Disability as "Abnormal": Court Sanctioned Violence Against Individuals With Disabilities

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†This Note was influenced by my personal experiences. I have generalized anxiety disorder and panic disorder, but I am typically able to mask my mental illness and conform to societal norms. I recognize that my general ability to mask is a privilege, allowing me to escape the stigma and harm inflicted upon many members of the disabled community. Additionally, my older brother Zachery has Down syndrome, which has made me more keenly aware of society's dangerous ignorance towards individuals with disabilities. My brother is kind, funny, and warm, but above all else: he is human. He deserves to live in a society that accounts for his needs, rather than one that relegates him to a subclass of humans and effectively endorses the devaluing of his life. My indignation of such widespread ableism—intensified through seven years spent working at a program for individuals with disabilities—forms the foundation of this Note.

INTRODUCTION

On January 12, 2013, 26-year-old Ethan Saylor visited a Maryland movie theater for a showing of the film "Zero Dark Thirty."[1] Saylor had Down syndrome and was accompanied by his 18-year-old aide.[2] When the film ended, Saylor decided to stay and wait for the second showing of the film.[3] Neither he nor his aide had the money to purchase another twelve-dollar movie ticket, but Saylor would not leave.[4] The theater's manager called security and three off-duty Frederick County sheriff's deputies (moonlighting as security guards) arrived to confront the young man.[5] Saylor's aide spoke to one of the deputies and explained that Saylor's mother was already on her way and would either pay for her son's ticket or convince him to leave.[6] The aide also tried to explain the cognitive and behavioral symptoms of Down syndrome and informed the deputy that Saylor did not like to be touched.[7] Ignoring the aide's concerns, the three deputies surrounded Saylor and told him he was being arrested.[8] They forcibly removed Saylor from his seat and dragged him up the aisle.[9] Within moments, the 26-year-old was on the ground—handcuffed and unresponsive.[10] Saylor was transported to a hospital where he was pronounced dead.[11] His death was ruled a homicide by asphyxia.[12]

Ironically, Ethan Saylor idolized police officers and dreamed of becoming one himself.[13] Saylor's idols, however, would leave him dead over a

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[1] *See* Est. of Saylor v. Regal Cinemas, Inc., CV WMN-13-3089, 2016 WL 4721254, at *1–2 (D. Md. Sept. 9, 2016), *aff'd sub nom.* Est. of Saylor v. Rochford, 698 Fed. Appx. 72 (4th Cir. 2017) (unpublished). Note that although the deputies were off-duty and acting in their capacity as security guards, they took on the role of law enforcement officers once they commenced the arrest. *Id.* at *5.

[2] *Id.* at *2.

[3] *Id.* at *2–3.

[4] *Id.*

[5] Susan Donaldson James, *Down Syndrome Man Goes to Movies, Ends Up in Morgue Over $12 Ticket*, ABC NEWS (Aug. 23, 2013), https://abcnews.go.com/Health/syndrome-man-movies-ends-morgue/story?id=20046376, *archived at* https://perma.cc/4WWH-XX5D. *See also Saylor*, 2016 WL 4721254, at *5–7.

[6] *Saylor*, 2016 WL 4721254, at *3.

[7] *Id.*

[8] *Id.* at *3–4.

[9] *Id.* at *4.

[10] *Id.*

[11] *Id.*

[12] James, *supra* note 5.

[13] Theresa Vargas, *Settlement Reached in Police-Custody Death of Man With Down Syndrome*, WASH. POST (Apr. 24, 2018), https://www.washingtonpost.com/local/settlement-reached-in-police-custody-death-of-man-with-down-syndrome/2018/04/24/7d53c0ca-47fe-11e8-827e-190efaf1f1ee_story.html, *archived at* https://perma.cc/LAW9-XCKL.

twelve-dollar movie ticket.[14] The deputies that killed the young man were placed on paid administrative leave for a mere two months and then returned to their normal assignments.[15] Despite the medical examiner's conclusion that Saylor's death was a homicide,[16] the deputies were cleared of wrongdoing by an internal investigation and a grand jury decided not to issue criminal charges.[17] Then, as a final slap in the face, the Frederick County sheriff's brother[18] published a letter in the local paper blaming Ethan Saylor's mother for her son's death.[19] Explaining that she should have kept her son home instead of allowing him to go out in public, he implored the grieving mother to "go to the bathroom, look in the mirror and face the blame."[20] This is the sad reality of policing in America. Officers deploy needless violence against individuals with disabilities, yet the blame is placed on the victims and their families. While the murder of George Floyd by a Minneapolis police officer sparked important conversations about violent and discriminatory policing,[21] a crucial piece of the conversation was missing.[22] Despite comprising the world's largest "minority" group,[23] individuals with disabilities are continuously overlooked in movements against police brutality.

The Centers for Disease Control and Prevention ("CDC") reports that 61 million people—one in four adults—in the United States are living with a

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[14] *See* James, *supra* note 5.

[15] Jessica Anderson, *Frederick Sheriff's Deputies Will Not Face Charges in Movie Theater Incident*, BALT. SUN (Mar. 22, 2013), https://www.baltimoresun.com/news/bs-xpm-2013-03-22-bs-md-saylor-investigation-20130322-story.html, *archived at* https://perma.cc/B3XA-SDBA.

[16] James, *supra* note 5.

[17] Peter Herman, *Judge: Lawsuit in Police Death of Man With Down Syndrome Can Move Forward*, WASH. POST (Oct. 16, 2014), https://www.washingtonpost.com/local/crime/judge-lawsuit-in-police-death-of-man-with-down-syndrome-can-move-forward/2014/10/16/5f2c6182-5578-11e4-809b-8cc0a295c773_story.html, *archived at* https://perma.cc/7BFA-CEPL.

[18] *See* Mardra Sikora, *According to Jenkins, Best to Keep a Person With Down Syndrome at Home*, HUFF. POST (Dec. 6, 2017), https://www.huffpost.com/entry/according-to-jenkins-best_b_5846042, *archived at* https://perma.cc/5NH7-4LNB (explaining that Gary Jenkins is the brother of Frederick County sheriff Chuck Jenkins).

[19] Gary L. Jenkins, *Tired of Misplaced Blame in Saylor Death*, FREDERICK NEWS-POST (Sept. 16, 2014), https://www.fredericknewspost.com/places/local/frederick_county/middletown_braddock_heights/tired-of-misplaced-blame-in-saylor-death/article_b79874f7-34bb-50e7-8769-bda460324f4f.html, *archived at* https://perma.cc/Y6BP-RVQM.

[20] *Id.*

[21] Audra D. S. Burch, Amy Harmon, Sabrina Tavernise & Emily Badger, *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES (Oct. 5, 2021), https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html, *archived at* https://perma.cc/G54X-4SMB.

[22] *See, e.g.*, Abigail Abrams, *Black, Disabled and at Risk: The Overlooked Problem of Police Violence Against Americans with Disabilities*, TIME (June 25, 2020), https://time.com/5857438/police-violence-black-disabled, *archived at* https://perma.cc/VU94-A3K3; Dominic Bradley & Sarah Katz, *Sandra Bland, Eric Garner, Freddie Gray: The Toll of Police Violence on Disabled Americans*, THE GUARDIAN (June 9, 2020), https://www.theguardian.com/////bland-eric-garner-freddie-gray-the-toll-of-police-violence-on-disabled-americans, *archived at* https://perma.cc/NMY9-QZWP.

[23] *Fact Sheet on Persons with Disabilities*, U.N. ENABLE, https://www.un.org/disabilities/documents/toolaction/pwdfs.pdf, *archived at* https://perma.cc/2P9X-9GHL.

disability.[24] While staggering, this number may in fact be a gross underestimate due to limitations of the survey used to collect the data.[25] The American Community Survey, prepared by the Department of Health and Human Services, uses six basic categories in its definition of disability, which may not capture persons with mental illness or physical limitations to the upper body.[26] The term "disability" is incredibly broad and may include conditions ranging from Down syndrome, autism, and cerebral palsy, to diabetes, asthma, and depression. According to the CDC, a disability is any condition of the body or mind that makes it more difficult for an individual to perform certain activities and interact with the world around them.[27] Disabilities may include conditions that affect a person's vision, movement, thinking, communicating, hearing, and mental health—to name a few.[28]

Any one of us can become a member of this marginalized group in an instant, often due to aging, accident, or illness.[29] Some disability scholars note that we are all "temporarily-able-bodied," meaning that we are all likely to become disabled at some point in our lives.[30] Despite its pervasiveness, however, both the law and society in general treat disability as a deviation from the "norm."[31] Those who are not disabled are considered "normal"—"the very core of legal subjects and law."[32] Those with disabilities are viewed as "victims" of a medical abnormality, maintaining the misconception that disability is "some terrible chance event that occurs at random to unfortunate individuals."[33] Disability itself is considered a medi-

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[24] This statistic is based on data compiled in 2016 and 2018. As of September 16, 2020, the statistic is still published as current. *Disability Impacts All of Us*, CDC, https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html, *archived at* https://perma.cc/YKM4-88LZ.

[25] *See Understanding Disability Statistics*, ADA Nat'l Network, https://adata.org/factsheet/understanding-disability-statistics, *archived at* https://perma.cc/Y5ZU-FRRG. *See also Disability Datasets*, CDC, https://www.cdc.gov/ncbddd/disabilityandhealth/datasets.html, *archived at* https://perma.cc/R8EB-WKWW (explaining that the questions used in the survey represent a minimum standard).

[26] *Understanding Disability Statistics*, *supra* note 25.

[27] *Disability & Health Overview*, CDC, https://www.cdc.gov/ncbddd/disabilityandhealth/disability.html, *archived at* https://perma.cc/6AWR-2D3S.

[28] *Id.*

[29] David M. Perry & Lawrence Carter-Long, *The Ruderman White Paper on Media Coverage of Law Enforcement Use of Force and Disability*, Ruderman Fam. Found. 1, 11 (Mar. 2016), https://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf, *archived at* https://perma.cc/8YX5-NNUJ [hereinafter *Ruderman White Paper*].

[30] *See* Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or An Introduction to Disability Legal Studies*, 42 Colum. Hum. Rts. L. Rev. 403, 449 (2011); Carol A. Breckenridge & Candace Vogler, *The Critical Limits of Embodiment: Disability's Criticism*, 13 Pub. Culture 349, 349 (2001); David Ferleger & Penelope A. Boyd, *Anti-Institutionalization: The Promise of the* Pennhurst *Case*, 31 Stan. L. Rev. 717, 742 n.107 (1979).

[31] Kanter, *supra* note 30, at 406.

[32] Linda Steele & Stuart Thomas, *Disability at the Periphery: Legal Theory, Disability and Criminal Law*, 23 Griffith L. Rev. 357, 362 (2014).

