Disability Criminal Procedure: An Exploration of How and Why Disability Law Regulates the Carceral System

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The Supreme Court's 1998 decision in Pennsylvania Department of Corrections v. Yeskey, paved the way for Title II of the Americans with Disabilities Act and § 504 of the Rehabilitation Act's (collectively "disability law") to regulate the carceral system. Contrastingly, these past few decades the Court has cut back the rights and available remedies derived from constitutional criminal procedure.

As constitutional criminal procedure collapses, anti-carceral advocates must find an alternative pathway. Advocates should begin by defining criminal procedure so they might determine what tools can fulfill its function. This Note argues that criminal procedure is defined as a system of liability rules for actors in the carceral system enforceable through litigation. Comparing recent litigation involving disability law failure-to-modify cases with Fourth Amendment excessive force and Eighth Amendment prison conditions cases reveals that disability law is criminal procedure.

Modern constitution-based criminal procedure's anti-discrimination origins help explain why disability law functions as criminal procedure. Developed in the mid-20th century, modern constitution-based criminal procedure was created to target political process defects that resulted in large racial disparities in the carceral system. The same defects have created large disability-based disparities in the carceral system, thus allowing disability law to function similarly to modern criminal procedure. This Note contends

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* J.D., Harvard Law School '24; B.A., U.C. Berkeley '21; A.A., Moorpark College '19. I want to extend my profound gratitude to Professors Michael Ashley Stein and Michael J. Klarman, who supervised various stages of this Note. I am also especially thankful to Sam Weiss for his invaluable insights into the state of disability criminal procedure litigation and key caselaw on the frontlines, as well as for introducing arguments I had not previously considered, such as the unique benefits of disability law's attorneys' fees provisions. I also wish to thank Susannah Tobin, Andrew Manuel Crespo, Crystal Yang, Alan Jenkins, Carol Steiker, Louis Michael Seidman, Richard Fallon, Michael Skocpol, Benjamin Eidelson, Guha Krishnamurthi, Richard Lazarus, Clyde Engle, and countless others not mentioned here. Each of you has contributed in various ways—through classes, emails, texts, meetings, and other interactions—to help me assemble the pieces necessary to write this Note. Additionally, I am grateful to Makenzie Stuard and the exceptional editors at the *Texas Journal on Civil Liberties and Civil Rights*, all of whom provided invaluable editing assistance and have been incredibly supportive of scholarship by openly disabled authors like myself, someone with Autism Spectrum Disorder. Finally, I thank my father, Andrew Alpert, for being an immense guide in my writing and life journey. The views expressed in this Note are solely my own and do not reflect those of any past, present, or future employers.

that because disability law more precisely targets these political process defects and has several unique legal benefits, such as its statutory nature and broad enforcement and remedial mechanisms, disability law can fill the void created by the collapse of constitutional criminal procedure.

INTRODUCTION

"[T]he plain text of Title II of the [Americans with Disabilities Act ("ADA")] unambiguously extends to state prison inmates[.]"[1] Justice Scalia wrote these words for a unanimous Court in *Pennsylvania Department of Corrections v. Yeskey*,[2] and they have become a cornerstone of Title II of the ADA and § 504 of the Rehabilitation Act's (collectively "disability law") ability to regulate the carceral system. Even when the Court gives, it also often chooses to take away. The Court, during the same term as *Yeskey*, constricted constitutional criminal procedure by holding that the exclusionary rule does not apply to parole revocation hearings in *Pennsylvania Board of Probation and Parole v. Scott*.[3]

In the years before and after *Yeskey* and *Scott*, effective liability under constitutional criminal procedure shrunk,[4] while judicial decisions and legislative enactments in *Yeskey*'s wake expanded disability law's ability to regulate the carceral system.[5] Because of the deterioration of constitutional criminal procedure, anti-carceral advocates must figure out a way forward using tools that in other contexts have proven successful. This may require advocates to re-examine the definition of criminal procedure for viable alternative legal pathways to achieve similar—or perhaps even better—results to the current constitutional scheme. The expanding regulatory power of disability law over the carceral system signals that disability law can operate as such an alternative.

That these two distinct legal regimes—disability law and constitutional criminal procedure—both function as "criminal procedure," regulating the carceral system is explained by how *modern* constitutional criminal procedure was created in response to a two-layered political process defect. The first layer is that the carceral system itself is primed to create, exacerbate, and perpetuate political process defects. That is, majority groups can use the carceral system against minorities[6] adverse to their interests by depriving them of their rights, locking them up, and

1. Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206, 213 (1998).

2. *Id.*

3. Pa. Bd. of Prob. and Parole v. Scott, 524 U.S. 357, 369 (1998).

4. *See e.g.*, Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397 (1997); *United States v. Calandra*, 414 U.S. 338 (1974); *Davis v. United States*, 564 U.S. 229 (2011).

