ESSAY

DISABILITY'S FOURTH AMENDMENT

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Issues relating to disability are undertheorized in the Supreme Court's Fourth Amendment jurisprudence. Across the lower courts, although disability features prominently in excessive force cases, typically involving individuals with psychiatric disabilities, it features less prominently in other areas of Fourth Amendment doctrine. Similarly, scholars have yet to substantively address how the Fourth Amendment's vast scope of police discretion renders individuals with disabilities vulnerable to policing and police violence. Although scholarship has engaged robustly with theories of criminalization and social control in critiques of Fourth Amendment doctrine that address race and racism, thus far, its engagement with disability and its intersections with other current and historically marginalized subordinated identities is limited.

This Essay centers disability as a lens for analysis in Fourth Amendment jurisprudence. This Essay discusses the ways in which disability mediates interactions with law enforcement and how Fourth Amendment doctrine renders disabled people vulnerable to police intrusions and police violence. More specifically, this Essay critiques the Terry *doctrine, consensual encounters, consent searches, and the objective reasonableness standard under* Graham v. Connor. *Applying a disability and critical race lens to each of these doctrines, taken together, demonstrates how Fourth Amendment doctrine both fails to adequately protect the constitutional rights of disabled people and reinforces a "normative bodymind" by rendering vulnerable to police surveillance, suspicion, searches, and force those persons whose physical and psychological conditions, abilities, appearances, behaviors, and responses do not conform to the dominant norm. By focusing on how Fourth Amendment doctrine*

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both erases disability and fails to adequately protect disabled people's privacy and security interests, this Essay suggests how the doctrine itself renders disabled people more vulnerable to policing and police violence.

INTRODUCTION

The story of *Graham v. Connor* is familiar to students and teachers of criminal procedure.[1] The facts of the case go something like this: Dethorne Graham was a thirty-nine-year-old Black man with diabetes.[2] On the day in question, Graham experienced the onset of an adverse insulin reaction.[3] He asked a friend to drive him to a nearby convenience store to purchase some orange juice to mitigate the reaction.[4] He grabbed a bottle of orange juice and went to stand in line at the store but decided that there were too many people in line.[5] Consequently, Graham rushed out of the store, returned to his friend's car, and asked his friend to drive him to another friend's house.[6] Officer Connor, a Black police officer, observed what had transpired in the convenience store, and it provoked his suspicion so much that he made an investigatory stop.[7] Graham's friend then told Officer Connor that Graham was having a "sugar reaction."[8] Unconvinced, Officer Connor wanted to verify this account, so he returned to his car to call the convenience store.[9] He also called for additional police backup.[10] In the meantime, Graham got out of the car, circled it a couple of times, and passed out briefly on or near the curb.[11] When responding officers arrived, Graham was drifting in and out of consciousness.[12] Nonetheless, officers still forcibly handcuffed him, and at some point during the ordeal, "Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder . . . [and] a loud ringing in his right ear."[13]

What is interesting about the case and how it is discussed in subsequent court opinions and legal scholarship and taught in criminal procedure courses is that Graham's disability is at once hypervisible and yet still somewhat invisible. Graham's disability is noted, but little interrogation ever arose of how disability mediated the police interaction or what it says about Fourth Amendment doctrine that suspicion could be based on behaviors caused by, or at least closely related to, a person's disability. This is

1. 490 U.S. 386 (1989).

2. Id. at 388; Leon Neyfakh, Is Juice Delayed Justice Denied?: What Constitutes "Reasonable" Use of Force by Police? It Goes Back to the Case of Dethorne Graham., Slate (Oct. 2, 2015), https://slate.com/news-and-politics/2015/10/when-is-police-violence-reasonable-it-goes-back-to-this-supreme-court-decision.html [https://perma.cc/72RQ-FABL].

3. *Graham*, 490 U.S. at 388.

4. Id.

5. Id. at 388–89.

6. Id. at 389.

7. Id.

8. Id.

9. Id.

10. Id.

11. Id.

12. Id.

13. Id. at 390.

perplexing because Graham's disability—or more precisely, his disability-related behaviors—furnished a large part of the basis for reasonable suspicion justifying Officer Connor's investigatory stop. Subsequently, the responding officer misinterpreted Graham's disability and attendant symptoms as indicia of drunkenness. Indeed, one of the officers was quoted in the opinion as stating, "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up."[14] Of course, *Graham* is an excessive force case, and the question of whether the investigatory stop was legal was not at issue by the time the case reached the Supreme Court. At oral argument, however, Justice Thurgood Marshall was cognizant that disability furnished a basis for the seizure and subsequent use of force. Marshall pressed respondent's counsel to answer exactly "what reason . . . there [was] for handcuffing a diabetic in a coma."[15] The Supreme Court went on to rule in Graham's favor, remanding the case back to the court below to apply the correct standard—that of objective reasonableness. Yet despite Justice Marshall's thorough engagement with Graham's disability, the role it played in the encounter, and how it shaped the officers' subsequent justifications for their use of force, disability does not feature prominently in the majority opinion.

This duality, both the hypervisibility and invisibility of Graham's disability, comes through in a subsequent Supreme Court opinion some twenty-six years later, in a case involving another excessive force claim: *City of San Francisco v. Sheehan*.[16] In that case, officers from the San Francisco Police Department shot Teresa Sheehan, a white woman in her fifties with psychiatric disabilities, fourteen times.[17] The officers, Kimberly Reynolds and Katherine Holder, were called to the group home where Sheehan resided to effectuate a temporary detention order after a social worker had determined that Sheehan required temporary detention for psychiatric evaluation and treatment.[18] According to the social worker, Sheehan had stopped taking her medication, which concerned him, so he called the police.[19] When Officers Reynolds and Holder arrived at Sheehan's room, they knocked and informed Sheehan that they were there to help her.[20]

14. Id. at 389.

15. Transcript of Oral Argument at 26, *Graham*, 490 U.S. 386 (No. 87-6571), https://www.supremecourt.gov/pdfs/transcripts/1988/87-6571_02-21-1989.pdf [https://perma.cc/KUS9-RLSU].

16. 575 U.S. 600 (2015).

17. Id. at 602–08; Sandy Allen, Police Were Called to Take Teresa Sheehan to a Hospital. Instead, They Shot Her Seven Times., Buzzfeed News (July 9, 2015), https://www.buzzfeednews.com/article/sandraeallen/the-trials-of-teresa-sheehan-how-america-is-killing-its-ment [https://perma.cc/7S79-Z6SM] ("There were 14 bullet holes in her body.").

18. *Sheehan*, 575 U.S. at 603.

19. Id.

20. Id. at 604.

When Sheehan did not respond, the officers obtained a key from the social worker and entered the room, which startled Sheehan.[21] Sheehan picked up a "kitchen knife with an approximately 5-inch blade and began approaching the officers, yelling something along the lines of 'I am going to kill you. I don't need help.'"[22] The officers retreated and left Sheehan in her room alone.[23] Fearing that Sheehan would escape or harm herself or others, the officers reentered the room instead of waiting for backup.[24] Armed with pepper spray and their pistols, the officers sprayed Sheehan in the face. They testified that when Sheehan did not drop the knife after being pepper sprayed, they shot her multiple times.[25] Sheehan survived and sued, alleging that the officers had used excessive force in violation of the Fourth Amendment and that the officers had failed to accommodate her in violation of the Americans with Disabilities Act (ADA).[26] The Court dismissed the ADA claim as improvidently granted and held that the officers were entitled to qualified immunity, as no clearly established law existed that put them on notice that they were violating Sheehan's Fourth Amendment rights.[27] In reaching that holding, Justice Samuel Alito, writing for the majority, sharply distinguished *Graham* from *Sheehan*—and overturned the Ninth Circuit's holding that *Graham* controlled as clearly established law sufficient to defeat qualified immunity—noting that:

> Even a cursory glance at the facts of *Graham* confirms just how different that case is from this one. That case did not involve a dangerous, obviously unstable person making threats, much less was there a weapon involved. There is a world of difference between needlessly withholding sugar from an innocent person who is suffering from an insulin reaction, and responding to the perilous situation Reynolds and Holder confronted. *Graham* is a nonstarter.[28]

On the surface, distinguishing *Graham* from *Sheehan* on the facts seems correct. Yet while the facts of the cases differ dramatically, the Court's move to sharply distinguish may indeed miss some of the more fundamental ways in which the cases are similar. Disability is both hypervisible and invisible in both cases: Disability and reactions to it prompt the police encounter, yet the role disability plays, whether in triggering the encounter or during the encounter, and its role in justifying the use of force, is largely ignored. Most importantly, the Court's cursory glance does not take critical account of how the discretionary decisions (e.g., to stop,

21. Id.
22. Id.
23. Id.
24. Id. at 604–05.
25. Id. at 605–06
26. Id. at 606.
27. Id. at 616–17.
28. Id. at 614 (citation omitted) (citing Graham v. Connor, 490 U.S. 386, 388–89 (1989)).

to seize) by police in *Graham* share similarities, or operating logics, with the discretionary decisions (e.g., to enter the room, to not wait for backup, to use force) at issue in *Sheehan*. These discretionary decisions or operating logics relate to the policing of disability and how norms, attitudes, and social practices related to, responding to, or produced by disability and disability-based subordination are reinforced through the policing powers the Fourth Amendment authorizes and upholds.

To date, the Supreme Court's Fourth Amendment jurisprudence is undertheorized when it comes to issues relating to disability. A number of cases discuss disability and Fourth Amendment doctrine, but few offer a substantive critique or engage with disability as a subordinated identity or status.[29] Among the lower courts, though disability features prominently in excessive force cases, typically involving individuals with psychiatric disabilities, it features less prominently in other areas of Fourth Amendment doctrine.[30] Although there has been robust engagement with theories of criminalization and social control in Fourth Amendment critiques involving race, there is limited engagement with disability and its intersections with other subordinated identities, including race, class, and marginalized gender identities and expressions.[31] Finally, despite some recent legal scholarship addressing police violence as it affects disabled people, particularly people with psychiatric disabilities, scholars have yet to substantively address how the vast scope of police discretion afforded by the Fourth Amendment renders individuals with disabilities vulnerable to unwarranted police encounters and intrusions.[32]

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29. See Samuel R. Bagenstos, Subordination, Stigma, and "Disability", 86 Va. L. Rev. 397, 402 (2000) ("A casual first glance at the bottom-line results might suggest that the four cases are consistent with an understanding of disability as a subordinated group status. A closer analysis reveals a more complicated picture, however.").

30. E.g., Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst, 810 F.3d 892, 910 (2016) ("Where, during the course of seizing an out-numbered mentally ill individual who is a danger only to himself, police officers choose to deploy a taser[,] . . . those officers use unreasonably excessive force . . . . [L]aw enforcement officers should now be on notice that such taser use violates the Fourth Amendment.").

31. See, e.g., David Cole, No Equal Justice: Race and Class in the American Criminal Justice System 22, 32 (1999) (arguing that the courts have "turned a blind eye to factors strongly suggesting a less than voluntary encounter" in the context of Fourth Amendment jurisprudence and citing cases involving police violence that affected disabled individuals).

32. See, e.g., Michael Avery, Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People, 34 Colum. Hum. Rts. L. Rev. 261, 267–89 (2003) (discussing police excessive force against individuals labeled as "emotionally disturbed"); Camille A. Nelson, Frontlines: Policing at the Nexus of Race and Mental Health, 43 Fordham Urb. L.J. 615, 619 (2016) [hereinafter Nelson, Frontlines] (discussing ways in which negatively racialized individuals are labeled as crazy despite actual mental health diagnosis); Camille A. Nelson, Racializing Disability, Disabling Race: Policing Race and Mental Status, 15 Berkeley J. Crim. L. 1, 16 (2010) [hereinafter Nelson, Racializing Disability] (discussing the criminalization of and excessive force against disabled people of color).

This Essay centers disability as a lens for analysis in Fourth Amendment jurisprudence. This Essay discusses the ways in which disability mediates interactions with law enforcement and how Fourth Amendment doctrine renders disabled people vulnerable to policing and police violence.[33] More specifically, this Essay focuses on a critique of the *Terry* doctrine, consensual encounters, consent searches, and the objective reasonableness standard under *Graham*. A critical lens focused on each of these doctrines, taken together, demonstrates how Fourth Amendment doctrine both fails to adequately protect disabled people and reinforces a "normative bodymind"[34] by rendering vulnerable to police surveillance, suspicion, and force those persons whose physical and psychological conditions, abilities, appearances, behaviors, and responses do not conform to the dominant norm.

This Essay also builds on and grows out of the work of many scholars who have written about racial bias and disparities in policing,[35] and the work of critical race theorists who have argued that legal doctrine constructs race and gender hierarchies.[36] Legal scholars have long recognized

33. This Essay's reference to "disabled people" should not be taken to suggest uniformity in disabilities or in the experiences of people with disabilities. Naturally, disabilities include a whole range of physical, intellectual, developmental, sensory, and biological embodiments, expressions, conditions, and impairments, as well as chronic illnesses and injuries. See Bagenstos, supra note 29, at 405 (describing disability as a "diverse array of conditions"). This Essay uses the term "disabled people" to acknowledge the shared experiences with subordination that attaches to the social meanings of disabilities. See Simi Linton, Claiming Disability: Knowledge and Identity 2 (1998) (describing the "group identity" that disabled people have embraced); Bagenstos, supra note 29, at 418 (suggesting that subordination creates an identifiable class of people with disabilities).

34. See Sami Schalk, Bodyminds Reimagined: (Dis)ability, Race, and Gender in Black Women's Speculative Fiction 5 (2018) ("Bodymind is a materialist feminist disability studies concept from Margaret Price that refers to the enmeshment of the mind and body, which are typically understood as interacting and connected, yet distinct entities due to the Cartesian dualism of Western philosophy." (citing Margaret Price, The Bodymind Problem and the Possibilities of Pain, 30 Hypatia 268, 270 (2014))).

35. See generally Cole, supra note 31 (arguing that policing prerogatives and America's criminal justice imposes race- and class-based double standards which consequently impacts the rights of the poor and minorities); David A. Harris, A City Divided: Race, Fear and the Law in Police Confrontations (2020) (discussing how different races of people have varying police encounters and the effects of militarization of the police on police relations amongst various minority communities); David A. Harris, Racial Profiling: Past, Present and Future?, 34 Crim. Just. 10 (2020) [hereinafter Harris, Racial Profiling] (noting how entrenched racial profiling is within our community and explaining how it corrodes relations between police and communities); Tracey Maclin, Race and the Fourth Amendment, 51 Vand. L. Rev. 333 (1998) [hereinafter Maclin, Race and the Fourth Amendment] (arguing how Whren v. United States, 517 U.S. 806 (1996), continues to allow for more racial policing in the area of traffic enforcement).

36. See, e.g., I. Bennett Capers, Policing, Race, and Place, 44 Harv. C.R.-C.L. L. Rev. 43, 65 (2009) (describing the role of criminal law and procedure in creating racialized spaces); Devon W. Carbado, (E)racing the Fourth Amendment, 100 Mich. L. Rev. 946, 947 (2002) [hereinafter Carbado, (E)racing the Fourth Amendment]; Kimberle Crenshaw,

the role of race and racism in the criminal legal system, particularly with respect to policing.[37] These criminal legal scholars[38] have identified overpolicing and discriminatory enforcement with respect to racial minorities and low- to no-income persons of color in particular as central to the problem of mass criminalization and the mass punishment system in America.[39]

Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal Forum 139, 145, 151; Dorothy E. Roberts, Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing, 89 J. Crim. L. & Criminology 775, 805 (1999) [hereinafter Roberts, Race, Vagueness, and the Social Meaning of Order-Maintenance Policing].

37. See, e.g., Cole, supra note 31, at 53 ("In effect, then, the Supreme Court has immunized a wide range of law enforcement from any Fourth Amendment review. All these tactics are disproportionately directed at persons of color."); Devon W. Carbado, From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence, 105 Calif. L. Rev. 125, 143 (2017) [hereinafter Carbado, From Stopping Black People to Killing Black People] (arguing that the Court should consider race when assessing the "totality of the circumstances" of a police seizure); Cynthia Lee, Reasonableness With Teeth: The Future of Fourth Amendment Reasonableness Analysis, 81 Miss. L.J. 1133, 1152 (2012) [hereinafter Lee, Reasonableness With Teeth] (describing police officers' implicit racial bias toward Black and brown individuals in stops and searches); Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 Val. U. L. Rev. 243, 250 (1991) [hereinafter, Maclin, Black and Blue Encounters] ("When assessing the coercive nature of an encounter, the Court should consider the race of the person confronted by the police, and how that person's race might have influenced his attitude toward the encounter."); Maclin, Race and the Fourth Amendment, supra note 35, at 339–40 ("Although the casual reader of the Court's Fourth Amendment opinions would never know it, race matters when measuring the dynamics and legitimacy of certain police-citizen encounters.").

38. See, e.g., Issa Kohler-Hausmann, Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing 9 (2018); Alexandra Natapoff, Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal 3–12 (2018) [hereinafter Natapoff, Punishment Without Crime]; John Pfaff, Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform 14 (2017); see also Jenny Roberts, Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts, 45 U.C. Davis L. Rev. 277, 293 n.69 (2011) (noting that racial and economic disparities in the criminal justice system are particularly apparent when it comes to misdemeanor arrests).

39. See, e.g., Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 178–90, 234 (2010) ("[T]he War on Drugs is an engine of mass incarceration, as well as a major cause of gross racial disparities throughout the system."); Elise C. Boddie, Adaptive Discrimination, 94 N.C. L. Rev. 1235, 1272–73 (2016) (noting that Black people "comprise a disproportionate number of those imprisoned and, thus, a disproportionate number of those affected by felon disenfranchisement"); Ian F. Haney López, Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama, 98 Calif. L. Rev. 1023, 1050–51 (2010) ("Mass incarceration, and even more convict leasing, demonstrate one of the core insights promoted by a theory of racial stratification: the inseparable connection between race and class in the United States."); Joseph H. Tieger, Police Discretion and Discriminatory Enforcement, 1971 Duke L.J. 717, 718–19 ("For the poor, the Black, the culturally-deviant, and the politically-activist minorities, constitutional protections are easily rendered meaningless by the capricious exercise of unreviewable discretion by the policeman on the beat . . . ."); Valeria Vegh Weis, Criminal Selectivity in the United

Criminal law scholars have documented the manner in which race, class, and community—namely, the designation of a community as "high crime"—facilitates police stops based on a lack of individualized suspicion.[40] Beyond this, critical race theorists have documented the manner in which policing and legal doctrine construct racialized suspicion while at the same time omitting consideration of the experiences of racial minorities as policed subjects in Fourth Amendment jurisprudence.[41] This analysis is informed by Professor Devon Carbado's work, which sought to uncover the pathways to police violence as both a theoretical framework for diagnosing the nature and scope of the problem of policing and remedial interventions.[42] In addition, this Essay builds on the work of Professor Camille Nelson, who has written on the role of policing in race- and mental disability-based subordination, to hone in on the Fourth Amendment and its role in reinforcing disability-based subordination, beyond mental disability and inclusive of physical, intellectual, and developmental disability.

Finally, this Essay rethinks aspects of Fourth Amendment doctrine, drawing from disability studies, critical disability theory, and disability critical race theory, and offers an analysis of police encounters that centers the experiences of people with disabilities, with a particular focus on multiple marginalized disabled people. Though this Essay provides a more nuanced analytical framework for understanding policing, it aims to do more than offer another identity to the significant and pervasive problem of racial bias in policing. Rather, this Essay aims to discuss how disability and race, gender, and class all intersect to form "multiple axes and forms of oppression."[43] In short, this Essay is informed by Professor Kimberlé Crenshaw's work on intersectionality and its applications to American law and politics and offers an intersectional analysis of policing through the

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States: A History Plagued by Class & Race Bias, DePaul J. Soc. Just., Summer 2017, at 1, 5–9, 22–24 ("This means that, although most laws appear to be facially neutral, they disproportionately target behaviors associated with the lower classes and racial minorities.").

40. David A. Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 Ind. L.J. 659, 660 (1994); David A. Harris, Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under *Terry v. Ohio*, 72 St. John's L. Rev. 975, 976 (1998); Tracey Maclin, The Decline of the Right of Locomotion: The Fourth Amendment on the Streets, 75 Cornell L. Rev. 1257, 1273 (1990); Margaret Raymond, Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion, 60 Ohio St. L.J. 99, 100–01 (1999).

41. Carbado, (E)racing the Fourth Amendment, supra note 36, at 965; see also Dorothy Roberts, How the Child Welfare System Polices Black Mothers, S&F Online (2019), https://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/how-the-child-welfare-system-polices-black-mothers/# [https://perma.cc/6DL4-GLL7].

42. See Carbado, From Stopping Black People to Killing Black People, supra note 37, at 128 (discussing how Fourth Amendment law enables pathways to police violence).

43. Liat Ben-Moshe, The State of (Intersectional Critique of) State Violence, 46 Women's Stud. Q. 306, 306 (2018) [hereinafter Ben-Moshe, The State of State Violence].

lens of disability, with a focus on Fourth Amendment doctrine.[44] As such, this Essay aims to provide a thick description of individuals criminalized on account of their disabilities, but it rejects accounts that are rooted in medicalized notions of disability and that explain criminalization as a product of disability.[45]

This Essay proceeds in three parts. Part I discusses the problems of policing and police violence as they affect disabled people. Part II provides an extensive critique of Fourth Amendment doctrine to demonstrate how the doctrine either erases disability or fails to recognize and adequately address issues relating to disability. Here, the focus of my critique is on the *Terry* doctrine and its progeny, consensual encounters, consent searches, and the objective reasonableness standard under *Graham*. Disability and critical race lenses applied to each of these doctrines and taken together demonstrate how Fourth Amendment doctrine fails to adequately protect the Fourth Amendment rights of disabled people. Part III notes how this erasure serves to reinforce a "normative bodymind" by rendering vulnerable to police surveillance, suspicion, searches, and force those persons whose physical and psychological conditions, abilities, appearances, behaviors, and responses do not conform to the dominant norm. This Essay then offers a set of doctrinal and policy solutions to address the problems identified in Fourth Amendment jurisprudence.

I. POLICING DISABILITY

In part, longstanding associations between disability and criminality may lead to initial skepticism regarding a project that seems to examine policing through the lens of disability.[46] For some, policing disability—which is defined here as aggressive scrutiny, surveillance, and policing of disabled people—is an appropriate way to prevent harm and promote public safety. A cursory review of media accounts following recent mass shootings reveals a similar pattern, as media commentators, policymakers, and elected officials rush to link such violent acts solely to "mental illness,"[47]

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44. Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1242–43 (1991).

45. See, e.g., 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 (2008) ("[U]nder the medical model, a person's disability is her own personal misfortune—devoid of social cause or responsibility."); Bagenstos, supra note 29, at 427–28 ("Activists with disabilities believed the dominant [medical] approach inappropriate because it treated disability as an inherent personal characteristic that should ideally be fixed . . . .").

46. See, e.g., Liat Ben-Moshe, Decarcerating Disability: Deinstitutionalization and Prison Abolition 26 (2020) [hereinafter Ben-Moshe, Decarcerating Disability] (noting the long history of "racial criminal pathologization").

47. This Essay uses the term psychiatric or mental disabilities instead of mental illness. Psychiatric disabilities include "anxiety disorders (which include panic disorder, obsessive

while ignoring or diminishing the role of a host of other causal factors.[48] Furthermore, policing and surveillance—whether through aggressive enforcement of order-maintenance laws or policing of public and private spaces where disabled people reside (e.g., group homes, clinics, and hospitals)—may be viewed as appropriate approaches to minimizing public disorder, including disruptions to normal social and business operations, or preventing harm to others, including staff and other patients.[49] Though

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compulsive disorder, and post-traumatic stress disorder), bipolar disorder, schizophrenia, major depression, and personality disorders . . . phobias such as agoraphobia, eating disorders . . . personality disorders such as borderline personality disorder and antisocial personality disorder, and dissociative disorders such as dissociative identity disorder and depersonalization disorder." What Are Psychiatric Disabilities?, Nat'l Rehab. Info. Ctr. (May 12, 2014), https://naric.com/?q=en/FAQ/what-are-psychiatric-disabilities [https://perma.cc/JDN9-7V2D] (citing Enforcement Guidance on the ADA and Psychiatric Disabilities, EEOC, https://www.eeoc.gov/laws/guidance/enforcement-guidance-ada-and-psychiatric-disabilities [https://perma.cc/S46M-EYZE] (last visited Sept. 28, 2021)). Consistent with disability rights and disability justice movements, this Essay recognizes the importance of language in shaping how we think about disability and how language choices can be imbued with ableism and both reveal and reinforce subordination on the basis of disability. See, e.g., Lydia X. Z. Brown, Ableism/Language, Autistic Hoya, https://www.autistichoya.com/p/ableist-words-and-terms-to-avoid.html [https://perma.cc/6UAH-MU3M] (last updated Nov. 16, 2021) (providing a "glossary of ableist phrases"); Disability Language Style Guide, Nat'l Ctr. on Disability & Journalism, https://ncdj.org/style-guide/ [https://perma.cc/CJG9-URV7] (last modified Aug. 2021) (providing a style guide for words commonly used to refer to disability); Labib Rahman, Disability Language Guide 1–2 (July 11, 2019), https://disability.stanford.edu/sites/g/files/sbiybj1401/f/disability-language-guide-stanford.pdf [https://perma.cc/LLG9-SVUU] (offering "a starter guide . . . for considering disability equity (and practicing deference to individual experiences) in the words we use as an institutional community"). In the discussion of individuals with disabilities, this Essay uses identity-first language to refer to disabled people as a group or class. 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 Rahman, supra, at 2.

48. Media coverage and public discourse following mass shootings consistently emphasize psychiatric disabilities ("mental illness"). As scholar Nirmala Erevelles notes in her discussion of the white men who perpetrated the mass shootings at Sandy Hook, Northern Illinois University, and the Aurora, Colorado movie theater:

> Although the media downplayed the fact that at least three of these shooters were young white men with easy access to assault rifles, much was made of the allegation that all four men were presumably diagnosed with a mental illness/disability . . . . [I]n each of the public discourse surrounding these mass killings, mental illness/disability appears as the dividing line—the fearsome Other—that sign "of deviance that will separate the killers from 'us.'"

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 83 (Liat Ben-Moshe, Chris Chapman & Allison C. Carey eds., 2014) (quoting Margaret Price, Mad at School: Rhetorics of Mental Disability and Academic Life 151 (2011)).

49. See, e.g., Sunita Patel, The Hospital Policing Web 5–6 (Sept. 23, 2021) (unpublished manuscript) (on file with the *Columbia Law Review*) ("The nexus of care work and carcerality is also enmeshed with street policing.").

I specifically challenge such order-maintenance policing policies and practices elsewhere,[50] this Essay argues that interrogating these public safety rationales will be important to adequately respond to the harms of policing that disproportionately affect disabled people and render them vulnerable to police violence.

Other critics may read this and believe that, to put it bluntly, disability does not matter for the purposes of policing. In other words, whether a police officer uses force to detain an individual who is allegedly engaged in criminal conduct because of conduct stemming from their disability should not matter. Critics may assert that the officer's duty is to, in police parlance, contain the threat or subdue the suspect.[51] This Essay challenges this view by suggesting that such an approach risks criminalizing a class of people. Admittedly, in some cases it will be difficult, if not impossible, for officers to identify disability-related behaviors or behaviors linked to disability (in some cases, behaviors involving impairments stemming from disabilities that go untreated). In many cases, however, acknowledging the role of disability in policing will and can save a person's life or minimize the person's exposure to unwarranted intrusion by law enforcement. Finally, failing to account for the ways in which the Fourth Amendment underprotects disabled people, or to pay sufficient attention to issues relating to disability, renders Fourth Amendment doctrine complicit in the subordination of disabled people. By erasing or failing to properly analyze disability, courts ignore or fail to adequately consider how disability not only mediates encounters, seizures, searches, and uses of force but also how disability constructs both "suspects" and a particular vision of police and policing itself. The Fourth Amendment should have something to say about police violence against disabled people—and this Essay attempts to make the case for why and how.

Although the focus here is on Fourth Amendment doctrine, in ways similar to the doctrines later discussed, disability hides in plain sight in public advocacy for police reform and movements to end police violence.

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50. See Jamelia N. Morgan, Rethinking Disorderly Conduct, 109 Calif. L. Rev. 1637, 1642 (2021) ("[D]isorderly conduct laws continue to enforce norms for behavior that are discriminatory and, in doing so, reinforce social hierarchies based on race, gender, sexual orientation, and disability.").

51. See, e.g., United States v. Cowden, 882 F.3d 464, 471 (4th Cir. 2018) (discussing how a state police trooper testified in his own defense that he only intended to "subdue" the suspect and "contain the threat that he posed" when the trooper grabbed the suspect by the throat and punched him in the back of the head); Pearland Police Dep't, Policy Manual, §§ 502.3.1(3)(h), 502.3.8(3)(c) (2021), https://www.pearlandtx.gov/home/showdocument?id=30669&t=637680110750421500&fbclid=IwAR1V_pZdSSgJaE4CBymDyomHiwauSiSWBtboIVr1gSa_alM2dw0QzAQWR-g [https://perma.cc/2AYM-S39B] (discussing "[d]e-escalation techniques" officers may use to "[c]ontain a threat"). For a version of this argument, admittedly in the Canadian context, see Ottawa Man Critically Injured During Arrest Has Died, CBC News (July 25, 2016), https://www.cbc.ca/news/canada/ottawa/siu-investigate-hilda-street-arrest-hospital-1.3694114 [https://perma.cc/QA3Y-PSBJ].

