 2009); Estate of Silva v. City of San Diego, No. 18-cv-02282, 2019 WL 3220165, at *9 (S.D. Cal. July 17, 2019).

340. J.V. v. Albuquerque Pub. Schs., 813 F.3d 1289, 1299 (10th Cir. 2016) (quoting Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City, 685 F.3d 917, 922 (10th Cir. 2012)); *see also id.* ("'This is generally shown by statistical evidence involving the appropriate comparables [sic] necessary to create a reasonable inference that any disparate effect identified was caused by the challenged policy and not other causal factors.' Moreover, a disparate impact claim must allege a pattern or practice of discrimination, not merely an isolated instance of it." (citation omitted) (quoting *Cinnamon Hills*, 685 F.3d at 922)).

Disparate-impact claims could be used to challenge a police department's failure to address disparities in uses of force deployed against disabled people as compared to that deployed against nondisabled people.[341] Title II's implementing regulations provide:

> (3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:
>
> (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;
>
> (ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or
>
> (iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.[342]

It is conceivable that Title II's disparate-impact provisions could support such claims when courts find a private right of action to enforce these regulations.[343] Failure to adopt more equitable policing policies or practices—including policies of diversion and de-escalation—to redress disparities in investigations, interactions, arrests, and detentions may screen out disabled

341. This would greatly expand legal liability for public entities, particularly with respect to disparities in use of force or deadly force. Recent investigations by the DOJ show disparities based on disability in deadly force and use of force. For example, the *Ferguson Report* noted that Ferguson Police Department (FPD) officers were "inclined to interpret . . . indications of mental or physical illness as belligerence," and FPD's own "records suggest[ed] a tendency to use unnecessary force against vulnerable groups such as people with mental health conditions or cognitive disabilities, and juvenile students." FERGUSON REPORT, *supra* note 4, at 2, 28. In its findings letter of its investigation into the Baltimore Police Department (BPD), the DOJ dedicated an entire section to the BPD's incidents of excessive force against individuals with mental disabilities, or those in mental crisis, who had committed no crime. BALTIMORE REPORT, *supra* note 4, at 77-85. With a nod to ADA claims, the investigation letter concluded that "BPD ha[d] failed to make reasonable modifications in its policies, practices, and procedures to avoid discriminating against people with mental illness and intellectual disabilities." *Id.* at 8.

342. 28 C.F.R. § 35.130(b)(3) (2020); *see also id.* § 35.130(b)(8) ("A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.").

343. *See* Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("[P]rivate rights of action to enforce federal law must be created by Congress."). Some courts have held that ADA Title II regulations provide a private cause of action for disparate-impact claims. Ability Ctr. of Greater Toledo v. City of Sandusky, 181 F. Supp. 2d 797, 799-800 (N.D. Ohio 2001), *aff'd*, 385 F.3d 901 (6th Cir. 2004); Wis. Cmty. Servs., Inc. v. City of Milwaukee, 465 F.3d 737, 753 (7th Cir. 2006) (en banc). *But see, e.g.*, Chasse v. Humphreys, No. 07-cv-00189, 2008 WL 4846208, at *8 (D. Or. Nov. 3, 2008) (holding that there was no private right of action to enforce the self-evaluation regulations of the ADA).

people as a class or work to "subject[] qualified individuals with disabilities to discrimination on the basis of disability."[344]

Use-of-force practices that lead to disproportionate violence against disabled people could be challenged on similar grounds. Such claims are indeed novel, but they are not without basis in the ADA. Disparate-impact liability is consistent with Congress's view that discrimination against disabled people does not occur only because of intentional discrimination.[345] Instead, Congress emphasized that structural barriers, social exclusion, and segregation resulted at times from neglect—or the failure to consider the needs, interests, and abilities of disabled people at all. For similar reasons, disparate-impact liability would also further a social model of disability under Title II by focusing on the effects of social exclusion (for example, removal via arrests or incarceration) created within the criminal legal system due to policies and practices that disproportionately affect disabled people or on the disparities generated by the failure to adopt necessary policies and practices.