5. *See e.g.*, Gorman v. Bartch, 152 F.3d 907, 911–14 (8th Cir. 1998); Gohier v. Enright, 186 F.3d 1216, 1220–21 (10th Cir. 1999); United States v. Georgia, 546 U.S. 151 (2006); Tennessee v. Lane, 541 U.S. 509 (2004); *see* ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (2008).

6. When this Note uses the term "minority groups" without a qualifier, e.g., racial minorities or political minorities, it is referring to a broad conception of minority groups widely encompassing those with limited socio-political power—which of course includes both racial and political minorities.

labeling them as criminals. This allows the majority to assert and consolidate their power while increasingly depriving minorities of their rights and the political power necessary to bring about change. These defects can materialize through judicial abuse, active legislative enactments, passive abdication of executive and legislative responsibility, or zones of discretion that allow an executive—and their subordinates—to discriminatorily wield power. Consequently, the protections in the Bill of Rights were originally created to act as "neutral" safeguards against this first layer.[7]

The second layer of political process defect involves *how* and against *whom* this defect-primed system is used. In the United States, a history of racial discrimination has resulted in a carceral system that is used to subordinate racial minorities.[8] As a result, the Warren Court attempted to remedy this by expanding the "neutral" safeguards of constitutional criminal procedure to the second layer, even though they were originally created to only guard against the first-layer defect. Therefore, the jurisprudence of *modern* criminal procedure took on a unique flavor of anti-discrimination law.[9]

While the Warren Court targeted the second layer of political process defects as it relates to racial discrimination, it ignored how these same defects have resulted in wrongful discrimination against persons with disabilities. In fact, the carceral system's discriminatory application to racial minorities and disabled persons mirrors each other. This twin history occurs through analogous criminal laws that attempted to subordinate both groups in similar manners. For example, by laws that discriminatorily criminalize each groups' public existence such as "ugly laws," "exclusion laws," "vagrancy laws."[10] Moreover, both groups have a shared history of carceral discrimination through in the organization of the prison and asylum systems and the disparate police abuse they face.[11]

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7. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 771–800, 808–811 (1994).

8. Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830–44 (1994).

9. *See id*.

10. Adrienne Phelps Coco, *Diseased, Maimed, Mutilated: Categorizations of Disability and an Ugly Law in Late Nineteenth-Century Chicago*, 44 J. SOC. HIST. 23, 23–37 (2010); DeNeen L. Brown, *When Portland banned blacks: Oregon's shameful history as an 'all-white' state*, WASH. POST (June 7, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/06/07/when-portland-banned-blacks-oregons-shameful-history-as-an-all-white-state/ [https://perma.cc/Q6JC-UNVX]; Risa L. Goluboff, *Before Black Lives Matter*, SLATE (March, 2, 2016), https://slate.com/news-and-politics/2016/03/vagrancy-laws-and-the-legacy-of-the-civil-rights-movement.html [https://perma.cc/2HWK-6ZQ8].

11. *See* Vilissa Thompson, *Understanding the Policing of Black, Disabled Bodies*, CTR. FOR AM. PROGRESS (Feb. 10, 2021), https://www.americanprogress.org/article/understanding-policing-black-disabled-bodies [https://perma.cc/L69C-ZU78].

In fact, disability is often in the background of many major modern criminal procedure cases.[12]

This twin history has produced race and disability-based disparities in the carceral system.[13] For example, police violence against disabled persons—much like similar violence against racial minorities—is pervasive. People with disabilities account for between 33% and 50% of police use of force incidents and over 50% of police killings.[14] Additionally, "an estimated 66 percent of incarcerated people" have a disability compared to the roughly 26% of the U.S. population that has a disability.[15] Furthermore, children with disabilities are about four times more likely to be arrested in school.[16] These disability-based disparities are often intertwined with racial disparities.[17] For example, "more than half of disabled African Americans have been arrested by the time they turn 28—double the risk in comparison to their white disabled counterparts."[18]

Given the carceral system's disproportionate effect on disabled persons, disability law functions analogously to constitutional criminal procedure. In essence, disability law targets the second layer of political process defect, as it involves discriminatory application against disabled persons. While it uses a different means, these laws target the same second-layer defect that the Warren Court targeted—in relation to race—by using the facially-neutral,[19] constitutional criminal procedure. Ironically, it may be that reversing the Warren Court's approach could achieve similar—and perhaps even better—results than that Court intended. Instead of using a facially neutral means to resolve the second

12. *See*, *e.g.*, Graham v. Connor, 490 U.S. 386, 388–89 (1989) (involving a police officer using excessive force on Dethorne Graham due to the police officer's mistaken assumptions about Graham's behavior while he was experiencing hypoglycemia (low blood-sugar) due to his diabetes); Payne v. Arkansas, 356 U.S. 560, 562–68 (1958) (involving a police officer violating the due process rights of a Frank Andrew Payne, a Black man with an intellectual disability).

13. *See* Thompson *supra* note, at 11; SUSAN NEMBHARD & LILY ROBIN, RACIAL AND ETHNIC DISPARITIES THROUGHOUT THE CRIMINAL LEGAL SYSTEM 1–8 (2021).