A few exceptions do exist—local protests in response to the killings of Mario Woods and Deborah Danner are such examples[52]—but in general, disability is comparatively less prominent in movements against police violence. As disability justice advocates have emphasized in their efforts to obtain inclusion in movements against police violence, a number of the high-profile victims of police violence have been Black, indigenous, and Latinx people *with disabilities*.[53] Freddie Gray was a twenty-five-year-old Black man with a learning disability.[54] Laquan McDonald was a seventeen-year-old Black man with PTSD and unspecified psychiatric disabilities.[55] Eric Garner was a Black man with respiratory disabilities.[56] This list of names omits Black women, in part, because Black women do not feature prominently among well-known victims of police violence recognized by movements. The campaign #SayHerName has emphasized the way media and public discourse erases Black women from discussions of police violence.[57] Their names are certainly less well known, but a number of Black women who have been killed by law enforcement were also Black disabled women, including but not limited to Tanisha Anderson,[58] Michelle

52. See Protest Held Over NYPD Shooting of Deborah Danner in the Bronx, ABC 7 (Oct. 19, 2016), https://abc7ny.com/news/protest-held-over-nypd-shooting-of-deborah-danner-in-the-bronx/1562150/ [https://perma.cc/6DH6-U26B] (reporting on a local protest held over the fatal shooting of Deborah Danner, a sixty-six-year-old woman who had "extensive mental health difficulties"); Report: Mario Woods Officer-Involved Shooting Inspired Kaepernick's Anthem Protest, CBS SF Bay Area (Aug. 20, 2019), https://sanfrancisco.cbslocal.com/2019/08/20/mario-woods-officer-involved-shooting-san-francisco-colin-kaepernick-anthem/ [https://perma.cc/F348-PGK2] (reporting on how the killing of Mario Woods sparked months of protests).

53. See The Harriet Tubman Collective, Disability Solidarity: Completing the "Vision for Black Lives," Tumblr (Sept. 7, 2016), https://wocinsolidarity.tumblr.com/post/163486425847/disability-solidarity-completing-the-vision-for [https://perma.cc/E73M-KMM3].

54. Zosia Zaks, Opinion, Why No Talk of Gray's Disabilities?, Baltimore Sun (May 4, 2015), https://www.baltimoresun.com/opinion/readers-respond/bs-ed-gray-disabled-letter-20150502-story.html (on file with the *Columbia Law Review*).

55. See Christy Gutowski & Jeremy Gorner, The Complicated, Short Life of Laquan McDonald, Chi. Trib. (Dec. 11, 2015), https://www.chicagotribune.com/news/breaking/ct-laquan-mcdonald-trouble-met-20151211-story.html (on file with the *Columbia Law Review*) ("McDonald had learning disabilities and was diagnosed with complex mental health problems, including post-traumatic stress disorder.").

56. See Terry J. Allen, Why Eric Garner Couldn't Breathe, In These Times (Jan. 15, 2015), https://inthesetimes.com/article/17518/why_eric_garner_couldnt_breathe [https://perma.cc/L5ZR-MMXC] (stating that Garner was obese and had asthma and a weak heart).

57. About #SayHerName, Afr. Am. Pol'y Forum, https://aapf.org/sayhername [https://perma.cc/BWV2-XCL7] (last visited Sept. 28, 2021).

58. Michelle Dean, 'Black Women Unnamed': How Tanisha Anderson's Bad Day Turned Into Her Last, Guardian (June 5, 2015), https://www.theguardian.com/us-news/2015/jun/05/black-women-police-killing-tanisha-anderson [https://perma.cc/B7HC-JN8Z].

Cusseaux,[59] Charleena Lyles,[60] and Sandra Bland.[61] Moreover, though even less publicized, police killings of indigenous and Latinx people have also spurred community outrage, but comparatively less public protest, as was the case following the police killings of Freddy Centeno, a forty-year-old Latino man with psychiatric disabilities, and Jeanetta Riley, a thirty-five-year-old Native American pregnant woman with psychiatric disabilities.[62]

The erasure of disability in movements is likely not intentional but may reflect social norms around claiming disability among negatively racialized and historically marginalized groups.[63] But that nuance does not excuse organizations and campaigns that focus on police reform, or social movements focused on ending police violence, from recognizing the needs and interests of disabled people in their advocacy efforts.[64]

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59. Miriam Wasser, Phoenix Cop Who Killed Michelle Cusseaux Violated Department Policy, PPD Board Rules, Phx. New Times (Sept. 18, 2015), https://www.phoenixnewtimes.com/news/phoenix-cop-who-killed-michelle-cusseaux-violated-department-policy-ppd-board-rules-7670775 [https://perma.cc/GQW9-RXD8].

60. Sam Levin, Seattle Woman Killed by Police While Children Were Home After Reporting Theft, Guardian (June 19, 2017), https://www.theguardian.com/us-news/2017/jun/19/seattle-police-shooting-charleena-lyles-mother [https://perma.cc/33R9-47A5]; Officers Who Killed Seattle Woman in Her Home Had Mental Health Crisis Training, Guardian (June 20, 2017), https://www.theguardian.com/us-news/2017/jun/20/seattle-police-shooting-charleena-lyles-mental-health [https://perma.cc/87C6-6L9F].

61. David Montgomery, The Death of Sandra Bland: Is There Anything Left to Investigate?, N.Y. Times (May 8, 2019), https://www.nytimes.com/2019/05/08/us/sandra-bland-texas-death.html (on file with the *Columbia Law Review*).

62. Fresno Police Respond to Body Cam Video of Fatal Shooting of Freddy Centeno, ABC30 (Mar. 25, 2016), https://abc30.com/jerry-dyer-fresno-police-department-officer-involved-shooting/1261720/ [https://perma.cc/ZY8A-R4WQ]; Stephanie Woodard, The Police Killings No One Is Talking About, In These Times (Oct. 17, 2016), https://inthesetimes.com/features/native_american_police_killings_native_lives_matter.html [https://perma.cc/E2PS-WWDW].

63. See, e.g., Nirmala Erevelles, Disability and Difference in Global Contexts: Enabling a Transformative Body Politic 2–4 (2011) ("Disabled bodies . . . have [been] . . . more recalcitrant, reminding the medical and rehabilitation establishment of the limits of their authority in restoring the body to its 'normal' state . . . . [D]isability can further complicate theorizations of the 'different' body that is already marked by oppressive ideologies of race and gender."); Linton, supra note 33, at 7 (explaining the ways in which disability is rendered "invisible" and examining "those processes inside out . . . to be not inevitable reactions to human conditions labeled disabilities but devices used to sort human beings according to the social and economic needs of a society"); Katie Eyer, Claiming Disability, 101 B.U. L. Rev. 547, 565–68 (2021) ("Thus for some, self-identifying as disabled may represent a reluctant concession of functional limitation, as opposed to a claiming of a desired identity.").

64. See The Harriet Tubman Collective, In Defense of No New Jails: An Open Letter on Disability Justice to Darren Walker, President of the Ford Foundation, Tumblr (Oct. 1, 2019), https://medium.com/@harriettubmancollective/in-defense-of-no-new-jails-10c6f5e00e [https://perma.cc/TJK8-VB6H] (distinguishing efforts to include disabled people in plans to expand carceral facilities from disability justice efforts aimed toward abolition).

Recognizing disability[65]—along with issues of race, gender, class, and so on—is imperative if the objectives of those campaigns are to end policing

65. Recognizing disability requires defining it. Defining disability poses a challenge for disability rights advocacy movements and reform efforts aimed at protecting the rights of disabled people. See Eyer, supra note 63, at 597 (explaining that "claiming disability identity" is an "individual determination [that] need not be tethered to particular legal definitions"); Jasmine E. Harris, The Frailty of Disability Rights, 169 U. Pa. L. Rev. Online 29, 49 (2020) ("A third, related factor that has undermined the stability of disability rights is the unresolved tension between public perceptions and legal definitions of disability, a conflict that has unfolded principally in courts and places of public accommodations."). This Essay relies primarily on the definition of disability set forth in the ADA, along with definitions for IDD provided by the American Association on Intellectual and Developmental Disabilities (AAIDD). Under the ADA, "disability" means, with respect to an individual: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))." 42 U.S.C. § 12102(1) (2018). Pursuant to the statute, "[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working," and major bodily functions. Id.

According to the AAIDD, an intellectual disability is defined as "significant limitations in both intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills," that occurs before the age of twenty-two. Definition of Intellectual Disability, AAIDD, https://www.aaidd.org/intellectual-disability/definition [https://perma.cc/L95J-4WDY] [hereinafter AAIDD, Definition of Intellectual Disability] (last visited Sept. 27, 2021). Intellectual disability was primarily known as "mental retardation," but this Essay uses the term "intellectual disability," consistent with disability rights movements and scholarly, clinical, and public policy initiatives that view the original terminology as outdated, disrespectful, and dehumanizing. See The Use of Mental Retardation on This Website, AAIDD, https://www.aaidd.org/intellectual-disability/historical-context [https://perma.cc/CRB6-C88W] [hereinafter AAIDD, Use of Mental Retardation] (last visited Sept. 27, 2021); see also 42 U.S.C. § 285g-2 (providing for "research and related activities into the causes, prevention, and treatment of intellectual disabilities"); Brown, supra note 47. Intellectual functioning (or intelligence) describes "general mental capacity, such as learning, reasoning, problem solving," and historically has been measured using an IQ test; an IQ test between seventy and seventy-five indicated limited intellectual functioning. AAIDD, Definition of Intellectual Disability, supra. Adaptive behavior describes the "collection of conceptual, social, and practical skills that are learned and performed by people in their everyday lives." Id. Additionally, "[s]tandardized tests can also determine limitations in adaptive behavior." Id. Conceptual skills include things like "language and literacy; money, time, and number concepts; and self-direction." Id. Social skills refer to "interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), social problem solving, and the ability to follow rules/obey laws and to avoid being victimized." Id. Practical skills include "activities of daily living (personal care), occupational skills, healthcare, travel/transportation, schedules/routines, safety, use of money, use of the telephone." Id.

The Developmental Disabilities Assistance and Bill of Rights Act of 2000 defines "developmental disability" as a

> severe, chronic disability of an individual that—
>
> (i) is attributable to a mental or physical impairment or combination of mental and physical impairments;
>
> (ii) is manifested before the individual attains age 22;
>
> (iii) is likely to continue indefinitely;

as it currently exists or end police abuses and violence that affect *all* people.[66]

Data confirms that disabled people are vulnerable to policing and police violence. More specifically, the vulnerability to policing experienced by disabled people—including, as discussed below, increased surveillance and disability profiling that leads to stops, arrests, and detentions[67]—renders disabled people vulnerable to police violence. The nature and scope of the vulnerability varies, of course, based on the individual's disability or disabilities, societal norms, attitudes, and barriers and on how disability intersects with other statuses and identities—class, gender, sexual identity and expression, age, and so forth. That said, taken together, these factors have an influence on whether and to what extent an individual with a disability or disabilities is policed. In the aggregate, the data on police violence and people with disabilities raise cause for concern.

Data compiled since 2015 by the *Washington Post* indicate that anywhere from 20% to over half of the people killed each year by law enforcement have a disability.[68] People with psychiatric disabilities, particularly those who lack treatment and support, are more than sixteen times more

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(iv) results in substantial functional limitations in 3 or more of the following areas of major life activity:

(I) Self-care.

(II) Receptive and expressive language.

(III) Learning.

(IV) Mobility.

(V) Self-direction.

(VI) Capacity for independent living.

(VII) Economic self-sufficiency; and

(v) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated.

Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. § 15002(8)(A).

66. See, e.g., Jack Kelly, The Movement to Defund or Disband Police: Here's What You Need to Know Now, Forbes (June 9, 2020), https://www.forbes.com/sites/jackkelly/2020/06/09/the-movement-to-defund-or-disband-police-heres-what-you-need-to-know-now/#66ee51147f1a [https://perma.cc/EMN8-QE2L]; David Zahniser, Dakota Smith & Emily Alpert Reyes, Los Angeles Cuts LAPD Spending, Taking Police Staffing to Its Lowest Level in 12 Years, L.A. Times (July 1, 2020), https://www.latimes.com/california/story/2020-07-01/lapd-budget-cuts-protesters-police-brutality (on file with the *Columbia Law Review*); Scottie Andrew, There's a Growing Call to Defund the Police. Here's What It Means, CNN (June 17, 2020), https://www.cnn.com/2020/06/06/us/what-is-defund-police-trnd/index.html [https://perma.cc/9349-VGX2].

67. See infra notes 94–113 and accompanying text.

68. Fatal Force, Wash. Post, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ (on file with the *Columbia Law Review*) (last updated Feb. 22, 2022).

likely to be killed in encounters with law enforcement than nondisabled persons.[69] Given that approximately 4% of the total U.S. population has at least one "serious" psychiatric disability and about 18% experiences "less severe psychiatric conditions,"[70] it is no stretch to say that individuals with psychiatric disabilities are overrepresented in deadly shootings by police. A review of the data reveals disparities along racial and gender lines. According to researchers, "If showing 'signs of mental illness' is assumed to be equivalent with having a serious mental illness, the number of African American individuals . . . [with a] serious mental illness who were killed by police outpaced the proportion of that group in the general population by a factor of 10:1."[71] Though the researchers acknowledged the need for more complete data and risks of discrepancy in the data, they also noted that "[w]hile relatively few women compared to men are killed by police, the *Washington Post* data reveal that a very large percentage of women killed by police from 2015 to 2017 showed signs of mental illness (37%)."[72]

As noted, anywhere from 20% to over half of the people killed by police have a diagnosed disability.[73] The few studies that collect data on officer-involved killings rely on media accounts and some self-reporting by local jurisdictions. Adequately capturing the extent of disability-based disparities requires more data and uniform definitions of disability. Based on what data are available, however, conversations on police reform and ending police violence should center the problem of policing as one of disability subordination along with racial, gender, and class subordination.[74] Documenting disability-based disparities in policing and police violence is a challenging task, but recognizing vulnerabilities enables a framework for understanding the risk of policing and police violence, and understanding how the Fourth Amendment fails to recognize those vulnerabilities.

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69. Doris A. Fuller, H. Richard Lamb, Michael Biasotti & John Snook, Treatment Advoc. Ctr., Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters 1 (2015), https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf [https://perma.cc/NT3D-KD39].

70. Kyle Lane-McKinley, Tenzin Tsungmey & Laura Weiss Roberts, The Deborah Danner Story: Officer-Involved Deaths of People Living With Mental Illness, 42 Acad. Psychiatry 443, 443–50 (2018); see also Deborah Danner, Living With Schizophrenia 4 (Jan. 28, 2012), https://s3.documentcloud.org/documents/3146953/Living-With-Schizophrenia-by-Deborah-Danner.pdf [https://perma.cc/H6Z2-3CMT].

71. Lane-McKinley et al., supra note 70, at 445.

72. Id.

73. See supra note 68 and accompanying text.

74. See Angela P. Harris, Gender, Violence, Race, and Criminal Justice, 52 Stan. L. Rev. 777, 777–80 (2000) (arguing that "traditional practices of law enforcement incorporate or facilitate gender violence, whether it is directed at women, sexual minorities, or racial-ethnic minorities"); Darren Lenard Hutchinson, Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics, 47 Buff. L. Rev. 1, 9–17 (1999) (describing how the "multidimensional" considerations of race, class, and gender "push[] legal theorists and political activists to recognize the multiple and complex ways in which all individuals experience oppression").

Furthermore, data suggest that proximity to police violence is influenced by race *and* disability, as disabled people of color make up a disproportionate number of police killings.[75] Racial stereotypes that facilitate race-based suspicion also facilitate forms of racialized disability-based suspicion. Racialized "others" are at times stereotyped as abnormal, physiologically deviant, and pathologized "others." This is true in two ways. First, racial *identity* is constructed as disabling, and second, *behaviors* by racialized others are constructed as disabling. In the first set of cases, racial identity becomes conflated with medicalized notions of disability. Beliefs rooted in eugenics-based ideologies worked to link race with low intelligence, "feeblemindedness," and insanity.[76] In the second set of cases, behaviors by negatively racialized groups are justified, through the use of terms that construct a medicalized or pathological view of disability in efforts to discredit these groups' actions. Examples include labeling acts of self-defense or resistance as pathological, deranged, or crazy when racialized groups commit them.[77]

That such negative stereotypes about disabled people have been used to characterize and even demean racialized groups may not be surprising given pervasive negative attitudes about disabled people.[78] Though there is comparatively less literature on implicit bias and disabled people, available studies indicate high rates of implicit bias against disabled people as a group.[79] One study that reviewed data generated from participants who

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75. See supra note 68 and accompanying text.

76. Chris Chapman, Allison C. Carey & Liat Ben-Moshe, Reconsidering Confinement: Interlocking Locations and Logics of Incarceration, *in* Disability Incarcerated: Imprisonment and Disability in the United States and Canada 3, 8 (Liat Ben-Moshe, Chris Chapman & Allison Carey eds., 2014); Adam Cohen, Imbeciles: The Supreme Court, American Eugenics, and Sterilization of Carrie Buck 6 (2016).

77. In another example of this narrative in a case involving private violence, the actions of a twenty-five-year-old Black man, Ahmaud Arbery, in defending himself against an armed attack, were explained by reference to his mental health record. In his letter to the Glynn County Police Department, District Attorney George E. Barnhill writes, "Arbery's mental health records & prior convictions help explain his apparent aggressive nature and his possible thought pattern to attack an armed man." Letter from George E. Barnhill, Dist. Att'y, Waycross Jud. Circuit, to Tom Jump, Captain, Glynn Cnty. Police Dep't (Apr. 2, 2020), https://int.nyt.com/data/documenthelper/6916-george-barnhill-letter-to-glyn/b52fa09cdc974b970b79/optimized/full.pdf (on file with the *Columbia Law Review*). It is also imperative to note that in discussing how these labels have been used to denigrate negatively racialized groups, this Essay also rejects the use of such labels deployed to demean and dehumanize disabled people.

78. See Jasmine E. Harris, The Aesthetics of Disability, 119 Colum. L. Rev. 895, 916 (2019) (noting that "the elimination of prejudicial attitudes and norms" was Congress's central goal when crafting the ADA).

79. See, e.g., Brian A. Nosek, Frederick L. Smyth, Jeffrey J. Hansen, Thierry Devos, Nicole M. Lindner, Kate A. Ranganath, Colin Tucker Smith, Kristina R. Olson, Dolly Chugh, Anthony G. Greenwald & Mahzarin R. Banaji, Pervasiveness and Correlates of Implicit Attitudes and Stereotypes, 18 Eur. Rev. Soc. Psych. 36, 53–54 (2007) (discussing evidence of implicit preferences for people without disabilities compared to people with disabilities);

had completed an online Implicit Association Test (IAT) found that the "[p]reference for people without disabilities compared to people with disabilities was among the strongest implicit and explicit effects across the social group domains."[80] Preferences for nondisabled persons existed among those *with* disabilities and among those *without* disabilities. Men and older adults showed greater implicit bias against disabled people than women and younger adults, respectively.[81] Finally, researchers found that implicit bias against disabled people is weakly correlated with explicit bias, meaning that individuals who harbor these biases are likely unaware of them.[82]

Race, gender, and class intersect with disability to influence how behaviors are interpreted and responded to, and in some cases these identities can intersect to portray behaviors as disruptive, offensive, threatening, or even violent.[83] As attorney and scholar Andrea Ritchie put it, "What is deemed disorderly . . . is often in the eye of the beholder, an eye that is informed by deeply racialized and gendered perceptions."[84] Ritchie explains that "[a]nti-Blackness, including its specific manifestations with respect to Black women," permeates the policing of disorder and "is embedded within this fear of disorder."[85] These racialized and gendered fears of disorder have resulted in

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E.A. Nowicki, A Cross-Sectional Multivariate Analysis of Children's Attitudes Towards Disabilities, 50 J. Intell. Disability Rsch. 335, 345 (2005) (acknowledging previous research that "children may have negative attitudes towards individuals with disabilities"); Carrie L. Saetermoe, Dorothy Scattone & Kevin H. Kim, Ethnicity and the Stigma of Disabilities, 16 Psych. & Health 699, 710 (2001) (noting that disability severity may impact the level of implicit bias); Michelle Clare Wilson & Katrina Scior, Attitudes Towards Individuals With Disabilities as Measured by the Implicit Association Test: A Literature Review, 35 Rsch. Developmental Disabilities 294, 319 (2014) (observing that "relatively strong negative implicit attitudes prevail" toward individuals with disabilities). But see Laura A. Nabors & Eric R. Larson, The Effects of Brief Interventions on Children's Playmate Preferences for a Child Sitting in a Wheelchair, 14 J. Developmental & Physical Disabilities 403, 410 (2002) ("Our findings indicated that children perceived both the typical child and the child in the wheelchair as possible 'best friends.'").

80. Nosek et al., supra note 79, at 54.

81. Id. at 54, 63, 67.

82. Id. at 60.

83. See, e.g., Elizabeth Sepper & Deborah Dinner, Sex in Public, 129 Yale L.J. 78, 105–13 (2019) ("Exclusion from bars and restaurants at first mattered more to middle-class white women who had the class and race status that would enable them to enjoy these spaces but for sex discrimination."). In their discussion of the history of sex discrimination in public accommodation laws, Professors Sepper and Dinner noted, "Race and ethnicity often delineated between realms of respectability and vice. Police viewed young women of color as inherently licentious." Id. at 91.

84. Andrea J. Ritchie, Invisible No More: Police Violence Against Black Women and Women of Color 69 (2017).

85. Id. at 70; see also id. (discussing a 1994 internal memorandum titled *Reclaiming the Public Spaces of New York* by then-Mayor Rudolph Giuliani and Police Commissioner William Bratton that cited Daniel Patrick Moynihan's report, "The Negro Family: The Case for

> dramatically increased frequency and intensity of police interactions with Black and Latinx youth, low-income, and homeless people; public housing residents; people who are—or who are perceived to be—engaged in . . . prostitution; street vendors (many of whom are immigrants); and anyone else who is hypervisible in public spaces[,] . . . including lesbian, gay, bisexual, trans, and gender-nonconforming youth and adults.[86]

In short, the policing of disorder renders these groups more susceptible to forms of police intrusion—stops, quests, frisks, and arrests—that produce pathways to police violence.[87]

This discussion adds a necessary layer to arguments about policing and disability, which should factor into conversations about police reform along with defund and abolition movements. Public discourse on police violence against disabled people tends to focus on incidents in which police kill, and more specifically, in which they kill individuals with psychiatric disabilities.[88] For obvious reasons, these accounts dominate media stories and feature prominently in advocacy campaigns for police reform. However, these forms of police violence capture only one (albeit important) aspect of the harms disabled people have experienced in police encounters. Individuals with physical disabilities or sensory disabilities have been arrested for disability-related behaviors that were interpreted as criminal conduct.[89] Individuals with developmental and intellectual disa-

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National Action," and tracing social disorder to Black families and Black mothers in particular).

86. Id. at 71.

87. Carbado, From Stopping Black People to Killing Black People, supra note 37, at 128 (discussing how Fourth Amendment law enables pathways to police violence).

88. See, e.g., Rory Appleton, Family of Man Slain by Fresno Police Stage Protest Outside Department, Fresno Bee (Sept. 30, 2015), https://www.fresnobee.com/news/local/crime/article37140321.html (on file with the *Columbia Law Review*) (last updated Mar. 24, 2016) (describing protests following police shooting of a man with a history of mental illness); Autopsy Shows Mario Woods Was Shot 20 Times, Had History of Drug Use, CBS SF Bay Area (Feb. 11, 2016), https://sanfrancisco.cbslocal.com/2016/02/11/autopsy-shows-woods-was-shot-20-times-had-history-of-drug-use/ [https://perma.cc/549L-MWC3] ("Woods' family has said that he suffered from mental health issues . . . ."); Protesters Interrupt Super Bowl Festivities Demanding Prosecution of Officers in Mario Woods Shooting, NBC Bay Area (Jan. 30, 2016), https://www.nbcbayarea.com/news/local/protesters-disrupt-super-bowl-festivities-mario-woods/128312/ [https://perma.cc/UX38-V56D] (last updated Feb. 1, 2016).

89. Wrongful arrests based on conduct linked to disability are just one type of disability discrimination in policing. Several cases involve situations wherein disabled people challenged the failure to accommodate them during arrests as well. See, e.g., Windham v. Harris County, 875 F.3d 229, 237 (5th Cir. 2017) ("In this case, Windham contends that the County failed reasonably to accommodate his neck disability in Dunn's administration of the gaze nystagmus test."); Montae v. Am. Airlines, Inc., 757 F. Supp. 2d 47, 50 (D. Mass. 2010) (noting plaintiff's claim that the Massachusetts State Police Department discriminated against her on the basis of her post-traumatic stress disorder).

bilities and traumatic brain injuries have been subjected to force in instances in which the individual's comprehension skills may have limited their ability to understand and comply with police commands.[90] Beyond this aspect, broken windows, zero tolerance, and predatory policing strategies—strategies that target low-level offenses—have swept disabled people into a web of criminalization as well.[91] As scholars have argued, aggressive policing of low-level offenses facilitates police encounters, creating risks that such encounters will transform into confrontations resulting in police use of force—and even death.[92] In an era of mass criminalization, it is easy to articulate a basis for probable cause, let alone reasonable suspicion, given the wide array of quality-of-life offenses that can be used to detain, arrest, or jail—even for nonjailable offenses.

As critical race scholars in particular have long argued, race-based policing has generated racial disparities in stops, frisks, and arrests for low-level offenses, which have rendered Black communities vulnerable to police violence. These scholars have also focused on how the Supreme Court has expanded the scope of police power—here, as is most relevant, the power to stop, arrest, and detain—through its Fourth Amendment jurisprudence. This Essay builds on this work by centering disability as a lens for analysis, using existing data on disparities in disabled people's exposure to police killings as a starting point and working backward to scrutinize the investigative and arrest powers that the Fourth Amendment affords to police, thereby creating pathways to such violence.[93]

The next Part offers a fuller picture of the problems of policing as it affects disabled people and how those problems in part stem from Fourth Amendment doctrine. Each section traverses through Fourth Amendment doctrine from *Terry* stops to consensual encounters to consent searches and, finally, to use of force cases. Each section applies a disability and critical race lens to a doctrinal area to demonstrate how Fourth Amendment doctrine erases or fails to recognize or fully appreciate disability as an identity or subordinated status.

II. "DISABILITY POLICING" AND THE FOURTH AMENDMENT

Extensive scholarship documents how the Fourth Amendment produces vulnerabilities to police intrusion and violence and constructs Black

90. See infra notes 426–434 and accompanying text (discussing Arnaldo Rios Soto and the shooting of Charles Kinsey); see also infra notes 471–482 and accompanying text (discussing the Daniel Shaver case).

91. See supra note 32 and accompanying text.

92. Carbado, From Stopping Black People to Killing Black People, supra note 37, at 125 (noting the potentially fatal effects of police officers' increased engagement with African Americans for "little or no basis").

93. Id. at 128.

people as criminal.[94] A similar argument can be made about disability under the Fourth Amendment and what this Essay refers to as "disability policing." Particularly when society rejects widespread notions of certain disabilities as inherently dangerous, it is possible to see how disability as constructed in Fourth Amendment doctrine reinforces associations between disability and criminality. At the same time, the social construction of disability as criminal—as with the assignment of perceived risk—will vary based on the nature of the disability and how it is expressed or manifests itself, which is to say that disability cannot be isolated as a singular identity or category for analysis. Indeed, an intersectional approach reveals how the presence of disability renders those individuals with multiple marginalized statuses and identities vulnerable to policing and how these identities and statuses create vulnerabilities to police violence. Although there is a need for more robust data on police brutality against nonwhite people with disabilities, initial research suggests (and community members affirm)[95] that race *and* disability influence proximity to police violence, as disabled people of color make up a disproportionate number of police killings.[96]

So, what is the nature of disability policing? Disability policing reinforces stereotypes that associate disability with criminality, specifically those that construct disabled people as suspicious, deviant, risky, dangerous, or threatening.[97] Scholar and social justice advocate, Dorothy Roberts, made this point in the context of her discussion of racial stereotypes and

94. See Paul Butler, The White Fourth Amendment, 43 Tex. Tech L. Rev. 245, 247 (2010) ("The part of the Constitution that is most responsible for these extraordinary racial disparities is the Fourth Amendment."); cf. Jennifer M. Chacón, Managing Migration Through Crime, 109 Colum. L. Rev. Sidebar 135, 141 n.34 (2009) (noting the relevance of "the development of case law concluding that certain undocumented migrants in the United States . . . are not entitled to the protections of the Fourth Amendment at all").

95. See, e.g., Oliver Glass, Why Racial Justice Needs to Include Mental Health, BGD (Jan. 20, 2016), https://www.bgdblog.org/2016/01/why-racial-justice-needs-to-include-mental-health/ [https://perma.cc/ELF6-U5CY]; Talila A. Lewis, Emmett Till & the Pervasive Erasure of Disability in Conversations About White Supremacy & Police Violence, Talila A. Lewis (Jan. 28, 2017), https://www.talilalewis.com/blog/emmett-till-disability-erasure [https://perma.cc/XP65-BDCU].

96. Elinoam Abramov, "An Autistic Man Lives Here Cops No Excuses . . . Oh Yes He is Black Too": Cognitive Disability, Race and Police Brutality in the United States 47–48 (Oct. 2017) (M.A. thesis, Columbia University) (on file with the *Columbia Law Review*).