D. Deference to Law Enforcement

Courts should give less deference to law enforcement in ADA policing cases. Deference to law enforcement informs judicial decisionmaking in several ways. In circuits that have decided that Title II does not apply to on-the-street arrests involving exigent circumstances, courts have deferred to officers as to what constitutes an exigent circumstance.[346] And in cases in which courts find that Title II applies but require a determination of whether there was a duty to accommodate, courts have deferred to officers in determining whether the requested accommodation was an unreasonable one based on the facts on the ground and the nature of the perceived or actual threat to officers or others.[347]

Adopting a social model of disability—again, a model of disability that is consistent with the ADA—requires limiting the vast scope of police discretion. Title II limits officer discretion and structures officer conduct in encounters, stops, and arrests in more robust ways than the Fourth Amendment does. The Fourth Amendment attempts (rather imperfectly) to limit and structure police

344. 28 C.F.R. § 35.130(b)(3)(i).

345. *See supra* notes 326-27 and accompanying text.

346. *See, e.g.*, Hainze v. Richards, 207 F.3d 795, 801-02 (5th Cir. 2000) (explaining that an officer's assessment of a danger and an appropriate response is "discretionary").

347. *See, e.g.*, Seremeth v. Bd. of Cnty. Comm'rs, 673 F.3d 333, 340-41 (4th Cir. 2012) (affirming the dismissal of an ADA reasonable-accommodation claim because although the reasonableness inquiry is necessarily fact specific, the court was "reluctant to question the snap judgments of law enforcement officials in situations in which a reasonable officer would fear for his [and others'] safety").

conduct around doctrines such as reasonable suspicion, probable cause, and reasonableness in excessive-force cases. The Fourth Amendment limits discretion within a particular police encounter by requiring, for example, reasonable suspicion for a stop, probable cause for an arrest, or the "quantum of individualized suspicion" that must exist to conduct a particular seizure.[348] But it does not require that the officer conduct the seizure in a particular manner, unless of course the officer chooses to engage in the use of force.[349] By contrast, Title II mediates officer encounters with civilians with disabilities in affirmative ways and builds on the constitutional floor that governs police encounters under the Fourth Amendment.[350] As a result, reading an unduly deferential standard into the ADA conflicts with Congress's mandate that public entities provide equality and inclusion for disabled people and Congress's recognition that policing and overcriminalization have caused long-standing inequality and exclusion.[351]

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348. Whren v. United States, 517 U.S. 806, 810, 817-18 (1996) (quoting Delaware v. Prouse, 440 U.S. 648, 654-55 (1979)).

349. Specifically, once a court determines that a seizure has occurred within the meaning of the Fourth Amendment, the reasonableness inquiry is only triggered when there is a use of force involved. *See, e.g.*, McCoy v. City of Monticello, 342 F.3d 842, 847-48 (8th Cir. 2003).

350. *See* David A. Maas, *Expecting the Unreasonable: Why a Specific Request Requirement for ADA Title II Discrimination Claims Fails to Protect Those Who Cannot Request Reasonable Accommodations*, 5 HARV. L. & POL'Y REV. 217, 220-22 (2011) (illustrating the heightened duty of law enforcement under the ADA to provide accommodations and illuminating the paradox of requiring someone to request what is already an affirmative duty to provide); *see also* Danielle Barondess, Comment, *[ADA]pting Policies & Practices: Applying Title II's Reasonable Modifications Requirement to Law Enforcement Interactions with Individuals with Disabilities*, 24 GEO. MASON L. REV. 981, 1013 (2017) ("Law enforcement has an affirmative duty to implement policies and procedures that modify the default practices to prevent discrimination based on disability.").