14. Thompson *supra* note, at 11; *see also* Jamelia N. Morgan, *Policing Under Disability Law,* 73 STAN. L. REV. 1401 (2021).

15. Laurin Bixby, Stacey Bevan, & Courtney Boen, *The Links Between Disability, Incarceration, And Social Exclusion*, 41 HEALTH AFFAIRS, 1460, 1462, 1464 (2022).

16. Chris Hacker et al., *Handcuffs in Hallways: Hundreds of elementary Students Arrested at U.S. Schools*, CBS NEWS (Dec. 9, 2022), https://www.cbsnews.com/news/hundreds-of-elementary-students-arrested-at-us-schools/ [https;//perma.cc/7GB4-WWCL].

17. *See* Thompson *supra* note, at 11.

18. *Id.*

19. By facially neutral I mean neutral in relation to whether it protects all groups or expressly only protects certain groups. For example, a statute that says everyone has the right to X would be facially neutral whereas a statute that says only disabled people get X would not be facially-neutral.

layer defect, employing a non-facially neutral means might more effectively resolve that second layer defect, while simultaneously creating a prophylactic shield against the first-layer defect. In fact, not only is this approach better targeted, but, thanks to several unique characteristics of disability law, it has certain advantages over constitutional criminal procedure.

This Note argues that disability law functions as "criminal procedure," and offers several benefits over traditional constitutional criminal procedure, which allows disability law to more effectively regulate the carceral system. First, this Note defines "criminal procedure" as containing two elements which I will call the "rule component" and the "enforcement component." The rule component—derived from Professor William J. Stuntz—states criminal procedure is like a "species of tort law, defining liability rules for a given set of actors in the criminal justice system…"[20] The enforcement component requires that those liability rules must be enforceable through litigation.[21] Second, it discusses how disability law is criminal procedure by comparing Fourth Amendment excessive force, Eighth Amendment deliberate medical indifference, and equivalent disability law failure-to-modify claims.[22] Third, drawing on political process theory, it examines the overlap between the racial anti-discrimination goals of constitutional criminal procedure and the disability anti-discrimination goals of disability law, to explain *why* disability law functions as criminal procedure. Finally, it explores how the collapse of constitutional criminal procedure created a void. Disability law, with its similar function to constitutional criminal procedure and unique advantages—such as its statutory nature, broad enforcement and remedial mechanisms, and more precise targeting—can fill that growing void.

I. CRIMINAL PROCEDURE DEFINED

What is criminal procedure? This definitional question is key to determining whether disability law—or anything else for that matter—is criminal procedure. One might think of criminal procedure in formal terms, defining it as comprised of the constitutional decisions rooted in the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments that have

20. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 17 (1997). While Professor Stuntz also discussed two other functions of criminal procedure regarding the creation of burdens of proof and limits on judicial flexibility for trial management, *id.* at 13, those functions have no bearing on this Note's discussion.

21. *See infra* p. 226–27 .

22. This Note uses reasonable modification and accommodations interchangeably since they are the same thing with reasonable accommodation being the term used under § 504 and modification being the term used under Title II. Berardelli v. Allied Servs. Inst. of Rehab. Med., 900 F.3d 104, 114–18 (3d Cir. 2018).

traditionally defined criminal procedure. Yet, this fails to explain *why* these Amendments are chosen in non-arbitrary terms. To say something is what it is, is not a definition—it is a tautology. Properly defined, criminal procedure *is a system of liability rules for actors in the carceral system enforceable through litigation*. This modifies Professor Stuntz's definition of criminal procedure, accepting his view of the "rule component," while taking a broader view of the "enforcement component" to account for how enforcement occurs through *both* criminal and civil litigation.

Black's Law Dictionary provides a useful starting point for defining criminal procedure. It defines criminal procedure as "[t]he rules governing the mechanisms under which crimes are investigated, prosecuted, adjudicated, and punished. . . . includ[ing] the protection of accused persons' constitutional rights."[23] These rules regulate how law enforcement conducts its investigations, the prosecution acts in its capacity as a state representative, the court system functions, and, of course, the endpoint of the carceral system's "punishment" operates. While this account provides a definition of some actors and actions in the system and explains how criminal procedure is a rule-based system, Black's Law does not explain the content of said rules or their enforcement mechanism.

Professor Stuntz's account in "*The Uneasy Relationship Between Criminal Procedure and Criminal Justice*" clarifies how the "rules" of criminal procedure operate. Stuntz describes criminal procedure in two parts. First, the "rule component" which is like "a species of tort law, defining liability rules for a given set of actors in the criminal justice system. . . ."[24] These liability rules regulate police, lawyers, prisons, and the courts by outlining acceptable behavior and punishment for violating the rules.[25]

While Professor Stuntz's substantive account of this process as a system of tort-like liability rules is correct, his conception of the enforcement component is incomplete. Under Stuntz's account, "the threat of reversal in criminal litigation rather than damages or injunctive relief" is used to enforce the liability rules of criminal procedure.[26] However, this view fails to account for how criminal procedure is also enforced using civil litigation to seek damages, declaratory, and injunctive relief when those rules are violated. To account for civil enforcement, this Note

23. *Criminal Procedure*, BLACK'S LAW DICTIONARY (11th ed. 2019).