[33] Kanter, *supra* note 30, at 420–22.

cal defect that lies within the individual and must be remedied or cured.[34] By conceptualizing disability as an internal flaw, rather than acknowledging the societal limitations imposed on those with particular conditions, society is seemingly absolved of any obligation to avoid or eliminate barriers that exclude people with disabilities.[35] These barriers exist at every level within the criminal legal system, depriving persons with disabilities of fair treatment before courts, tribunals, and law enforcement.[36]

While the movement against police brutality focuses on the police—their racist history,[37] lack of training,[38] and abysmal track record[39]—it often fails to criticize those who empower the police to act so brutishly and with impunity. In an effort to expand the conversation surrounding police brutality and its disparate impact on marginalized groups, this Note will explore the implications of the Supreme Court's ruling in *Graham v. Connor*, the seminal case in civil actions for excessive use of force. Part I will discuss use of force by police officers against individuals with disabilities and the remedies available to victims. It will also explain the "objective reasonableness" standard set forth by the *Graham* court to analyze excessive use of force and will examine the many ways in which the standard authorizes police violence against the disabled community. Part II will discuss the Court's specious interpretation of Fourth Amendment reasonableness and the way it delegitimizes the experiences of disabled communities. It will also explain the medical model of disability and its shortcomings. Finally, Part III will propose that the Supreme Court embrace the socio-political model of disability as a means of constructing a reasonableness standard for excessive force law that effectively protects the rights of individuals with disabilities. When the Court stops viewing disability as "abnormal" and acknowledges it as ordinary, it will be able to conduct proper analyses that address police violence against individuals with disabilities.

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[34] *See id.* at 409.

[35] *Id.* at 420.

[36] Stephanie Ortoleva, *Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System*, 17 ILSA J. Int'l & Compar. L. 281, 282 (2011).

[37] Connie Hassett-Walker, *How You Start is How You Finish? The Slave Patrol and Jim Crow Origin of Policing*, ABA (Jan. 12, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/you-start-is-how-you-finish, *archived at* https://perma.cc/JBK-X6HL (explaining how modern American policing emanated from the "slave patrols of the seventeenth and eighteenth centuries and police enforcement of Jim Crow laws in the late nineteenth to mid-twentieth centuries").

[38] Olga Khazan, *American Police are Inadequately Trained*, The Atlantic (Apr. 22, 2021), https://www.theatlantic.com/politics/archive/2021/04/daunte-wright-and-crisis-american-police-training/618649/, *archived at* https://perma.cc/-DHFM (discussing the inadequate training of police officers in the United States).

[39] Rob Picheta & Henrik Pettersson, *American Police Shoot, Kill and Imprison More People Than Other Developed Countries. Here's the Data*, CNN (June 8, 2020), https://www.cnn.com/2020/06/08/us/us-police-floyd-protests-country-comparisons-intl/index.html, *archived at* https://perma.cc/7NXS-XTUC ("Statistical comparisons show that police in the US typically shoot, arrest and imprison more people than similarly developed nations. . . . [W]hen it comes to policing and criminal justice, the US is a noticeable outlier, and black Americans are disproportionately affected.").

I. Discriminatory Police Violence and the Court's Stamp of Approval

A. Police Use of Force Against Individuals with Disabilities

While the homicide of Ethan Saylor over a twelve-dollar movie ticket is particularly horrifying, it is not an isolated occurrence. Despite a lack of comprehensive data, the Ruderman Family Foundation[40] reports that one-third to one-half of all use of force incidents involve an individual with a disability.[41] Throughout U.S. history, misunderstandings and harmful stereotypes about individuals with disabilities have popularized theories linking disability and criminality.[42] Individuals with disabilities, however, are far more likely to be the victims of crime than the perpetrators.[43] As of 2015, individuals with disabilities were 2.5 times more likely to be the victim of a violent crime than individuals without disabilities.[44] Nonetheless, persisting public perceptions fueled by ignorance and fear cause individuals with disabilities to receive "disparate and inappropriate" treatment by law enforcement.[45] Unfortunately, the United States lacks comprehensive data sets about police use of force against individuals with disabilities because there is no legal requirement for law enforcement agencies to aggregate or collect infor-

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[40] The Ruderman Family Foundation is a philanthropic organization dedicated to the advancement of disability rights. *See Our Story*, Ruderman Fam. Found., https://rudermanfoundation.org/about-us/our-story, *archived at* https://perma.cc/9LNS-U2DZ.

[41] *Ruderman White Paper*, *supra* note 29, at 7.

[42] *Law Enforcement Responses to Disabled Americans: Promising Approaches for Protecting Public Safety: Hearing on Law Enforcement Responses to People with Disabilities Before the Subcomm. on Const., Civ. Rts., and Hum. Rts. of the S. Jud. Comm.*, 113th Cong. (2014) (written testimony of Rebecca Cokley, Exec. Dir., Nat'l Council on Disability) [hereinafter *Cokley Testimony*]. America has a long history of segregating and institutionalizing individuals with disabilities. When the United States was first formed, many Americans feared the instability of the fledgling republic and wanted to contain, control, and separate those who were seen as a burden to society. Both individuals who commit crimes and individuals with disabilities were deemed "undesirable" and were grouped together for purposes of containment. Since the approach to both crime and disability was the same, the two became inextricably linked. Then, in the early 1900s, the American eugenics movement took hold. Eugenicists reported that those who commit crimes and those with disabilities are biologically inferior and should either be imprisoned, sterilized, or euthanized. By classifying certain people as "hereditarily unfit," "[e]ugenics recast mentally ill and disabled citizens from community outsiders to long-term societal dangers." Indeed, "[t]he first modern mass incarceration was not of criminal offenders, but of the disabled." Due to mounting social pressure, there have been recent efforts towards deinstitutionalization. Unfortunately, however, the resources allocated to deinstitutionalization are insufficient for the policy's success. The absence of appropriate resources, aggravated by enduring bias and ignorance, causes many individuals with disabilities to end up incarcerated. Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 Duke L.J. 417, 433, 441–43 (2018).

[43] *Cokley Testimony*, *supra* note 42.

[44] *Crime Against Persons with Disabilities, 2009–2015 - Statistical Tables*, U.S. Dep't of Just. (July 2017), https://www.bjs.ojp.gov/library/publications/crime-against-persons-disabilities-2009-2015-statistical-tables, *archived at* https://perma.cc/FEY6-H7PX.

[45] *Cokley Testimony*, *supra* note 42.

mation about such incidents.[46] As such, information regarding police violence and disability is largely limited to collecting data from media coverage, which often fails to discuss a victim's disability.[47] Notwithstanding the statistical limitations, the data reveals that interactions between officers and civilians with disabilities are incredibly dangerous, often resulting in injuries and death.[48] As seen in the case of Ethan Saylor, however, it is incredibly rare that police officers are held criminally liable for these devasting outcomes.[49] Saylor's parents, seeking another means of accountability, filed a civil action against the three deputies that killed their son.[50] Civil lawsuits provide a second channel for holding police accountable, yet they similarly often fail to impart liability.[51]

B. Excessive Force Law

A government agent, such as a police officer, that infringes upon an individual's constitutional rights while acting in their official capacity may be liable to the victim for money damages.[52] Civil actions for deprivation of rights are outlined in 42 U.S.C. § 1983, which states that any person acting under the color of state law who subjects an individual "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law."[53] This liability applies to law enforcement officers who use excessive force against individuals in violation of the Fourth Amendment right to be free from unreasonable

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[46] *Ruderman White Paper*, *supra* note 29, at 2.

[47] *Id.*

[48] Brief of ACLU & Am. Diabetes Ass'n et al. as Amici Curiae Supporting Respondent at 9–19, City and County of San Francisco v. Sheehan, 575 U.S. 600 (2015) (No. 13-1412) [hereinafter Brief of ACLU].

[49] Amelia Thomson-DeVeaux, Nathantial Rakich & Lakitha Butchireddygari, *Why It's So Rare For Police to Face Legal Consequences*, FiveThirtyEight (June 4, 2020), https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct, *archived at* https://perma.cc/3VFX-UC6G.

[50] *See* Est. of Saylor v. Regal Cinemas, Inc., CV WMN-13-3089, 2016 WL 4721254, at *1–2 (D. Md. Sept. 9, 2016), *aff'd sub nom.* Est. of Saylor v. Rochford, 698 Fed. Appx. 72 (4th Cir. 2017) (unpublished).

[51] *See, e.g.*, *infra* notes 75–85 and accompanying text (discussing the result in *Graham v. Connor* after it was remanded to the district court).

[52] Nathaniel Sobel, *What is Qualified Immunity, and What Does it Have to do with Police Reform?*, Lawfare (June 6, 2020), https://www.lawfareblog.com/what-qualified-immunity-and-what-does-it-have-do-police-reform, *archived at* https://perma.cc/9P6L-ZSNH.

[53] Section 1983 provides in full: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S.C. § 1983.

searches and seizures by the government.[54] Force becomes "excessive" when it is considered to be "unreasonable." Given that there are so few criminal prosecutions of police officers, an action under § 1983 is the primary mode of recourse for victims of police brutality.[55]

Even when a court determines that excessive force was used, however, officers may raise the affirmative defense of qualified immunity.[56] Qualified immunity is a judicially manufactured doctrine that shields government officials, including law enforcement officers, from civil liability for constitutional violations.[57] It may only be defeated if an official knew or reasonably should have known that the action they took, within their official capacity, would violate the constitutional rights of the plaintiff.[58] The Supreme Court's proffered impetus for the doctrine of qualified immunity is the "desire to ensure that 'insubstantial claims' against government officials [will] be resolved prior to discovery."[59] The Court has explained that the doctrine balances two important interests—"the need to hold public officials accountable" and "the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[60] In practice, qualified immunity presents an almost insurmountable hurdle for civil rights plaintiffs.[61] Thus, the qualified immunity doctrine further insulates law enforcement from liability and accountability in excessive force actions.[62]

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[54] Monroe v. Pape, 365 U.S. 473 (1961); Mitchell W. Karsch, *Excessive Force and the Fourth Amendment: When Does Seizure End?*, 58 FORDHAM L. REV. 823, 825 (1990).

[55] Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1777 (2016).

[56] Sobel, *supra* note 52.

[57] *Id.*

[58] In *Harlow v. Fitzgerald*, the Supreme Court held that the constitutional right allegedly violated must have been clearly established at the time of the defendant's actions such that a reasonable person would have had knowledge of it. For a constitutional right to be clearly established, a previously decided case must involve the same specific context and conduct. This means that even where a court determines that an officer used excessive force in violation of the Fourth Amendment, it may still find that an officer is entitled to qualified immunity, and therefore not subject to penalty, simply because no previously decided case involved the same set of facts. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[59] Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Anderson v. Creighton, 483 U.S. 635, 640, n. 2 (1987)).

[60] *Id.*

[61] Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. (Sept. 14, 2020), https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure#wont-risk-liability-deter-police, *archived at* https://perma.cc/GRS3-4C69 ("In practice, [qualified immunity] is a huge hurdle for civil rights plaintiffs because it generally requires them to identify not just a clear legal *rule* but a prior case with functionally identical *facts*.").

[62] *See* Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 119 (2009).