97. See Elliot Oberholtzer, Police, Courts, Jails, and Prisons All Fail Disabled People, Prison Pol'y Initiative (Aug. 23, 2017), https://www.prisonpolicy.org/blog/2017/08/23/disability/ [https://perma.cc/WLC9-TQZF]. There are a number of demeaning stereotypes against disabled people, including stereotypes linking disability with dependency, incompetence, incapacity, and childlike status even when referring to adults. See, e.g., Adrienne Asch, Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity, 62 Ohio St. L.J. 391, 395–97 (2001).

order-maintenance policing.[98] In enforcement of order-maintenance laws, such as Chicago's antiloitering ordinance, Roberts notes how policing itself reinforces associations between Blackness and criminality.[99] Specifically, Roberts argues that the legally constructed dichotomy between orderly and disorderly individuals "incorporates racist social norms that help to perpetuate stereotypes of Black criminality."[100] Latinx communities were similarly criminalized under Chicago's aggressive enforcement of its antiloitering/gang ordinance.[101] Order-maintenance policing, or more directly, the policing of "disorderly people" to distinguish them from "orderly people," in Roberts's description functions as a type of social control, reinforcing—through stereotypic association—the subordinated status of Black and Latinx people in society as criminal, dangerous, and threatening.[102]

The social control function of criminal law enforcement is widely discussed in the extant criminal law and criminal procedure scholarship.[103] Building on this work, this Essay suggests that policing disability serves similar social control purposes. Policing disability is not solely about the singular purpose of fighting crime but can also function as a way of policing risk, or so-called "risky" people.[104] When disability and risk are centered as two metrics for determining whether a person looks suspicious or threatening enough to warrant police intrusion, it is clear how policing disability functions as the analogue version of the multitude of predictive technologies that have infiltrated criminal justice systems. Whether as predictive policing, or risk assessment tools in pretrial bail or sentencing hearings, as legal scholar Jessica Eaglin notes, "Predictive technologies increasingly appear at every stage of the criminal justice process."[105] Though the focus here is on policing and analogue forms of surveillance and social control, this Essay suggests that Eaglin's claim that "normative judgments [are] entailed in the development of predictive recidivism risk information for the administration of justice" applies with equal force to the longstanding and

98. See Roberts, Race, Vagueness, and the Social Meaning of Order-Maintenance Policing, supra note 36, at 803–05.

99. Id.

100. Id. at 803.

101. See id. at 806.

102. See id. at 810–13.

103. See, e.g., David Garland, The Culture of Control: Crime and Social Order in Contemporary Society 193–95 (2002); Kohler-Hausmann, supra note 38, at 267–68; Natapoff, Punishment Without Crime, supra note 38, at 9–12; Jonathan Simon, Poor Discipline: Parole and the Social Control of the Underclass, 1890–1990, at 28–30 (1993).

104. See Nelson, Racializing Disability, supra note 32, at 6 ("Mental illness itself is thus criminalized."). Indeed, as scholars have noted, criminal law enforcement serves other functions often disconnected from the purposes of punishment. See, e.g., David Garland, supra note 103, at 193–95; Kohler-Hausmann, supra note 38, at 267–68; Natapoff, Punishment Without Crime, supra note 38, at 10–12; Simon, supra note 103, at 28–30.

105. Jessica M. Eaglin, Constructing Recidivism Risk, 67 Emory L.J. 59, 61 (2017).

ongoing policing efforts targeted at disabled people.[106] Certain manifestations of disability read as inherently risky—uncontrollable, unpredictable, and dangerous if not closely monitored and managed, even with force. Critical disability studies scholars have argued that stereotypes of certain disabilities themselves serve the function of risk management.[107] Scholars such as Liat Ben-Moshe have argued that "disability [is a kind of] risk coding, . . . an aspect of population management."[108] To put it another way, through labeling certain differences as disabilities, society communicates what it considers a social risk, which in turn serves to control through policing, surveillance, and the use of force those behaviors labeled as risky. Historically, such social regulation, of which policing is one component, rendered those whose bodies and minds did not conform to the dominant stated norm vulnerable to policing, segregation in institutions, and forcible sterilization.[109] Today, when police profile disabled people, they enforce these stereotypes, assumptions, and attitudes. Policing nonnormativity hence reinforces dominant social norms for how bodies and minds should exist in public space.

Disability-as-risk coding provides a framework for understanding why certain nonnormative appearances and behaviors would render a person with a disability vulnerable to policing. Under this framework, the purpose of policing is not just to prevent or investigate crime through the enforcement of criminal law[110] but also to provide legal mechanisms for managing and modifying bodies and minds, and their attendant behaviors in public and private spaces. Criminal law enforcement offers the tools for managing behaviors, or ensuring that behaviors do not deviate too far outside the acceptable zone of tolerable risk (i.e., the norm). In this way, and as discussed below, disability-as-risk-coding, or what this Essay describes as "disability profiling," functions predominantly as a project of behavior regulation and modification in real time. Disability profiling would suggest that though disability (and other marginalized identities) can form the basis for suspicion, the purpose of the intervention by police officers who

106. Id.

107. See Alexandra Natapoff, Misdemeanors, 85 S. Cal. L. Rev. 1313, 1368 & n.258 (2012); see also Jonathan Simon, Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear 23 (2007).

108. Ben-Moshe, The State of State Violence, supra note 43, at 308.

109. See, e.g., Cohen, supra note 76, at 1–6; Susan M. Schweik, The Ugly Laws: Disability in Public 141, 165, 184 (2009).

110. See C.R. Div., DOJ, Investigation of the Ferguson Police Department 18–19 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/6AAZ-DYN5] [hereinafter Ferguson DOJ Report] ("While the record demonstrates a pattern of stops that are improper from the beginning, it also exposes encounters that start as constitutionally defensible but quickly cross the line.").

observe or are called to intervene is not just to investigate crime but often also to modify the behavior.

Of course, not all nonnormative and nonconforming behaviors are perceived as risky, and so there is variation in the extent to which levels of risk are assigned to specific manifestations of disability. For example, individuals with untreated psychiatric disabilities are consistently portrayed in media accounts as threatening—indeed, public discourse following mass shootings tends to focus on "mental illness" as the primary cause for violence, in particular in cases in which the alleged shooter is white and male.[111] By contrast, when we incorporate racialized persons with psychiatric disabilities, racism and ableism converge in ways that acknowledge the role of "mental illness" yet also construct such persons as incorrigibly pathologized beings incapable of rehabilitative treatment and care.[112] By contrast, individuals with physical disabilities may not be perceived as particularly risky but are similarly vulnerable in police encounters as individuals whose bodies must still be forced to physically comply with routine practices and procedures for arrests.[113] Individuals with intellectual disabilities pose risks only when officers construct their perceived *intentional* failure to comply with commands as resistance, or a threat—justifying use of force as discussed in section II.E.

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111. Zaid Jilani, As King Targets Muslims, There Have Been Almost Twice as Many Plots Since 9/11 From Non-Muslim Terrorists, ThinkProgress (Mar. 9, 2011), https://thinkprogress.org/as-king-targets-muslims-there-have-been-almost-twice-as-many-plots-since-9-11-from-non-muslim-bda3c8b67ab0/ [https://perma.cc/W2CV-MKY7].

112. See Khaled A. Beydoun, Lone Wolf Terrorism: Types, Stripes, and Double Standards, 112 Nw. U. L. Rev. 1213, 1217–19 (2018) (discussing how "the lone wolf designation deployed by law enforcement functions as a presumption of terror exemption when the culprit is white (and non-Muslim), and as a presumption of terror connection when the culprit is Muslim"); Leti Volpp, The Boston Bombers, 82 Fordham L. Rev. 2209, 2214–15 (2014) (citing examples "suggest[ing] that whatever a Muslim person does will potentially be perceived as a terrorist act"); Jilani, supra note 111 (pointing out the irony of targeting Muslims "[g]iven the fact that non-Muslim terrorists account for almost twice as many plots as Muslim terrorists in the United States since 9/11").

113. See Amanda Michelle Gomez & Ryan Koronowski, ADAPT Activists Put Their Bodies on the Line to Gain Support for Disability Integration Act, ThinkProgress (May 24, 2018), https://archive.thinkprogress.org/adapt-activism-disability-integration-act-42de6c0c1cc9/ [https://perma.cc/R5H6-Q7M9] (discussing how "Capitol Hill police dragged ADAPT demonstrators in wheelchairs and with assistive canes out of Trumpcare hearings"); Stephanie Woodward, I Was Pulled Out of My Wheelchair by Police. It Could Be Worse. Trumpcare Could Pass., Vox, https://www.vox.com/first-person/2017/6/27/15876442/healthcare-medicaid-cuts-disability-protests (on file with the *Columbia Law Review*) (last updated June 28, 2017) ("[Woodward] was held in a room with at least 25 other wheelchair users . . . . [F]or approximately 10 hours in a building with no accessible women's facilities.").

A. *Disability and Consensual Encounters*

The Fourth Amendment protects against unreasonable seizures including "seizures that involve only a brief detention short of traditional arrest."[114] Consensual encounters do not count as seizures for Fourth Amendment purposes, but they may become seizures "if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[115] In *United States v. Mendenhall*, Justice Potter Stewart in a plurality opinion listed a number of factors that could be used to determine whether, under the circumstances, a seizure had occurred, including the "threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."[116]

In *Florida v. Bostick*, Justice Sandra Day O'Connor, writing for the majority, adapted the free to leave test to bus sweeps. Justice O'Connor explained the test as "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'"[117] The Court affirmed its commitment to examining "all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter."[118]

The dissents in *Mendenhall*, *Bostick*, and *Drayton*, a subsequent case also involving a bus sweep, criticized the majority for, among other faults, failing to identify or fully appreciate evidence pointing to the coercive effect of the actions by law enforcement and the realities and power dynamics inherent in police encounters, particularly when individuals are not informed of their right to terminate the encounter by walking away or refusing to respond to questions.[119] Writing for the dissent in *Bostick*, Justice

114. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

115. United States v. Mendenhall, 446 U.S. 544, 554 (1980) (plurality opinion); see also Immigr. & Naturalization Serv. v. Delgado, 466 U.S. 210, 215 (1984) ("[A]n initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment . . . ."); Florida v. Royer, 460 U.S. 491, 501–02 (1983) (plurality opinion) ("These circumstances surely amount to a show of official authority such that a 'reasonable person would have believed that he was not free to leave.'").

116. *Mendenhall*, 446 U.S. at 554.

117. 501 U.S. 429, 436–37 (1991) (quoting Michigan v. Chesternut, 486 U.S. 567, 569 (1988)).

118. Id. at 439.

119. See United States v. Drayton, 536 U.S. 194, 210 (2002) (Souter, J., dissenting); *Bostick*, 501 U.S. at 446; *Mendenhall*, 446 U.S. at 574 (pointing to agents requiring the subject to undergo a strip-search to conclude that the experience was "indistinguishable" from a

Marshall described some of the more coercive aspects of the bus sweep at issue in that case, noting that the two officers who boarded the Greyhound bus "made a visible display of their badges and wore bright green 'raid' jackets bearing the insignia of the Broward County Sheriff's Department," and "one held a gun in a recognizable weapons pouch."[120] While on the bus, "officers approached respondent, who was sitting in the back of the bus, identified themselves as narcotics officers and began to question him," while "[o]ne officer stood in front of respondent's seat, partially blocking the narrow aisle through which respondent would have been required to pass to reach the exit of the bus."[121] For the majority, none of this amounted to police conduct that was coercive enough to find that a seizure had taken place.

Legal scholars have emphasized the inherently coercive nature of such encounters and criticized extensively the reasonable person standard for failing to acknowledge race as a relevant factor in determining whether a person has been seized under the Fourth Amendment.[122] In particular, criminal law and critical race scholars have argued that the test for whether a seizure takes place, and specifically the reasonable person standard incorporated into the free to leave test, pays insufficient attention to coercive power dynamics and in particular questions of race. Professor Cynthia Lee makes this point with a vivid example:

> A young black male who has grown up in South Central Los Angeles knows that if he is stopped by a police officer, he should do whatever the officer says and not talk back unless he wants to kiss the ground. This young man may not feel free to leave or terminate the encounter with the officer, but if the reviewing court believes the average (white) person would have felt free to leave, then the encounter will not be considered a seizure and

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traditional arrest). Similarly, the Court's ruling in *Delgado*, a case challenging surveys or sweeps of garment factories where INS officials stood by the exits, walked down the aisles, and tapped workers on their shoulders to ask questions about workers' citizenship status, was widely criticized. See, e.g., *Delgado*, 466 U.S. at 226 (Brennan J., concurring in part); George E. Dix, Nonarrest Investigatory Detentions in Search and Seizure Law, 1985 Duke L.J. 849, 869 (1985); Russell L. Jones, *Terry v. Ohio*: Its Failure, Immoral Progeny, and Racial Profiling, 54 Idaho L. Rev. 511, 525–26 (2018); Lewis R. Katz, *Terry v. Ohio* at Thirty-Five: A Revisionist View, 74 Miss. L.J. 423, 476–77 (2004). The Court ultimately held that neither the factory sweeps at issue nor "the individual questioning of the respondents in this case by INS agents concerning their citizenship [amounted] to a detention or seizure under the Fourth Amendment." *Delgado*, 466 U.S. at 212.

120. *Bostick*, 501 U.S. at 446–47 (Marshall, J., dissenting) (addressing the "intimidating show of authority" of armed officers boarding a bus).

121. Id.

122. See Carbado, From Stopping Black People to Killing Black People, supra note 37, at 141; Lee, Reasonableness with Teeth, supra note 37, at 1151; Maclin, Race and the Fourth Amendment, supra note 35, at 339–40.

> the young black male will not be able to complain that his Fourth Amendment rights have been violated.[123]

Similarly, Professors Devon Carbado and Tracey Maclin both proposed reforms that sought to incorporate race into the Court's totality of the circumstances test.[124] Beyond this, these scholars have demonstrated how the reasonable person standard is a normative construction. As Carbado puts it, "When the Court asks 'whether a reasonable person would feel free to leave or otherwise terminate the encounter,' it is really asking whether a reasonable person *should* feel free to leave or otherwise terminate the encounter."[125]

Carbado's claim that the reasonable person is a normative construction is particularly apparent when disability is centered within the analysis. To begin with, the reasonable person standard in the Court's test for whether a seizure has occurred does not adequately take into consideration disability. In Carbado's formulation, the normative reasonable person is not a person with intellectual, developmental, or physical disabilities. Even where there is no dispute that a person is disabled, as this Essay discusses below, nothing in the legal test provides a mechanism to ensure that courts meaningfully consider how disability informs whether that particular disabled person feels free to leave or otherwise terminate the encounter. As a result, this test fails to adequately protect the Fourth Amendment rights of disabled people.

Even for people who do not have disabilities, empirical studies raise doubts about whether individuals in particular locations—for example, sidewalks or buses—and across various demographics would feel free to leave or otherwise terminate encounters with police officers.[126] These con-

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123. Lee, Reasonableness With Teeth, supra note 37, at 1152.

124. Carbado, From Stopping Black People to Killing Black People, supra note 37, at 143; Tracey Maclin, Black and Blue Encounters, supra note 37, at 250.

125. Carbado, From Stopping Black People to Killing Black People, supra note 37, at 141.

126. See, e.g., David K. Kessler, Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard, 99 J. Crim. L. & Criminology 51, 87 (2009). Kessler distributed a questionnaire randomly to 406 people in Boston that asked three questions. Paraphrased, the questions asked: (1) How free would they feel to walk away or decline to talk with a police officer when approached while walking on a sidewalk; (2) How free would they feel to walk away or decline to talk with a police officer when approached while riding a bus; and (3) Do they have a legal right to refuse to talk with a police officer or do they have a legal duty to talk with a police officer when approached? Id. at 69–73. Respondents recorded their answers to these questions on a scale of 1 to 5, where 1 meant "not free to leave or say no" and 5 meant "completely free to leave or say no." Id. at 69. Four-hundred and six completed surveys were collected, of which 52% were completed by women, 26.7% were completed by people under the age of twenty-five, and 77.7% were completed by white people. Id. The surveys were taken in late 2007 and early 2008 at four locations in the greater Boston area, including two transit stations.

cerns are heightened for people with intellectual and developmental disabilities (IDD). Individuals with cognitive disabilities may perceive merely an officer's presence as coercive, threatening, and overwhelming or, by contrast, express a quick desire to "please" a police officer who is regarded as an authority figure and decline to terminate the encounter, even if the person has knowledge of the right to do so.[127] Such persons may not be

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Overall, nearly 80% of respondents answered that to some degree they would not feel free to leave in either situation, which was indicated by the average 'free to leave' score of 2.61 for the sidewalk situation and 2.52 for the bus situation. Id. at 74–75. Further, about half of the respondents answered that they would feel less than somewhat free or not feel free to leave at all in either situation. Id. Kessler's study revealed three main findings: (1) "most people would *not* feel free to leave when questioned by a police officer on the street or on a public bus;" (2) "women and people under twenty-five[] would feel even less free to leave than the average;" and (3) "[t]here were no statistically significant differences between respondents of different races, different income levels, or those who had different experiences with the police." Id. at 73. Even among people who knew they had the right to leave or otherwise not interact with the police officer, the average answer was that they would feel only "somewhat free to leave." Id. at 78. On the "freedom-to-leave" scale, the average answers for both the sidewalk and bus revealed that respondents did not even feel "somewhat free to leave." Id. at 75.

While the data collected in this study did not yield any significant differences across different races or levels of income, women and people under twenty-five answered that they would feel less free to leave in both situations than "men and people over the age of twenty-five." Id. at 75.

These differences across gender and age demographics highlight the theme that certain groups feel greater coercive pressure from police officers than others. This study did not yield any significant differences across different races or income levels, and neither supports nor refutes the argument that racial minorities and those of lower income levels are more vulnerable and susceptible to police coercion than others. Additionally, the study freely acknowledged that the surveyor's location and bias may have resulted in overrepresentation of wealthier people and white people. Id. at 72. Of the 406 people surveyed, only 22.3% were not white. Id. at 74.

Surprisingly, the authors of the study did *not* discuss any significant differences between the enclosed space—the bus—and the unenclosed space—the sidewalk—even though the sidewalk would seem to involve vastly more exit routes and literal freedom of movement than a bus would. The bus scenario yielded only a slightly lower average score on the "freedom to leave" scale than the sidewalk, meaning that people answered that they would feel slightly less free to leave on the bus. Id. at 74. If it is the case that the nature of the location truly results in such little difference in how free to leave people feel, this may suggest that the "totality of circumstances" analysis places weight on factors that it need not consider at all.

This study is far from comprehensive, but it does highlight the discrepancies between the Supreme Court's presumption of situations in which a reasonable person would feel free to leave, and thus not triggering their Fourth Amendment rights, and situations in which people would actually feel free to leave. Though this study also does not broach the topic of where people with disabilities would fall into the discussion, people with IDD would likely follow the trend exhibited by the differences between men and women and younger people and those over the age of twenty-five. Id. at 75–77.

127. See, e.g., Joan Petersilia, Doing Justice? Criminal Offenders With Developmental Disabilities, Cal. Pol'y Rsch. Ctr. 12–14 (2000) ("During interrogation, suspects with cogni-

able to so easily decline to "answer any question put to him," or "decline to listen to the questions at all and . . . go on his way."[128] Similarly, because the environment and infrastructure in which the police encounter takes place may be adapted to the functioning of nondisabled bodies, people with physical disabilities might physically experience a power imbalance that renders their capacity to consent to the encounter and to easily leave less voluntary.

As an objective test, the totality of the circumstances test does not take into consideration the subjective state of mind of the individual that law enforcement approaches.[129] The conduct of police is judged from the perspective of the "reasonable man's interpretation of the conduct in question."[130] The test is framed objectively to apply "to the whole range of police conduct in an equally broad range of settings," which allows for "consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police."[131] As the Supreme Court has explained, "[t]he test's objective standard . . . allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment."[132]

Recognizing how a person's cognitive disability could influence how that person interprets and respond to police commands would seem to fit well into the totality of the circumstances test. Indeed, in *Mendenhall*, the Court considered both how race and education influenced whether Mendenhall interpreted the actions by officers as coercive.[133] The test for whether a person has been seized is identical, regardless of the person's

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tive impairments tend to be more suggestible and therefore more vulnerable to the pressures of interrogation." (citation omitted)); Morgan Cloud, George B. Shepherd, Alison Nodvin Barkoff & Justin V. Shur, Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects, 69 U. Chi. L. Rev. 495, 511–12 (2002) (describing seven common characteristics of individuals with cognitive disabilities that make them susceptible to police interrogation methods); Samson J. Schatz, Note, Interrogated With Intellectual Disabilities: The Risk of False Confession, 70 Stan. L. Rev. 643, 666 (2018) (arguing that an individual with intellectual disabilities will be uniquely susceptible to police interrogation tactics); The Police Response to People With Mental Retardation: Trainers Guide, Nat'l Crim. Just. Reference Serv. 16 (1998), https://www.ncjrs.gov/pdffiles1/Digitization/204210NCJRS.pdf [https://perma.cc/D67F-ARJ4] ("A person with mental retardation may give self-condemning answers regarding his or her part in a crime, if such answers appear to evoke desired attention from the police or others.").

128. Florida v. Royer, 460 U.S. 491, 497–98 (1983).

129. See Michigan v. Chesternut, 486 U.S. 567, 574 (1988) (explaining that the test for whether someone has been "seized" within the meaning of the Fourth Amendment is based on an "objective standard" that "look[s] to the reasonable man's interpretation of the conduct in question").

130. Id.

131. Id.

132. Id. (citing 3 Wayne R. LaFave, Search and Seizure § 9.2(h) (2d ed. 1987 & Supp. 1988)).

133. United States v. Mendenhall, 446 U.S. 544, 557–58 (1980).

race, gender, mental disability, education, or class.[134] The focal point of the test remains police conduct as interpreted by the normative reasonable person. Taking the Supreme Court's opinions in *INS* and *Bostick* as examples, in the majority of cases, disability is a factor more like the location of the encounter, which is a factor that is assessed,[135] and less like race, which is largely ignored.[136] Nonetheless, even in cases where there is evidence of disability and courts have considered how disability influences the encounter,[137] the examination of disability still takes place from the perspective of the officer, which does not fully account for how disability may truly influence whether a disabled person feels free to leave or otherwise terminate the police encounter.[138]

The reasonable person standard is a legal construction that permits police intrusion even where consent may not exist. The standard provides

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134. See, e.g., State v. York, 184 Wash. App. 1057, at *3 (Wash. Ct. App. 2014) (Fearing, J., concurring).

135. See *Chesternut*, 486 U.S. at 573–74 ("The test's objective standard—looking to the reasonable man's interpretation of the conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." (citing 3 Wayne R. LaFave, Search and Seizure § 9.2(h), 407–08 (2d ed. 1987 and Supp.1988))). Compare *Mendenhall*, 446 U.S. at 547–48 (considering whether police request to see identification and ticket of individual who stopped upon police's approach constituted seizure), with Immigr. & Naturalization Serv. v. Delgado, 466 U.S. 210, 212–13 (1984) (considering whether an INS "factory survey" conducted while employees continued to move about constituted seizure of entire work force).

136. See Carbado, (E)racing the Fourth Amendment, supra note 36, at 977–78, 995 (arguing that the *Bostick* Court "constructs Bostick and the officers with the racial ideology of colorblindness" and that the *Delgado* Court does not consider how "Latina/o communities . . . are likely to perceive and respond to INS authority").

137. See, e.g., McCray v. City of Dothan, 169 F. Supp. 2d 1260, 1280 (M.D. Ala. 2001) ("Beyond the communication gap between a deaf man and herself, [the police officer] has not articulated *any* specific facts upon which suspicion reasonably could be founded."); Alber v. Ill. Dep't of Mental Health and Developmental Disabilities, 816 F. Supp. 1298, 1305 (N.D. Ill. 1993) (referring to the fact that two of the individuals who faced seizures were developmentally disabled); People v. Posadas, 2004 WL 1776520, at *5 (Cal. Ct. App. 2004) ("[C]ounsel argued Posadas had been detained because he was disabled and could not walk away.").

138. See *Posadas*, 2004 WL 1776520, at *4 (concluding that the police officer's encounter with the disabled defendant was consensual because the officer asked questions, did nothing to prevent the defendant from refusing to answer, and never told him he was obliged to remain at the scene); *Alber*, 816 F. Supp. at 1305 (holding that of the two people who allegedly consented, "[n]either's actions plainly reveal the requisite understanding by a severely developmentally disabled individual of the choice that they were being asked to make"); cf. Ebonie S. v. Pueblo Sch. Dist. 60, 695 F.3d 1051, 1057 (10th Cir. 2012) (holding that a disabled student who was made to sit in a desk with a restraining bar failed to demonstrate a cognizable seizure under the Fourth Amendment because "the desk's limitation on Ebonie's movement did not 'significantly exceed that inherent in every-day, compulsory attendance.'" (quoting Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243, 1251 (10th Cir. 2008))); *McCray*, 169 F. Supp. 2d at 1280 ("Any 'evasive' behavior on the part of McCray was justified by his belief that he was entitled to wait for his interpreter.").

inadequate protection for disabled people, particularly those with intellectual and cognitive disabilities, who may interpret any show of force or authority as inherently coercive.[139] The same also is true for individuals with physical disabilities who are wheelchair users and who may not feel free to terminate an encounter with police officers towering over them.[140] Despite the fact that perhaps in these examples individuals with disabilities may not feel free to terminate encounters with police, such persons would not receive protections under the Fourth Amendment.[141] This standard appreciates neither the inherently coercive nature of the police encounter nor how the circumstances of the particular encounter might be perceived as coercive to the disabled individual, particularly those individuals from negatively racialized and historically marginalized groups who are disproportionately targeted by policing.[142] Stated differently, the objective reasonable person test fails to adequately account for the fact that "citizens may be differently situated with respect to encounters with police," as David Cole, National Director of the ACLU, has argued.[143] This failure to consider the "state of mind of the particular individual being approached," privileges "consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police."[144]

B. Terry *Stops and Disability Profiling*

In *Terry v. Ohio*, the Supreme Court greatly expanded police discretion and authority when it held that police may stop an individual if the officer has reasonable suspicion that "criminal activity may be afoot."[145] *Terry* also allows an officer to perform a protective pat down or frisk if the officer has reason to suspect that the person stopped "may be armed and

139. See Petersilia, supra note 127, at 12 ("When faced with uncertain situations in which an authority figure is present, people with developmental disabilities usually defer to the authority figure. This makes them especially sensitive to response shaping, mild coercion, coaching, hints, and other verbal and nonverbal questions.").

140. Desiree Phair, Note, Searching for the Appropriate Standard: Stops, Seizure, and the Reasonable Person's Willingness to Walk Away From the Police, 92 Wash. L. Rev. 425, 454 (2017) ("Not all disabilities necessarily lead to a sense of powerlessness . . . but certain conditions may make 'freedom to leave' a farce.").

141. See Michigan v. Chesternut, 486 U.S. 567, 574 (1988) (noting that the reasonable person test "calls for consistent application from one police encounter to the next, *regardless of the particular individual's response* to the actions of the police" (emphasis added)).

141. Id.

142. See Maclin, Black and Blue Encounters, supra note 37, at 250 ("[T]he dynamics surrounding an encounter between a police officer and a black male are quite different from those that surround an encounter between an officer and the so-called average, reasonable person.").

143. Cole, No Equal Justice, supra note 31, at 22.

144. *Chesternut*, 486 U.S. at 574.

145. 392 U.S. 1, 30 (1968).

presently dangerous."[146] As critics have argued, *Terry* and its progeny vastly expanded police power to stop and frisk Black and Latinx people and facilitate exercises of race- and group-based police discretion.[147] To make matters worse, *Terry* and its progeny, along with the Supreme Court's decision in *Whren v. United States*, insulate officers who engage in racially biased policing.[148]

In *Whren*, the Supreme Court held that the subjective intentions of a police officer are not relevant for determining whether a seizure was reasonable under the Fourth Amendment.[149] When probable cause of illegal conduct exists, such as a traffic violation, an officer's subjective intent or motive does not negate the constitutionality of a search or seizure.[150]

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146. See id. (allowing a carefully limited search where an officer reasonably concludes that the person with whom he is dealing may be armed and presently dangerous).

147. See, e.g., Butler, supra note 94, at 246 (highlighting the scholarship on race-based policing and racial profiling); Carbado, (E)racing the Fourth Amendment, supra note 36, at 954 n.40 (pointing out scholarship highlighting the difficulties of characterizing a neighborhood as a "high-crime" area, disadvantaging colored and poor individuals); Maclin, Race and the Fourth Amendment, supra note 35, at 374 (discussing how subsequent case law such as "[*Brignoni-Ponce*] and [*Martinez-Fuerte*] endorsed an officer's reliance on race, in certain contexts, when deciding whether to effectuate a seizure"); Eric Miller, Reasonably Radical: *Terry*'s Attack on Race-Based Policing, 54 Idaho L. Rev. 479, 481 (2018) ("Despite the Court's worries about the impact of stop and frisk on minority individuals, the Court endorsed some version of that practice, prompting critiques of the *Terry* opinion as formalistic, or race-blind, or as conciliating the police." (footnotes omitted)); L. Song Richardson, Arrest Efficiency and the Fourth Amendment, 95 Minn. L. Rev 2035, 2059–60 (2011) (noting that the author joins sustained critiques that *Terry* "allows officers to act on conscious racial biases" while arguing for the consideration of "the effects of nonconscious racial biases on police behavior" as well); Symposium, A Stop Is Just a Stop: *Terry*'s Formalism, 15 Ohio St. J. Crim. L. 113, 114 (2017) (citing scholarship criticizing the failure of the Supreme Court to engage with race-based suspicion so long as police have probable cause).