24. Stuntz *supra* note 20 at 17 (emphasis added).

25. *See id.* at 16–22.

26. Stuntz *supra* note 20 at 17 (emphasis added).

defines the enforcement component as only requiring that *the standards created by the rule component be enforceable through litigation*.[27]

Currently, the primary mechanism for *private* individuals to remedy violations of criminal procedure's rule component in civil litigation is § 1983.[28] This statute allows private individuals to hold those acting under color of law, such as police officers liable for violating the rules of criminal procedure. Beyond rendering individuals liable, § 1983 has created a cause of action against a municipality for policies that result in constitutional violations. Using what is called "*Monell* liability," local governing bodies "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where. . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[29] This does not have to be a formal policy, as it can be a "custom or usage" forming a "persistent and widespread discriminatory practice[e]. . . ."[30] Moreover, *Monell* liability can be established through even a single decision by a municipal policymaker in some circumstances[31] or from "constitutional violations resulting from its failure to train municipal employees."[32] In light of these rulings, § 1983 allows private individuals to use civil litigation to enforce the "rules" of criminal procedure to obtain declaratory, monetary, and injunctive relief.[33]

Bivens claims also provide another mechanism to enforce the rule component of criminal procedure. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Court held that individuals have a cause of action—for monetary damages—against federal officials who violate their constitutional rights.[34] This case involved agents of the Federal Bureau of Narcotics who were alleged to have unconstitutionally arrested Webster Bivens, a Black man, whom the police shackled and

27. While there may be ways other than litigation that criminal procedure could be enforced, such as through cultural or political mechanisms, as a *descriptive* matter this is how criminal procedure operates in the United States.

28. 42 U.S.C. § 1983 ("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 . . . .").

29. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).

30. *Id.* at 691.

31. Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986).

32. City of Canton v. Harris, 489 U.S. 378, 380 (1989).

33. However, the development various doctrines have made obtaining relief difficult. *See infra* Part IV(A).

34. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 389–98 (1971).

strip-searched, and whose home was searched in relation to a suspected narcotics violation.[35] In particular, Bivens alleged that the agents arrested him without a warrant and probable cause and that the agents used excessive force in violation of the Fourth Amendment.[36] The Supreme Court held that individuals can bring a claim to recover damages for Fourth Amendment violations carried out by federal officials,[37] now known as "*Bivens* claims." Much like § 1983 creates a cause of action against *state or local* officials for constitutional violations, *Bivens* claims allow individuals to bring a cause of action for specific constitutional violations by *federal* officials even though Congress has not explicitly authorized a cause of action. The Court extended *Bivens* claims two more instances, most relevant is *Carlson v. Green*, which provided a *Bivens* claim for violations of the Eighth Amendment's prohibition on cruel and unusual punishment.[38] Resultingly, two core components of criminal procedure provide a backstop of civil liability against federal officials.

II. DISABILITY LAW IS CRIMINAL PROCEDURE

Disability law regulates the actions of law enforcement and the carceral system through a *system of liability rules for actors in the carceral system enforceable through litigation*. Therefore, disability law functions as criminal procedure. As a result, claims analogous to traditional criminal procedure claims under the Fourth and Eighth Amendments are being brought using disability law. Excessive force and prisoners' rights litigation provides particularly salient examples of this phenomenon.

35. *Id.* at 389–90.

36. *Id.* However, the Court later narrowed *Bivens*, holding it does not apply to excessive force claims near the border when a border patrol agent is enforcing immigration laws—in effect limited *Bivens* to Webster Bivens (and possibly those with completely identical relevant facts). Egbert v. Boule, 596 U.S. 482, 493–98 (2022). The new *Egbert* test, which states that a *Bivens* claim is unavailable if there is "any reason to think that Congress might be better equipped to create a damages remedy[,]" indicates that *Bivens* claims will be unavailable for nearly all excessive force claims going forward. *See id.* at 492; *see also id.* at 502–04 (Gorsuch, J., concurring); *id.* at 505, 517–27 (Sotomayor, J., dissenting). This is further confirmed by the fact that *Egbert* involved near identical relevant facts except for the agent specifically enforcing immigration law and the location near the border. *Id.* at 503–04 (Gorsuch, J., concurring); *id.* at 505, 517–27 (Sotomayor, J., dissenting).

37. *Bivens*, 403 U.S. at 397.

38. Carlson v. Green, 446 U.S. 14, 17–25 (1980). While Carlson is relevant to this Note, the other instance, Davis v. Passman, 442 U.S. 228, 245 (1979) (holding that allegations of sex discrimination in violation of the Fifth Amendment give rise to a Bivens claim), is not relevant to this Note.