351. *See supra* notes 326-27 and accompanying text; *see also* H.R. REP. NO. 101-485, pt. 3, at 50 (1990) ("In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures. . . . Such discriminatory treatment based on disability can be avoided by proper training."); 136 CONG. REC. 11,461 (1990) (statement of Rep. Levine) ("One area that should be specifically addressed by the ADA's regulations should be the issue of nondiscrimination by police. Regretfully, it is not rare for persons with disabilities to be mistreated by the police. Sometimes this is due to persistent myths and stereotypes about disabled people. At other times, it is actually due to mistaken conclusions drawn by the police officer witnessing a disabled person's behavior. . . . [T]hese mistakes are avoidable and should be considered illegal under the [ADA]."); 28 C.F.R. app. B (2020) (Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services Originally Published July 26, 1991) (instructing that "law enforcement personnel [are] required to make appropriate efforts to determine whether perceived strange or disruptive behavior or unconsciousness is the result of disability."); Carly A. Myers, *Police Violence Against*

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Some may argue that such a reading of the ADA will put officers at greater risk of harm. There are two doctrinal responses to this concern—both of which take into consideration the facts on the ground without presuming the existence of exigent circumstances that pose unmitigable dangers to police. First, even if courts read the ADA as requiring less deference in Title II cases involving challenges to police conduct, they would still need to evaluate the facts of the case to determine whether reasonable accommodations could have mitigated any alleged threat to officers. Defendants would only have to demonstrate with objective evidence that accommodations would not have mitigated the alleged threat. Again, this approach is consistent with the defendant's burden under Title II's implementing regulations as they have been applied by courts. Stated differently, if an accommodation cannot be provided due to a direct threat posed by the plaintiff, the defendants must prove that with objective evidence, not with generalizations or stereotypes.[352] Second, scrutinizing officer conduct in Title II policing cases would incentivize municipalities and police departments, when there is actual or constructive notice, to redirect calls involving disabled people to social-service providers, who are better equipped to seek out and obtain information about a person's disability and come prepared to accommodate it.

E. Decriminalization and Diversion

Harm reduction requires eliminating pathways to police violence for disabled people and requires decriminalization and diversion. I offer a few legal and policy recommendations that can serve to reduce the contact between disabled people and police. Eliminating these contacts could help reduce the interactions with law enforcement, though the wide scope of discretion afforded to police under the Fourth Amendment may still allow for police intrusions against disabled people.[353] Though discretionary and discriminatory policing remains a social problem—a problem reinforced by legal rules that provide for broad discretion—eliminating pathways to police violence that stem from the criminalization of disability-related behavior and contact of persons with disabilities with the criminal legal system is a step in the direction of safety.

People with Mental Disabilities: The Immutable Duty Under the ADA to Reasonably Accommodate During Arrest, 70 VAND. L. REV. 1393, 1401 (2017) (arguing that "Congress likely intended the ADA's nondiscrimination mandate to apply to arrest").

352. *E.g.*, Hulett v. City of Syracuse, 253 F. Supp. 3d 462, 487-88 (N.D.N.Y. 2017) (citing 28 C.F.R. § 36.301).

353. *See* Carbado, *Stopping Black People*, *supra* note 33, at 134, 162-63 (illustrating the strikingly broad discretion afforded to police under the Fourth Amendment "with respect to *when* they can engage people" (quoting Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1505 (2016))).

1. Decriminalization

Mass criminalization not only renders disabled people vulnerable to policing and police violence but also provides an entry point into the criminal legal system and, in particular, administrative and institutional mechanisms of social control.[354] Decriminalization of low-level offenses, diversion, treatment, and robust discharge planning would go a long way toward decreasing points of contact—potential pathways to police violence—between disabled people and law enforcement. Short of decriminalization through legislation, police departments and prosecutors' offices should also commit to declining to enforce or prosecute low-level offenses.[355] As aggressive policing of unsheltered communities has demonstrated, quality-of-life offenses provide a readily available mechanism for removing people from public spaces, a large proportion of whom are disabled.[356] Criminalization and policing happens even when the only supposedly criminal act is performing a life-sustaining activity such as sleeping, sitting, or residing in tents in public.[357] Given this risk of criminalization and policing, policy proposals should also focus on providing housing and vocational services as another way of eliminating or reducing pathways to police violence against disabled communities.[358] These proposals should incorporate public health approaches that are noncoercive

354. *See generally* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015) (discussing arrests as regulation in immigration, housing, public benefits, employment, licensing, social services, education, and more); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1368-72 (2012) (discussing misdemeanors as a tool of racializing crime); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 294-97 (2011) (discussing excessive public-defender workloads as a significant factor in mass misdemeanor processing).