148. See Capers, supra note 36, at 64–65 ("[T]he Court further tipped the scale against minorities when it sanctioned pretext stops in *Whren v. United States*, ruling that the subjective motivation of an officer in singling out a particular individual is irrelevant under the Fourth Amendment so long as the stop itself is supportable by reasonable suspicion or probable cause."); Carbado, (E)racing the Fourth Amendment, supra note 36, at 1033 ("Fundamental to the Court's argument that the Fourth Amendment does not reach racial profiling is the idea that ulterior motives including but not limited to race cannot 'invalidat[e] objectively justifiable behavior under the Fourth Amendment.'" (alteration in original) (quoting *Whren*, 517 U.S. 806, 812 (1996))); Vida B. Johnson, KKK in the PD: White Supremacist Police and What to Do About It, 23 Lewis & Clark L. Rev. 205, 232 (2019) (discussing how *Terry* and *Whren* have "allowed police and prosecutors to discriminate in criminal cases"); Maclin, Race and the Fourth Amendment, supra note 35, at 338 (discussing how the Court is reluctant to consider the motivations and expectations of police officers in alleged racial profiling); see also Anthony C. Thompson, Stopping the Usual Suspects: Race and the Fourth Amendment, 74 N.Y.U. L. Rev. 956, 1012–13 (1999).

149. 517 U.S. 806, 813 (1996).

150. Id.

Whren finds its origins in 1993 in the District of Columbia.[151] Plainclothes police officers were patrolling a "high drug area" in an unmarked car when they observed a vehicle stopped at a stop sign for an unusually long period of time.[152] When the officers turned to drive back toward the vehicle, the vehicle "turned suddenly to its right, without signaling, and sped off at an 'unreasonable' speed."[153] The officers then followed the vehicle until it came to a stop in traffic, at which point the officers approached the vehicle on foot, identified themselves as police officers, and directed the driver to put the vehicle in park.[154] One officer observed two bags of what appeared to be drugs in the passenger's hands.[155] The petitioners, the driver and passenger of the vehicle, were arrested and several types of illegal drugs were found and seized from the vehicle.[156]

At a pretrial suppression hearing, the petitioners unsuccessfully challenged the legality of the stop and the seizure of the drugs.[157] They attempted to argue that there was no probable cause to justify the stop and that the officer's initial approach to the vehicle, to issue a traffic violation, was pretextual.[158] The district court denied the petitioners' motion to suppress, the petitioners were convicted of drug offenses at trial, and the court of appeals upheld their convictions.[159] With respect to the issue of suppression, the D.C. Circuit held that regardless of subjective intent, "a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation."[160]

The Supreme Court granted certiorari and ruled on the issue of whether the temporary detention of a driver, who officers had probable cause to believe had committed a traffic violation, violates the Fourth Amendment unless a reasonable officer would have been motivated to stop the car purely on the desire to enforce traffic laws.[161]

Petitioners attempted to argue that probable cause is not enough to justify a stop "in the unique context of civil traffic regulations" because the use of vehicles is so "heavily and minutely regulated" that it is nearly impossible to always completely comply with said regulations and officers

151. Id. at 808.
152. Id.
153. Id.
154. Id.
155. Id. at 809.
156. Id.
157. Id.
158. Id.
159. Id.
160. Id. (quoting United States v. Whren, 53 F.3d 371, 375 (D.C. Cir. 1995)).
161. Id. at 808.

would almost always be able to catch any given driver for a traffic violation.[162] These factors, the petitioners argued, create the temptation for officers to use traffic stops as a means of investigating other violations for which probable cause does *not* exist.[163] Further, the petitioners argued that this could allow officers to decide which drivers to stop based on impermissible factors, such as race.[164] The petitioners concluded that the Fourth Amendment test for traffic stops should not be whether probable cause existed to justify the stop, but instead whether a reasonable police officer would have made the stop for the reason given, namely a purported traffic violation.[165] They further contended and that this standard was supported by the Court's case law,[166] but the Court disagreed.[167]

The Court traced its case law and found that "only an undiscerning reader" could regard said cases as supporting the notion that ulterior motives can invalidate a search and seizure that is otherwise justified through probable cause.[168] In asserting this, the Court found that in each of the cases cited it had been merely addressing the validity of searches lacking probable cause altogether.[169] Further, the Court found that not only was there no case law to support the petitioners' arguments, but also that it had repeatedly held the exact opposite.[170] Specifically the Court referred to *United States v. Villamonte-Marquez*,[171] *United States v. Robinson*,[172] and *Scott v. United States*,[173] where it held that an otherwise valid search and seizure would not be invalidated by an ulterior, subjective motive.[174]

In dismissing the petitioners' arguments regarding racial discrimination, the Court found that the Constitution prohibits selective enforcement of the law based on race, but that the correct vessel for such an argument is the Equal Protection Clause; subjective intentions are irrelevant in Fourth Amendment analysis.[175]

The Court went on to address the petitioners' proposed "objective" standard hinging on whether a reasonable officer would have executed the stop based purely on the traffic violation, without an ulterior motive.[176]

162. Id. at 810.
163. Id.
164. Id.
165. Id.
166. Id. at 811.
167. Id. at 811–13.
168. Id. at 811.
169. Id. at 811–12.
170. Id. at 812.
171. 462 U.S. 579 (1983).
172. 414 U.S. 218 (1973).
173. 436 U.S. 128 (1978).
174. *Whren*, 571 U.S. at 812–13.
175. Id. at 813.
176. Id. at 813–16.

The Court found that this proposed test was not objective, but was in fact almost entirely subjective and an attempt to circumvent the already well-developed case law on "pretextual" stops.[177] The Court held that the correct standard for Fourth Amendment analysis remained whether probable cause existed to justify the stop.[178]

Finally, the Court addressed whether the Fourth Amendment analysis requires courts to weigh the governmental and individual interests implicated by the traffic stop.[179] The Court held that Fourth Amendment analysis requires the balancing of all relevant factors to determine the reasonableness of the stop, but that when probable cause exists the result of said balancing test is essentially already known.[180] Where probable cause exists, the governmental interest "outbalances" the individual interest.[181] Additionally, the Court held that the fact that there are numerous traffic laws that any given driver could be in violation of at any given time does not mean that enforcement of said traffic laws should not be a valid justification for traffic stops.[182]

Because the district court found that the officers had probable cause to believe that the petitioners had committed a traffic violation, it held that the stop was reasonable under the Fourth Amendment, regardless of the officer's actual, subjective intentions in executing the stop, and upheld the petitioners' convictions.[183]

Whren insulated police discretion from Fourth Amendment scrutiny. Professor Paul Butler puts it more boldly, noting that in *Whren* "the Court effectively declared that the Fourth Amendment cannot be used as a tool to ensure racial justice."[184] Along with *Terry*, *Whren* worked to insulate police discretion and indeed protect it from constitutional scrutiny. If, under *Terry*, police can briefly detain civilians based on reasonable suspicion, then *Whren* insulates implicit and express racial bias that can inform these judgements as to discretion. The subjective motivations for the stop are labeled irrelevant to Fourth Amendment analysis.[185] What matters is that there was probable cause for the stop.[186] Ultimately, as Butler explains

177. Id.
178. Id. at 819.
179. Id. at 816–19.
180. Id. at 817.
181. Id. at 818.
182. Id. at 818–19.
183. Id. at 819.
184. Butler, supra note 94, at 250.
185. *Whren*, 517 U.S. at 813.
186. Id. at 818–19.

about *Whren* and other Fourth Amendment cases, "[T]he Court is so protective of this discretion that, if not unbridled, [discretion] is extremely expansive, especially in high-crime—i.e., minority—areas."[187]

Recently, scholars have relied on social psychology to explain racial bias in policing—from the construction of reasonable suspicion to uses of force—and suggest ways for how cognitive science can inform Fourth Amendment doctrine.[188] For example, Professor L. Song Richardson argues that the "*Terry* doctrine facilitates the influence of implicit racial bias and racial anxiety on behaviors and judgments, leading to unjustified racial disparities in police stop and frisk practices."[189] Drawing from social psychology, Richardson explains how both phases of the stop and frisk—the "initial judgment of suspicion that results in the stop" and the "interaction that occurs when officers investigate their suspicion and potentially conduct a frisk for weapons"—are informed by implicit racial biases that in turn produce racial disparities in stops and frisks.[190] Richardson points out that "unconscious racial biases linking Black individuals with criminality and White individuals with innocence create the risk that officers will be more likely to judge the ambiguous behaviors of Blacks as suspicious while ignoring or not even noticing the identical ambiguous behaviors of Whites."[191] The result is not only that "Blacks are more likely than Whites to be stopped by the police," but also that during the encounter, "another psychological process known as racial anxiety can enable troubling racial disparities in whether a frisk will occur or force will be used."[192]

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187. Butler, supra note 94, at 252.

188. See, e.g., Jerry Kang & Kristin Lane, Seeing Through Colorblindness: Implicit Bias and the Law, 58 UCLA L. Rev. 465, 468 (2010) ("As behavioral realists, we . . . insist[] that the law account for the most accurate model of human thought, decisionmaking, and action provided by the sciences."); Jillian K. Swencionis & Phillip Atiba Goff, The Psychological Science of Racial Bias and Policing, 23 Psych. Pub. Pol'y & L. 398, 400 (2017) (highlighting the potential for aversive racism—the conflict between affirming anti-prejudicial views and holding implicit biases—to inform how racial discrimination can result from officer discretion, particularly when determining probable cause); L. Song Richardson, Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks, 15 Ohio St. J. Crim. L. 73, 84 (2017) [hereinafter Richardson, Implicit Racial Bias and Racial Anxiety] ("[I]mplicit biases can influence behaviors and judgments in systematic and predictable ways that can cause unjustified racial disparities and the *Terry* doctrine exacerbates their influence."); see also Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 Calif. L. Rev. 945, 946 (2006) ("[T]he science of implicit cognition suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.").

189. Richardson, Implicit Racial Bias and Racial Anxiety, supra note 188, at 74.

190. Id. at 75.

191. Id. at 74.

192. Id.; see also Devon W. Carbado, Blue-on-Black Violence: A Provisional Model of Some of the Causes, 104 Geo. L.J. 1479, 1492, 1485–87 (2016) [hereinafter Carbado, Blue-on-Black Violence] (noting that police officers possess racialized perceptions of disorder

Similarly, disability may inform what Richardson refers to as an "initial judgment" regarding suspicion—even without being expressly identified as the *reason* for the stop.[193] To begin with, nonnormative or nonconforming behaviors and expressions may read as "suspicious," even forming the basis for reasonable suspicion to stop a civilian.[194] Media accounts of disabled people profiled by police reveal how innocuous but nonnormative behaviors have been constructed as suspicious, dangerous, threatening, and even animallike.[195] Moreover, disability-based behaviors or conditions per se may factor into what an officer finds amounts to reasonable suspicion, even when what are interpreted as behaviors indicative of criminal activity are instead manifestations of disability, such as when symptoms stemming from physical disabilities are confused with drunkenness.[196] Think back to *Graham*, where Dethorne Graham's hurried actions as he exited the convenience store in search of orange juice were interpreted as suspicious, and his later actions as he slipped in and out of consciousness

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and are more likely to view Black teenagers on a street corner as a sign of disorder than white teenagers).

193. Richardson, Implicit Racial Bias and Racial Anxiety, supra note 188, at 75. Moreover, even if behaviors are recognized as, let's say, "disability-related," such as the manifestation of mental distress, the behaviors may be explained as evidence of malingering. In *Graham*, Graham's disability was recognized but characterized as "drunkenness," a version of the refrain, "he's faking it." See supra notes 1–15 and accompanying text. In numerous other cases, disability is viewed as part of a deliberate con game. See, e.g., Griffith v. Coburn, 473 F.3d 650, 652 (6th Cir. 2007) (describing how officers refused to help a disabled person because they thought he was just "just faking" and "playing possum"); Lewis v. Truitt, 960 F. Supp. 175, 176 (S.D. Ind. 1997) (describing how police beat and arrested a deaf plaintiff whom they "refused to believe" was deaf and whom they accused of "lying" about his disability). For an insightful discussion of the "disability con" and the claiming of legal entitlements under disability law, see Doron Dorfman, Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse, 53 Law & Soc'y Rev. 1051, 1078–82 (2019).

194. See Graham v. Connor, 490 U.S. 386, 389 (1989) (examining a Fourth Amendment excessive force claim where the diabetic petitioner, suffering from a "sugar reaction," hastily entered and left a convenience store, leading the officer to "become suspicious" and to make an investigative stop).

195. See, e.g., Gohier v. Enright, 186 F.3d 1216, 1218 (10th Cir. 1999) (reviewing a district court order in a case where the police officer described the mentally ill petitioner as "'crazed and wild-eyed,' with his teeth gritted in a grimace and a 'Charles Mason-type look'"); see also Bill Hutchinson, Independent Investigators in Elijah McClain's Death Issue Scathing Report, ABC News (Feb. 25, 2021), https://abcnews.go.com/US/independent-investigators-elijah-mcclains-death-issue-scathing-report/story?id=76042087 [https://perma.cc/N79C-4WNC] [hereinafter Hutchinson, Independent Investigators]; Joanne Schnurr, Witness Describes Abdi Having a 'Blank Stare' in Interaction Shortly Before Police Takedown of Adbi; Surveillance Footage Released, CTV News (Mar. 6, 2019), https://ottawa.ctvnews.ca/witness-describes-abdi-having-a-blank-stare-in-interaction-shortly-before-police-takedown-of-abdi-surveillance-footage-released-1.4325249 [https://perma.cc/74Y6-TQ7U].

196. Jackson v. Inhabitants of Town of Sanford, No. 94-12-P-H, 1994 WL 589617, at *1 (D. Me. 1994) ("[When the] police officer . . . arrived at the [accident] scene[,] . . . the other driver . . . thought Jackson was drunk. In fact, Jackson was not drunk but suffered from some physical difficulties, including partial paralysis of his right side and slurred speech, as a result of a stroke several years earlier.").

were interpreted as drunkenness.[197] Both observations give legitimacy to the idea that policing disability serves social control purposes and enforces a state of normalcy. This Essay discusses both types of disability profiling below.

This Essay uses the phrase "disability profiling" to draw from and intentionally call to mind racial profiling, which is also at play in the policing of disabled people of color. Numerous scholars have argued that Fourth Amendment doctrine facilitates racial profiling.[198] Racial profiling, as legal scholar David Harris defines it, is "the law enforcement practice of using race, ethnicity, national origin, or religious appearance as one factor, among others, when police decide which people are suspicious enough to warrant police stops, questioning, frisks, searches, and other routine police practices."[199] Similarly, disability profiling refers to instances in which police use disability-related, yet noncriminal behaviors as a basis for initiating an encounter. Disability profiling may occur when nonnormative behaviors are perceived as not only unusual but also suspicious enough to warrant further attention or intrusion. In short, disability informs the basis for suspicion. This is true even when disability is not explicitly acknowledged in the official report, court cases, media accounts, or other forms of documenting police practice.

For example, certain expressions of disability—such as flapping hands, low-affect facial expressions, pacing, lack of eye contact, and unsteadiness that may be exhibited by some autistic individuals—may draw

197. See *Graham*, 490 U.S. at 389.

198. See Cole, supra note 31, at 18–22 ("By permitting the police to use what is actually quite coercive behavior without any articulable basis for individualized suspicion, the Court's [Fourth Amendment reasonable person] standard encourages the police to act on race-based judgments."); Butler, supra note 94, at 253 (describing how the Fourth Amendment conflates criminals with people of color); Carbado, (E)racing the Fourth Amendment, supra note 36, at 1032–34 (noting the Court's implicit recognition that race-based profiling in policing is only "an attitude that resides in the mind of bad police officers" and "not per se inconsistent with the Fourth Amendment"); Maclin, Race and the Fourth Amendment, supra note 35, at 357 ("[S]tatistics . . . provide concrete evidence that state police officers are targeting black motorists for unwarranted narcotics investigations under the guise of traffic enforcement . . . . indicat[ing] large-scale, arbitrary, and biased police seizures that implicate essential Fourth Amendment protections.").

199. Harris, Racial Profiling, supra note 35, at 11. In *Whren*, the Supreme Court held that the subjective intentions of a police officer were not relevant for determining whether a seizure was reasonable under the Fourth Amendment. Whren v. United States, 517 U.S. 806, 813 (1996). In United States v. Brignoni-Ponce, 422 U.S. 873, 886 (1975), the Supreme Court held that a stop based on a single factor (apparent Mexican ancestry of occupants) did not justify a stop by the police near a border check point. But in United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976), the Court upheld a referral to a secondary inspection area even assuming "that such referrals are made largely on the basis of apparent Mexican ancestry."

police attention.[200] In another example, say that during the course of police questioning, the person being questioned exhibits speech disabilities, which is interpreted as slurred speech or limited motor skills. Such behaviors have elicited heightened scrutiny, in some cases, serving as a factor that forms a basis for reasonable suspicion.[201] Reactions to police by autistic individuals and individuals with developmental disabilities—including not just fear and anxiety due to the police presence but also expressions of sensory overload stemming from the loud sirens, flashing lights, and shouted commands—can in turn be perceived by officers as nervousness, furtiveness, or evasiveness. In a word, officers may perceive these reactions as suspicious.[202] In short, from the perspective of civilians with intellectual or developmental disabilities in particular, police encounters can prove traumatizing, leading to reactions that can provide additional justifications for reasonable suspicion.

Unconscious, implicit biases may influence which behaviors are labeled unusual and even suspicious, particularly when such behaviors are exhibited by individuals who are negatively racialized or are members of historically marginalized groups. As Professor Richardson notes, ambiguous behaviors in whites tend to be ignored or not even noticed.[203] Furthermore, she argues that unconscious bias linking Black people to criminality risks ambiguous behaviors being interpreted as criminal.[204] Some police officers may have similar implicit biases against disabled people. Existing research suggests that people continue to associate disability, and in particular mental disability, with criminality or threatening behaviors. In one

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200. A survey of individuals with IDD reported similar findings. Jennifer C. Sarrett & Alexa Ucar, Beliefs About and Perspectives of the Criminal Justice System of People With Intellectual and Developmental Disabilities: A Qualitative Study, 3 Soc. Scis. & Human. Open, Jan. 2021, at 1, 4; see also Schnurr, supra note 195 (explaining how a witness who interacted with an individual prior to his deathly encounter with the police described the individual as having a "blank stare"). These examples are not intended to essentialize disabled people, within particular disability identities, or force comparisons across disabilities. They are offered only as examples of how disability expressions can be interpreted as suspicious by law enforcement.

201. See Lewis v. Truitt, 960 F. Supp. 175, 178 (S.D. Ind. 1997); *Jackson*, 1994 WL 589617, at *1; Malone v. State, 195 So. 3d 1184, 1186 (Fla. Dist. Ct. App. 2016).

202. The Department of Justice's investigation into the Ferguson Police Department revealed such disability policing:

> FPD stopped a man running with a shopping cart because he seemed "suspicious." According to the file, the man was "obviously mentally handicapped." Officers took the man to the ground and attempted to arrest him for Failure to Comply after he refused to submit to a pat-down. In the officers' view, the man resisted arrest by pulling his arms away. The officers drive-stunned him in the side of the neck. They charged him only with Failure to Comply and Resisting Arrest.

Ferguson DOJ Report, supra note 110, at 36.

203. Richardson, Implicit Bias and Racial Anxiety, supra note 188, at 76–77.

204. Id. at 77.

study, researchers found that police viewed individuals with "mental impairments" as more threatening and generally believed this group "required more effort to arrest."[205] This Essay discusses how disability-related behaviors create pathways to excessive force,[206] but for now, it is important to note how data suggest that mental disabilities can form the basis for reasonable suspicion. This is true when, for instance, disability is coded as threatening and potentially dangerous, not because of any actual threat or danger but rather because officers interpret disabled people as exhibiting behaviors that do not align with the dominant social norms (i.e., nonnormative behaviors).[207]

The term nonnormative is helpful here in part because there is a relational aspect to suspicion that is not captured in labeling certain behaviors as simply "suspicious." Criminal law and critical race scholars have documented this relational aspect of suspicion—namely, how race-based suspicion leads not just to overpolicing in so-called minority neighborhoods, but also how it is used to sweep up Black and Latinx people deemed "out of place" in white (non-Latino) neighborhoods.[208] Professor Bennett

205. Melissa Reuland, Matthew Schwarzfeld & Laura Draper, Law Enforcement Responses to People With Mental Illness: A Guide to Research-Informed Policy and Practice 8 (2009), https://csgjusticecenter.org/wp-content/uploads/2020/02/le-research.pdf [https://perma.cc/T2V4-6ZHJ].

206. See infra section IV.B.3.

207. This is particularly true in this era of mass shootings, where public manifestation of untreated disability—in particular mental disability—may work to reinforce stereotypes and create a "profile" sufficient to provide reasonable "articulable suspicion that a person has committed or is about to commit a crime" of violence. Florida v. Royer, 460 U.S. 491, 498 (1983). Yet as disability rights advocacy organizations have argued, mental disability is not a predictor of violence. See, e.g., Coal. for Smart Safety, Debunking the Myths: Mental Health and Gun Violence 1 (2020), http://www.bazelon.org/wp-content/uploads/2020/02/2-3-2020-debunkingtheMyths_follow_up_materials.pdf [https://perma.cc/KM26-NGRN] ("While public perceptions associating serious mental illness with violence have increased substantially in recent decades, serious mental illness is not by itself a predictor of violence." (footnote omitted)). According to a recent report by Coalition for Smart Safety, "Only 3-5% of violence is committed by people with mental health disabilities," and "[l]ess than 5% of gun-related killings in the U.S. are committed by people with mental health disabilities." Id. Indeed, people with untreated psychiatric disabilities are more likely to be victims rather than perpetrators of violence. Id. With respect to mass shootings, "[t]he vast majority of mass shooters do not have a mental illness." Id.

208. See, e.g., Carbado, Blue-on-Black Violence, supra note 192, at 1494–95 ("[R]acial segregation, including gentrification, facilitates police interactions with African-Americans by creating a logic about race and space that justifies the aggressive policing of predominantly black neighborhoods and the police targeting of African-Americans in predominantly white neighborhoods and areas in racial transition."); Capers, supra note 36, at 65–66 ("The usual concern is that minorities are disproportionately targeted for stops . . . often conducted in minority neighborhoods. What is often obscured . . . is another type of stop that is perhaps more troubling, since it has the effect of reifying the notion that certain neighborhoods are white and other neighborhoods are not.").

Capers terms this relational aspect of racial suspicion "racial incongruity."[209] As he explains, "Who is scrutinized, who is stopped, who is questioned, and who is frisked is too often based on 'racial incongruity,'—the presence of a minority in a predominantly nonminority neighborhood or the presence of a nonminority in a predominantly minority neighborhood."[210] Moreover, whom police decide to stop "is inextricably tied not only to race, but to officers' conception[s] of place, of what *should* typically occur in an area and *who belongs*, as well as *where they belong*."[211] This "commonsense geography," Capers asserts, "informs [officers'] decisions about whom to deem 'out of place,' which in turn send expressive messages about who belongs and who does not."[212]

Disability profiling may be more pronounced in places where the presence of disabled people is perceived as a type of physio-normative incongruity and includes places in which, for example, disabled people manifesting their disabilities in public are targeted by aggressive quality-of-life policing targeting alleged violators of loitering, disorderly conduct, and public intoxication laws. According to Professor Carbado, there are "added incentive[s]" for police to aggressively enforce low-level offenses to "protect and serve" privileged residents of these gentrifying communities.[213] Privileged residents of such communities could include those who are white, cisgender, and nondisabled—or at least not manifesting their disabilities or impairments related to their disabilities in ways that are perceived as threatening or dangerous, based on stereotypes, or in ways that are simply regarded as unwelcomed.[214] As with the policing of negatively racialized communities, policing based on such disability stereotypes serves to reinforce those disability stereotypes.[215]

Disability-related behaviors do not just serve as a basis for reasonable suspicion; Fourth Amendment doctrine *facilitates* such disability profiling. Fourth Amendment doctrine legitimizes nonnormativity itself as a basis for suspicion. Indeed, the ability of officers to spot and investigate physical

209. Capers, supra note 36, at 65–66.

210. Id.

211. Id. at 65 (quoting Albert J. Meehan & Michael C. Ponder, Race and Place: The Ecology of Racial Profiling of African American Motorists, 19 Just. Q. 399, 402 (2002)).

212. Id.

213. Carbado, Blue-on-Black Violence, supra note 192, at 1493.

214. Cf. id. ("Here, police officers would perform a kind of brush-clearing of inner city areas to enable whites to traverse the neighborhood unencumbered by signs of disorder (read: public black presence, particularly in the form of adolescence, homelessness, and gender non-conformity).").

215. Cf. id. at 1509, 1510 ("[P]olice targeting of (and violence against) African-Americans produces the very stereotypes about African-Americans that justify that targeting and violence."); Roberts, Race, Vagueness, and the Social Meaning of Order-Maintenance Policing, supra note 36, at 810 ("Just as visible disorder 'tells' residents that the community is not enforcing norms of orderliness, race-based policing tells the community that Blacks are presumed to be lawless and are entitled to fewer liberties.").

manifestations of nonnormative behaviors—such as "unusual" or "suspicious" behaviors—is viewed as a cornerstone of good police work.[216] In places in which police profile "suspicious persons," police may also sweep up persons whose appearance and behaviors are perceived as nonnormative, which in turn tend to be perceived as behaviors that pose risks—risks of harm, risks of disorder, and risks of disruption, to name a few.

The Supreme Court has explained that "[i]n making reasonable-suspicion determinations, reviewing courts must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing," a process that "allows officers to draw on their own experiences and specialized training to make inferences from and deductions about the cumulative information available."[217] Because Fourth Amendment doctrine permits police officers to rely on "commonsense judgments and inferences about human behavior"[218] in reasonable suspicion determinations, the doctrine does not prevent officers from constructing reasonable suspicion based on physiological abnormalities. Indeed, Fourth Amendment doctrine permits brief detentions to resolve ambiguities as to unusual behaviors.[219]

1. *Nervous and Evasive Behavior as a Basis for a* Terry *Stop.* — Even ambiguous, innocent behaviors, taken together, may provide the basis for reasonable suspicion.[220] DEA agents stopped Andrew Sokolow at Miami

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216. See Adams v. Williams, 407 U.S. 143, 145–46 (1972) ("The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to . . . allow a crime to occur or a criminal to escape . . . . [*Terry*] recognizes that it may be the essence of good police work to adopt an intermediate response.").

217. United States v. Arvizu, 534 U.S. 266, 266 (2002) (citing United States v. Cortez, 449 U.S. 411, 417–18 (1981)).

218. Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000) (concluding that an officer was "justified in suspecting that [the respondent] was involved in criminal activity, and, therefore, in investigating further" due to the respondent's "presence in an area of heavy narcotics trafficking" and "unprovoked flight"); cf. *Cortez*, 449 U.S. at 418 ("[T]he assessment must be based upon all the circumstances . . . . [P]ractical people formulated certain commonsense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers.").

219. See *Wardlow*, 528 U.S. at 125 (noting that, while conduct justifying a stop may be "ambiguous and susceptible of an innocent explanation," officers can detain individuals to "resolve the ambiguity").

220. See United States v. Sokolow, 490 U.S. 1, 9–10 (1989). In *Sokolow*, the Supreme Court explained:

> We said in *Reid v. Georgia*, [that] "there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." Indeed, *Terry* itself involved "a series of acts, each of them perhaps innocent" if viewed separately, "but which taken together warranted further investigation." We noted in *Gates* that "innocent behavior will frequently provide the basis for a showing of probable cause," and that "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,'

International Airport on suspicion that he was smuggling drugs.[221] Sokolow's nervousness was one of six factors that provided reasonable suspicion to justify the stop,[222] although this is not meant to suggest that nervousness was dispositive or even a principal factor in the court's inquiry. Instead, the point is that Fourth Amendment doctrine permits nervousness—even nervousness related to disability—to factor into determinations of reasonable suspicion.[223] For example, say police stop someone "out of place" on a street corner and approach the person for questioning. The person appears nervous and shifty due to their cognitive disability, and the police interpret these behaviors as a basis for reasonable suspicion that the individual has committed or is about to commit a crime. In this case, disability is just one factor that comes into the analysis alongside a whole host of factors that can legally provide the basis for reasonable suspicion.[224] Thus, the doctrine explicitly allows police officers to rely on ableist understandings of how bodyminds are supposed to behave to justify stopping nonconforming individuals—that is, the Fourth Amendment *Terry* doctrine allows for the policing of disabled people.

In *Illinois v. Wardlow*, officers from the special operations section of the Chicago Police Department were riding caravan-style in an "area known for heavy narcotics trafficking."[225] During the ride, they observed Sam Wardlow holding an "opaque bag."[226] After seeing the officers, Wardlow fled.[227] Police later caught up to Wardlow, frisked him for weapons, and found a handgun in a bag he was carrying.[228] Wardlow moved to suppress the gun obtained from the search.[229] The Supreme Court held that the officers' conduct did not violate the Fourth Amendment. In reach-

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> but the degree of suspicion that attaches to particular types of noncriminal acts." That principle applies equally well to the reasonable suspicion inquiry.

Id. (second alteration in original) (citations omitted).

221. See id. at 4–6.

222. See id. at 3 (listing the factors).

223. See id.; see also United States v. Santillan, 902 F.3d 49, 58 (2d Cir. 2018) ("The men's nervousness and inability to specify where they had come from would have suggested to a reasonable officer . . . that the men were struggling to fabricate a cover story."); United States v. Pettit, 785 F.3d 1374, 1380 (10th Cir. 2015) ("We look only for signs of nervousness 'beyond those normally anticipated during a citizen-police encounter.'" (quoting United States v. Salzano, 158 F.3d 1107, 1113 (10th Cir. 1998))).

224. See Terry v. Ohio, 392 U.S. 1, 21 (1968) ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

225. 528 U.S. 119, 121 (2000).

226. Id. at 121–22.

227. Id. at 122.

228. Id.

229. Id.

ing its holding, the Court reiterated that "nervous, evasive behavior" is another pertinent factor in determining whether reasonable suspicion exists to justify a stop.[230]

Scholars have criticized *Wardlow*'s holding largely for its apparent conclusion that flight in a high-crime area—and the racialized characterizations of Black and Latinx communities as "high crime"—partly established reasonable suspicion to justify the *Terry* stop.[231] Again, however, the decision's approval of "nervous, evasive behavior" and its emphasis on "reasonable commonsense judgments as inferences about human behavior" in determinations of reasonable suspicion warrant greater attention in light of the potential harms of such an approach to disabled people.