A. Regulation of Law Enforcement: Comparing Fourth Amendment Excessive Force Claims and Disability Law Arrest Claims

Disability law regulates law enforcement similarly to Fourth Amendment excessive force claims, and thus disability law acts as "criminal procedure." The Fourth Amendment provides a constitutional limit to the amount of force that law enforcement can use.[39] If that limit is exceeded, a plaintiff can bring a Fourth Amendment excessive force claim.[40] Due to several Supreme Court and federal circuit court decisions, disability law jurisprudence has developed around regulating police activities including investigations and arrests.[41] The upshot is that plaintiffs can bring claims under a "failure to modify" theory, which bears a striking resemblance to Fourth Amendment excessive force claims.[42] Yet, while this analogy sufficiently demonstrates that disability law functions as criminal procedure, there are a few key differences between disability law and Fourth Amendment claims.

1. Fourth Amendment Excessive Force Jurisprudence

The Fourth Amendment protects against "unreasonable searches and seizures," and, in so doing so, prohibits police from using excessive force.[43] This acts as criminal procedure since the Fourth Amendment's limitations on seizures regulates the carceral system through a liability rule that is enforceable through litigation. The lodestar case discussing the standards governing the use of force under the Fourth Amendment is *Graham v. Connor*.[44]

Graham involves police officers alleged to have used excessive force against Dethorne Graham, in violation of the Fourth Amendment's prohibition on unreasonable seizures.[45] Graham, who was diabetic, began to feel the onset of hypoglycemia.[46] Initially, he tried to get orange juice at a convenience store to counteract the reaction, but he left the store

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

40. *See id.*

41. *See infra* Part II (A)(2).

42. *See infra* Part II (A).

43. *Graham*, 490 U.S. at 386.

44. The first U.S. Supreme Court case to discuss standards governing the use of excessive force under the Fourth Amendment is *Tennessee v. Garner*, 471 U.S. 1 (1985). While *Garner* initially appeared to create a separate standard for the use of deadly force, in *Scott v. Harris*, the U.S. Supreme Court clarified that the *Graham* test applies to all Fourth Amendment excessive force claims, regardless of whether a claim involves deadly force or not. Scott v. Harris, 550 U.S. 372, 381–83 (2007).

45. *Graham*, 490 U.S. at 395–97.

46. *See id.* at 388.

quickly because the line was too long and he urgently needed sugar.[47] He immediately went to his friend's house for help, but Graham was pulled over by a police officer who was "suspicious" of his behavior.[48] After appearing dazed and eventually passing out, Graham was handcuffed by officers.[49] The officers ignored Graham's friend's pleas to help Graham with his diabetic reaction.[50] When Graham woke up and asked the officers to check his wallet for a diabetic decal to alert them further to his needs, an officer told him to "shut up."[51] That official's statement was followed by four officers brutally beating Graham.[52] Thereafter, Graham sued the officers for using excessive force in violation of the Fourth Amendment's prohibition on unreasonable seizures.[53]

On appeal, the Supreme Court created an objective reasonableness test to determine whether the use of force violates the Fourth Amendment. Under the objective reasonableness test, courts must assess whether the amount of force that the officer used in the situation at issue was reasonable in light of the particular facts and circumstances and "judge[it] from the perspective of a *reasonable officer* on the scene, rather than with the 20/20 vision of hindsight."[54] However, this is not the only "rule" that governs excessive force by law enforcement as an analogous claim can be made using disability law.[55]

2. "Failure to Modify" Claims as Compared to Fourth Amendment Excessive Force Claims

Using disability law, plaintiffs can bring claims for disability discrimination under a "failure to modify" theory, requiring carceral actors including police officers to reasonably modify their practices to accommodate disabled persons during investigations or arrests. With some slight difference between the two, these "failure to modify" claims function similarly to Fourth Amendment excessive force claims.

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47. *Id.* at 388–89.

48. *Id.* at 389.

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

50. *Id.*

51. *Id.*

52. *Id.*

53. *Graham*, 490 U.S. at 390.

54. Kisela v. Hughes, 584 U.S. 100, 103 (2018) (emphasis added) (citations omitted) (discussing and citing *Graham*, 490 U.S. at 396–97).

55. Rather than bringing claims under the Fourth Amendment, incarcerated persons can bring excessive force claims—with some slight differences in legal analysis—using the Eighth Amendment. *See* Hudson v. McMillian, 503 U.S. 1, 4–7 (1992). For the purposes of Note, whether the claim is brought under the Fourth or Eighth Amendment makes no difference since the ADA regulates both prisons and police departments, *see infra* Part II(A)(2)–(B), and the disability law reasonable modification analysis is the same in either context.