355. *E.g.*, Eric Westervelt, *San Francisco Elects Chesa Boudin as New District Attorney*, NPR: ALL THINGS CONSIDERED (Nov. 20, 2019, 5:22 PM ET), https://perma.cc/QAF3-MU6Q; Allan Smith, *Progressive DAs Are Shaking Up the Criminal Justice System. Pro-Police Groups Aren't Happy.*, NBC NEWS (updated Aug. 19, 2019, 9:01 AM PDT), https://perma.cc/FTL5-QU62.

356. *See, e.g.*, DISABILITY RTS. OR., *supra* note 6, at 29; U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, HOMELESSNESS IN AMERICA: FOCUS ON CHRONIC HOMELESSNESS AMONG PEOPLE WITH DISABILITIES 2 (2018), https://perma.cc/E5EL-CKBE; *see also Criminalization of Individuals with Severe Psychiatric Disorders*, MENTAL ILLNESS POL'Y ORG., https://perma.cc/4D54-UR87 (archived May 2, 2021) (discussing so-called "[m]ercy bookings").

357. *See, e.g.*, Martin v. City of Boise, 920 F.3d 584, 603-04 (9th Cir. 2019) (amended opinion); Joyce v. City & County of San Francisco, 846 F. Supp. 843, 845-46 (N.D. Cal. 1994); Pottinger v. City of Miami, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992).

358. BERNSTEIN ET AL., *supra* note 74, at 9 ("Although people with mental illness, like people without mental illness, sometimes commit crimes, the behavior leading to their involvement with the criminal justice system is most often the result of not receiving community services—clinical, housing, or vocational—that address their needs resulting from a disability.").

and nonpunitive. They may include proposals that focus on providing access to drug treatment, mental-health programs, and other support in communities, free of the threat of a criminal charge as a sanction for noncompliance with program requirements. Such community-based supports have proven effective in reducing contact with the criminal legal system and emergency hospitalization.[359]

2. Diversion

Adopting a social model of policing in Title II cases would not by itself prevent police violence against disabled people, and these recommendations should be accompanied by policies that eliminate pathways to police violence. The objective of these reforms should be the decoupling of law enforcement from mental-health crisis responses. Decoupling serves to disrupt the mental-distress-to-arrest pipeline that results in disabled people experiencing disproportionate exposure to police violence.[360] Reforms could include diverting calls that report a person in mental distress from police departments to counselors or social workers. They could also include local ordinances or municipal and police department policies that mandate the deployment of mental-health specialists and support staff and social workers instead of law enforcement.[361]

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359. A more recent report by the Judge David L. Bazelon Center for Mental Health Law summarized studies on the effects of Assertive Community Treatment (ACT), an individual package of services and supports for the day-to-day needs of people with serious mental illness. JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH L., DIVERSION TO WHAT? EVIDENCE-BASED MENTAL HEALTH SERVICES THAT PREVENT NEEDLESS INCARCERATION 3-4 (2019), https://perma.cc/WF7F-H6EX. It reported that:

> A 2017 study examining forensic ACT (FACT), which is specifically designed to serve people involved with the criminal justice system, found that participants receiving FACT over the course of a year spent significantly fewer days in jail than similar participants not receiving FACT (21.5 vs 43.5) and were less likely to incur new convictions. . . . A California study found that over 12 months, jail bookings for individuals enrolled in ACT were 36% lower than those for similarly situated individuals not enrolled in ACT, and the group not enrolled in ACT spent 48% more days in jail. A New York study found that over the course of one year, individuals enrolled in ACT had fewer arrests and spent approximately half the number of days in jail as individuals in a control group receiving enhanced "treatment as usual." Individuals who received ACT for the first time in Oklahoma in 2007 spent 65% fewer days in jail and 71% fewer days in inpatient hospitals than they had during the prior year.