C. The Current Standard of Analysis

The Supreme Court decided *Graham v. Connor* in 1989*,* which shaped the way that claims of excessive force under § 1983 are analyzed.[63] The plaintiff in this case, Dethorne Graham, was both Black and disabled.[64] Graham has diabetes and was experiencing hypoglycemia caused by low blood sugar at the time of the incident.[65]

On November 12, 1984, Dethorne Graham triggered police suspicion when he entered a North Carolina convenience store and then hurriedly exited.[66] Graham had entered the store in hopes of buying an orange juice to counteract an insulin reaction caused by his diabetes.[67] When he realized the line was too long, however, he returned to his friend's car and asked to be driven to a friend's home nearby.[68] The suspicious officer made an investigative stop of the vehicle about one-half mile from the store and ordered Graham and his friend to wait while the officer ascertained what happened at the convenience store.[69] Graham then exited the car, ran around it twice, and briefly passed out on the curb.[70] More officers arrived at the scene, and one rolled Graham over and tightly handcuffed him.[71] Graham's friend alerted the police that Graham was simply experiencing a "sugar reaction," to which one officer replied, "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."[72] An insulin reaction like Graham's causes the body to release adrenaline and does indeed produce symptoms similar to drunkenness, like dizziness, confusion, and difficulty speaking.[73] Ignoring his friend's pleas, officers shoved Graham face-first against the hood of the police car and threw him into the back of the vehicle.[74] He sustained a broken foot, cuts on his wrists, a bruised forehead, an injured shoulder, and permanent damage to his right ear.[75]

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[63] Osagie K. Obasogie, *The Bad-Apple Myth of Policing*, THE ATLANTIC (Aug. 2, 2019), https://www.theatlantic.com/politics/archive/2019/08/how-courts-judge-police-use-force/594832, *archived at* https://perma.cc/DBT8-DKSW.

[64] *See* Graham v. Connor, 490 U.S. 386, 388 (1989).

[65] Leon Neyfakh, *Is Juice Delayed Justice Denied?*, 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*, archived at* https://perma.cc/5422-GN4P.

[66] *Id.* at 388–89.

[67] *Id.* An insulin reaction occurs when the level of glucose in the blood is too low. Such reactions most commonly occur in people with type 1 and type 2 diabetes. Consuming a sugary food or beverage will usually relieve symptoms of low blood sugar within minutes. *Hypoglycemia*, MED BROAD., https://medbroadcast.com/condition/getcondition/hypoglycemia, *archived at* https://perma.cc/4XAW-RNWH.

[68] *Graham*, 490 U.S. at 388–89.

[69] *Id.* at 389.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Hypoglycemia*, *supra* note 67.

[74] *Graham*, 490 U.S. at 389.

[75] *Id.* at 390.

Dethorne Graham commenced an action against the officers involved, alleging that they used excessive force in violation of § 1983.[76] Following precedent set forth in *Tennessee v. Garner*,[77] the *Graham* Court analyzed the excessive force claim in light of the Fourth Amendment's prohibition against unreasonable searches and seizures.[78] In this context, a "seizure" refers to the act of using deadly force to detain, arrest, or apprehend an individual.[79] The Court conducted an inquiry as to whether the officer's actions were "objectively reasonable."[80] The Court employed a totality of the circumstances approach—considering all of the factors surrounding the incident—and listed three factors to consider when analyzing objective reasonableness: (1) the severity of the suspected crime, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.[81] The Court further explained that "the 'reasonableness' must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[82]

In conducting its objective reasonableness analysis, the *Graham* Court relied on a balancing test comparing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake."[83] Before *Graham*, a plaintiff alleging excessive use of force had the burden of proving that an officer acted "maliciously and sadistically for the very purpose of causing harm."[84] Following *Graham*, which removed the requirement to prove malicious intent, Graham's lawyer stated that the Supreme Court's decision had "considerably reduced the burden that civil rights plaintiffs had to establish."[85] Unfortunately, it would soon be revealed that in practice, the *Graham* standard provides greater protection to officers, instead of the victims of police brutality. Dethorne Graham's case was remanded to the district court, and a jury, relying on the newfound standard, determined that the officer's conduct was rea-

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[76] *Id.*

[77] Tennessee v. Garner, 471 U.S. 1, 1 (1985) (determining that "[a]pprehension by the use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement").

[78] *Graham*, 490 U.S. at 394.

[79] *Fourth Amendment Seizure of Persons*, FINDLAW, https://constitution.findlaw.com/amendment4/annotation03.html, *archived at* https://perma.cc/2AVC-YR8Q; *Garner*, 471 U.S. at 7.

[80] *Graham*, 490 U.S. at 397.

[81] *Id.* at 396.

[82] *Id.*

[83] *Id.* (internal quotations omitted).

[84] *See id.* at 386.

[85] Nate Morabito, *Before George Floyd changed the world, Dethorn Graham changed use of force as we know it*, WCNC (June 10, 2020), https://www.wcnc.com/article/news/local/before-george-floyd-changed-the-world-dethorn-graham-changed-use-of-force-as-we-know-it/275-cfd30b2a-3683-4adb-9083-5d7b6547d4ba, *archived at* https://perma.cc/QY9L-P7HS. Please note that this source misspells Graham's first name.

sonable.[86] This instantly exposed the *Graham* standard's devastating implications for individuals with disabilities: when a disability gives rise to unconventional or unfamiliar behaviors, police may respond with violence.

D. Warranting Use of Force Against the Disabled Community

The *Graham* Court explained that to determine the reasonableness of use of force, a court should determine whether the suspect posed an immediate threat to the safety of others and whether they actively resisted or attempted to evade arrest.[87] By justifying use of force when an individual seems to be posing a threat or resisting arrest, the Court conveyed its belief that an inability to act in accordance with societal norms makes an individual deserving of a greater use of force. This inappropriately presupposes that a suspect is capable of conforming to societal norms in the first place. Police officers often perceive unusual behaviors or non-compliance as threatening and intentionally evasive. People with disabilities, however, often behave unconventionally or lack the ability to comply with police demands. Consequently, the "objectively reasonable" analysis often warrants the senseless use of force against persons with disabilities. This makes simply existing in public a particularly dangerous endeavor for many people with disabilities.

i. "Immediate Threat to the Safety of the Officers or Others"

Determining whether the force used to affect a seizure was "reasonable" requires a determination of whether a reasonable officer would believe that a suspect poses an immediate threat to the safety of officers or the safety of others.[88] Many disabilities generate behaviors that are perceived as threatening but are entirely harmless. Manifestations of some disabilities, such as diabetes, cerebral palsy, and disabilities resulting from a stroke, are often incorrectly perceived as signs of intoxication or drug use.[89] Many learning and developmental disabilities are misunderstood by law enforcement as well. Learning and developmental disabilities may cause deficits in social skills, problems with impulse control, and maladaptive behaviors.[90] Some individuals with deficient social skills or poor impulse control like to

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[86] Charles Lane, *A 1989 Supreme Court Ruling is Unintentionally Providing Cover for Police Brutality*, WASH. POST (June 8, 2020), https://www.washingtonpost.com/opinions/a-1989-supreme-court-ruling-is-unintentionally-providing-cover-for-police-brutality/2020/06/08/91cc-a9a7-11ea-94d2-d7bc43b26bf9_story.html, *archived at* https://perma.cc/K9D2-QWVJ.

[87] *Graham*, 490 U.S. at 396.

[88] *Id.*

[89] Brief of ACLU, *supra* note 48, at 11–13.

[90] Henry B. Reiff, *Social Skills and Adults with Learning Disabilities*, LD ONLINE, https://www.ldonline.org/ld-topics/behavior-social-skills/social-skills-and-adults-learning-disabilities, *archived at* https://perma.cc/G3WZ-CHS8.

touch.[91] An unwanted touch, however, could easily be perceived as threatening.

Autism is another disability with manifestations that, when unrecognized by police, are easily misinterpreted as threatening.[92] Over 5.4 million adults in the U.S.—or 1 in 45–—have an autism spectrum disorder.[93] Part of the diagnostic criteria for autism is self-stimulating behavior, known as "stimming."[94] Stimming usually involves repetitive movements or sounds[95] and may include actions such as hand movements, grunting, repetitive speech, spinning, jumping, or headbanging.[96] For those who do not understand stimming, such behaviors may be upsetting, frightening, or seemingly dangerous.[97] Law enforcement, generally ignorant of self-stimulating behaviors, have escalated situations when they mistake stimming as threatening or as a sign of intoxication or drug use.[98] In 2017, an Arizona officer detained 14-year-old Connor Leibel after misinterpreting Leibel's stimming as a sign of illegal drug use.[99] When approached by the officer, Leibel, who has autism and an intellectual disability, explained that he was stimming.[100] Despite his explanation, the ensuing encounter left Leibel physically injured and emotionally traumatized.[101] Leibel's caregiver, Diane Craglow, later arrived at the scene and the following exchange took place:

> Officer: "Cause—[he was] doing something with his hands, something with his hands."

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[91] Meg Anderson, *How One Mother's Battle is Changing Police Training on Disabilities*, NPR (Apr. 13, 2019), https://www.npr.org/2019/04/13/705887493/how-one-mothers-battle-is-changing-police-training-on-disabilities, *archived at* https://perma.cc/P4Y9-W7K7.

[92] Leah Anaya, *Autism and "Stimming": What Law Enforcement Needs to Know About Autism Awareness*, L. Enf't Today (May 29, 2020), https://www.lawenforcementtoday.com/-stimming-why-autism-awareness-training-is-imperative, *archived at* https://perma.cc/U9CA-C3ZC.

[93] Michelle Diament, *CDC Researchers: Over 5 Million US Adults Have Autism*, Disability Scoop (May 13, 2020), https://www.disabilityscoop.com/2020/05/13/cdc-researchers-over-5-million-adults-autism/28327/, *archived at* https://perma.cc/ZP8M-ZWDT.

[94] Ann Pietrangelo, *Stimming: Causes and Management*, Healthline (June 28, 2019), https://www.healthline.com///, *archived at* https://perma.cc/X9KC-RWMH.

[95] *Id.*

[96] Lori Smith, *What Is Stimming?*, Med. News Today (Feb. 18, 2018), https://www.medicalnewstoday.com/articles/319714, *archived at* https://perma.cc/3K4G-BHMG.

[97] *Id.*

[98] Anaya, *supra* note 92; Kevin Kennedy, *Family of Teen with Autism Wants Justice After Buckeye Officer Detained Him*, 12 News (Sept. 21, 2017), https://www.12news.com/article/news/local/valley/family-of-teen-with-autism-wants-justice-after-buckeye-officer-detained-him/-477755097, *archived at* https://perma.cc/H2JK-6HJR.

[99] Kennedy, *supra* note 98; Leibel v. City of Buckeye, 556 F. Supp. 3d 1042 (D. Ariz. 2021).

[100] Kennedy, *supra* note 98.