As a quick primer, Title II of the ADA states, "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."[56] Section 504 applies a stricter sole causation standard and covers federally funded entities rather than "public entities"; otherwise, Title II and § 504 are largely identical, and their caselaw is generally read interchangeably.[57]

A series of court decisions have resulted in disability law applying to various actors in the criminal legal system. In *Pennsylvania Department of Corrections v. Yeskey*, Justice Scalia, writing for a unanimous court, stated that state prisons are public entities under the ADA.[58] Justice Scalia explained that "prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners (and any of which disabled prisoners could be 'excluded from participation in')."[59] Moreover, in *Yeskey*, the Court rejected the argument that participation in a public entities' programs or services must be voluntary, which broadened the scope of potential activities covered by disability law.[60] Two months after *Yeskey*, in *Gorman v. Bartch*, the Eighth Circuit applied Title II to law enforcement transportation post-arrest.[61] A year later, in *Gohier v. Enright*, the Tenth Circuit became the first federal circuit court of appeals to hold that Title II applied to arrests.[62] Over the following twenty years, this interpretation expanded, as the majority of circuit courts applied disability law—in varying degrees—to investigations and arrests.[63]

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56. 42 U.S.C. § 12132.

57. *See*, *e.g.*, Bennett v. Hurley Med. Ctr., 86 F.4th 314, 323 (6th Cir. 2023). Regardless, it is worth pointing out that Title II limits the relevant definition of a public entity to state and local governments and their instrumentalities, 42 U.S.C. § 12131(1)(A-B), whereas § 504 applies to the federal government and federal fund recipients, 29 U.S.C. § 794. Resultingly, any federal criminal procedure claim would have to use § 504.

58. *Yeskey*, 524 U.S. at 210.

59. *Id.*

60. *Id.* at 211.

61. *Gorman*, 152 F.3d at 911–14.

62. *Gohier*, 186 F.3d at 1221.

63. Haberle v. Troxell, 885 F.3d 171, 179–81 (3d Cir. 2018); Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty., 673 F.3d 333, 337–38 (4th Cir. 2012); Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000) (holding that while Title II does not apply to arrests or investigations generally, it may apply to specific arrests or investigations when exigent circumstances are not present); Roberts v. City of Omaha, 723 F.3d 966, 973 (8th Cir. 2013); Sheehan v. City & Cnty.. of S.F., 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part on other grounds, cert. dismissed in part by* City & Cnty. of S.F. v. Sheehan, 575 U.S. 600 (2015); Bircoll v. Miami-Dade Cnty., 480 F.3d 1072, 1083–85 (11th Cir. 2007). The First, Sixth, and Seventh Circuits have not decided

While there are other types of claims that can be brought,[64] a "failure-to-modify" claim can function similarly to a Fourth Amendment excessive force claim. A failure-to-modify claim alleges a violation of disability law where "police properly investigated and arrested a person with a disability for a crime unrelated to that disability," but failed to reasonably accommodate that person's disability during the "investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees."[65]

In addition to proving that they have a disability and were otherwise qualified, plaintiffs must prove that they were excluded, denied, or discriminated against *because* of their disability. In the context of failure-to-modify claims, this generally requires proving that: (1) The officer received a request for a modification or was otherwise alerted to the need for a modification;[66] (2) It was clear from the context that the purpose of the modification request was to accommodate a disability; and (3) The modification was reasonable.[67] Once the officer receives the request for reasonable modification, they must give individualized attention to the request.[68] The notice requirement is distinct in disability claims—Fourth Amendment claims do not require notice to establish liability.[69]

While both the Fourth Amendment and disability law govern permissible force levels, the criteria set by each differs—with disability

whether Title II applies to arrests or investigations, but for the purposes of review, they have assumed that it does. *See* Gray v. Cummings, 917 F.3d 1, 16–17 (1st Cir. 2019); *see also* Roell v. Hamilton Cnty., 870 F.3d 471, 489 (6th Cir. 2017); *see also* King v. Hendricks Cnty. Comm'rs, 954 F.3d 981, 988–89 (7th Cir. 2020). The Second and D.C. Circuits have not decided the issue, but district courts in those circuits have followed the decisions of the majority of federal circuit courts in holding that Title II applies to arrests or investigations. *See* Williams v. City of N.Y., 121 F. Supp. 3d 354 (S.D.N.Y. 2015); *see also* Sacchetti v. Gallaudet Univ., 181 F. Supp. 3d 107, 129 (D.D.C. 2016).

64. For example, a "wrongful arrest" claim or depending on the circuit a "failure-to-train" claim. *See* J.V. ex rel. C. v. Albuquerque Pub. Sch., 813 F.3d 1289, 1297 (10th Cir. 2016) (discussing the possibility of a "failure-to-train" claim); *Gohier*, 186 F.3d at 1220–21 (discussing a "wrongful arrest" claim).

65. *Gray*, 917 F.3d at 15 (citing *Gohier*, 186 F.3d at 1220–21).

66. The person does not need to say the magic words "accommodation" or "modification," and should the need for modification be obvious, the officer has a duty to provide the modification. *See e.g.*, Robertson v. Las Animas Cnty. Sheriff's Dep't, 500 F.3d 1185, 1197 (10th Cir. 2007).

67. *See e.g.*, Marble v. Tennessee, 767 F. App'x 647, 652–53 (6th Cir. 2019).