The risk that disability-related behaviors may read as nervous or evasive conduct constituting a basis for reasonable suspicion may be heightened in predominantly Black communities experiencing high rates of violent crime. The facts surrounding the shooting of Ricardo Hayes illustrate the point. In December 2019, the Chicago Police Board (CPB) voted to suspend Sergeant Khalil Muhammad for the August 2017 shooting of then-eighteen-year-old Ricardo Hayes, a Black teenager with IDD in the predominantly Black neighborhood of Fernwood in the South Side of Chicago.[232] On this night, Hayes had wandered off from the group home where he lived, as he had done on a number of prior occasions. Sergeant Muhammad, who was not aware that Hayes had wandered away from his group home, and who was off duty at the time, observed Hayes on the street.[233] According to the civil case Hayes later filed, at the time Hayes spotted the officer, Hayes was likely "running and skipping," which was typically what he did during these ventures.[234] This may have appeared unusual to an observer but was nonthreatening and innocent conduct.

230. See id. at 124.

231. See, e.g., Carbado, From Stopping Black People to Killing Black People, supra note 37, at 147 n.87 ("Importantly, *Wardlow* does not say expressly that fleeing in a high-crime area equals reasonable suspicion, but it comes pretty close."); Ben Grunwald & Jeffrey Fagan, The End of Intuition-Based High-Crime Areas, 107 Calif. L. Rev. 345, 389 (2019) ("*Wardlow* thus assumes that, controlling for other stated bases of reasonable suspicion, there is a higher probability that a suspect is engaged in a crime where the officer invokes [the] high-crime area as a basis of a stop."); Amy D. Ronner, Fleeing While Black: The Fourth Amendment Apartheid, 32 Colum. Hum. Rts. L. Rev. 383, 385 (2001) ("[T]he *Wardlow* Court effectively removed the protections of the Fourth Amendment from individuals that need it the most, namely minorities who have faced historic[al] discrimination at the hands of the police.").

232. Charlie De Mar, New Video Shows Off-Duty Chicago Police Sergeant Shooting Teenager Ricardo Hayes, CBS Chi. (Oct. 16, 2018), https://chicago.cbslocal.com/2018/10/16/video-shows-off-duty-chicago-police-sergeant-khalil-muhammad-shooting-unarmed-teenager-ricardo-hayes/ (on file with the *Columbia Law Review*).

233. Id.

234. Fran Spielman, $2.25M Settlement Proposed for Unarmed, Developmentally Disabled Man Shot by Police, Chi. Sun Times, https://chicago.suntimes.com/city-

Sergeant Muhammad said that Hayes was "behaving suspiciously" when he first spotted him and that when the officer proceeded to ask Hayes questions, Hayes became "elusive" and indeed took off running.[235] Reviewing Hayes's actions through the lens of disability however, shows that his actions are consistent with an individual with IDD—running away may suggest fear, confusion, or lack of comprehension as to the officer's request.[236] Sergeant Muhammad eventually shot Hayes several times in the arm. In the 911 call Sergeant Muhammad made at the scene, he explained why he shot Hayes, stating, "The guy pulled like he was about to pull a gun on me, walked up to the car, and I had to shoot."[237] However, a video released by the Civilian Office of Police Accountability contradicted Sergeant. Muhammad's account.[238] Hayes did not at all appear to be reaching for anything at the time he was shot. Here, disability profiling formed a basis for suspicion that created a clear pathway to police violence.[239]

2. *Challenges in Identifying Specific Instances of Impermissible Disability Profiling*. — What makes identifying disability-based reasonable suspicion determinations difficult is that disability-related behaviors may appear among a range of behaviors. This makes it challenging to distinguish what specific disability-related behavior, or behaviors, police impermissibly interpreted as criminal conduct. For example, in *United States v. Jabbi*, a Kentucky state trooper decided to follow a white SUV driving slowly in the right lane on the interstate.[240] At the time Trooper Michael King decided

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hall/2020/5/14/21258767/chicago-police-shooting-settlement-khalil-muhammad-richard-hayes [https://perma.cc/CSZ7-CGBM] (last updated May 14, 2020).

235. Jamie Kalven, Chicago Finally Releases Video of Police Officer Shooting Unarmed and Disabled Ricky Hayes, Intercept (Oct. 16, 2018), https://theintercept.com/2018/10/16/chicago-police-shooting-video-ricky-hayes/ [https://perma.cc/9SBP-AKDW].

236. Id.; see also Arc Nat'l Ctr. on Crim. Just. & Disability, Advancing Public Safety for Officers and Individuals With Intellectual and Developmental Disabilities (I/DD), Cmty. Policing Dispatch (2019), https://cops.usdoj.gov/html/dispatch/05-2019/intel_disability.html [https://perma.cc/99JJ-CL7F].

237. Kalven, supra note 235.

238. Id.

239. That disability draws suspicion should not be taken to mean that such suspicion is in any way warranted. Nonnormative behaviors are perceived as such because of social practices that marginalize or underappreciate variations in human bodies and minds. For example, in explaining autism and their experiences, advocates from the Autistic Self-Advocacy Network emphasize that:

> There is no one way to be autistic. Some autistic people can speak, and some autistic people need to communicate in other ways. Some autistic people also have intellectual disabilities, and some autistic people don't. Some autistic people need a lot of help in their day-to-day lives, and some autistic people only need a little help. All of these people are autistic, because there is no right or wrong way to be autistic.

About Autism, Autistic Self Advoc. Network, https://autisticadvocacy.org/about-asan/about-autism/ [https://perma.cc/3ZS3-PSEB] (last visited Sept. 28, 2021).

240. No. CR 5:18-62-KKC, 2018 WL 5306989, at *1 (E.D. Ky. Oct. 26, 2018).

to follow the vehicle, the driver had violated no traffic laws.[241] As Trooper King followed, he testified that he noticed the driver, Abdourahman Jabbi, looking over his shoulder repeatedly and veering off the road, hitting the rumble strips.[242] Trooper King testified that he suspected the driver of having fallen asleep or being under the influence and decided to pull Jabbi over.[243] Trooper King asked Jabbi whether he was tired, and he replied that he was and had been driving for a while.[244] According to King's testimony at trial, Jabbi appeared "extremely nervous, noticeably more nervous than other drivers that King had stopped in the past," and Jabbi's hand was shaking when he handed his identification to King.[245] At some point during King's questioning, Jabbi informed him that he had a stutter.[246] Later in the questioning, Trooper King testified that he could not hear what Jabbi had said due to traffic and so asked him to exit the vehicle.[247] King asked Jabbi if he could search the vehicle, and Jabbi agreed to King's search.[248] A subsequent search discovered twenty-seven pounds of marijuana and $4,300 in cash.[249] King proceeded to arrest Jabbi and drug enforcement agents later interviewed him.[250]

In his motion to suppress, Jabbi argued that Trooper King had detained him beyond what was reasonable and that he did not consent to the search of his vehicle.[251] In support of his motion, Jabbi testified that he was from Gambia and that he was born with a "severe speech impediment."[252] Specifically, Jabbi testified that "it is difficult for him to begin speaking; that there is a long pause before he can get words out, and that his lips flap, he mumbles, and his eyes react also."[253] He also testified that his speech disabilities cause him to stutter and are "more pronounced when he is nervous."[254] Further, Jabbi testified that his speech disabilities cause him embarrassment, and so he typically will "put his head down or look away when he speaks to someone."[255] The court denied the motion

241. Id.
242. Id.
243. Id.
244. Id.
245. Id.
246. Id.
247. Id.
248. Id. at *2.
249. Id.
250. Id.
251. Id. at *1.
252. Id. at *2.
253. Id.
254. Id.
255. Id.

to dismiss, finding reasonable suspicion for the stop and consent to the search.[256]

Jabbi demonstrates how race *and* disability may inform suspicion in cases involving disabled people of color. In *Jabbi*, though Jabbi's racial identity is not expressly stated, his birthplace in the Republic of The Gambia suggests African heritage and that the officer had identified him as a Black male.[257] The Fourth Amendment permits the traffic stop, even if motivated in part by pretext such as the race of the driver.[258] Once Jabbi had been stopped, Jabbi's speech disability likely factored into Trooper King's determination of reasonable suspicion. Indeed, the district court found sufficient facts to support reasonable suspicion, even acknowledging that Jabbi's disability might have played a role.[259] Yet again, even if disability factors into reasonable suspicion, that determination on its own does not violate the Fourth Amendment. Furthermore, like race, even if disability does inform reasonable suspicion determinations, officers may have incentives to provide disability-neutral reasons for the stop, or more likely, officers may not even recognize that disability was a factor ex ante.[260]

The foregoing demonstrates how Fourth Amendment doctrine may work to construct disabled persons as suspicious based in part on nonnormative behaviors. By granting broad, front-end investigatory powers to police to target nonnormative bodyminds, individuals from negatively racialized communities and other historically marginalized groups are too often deemed suspicious and in some cases "criminal." The next section discusses the Supreme Court's reasonable person standard and the test for seizures.

C. *Consent to Search*

In *Schneckloth v. Bustamonte*, the Supreme Court held that "when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied."[261] Whether the search is voluntary is a "question of fact to be

256. Id. at *4–5.

257. Id. at *2.

258. Id. at *3.

259. See id. at *4 ("[A]s the two spoke, Jabbi began looking away from Trooper King and took several seconds to respond to questions. These reactions may well have been caused by Jabbi's speech impediment but, based on Trooper King's brief interaction with Jabbi on the night of the arrest, they were reasonably concerning.").

260. See April J. Anderson, Cong. Rsch. Serv., LSB10524, Racial Profiling: Constitutional and Statutory Considerations for Congress 2 (2020) ("As long as they can point to individualized justification, the personal motives of an officer are not a factor in the Fourth Amendment analysis.").

261. 412 U.S. 218, 248 (1973).

determined from the totality of all the circumstances," and "[w]hile [the subject's] knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective voluntary consent."[262]

Appellate courts have largely upheld convictions against disabled people who argued that they lacked the capacity to voluntarily consent to searches due to IDD or brain injury.[263] This low win rate may be due to briefing and evidentiary issues, but another explanation might be the doctrinal test itself. First, courts are split on whether the test in *Schneckloth* is an objective or subjective one.[264] If subjective, relevant factors would be applied from the perspective of the individual defendant. If objective, relevant factors are applied from the perspective of the reasonable person. As the cases below suggest, when applied objectively, the test can underprotect the Fourth Amendment rights of disabled people. Second, voluntariness may refer to both the capacity to consent and freedom to consent (as in a free choice among a set of reasonable alternatives). Though it is important to consider the presence of voluntary consent to determine whether the defendant was "capable of a knowing consent,"[265] disability does not *only* influence cognitive capacity to consent. Disability also influences perceptions of police coercion, another factor necessary for determining whether consent is voluntary.[266] In *Mendenhall*, although the district court's application of the totality of the circumstances test (discussed approvingly by the Supreme Court) could conceivably incorporate disability, it fails to provide a way to *ensure* that courts *adequately* consider how disability influences perceptions of, or responses to, police behavior. Police behaviors may influence whether the defendant perceives an action by officers as coercive. Though the *Mendenhall* test is arguably inconsistent with the test in *Schneckloth*, most courts measure coercion from the vantage point of police and their conduct rather than the subjective state of the defendant. A few illustrative cases follow.

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262. Id. at 228; see also United States v. Mendenhall, 446 U.S. 544, 557–58 (1980) ("The question whether the respondent's consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances . . . ." (citing *Schneckloth*, 412 U.S. at 227)).

263. See, e.g., United States v. Sims, 428 F.3d 945, 953 (10th Cir. 2005) (finding that evidence of Sims's degenerative disorder was insufficient to prove that he did not voluntarily consent to a search); United States v. Hall, 969 F.2d 1102, 1107–09 (D.C. Cir. 1992) ("[T]here is affirmative evidence in the record that [the developmentally disabled] appellant . . . did indeed demonstrate a capacity to make autonomous decisions in the face of police questioning.").

264. David John Housholder, Reconciling Consent Searches and Fourth Amendment Jurisprudence: Incorporating Privacy Into the Test for Valid Consent Searches, 58 Vand. L. Rev. 1279, 1293–94 (2005).

265. *Mendenhall*, 446 U.S. at 558.

266. See infra notes 447–449 and accompanying text.

1. United States v. Sims. — In *United States v. Sims*,[267] the defendant, Stanley Howard Sims, argued that he did not give police voluntary consent to search his car, belongings, and hotel room, in part because of brain deterioration caused by frontotemporal dementia, which resulted in a "progressive loss of basic cognitive abilities."[268] The Tenth Circuit relied on the test in *Schneckloth* for determining whether Sims's consent to search was voluntary.[269] It explained that "[t]he Government establishes voluntariness only if it (1) produces clear and positive testimony that the consent was unequivocal, specific, and freely given, and (2) proves that consent was given without duress or coercion, express or implied."[270] Applying this test, it upheld the district court finding that Sims's consent was voluntary.[271] The court found "no evidence of any coercive police conduct or the use of any physical force," despite Sims's argument that he "thought he had no choice but to sign the consent form, and [that he] signed the consent form 'while also asking for a specific lawyer.'"[272] Sims maintained that his brain deterioration "made him unable to resist the pressure upon him at that time."[273] The Tenth Circuit concluded that the district court's finding that, despite conflicting testimony, Sims had signed the consent form prior to invoking his right to counsel was not clearly erroneous.[274] Moreover, and consistent with *Schneckloth*, the court determined that knowledge of the right to refuse consent was not dispositive, even though "knowledge of the right to refuse consent is one factor to be taken into account."[275] Though the court identified Sims's "mental condition" as a factor in "the most troubling issue" of whether he consented to the search, the court noted

267. 428 F.3d 945 (10th Cir. 2005).

268. Id. at 951. Defendants may of course move to suppress evidence obtained even after they are in custody. *Schneckloth* did not involve an individual in police custody. However, in United States v. Watson, 423 U.S. 411 (1976), the Court applied *Schneckloth* to a custodial arrest on a public street. In *Watson*, the Court noted that though there was an arrest, consent was not given "in the confines of the police station." Id. at 424. Other appellate courts, however, have applied *Schneckloth* to defendants in custody, including those in police stations. See, e.g., United States v. Duran, 957 F.2d 499, 503 (7th Cir. 1992) ("That [the defendant] consented while being held in custody in the . . . police station bears on the issue of voluntariness." (citing *Mendenhall*, 446 U.S. at 559)).

269. See *Sims*, 428 F.3d at 952 ("[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." (alteration in original) (internal quotation marks omitted) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973))).

270. Id. (citing United States v. Butler, 966 F.2d 559, 562 (10th Cir. 1992)).

271. Id. at 953.

272. Id. at 952.

273. Id. (internal quotation marks omitted).

274. Id. at 952–53.

275. Id. at 953.

that the circuit's cases have never required "perfect mental ability" in order to find consent to search voluntary.[276] The Tenth Circuit reasoned that Sims had failed to identify any "specific evidence" that had demonstrated the "extent of his impairment at the time of his consent to search," and that "the officers testified that no aspect of Sims's dysfunction was apparent to them."[277] Similarly, the court made note of testimony from Sims's coworkers indicating that they too were unaware of Sims's "illness" before his arrest.[278] Accordingly, the Tenth Circuit concluded there was no reason to find the lower court's decision clearly erroneous.[279]

The Tenth Circuit's decision to uphold the district court's finding that Sims's consent was voluntary, even accepting that the district court's findings of fact must be accepted unless clearly erroneous, pays insufficient attention to disability. In Sims's presentence investigation report, an independent neurologist diagnosed Sims with a form of dementia that causes a loss of "basic cognitive abilities."[280] Sims argued on appeal that his brain deterioration made him unable to resist the pressure put upon him.[281] Though the court adopted *Schneckloth*'s totality of the circumstances test, it judged whether Sims's consent was voluntary from an external perspective.[282] The court notes that neither the police nor Sims's coworkers were aware of Sims's condition.[283] With respect to police conduct, the court distinguished the totality of the circumstances test from the police perspective test, applied in cases challenging the voluntariness of confessions after *Miranda* warnings, while appearing to apply the latter.[284] The court credited testimony from the police "that no aspect of Sims's dysfunction was apparent to them,"[285] and that "the district court found no evidence that the police had attempted to exploit any of his vulnerabilities."[286] Here, the court's analysis conditioned its conclusion as to whether there was voluntary consent on the extent to which Sims's "impairments" were visible to law enforcement. This reasoning is consistent with the view that consent

276. Id.

277. Id.

278. Id.

279. Id.

280. Id. at 951.

281. Id. at 952.

282. See id. at 952–53 (noting that the district court had found that the officers did not notice Sims's impairment or attempt to exploit it to obtain consent).

283. Id. at 953.

284. Id. at 953 n.2; see also Colorado v. Connelly, 479 U.S. 157, 167 (1986) ("We hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment.").

285. *Sims*, 428 F.3d at 953.

286. Id.

to search is involuntary *only* if police intentionally exploited the disability-related vulnerabilities of the defendant.[287]

2. United States v. Zeng. — In *United States v. Zeng*, the defendant, Zhi Zheng, sought to suppress statements made while he was in custody and evidence taken from a search of his cellphone.[288] Zeng admitted to signing forms waiving his *Miranda* rights and consenting to a search, but he argued that an "intellectual disability that severely limit[ed] his ability to comprehend English prevented him from understanding the forms he signed."[289] The Second Circuit affirmed the district court's decision holding that "Zeng's intellectual limitations did not prevent him from understanding the content of the waiver and consent forms that he signed."[290] In affirming the district court decision, the Second Circuit affirmed the lower court's application of the totality of the circumstances test.[291]

The district court found credible testimony from three Border Patrol agents who had conducted interviews with Zeng.[292] Zeng presented evidence that he was "classified as learning disabled in high school," which the district court acknowledged in its opinion.[293] There are a number of different types of learning disabilities, each of which could limit comprehension and yet go unrecognized in officer interactions. Some learning disabilities influence language-based processing (e.g., reading fluency, comprehension, and recall), whereas other nonverbal learning disabilities (characterized by "weaker motor, visual-spatial, and social skills,") make it difficult for a person to interpret "non-verbal cues like facial expressions or body language."[294] The nuance of these interactions do not appear to be addressed in the district court opinion, even after the court acknowledged that Zeng was classified as having a learning disability in high school.[295]

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287. It is important to note that such a theory of disability discrimination is inconsistent with the ADA, which suggests that disability discrimination can occur by unintentional actions (i.e., disparate impact or failure to accommodate even where a decision not to accommodate is not based on animus) by state and local entities. See 42 U.S.C. § 12112(b)(3), (5) (2018) (defining discrimination in employment to include disparate impact and failure to accommodate); id. §§ 12131–12132 (prohibiting discrimination by state and local entities); Raytheon Co. v. Hernandez, 540 U.S. 44, 52–53 (2003) (noting that the ADA authorizes disparate-impact claims, which do not require showing an intent to discriminate).

288. 804 F. App'x 18 (2d Cir. 2020).

289. Id. at 20.

290. Id.

291. Id.

292. Id.

293. Id.

294. Types of Learning Disabilities, Learning Disabilities Ass'n of Am., https://ldaamerica.org/types-of-learning-disabilities/ [https://perma.cc/UQ7H-TCDB], (last visited Sept. 29, 2021).

295. *Zeng*, 804 F. App'x 18, 20 (2020). Zeng submitted an Individualized Education Plan (IEP) documenting learning and intellectual disabilities. An IEP is a legal document for

Zeng also provided opinions from two experts, which the district court found to have "'somewhat less weight' because they rested on testing and interview methods that the experts failed to establish were reliable."[296] At first glance, this outcome seems correct: Zeng's argument that his signing of the consent form was involuntary is based in part on the finding that he has a disability that limits both his ability to understand and process the English language.[297] If the district court determined that the evidence he had presented as to his intellectual and learning disability was not persuasive, then it could weigh that factor in favor of finding that the government had indeed met its burden of proving that the consent was voluntary.

However, diagnosis alone—whether reliable or not—cannot control the inquiry as to disability here. Stated differently, just because Zeng could not prove his disability through reliable testing does not mean that Zeng is not disabled, or that, as he argued, his disability impeded his understanding of what consent entailed. Disability diagnosis testing is notoriously both inaccurate and unreliable when applied to disabled people of color.[298] Furthermore, the court's analysis focused on one aspect of disability (the diagnosis, or more specifically, the reliability of the diagnosis presented by two experts in court) without acknowledging the testimony and documentation Zeng had submitted that demonstrated that he had been classified as learning disabled in high school.[299] It is likely that Zeng's learning disability was not readily apparent to law enforcement, but there is nothing in the evidentiary record to suggest that officers asked whether Zeng had *any* disability that may have impeded his ability to understand

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students who require special education services. Brief of Appellant and Special Appendix at 11, *Zeng*, 804 F. App'x 18 (2020) (No. 19-1357), 2019 WL 3886753.

296. *Zeng*, 804 F. App'x at 20.

297. See Brief of Appellant and Special Appendix, supra note 295, at 13 ("Given Zeng's intellectual disability with language processing, Ms. Silverstein concluded that Zeng could not understand the Advice-of-Rights and the Consent-to-Search documents based on the language, the length of the sentences, and the concept in the documents.").

298. Inst. of Med. of the Nat'l Acads., Psychological Testing in the Service of Disability Determination 99 (2015) (discussing how an unconscious bias in testing that can cause inconsistent or unreliable results based off cultural characteristics); Thorne Clark, Protection From Protection: Section 1983 and the ADA's Implications for Devising a Race-Conscious Police Misconduct Statute, 150 U. Pa. L. Rev. 1585, 1613–19 (2002) ("[S]tress-inducing situations suffered by whites as well as by people of color are included under the ADA, while similar conditions suffered more often by people of color alone are not included." (footnote omitted)); Mary Crossley, Infected Judgment: Legal Responses to Physician Bias, 48 Vill. L. Rev. 195, 227–29 (2003) (demonstrating that race and gender play an integral role in the kind of cardiac care an individual may receive); see also Cristina Rojas, More Minorities Labeled 'Learning Disabled' Because of Social Inequities, Study Finds, Sci. Daily (Aug. 21, 2018), https://www.sciencedaily.com/releases/2018/08/180821094158.htm [https://perma.cc/AC84-N7VD] ("[A] student's socioeconomic status is a strong predictor of academic achievement, which is often used to diagnose learning disabilities.").

299. See *Zeng*, 804 F. App'x at 21. See generally Brief of Appellant and Special Appendix, supra note 295, at 9–12.

the "advice-of-rights" form. But that goes to the core of the problem. The totality of the circumstances test does not require that law enforcement engage in such an inquiry before seeking a waiver of rights and a consent to search. Disability is just "a factor" to be considered, primarily after the fact—after the fact because it is routinely missed by law enforcement, or not expressly "claimed" by defendants.[300] Thus, that disability can be a factor in determining whether the government has met its burden of proving that the consent was voluntary matters little if disability is not recognized and officers are not required to ask about disability. Any measures geared generally toward comprehension will weigh in favor of the government, even where such general measures fail to meet the specific comprehension needs of the person with IDD.[301]

3. United States v. Barbour. — *United States v. Barbour* involved a man with severe depression who signed a consent form allowing an agent to search his apartment and car as part of an investigation into threats he had allegedly made against the president.[302] Evidence presented at the suppression hearing showed that federal agents had presented him with the consent form, informed him of his right to refuse consent, and read him the form, which indicated that "no promises were being made in exchange for [his] consent."[303] At that point, Barbour signed the form.[304] The Eleventh Circuit concluded that because there was no evidence of physical or psychological coercion, there was no basis to conclude that Barbour's consent

300. See, e.g., United States v. Male Juvenile (95-CR-1074), 121 F.3d 34, 40 (2d Cir. 1997) (noting "that at the suppression hearing and at trial the only evidence of defendant's learning and attentional difficulties was his mother's testimony regarding defendant's math and reading skills").

301. Though the facts discussed in the Second Circuit opinion emphasized that the officers were cognizant of some potential language barriers, the facts did not clearly point to the officers' awareness of Zeng's disability. *Zeng*, 804 Fed. App'x at *20. This is important: Though the court recognized that the officers' actions to read the "advice-of-rights" slowly and seek confirmation from Zeng as to his understanding were geared toward English language comprehension, this is not necessarily evidence that the officers were attuned to Zeng's cognitive abilities when they read the advice-of-rights form slowly or asked whether he understood what the officers were communicating. Id. Moreover, since native English speakers often presume enabled nonnative speakers to not understand them (as attested by the fact that they will often start speaking more slowly and louder), officers are likely to attribute any type of miscommunication between them and disabled nonnative speakers to the fact that they have a foreign language as their primary language. Branka Drljača Margić, Communication Courtesy or Condescension? Linguistic Accommodation of Native to Non-Native Speakers of English, 6 J. Eng. as Lingua Franca 29, 37–38 (2017) (reporting accommodative behavior by survey respondents who noted they adjusted their English when communicating with nonnative English speakers). This cultural presumption results in the erasure of disabilities since it allows officers to not inquire or even think about the fact that the miscommunication might be due to some kind of disability.

302. 70 F.3d 580, 583–84 (11th Cir. 1995).

303. Id. at 584.

304. Id.

to search was involuntary.[305] In reaching this conclusion, the court emphasized that "[t]he fact that a defendant suffers a mental disability does not, by itself, render a waiver involuntary; there must be coercion by an official actor."[306]

The court's determination that there had been no physical or psychological coercion centers on the individual actions of the federal agents, not Barbour's mental state and how that mental state could have influenced whether he had perceived the conduct by federal agents as coercive. The Eleventh Circuit's analysis is consistent with the Supreme Court's conclusion in the context of *Miranda* waivers that the "Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'"[307] Yet the Eleventh Circuit merges the test for compulsion with the test for voluntariness, seemingly reading into the test for voluntariness a requirement that all coercion must stem from police coercion.[308] Such a reading may run counter to *Schneckloth*, which can be read to include disability as a factor under the totality of the circumstances.[309] Furthermore, here again, the court states that there must be evidence that the officers *intended* to take advantage of disability.[310] As the court reasons, "[T]he fact that Barbour was suffering severe depression does not render his statements involuntary unless the agents took advantage of his mental illness."[311]

4. United States v. Duran. — *United States v. Duran* involved the appellant's wife, Karen Duran, who had signed a form consenting to the search of their home after being informed of her right to refuse.[312] Appellant Cesar Duran challenged the search on the grounds that, inter alia, the consent was involuntary, in part because of Karen's "fragile emotional state at the time she consented."[313] Duran maintained that Karen's emotional state was exacerbated by her not taking Prozac, the medication prescribed to treat a nervous disorder.[314] The Seventh Circuit determined that Karen's emotional state was relevant to the question of whether her consent was

305. Id. at 585.

306. Id. (citing Colorado v. Connelly, 479 U.S. 157, 169–70 (1986)).

307. *Connelly*, 479 U.S. at 169, 170–71 (quoting Oregon v. Elstad, 470 U.S. 298, 305 (1985)).

308. *Barbour*, 70 F.3d at 585.

309. See Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973) ("In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of . . . the possibly vulnerable subjective state of the person who consents.").

310. See *Barbour*, 70 F.3d at 585 ("Absent any evidence of psychological or physical coercion on the part of the agents, there is no basis for declaring Barbour's statements and consent to search involuntary.").

311. Id.

312. 957 F.2d 499, 501 (7th Cir. 1992).

313. Id. at 503.

314. Id.

voluntary even if her emotional state did not stem from police coercion.[315] Unlike the Eleventh Circuit and "contrary to the [lower] court's suggestion," the Seventh Circuit concluded that "it [was] immaterial whether her fragile emotional state arose from official coercion or not."[316] Ultimately, the Seventh Circuit held that unless Duran's emotional distress was profound enough to impair her capacity for self-determination, her consent was voluntary.[317]

5. *The Limits of the Totality of the Circumstances Inquiry in Assessing Consent in Disability Cases.* — The foregoing suggests a need to increase attention to disability in assessments as to whether consent was voluntary. Similarly, empirical studies call into doubt the effectiveness of consent doctrine in protecting Fourth Amendment rights and point to strengthening doctrinal protections. A recent empirical study by Professors Roseanna Sommers and Vanessa K. Bohns suggests that "third parties judging the voluntariness of consent are likely to underestimate the pressure people feel to comply with intrusive requests."[318] The authors note that the current approach to consent doctrine is "problematic because it invites judges to assess the power of social influence, a task that decision makers tend to perform inaccurately."[319] The study's findings also "cast doubt on" the assumption "that warnings enable people to feel free to refuse search requests."[320] This research provides even more reason for courts to scrutinize the effects of disability when consent is contested.

Furthermore, the prior discussion suggests the limits of the totality of the circumstances inquiry when there is evidence of a disability and the defendant argues that the disability rendered consent involuntary. A claim that disability mediated the interaction with police and did so in such a way as to render the consent involuntary should be evaluated as more than simply "a factor" in the totality of the circumstances test.[321] Where disabil-

315. Id.

316. Id. (citing United States v. Talkington, 843 F.2d 1041, 1047–48 (7th Cir. 1988)).

317. Id.

318. Roseanna Sommers & Vanessa K. Bohns, The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance, 128 Yale L.J. 1962, 1967 (2019).