[101] Victoria Albert, *Cop Thought It Was Drugs. It Was a Teen Coping With Autism: Lawsuit*, The Daily Beast (June 7, 2018), https://www.thedailybeast.com/-it-was-drugs-it-was-a-teen-coping-with-autism-lawsuit, *archived at* https://perma.cc/VZ9R-2KA2. Leibel had contusions and scrapes on his face, back, shoulders, and knees, and suffered an ankle injury which required multiple surgeries. He is also emotionally scarred—constantly reliving the event in excruciating detail and becoming fearful when meeting new men. *Id.*

> Craglow: "He's stimming."
> Officer: "Yeah, I don't know what that is."
> Craglow: "It's when you have autism, it's his nerves."
> . . .
> Craglow: "So you drove by and saw him stimming and you thought he was on drugs?"
> Officer: "A couple times, yeah."
> Craglow: "You don't know anything about autism, huh?"
> Officer: "No."[102]

Leibel, like many others, engages in stimming to calm his anxiety.[103] While self-stimulating behavior is incredibly common,[104] an ignorant officer may believe that it warrants intervention and the use of physical force.

Epilepsy is another condition characterized by behaviors are that are often misconstrued as threatening. Epilepsy is a central nervous system condition that causes abnormal brain activity leading to seizures.[105] Seizures can manifest as stiffening of the muscles, loss of muscle control, jerking muscle movements, twitches in the arms and legs, or shaking.[106] Aside from involuntary movements, epilepsy can cause temporary confusion, loss of consciousness or awareness, or feelings of anxiety and fear.[107] An officer's unfamiliarity with seizures may cause them to restrain a seizing individual, misconstruing their involuntary movements as combative.[108] Medical experts warn against restraining an individual having a seizure because it can cause increased distress and confusion.[109] As one example, officers deployed force

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[102] *Leibel*, 556 F. Supp. at 1052.

[103] *See* Lauren Rowello, *Stimming: What This Behavior Is and Why People Do It*, HEALTH (Sept. 1, 2020), https://www.health.com/condition/anxiety/what-is-stimming, *archived at* https://perma.cc/JT77-BP9S ("Stimming is a way to regulate stress and emotion.").

[104] *See* Pietrangelo, *supra* note 94 ("Almost everyone engages in some form of self-stimulating behavior. You might bite your nails or twirl your hair around your fingers when you're bored, nervous, or need to relieve tension.").

[105] *Epilepsy*, MAYO CLINIC (Oct. 7, 2021), https://www.mayoclinic.org/diseases/conditions/epilepsy/symptoms-causes/syc-20350093, *archived at* https://perma.cc/58X8-2B98.

[106] *Id.*

[107] *Id.*

[108] *Law Enforcement Training Guide: Epilepsy and Seizure Response for Law Enforcement*, EPILEPSY FOUND. & POLICE EXEC. F. 1, 3 (Apr. 2008), https://www.epilepsy.com/sites/core/files/atoms/files/Law-Enforcement-Training-Guide-PDF-3-29-10.pdf, *archived at* https://perma.cc/K42L-PXR8.

[109] *First Aid for All Seizures*, EPILEPSY SOC'Y (updated Dec. 2021), https://epilepsysociety.org.uk/about-epilepsy/first-aid-epileptic-seizures/seizure-first-aid, *archived at* https://perma.cc/UN37-MG6W. In 2012, a 17-year-old experienced a seizure and officers restrained her in an ill-informed effort to keep her from hurting herself. When the teenager regained consciousness and realized there were four officers pinning her to the ground, she was terrified and fought to get free. The officers determined that the teen had become combative and one officer put her in a headlock while another tased her. Wendy Ruderman & Abbie Vansickle, *She Was Having a Seizure. Police Shocked Her With a Taser*, MARSHALL PROJ. (Dec. 2, 2021), https://www.themarshallproject.org/2021/12/02/she-was-having-a-seizure-police-shocked-her-with-a-taser, *archived at* https://perma.cc/VXJ8-BVW2.

against an individual experiencing a seizure in *O'Doan v. Sanford*.[110] O'Doan, who is epileptic, had a seizure while taking a shower causing him to enter a state of unconsciousness, during which he left his home and wandered the streets nude.[111] When police arrived, they directed him to stop, but O'Doan, in his unconscious state, was unable to comply.[112] O'Doan allegedly balled up his fists, prompting an officer to deploy his taser, but when it malfunctioned, the officer performed a "reverse reap throw," violently throwing O'Doan to the ground.[113] O'Doan suffered lacerations and swelling to his head.[114] In a lawsuit against the officers, a Nevada district court applied the *Graham* analysis and concluded that the officers used an objectively reasonable amount of force.[115] The court explained that in his unconscious state, O'Doan could have been hurt or could have hurt others.[116] It also focused on the fact that O'Doan attempted to walk away from officers and did not respond to their commands.[117] The court did not account for O'Doan's disability in its analysis, even though officers were made aware of it at the time of the incident.[118] Because O'Doan was nude, it was readily apparent that he did not have any weapons on him. Officers could have calmly approached O'Doan, walked beside him, spoken to him calmly, and escorted him to safety. Instead, officers focused on restraining O'Doan as quickly as possible, willing to employ a taser and martial arts techniques on a disabled man to do so. Unfortunately, the *Graham* Court authorized such actions—empowering officers to react with force when interacting with individuals who have conditions that give rise to unconventional behaviors.

ii. "Actively Resisting Arrest or Attempting to Evade Arrest by Flight"

Whether a suspect is actively resisting arrest or attempting to evade arrest by flight is another factor given weighty consideration under the *Graham* analysis,[119] but certain disabilities may render a person unable to comply with law enforcement due to a lack of understanding (such as with deafness), lack of physical control (as with individuals with diabetes experiencing insulin reactions), or both.[120] The Police Executive Research Fo-

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[110] O'Doan v. Sanford, 3:17-CV-00293, 2019 WL 1386373 at *1 (D. Nev. Mar. 26, 2019), *aff'd*, 991 F.3d 1027 (9th Cir. 2021).
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at *6–7.
[116] *Id.* at *7.
[117] *Id.*
[118] *See id.* at *5.
[119] Graham v. Connor, 490 U.S. 386, 396 (1989).
[120] Harold Braswell, *Why Do Police Keep Seeing a Person's Disability as a Provocation?*, WASH. POST (Aug. 25, 2014), https://www.washingtonpost.com/posteverything/wp/2014/08/25

rum[121] has admitted that officers dealing with individuals with disabilities often misunderstand the nature of an encounter, explaining that "officers may believe that an individual is willfully disobeying their commands, when in fact the person is unable to comply because of illness or disability."[122]

People who are deaf, for example, are often perceived by officers as uncooperative, and their use of sign language is mistaken as aggressive behavior.[123] To illustrate this, consider the case of Antonio Love. In 2009, Love felt sick and entered a store bathroom.[124] When employees noticed that Love was still in the bathroom after a substantial amount of time, they called the police.[125] Police knocked and ordered Love to come out, but received no response.[126] Love was deaf and, therefore, unable to hear the knocking or commands.[127] Believing he was simply choosing not to comply, police pepper sprayed under the door, opened the door with a tire iron, and tasered Love repeatedly.[128] A judge ruled that the officers acted reasonably given the facts they knew at the time.[129] She explained that "the reasonableness of an officer's conduct is not to be judged with hindsight but from the perspective of a reasonable officer on the scene."[130] This ruling makes explicit that an individual whose abilities differ from that of general public can reasonably be subjected to police violence based solely on their differences.

Similarly, individuals with autism are often perceived as non-compliant.[131] Many individuals with autism struggle with communication and may have difficulty developing language skills or understanding what others are

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/people-with-mental-disabilities-get-the-worst-and-least-recognized-treatment-from-police/, *archived at* https://perma.cc/3BWS-V4FF.

[121] *About PERF*, Police Exec. Rsch. F., https://www.policeforum.org/about-us, *archived at* https://perma.cc/T5D7-9BZ8 ("The Police Executive Research Forum (PERF) is an independent research organization that focuses on critical issues in policing. . . . All of PERF's work benefits from PERF's status as a membership organization of police officials, academics, federal government leaders, and others with an interest in policing and criminal justice.").

[122] *Critical Issues in Policing Series: An Integrated Approach to De-Escalation and Minimizing Use of Force*, Police Exec. Rsch. F. 1, 1 (Aug. 2012), https://www.policeforum.org/assets/docs/Critical_Issues_Series/ an%20integrated%20approach%20to%20de-escalation%20and%20minimizing%20use%20of%2020force%202012.pdf, *archived at* https://perma.cc/G5T8-ZRBW.

[123] Brief of ACLU, *supra* note 48, at 10.

[124] David M. Perry & Lawrence Carter-Long, *How Misunderstanding Disability Leads to Police Violence*, The Atlantic (May 6, 2014), https://www.theatlantic.com/health/archive/2014/05/misunderstanding-disability-leads-to-police-violence/361786/, *archived at* https://perma.cc/BM4G-KFTN.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] Brendan Kirby, *Disabled Man Tasered at Dollar General: Judge Rules Mobile Police Immune*, Advance Loc. (Aug. 30, 2011), https://www.al.com/live/2011/08/judge_rules_mobile_police_immu.html, *archived at* https://perma.cc/FG2Y-7DVY.

[130] *Id.*

[131] *See Autism and Challenging Behaviors: Strategies and Support*, Autism Speaks 1, 57 (2018), https://www.autismspeaks.org/sites/default/files/2018-08/Challenging%20Behaviors%20Tool%20Kit.pdf, *archived at* https://perma.cc/SP99-G52U.

saying to them.[132] These difficulties often result from a "lack of understanding, lack of motivation, fatigue, or poor organizational or motor planning issues."[133] The facts of *Garner v. Ozark* provide an example of this.[134] The case involved 18-year-old Wynter Stokes, who left his home one evening without his mother's knowledge and wandered to a stranger's backyard.[135] Stokes has autism and is completely non-verbal.[136] An officer attempted to apprehend Stokes and eventually dispatched his canine to stop Stokes from fleeing.[137] Stokes suffered injuries requiring medical treatment and endured emotional distress and trauma from the incident.[138] Stokes' mother brought a suit alleging excessive force, but the court found that the officer was entitled to qualified immunity.[139] The court determined that the officer used reasonable force, explaining that Stokes' "patent autism could [not] be fully appreciated in the dark," and that without the knowledge that Stokes was nonverbal and autistic, the officer believed Stokes was ignoring and evading him because Stokes had committed attempted burglary.[140] The court suggested that had the officer been able to recognize that Stokes had autism, the use of force may not have been objectively reasonable.[141] Unfortunately, though, the officer assumed Stokes was capable of complying and acted accordingly. Instead of requiring officers to consider the possibility that an individual is incapable of complying, officers are authorized to operate under the assumption that all individuals are capable of compliance.