68. *Id.*

69. However, to bring a damages claim against an individual officer, qualified immunity doctrine requires that clearly established law be violated. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). This is arguably analogous to a notice requirement for a violation of the law, even if there is not a notice requirement as to the needs of the specific plaintiff.

law being slightly more plaintiff friendly.[70] The disability law test also relies on individualized reasonable judgement generally, without filtering the inquiry through the hypothetical "reasonable officer."[71] Moreover, unlike the Fourth Amendment, the ADA's test requires that officers: (1) exercise individualized judgement, (2) rely on "the *best* available objective evidence," (3) respond to actual, non-speculative risk in cases of legitimate safety requirements, (4) rely on knowledge available to them, and (5) not use stereotypes or generalizations about persons with disabilities.[72] These differences can be dispositive, in the analysis, particularly the additional burdens.

Compare these requirements to the Fourth Amendment and a different picture begins to emerge. The Fourth Amendment analysis does not require: (1) any analysis of the individual officer's mindset, (2) the officer to rely on the *best* available objective evidence or knowledge available, (3) that a risk be actual,[73] or (4) individualized judgment as to the plaintiff in the same way as disability law.[74] Despite these differences in exigency analyses, there is a significant overlap in functionality between disability law and the Fourth Amendment. Both impose liability on carceral actors, such as police officers—thereby governing their conduct during investigations or arrests.

The case of *Estate of LeRoux v. Montgomery County*, in which LeRoux alleged violations of both Title II and § 504, serves as an example of a failure-to-modify claim.[75] This case involved Ryan LeRoux, an individual with a disability and long history of mental health treatment.[76] On July 16, 2021, LeRoux was parked in the drive-thru lane of McDonald's in Montgomery County, reclining in the driver's seat of his car.[77] In response, McDonald's employees called the police and claimed that LeRoux was acting crazy, but nobody was in danger.[78] The dispatcher called an armed patrol officer who lacked crisis intervention training.[79]

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70. While there is overlap between the exigency analysis used for ADA claims and that used for Fourth Amendment claims, courts may sometimes erroneously analyze whether use of force would be justified under the Fourth Amendment. *See e.g.*, Everson v. Leis, 412 F. App'x 771, 777 (6th Cir. 2011); Ali ex rel. Marbly v. City of Louisville, 395 F. Supp. 2d 527, 540 (W.D. Ky. 2005).

71. *Compare with Kisela*, 584 U.S. at 103, *with* 28 C.F.R. § 35.139.

72. *See* 28 C.F.R. § 35.139; *See also Woodford Cnty. Bd. of Educ.*, 213 F.3d at 925.

73. However, the plausibility of the risk may affect any fact-finding.

74. *Graham*, 490 U.S. at 394–98.

75. *See* Estate of LeRoux v. Montgomery Cty., No. 8:22-cv-00856-AAQ, 2023 WL 2571518, at *1 (D. Md. Mar. 20, 2023) (mem. op.).

76. *Id.*

77. *Id*. at *3.

78. *Id.*

79. *Estate of LeRoux*, 2023 WL 2571518 at *3.

The officer saw a gun on LeRoux's passenger seat, drew his weapon and yelled profanely at LeRoux—demanding that he keep his hands up.[80] More officers would arrive at the scene for a total of 17 officers, many of whom had their weapons drawn.[81] LeRoux was not aggressive toward the officers, but when he sat up in the driver's seat of his car, four officers shot LeRoux a total of 23 times, killing him.[82]

The district court held that the plaintiff adequately pled a claim for a failure-to-modify.[83] The plaintiff successfully argued that multiple reasonable accommodations were available to the officers, including using a crisis team as the first response, employing crisis management techniques, and waiting for a crisis negotiator.[84] This case—and others in which officers had an option for reasonable modification during arrest—has the effect of prescribing how an officer is to interact with an individual during arrest, functionally limiting the officer's ability to use force. If an officer does not adhere to those standards, the ADA is violated as the officer's failure to reasonably modify during arrest means using greater force than the officers per permitted to use. Thus, failure-to-modify claims create a standard limiting the use of force in an analogous manner to Fourth Amendment excessive-force claims. Failure-to-modify during arrest claims are not the only example of disability law acting as criminal procedure, as the Eighth Amendment also has its own disability law analogue.

B. Prisoner's Rights: Analogies to the Eighth Amendment

Increasingly, disability law is employed in prisoners' rights claims akin to those made under the Eighth Amendment. Specifically, it is used to achieve results similar to claims of deliberate indifference to prisoners' medical needs,[85] commonly referred to as *Estelle* claims.[86] Recent litigation around Opioid Use Disorder ("OUD"), that uses both disability law and *Estelle* claims helps illuminate the parallels between these two legal theories.[87] This analysis also highlights another way in which disability law functions within the realm of criminal procedure.

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80. Id.

81. *Id.* at *8–*10.

82. *Id.*

83. *Estate of LeRoux*, 2023 WL 2571518, at *6–*18.