319. Id. at 1974.

320. Id. at 2014.

321. See United States v. Reynolds, 646 F.3d 63, 73 (1st Cir. 2011) (citing United States v. Watson, 423 U.S. 411, 424–25 (1976)). In *Reynolds*, officers entered Bonny Reynolds's bedroom and asked if she had any guns; she answered affirmatively and gestured toward her headboard. Id. at 66. The officers took the gesture as consent and proceeded to search the headboard without asking for any further permission. A month prior, Reynolds was involuntarily committed to a mental hospital for psychological evaluation. The First Circuit rejected Reynolds's argument that the lower court erred in finding her consent voluntary and not fully considering mental competence. Id. at 73. The court considered mental competency as one factor among several others. Reynolds's mental disability was found to not demon-

ity is present, the court should consider not just how police (or other observers) respond to disability, but how disability influences how the disabled person perceives the request to search and how the surrounding circumstances and conditions influence how the request is interpreted. This will likely require testimony from experts on cognitive disabilities or behavioral health experts along with, of course, the testimony of the defendant. In short, the totality of the circumstances test must be strengthened to adequately account for the ways in which disability could have rendered consent involuntary, at least in the sense that such consent was free of duress or coercion.

D. *Use of Force*

Graham sets forth the constitutional standard for what constitutes reasonable force by police. Specifically, in that case, the Supreme Court ruled that Fourth Amendment excessive force claims involving arrests, investigatory stops, or other seizures of one's person are to be "properly analyzed under the Fourth Amendment's 'objective reasonableness' standard."[322] Under *Graham*, "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[323] "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[324] As the Court has noted, reviewing courts must pay "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[325]

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strate involuntariness. Id. at 74. The court also considered the fact that the search was minimally coercive and observed that there was a lack of evidence that Reynolds had an underlying illness at the time of the search.

322. Graham v. Connor, 490 U.S. 386, 388 (1989).

323. Id. at 397.

324. Id. at 396.

325. Id. As other courts have emphasized, Fourth Amendment doctrine recognizes that "[t]he intrusiveness of a seizure by means of deadly force is unmatched," and therefore, "[t]he use of deadly force implicates the highest level of Fourth Amendment interests both because the suspect has a fundamental interest in his own life and because such force frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." Landeros v. City of Tustin, 837 F.3d 1005, 1011 (9th Cir. 2016) (internal quotation marks omitted) (quoting Tennessee v. Garner, 471 U.S. 1, 9 (1985)). Thus, "[d]eadly force is permissible only if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm." Id. (internal quotation marks omitted) (quoting Tennessee v. Garner, 471 U.S. 1, 11 (1985)).

Graham's objective reasonableness standard has been widely criticized both in public discourse and academic scholarship.[326] In particular, legal scholars have criticized the Fourth Amendment reasonableness test for ignoring the role of race and racial bias.[327] The paragraphs below build on this critique by adding disability as a lens for analysis.

The extent to which courts recognize and weigh disability as a factor in determining whether a particular use of force was reasonable varies widely. Though courts have generally determined that disability is *a* factor in determinations of reasonableness pursuant to the Fourth Amendment's constitutional protections against excessive force,[328] disagreement exists as to *how* disability should factor into the reasonableness analysis. Some courts have added disability as another factor to be considered among the so-called *Graham* factors.[329] Other courts acknowledge disability indirectly under the first *Graham* factor, severity of the crime, to expressly identify cases in which officers deployed force against a person who was in a mental crisis—and not someone who had committed, was committing, or was about to commit a crime.[330]

In *Bryan v. McPherson*, the Ninth Circuit discussed disability in its use of force analysis.[331] Officer Brian MacPherson argued that his decision to deploy a taser against the plaintiff, Carl Bryan, a young man with psychiatric disabilities, was necessary to detain him.[332] The Ninth Circuit disagreed

326. See, e.g., Rachel A. Harmon, When Is Police Violence Justified?, 102 Nw. U. L. Rev. 1119, 1150–55 (2008); Maclin, Race and the Fourth Amendment, supra note 35, at 371; German Lopez, Police Can Use Deadly Force if They Merely Perceive a Threat, Vox (Nov. 14, 2018), https://www.vox.com/identities/2016/8/13/17938226/police-shootings-killings-law-legal-standard-garner-graham-connor (on file with the *Columbia Law Review*); Osagie K. Obasogie, The Bad-Apple Myth of Policing, Atlantic (Aug. 2, 2019), https://www.theatlantic.com/politics/archive/2019/08/how-courts-judge-police-use-force/594832/ (on file with the *Columbia Law Review*).

327. See, e.g., Cynthia Lee, Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense, 2018 U. Ill. L. Rev. 629, 637; Maclin, Race and the Fourth Amendment, supra note 35, at 371.

328. City of San Francisco v. Sheehan, 575 U.S. 600, 600 (2015); Estate of Armstrong v. Village of Pinehurst, 810 F.3d 892, 899 (4th Cir. 2016).

329. See, e.g., Deorle v. Rutherford, 272 F.3d 1272, 1283 (9th Cir. 2001) ("[W]here it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed.").

330. See, e.g., Gray v. Cummings, 917 F.3d 1, 8 (1st Cir. 2019) (observing, during the First Circuit's analysis of the first *Graham* factor, that the police officer was there to return an individual suffering from mental illness to the hospital); Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1059–60 (9th Cir. 2003) ("Drummond was a mentally disturbed individual not wanted for any crime, who was being taken into custody to prevent injury to himself. Directly causing him grievous injury does not serve that objective in any respect.").

331. 630 F.3d 805, 829 (9th Cir. 2009).

332. Id.

and reasoned instead that MacPherson's awareness of Bryan's mental disability meant that MacPherson should have "made greater effort to take control of the situation through less intrusive means."[333] The court distinguished the interests at stake when "subdu[ing] an armed and dangerous criminal who has recently committed a serious offense" from situations in which "an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him."[334] Noting that "the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a mentally ill individual," the Ninth Circuit reasoned that where the individual does not pose a threat to himself or others, the government's interest in using force is "not as substantial as its interest in deploying that force to apprehend a dangerous criminal."[335]

Though the Ninth Circuit emphasized that the purpose of detention in the *Bryan* case was not for punishment but to provide psychiatric care, its evaluation of the government's interest assumes police officers will be able to identify a clear line between individuals with mental disabilities in need of care and those deemed "armed and dangerous criminal[s]."[336] The volume of deadly force cases involving unarmed individuals with psychiatric disabilities indicates that police do not observe this distinction in practice. Here again, although the line between an individual with, for example, untreated psychiatric disabilities who is deemed threatening and one who is not is not always clear, this should not be taken to mean that individuals with untreated and treated psychiatric disabilities are prone to criminality. It rather should suggest the limits of policing as a way to respond to, in this case, mental crisis. In another Ninth Circuit case, *Deorle v. Rutherford*, the court reversed the grant of summary judgment and remanded the case to the district court, holding that Officer Greg Rutherford used excessive force and was not entitled to qualified immunity.[337] The court opinion in that case describes the plaintiff, Richard Deorle, as "suicidal" and "erratic[]" after being diagnosed with hepatitis

333. Id.

334. Id.

335. Id. (first alteration in original) (internal quotation marks omitted) (quoting Deorle v. Rutherford, 272 F.3d 1272, 1283 (9th Cir. 2001)).

336. Id. at 829 (internal quotation marks omitted) (quoting *Deorle*, 272 F.3d at 1282–83); see also Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst, 810 F.3d 892, 900 (4th Cir. 2016) (internal quotation marks omitted) (quoting *Deorle*, 272 F.3d at 1282–83); cf. Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d, 1052, 1058 n.6 (9th Cir. 2003); C.R. Div., DOJ, Investigation of the Baltimore City Police Department 83 (2016), https://www.justice.gov/opa/file/883366/download [https://perma.cc/26WD-DFTW] [hereinafter Baltimore DOJ Report] ("In many incidents, however, officers have failed to distinguish between people in crisis who are being escorted to the hospital for treatment, and people who have committed crimes and are being placed under arrest.").

337. 272 F.3d 1272, 1286 (9th Cir. 2001).

C.[338] His wife called 911, and officers from the Special Incident Response Team arrived along with a team of negotiators. At no point during the period that led up to the use of force did Officer Rutherford observe Deorle attack or harm anyone.[339] The Ninth Circuit described Deorle's conduct as "verbally abusive" but "physically compliant."[340] At some point, Deorle picked up a crossbow but then discarded it when the officer commanded him to do so.[341] Deorle was shot in the face as he approached Officer Rutherford,[342] with a "'less lethal' lead-filled beanbag round."[343] At the time he was shot, Deorle was unarmed and was not committing any major crime, if any at all.[344] Officer Rutherford did not provide any warnings that he would shoot if Deorle came closer.[345] The shot caused Deorle to lose an eye and left fragments of lead in his skull.[346]

Considering all the facts, the court held that although the force was less than deadly, it was still excessive.[347] The court concluded that at the time he was shot, Deorle posed no flight risk and did not pose a threat to the officers.[348] Furthermore, his escape was prevented by the roadblock officers had set up.[349] Finally, Officer Rutherford issued no warnings before firing at Deorle.[350]

The court then concluded "that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed."[351] Notably, the court declined to endorse a rule "establishing two different classifications of suspects: mentally disabled persons and serious criminals."[352] The court also declined to adopt a rule requiring warnings before the use of less-than-deadly force, though it acknowledged it as a factor in the reasonableness inquiry.[353] In regard to Deorle's emotional distress, the court recognized the risk that a show of

338. Id. at 1276.
339. Id. at 1282.
340. Id. at 1276.
341. Id. at 1277.
342. Id. at 1275.
343. Id.
344. See id. at 1282 ("In sum, the crime being committed, if any, was minor and the danger to Rutherford and others appears to have been minimal, as was the risk of flight.").
345. Id. at 1284.
346. Id. at 1278.
347. Id. at 1284.
348. Id. at 1282.
349. Id.
350. Id.
351. Id. at 1283.
352. Id.
353. Id.

force or increasing the use of force might have triggered a confrontation.[354]

The Fourth Circuit reached a similar conclusion in *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*.[355] Ronald Armstrong's estate brought suit alleging that the police used excessive force during the course of executing an involuntary commitment order.[356] Armstrong had bipolar disorder and paranoid schizophrenia.[357] On the day in question, Armstrong's sister convinced him to check in to the hospital after he pok[ed] holes through the skin on his leg 'to let the air out.'"[358] Armstrong left the hospital abruptly at some point during the consultation, appearing "frightened."[359] Police were called in, and a few minutes later, officers located Armstrong near an intersection near the hospital.[360] When officers approached, they reported that Armstrong was eating grass and dandelions and chewing on gauze-like substances.[361] He also wandered into the street repeatedly. Soon after, he wrapped his body around a post nearby and refused to leave.[362] A lieutenant ordered Armstrong to let go of the post, and when he refused—and approximately thirty seconds after he had been told the commitment order was final—instructed an officer to tase him before five officers tackled him to the ground.[363] There was a struggle, and Armstrong expressed that he felt like he was being choked.[364] When he continued to resist, officers handcuffed him behind his back, shackled his legs, and placed him face down in the grass. Armstrong stopped breathing and later that day died at the hospital.[365]

The Fourth Circuit held that the officers had used excessive force but held that they were entitled to qualified immunity.[366] While recognizing that "[m]ental illness, of course, describes a broad spectrum of conditions and does not dictate the same police response in all situations," the Fourth Circuit noted that "in some circumstances at least," it means that "increasing the use of force may . . . exacerbate the situation."[367] For this reason,

354. Id. at 1284.

355. 810 F.3d 892 (4th Cir. 2016).

356. Id. at 895.

357. Id. at 896.

358. Id.

359. Id.

360. Id.

361. Id. at 910.

362. Id.

363. Id. at 897.

364. Id.

365. Id. at 897–98.

366. See id. at 907; Deorle v. Rutherford, 272 F.3d 1272, 1295 (9th Cir. 2001) (explaining that before holding that the officer was entitled to qualified immunity, the Fourth Circuit defined the constitutional right in such a way that did not recognize Armstrong's disability).

367. *Armstrong*, 810 F.3d at 900 (quoting *Deorle*, 272 F.3d at 1283).

the Fourth Circuit concluded that "the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis."[368] Furthermore, the court determined that as to the question of reasonableness, "even when this ideal course is not feasible, officers who encounter an unarmed and minimally threatening individual who is 'exhibit[ing] conspicuous signs that he [i]s mentally unstable' must 'de-escalate the situation and adjust the application of force downward.'"[369]

These cases suggest that some courts are recognizing the role disability plays in police use of force cases. Indeed, courts should consider disability in assessing whether an officer used excessive force in violation of the Fourth Amendment. Yet consideration of disability as "a factor" is not enough. To begin with, even though courts can and should consider disability as a factor when weighing the quality of the intrusion against the government's interest in using force as the *Graham* factors provide,[370] the analysis does not require courts to center the disabled body or the disabled mind in assessing the nature and quality of the intrusion. Failure to acknowledge the importance of disability may fail to give adequate protection to the Fourth Amendment rights of disabled people. This unequal protection is built into Fourth Amendment doctrine. The focus of the reasonableness inquiry is on force and whether the force deployed is disproportionate to the purported need for force—a need that is determined from the perspective of the officer, not the impact of such force on the disabled person. This is to say that in cases involving disabled people, as in other cases, the inquiry into the nature and quality of the intrusion on an individual's Fourth Amendment interest is more focused on the nature and quality of the force than the nature or quality of intrusion vis-à-vis the disabled person's body or mind. If police throw a person with mobility disabilities out of a wheelchair,[371] suffocate a man with Down's syndrome by pinning him to the ground,[372] or tackle a man with an

368. Id. (quoting *Deorle*, 272 F.3d at 1283).

369. Id. (alterations in original) (quoting Martin v. City of Broadview Heights, 712 F.3d 951, 962 (6th Cir. 2013)).

370. Graham v. Connor, 490 U.S. 386, 396 (1989).

371. See, e.g., Sarah Jones, Arresting Disabled Bodies, New Republic (Sept. 28, 2017), https://newrepublic.com/article/145072/arresting-disabled-bodies (on file with the *Columbia Law Review*) (referencing a moment at a protest on cuts to Medicaid in which a police officer used force against a woman in a wheelchair); Alejandra Reyes-Velarde, Protesters and the LAPD Have Different Stories About How a Peaceful March Turned Violent, L.A. Times (July 16, 2020), https://www.latimes.com/california/story/2020-07-16/police-said-they-assaulted-an-officer-but-protesters-have-a-different-account (on file with the *Columbia Law Review*) (noting that at a protest in downtown Los Angeles, police officers used excessive force against a disabled man in a wheelchair and an asthmatic teen).

372. Theresa Vargas, Settlement Reached in Police-Custody Death of Man With Down Syndrome, Wash. Post (Apr. 24, 2018), https://www.washingtonpost.com/local/settlement-

intellectual disability, tearing a ligament in his leg,[373] the analysis focuses on the nature and quality of force deployed (e.g., deadly, nondeadly, taser, OC spray) but not on the particularities of the bodies that are the subject of the force. Such recognition may not matter in the case in which, say, deadly force is deployed against someone who is experiencing a mental crisis and not resisting. But in closer cases, not centering disability may render disability-based injuries illegible or, more precisely, devalue the nature and quality of the intrusion caused by the use of force.

Even where courts *have* found liability, closer examination shows that the recognition of disability as a factor might not necessarily provide robust protections for disabled people in future cases. Furthermore, even where disability is recognized and weighed, it is more often than not treated as an additional factor to be considered rather than a factor that may change the very contours of the confrontation itself. Hence, disability is included in the analysis, but the underlying characterization of policing, police decisionmaking, and discretion remain the same. This additive analysis, though consistent with the totality of the circumstances test,[374] also underprotects disabled people. For instance, though both the *Deorle* and *Armstrong* courts recognize disability—or more accurately, mental distress or mental disturbance—disability is factored in alongside routine notions and conceptions of policing. For the *Deorle* court, policing involved fast-paced decisionmaking, so in part, the only disabilities recognized are those that clearly distinguish the "disabled" from the "criminal" or the "disabled" from the "non-disabled."[375] The Ninth Circuit recognized that officers make split-second decisions, while emphasizing that there is a clear difference between use of force against "mentally disabled persons" and "criminals."[376] The *Deorle* court suggests that whereas use of force can subdue criminals, use of force can escalate individuals with mental disabilities.[377] Such a formulation establishes a clear division between "criminals" and "individuals with mental disabilities," without recognizing the socially constructed nature of both and their interrelatedness. Similarly, the Fourth Circuit also recognizes disability, but it requires de-escalation only

reached-in-police-custody-death-of-man-with-down-syndrome/2018/04/24/7d53c0ca-47fe-11e8-827e-190efaf1f1ee_story.html (on file with the *Columbia Law Review*).

373. Rowland v. Perry, 41 F.3d 167, 172 (4th Cir. 1994).

374. See *Graham*, 490 U.S. at 396 (citing Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)) ("[The Fourth Amendment's] proper application requires careful attention to the facts and circumstances of each particular case . . . .").

375. See Deorle v. Rutherford, 272 F.3d 1272, 1283 (9th Cir. 2001) (recognizing that decisions by police officers often occur under tense and rapidly evolving situations).

376. Id. But see Brandon Garrett & Seth Stoughton, A Tactical Fourth Amendment, 103 Va. L. Rev. 211, 228–38 (2017) (criticizing "split-second syndrome" in the Supreme Court's reasonableness analysis).

377. *Deorle*, 272 F.3d at 1282–83.

when the individual is exhibiting "conspicuous signs" of mental instability.[378] Of course, the "conspicuous signs" of Armstrong's disability were an easy showing here given that all the officers were aware they were effectuating an involuntary commitment order and the implementing statute applied to individuals who were "mentally ill."[379] Furthermore, evidence from Armstrong's psychiatric evaluation showed that he posed only a danger to himself (indeed, the physician checked the box indicating exactly that).[380] Yet such clear, conclusive evidence of disability will rarely be available—or at least not so clearly apparent—to officers.

In *Bates ex rel. Johns v. Chesterfield County*, the Fourth Circuit held that officers did not use excessive force in forcibly arresting an autistic teenager.[381] On the night in question, the complaining witness identified the plaintiff, Brian Bates, as a "tall, skinny, shirtless teenager" at the end of his driveway.[382] The witness, Ivan Schwartz, reported that "Bates entered Schwartz's garage and walked up to a cage containing kittens," then started "talking incoherently to the kittens, making animal noises, and reaching into the cage."[383] In turn, "Schwartz twice asked Bates if he could help him, but Bates did not respond," which prompted Schwartz to state, "Look, I'm asking you a question. Talk to me."[384] Bates continued to respond with incoherent answers.[385] After multiple failed attempts to communicate with Bates, Schwartz called 911.[386] At this point, no parties on the scene did not have actual knowledge of Bates's autism.[387]

Officers were dispatched to the scene. One officer, Officer Wayne Genova, arrived on motorcycle.[388] He spotted Bates walking and asked to speak with him, but Bates responded by walking away.[389] Genova then ordered Bates to come back and Bates complied.[390] But this time he mounted Genova's motorcycle without his permission, which prompted Genova to push him off the motorcycle.[391] The encounter eventually escalated into a

378. Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst, 810 F.3d 892, 900 (4th Cir. 2016).

379. Id.

380. Id. at 896.

381. 216 F.3d 367, 368 (4th Cir. 2000).

382. Id. at 369.

383. Id.

384. Id.

385. See id.

386. Id.

387. See id.

388. Id.

389. Id.

390. Id.

391. Id.

wrestling match with Bates scratching and spitting and Genova grabbing Bates and wrestling him to the pavement.[392]

Genova called for backup and eventually officers wrestled Bates to the ground.[393] Bates continued to physically resist, at one point kicking one of the officers in the groin.[394] Around this time, members of Bates's family arrived and told the officers that he was autistic.[395] After being informed of his autism, the officers continued to use force against Bates, on the grounds that he continued to struggle to escape.[396] Eventually, Bates's mother provided him with his prescription medications and he "calmed down."[397]

Applying the *Graham* factors, the Fourth Circuit deemed the use of force to be reasonable.[398] As to the first factor, the severity of the crime, the court noted that Bates had committed criminal assault.[399] Relatedly, as to the second factor, Bates posed an immediate threat, biting, kicking, and scratching officers.[400] Finally, pursuant to the last *Graham* factor, Bates was actively resisting arrest.[401]

In alleging that officers used excessive force in effectuating his arrest, Bates emphasized that the officers' use of force was not reasonable in light of his disability.[402] The Fourth Circuit recognized but did not critically examine the role that Bates's disability played in its analysis. While noting that "Bates never told the officers he was autistic," the court emphasized that "in the midst of a rapidly escalating situation, the officers cannot be faulted for failing to diagnose Bates' autism" and that "the volatile nature of a situation may make a pause for psychiatric diagnosis impractical and even dangerous."[403]

The Fourth Circuit held that the use of force was reasonable even after the officer's had knowledge of Bates's disability:

> In light of Bates' previous resistance to police—his scratching, spitting, biting, and kicking—the officers acted reasonably by forcibly restraining him. Knowledge of a person's disability simply cannot foreclose officers from protecting themselves, the disabled person, and the general public when faced with threatening conduct by the disabled individual. We do not underestimate the

392. Id.
393. Id.
394. Id. at 370.
395. Id.
396. See id.
397. Id.
398. Id at 371–72.
399. Id. at 372.
400. Id.
401. Id.
402. Id. at 371–72.
403. Id. at 372.

> difficulties that an autistic individual may face in dealing with law enforcement officers. At the same time, that fact cannot set aside an officer's responsibility to uphold the law and ensure public safety.[404]

Here, the officers' safety and public safety are pitted against the purported danger that the conduct of the disabled person causes. The court gives little inquiry into how actions by the officers could have triggered the threatening and assaultive conduct, or how conduct that accommodated Bates's autism could have avoided the need for force entirely. Indeed, the entire alleged assault could have been avoided entirely if officers were not dispatched to the scene.[405]

Simply recognizing and even weighing disability as a factor in the analysis may fail to capture the social meanings that attach to disability and that work to construct disabled people as threatening, disorderly, or otherwise suspicious. Failure to recognize these social meanings does not adequately protect the Fourth Amendment rights of disabled people. The following sections expand on this point.

1. *Constructing the Threat.* — As this Essay discusses below, the Fourth Amendment's objective reasonableness test does not protect against disability-related conduct that is incorrectly interpreted as threatening.[406] Moreover, as in the race context, Fourth Amendment doctrine does not acknowledge the ways in which certain disabilities have been socially constructed as both threatening and dangerous and the implications of such constructions in a real-world setting. This is true in three principal ways.

First, police may interpret nonnormative behaviors that are innocuous as threatening and rely on that to justify the use of force. Take, for example, the case of Ricardo Hayes described above.[407] The officer in that case justified his use of force on the basis of his claim that Hayes may have

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404. Id.

405. A number of jurisdictions are implementing alternative responder or community responder programs to avoid dispatching police in situations involving individuals in crisis or individuals with disabilities, including autistic people. See, e.g., Jackson Beck, Melissa Reuland & Leah Pope, Behavioral Health Crisis Alternatives: Shifting From Police to Community Responses, Vera Inst. of Just. (Nov. 2020), https://www.vera.org/behavioral-health-crisis-alternatives [https://perma.cc/9DJZ-TEEB] (discussing crisis response programs); see also Amos Irwin & Betsy Pearl, The Community Responder Model: How Cities Can Send the Right Responder to Every 911 Call, Ctr. for Am. Progress (Oct. 28, 2020), https://www.americanprogress.org/issues/criminal-justice/reports/2020/10/28/492492/community-responder-model/ [https://perma.cc/AV2G-F3BQ].

406. Whether the officer is liable of course depends on whether the law is clearly established under the Supreme Court's qualified immunity doctrine. Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982))).

407. See supra notes 232–239 and accompanying text.

looked like he was about to pull a gun. In fact, that reaction—and the resort to the use of force—was later shown to be unreasonable.[408] Indeed, the video—showing a young Black, disabled man with his hands at his side—likely explains why the Chicago Police Board deemed the officer's actions objectively unreasonable.[409] But would it have been difficult for the officer to contend that his conduct was objectively reasonable without the video? By the officer's account, Hayes ran when the officer approached him for questioning and made a move suggesting that he was attempting to locate a weapon. Hayes survived and could have been called to testify, but he may have faced challenges to his credibility in part due to his intellectual disability.[410] Had he not survived, surviving summary judgment would have been a challenge, even though some courts have demonstrated a reluctance to grant summary judgment in cases involving a deceased victim of police violence.[411] The discussion below suggests that justifications for the use of force even in the Hayes case would not be difficult to find. This is true not only because reasonableness is a low standard, as scholars have noted,[412] but also because disability-based behaviors can easily slide into criminal constructions.[413] Of course, one way to view the officer's actions is as just bad police work or conduct by a "bad apple" police officer. However, another way to view the officer's actions is as somehow connected to the policing of disabled identities constructed as suspicious, threatening, and dangerous—dangerous enough to justify use of force.[414]

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408. See Spielman, supra note 234 ("In 2018, the Civilian Office of Police Accountability found Muhammad was not justified when he fired shots and recommended Muhammad be suspended for six months.").

409. See De Mar, supra note 232.

410. See Lucy A. Henry, A. Ridley, J. Perry & L. Crane, Perceived Credibility and Eyewitness Testimony of Children With Intellectual Disabilities, 55 J. Intell. Disability Rsch. 385, 386 (2011) (noting that negative stereotypes toward children with intellectual disabilities can make accurate testimony unpersuasive to jurors, thereby leading to a dismissal of evidence); Antonio L. Manzanero, Alberto Alemany, María Recio, Rocío Vallet & Javier Aróztegui, Evaluating the Credibility of Statements Given by Persons With Intellectual Disability, 31 Anales de Psicologia 338, 338 (2015) (discussing studies in which observers have found testimonies given by a person with intellectual disability less credible).

411. See, e.g., Centeno v. City of Fresno, No. 1:16-cv-00653-DAD-SAB, 2017 WL 3730400, at *4–9 (E.D. Cal., 2017) (denying summary judgment to defendant police officers with respect to an excessive force claim in a case involving a deceased victim of police violence), rev'd in part on other grounds, 740 F. App'x 597 (9th Cir. 2018).

412. Garrett & Stoughton, supra note 376, at 223–24; John P. Gross, Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers, 21 Tex. J. C.L. & C.R. 155, 174–76 (2016); Radley Balko, Opinion, When the "Reasonable Police Officer" Standard Isn't Reasonable at All, Wash. Post (Dec. 17, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/12/17/when-the-reasonable-police-officer-standard-isnt-reasonable-at-all/ (on file with the *Columbia Law Review*).

413. See Roell v. Hamilton County, 870 F. 3d 471, 477–78 (6th Cir. 2017); Everson v. Leis, 412 F. App'x 771, 772–73 (6th Cir. 2011).

414. The nexus between disability, criminality, and police violence appears in more literal ways, such as when certain disability-related behaviors and responses are classified as

Second, racialized and gendered stereotypes of disabled persons as superhuman, possessing immense physical strength, even in the face of deadly physical violence, may also lead to deployments of excessive force against them.[415] Moreover, ableist constructions of disability can be deployed to reinforce racial and gender stereotypes—even in cases in which no evidence exists that the person is disabled or manifesting disability-related behaviors. Stated differently, although disabled people are disproportionately more likely to face deadly force at the hands of law enforcement, the existence of an actual disability—diagnosed or otherwise—or some outward manifestation of that disability is not a prerequisite. That is because ableist constructions of disability may be grafted onto certain historically marginalized groups in a manner that can result in these groups' disproportionate exposure to police violence.

Racist ideas that link Blackness to criminality or indigenous groups to degeneracy also serve to link certain disabilities to both criminality and violence. As Andrew Ritchie recounts, public justifications for the shooting deaths of Aura Rosser and Michael Brown included not only descriptions of animallike, superhuman strength but also depictions of Rosser and Brown as deranged and demonic.[416] These depictions reflect ableist norms that view racialized bodies as sites for mental, physical, and moral abnormality, degeneracy, and dependency.[417] Andrea Ritchie notes the role that "controlling narratives of 'deranged' Black women of inhumane or superhuman strength" play in relation to racial profiling and police violence.[418] When traits are constructed as superhuman, animal-like, and as physically and psychologically abnormal threats, justifying the use of force—even deadly force—is not a difficult task.

Third, failures to scrutinize justifications for use of force allow post hoc rationalizations by police to—consciously or not—reinforce ableist constructions of disability as necessarily threatening, violent, or dangerous. When disability is involved, justifications for use of force should be closely scrutinized. This is true, for example, when individuals with (untreated) psychiatric disabilities are manifesting symptoms (e.g., active

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security threats that then provide a justification for the use of force, even excessive force. See, e.g., *Roell*, 870 F.3d at 476, 478 (discussing excited delirium).

415. Ritchie, supra note 84, at 53–54, 56, 59.

416. Id. at 199.

417. Larry Buchanan, Ford Fessenden, K.K. Rebecca Lai, Haeyoun Park, Alicia Parlapiano, Archie Tse, Tim Wallace, Derek Watkins & Karen Yourish, What Happened in Ferguson?, N.Y. Times, https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html (on file with the *Columbia Law Review*) (last updated Aug. 10, 2015) ("Officer Wilson also said that Mr. Brown charged at him, making 'a grunting, like aggravated sound.'"); John Eligon, Michael Brown Spent Last Weeks Grappling With Problem and Promise, N.Y. Times (Aug. 24, 2014), https://www.nytimes.com/2014/08/25/us/michael-brown-spent-last-weeks-grappling-with-lifes-mysteries.html (on file with the *Columbia Law Review*).

418. Ritchie, supra note 84, at 89.

psychosis or hallucinations) that are interpreted as violent, threatening, or dangerous to themselves, officers, or others, *and* when those symptoms are regarded as so dangerous that treatment, de-escalation, crisis intervention, or diversion are deemed unnecessary or infeasible. It holds true, too, for example, when autistic individuals or individuals with IDD exhibit nonnormative responses—an inability to respond to commands due to lack of understanding, laughing when nervous or in stressful situations, emotionless expressions, and so forth—that are interpreted as resistant or noncompliant and therefore threatening or dangerous to the officer or others, which again leads to deployments of excessive force.[419] With every police report or internal investigation that justifies the use of force for reasons closely linked to disability, or that simply defines the nature of the threat based on disability along with race-gender stereotypes, policing helps reinforce associations between certain disabilities and criminality and dangerousness.