Individuals with psychiatric disabilities are another group of people who often struggle to follow officers' orders.[142] During mental health crises, these individuals are often shot or beaten when they are unable to comply with police orders[143] and it is estimated that up to fifty percent of fatal police encounters involve individuals with psychiatric disabilities.[144] In March 2020, one such encounter made national news. Daniel Prude, a 41-year-old Black man, was in the midst of a mental health crisis when he suddenly ran

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[132] *Autism Spectrum Disorder: Communication Problems in Children*, NAT'L INST. ON DEAFNESS & OTHER COMMC'N DISORDERS (last updated Apr. 13, 2020), https://www.nidcd.nih.gov/health/autism-spectrum-disorder-communication-problems-children, *archived at* https://perma.cc/C4JS-HPPG.

[133] AUTISM SPEAKS, *supra* note 131, at 9.

[134] Garner v. City of Ozark, 1:13-CV-90, 2015 WL 728680 (M.D. Ala. Feb. 19, 2015).

[135] *Id.* at *2.

[136] *Id.* at *1.

[137] *Id.* at *2.

[138] *Id.* at *2.

[139] *Id.* at *7.

[140] *Id.* at *6.

[141] See *id.* at *10–11 (explaining that it would have been unreasonable under the circumstances for the officers to have been required to assess whether Stokes had autism or some other disability).

[142] Brief of ACLU, *supra* note 48, at 17.

[143] *Id.* at 17.

[144] Kelley Bouchard, *Across Nation, Unsettling Acceptance When Mentally Ill in Crisis are Killed*, PORTLAND PRESS HERALD (Dec. 9, 2012), https://www.pressherald.com/2012/12/09/shoot-across-nation-a-grim-acceptance-when-mentally-ill-shot-down/, *archived at* https://perma.cc/5QTP-NXFP.

out of his brother's home and into the night.[145] Prude's brother called 9-1-1, seeking help for his sibling who had been released from the hospital after undergoing a psychiatric evaluation just one day earlier.[146] When officers found Prude around 3:00 AM, he was walking naked in the street.[147] An officer pulled out his taser and ordered Prude to get on the ground and place his hands behind his back.[148] Prude immediately complied and was handcuffed.[149] Officers then left Prude lying naked on the cold, wet ground as snow continued to fall.[150] Understandably growing agitated, Prude began spitting in the street.[151] Although he was not spitting at the officers, who were a few feet away, an officer placed a spit sock over Prude's head.[152] After having his face covered, Prude grew upset and repeatedly asked officers to remove the spit sock and to give him their mace, handcuffs, and guns.[153] Then Prude, who was still handcuffed on the ground, attempted to stand up but was immediately pinned to the ground by officers.[154] One officer knelt on Prude's back, while another pushed his face into the pavement.[155] Prude begged officers to get off of him, whimpering and crying as his speech started becoming garbled, but an officer threatened that he would be tased if he did not relax.[156] Prude's head was held to the ground for two minutes and fifteen seconds[157] while officers mocked him and he slowly stopped being able to breathe.[158] Medics resuscitated him, but there was no sign of brain activity and Prude's family took him off life support one week later.[159] The medical examiner ruled his death a homicide, caused in part by "complications of asphyxia in the setting of physical restraint."[160] Daniel Prude's brother explained, "I placed a phone call to get my brother

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[145] Sarah Maslin Nir, *Rochester Officers Will Not Be Charged in Killing of Daniel Prude*, N.Y. Times (Feb. 23, 2021), https://www.nytimes.com/2021/02/23/nyregion/daniel-prude-rochester-police.html, *archived at* https://perma.cc/TF2H-W63Q.

[146] *Id.*

[147] Meg O'Connor, *His Brother Called for Help After He Was Acting Strangely. Police Knelt On Him Until He Was Brain Dead*, The Appeal (Sept. 2, 2020), https://theappeal.org/daniel-prude-rochester-new-york-police-killing, *archived at* https://perma.cc/9CGL-9SS7.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] Michael Gold & Troy Closson, *What We Know About Daniel Prude's Case and Death*, N.Y. Times (Apr. 6, 2021), https://www.nytimes.com/article/what-happened-daniel-prude.html, *archived at* https://perma.cc/E3RN-NRSU.

[152] O'Connor, *supra* note 147.

[153] *Id.*

[154] Gold & Closson, *supra* note 151.

[155] *Id.*

[156] O'Connor, *supra* note 147.

[157] Brian Sharp, *Daniel Prude: One Year After His Death Became Public Fallout Continues*, Democrat & Chron. (Sept. 2, 2021), https://www.democratandchronicle.com/story/news/2021/09/02/daniel-prude-one-year-after-his-death-became-public-fallout-continues-rpd-rochester-ny/, *archived at* https://perma.cc/VGT3-KLFN.

[158] O'Connor, *supra* note 147.

[159] *Id.*

[160] Maslin Nir, *supra* note 145.

help . . . not to have my brother lynched."[161] Prude's death is one of the many tragedies resulting from "compliance culture"—police demand compliance and when an individual fails to comply, the police deploy force.[162] The Prude family has a pending civil suit against the city of Rochester, New York.[163] Unfortunately, the *Graham* Court's objective reasonableness standard and endorsement of compliance culture may prove detrimental to their case.

II. *Graham v. Connor*: Its Limitations and Legacy

The *Graham* decision offered very little guidance for determining whether a seizure was "reasonable," simply noting that Fourth Amendment reasonableness is "not capable of precise definition or mechanical application."[164] While the Court purportedly created an objective reasonableness standard, the standard is perverted by excessive deference to officers and a complete disregard of disability and its pervasiveness. The standard the court promulgated makes clear that the Court depended on the medical model of disability, viewing Graham's diabetes as a medical abnormality which could be ignored for purposes of creating a prevailing standard.

Theories of disability typically fall within two conceptual models—the social model and medical model.[165] The social model focuses on the environment, which was tailored for non-disabled individuals, as the source of limitation for persons with disabilities.[166] The recent shift to working and attending school online as a result of the COVID-19 pandemic helps illustrate this concept. Dr. Robyn Powell, a disability law scholar with a disability, explained, "[p]eople with disabilities have been told for years we can't work from home, or attend classes via Zoom. But now everyone's doing it."[167] Once non-disabled individuals developed a need to work and attend school remotely, the ability was suddenly accessible. The limitation explained by Dr. Powell exemplifies the social model of disability as it stemmed from society's unwillingness to accommodate, not from individual incapacity. The medical model, in contrast, views those with disabilities as sick individuals in need of treatment or a cure.[168] As such, it places responsi-

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[161] *Id.*

[162] Abrams, *supra* note 22.

[163] Sharp, *supra* note 157.

[164] Graham v. Connor, 490 U.S. 386, 396 (1989) (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

[165] *Medical and Social Models of Disability*, Off. Dev. Primary Care, https://odpc.ucsf.edu/clinical/patient-centered-care/medical-and-social-models-of-disability, *archived at* https://perma.cc/542E-HPS8.

[166] *Id.*

[167] Karen Shih, *Amplifying the Voices of People with Disabilities During the COVID-19 Pandemic*, Brandeis Heller Sch. Soc. Pol'y and Mgmt., https://heller.brandeis.edu/news/items/releases/2020/powell-covid-qa.html, *archived at* https://perma.cc/7CX5-XNJL.

[168] Kanter, *supra* note 30, at 419.

bility on the individual to remedy their "defect" so that they may fit into "normal" society.[169]

Framing disability solely as a personal misfortune, rather than socially caused, frees society from any obligation to provide remediation.[170] Therefore, when society does provide assistance or accommodations, it can be viewed as charity or special treatment, rather than as antidiscrimination measures intended to secure justice and equal access.[171] Consequently, the medical model authorizes the Court to dismiss disability, rather than incorporate it into its jurisprudence. The *Graham* Court did just that, completely ignoring Graham's disability despite the fact that it served as the impetus for the challenged action.

A. The Graham Court and its Failure to Account for Disability

In formulating the objective reasonableness standard set forth in *Graham*, the Supreme Court relied on the medical model of disability. Graham's insulin reaction was the driving force behind his seemingly threatening and non-compliant behavior, yet the majority opinion only briefly mentions diabetes in its recitation of the facts and fails to consider it in any part of its analysis.[172] While the case was on appeal in the Fourth Circuit, a family physician serving as an expert witness testified that diabetes is "quite common."[173] This testimony implies that what happened to Graham could easily happen to others who share his "quite common" condition. Despite the physician's testimony about the pervasiveness of diabetes and the disability's salience in the record, the Court ignored the opportunity to create a standard that is mindful of disability, its pervasiveness, and its many manifestations.[174] Instead, the resulting standard justifies law enforcement's excessive use of force against individuals who seem threatening or evasive—two characteristics often misattributed to those with disabilities.[175] Indeed, these are the very characteristics that led officers to use physical force against Graham, suggesting that the Court regarded the situation as an isolated occurrence. Dethorne Graham was a mere anomaly in the eyes of the law, not the "normal" individual which law and society naturally accommodate. The Court seemingly relegated Graham, and all individuals with disabilities, to a subclass of humans deserving of fewer constitutional protections. Perhaps it is unsurprising, then, that thirty to fifty percent of all use of force incidents

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[169] *Id.* at 419–20.

[170] Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 652–53 (1999).

[171] *Id.* at 652; Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1075 (2004).

[172] Graham v. Connor, 490 U.S. 386, 388–89 (1989).

[173] Petition for Writ of Certiorari, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571).

[174] *See Graham*, 490 U.S. at 386.

[175] *See id.* at 396.

involve an individual with a disability.[176] Officers simply are not required to accommodate this group of individuals, or even consider their existence. While surely not its primary objective, the *Graham* Court's willful ignorance in setting forth its objective reasonableness standard has delegitimized individuals with disabilities while justifying police violence against them.[177]

B. Determining the "Reasonableness" of Officer Use of Force

The *Graham* Court issued vague and deficient guidance for assessing the reasonableness of an officer's use of force. As previously mentioned, the Court explained that determining whether an officer's use of force was "reasonable" under the Fourth Amendment requires a balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake."[178] Such a balancing test is common to most Fourth Amendment analyses and weighs the interests of the government against the violation of an individual's constitutional rights.[179] In conducting these analyses, the Supreme Court often fails to "accurately identify or compare the relevant competing concerns," providing excessive consideration of government interests, while minimizing the interests of civil rights plaintiffs.[180] The Court typically balances an individual's interest in bodily autonomy and freedom from physical and emotional harm against the government's interest of effective law enforcement.[181] Such balancing is frequently criticized as being conducted "with 'the judicial thumb . . . planted firmly on the law enforcement side of the scales.' "[182]

i. The Lenient "Reasonable Officer" Standard

In the distinct context of excessive force, this imbalance is amplified by the *Graham* Court's implementation of the "reasonable officer" standard, as opposed to the "reasonable person" standard that is commonly employed in other areas of the law. The Court explained that the " 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene."[183] While the "reasonable officer" standard was an entirely new concept,[184] the Court neglected to explain how it differed from the "reasonable person" standard and provided no distinct guidance for its fu-