Id. (footnotes omitted) (quoting J. Steven Lamberti et al., *A Randomized Controlled Trial of the Rochester Forensic Assertive Community Treatment Model*, 68 PSYCHIATRIC SERVS. 1016, 1016 (2017)).

360. *See* Derek Thompson, *Unbundle the Police*, ATLANTIC (June 11, 2020), https://perma.cc/2V8L-U76M.

361. *See, e.g.*, Jocelyn Wiener, *Rethinking 911: New California Efforts Seek to Shift Mental-Health Calls Away from Police*, DESERT SUN (updated July 5, 2020, 9:38 AM PT), https://perma.cc/D68R-99WC; Vik Adhopia, *It's Time to Rethink Police Wellness Checks, Mental Health Advocates Say*, CBC NEWS (updated July 4, 2020, 4:00 AM ET),

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These reforms should not be taken to suggest that mental disability is always the cause of violent behavior or inevitably leads to violent behaviors. However, a specific call for diversion recognizes that often, even social responses to non-normative psychiatric and psychological conditions involve forcible restraint, detention, and forcible medication. Though a full critique of the nature and scope of these social responses is beyond the scope of this Article, for now I note that there is growing consensus that healthcare workers and mental-health providers should not be deployed to perform punitive functions or pursue public-health approaches in a coercive manner.[362]

Calls for diversion are growing but are not yet widespread. More commonly, jurisdictions require police departments to receive training on disability- and mental-health-related topics.[363] I am skeptical about these reforms. Training programs that focus only on responses to an arrestee's behavior will reinforce the notion that the problem of policing in this context can be reduced to de-escalating, controlling, or containing the purported threat posed by disabled people. This approach fails to acknowledge that the problem is rooted in the deeper function and purpose of policing as a mechanism for regulating and responding to disabled persons who have breached social norms or pose a perceived or actual threat.

Though departments across the country have enacted policies requiring de-escalation and training[364]—and indeed, some departments report a reduction in uses of force, detention, and arrests as a result of such reforms[365]—these reforms do not go far enough in disrupting the pathways to police

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https://perma.cc/6DDP-ZHNR; Anna V. Smith, *There's Already an Alternative to Calling the Police*, MOTHER JONES (June 13, 2020), https://perma.cc/HLD7-ZHBE; LJ Dawson, *Taking Police Officers Out of Mental Health-Related 911 Rescues*, NBC NEWS (Oct. 10, 2019, 1:30 AM PDT), https://perma.cc/4HYR-L2JJ.

362. The Care Not Cops campaign has cautioned against coercive forms of care. *See* CARE NOT COPS, BUILDING CARE: PORTLAND COMMUNITIES RESPOND TO THE VIOLENCE OF POLICING—COMMUNITY REPORT, VOL 1, at 2 (2019), https://perma.cc/J4B2-UZRZ ("Under the guise of 'care' and 'treatment', the [treatment industrial complex] cages and controls people through correctional medical care, court-ordered or forced mental health treatment, and community corrections—including halfway houses, day reporting centers, drug and alcohol treatment programs, home confinement, electronic monitoring, state-mandated classes, and education programs.").

363. *See, e.g.*, ALYSSA WRIGHT, POLICE INTERACTIONS WITH INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES: USE OF FORCE, TRAINING, AND IMPLICIT BIAS 10-21 (2018), https://perma.cc/VX4D-TFFJ.

364. *See, e.g.*, SEATTLE POLICE DEP'T, SEATTLE POLICE DEPARTMENT MANUAL § 8.100 (2021), https://perma.cc/NBY8-Z9EN (offering broad guidelines for de-escalating situations); Claire Trageser, *Experts, Activists Say San Diego's New Police De-escalation Policy May Not Change Much*, KPBS (June 26, 2020), https://perma.cc/BF42-MFL3.