The framing and analysis above are not intended to suggest that officers are in every case intentionally engaging in practices that subordinate disabled people. Indeed, individual police officers may not even recognize disability when it is present in encounters, though there are a number of cases in which police officers' awareness of disability is disputed.[420] Moreover, disability may be one of a number of factors used to justify force. That disability (or disability-related behaviors) did indeed factor into an officer's use of force should matter—and courts should scrutinize disability in determinations as to whether the officer's use of force was objectively reasonable. Failure to do so permits Fourth Amendment doctrine to serve as a site for group-based suspicion and subordination.

2. *Command, Control, and Noncompliance.* — Fourth Amendment doctrine confers ample discretion to police to seize, based on either reasonable suspicion or probable cause, and aims to set limits on how officers effectuate seizures by cabining constitutionally permissible uses of force to those that are objectively reasonable.[421] Existing doctrine also currently fails to fully recognize how policing both constructs disability as a threat and renders vulnerable to police violence those persons who fail to conform to expectations—ways of thinking, responding, behaving, and so on—for nondisabled people. This section supplements previous analysis with a discussion of theoretical frameworks for understanding disability and police violence, with a particular focus on the norms of compliance and constructions of noncompliance as resistance.

419. See Baltimore DOJ Report, supra note 336, at 85 ("Officers did not seem to understand that individuals' mental illness . . . might diminish their ability to comply with orders.").

420. See, e.g., Gray v. Cummings, 917 F.3d 1, 18 (1st Cir. 2019); Haberle v. Troxell, 885 F.3d 170, 181 (3d Cir. 2018); Everson v. Leis, 412 F. App'x 771, 778 (6th Cir. 2011).

421. See Graham v. Connor, 490 U.S. 386, 388 (1989).

a. *Perceived Noncompliance or Resistance.* — Noncompliance with officer commands furnishes a basis for use of force when it is interpreted as active or passive resistance, which in turn is perceived as threatening (to authority, officer safety, etc.). The label of "noncompliant" or "resistance" should be interrogated when the encounter involves a person with a disability. To begin with, individuals with physical disabilities simply may be physically unable to comply with the specific commands. Cases involving deaf individuals arrested for not complying with officer commands provide the starkest examples of disability-related behaviors being interpreted incorrectly as noncompliance.[422] The same is true for individuals with IDD. For example, in some cases, the high intensity and confrontational nature of a police encounter may be perceived by individuals with IDD as particularly threatening and may trigger a range of behaviors or responses that law enforcement may in turn view as threatening.[423] Law enforcement may interpret an involuntary movement like fidgeting or an irregular movement such as swaying or flapping[424] as an attempt to lunge toward the officer or reach for a weapon. In response, officers may then escalate the situation by shouting commands, in some cases with weapons drawn, in an effort to regain control and force compliance.[425]

A video of the July 2016 shooting of Charles Kinsey, a mental health behavioral therapist, captured how police can interpret nonnormative behaviors as noncompliant and then respond to such noncompliance using force. On the day of the shooting, Arnaldo Rios Soto, an autistic Latinx man, walked away from his group home. At around the same time but in an unrelated matter, a resident in the area called 911 to report that a man in the vicinity was "appearing suicidal" and holding what looked like a gun.[426] Officers were dispatched. When officers arrived, they found Rios Soto with a toy truck.[427] Kinsey was also there, and a video of the encounter

422. See, e.g., Rosen v. Montgomery County, 121 F.3d 154 (4th Cir. 1997).

423. Fuller et al., supra note 69, at 5.

424. See generally Kristen H. Gilchrist, Meghan Hegarty-Craver, Robert B. Christian, Sonia Grego, Ashley C. Kies & Anne C. Wheeler, Automated Detection of Repetitive Motor Behaviors as an Outcome Measurement in Intellectual and Developmental Disabilities, 48 J. Autism Dev. Disorders 1458, 1458 (2018) (explaining that repetitive sensory motor behaviors such as rocking and hand flapping "are common among individuals with intellectual or developmental disabilities").

425. Marie Myung-Ok Lee, Opinion, It's Not Just the Costco Shooting. Disabled People Are Often Killed by Police, L.A. Times (June 19, 2019), https://www.latimes.com/opinion/op-ed/la-oe-lee-disability-costco-shooting-20190619-story.html (on file with the *Columbia Law Review*) (describing several occasions when law enforcement officers have mistaken disability symptoms for "criminal behavior").

426. See Jury Deadlocks on North Miami Cop Who Shot Unarmed Caretaker, CBS News (Mar. 15, 2019), https://www.cbsnews.com/news/charles-kinsey-shooting-clears-officer-jonathan-aledda-on-1-count-deadlocks-on-others-today-2019-03-15/ [https://perma.cc/7U29-SN4N] ("A motorist called 911, saying the man was holding what may be a gun and appeared suicidal.").

427. Id.

shows Kinsey lying on the ground next to Rios with his arms raised.[428] In the video, Kinsey is telling officers that Rios Soto has a toy truck in his possession and not a gun.[429] At the time, North Miami Police Department Officer Jonathan Aledda was about 150 feet away from the two men, and he later testified that he had not heard those statements on police radio.[430] However, according to a warrant issued for Aledda's arrest, police officers at the scene were informed that Rios Soto was *not* holding a gun.[431] Less than a minute after receiving the radio alert stating, "I have a visual; does not appear to be a firearm. Have units [stand by]," Aledda shot Kinsey in the leg and later arrested him.[432] The officer was subsequently charged with, and eventually acquitted of, attempted manslaughter.[433] Video evidence might have driven the decision to charge here—along with the fact that the officer later stated that he had meant to shoot Rios Soto, missed, and accidentally shot Kinsey in an effort to protect him from what he believed to be an armed Rios Soto.[434]

Centering Rios Soto's disability highlights the basis for his and his caretaker's vulnerabilities to police violence. Rios Soto's autism was incorrectly interpreted by the officer as indications of suicidality. At the point of the standoff, Soto's failure to drop his toy truck, perceived as a weapon, prompted the officer to aim his weapon at Rios Soto, miss, and per his testimony, accidentally shoot his caretaker Kinsey.[435] Here, noncompliance (caused by cognitive disabilities or otherwise) is read as noncompliant and threatening, leading to the use of deadly force.

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428. See Hilton Napoleon, Cellphone Video Shows Caretaker Lying in the Street Before Being Shot by Police, Miami Herald, at 00:20 (Feb. 25, 2019), https://www.miamiherald.com/news/local/community/miami-dade/north-miami/article90901487.html (on file with the *Columbia Law Review*) (including Kinsey's audible explanation to police officers that Rios Soto only held a toy truck).

429. Id.

430. CBS News, supra note 426.

431. Bill Chappell, North Miami Officer Is Arrested Over Shooting of Therapist During Standoff, NPR: The Two-Way (Apr. 12, 2017), https://www.npr.org/sections/thetwo-way/2017/04/12/523612815/north-miami-officer-is-arrested-over-shooting-of-therapist-during-standoff [https://perma.cc/D3SH-FU2X].

432. Id.

433. Scott Neuman, Miami Officer Acquitted of Attempted Manslaughter in Shooting of Caregiver, NPR (June 18, 2019), https://www.npr.org/2019/06/18/733621616/miami-officer-acquitted-of-attempted-manslaughter-in-shooting-of-caregiver [https://perma.cc/AE5B-TNL6].

434. See Charles Rabin, Kinsey Attorney Skeptical of Cop's Claim Caregiver Was Shot Accidentally, Miami Herald, https://www.miamiherald.com/news/local/crime/article91261792.html (on file with the *Columbia Law Review*) (last updated July 22, 2016) ("[T]he head of the police union representing the officer said the cop actually took aim at the autistic man next to Kinsey . . . .").

435. See id.

III. RECOGNIZING DISABILITY

The preceding sections have argued that Fourth Amendment doctrine erases or fails to appreciate the nature and scope of disability and that, by so doing, underprotects the liberty and privacy interests of people with disabilities while heightening vulnerabilities to police intrusions and violence.[436] This section suggests ways for thinking about how the Fourth Amendment doctrine discussed above not only underprotects disabled people but also constructs a normative bodymind in the process. Stated differently, the failures of courts to recognize or adequately address disability and how it mediates policing, and the related limitations in doctrine work to construct the ideal bodymind, outside of which constitutional protections are even more limited or ineffective. In sum, the central question is: If this erasure does indeed construct a Fourth Amendment doctrine that regards an ablebodied, neurotypical person without psychiatric disabilities as a default, why does that matter? Finally, the second half of this section identifies a set of doctrinal reforms to better recognize disability in Fourth Amendment doctrine.

Erasure, or failure to fully recognize or adequately address disability and its role in *Terry* stops, police encounters, consent searches, and use of force, intentional or not, both reveals and reinforces an ideology—an ableist ideology—that upholds the normative bodymind as both the dominant and presumptively exclusive embodiment for doctrinal purposes. Erasure sets the boundaries between what is relevant and what is not within doctrinal analyses and underprotects disabled people in its failure to recognize and address how both disability and social responses to, and meanings of, disability can and should structure courts' doctrinal analysis. Disability erasure produces and reinforces vulnerabilities to police violence for disabled people.[437] As Carbado argued in his discussion of how the Supreme Court erases considerations of race and racism in areas of

436. Fourth Amendment doctrine underprotects people with disabilities, but what about federal disability laws? The Supreme Court has not yet decided whether Title II of the ADA, which applies to public entities, applies to on-the-street arrests. See City of San Francisco v. Sheehan, 575 U.S. 600, 608, 609 (2015) (explaining that San Francisco used a different argument for the Court than it used before the Ninth Circuit and "[t]he Court does not ordinarily decide questions that were not passed on below"). Courts, scholars, and advocates alike have also argued that the ADA should apply. See Robyn Levin, Responsiveness to Difference: ADA Accommodations in the Course of an Arrest, 69 Stan L. Rev. 269, 285 (2017). Consistent with the text and congressional purpose, Title II of the ADA should apply to arrests. See Jamelia N. Morgan, Policing Under Disability Law, 73 Stan. L. Rev. 1401, 1426, 1446, 1457–58 (2021) [hereinafter Morgan, Policing Under Disability Law]. Of course, applying the ADA to street arrests does not guarantee robust protections for people with disabilities. Id.

437. See Carbado, (E)racing the Fourth Amendment, supra note 36, at 971.

Fourth Amendment doctrine, erasure (a.k.a. colorblindness or race neutrality) is itself a racial ideology that can serve to uphold racial hierarchy.[438] Here, adding a disability lens suggests how, in addition to upholding racial hierarchy, disability erasure functions to uphold an ideology that both reveals and reinforces existing inequalities and subordination based on disability. This ideology is rooted in ableism, which is, as scholar Liat Ben-Moshe writes, "oppression faced due to disability/impairment (perceived or lived), which not only signals disability as a form of difference but constructs it as inferior."[439]

Failure to recognize or adequately address disability also reinforces particular ideologies and norms around how disabled people *should* manifest their disabilities. Stated differently, failing to fully recognize disability serves to construct norms relating to a "correct" or "acceptable" way of being with a disability—in other words, behaving, responding, or reacting—or, more specific to Fourth Amendment doctrine, ways of being with a disability during police encounters, investigations, and so forth. Such norms lead to police violence when disabled persons, even where police are aware of disability, do not respond in the ways police expect or when police recognize and label persons as having a disability or an impairment, but the label is incorrect, as in the case of Dethorne Graham.[440]

A. *Lawyers*

Though the focus of the suggested intervention is on courts, lawyers should do their part too. Defense attorneys in criminal cases and plaintiff's counsel in civil cases should both screen for disability and then be prepared to critically evaluate every stage of the interaction with police through the lens of disability to determine how disability—and its social meanings—mediated the police encounter, search, use of force, and so on. Screening based on medical diagnosis or on whether the client checks the box indicating "disability" is not sufficient.[441] Counsel should be prepared to work with professionals—whether social workers, counselors, psychiatrists, disability rights advocates, or independent living consultants—to develop robust screening tools and evaluation metrics for determining whether a client has a disability, if it is not readily apparent or identified by the client. To fully examine how disability mediates the encounter, again it is important to analyze the situation and circumstances not simply with a focus on the physical and mental limitations of the disabled person

438. Id. at 968–69.

439. Ben-Moshe, Decarcerating Disability, supra note 46, at 16. Similarly, Talila Lewis and Dustin Gibson provide a nuanced definition of ableism that recognizes its racialized origins. Talila A. Lewis & Dustin Gibson, Ableism 2020: An Updated Definition, Talila A. Lewis (Jan. 25, 2020), https://www.talilalewis.com/blog/ableism-2020-an-updated-definition [https://perma.cc/6SNW-ZGTC].

440. See, e.g., supra notes 1–14 and accompanying text.

441. See, e.g., Bradley A. Areheart, Disability Trouble, 29 Yale L. & Pol'y Rev. 347, 371 (2011).

but also focusing on how stereotypes, myths, and generalizations informed how the disabled person or their disability was perceived by police officers and others present at the scene. Such analysis will illuminate not only how disability influenced how a particular disabled person reacted or behaved but also how police responded to the person, whether in using force, failing to accommodate, or failing to recognize the person's disability.

B. *Judges*

Disability should "matter" in Fourth Amendment analysis.[442] The reasons that disability should matter to Fourth Amendment analysis are no different than the reasons that race should matter. Recognizing disability, like race, gender, class, and other identities, better accounts for the realities of policing on the ground. These realities suggest that failing to take into account disability leaves disabled people unprotected from biased policing practices, like disability profiling, and fails to provide them with adequate protections from police coercion, violence, and abuse. At bottom, such failure provides disabled people with less protection under the Fourth Amendment than nondisabled individuals. The sections below argue that courts should assess whether and to what extent disability factors into whether police have reasonable suspicion, whether a person is seized for Fourth Amendment purposes, whether police have consent to search, and whether an officer used excessive force. The following sections outline doctrinal reforms that serve to strengthen Fourth Amendment protections.

1. *Rethinking Reasonableness.* — Courts should assess the role that disability and disability-related behaviors play in officers' justifications for reasonable suspicion. They should also interrogate determinations based on amorphous descriptions such as "evasive" or "nervous" conduct. The balance struck in *Terry*—between unjustified police intrusions and officer safety—disadvantages disabled people.[443] As explained above, *Terry*'s connection between "unusual conduct" and "criminal activity" permits officers to stop disabled people even where the basis for the stop is that the disabled person is behaving in an unusual (though not harmful) manner in a public space.[444] And such unusual behaviors can also be linked to a host of criminal offenses—loitering, disorderly conduct, trespassing, incommoding—that can provide a basis for probable cause for an arrest. Yet

442. Cf. Maclin, Black and Blue Encounters, supra note 37, at 267–68 (1991) (arguing that the Supreme Court should consider race when analyzing Fourth Amendment seizures).

443. See Terry v. Ohio, 392 U.S 1, 22–27 (1968) ("The issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.").

444. See id. at 22 (noting that an officer may approach a person for "a series of acts, each of them perhaps innocent in itself, but which taken together warrant[] further investigation").

assessing the role that disability plays in reasonable suspicion determinations would better protect the Fourth Amendment rights of disabled people. Stops justified primarily on the basis of innocuous disability-based behaviors should not constitute a constitutionally permissible basis for reasonable suspicion.

Of course, the challenge here will be determining what constitutes innocuous disability-based behaviors. Disability-related behaviors, like skipping and singing[445] or dancing in a public street,[446] may appear to be obviously harmless. Yet skeptics may point to cases where disability-related behaviors cannot be neatly disentangled from potentially harmful conduct, say where police believe the individual to be in a mental crisis and to be armed with a weapon. These are difficult issues that will be challenging to resolve on the front end through doctrinal interventions. This proposal better responds to the "easy" cases involving innocuous disability-based behaviors and punts the challenging cases to consideration under interventions for objective reasonableness in excessive force cases, as legal challenges involving people believed to be armed will be more likely to arise in those cases.

2. *Seizure Doctrine and Consent Searches.* — Disability should factor into courts' assessments regarding whether there has been a seizure under the Fourth Amendment. Courts should consider how a person's disability factored into police encounters and how disability influenced the person's perception of the police's behavior during the encounter.[447] Taking disability into account would not be difficult. Courts could simply consider disability as part of the totality of the circumstances test. Doing so would provide a much clearer picture of the nature and extent of police coercion and how it affects the disabled person. Of course, assessing the nature and extent of police coercion requires moving away from the hypothetical reasonable person.[448] As discussed above, some disabled people will react to police encounters in ways that differ from the average hypothetical person.[449] A more subjective standard—for example, the reasonable disabled person standard—more accurately takes into consideration the role that disability plays, along with other axes of identity, in police encounters and would better equip judges in assessing the constitutionality of the encounter. Constitutional protections should hinge on whether the reasonable

445. See De Mar, supra note 232.

446. Luke Money, Police Detain Black Man Who Was Dancing in the Street in Alameda, L.A. Times (June 11, 2020), https://www.latimes.com/california/story/2020-06-11/police-detain-black-man-who-was-dancing-in-the-street-in-alameda (on file with the *Columbia Law Review*).

447. Professor Tracey Maclin made a similar claim with respect to the recognition of race in seizure jurisprudence. See Maclin, Black and Blue Encounters, supra note 37, at 272–74.

448. Id. at 250.

449. See supra notes 142–144 and accompanying text.

person with the specific disability would know that they had the right to leave and terminate the encounter. There are of course drawbacks to the subjective approach to reasonable suspicion.[450] But these drawbacks should be weighed against the harms of underprotecting the Fourth Amendment rights of disabled people.[451]

For similar reasons, disability should be a factor in determining whether consent to search was voluntary. Research shows that few would ignore or deny an officer's request to search.[452] Yet research also shows that individuals with IDD are *even more likely* to perceive police encounters as coercive. Consistent with the totality of the circumstances test, courts should determine whether consent was freely given with an eye toward the role disability played in a person's decision to give consent.

At least a couple state courts have incorporated disability into their assessment as to whether consent was voluntary. In *State v. Sondergaard*, the Washington Court of Appeals upheld a trial court's finding that the defendant could not voluntarily consent because she was hallucinating at the time police asked her for consent to search.[453] From the facts in *Sondergaard*, it is not clear whether the hallucination was due to drug use or some underlying disability.[454] Yet in its decision, the court cited *Schneckloth* for the proposition that the "vulnerable subjective state" of the person who consents may be taken into consideration in determining whether consent to search was coerced.[455] In another case, *Cisneros v. State*,[456] the court recognized disability but eventually found that "nothing in the record shows appellant is of low intelligence or physically disabled" in determining that the consent was voluntary.[457]

3. *Excessive Force*

a. *Compulsory Able-Bodiedness.* — Policing is one site where entrenched normative ideals for how bodyminds should appear and function in public space govern which persons are deemed criminal, threatening, or disorderly. Policing thus reinforces entrenched normative ideals of bodyminds

450. See Wayne R. LaFave, "Seizures" Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues, 17 U. Mich. J.L. Reform 417, 423 (1984).

451. See Maclin, Black and Blue Encounters, supra note 37, at 273 (arguing in favor of subjective standard).

452. See supra notes 126–128 and accompanying text.

453. 938 P.2d 351, 352, 355 (Wash. Ct. App. 1997).

454. See id. at 355 ("[T]he trial court found that the defendant was in a hallucinatory state when she agreed to the search, and 'was mentally incapable of understanding what was happening.'").

455. Id. at 353 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973)).

456. 290 S.W. 3d 457 (Tex. Crim. App. 2009).

457. Id. at 465.

in public spaces. Individuals with psychiatric disabilities are disproportionately represented in use of force in some police departments.[458] It is possible to conclude that such data imply that individuals with psychiatric disabilities are, for example, more threatening (e.g., tend to be armed with something that is actually or perceived to be a weapon), or engage in specific behaviors that prompt officers to use force (e.g., do not comply with commands).[459] This is not pointed out to weigh in on the myriad of potential factors that may explain the data here, but rather to provide use of force data as a lens through which to understand how threat is constructed when disability—or nonnormativity—is recognized. Whether the individual poses an actual threat of serious physical harm is often highly contested.[460]

Allegations of excessive force, particularly with the use of tasers like the one documented in the Ferguson DOJ report, are not uncommon.[461] Use of tasers against individuals with disabilities, particularly those in crisis, serves to facilitate compliance and de-escalate the situation by rendering the targeted individual physically subdued.[462]

Swift and severe deployments of tasers and OC spray against individuals with mental disabilities are coercive, painful, and tangible forms of disciplining.[463] Camille Nelson makes a similar point, noting that in encounters involving race and mental or psychiatric disabilities, "[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."[464] When a negatively racialized identity is apparent, such recognition may

458. See Baltimore DOJ Report, supra note 336, at 78 (finding 20% of use of force involved individuals with mental disabilities).

459. See id. at 84.

460. The DOJ's report detailing the findings of the investigation of the Ferguson Police Department highlighted a number of such incidents. Ferguson DOJ Report, supra note 110, at 36.

461. See Baltimore DOJ Report, supra note 336, at 83; Jay M. Zitter, When Does Use of Taser Constitute Violation of Constitutional Rights, 45 A.L.R. Fed. 6th Art. 2, at 1 (2009); Police Exec. Research Forum & Cmty. Oriented Policing Servs., 2011 Electronic Control Weapon Guidelines 14 (2011).

462. Baltimore DOJ Report, supra note 336, at 104; see also Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst, 810 F.3d 892, 897 n.3 (4th Cir. 2016).

463. See Baltimore DOJ Report, supra note 336, at 84. Courts have recognized that tasers are pain compliance tools. See, e.g., *Armstrong*, 810 F.3d at 902 (citing Cavanaugh v. Woods Cross City, 625 F.3d 661, 665 (10th Cir. 2010)); Estate of Booker v. Gomez, 745 F.3d 405, 414 n.9 (10th Cir. 2014); Abbott v. Sangamon County, 705 F.3d 706, 726 (7th Cir. 2013); Bryan v. MacPherson, 630 F.3d 805, 825 (9th Cir. 2010). Even if one accepts pain compliance as a goal, which this Essay does not, these tools may not produce the desired results. See, e.g., *Armstrong*, 810 F.3d at 903 (citing Cheryl W. Thompson & Mark Berman, Improper Techniques, Increased Risks, Wash. Post (Nov. 26, 2015) (on file with the *Columbia Law Review*)).

464. Nelson, Frontlines, supra note 32, at 618–19.

heighten both the perceived need for and types of force deployed.[465] Theoretically, deeply rooted historical associations between race, threatening conduct, and criminality and psychiatric disability may intensify the vulnerability to police violence for those at the intersection of both racial and disability identities.[466] Furthermore, as with race, it is possible that the presence of an identifiable disability may influence specific measures with respect to use of force, such as trigger response times.[467] Empirical research could explore the contours of such vulnerabilities.

Compulsory able-bodiedness offers a theoretical framework for understanding the problems stemming from the policing of people with disabilities, particularly in situations in which officers are attempting to effectuate an arrest. Disability scholars maintain that a central component of ableism is a program of compulsory able-bodiedness.[468] Professor Robert McRuer, who coined the term, has argued that compulsory able-bodiedness reinforces the notion that an able-body is the norm.[469] McRuer goes on to argue that able-bodiedness is an entrenched normative ideal that is socially constructed.[470]

By centering the body in the proposed theoretical framework, it is easier to see how compliance with law enforcement commands during the course of an arrest becomes another method of coercion that renders people with disabilities particularly vulnerable to police violence. For example, commands that require immediate compliance with orders by law enforcement demonstrate how the experience of arrest is categorically different for people with physical, psychiatric, intellectual, or developmental disabilities. At times, failure to physically comply quickly with law enforcement commands triggers the use of force, or deadly force, against disabled people. This section offers an example to help illustrate the point.

Six police officers were called to a La Quinta Inn and Suites in Mesa, Arizona, after complaints from hotel guests indicated that there was a man

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465. See id. at 618, 622.

466. See id. at 618, 621.

467. See Debbie S. Ma & Joshua Correll, Target Prototypicality Moderates Racial Bias in the Decision to Shoot, 47 J. Experimental Soc. Psych. 391, 391–96 (2011).

468. Robert McRuer suggests compulsory able-bodiedness reinforces the notion that an able-body is the norm. Robert McRuer, Crip Theory: Cultural Signs of Queerness and Disability 93 (2006). He argues that "[a]ble-bodied identity and heterosexual identity are linked in their mutual impossibility and in their mutual incomprehensibility . . . . [E]ach is an identity that is simultaneously the ground on which all identities supposedly rest and an impressive achievement that is always deferred and thus never really guaranteed." Id. at 9.

469. Id. at 7–8.

470. Id. at 8, 30.

with a gun in the window of one of the hotel rooms.[471] A police body camera captured the events as they unfolded.[472] In the video, two people—one woman and one man, Daniel Shaver—are seen walking in a hallway in front of Mesa Police Department Officer Philip Brailsford, who is positioned with an AR-15 rifle.[473] In the background, another officer orders the two to get on the ground and states that he will shoot if they do not submit.[474] The dialogue continues, covering a span of only a few minutes.[475] At some point, Shaver moves his hands to the floor and begins to crawl toward the officer.[476] As he begins to move, he twists slightly, so that his elbow is pointing upward.[477] Someone then screams, "Don't!" right before Officer Brailsford begins firing.[478] Shaver dies.[479]

During his trial testimony, Officer Brailsford testified that he shot Shaver because he believed he was reaching for a weapon.[480] Subsequent evidence revealed that before the incident, Shaver was in his room "showing off a pellet gun," a weapon he used for a pest control job.[481] The commands by Officer Brailsford were complicated and contradictory and, along with Brailsford's aggressive response and tactical errors in decisionmaking, tragically led to the killing of Shaver.[482] Shaver's disability—as a survivor of a traumatic brain injury who was then living with PTSD—may have also played a role.

Noncontradictory and even less complicated commands might still lead to confusion and thus contribute to the perception of noncompliance by the arrestee.[483] Reasons for not complying with more routine police commands may stem from an inability to comprehend the command or the instructions in proper sequence. Such noncompliance may be perceived as threatening and thus factor into police decisionmaking regarding use of force, including deadly force. As one mother of an autistic son

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471. See Judge Releases Video of Police Shooting of Daniel Shaver After Officer Acquitted, Wash. Post (Dec. 8, 2017), https://www.washingtonpost.com/video/national/judge-releases-video-of-police-shooting-of-daniel-shaver-after-officer-acquitted/2017/12/08/3e715e7a-dc3e-11e7-a241-0848315642d0_video.html (on file with the *Columbia Law Review*).

472. Id.

473. Id.

474. Id.

475. Id.

476. Id.

477. Id.

478. Id.

479. Id.

480. See Daniel Shaver: Police Officer Not Guilty of Murder, BBC News (Dec. 8, 2017), https://www.bbc.com/news/world-us-canada-42277309 [https://perma.cc/HW2Z-J25T].

481. Id.

482. See id.

483. See, e.g., Report: Mario Woods Officer-Involved Shooting Inspired Kaepernick's Anthem Protest, supra note 52.

put it, her son "would not raise his hands if ordered to," and "[e]very response he would have to an aggressive cop would be classified as resisting arrest."[484] In some situations, even a show of force would incite confusion, or at least not be recognized as a coercive threat of harm by law enforcement.[485]

The command-and-control framework provides an account of disability and officer use of force that is not just about whether the person being detained forcibly is rendered vulnerable to force due to the person's failure to comprehend police commands. This section suggests that disabled people are also vulnerable to excessive force because their bodies and minds do not easily adapt to the command-and-control framework.[486] Stated differently, their bodies and minds are perceived as posing physical barriers to compliance and total submission.

Moore v. City of Berkeley was a suit brought by the father of Kayla Moore, a Black trans woman with psychiatric disabilities.[487] On the day of her death, Moore's roommate called the police and informed them that Moore was having a "psychotic episode."[488] Officers were dispatched to the scene.[489] After arriving, the officers attempted to handcuff Moore; one of the officers put his weight on Moore's torso, and another officer put pressure on her shoulder blades.[490] At least two of the officers later testified that Moore had pulled two officers to the ground and kicked them.[491] Moore stopped breathing after struggling with the officers and later died.[492]

The district court found that the officers "had a diminished interest in using force because they confronted . . . someone who was mentally ill."[493] At the same time, the district court determined that because Moore

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484. Myung-Ok Lee, supra note 425; see also Winston-Salem Chief Makes Emotional Plea About Police Brutality as Mom of Black Autistic Teenager, WXII 12, https://www.wxii12.com/article/winston-salem-police-chief-emotional-protest-police-brutality-george-floyd/32758675 (on file with the *Columbia Law Review*) (last updated June 3, 2020).

485. See Working to End Police Violence and Systemic Racism, Autistic Self Advoc. Network (June 4, 2020), https://autisticadvocacy.org/2020/06/6454/ [https://perma.cc/EF24-WW35].

486. Existing 2021 data from California indicate that disabled people were "handcuffed at a higher rate than those perceived to not have a disability." 2021 Report Quick Facts, Racial and Identity Profiling Advisory Bd. 2 (2021), https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-quick-facts-2021-01.pdf? [https://perma.cc/8GNV-8G6D].

487. No. C14-00669, 2016 WL 6024530, at *1, *3 (N.D. Cal. Oct. 14, 2016), vacated in part, 2018 WL 1456628 (N.D. Cal. Mar. 23, 2018), aff'd, 801 F. App'x 480 (9th Cir. 2020).

488. Id. at *1.

489. Id.

490. Id. at *2.

491. Id. at *5.

492. Id. at *2. Despite the conduct from officers, the coroner concluded that the officers did not contribute to her death. Id.