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[176] *Ruderman White Paper*, *supra* note 29, at 7.
[177] *See* Kanter, *supra* note 30, at 433.
[178] *Graham*, 490 U.S. at 396 (internal quotations omitted).
[179] *Id.*
[180] Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. Rev. 1173, 1176, 1195 (1988).
[181] *Id.* at 1183.
[182] *Id.* at 1195 (quoting United States v. Sharpe, 470 U.S. 675, 720 (1985) (Brennan, J., dissenting)).
[183] *Graham*, 490 U.S. at 396.
[184] *See* Mitchell Zamoff, *Determining the Perspective of A Reasonable Police Officer: An Evidence-Based Proposal*, 65 Vill. L. Rev. 585, 599 (2020).

ture application. As a result, courts are still grappling with how to determine the perspective of a reasonable police officer.[185] The sole instruction provided by the *Graham* Court is that the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving."[186] Working within the parameters of *Graham*, the majority of courts determine officer reasonableness by conducting inquiries that focus solely on the plaintiff's conduct and the stressful and dangerous nature of policing, while ignoring other pertinent factors.[187] The outcome is a "reasonable officer" standard that is substantially more lenient than the "reasonable person" standard.[188] This more relaxed standard suggests that officers are trained, handed guns, granted enormous amounts of authority, and then expected to choke under the pressure—acting less reasonably than the typical reasonable person. The propensity to rely solely on the plaintiff's conduct and the stressful and dangerous nature of policing, while already troubling, is compounded by the Court's reliance on a number of inaccuracies that further subverts the courts' focus on the plaintiff's conduct and the dangers of policing.

ii. The Court's Reliance on Falsehoods

Generally, courts rely on facts that fall into one of two categories: adjudicative facts and legislative facts.[189] Law professor and former police officer Seth W. Stoughton[190] explains that while adjudicative facts are case-specific, legislative facts are "generalized facts about the world" that a court asserts and uses as a factual basis for its constitutional rules.[191] Such generalizations relied on by the Court are often incomplete and inaccurate.[192] Inaccurate legislative facts tend to result in ill-fitting rules that simply do not align with reality.[193] In *Graham*, the Court relied on at least two inaccurate

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[185] *See id.* at 599, 608–33.

[186] *Graham*, 490 U.S. at 396–97; *see also* Zamoff, *supra* note 184, at 599.

[187] Zamoff, *supra* note 184, at 590, 600.

[188] *Id.* at 608.

[189] Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 849 (2014).

[190] Stoughton's unique position as both a legal scholar and former officer strengthens his ability to critically analyze police use of force and the jurisprudence of the use of force. Stoughton spent five years as an officer at the Tallahassee Police Department before pursuing a career in law. Now a professor at the University of South Carolina School of Law, he has become a distinguished scholar in the areas of police misconduct, use of force, and use of force review. In the recent trial of Derek Chauvin, who was convicted for murdering George Floyd, Stoughton testified as a use of force expert for the prosecution. *Directory: Seth W. Stoughton*, UNIV. S.C., https://sc.edu/study/colleges_schools/law/faculty_and_staff/directory/stoughton_seth.php, *archived at* https://perma.cc/HC42-9Y6T.

[191] Stoughton, *supra* note 189, at 849.

[192] *Id.*; *see also* Ryan Gabrielson, *It's a Fact: Supreme Court Errors Aren't Hard to Find*, PROPUBLICA (Oct. 27, 2017), https://www.propublica.org/article/supreme-court-errors-are-not-hard-to-find, *archived at* https://perma.cc/73WM-L8DV (describing a number of instances where the Supreme Court relied on inaccurate legislative facts).

[193] Stoughton, *supra* note 189, at 851.

legislative facts: (1) that police violence against individuals perceived by officers as threatening or evasive is "reasonable," and (2) that officers typically use violence in situations requiring "split-second judgments." These fallacies further skew the determination of whether the officers' actions are "objectively reasonable."[194]

Through its jurisprudence, the Supreme Court has created a double standard in which the reasonable lay person must be "a paragon of self-control and rationality," while the reasonable officer is "allowed to have average perceptions, knowledge, emotions, or behavior even when these are flawed in some way."[195] A reasonable officer may assume the worst-case scenario, regardless of the facts of the situation.[196] They may "succumb to stress, anxiety, disorientation, or pressure, but lay people must lack or overcome these emotions to be considered reasonable."[197] This discrepancy is only exacerbated by the multitude of disabilities that affect the population.

In conducting its balancing of interests, the Court accounts for an officer's mistakes or misperceptions,[198] while a suspect who deviates from the "norm" is subject to state-sanctioned violence.[199] Therefore, the Court is relying on the generalization that the typical subject will not act in ways that are deemed threatening or evasive, unless they are individuals against whom police violence would be justified. This generalization, or legislative fact, is undoubtably false given the pervasiveness of disability. The Court assumes that these are appropriate indicators of behavior that require an additional level of force, but as previously mentioned, such behaviors are often manifestations of a variety of disabilities. While it failed to account for disability, the Court places emphasis on the fact that "police officers are often forced to make split-second judgments," affording them greater deference because of the need to act fast.[200] This "fact," however, is also inaccurate.

Graham's emphasis on "split-second judgments" greatly favors a finding that an officer's use of force was reasonable because, as the Court believes, effective law enforcement relies on the ability to act fast.[201] However, "only a very small percentage of use of force incidents resemble the Court's intuitions, suggesting that the standard used to review police violence may not often fit the circumstances of the incident itself."[202] Further, the vast majority of the time, officers use force aggressively, not defensively, and

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[194] *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989).

[195] Susan F. Mandiberg, *Reasonable Officers vs. Reasonable Lay Persons in the Supreme Court's* Miranda *and Fourth Amendment Cases*, 14 Lewis & Clark L. Rev. 1481, 1483 (2010).

[196] *Id.*

[197] *Id.* at 1518.

[198] Graham v. Connor, 490 U.S. 386, 396 (1989).

[199] *Id.* (noting that the "reasonable person" standard is used "normatively" and holds individuals to a higher standard than that of the average person).

[200] *Id.* at 397.

[201] Stoughton, *supra* note 189, at 852.

[202] *Id.* at 852.

with a degree of premeditation and low levels of resistance.[203] As such, the Court's immense emphasis on split-second judgments is incredibly inappropriate, serving to further undermine constitutional rights.

C. Lower Courts' Attempts to Make Excessive Force Jurisprudence More Inclusive

Some courts have explicitly accounted for disability in civil actions for excessive use of force. These efforts are limited in their efficacy though, because they only provide protection when an officer is aware of a suspect's disability and its manifestations. When an individual's disability is misunderstood or simply not readily apparent, officers in these jurisdictions may still act under the presumption that any given person is free from a disability. While explicitly accounting for disability is an improvement, many individuals with disabilities continue to fall through the cracks when their disability is invisible or simply not detected by officers. A brief examination of courts' efforts reveals this persistent problem.

In the § 1983 action brought by Ethan Saylor's parents, the court resolved to account for Saylor's disabilities in conducting its analysis.[204] The court made clear, however, that such consideration would not be given had the officers been unaware or unable to appreciate his disability.[205] Saylor's disability was readily apparent as he had physical features typical of individuals with Down syndrome.[206] Further, his aide informed officers of his disability and its behavioral symptoms.[207] The deputies filed a motion for summary judgment citing, amongst other things, a binding Fourth Circuit case holding that "in the midst of a rapidly escalating situation," an officer cannot be expected to "diagnose" an individual's disability because "the volatile nature of a situation may make a pause for . . . diagnosis impractical and even dangerous."[208] The district court, in denying the deputies' motion to dismiss, noted that there was no need for a diagnosis since Saylor's disability was known and that the rapid escalation of the incident was the result of the deputies' actions, not Saylor's.[209] The court went on to explain that "a detainee's known or evident disability is part of the Fourth Amendment circumstantial calculus."[210] A final decision was not issued in this suit as a $1.9

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[203] *Id.* at 868.

[204] Est. of Robert Ethan Saylor v. Regal Cinemas, Inc., CV WMN-13-3089, 2016 WL 4721254, at *1 (D. Md. Sept. 9, 2016), *aff'd sub nom.* Est. of Saylor v. Rochford, 698 Fed. Appx. 72 (4th Cir. 2017) (unpublished).

[205] *Id.* at *14.

[206] *Id.* at *2.

[207] *Id.* at *3.

[208] *Id.* at *9.

[209] *Id.*

[210] *Id.* at *9 (citing Bates *ex rel.* Johns v. Chesterfield Cty., Va., 216 F.3d 367, 373 (4th Cir. 2000)).

million settlement was reached.[211] The Court's pre-trial determinations are revealing though, articulating the different treatment for plaintiffs with known disabilities and those with unknown disabilities.

As another example of an insufficient judicial effort to account for disability, the Ninth Circuit held in *Deorle v. Rutherford* that "when it is or should be apparent that an individual is emotionally disturbed, this information must be considered in determining the reasonableness of force used by police officers."[212] The court's holding expands protections for civil rights litigants, explaining that the governmental interest in reacting with physical force is diminished when officers are confronted by an individual with a psychiatric condition.[213] A similar approach was applied in *Champion v. Outlook Nashville, Inc.*, a Sixth Circuit case in which physical force was deployed against an individual with autism.[214] While officers were alerted that the individual was "mentally ill," they were unaware that he had autism and was nonverbal and nonresponsive. Nonetheless, the court wrote:

> It cannot be forgotten that the police were confronting an individual whom they knew to be mentally ill or [disabled][215], even though the Officers may not have known the full extent of Champion's autism and his unresponsiveness. The diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force exerted.[216]

The court's consideration of intellectual disability and diminished capacity is noteworthy, but still inadequate, since it does not extend to cases in which officers are ignorant of an individual's disability.[217] While these cases are a step in the right direction, they simply do not go far enough. Inconsistent and opaque requirements that officers account for disability only when it is readily apparent provide no protection for individuals with disabilities in situations where their disability is not discernable.

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[211] Vargas, *supra* note 13.

[212] Kelley B. Harrington, *Policing Reasonable Accommodations for Individuals with Disabilities*, U.C. Davis L. Rev. 1361, 1381 (citing Deorle v. Rutherford, 272 F.3d 1272, 1283 (9th Cir. 2001)).

[213] *Deorle*, 272 F.3d at 1283.

[214] Champion v. Outlook Nashville, Inc., 380 F.3d 893 (6th Cir. 2004).

[215] The court used the term "retarded," which I have omitted and replaced with "disabled." In 2010, the passage of Rosa's Law removed the terms "mental retardation" and "mentally retarded" from federal health, education, and labor policy and replaced them with "individual with an intellectual disability" and "intellectual disability." While the words "retardation" and "retarded" were originally clinical terms, they have developed a negative connotation due to widespread use as derogatory and insulting slurs. Removal of these words promotes respect and human dignity for those with intellectual disabilities. *Rosa's Law Signed Into Law by President Obama*, Special Olympics https://www.specialolympics.org/stories/news/rosas-law-signed-into-law-by-president-obama, *archived at* https://perma.cc/9E29-CSU6.

[216] *Champion*, 380 F.3d at 904.