365. Paras V. Shah, Note, *A Use of Deadly Force: People with Mental Health Conditions and Encounters with Law Enforcement*, 32 HARV. HUM. RTS. J. 207, 218 (2019).

violence. This is because police officers are still deployed to respond to mental-health-crisis situations or effectuate involuntary mental holds, introducing the risks that armed officers will respond with potentially lethal force during the encounter.[366]

Some cities are adopting diversionary models to eliminate the involvement of law enforcement entirely. One such program is Crisis Assistance Helping Out On the Streets (CAHOOTS), a "mobile crisis intervention service integrated into the City of Eugene's public safety program."[367] The program provides a "confidential, voluntary and free service" to individuals experiencing mental-health issues, among a range of other needs, and transports them to sites where they can receive services and care.[368] Each van is equipped with a "mental health specialist/crisis worker . . . and an EMT or paramedic," along with "warm clothing, blankets, food and water."[369] These vans do not include weapons and CAHOOTS members lack the legal authority to arrest or detain people, though the vans do include a secure seating area for those who might be intimidated or feel unsafe.[370]

At the same time, diversionary reforms should also acknowledge the diversity of pathways to police violence. As noted, not all disabled people encounter police during mental crisis. For example, the services provided by the CAHOOTS team address homelessness, intoxication, disorientation, substance abuse, dispute resolution, first aid, and basic emergency medical care.[371] Indeed, the CAHOOTS approach and similar models recognize the overlapping individual and structural vulnerabilities that may place disabled individuals on a pathway to police violence. As one staff member from CAHOOTS put it:

> There's a growing awareness that alternatives to law enforcement are needed, that alternatives to emergency medical services are needed. There's a lot of people having problems related to psychiatric problems and addiction based problems

366. *Id.* at 209-11; *see also* OFF. OF THE INSPECTOR GEN. FOR THE NYPD, N.Y.C. DEP'T OF INVESTIGATION, PUTTING TRAINING INTO PRACTICE: A REVIEW OF NYPD'S APPROACH TO HANDLING INTERACTIONS WITH PEOPLE IN MENTAL CRISIS 12 (2017), https://perma.cc/FEQ3-8533.

367. Ellen Meny, *CAHOOTS an Alternative to Traditional Police, Ambulance Response*, KVAL (Feb. 5, 2016), https://perma.cc/ME59-KYE6 (quoting CAHOOTS materials); *see also* Rowan Moore Gerety, *An Alternative to Police That Police Can Get Behind*, ATLANTIC (Dec. 28, 2020), https://perma.cc/W37X-G9R3.

368. Meny, *supra* note 367.

369. *Id.*

370. *Id.*

371. *CAHOOTS FAQ*, WHITE BIRD CLINIC, https://perma.cc/BEU4-BCZK (archived May 2, 2021).

> and poverty problems, that end up getting addressed by the police but may be appropriately addressed by another resource.[372]

Intersectional approaches are required to reduce and eventually eradicate police violence against disabled people and to eliminate the use of arrests and detention as a way to contain and manage non-normative bodies and minds.

Conclusion

In this Article, I have explained how Title II of the ADA applies to lawsuits challenging police conduct, and I have argued that the medical model of disability predominates in these cases and works to limit relief for plaintiffs. I have argued that a social model of disability would permit greater protections under the ADA and would do so in a manner consistent with the statute's text and congressional purpose. I have also discussed both the limits and possibilities of police reform, and even transformative proposals, such as decriminalization and diversion, that extend beyond the enforcement of federal disability laws. Social movements, media accounts, disability-justice advocates, and, more recently, criminal-justice and disability-rights organizations have shown the need to address the problem of policing affecting disabled people and, in particular, disabled people of color. These movements point to the urgency of identifying and developing robust protections for disabled people under federal disability-rights law. Reframing the way courts conceptualize disability is one step in that direction.

372. Meny, *supra* note 367 (quoting CAHOOTS team member Brenton Gicker).