493. Id. at *5.

was so forcefully resisting arrest, the officers had little choice but to restrain her in the way they did, and thus the force used was reasonable.[494] The Ninth Circuit affirmed the district court.[495] Notably, the Ninth Circuit's affirmance did not mention Moore's schizophrenia in its review of the district court's excessive force analysis but did mention Moore's physical stature, noting that she was a "very large and strong person."[496] By ignoring Moore's disability in its Fourth Amendment analysis, the Ninth Circuit reduced the physical manifestation of her body to a threat posed and an object to be subdued.

In another incident, video footage captured a Pima County Sheriff's Department deputy tackling Immanuel Oloya, a fifteen-year-old Black teenager with no arms and no legs, during the course of an arrest.[497] A worker at the group home where Oloya lived called 911 to report that the teenager had knocked over a trash can and had become verbally aggressive toward staff in the group home.[498] When Officer Manuel Van Santen arrived, a staff member informed him that Oloya was upset about not being able to attend school due to a suspension and also told the officer that Oloya had no arms or legs.[499] According to the police report, when the officer found Oloya, he was lying on the floor and agitated, so Officer Van Santen tried to pick up Oloya from the torso.[500] The confrontation, however, appears to have quickly escalated from there, and at that point, another teen at the group home began to record.[501] The video begins with Van Santen attempting to grab Oloya's torso while Oloya resists and screams.[502] As the video continues, Van Santen is seen tackling and then pinning Oloya to the ground while Oloya screams at the officer to let him go.[503] Oloya and a second teen (the one who had recorded the encounter) were later arrested for disorderly conduct and taken to juvenile jail but charges were never filed.[504]

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494. Id. at *5–6.

495. See Moore v. City of Berkeley, 801 F. App'x 480, 483 (9th Cir. 2020).

496. See id. at 483.

497. See Stephanie Casanova, Pima County Deputy Won't Be Charged Over Tackling of Quadruple Amputee, Tucson.com (Mar. 11, 2020), https://569ucson.com/news/local/pima-county-deputy-wont-be-charged-over-tackling-of-quadruple-amputee/article_faa04e35-37a7-5585-8031-39f787879b0c.html [https://perma.cc/8KGX-G4SC] (last updated Apr. 23, 2020).

498. See Letter from Nicol R. Green, Chief Trial Couns., Pima Cnty. Att'y's Off., to Mark Napier, Sheriff, Pima Cnty. Sheriff's Dep't 1–2 (Mar. 10, 2020), https://www.scribd.com/document/451143627/Pima-County-Attorney-s-Office-decision-to-not-charge-deputy#from_embed (on file with the *Columbia Law Review*).

499. Id. at 2.

500. Id.

501. Id.

502. Id.

503. Id.

504. See Casanova, supra note 497; Molly Duerig, Arizona Deputy Tackles 15-Year-Old Boy With No Limbs, Video Shows, Azcentral.com (Nov. 15, 2019),

The report by the Pima County Attorney's Office emphasized Oloya's physical and verbal "unwillingness to cooperate" and that he "continued to physically resist and was able to escape from Deputy Van Santen's grip."[505] Given this resistance, and per the relevant state statute, the County Attorney concluded that the use of force was "immediately necessary to prevent [Oloya] from leaving the kitchen and again threatening the employee."[506]

The precise reason the officer pinned Oloya, a teenager without limbs, to the ground is difficult to discern.[507] Van Santen maintained that force was necessary to effectuate an arrest and prevent Oloya's escape.[508] Curiously, it mattered little, and the County Attorney's report does not mention, that Oloya could have escaped only by crawling.[509] However, by centering Oloya's disabled body in the analysis, Officer Van Santen's use of force looks more than just gratuitous, and its disciplining function becomes legible. The use of force functioned not just to mitigate any alleged threat that Oloya posed, but also to physically render Oloya into total submission—the embodiment of the perils of command-and-control police tactics.[510]

Police actions toward Elijah McClain, a twenty-three-year-old autistic Black man, further demonstrate the tragic outcomes of such command-and-control tactics. In a 158-page report, investigators determined that Aurora, Colorado police officers lacked reasonable suspicion to justify an investigatory stop of McClain.[511] On August 24, 2019, a 911 caller reported that McClain was walking down a street wearing a ski mask and making hand gestures.[512] The caller stated that McClain "looked sketchy."[513]

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https://www.azcentral.com/story/news/local/arizona/2019/11/15/arizona-teen-no-limbs-tackled-deputy-video-shows/4196210002/ [https://perma.cc/7DGV-WRYN].

505. See Letter from Nicol R. Green to Mark Napier, supra note 498, at 3.

506. Id. at 3–4.

507. But see id. (concluding after a review of "911 call, radio communications, police reports, witness statements, photographs, and video recordings" that there was not enough to charge Officer Van Santen).

508. Id. at 3.

509. Id.

510. For a brief introduction to the dangers posed by command-and-control tactics, particularly when they are employed against people with disabilities, see Susan Mizner, Police 'Command and Control' Culture Is Often Lethal—Especially for People With Disabilities, ACLU Blog (May 10, 2018), https://www.aclu.org/blog/criminal-law-reform/reforming-police/police-command-and-control-culture-often-lethal-especially [https://perma.cc/8A7J-8K68].

511. Hutchinson, Independent Investigators, supra note 195.

512. Lucy Tompkins, Here's What You Need to Know About Elijah McClain's Death, N.Y. Times (Jan. 18, 2022), https://www.nytimes.com/article/who-was-elijah-mcclain.html (on file with the *Columbia Law Review*).

513. Esteban L. Hernandez, Aurora Police Critically Mishandled Encounter With Elijah McClain Before His Death, Independent Report Finds, Denverite (Feb. 22, 2021),

Three white officers arrived on the scene[514] and approached McClain, who was listening to music.[515] They asked McClain to stop several times, but he stated that he had a right to continue on his way.[516] As seen on body camera footage, one officer stated that he had a right to stop McClain for looking suspicious.[517] The officer then grabbed McClain by the arms.[518] As another officer approached, McClain stated, "I am an introvert, please respect the boundaries that I am speaking. Leave me alone."[519]

Officers restrained McClain and shouted at him to stop resisting and to "stop tensing up."[520] McClain pleaded with the officers to let him go and tried to wrestle his way out of their grip.[521] Officers wrestled McClain to the ground. On the body camera footage, officers who arrived after police restrained McClain can be heard saying that McClain was "acting crazy," and that he was "definitely on something."[522] Officers also mention that he had "incredible, crazy strength."[523] What happened next is based on officer accounts because there is no video recording. Officers alleged that McClain tried to grab their guns as they tried to handcuff him.[524] Aurora Fire Rescue medics later injected McClain with ketamine, a substance used on individuals experiencing what is termed "excited delirium."[525]

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https://denverite.com/2021/02/22/aurora-police-critically-mishandled-encounter-with-elijah-mcclain-before-his-death-independent-report-finds/ [https://perma.cc/W9ZZ-84QS].

514. Patty Nieberg & Thomas Peipert, Colorado Reexamines Elijah McClain's Death in Police Custody, AP News (June 25, 2020), https://apnews.com/article/us-news-ap-top-news-denver-police-jared-polis-a1bdd8520088016cafe5a26c29146e84 (on file with the *Columbia Law Review*).

515. Aurora Police, Body Worn Camera Regarding the In-Custody Death of Elijah McClain, YouTube, at 29:38 (Nov. 22, 2019), https://www.youtube.com/watch?v=q5NcyePEOJ8 [https://perma.cc/XGH5-JBTW].

516. Id. at 29:18.

517. Tompkins, supra note 512.

518. Id.

519. Id.

520. Id.

521. Id.

522. Id.

523. Id.

524. Michael de Yoanna & Rae Solomon, Medics in Colorado Dosed 902 People With Ketamine for "Excited Delirium" in 2.5 years, Including Elijah McClain, Colorado Sun (July 23, 2020), https://coloradosun.com/2020/07/23/ketamine-use-paramedics-elijah-mclain/ [https://perma.cc/TZB2-UZMP].

525. Id. The International Association of Chiefs of Police describes the symptoms of excited delirium syndrome as including, but not limited to, "extreme aggression or violence; excessive or superhuman strength; delusional behavior; and insensitivity to and extreme tolerance of pain." Excited Delirium Syndrome, Int'l Ass'n of Chiefs of Police (Nov. 1, 2015), https://www.theiacp.org/resources/resolution/excited-delirium-syndrome [https://perma.cc/P833-BA4V]. Excited delirium syndrome is a commonly-cited cause of in-custody deaths following confrontations with law enforcement. The National Association of Medical

Connecting the command-and-control mode of policing to McRuer's idea of compulsory able-bodiedness provides a framework for understanding how and why disabled people of color, like McClain, are vulnerable to excessive force by police.[526] The 911 caller interpreted McClain's behaviors (i.e., wearing a ski mask in summer, likely due to his anemia, and waving his arms as he listened to music) as suspicious enough to warrant police intervention. Though the caller did not report any threat or danger, public reactions to McClain's nonnormative behaviors created the pathway to police intrusion.[527] When McClain resisted what he identified as an unjustified intrusion by the police, they responded with force, pinning him to the ground.[528] Even after detaining him on the ground, the officers interpreted McClain's resistance as so threatening that they had to "put him out" twice using a carotid hold, before eventually sedating him with an excessive dose of ketamine.[529]

b. *Fixing Excessive Force.* — According to critics, excessive force is perhaps the most pressing problem with policing.[530] The racialized nature of police violence is central to these ongoing critiques and movements against police violence and policing that constructs "pathways to police violence."[531] Though disabled people are vulnerable to police violence, the Supreme Court's excessive force jurisprudence provides little incentive for police departments to adopt policies and practices that respond to their unique vulnerabilities, including but not limited to those persons experiencing mental crises.[532]

Examiners and the American College of Emergency Physicians have recognized excited delirium syndrome as a medical condition. Id. In recent years, critics have questioned the legitimacy of autopsy reports finding that individuals have died of excited delirium—a medical condition not recognized by the American Medical Association, American Psychological Association, or the World Health Organization—after encounters with law enforcement or while in custody. See, e.g., Mary Paquette, Excited Delirium: Does it Exist?, 39 Persps. in Psychiatric Care 93, 93 (2003); Daniel Costello, Excited Delirium as a Cause of Death, L.A. Times (Apr. 21, 2003), https://www.latimes.com/archives/la-xpm-2003-apr-21-he-delirium21-story.html (on file with the *Columbia Law Review*); Laura Sullivan, Death by Excited Delirium: Diagnosis or Cover-Up?, NPR (Feb. 26, 2007), https://www.npr.org/templates/story/story.php?storyId=7608386 [https://perma.cc/8CLS-7QSV].

526. See supra notes 473–474 and accompanying text.

527. Tompkins, supra note 512.

528. See Aurora Police, supra note 515; Hernandez, supra note 513; Nieberg & Peipert, supra note 514; Tompkins, supra note 512.

529. Tompkins, supra note 512.

530. See Maria Ponomarenko, Rethinking Police Rulemaking, 114 Nw. L. Rev. 1, 8–9 (2019) ("By far the most salient issue around policing has been the use of excessive force—particularly in communities of color.").

531. Carbado, From Stopping Black People to Killing Black People, supra note 37, at 125.

532. Garrett & Stoughton, supra note 376, at 218–19 ("Similarly, there are no constitutional incentives for police agencies to adopt rules or provide officers with training on how to approach and engage with emotionally disturbed or disabled individuals.").

As with prior calls to incorporate race in determining the reasonableness standard under *Graham*,[533] disability should also be a factor into whether officers deployed excessive force. Courts should move away from a "deferential and constrained" totality of the circumstances test and toward a robust one that is broad enough to include officer conduct leading up to the use of force, along with policies and trainings involving interactions with disabled people, including those in mental crises.[534] Specifically, disability could be included as part of the court's inquiry into the governmental interests that justified the use of force, including the severity of the crime, which may or may not be severe if the individual is in mental crisis and not engaged in criminal conduct. Beyond the core *Graham* factors, other relevant factors could include "the availability of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officers that the subject of the force used" had a mental disability.[535]

At the same time, courts should not simply recognize disability and weigh it as just *a* factor, disconnected from other marginalized identities. Courts' use of force/reasonableness analysis should assess disability along with race, gender, and other subordinated identities. In short, courts should examine excessive force claims through an intersectional lens to determine, for example, the role of race or racial bias,[536] gender identity or gender bias,[537] and disability-based bias or ableism[538] in constructing the threat or justifying the use of force or the amount of force. Race, disability gender, and class, for example, can be variables that courts examine to determine whether an officer's use of force was unreasonable given the risk that implicit biases impermissibly influenced the officer's perceptions.

This analysis assumes that marginalized identities can combine to produce special vulnerability to police violence because of how officers deem force as necessary, based on implicit and explicit biases against racialized persons, individuals with marginalized gender identities, disabled people, and low-income people. But an intersectional analysis suggests that such vulnerabilities may stem from more than just cognitive biases or individual prejudices. An intersectional analysis identifies a function of policing that

533. See supra notes 122–124 and accompanying text.

534. See Avery, supra note 32, at 267 (arguing that when analyzing the totality of the circumstances courts should take into account established police practices, the training available and provided to the officers involved, individual choices made by officers leading up to the use of force, and the subject's emotional state); Garrett & Stoughton, supra note 376, at 223 ("Once one understands how the Supreme Court has cabined the relevant circumstances, one appreciates that it is not a 'totality of the circumstances' test at all.").

535. Vos v. City of Newport Beach, 892 F.3d 1024, 1033–34 (9th Cir. 2018).

536. See, e.g., Garrett & Stoughton, supra note 376, at 289–90 (discussing the role of implicit bias in generating racial disparities in use of force).

537. See, e.g., Ritchie, supra note 84, at 71–72 (explaining how broken windows policing increases the likelihood that police will approach women and trans people of color).

538. See, e.g., Nelson, Racializing Disability, supra note 32, at 16–17 (explaining the stigmatization of mental and physical disabilities in society).

is expressly about physical compliance. Indeed, as argued in section III.B.3.a, compulsory able-bodiedness provides a framework for examining the intersectional vulnerabilities to police violence, and it explains how noncompliance and resistance are interpreted. Such a framework analyzes how perceptions of the amount of force necessary to "subdue" an individual are influenced by how bodyminds are regarded as deviating from the norm. So, for example, non-violent resistance, triggered by disability, is nonetheless perceived as threatening enough to justify physical force. This is because the use of force becomes a pathway for inducing physical compliance with police commands. Command and control directives—"Freeze," "Put your hands where I can see them," "Stop resisting,"—all become triggers for not just behavior modification but also body modification.

Returning to the incident that led to the police killing of Kayla Moore described above,[539] one could ask: What does an intersectional analysis offer? In that case the officer testified that "Moore's demeanor switched from bubbly to paranoid to angry to fearful and back again," and that "[a]fter 15 to 20 minutes of conversation, Officer Brown decided to take Ms. Moore into custody."[540] According to the officers, Moore actively resisted handcuffing by kicking and flailing her arms.[541] The officers responded by applying more force and at various points placed their bodies on Moore's to stop her from resisting.[542] At some point, Moore stopped struggling and eventually stopped breathing.[543] She died less than two hours after the police arrived at her apartment.[544] The district court granted the City's motion for summary judgment on Moore's Fourth Amendment and ADA claims. At the very least, an intersectional analysis would point to the inability of the reasonableness standard to constrain and effectively regulate police use of force. Recognizing Moore's race, disability, and gender identity would demonstrate her unique vulnerability to police violence. It would also help to explain why officers would be very likely to defend any use of force as reasonable when their conduct involved forcibly detaining a 350-pound Black trans woman labeled as actively resisting and refusing involuntary commitment.

At best, an intersectional analysis would provide courts and advocates with the tools to identify potential vulnerabilities (and evidence of such vulnerabilities) and then scrutinize reasonableness even when faced with allegations from officers that the situation called for split-second decisionmaking and that the force used was necessary to subdue the threat posed by a 350-pound, Black trans woman physically resisting arrest. In

539. See supra notes 487–492 and accompanying text.

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

541. Id.

542. See id.

543. Id.

544. See id. at *1, *3.

other words, an intersectional analysis provides courts and advocates with an analytical tool for identifying particular vulnerabilities that then can inform how rigorously these courts scrutinize the category of reasonableness. In short, intersectionality provides an analytical method and justification (to combat erasure) for deeper scrutiny. For instance, courts could look to the latter two *Graham* factors—"whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest"[545]—and ask whether race, gender, class, or disability influenced the perceptions and judgments of the officers. Courts could also ask to what extent such perceptions and judgments are reasonable given growing recognition, even among police departments, that officers should provide accommodations for disabled people and de-escalate so-called crisis situations.[546] Deeper scrutiny of the reasonableness category in turn permits questions such as: Did the officer engage in use of force? Did the officer engage in de-escalation techniques? In what ways did the officer escalate the situation? Given the person's disability, was the officer's conduct likely to escalate the encounter? Should the police have been dispatched to respond in the first place?

Careful review of the facts, with an eye toward disability, can help courts assess whether the use of force was deployed in response to an immediate threat, or rather due to a "desire to resolve quickly a potentially dangerous situation," which on its own may not justify the use of force.[547] For example, oftentimes police officers are called onto the scene by relatives, neighbors, or friends fearing that the individual in crisis poses a risk of harm. In these cases, notice that an officer may encounter an individual with a disability or who is in mental crisis should help to reduce the need for split-second decisionmaking when the officer later arrives on the scene. When notice is provided, courts should be reluctant to evaluate the facts on the ground through the split-second framing that Professors Brandon Garrett and Seth Stoughton note has characterized the Supreme Court's excessive force jurisprudence since *Graham*.[548] Further, police encounters should be divided into relevant time frames to permit courts to assess whether the use of force was reasonable at each phase of the encounter

545. Graham v. Connor, 490 U.S. 386, 396 (1989).

546. See, e.g., Improving Officer Response to Persons With Mental Illness and Other Disabilities: A Guide for Law Enforcement Leaders, Int'l Ass'n of Chiefs of Police (2018), https://www.theiacp.org/sites/default/files/2018-08/IACP_Responding_to_MI.pdf [https://perma.cc/HST9-FYTC]; Model Policy: Interactions With Individuals With Intellectual and Developmental Disabilities, Int'l Ass'n Chiefs Police (2017), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/int-dev-disability-pol.pdf [https://perma.cc/8NLU-99YS].

547. Centeno v. City of Fresno, No. 1:16-CV-00653, 2017 WL 3730400, at *1, *6–7 (E.D. Cal. Aug. 30, 2017) (quoting Hughes v. Kisela, 862 F.3d 775, 780 (9th Cir. 2016)) (denying qualified immunity), rev'd in part, 740 F. App'x 597 (9th Cir. 2018).

548. See Garrett & Stoughton, supra note 376, at 228–37.

rather than simply focusing on the moments leading up to the decision to use force.[549]

To an extent, examining policing through a disability lens reveals just how harmful the split-second framework can be when assessing the reasonableness of police use of force. As Garrett and Stoughton maintain, a more tactical approach to the objective reasonableness inquiry in excessive force cases would require courts to consider whether officers should have used other methods (e.g., de-escalation, nonviolent conflict resolution) in responding to the individual labeled as a suspect, in order to reduce the need to use force in the first place.[550] But even a tactical approach may not adequately consider the ways in which disabled people are *constructed* as dangerous due to officer perceptions of the threat posed by their actual or alleged noncompliance and resistance. This is not to say that police tactics should not factor into use of force analysis, and this Essay agrees with Garrett and Stoughton that they should. Rather, if the goal of modern police tactics is to "manage[] risk" and if such tactics are "informed by the observation that officer decision making suffers in highly stressful situations," a tactical Fourth Amendment should grapple with the ways that police tactics can construct or lead officers to misinterpret disabled people as risky, and thereby lead to an unjustified use of force.[551]

Of course, qualified immunity poses a barrier to relief even where police use of force is deemed unreasonable.[552] "An officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it' . . . meaning that 'existing precedent . . . placed the statutory or constitutional question beyond debate.'"[553] As the Supreme Court stated in *Sheehan*, "This exacting standard 'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law.'"[554] That said, in their qualified immunity

549. See Garrett & Stoughton, supra note 376, at 220 (arguing that courts should look not at "snapshots" but of "series of events"); see also Avery, supra note 32, at 266 (discussing the "widespread failure of lower courts to consider the 'pre-seizure' conduct of officers and the training provided to police officers as elements in their assessment of the 'totality of the circumstances.'").

550. See Garrett & Stoughton, supra note 376, at 295–96 (discussing the treatment of warnings before use of force by lower courts).

551. Id. at 253–54.

552. As Professor Michael Avery noted, "[A]lthough a trier of fact might find a shooting to be unreasonable under Fourth Amendment standards, a court may still find that the officer was reasonably mistaken about the amount or type of force the law permitted under the circumstances and grant him qualified immunity from liability . . . ." Avery, supra note 32, at 266.

553. City of San Francisco v. Sheehan, 575 U.S. 600, 611 (2015) (alteration in original) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 739 (2011)).

554. Id. (quoting *Ashcroft*, 563 U.S. at 743).

analysis, courts should consider "training that a *reasonable* officer would have received" in determining whether the officer was reasonably mistaken as to the use and extent of force.[555] And, as Garrett and Stoughton maintain, "When an officer's action is contrary to her training, or when it is contrary to the training that a reasonable officer would have received, the infringement of individual rights may, although not invariably, fail to meet the Fourth Amendment reasonableness standard."[556]

C. *Municipalities*

Widespread structural change of police departments will not happen through litigation alone and certainly not through exclusively litigating constitutional law claims.[557] But there is room to challenge police departments who lack policies and training to cover the range of issues affecting disabled people in police encounters, whether it is regarding policies that deal with identifying disabilities and providing accommodations[558] or diverting individuals with disabilities who are in crisis to social service providers.[559] Under *City of Canton v. Harris*, plaintiffs may bring § 1983 failure-to-train claims against municipalities alleging Fourth Amendment violations due to deficient police training.[560] To make the required showing for failure-to-train claims, plaintiffs must show that "municipal decisionmakers either knew or should have known that training was inadequate but nonetheless exhibited deliberate indifference to the unconstitutional effects of those inadequacies."[561] This requires a plaintiff to show a "pattern of similar constitutional violations by untrained employees . . . to demonstrate deliberate indifference for purposes of failure to train."[562] Expert

555. Garrett & Stoughton, supra note 376, at 299; see also Avery, supra note 32, at 266 (noting the absence of case law "specifying how police training" regarding mental disabilities should be considered in determining the constitutionality of use of force).

556. Garrett & Stoughton, supra note 376, at 299 ("[W]e disagree with the suggestion in *Sheehan* that disregarding training and engaging in 'imprudent, inappropriate, or even reckless' conduct leading up to the incident are not of constitutional relevance (although the Court did note that the relevant training for approaching mentally ill persons was itself highly "general[]" in nature.)").

557. See, e.g., Rachel A. Harmon, The Problem of Policing, 110 Mich. L. Rev. 761, 763 (2012) ("[T]he public policy problems presented by the use of police power necessarily extend beyond constitutional law and courts. Protecting rights and balancing competing individual and social interests require a broader set of regulatory tools and institutions.").

558. These policies incorporate legal rights under the ADA. See generally Jamelia N. Morgan, Policing Under Disability Law, supra note 436 (discussing legal obligations of police departments under the ADA).

559. Sarah Holder & Kara Harris, Where Calling the Police Isn't the Only Option, Bloomberg (Sept. 3, 2020), https://www.bloomberg.com/news/articles/2020-09-03/alternative-policing-models-emerge-in-u-s-cities [https://perma.cc/L8UB-9FBN].

560. 489 U.S. 378, 387 (1989).

561. Haley v. City of Boston, 657 F.3d 39, 52 (1st Cir. 2011).

562. Connick v. Thompson, 563 U.S. 51, 62, (2011) (citing Bd. of Cnty. Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 409 (1997)).

testimony may be proffered to show appropriate police practices for interacting with disabled people and particular subgroups, such as individuals in crisis.

Of course, a plaintiff must show more than a faulty training program. Plaintiffs "must also show that the [municipality] knew or had reason to believe that such a regimen had unconstitutional effects."[563] The evidence must show a pattern of "past violations sufficient to put the [municipality] on notice of such effects."[564] Here, evidence of violations could be, for example, data showing a pattern of police killings or excessive force by the specific department against disabled people—perhaps, data of the kind that is discussed in the DOJ reports.[565] Such data could be used to demonstrate deliberate indifference by showing that the need for training was obvious given the pattern of killings.[566] Of course, plaintiffs in Fourth Amendment cases would have to show that the pattern of killings amounted to deliberate indifference to the risk of constitutional violations, which is a high bar.[567] With data however, such claims are plausible and provide a path to challenging such departments with a record of using excessive force against disabled people.

* * *

The current movement to end police violence has in recent years centered on defunding police departments as one way to reduce reliance on policing as a mechanism to address harm and mediate conflict.[568] In their advocacy, these movements seek to address both ongoing and historical legacies of policing and police violence. At the same time, calls to defund or abolish police have prompted more conservative and routine calls for reform that focus on police training on topics such as implicit bias and crisis intervention.[569] While this Essay proposes a set of legal reforms, there

563. Gray v. Cummings, 917 F.3d 1, 14 (1st Cir. 2019).

564. Id.

565. See generally Baltimore DOJ Report, supra note 336; Ferguson DOJ Report, supra note 110.

566. City of Canton v. Harris, 489 U.S. 378, 390 (1989).

567. Id.

568. Laura Bliss, The Movement Behind LA's Decision to Cut Its Police Budget, CityLab (June 4, 2020), https://www.bloomberg.com/news/articles/2020-06-04/-people-s-budgets-movement-takes-on-police-reform [https://perma.cc/XYR9-AMLW]; Dionne Searcey, What Would Efforts to Defund or Disband Police Departments Really Mean?, N.Y. Times (June 28, 2020), https://www.nytimes.com/2020/06/08/us/what-does-defund-police-mean.html (on file with the *Columbia Law Review*).

569. Taylor Goldenstein, Texas to Require All Police Officers Receive Implicit Bias Training, in First George Floyd-Inspired Reform, Houston Chronicle (June 9, 2020), https://www.houstonchronicle.com/politics/texas/article/Texas-to-require-all-police-officers-receive-15327779.php [https://perma.cc/7TCX-P2MM]; LaPorsche Thomas & Christie Ethridge, '8 Can't Wait' Passes: Here Is What That Looks Like for Atlanta, 11 Alive (July 7, 2020), https://www.11alive.com/article/news/local/morningrush/atlanta-city-council-passes-8-

are limitations to such reform efforts standing alone. Indeed, the current composition of the federal bench may lead some to be pessimistic about possibilities for doctrinal reform or doubt the potential for such doctrinal reforms to reduce or eliminate the disparities in police violence against disabled people. Eliminating disparities hardly constitutes good policing to police reformers and is a far cry from calls for an end to policing by abolitionists. That said, emphasizing doctrinal erasures can also point to opportunities for increased recognition and legal protection. But the limits of the rights-based framework are well known, and efforts to protect disabled people from police violence cannot end there. Decriminalization and diversion offer ways to eliminate or reduce exposure to police violence by providing access to mental health treatments that do not require police intervention.[570] Abolitionist organizers working to reimagine a society that does not rely on carceral and punitive responses to interpersonal harms are also working to end reliance on police and forms of policing.[571] In this moment of possible radical change, discussions of doctrinal reform (even if framed as harm reduction) may seem out of place or even tepid. However, these interventions matter in efforts to dismantle legal doctrines that produce, further, or insulate state-sanctioned discrimination, subordination, and of course, violence.

CONCLUSION

This Essay has attempted to center Fourth Amendment doctrine to highlight how the doctrine both erases or does not adequately consider disability as an identity or subordinated status and how it fails to adequately

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can-wait-police-reform-measures/85-c3e1654b-009d-4992-af81-5ab074464863 [https://perma.cc/V6EM-UTVX].

570. One such program is for Crisis Assistance Helping Out on the Streets (CAHOOTS), a "mobile crisis intervention service integrated into the City of Eugene's public safety program." Rowan Moore Gerety, An Alternative to Police That Police Can Get Behind, Atlantic (Dec. 28, 2020), https://www.theatlantic.com/politics/archive/2020/12/cahoots-program-may-reduce-likelihood-of-police-violence/617477/ (on file with the *Columbia Law Review*); Ellen Meny, CAHOOTS an Alternative to Traditional Police, Ambulance Response, KVAL (Feb. 5, 2016), https://kval.com/news/local/theres-a-growing-awareness-that-alternatives-to-law-enforcement-are-needed [https://perma.cc/MX5W-SH7N]. 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. Id. Each van is equipped with a "mental health specialist/crisis worker" and an "EMT or paramedic," along with "warm clothing, blankets, food and water." Id. These vans do not include weapons and further lack the legal authority to arrest or detain people, though the vans do include a secure seating area for cases where someone might be intimidated or feel unsafe. Id.

571. See, e.g., Mariame Kaba, Opinion, Yes, We Mean Literally Abolish the Police, N.Y. Times (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html (on file with the *Columbia Law Review*); #8toAbolition, https://www.8toabolition.com/ [https://perma.cc/PR4C-V6CS] (last visited July 25, 2020).

protect the privacy and security interests of disabled people. This underprotection, along with what this Essay has argued are disability-based vulnerabilities to policing, renders disabled people vulnerable to police violence. Such vulnerabilities require legal recognition. Indeed, such recognition may be consistent with the Fourth Amendment's founding principles.[572] Though this recognition and meaningful engagement with disability will not eliminate or perhaps even reduce interactions with police on the front end, it will provide greater legal accountability on the back end. In a moment that appears to signal a social movement toward transformative social change and an end to the traditional institution of policing, disabled people should not be left out of efforts for transformative legal change.

572. Thompson, supra note 195, at 991–92.