[217] *Id.*

In 2017, the Sixth Circuit tailored the *Graham* standard for situations in which there is a medical emergency, but no suspected crime, no allegations of resisting of arrest, and no suspected threat to officers or others.[218] The case, *Estate of Hill v. Miracle*, involved Hill, who experienced a diabetic emergency in his home due to a low blood-sugar level.[219] His girlfriend called 9-1-1 for an ambulance and four paramedics arrived.[220] As paramedics attempted to prick Hill's finger, he became agitated and combative[221]—common behaviors of someone experiencing low blood-sugar.[222] An officer arrived at the home as paramedics attempted to insert an intravenous catheter into Hill's arm.[223] Hill was aggressive and resisted paramedics' efforts.[224] By the time the catheter was inserted, Hill was completely disoriented.[225] He swung a fist at a paramedic and then ripped the catheter from his arm.[226] As he began to kick and swing, the officer deployed his taser directly to Hill's thigh.[227] Hill filed suit alleging that the officer used excessive force in violation of the Fourth Amendment by deploying his taser.[228] The court set forth the following standard:

> Where a situation does not fit within the *Graham* test because the person in question has not committed a crime, is not resisting arrest, and is not directly threatening the officer, the court should ask:
> (1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?
> (2) Was some degree of force reasonably necessary to ameliorate the immediate threat?
> (3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)?
> If the answers to the first two questions are "yes," and the answer to the third question is "no," then the officer is entitled to qualified immunity.[229]

This standard, though intended specifically for medical emergencies, provides a more inclusive standard than the one set forth in *Graham* as it recog-

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[218] Est. of Hill v. Miracle, 853 F.3d 306, 314 (6th Cir. 2017).
[219] *Id.* at 310.
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.* at 310–11.
[228] *Id.* at 311.
[229] *Id.* at 314.

nizes the effect of an individual's condition on their outward behavior and acknowledges a societal duty to accommodate. By judging not whether the force was "objectively reasonable," but whether it was "reasonably necessary," the court strays from its determinations on specific characteristics such as non-compliance and instead takes a more inclusive approach that determines the threat and the most narrowly tailored way to ameliorate it.[230] While the decisions discussed in this section constitute minor advancements for civil rights plaintiffs with disabilities, minor advancements are not enough. Many individuals with disabilities are under the constant threat of police violence every time they leave their homes and attempts to remedy this injustice should not withhold protections from individuals whose disabilities are not quite visible enough.

D. The ADA's Failure to Remedy Graham

One year after *Graham*, Congress passed the Americans with Disabilities Act ("ADA")—a comprehensive piece of legislation dedicated to creating an inclusive environment that accommodates, rather than limits, individuals with disabilities.[231] While the ADA might have the potential to reduce the inequities imposed by *Graham*, the applicability of the Act to police interactions remains unresolved. Title II of the ADA declares that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[232] The Act endeavored to guarantee equal opportunities for individuals with disabilities, mandating that public entities make reasonable accommodations that adapt to the needs of individuals with disabilities, unless such accommodation would constitute an "undue burden."[233] Unfortunately, the ADA's applicability in the context of excessive force is unknown because the Court has never answered whether the ADA requires police officers to accommodate disability when effectuating an arrest.[234] The uncertainty of the Act's applicability lies in whether an arrest is a service, program, or activity of a public entity under the meaning of Title II.[235] Circuit courts remain divided on the issue, yet the Supreme Court has failed to resolve the split.[236] In 2015, the Supreme Court had the opportunity in *City*

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[230] *Id.*

[231] *See* Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LABOR L. 213, 214–217 (1997).

[232] 42 U.S.C. § 12132.

[233] 42 U.S.C. § 12182(b)(2)(A)(ii)(iii).

[234] Robyn Levin, *Responsiveness to Difference: ADA Accommodations in the Course of an Arrest*, 69 STANFORD L. REV. 269, 269 (2017).

[235] *See* Taylor Pugliese, Note, *Dangerous Intersection: Protecting People with Mental Disabilities from Police Brutality during Arrests Using the American with Disabilities Act*, 46 HOFSTRA L. REV. 765, 783 (2017).

[236] Levin, *supra* note 234, at 269.

& County of San Francisco, California v. Sheehan to definitively answer whether the ADA applies to the effectuation of an arrest.[237] Sheehan, the respondent, sued the city alleging that its officers violated Title II of the ADA by arresting her without accommodating her disability.[238] The Supreme Court, however, dismissed the issue, deeming certiorari improvidently granted and offering no insight as to the ADA's application in arrest situations.[239]

While the Supreme Court failed to answer whether the ADA applies in arrest situations, some lower federal courts have answered affirmatively. The courts that apply it, however, differ in their application. The Fifth Circuit, for example, held in *Hainze v. Richards* that "Title II does not apply to an officer's on-the-street responses to reported disturbances . . . prior to the officer securing the scene and ensuring that there is no threat to human life."[240] This determination precluded the application of Title II in the particular case, but suggested that if the scene had been secure and there was no threat to human life, the officers would have been expected to accommodate the suspect's disability.[241] While the Fifth Circuit would authorize application of Title II to arrests in such instances, it considers exigent circumstances a complete bar to such claims.[242] In practice, this scheme would likely result in similar out-

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[237] Harrington, *supra* note 212, at 1363.

[238] Sheehan is mentally ill and threatened to kill her social worker. Police were dispatched to escort Sheehan to a facility for evaluation and treatment, but Sheehan grabbed a knife when officers entered her room. Officers retreated and closed the door, but later reentered without considering how they could accommodate her disability. As Sheehan was still holding the knife, the officers deployed pepper spray and when that proved ineffective, they shot her multiple times. San Francisco v. Sheehan, 135 S. Ct. 1765, 1769–71 (2015).

[239] *Id.* at 1778. The Court granted certiorari in *Sheehan* on the understanding that it would argue "that Title II does not apply when an officer faces an armed and dangerous individual." *Id.* at 1768. After certiorari was granted, however, San Francisco relied on an entirely different argument. *Id.* at 1772. Instead, it focused on whether respondent was a "qualified individual" within the meaning of the ADA, citing a regulation asserting that Title II "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others." *Id.* 1773. Further, neither party addressed the question of "whether a public entity can be liable for damages under Title II for an arrest made by its police officers." *Id.* While both parties agreed that a "[public] entity can be held vicariously liable for money damages for the purposeful or deliberately indifferent conduct of its employees," the Court had never decided the issue and declined to do so "in the absence of adversarial briefing." *Id.*

[240] Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000). Officers were dispatched to a parking lot after receiving a call requesting that they transport the caller's suicidal nephew to a mental hospital for treatment. *Id.* at 797. When officers arrived, Hainze approached carrying a knife and was subsequently shot. *Id.*

[241] Pugliese, *supra* note 235, at 783–84.

[242] Levin, *supra* note 234, at 286. *See also Exigent Circumstances*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/exigent_circumstances#:~:text=Exigent%20circumstances%20%2D%20%22circumstances%20that%20would,some%20other%20consequence%20improperly%20frustrating, *archived at* https://perma.cc/M3LX-JKWD (defining exigent circumstances as "circumstances that would cause a reasonable person to believe that . . . [relevant prompt action] was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts").

comes as *Graham*. Officers could allege exigent circumstances, like a misperceived threat engendered from an individual's disability, and be absolved from the duty to accommodate. Unlike the Fifth Circuit, some courts apply the ADA to all arrest situations regardless of the presence of exigent circumstances.

The Fourth,[243] Ninth,[244] and Eleventh[245] Circuits, for example, apply the ADA to arrests generally by integrating the Act into the objective reasonableness analysis.[246] These courts consider exigent circumstances as factors which may render accommodations "unreasonable."[247] *Bircoll v. Miami-Dade County* sets that precedent in the Eleventh Circuit.[248] Bircoll, the plaintiff, is a deaf man who was arrested for driving under the influence.[249] At the time of the incident, he was wearing a hearing aid that provided twenty percent hearing capacity.[250] The plaintiff relied heavily on lip reading, but due to the lack of lighting, it was difficult for him to understand the officer's instructions during the field sobriety test.[251] Bircoll asked the officer to "call somebody to help [him] out," but the officer did not do so.[252] The court relied on a number of factors, including the public safety concerns of DUI activity and the "already onerous tasks of police on the scene" in determining that while the ADA applies, the exigent circumstances rendered an accommodation unreasonable.[253] Once more, the resulting standard is one that provides substantial deference to police while minimizing the interests of a plaintiff with disabilities.[254] The court also neglected to discuss Bircoll's interest in being able to properly understand the officer before taking a field sobriety test, the failure to comply with which could have serious consequences.[255] Such cases reveal that while the ADA was a promising piece of legislation, courts continue to apply it in ways that undermine its purported goals of eliminating discrimination and providing equal opportunities.

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[243] Waller v. City of Danville, 556 F.3d 171, 175 (4th Cir. 2009).

[244] Sheehan v. City & County of San Francisco, 743 F.3d 1211, 1217 (9th Cir. 2014), *rev'd in part*, *cert. dismissed as improvidently granted in part*, *and remanded to* 135 S. Ct. 1765 (2015).

[245] Bircoll v. Miami-Dade County, 480 F.3d 1072, 1085 (11th Cir. 2007).

[246] Conor Gaffney, *Arrests and the Americans with Disabilities Act: Towards a Unitary Reasonableness Standard*, N.Y.U. L. Moot Ct. Bd. Proc. (Apr. 30, 2018), https://proceedings.nyumootcourt.org/2018/04/arrests-and-the-americans-with-disabilities-act-towards-a-unitary-reasonableness-standard/, *archived at* https://perma.cc/PF7D-8ALM.

[247] *Id.*

[248] *See* Levin, *supra* note 234, at 287.

[249] *Bircoll*, 480 F.3d at 1075, 1078.

[250] *Id.* at 1075–76.

[251] *Id.* at 1075–77.

[252] *Id.* at 1077.

[253] *Id.* at 1085.

[254] *Id.*

[255] *Id.* at 1085–86.

III. The Path Forward: Judicial Acceptance of the Socio-Political Model

Proper reform of excessive use of force jurisprudence requires the Court to accept the socio-political model of disability. Throughout the 1970s and 1980s, when the disability rights movement generated formative change,[256] a main feature of the movement was a conscious shift from the medical model to the socio-political model of disability. The socio-political model recognizes that many of the supposed "problems" associated with disabilities stem from barriers that the external environment imposes.[257]

One leading disability rights scholar, Harlan Hahn, argues that there is a dire need for courts to accept the socio-political model of disability.[258] Embracing this model requires an acknowledgment that people with disabilities are entitled to legal and constitutional protections.[259] By dismantling the medical model, the "solution" to disability no longer lies in medical treatment and remediation, but in social and political advancements to adapt the world to the needs of people with disabilities.[260] An individual would not need to rely on a cure or treatment to be free from discrimination, but could meaningfully participate in society as they are.[261]

If the Court were to embrace the socio-political model of disability, it would be an important step in coming to view people with disabilities beyond the parameter of "other." Rosemarie Garland-Thomson, a leader in disability justice, explained, "[i]magining disability as ordinary, as the typical rather than the atypical human experience, can promote practices of equality and inclusion that begin to fulfill the promise of a democratic order."[262] Imagining disability as ordinary will be difficult, as the medical model's focus on abnormality is so deeply entrenched in the American psyche. Yet with fifteen percent of the world living with disabilities,[263] or an estimated one billion people, disability is far from exceptional. When considering it in the context of the pervasiveness of disability and the fact that

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[256] *See* Julia Carmel, *'Nothing About Us Without Us': 16 Moments in the Fight for Disability Rights*, N.Y. Times, https://www.nytimes.com/2020/07/22/us/ada-disabilities-act-history.html, *archived at* https://perma.cc/N5SC-3J5M.

[257] Rovner, *supra* note 171, at 1051–52.

[258] Harlan Hahn, *Toward a Politics of Disability: Definitions, Disciplines, and Policies*, 22 Soc. Sci. J. 87, 100 (1985).

[259] *Id.* at 94.

[260] Kanter, *supra* note 30, at 408.

[261] Deborah Kaplan, *The Definition of Disability: Perspective of the Disability Community*, 3 J. Health Care L. & Pol'y 352, 353, 355 (2000).

[262] Rosemarie Garland-Thomson, *Seeing the Disabled: Visual Rhetorics of Disability in Popular Photography*, *in* New Disability History: American Perspectives 335, 372 (Paul Longmore & Lauri Umansky, eds., 2001).

[263] *Disability and Health*, World Health Org. (Dec. 1, 2020), https://www.who.int/en/news-room/fact-sheets/detail/disability-and-health, *archived at* https://perma.cc/JA59-4BZD.

any individual could develop or experience disability at any given moment,[264] the notion becomes easier to digest.

A. Reconsidering Reasonableness

First and foremost, the Court must stop focusing on an officer's perception of threat or evasiveness. As discussed above, the emphasis on these factors has proven to be incredibly harmful to persons with disabilities. Officers in the United States are incredibly undertrained[265] and enmeshed in a toxic policing culture. As Chuck Wexler, Executive Director of the Police Executive Research Forum, explains, "[p]olice are taught in the academy [that] police always have to win."[266] This adversarial identity causes officers to incorrectly perceive threats,[267] so it is far from "objective." By eliminating the focus on an officer's perception of threat or evasiveness, the Court may be able to impose a standard that is far more able to achieve its goal of being objective and reasonable.

Furthermore, the Court could "incorporat[e] the concepts of imminence, necessity, and proportionality that are part of a justification defense in criminal law" to their determinations of Fourth Amendment "reasonableness."[268] The inclusion of these concepts would hopefully reduce use of force in all situations, including those provoked or exacerbated by the manifestation of disability. Whether an officer knows, should know, or does not know of an individual's disability would be irrelevant because the requirements would apply regardless. People with disabilities, therefore, would not forfeit constitutional protections every time their non-normative behavior grabs the attention of police. In essence, the universal incorporation of these concepts to the *Graham* objective reasonableness standard would implicate the socio-political model of disability by naturally accommodating persons with disabilities, instead of disregarding them as abnormal. The success of such a reform, however, is predicated on the Court's true acceptance of the socio-political model, such that it does not discriminately apply imminence, necessity, and proportionately in situations involving persons with disabilities. While the incorporation of these concepts would strengthen Fourth Amendment protections, the Fourth Amendment would still fail to address systemic harms.

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[264] *Disability & Health Overview*, *supra* note 27.
[265] Khazan, *supra* note 38.
[266] *Id.*
[267] *Id.*
[268] *See* Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of* Graham v. Connor, 112 Nw. U. L. Rev. 1465, 1479 (2019) (citing Rachel A. Harmon, *When Is Police Violence Justified?*, 102 Nw. U. L. Rev. 1119, 1122–23 (2008)).

B. Application of the Fourteenth Amendment

Another way in which the Court may begin to treat disability as ordinary is to extend the Fourteenth Amendment's Equal Protection Clause to claims of excessive use of force.[269] Scholars Osagie K. Obasogie and Zachary Newman criticize the Court for "*individualizing*" the Fourth Amendment, such that use of force doctrine prioritizes individual rights to the exclusion of systemic and group harms.[270] The *Graham* Court's reliance on the Fourth Amendment characterized police excessive force "as a matter solely between an individual citizen and a state actor."[271] Each claim, including those involving individuals with disabilities, is thus analyzed as a one-off incident. Obasogie and Newman maintain that "the Fourth Amendment is simply not designed to address the group inequalities and racial dynamics that characterize police violence today."[272] This criticism applies to situations where police violence is triggered by an individual's manifestation of disability. By restricting analysis of such claims to the Fourth Amendment, the Court signals that disability is an individual matter, rather than a societal one.

Extending application of the Fourteenth Amendment's Equal Protection Clause could possibly provide greater protections for disabled communities. Of course, application of equal protection would invite its own set of challenges. The Supreme Court's failure to recognize disability as a suspect class would create one such challenge.[273] This failure can be attributed to the Court's continued reliance on the medical model of disability. Professors Anita Silvers and Michael Ashley Stein compare the Court's reliance on the medical model to the Court's limited understanding of sex in first part of the twentieth century.[274] Similarly,[275] "the methodology for assessing disability as a classification still depends on out-of-date notions rooted in empirically unsubstantiated social conventions."[276] Once the Court accepts the socio-political model of disability, however, an empirical analysis may be conducted which properly classifies disability, or groups of disabilities, without

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[269] *See id.*

[270] *See id.* at 1469.

[271] *Id.* at 1470.

[272] *Id.* at 1474.

[273] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 443 (1985) (holding that intellectual disability does not constitute a quasi-suspect class under the Fourteenth Amendment).

[274] Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J. L. REFORM 81, 88 (2001) (discussing the Supreme Court's 1948 decision upholding the constitutionality of a Michigan statute requiring that women seeking bartending licenses have close male family members in the profession in order to prevent negative "moral and social problems").

[275] *Id.* at 93 (explaining that "closer attention to the facts about women developed a perspective from which [earlier characterizations] seem 'archaic and stereotypic'").

[276] *Id.* at 84.

reliance on unsubstantiated and harmful beliefs. Should the Court then afford heightened scrutiny to certain disabled communities, excessive force actions could prove successful under both the Fourth and Fourteenth Amendments, creating jurisprudence that tackles the systemic issue of police violence against individuals with disabilities.

C. Minimizing Contact Between Officers and Persons with Disabilities

While judicial acceptance of the socio-political model would better safeguard the constitutional rights of individuals with disabilities, that itself is insufficient to protect disabled people from police violence. Even when § 1983 actions are successful, the monetary damages awarded to victims and their families are unable to remedy the harm that was caused, which is not just fiscal but emotional and physical as well. As such, the ultimate goal of shifting the analysis used in civil actions for excessive use of force is to deter future misconduct. To further protect individuals with disabilities, contact with officers must also be minimized to prevent harm. Police officers, with their minimal training,[277] simply cannot be expected to be experts on disability. While some departments have begun offering crisis-intervention training to help officers interact with people with disabilities and de-escalate confrontations, it is simply not a priority for police.[278] In 2016, police academies spent a median of fifty-eight hours on firearm training, but just eight hours on de-escalation or crisis intervention.[279] The system as it stands thus allows police in America to, as Supreme Court Justice Sonia Sotomayor put it, "shoot first and think later."[280] Regardless, even crisis intervention trainings have shown mixed results, with some studies finding no impact.[281] Unfortunately, the role law enforcement plays in responding to individuals with disabilities is increasing.[282] For example, many officers spend more time responding to calls involving mental illnesses than they do investigating burglaries or felony assaults.[283]

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[277] *See* Kelly McLaughlin, *The average US police department requires fewer hours of training than what it takes to become a barber or a plumber*, INSIDER (June 12, 2020), https://www.insider.com/some-police-academies-require-fewer-hours-of-training-plumbing-2020-6#:~:text=police%20departments%20on%20average%20require,for%20Criminal%20Justice%20Training%20Reform, *archived at* https://perma.cc/8KRH-2T5F.

[278] *See* Abrams, *supra* note 22.

[279] *Id.*

[280] Emma Andersson, *The Supreme Court Gives Police a Green Light to 'Shoot First and Think Later'*, ACLU (Apr. 9, 2018), https://www.aclu.org/blog/criminal-law-reform/reforming-police/supreme-court-gives-police-green-light-shoot-first-and, *archived at* https://perma.cc/42T9-QTSS.

[281] Amy C. Watson & Michael T. Compton, *What Research on Crisis Intervention Teams Tells Us and What We Need to Ask*, 47 J. AM. ACAD. PSYCHIATRY AND THE LAW 422 (2019).

[282] *Ruderman White Paper*, *supra* note 29, at 8.

[283] *Id.*

Because police officers are not trained as social workers or disability service professionals, and their jobs are rooted in discrimination,[284] their interactions with people with disabilities must be reduced by providing community support services and diverting 9-1-1 calls involving individuals with disabilities to mental health or disability services. The Treatment Advocacy Center explained that reducing encounters between on-duty police officers and individuals with psychiatric disabilities may represent "the single most immediate, practical strategy for reducing fatal police shootings in the United States."[285] Improved excessive use of force jurisprudence would mitigate the harm imposed on the disabled community as a result of violent policing, but minimizing contact is absolutely essential to any substantial reduction of such harm.

Conclusion

Few people openly express opposition to achieving equal rights for persons with disabilities.[286] The division that exists between individuals with disabilities and the non-disabled population, however, is harsh and unrelenting.[287] The medical model of disability supports this divide, suggesting that persons with disabilities must be "cured" in order to fit into society.[288] This is the lens through which the *Graham* Court created its objective reasonableness standard for analyzing § 1983 actions against officers for excessive use of force, which remains the governing case today. The *Graham* standard diminishes the Fourth Amendment rights of those with disabilities by justifying violence against them when they behave in non-normative ways. In reducing the discriminatory impact of excessive use of force against persons with disabilities, the Court must begin to imagine "disability as ordinary," creating standards which embrace disability in its analysis, rather than disregard it as "abnormal." By embracing the socio-political model and recognizing the disabling effects of the current environment, the judiciary can begin to deconstruct legal barriers and hold officers accountable, hopefully putting an end to state-sanctioned violence against individuals with disabilities.

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[284] *See* Connie Hassett-Walker, *How You Start is How You Finish? The Slave Patrol and Jim Crow Origins of Policing*, ABA (Jan. 11 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/how-you-start-is-how-you-finish, *archived at* https://perma.cc/JB9K-X6HL.

[285] Doris A. Fuller, H. Richard Lamb, Michael Biasotti & John Snook, *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters*, Off. of Rsch. & Pub. Aff. 1, 1 (Dec. 2015), https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf, *archived at* https://perma.cc/8HVJ-TNT7.

[286] Hahn, *supra* note 258, at 166.

[287] *Id.*

[288] Kanter, *supra* note 30, at 420.