84. *Id.* at *12–*14.

85. Estelle v. Gamble, 429 U.S. 97, 104–05 (1976).

86. *See, e.g.*, Moore v. Zant, 885 F.2d 1497, 1509 (11th Cir. 1989); Warren v. Prison Health Servs., Inc., 576 F. App'x 545, 555 (6th Cir. 2014); Jones v. Catoe, 9 F. App'x 245, 254 (4th Cir. 2001); Owens-El v. United States, 920 F.2d 936 (9th Cir. 1990).

87. *See infra* p. 234–36.

In *Estelle v. Gamble*, the Court held that deliberate indifference to the serious medical needs of a prisoner violates the Eighth Amendment and thereby creates a cause of action under §1983.[88] Deliberate indifference can be manifested by the actions of prison doctors in response to the medical needs of prisoners or through the actions of prison guards who intentionally deny, delay, or interfere with a prisoners' medical care.[89] In *Helling v. McKinney*, the Court expanded *Estelle*, holding that, in addition to prohibiting deliberate indifference to serious *current* medical needs, the Eighth Amendment also prohibits such indifference where there is risk of *future* harm.[90]

Much like Fourth Amendment excessive-force claims parallel by ADA failure-to-modify during arrest claims, Eighth Amendment *Estelle* claims have a failure-to-modify counterpart as exemplified in prison litigation claims involving OUD. One notable case in this area is *Pesce v. Coppinger*. In *Pesce*, the plaintiff, Geoffrey Pesce, was in recovery for two years because of his active participation in a methadone treatment program.[91] Fearing relapse when he was inevitably denied his prescribed methadone during incarceration, Pesce filed both an *Estelle* claim and an ADA claim, alleging discrimination related to the anticipated denial of access to the treatment proven effective for him.[92] Pesce sought injunctive relief to access his prescribed methadone under both legal theories.[93] Considering Pesce's medical history, the significant health risks involved in withholding his methadone treatment, and the demonstrated possibility of safe administration in other correctional facilities, the District Court granted Pesce's request for a preliminary injunction on both the ADA and Eighth Amendment grounds.[94] The overlapping reasoning and similar outcomes of these claims highlight how an ADA claim can function in a manner similar to an *Estelle* claim—with ADA claims providing a liability scheme that regulates the carceral system's approach to sentencing.

Still, skeptics may cite *Bryant v. Madigan*,[95] to argue that the ADA does not properly provide for claims analogous to *Estelle*. *Bryant* is a pre-*Yeskey* Seventh Circuit opinion by Judge Posner that held that the ADA neither applies to prisoners nor creates a cause of action for failing to attend to prisoners' medical needs.[96] However, the precedential value of

88. *Estelle*, 429 U.S. at 104–05.
89. *Id.*
90. Helling v. McKinney, 509 U.S. 25, 365 (1993).
91. Pesce v. Coppinger, 355 F. Supp. 3d 35, 38–39, 41 (D. Mass. 2018).
92. *Id.* at 39–42.
93. *Id.* at 39, 42.
94. *Id.* at 47–49.
95. 84 F.3d 246 (7th Cir. 1996), *abrogated in part by Yeskey*, 524 U.S. 206.
96. *Id.* at 248.

Bryant—which does not include a textual analysis of an *Estelle*-style claim[97]—is in serious doubt given that it was at least partially overruled by *Yeskey*.[98] In fact, the Seventh Circuit has recently started cabining *Bryant* as evidenced by *Brown v. Meisner*, where the court held in favor of the plaintiff despite its similarities with *Bryant* including a similar fact pattern and similar accommodations sought.[99]

Moreover, the broad language of the ADA contains no limit for medical needs. The Supreme Court acknowledged the ADA's breadth in the majority opinion of *United States v.* Georgia—another prisoners' rights case brought under both the Eighth Amendment and as an ADA failure-to-modify claim—wherein Justice Scalia specifically referenced medical care as one of the areas where ADA accommodations may be required.[100]

Furthermore, even if *Bryant* was correct and the ADA's protections excluded the medical needs of prisoners for fear of creating a medical malpractice scheme, there are many other disability law claims closely analogous to Eighth Amendment claims. For example, the claims made regarding prison spacing and exercise in *United States v. Georgia*,[101] or claims brought under both the Eighth Amendment and disability law for excessive heat exposure.[102] These claims demonstrate that prisoners' rights claims under disability law function as criminal procedure.

III. WHY DISABILITY LAW FUNCTIONS AS CRIMINAL PROCEDURE

While disability law claims and constitutional criminal procedure claims overlap, fully understanding why this overlap occurs requires analyzing the ills that criminal procedure is attempting to remedy. Modern criminal procedure—post-1930s—is attempting to remedy a two-layered political process defect. The first layer of defect is how the design of the carceral system is primed for political process defects to arise—something that the original formation of criminal procedure in the Bill of Rights attempted to remedy. The second layer is the activation and application of that system. In particular, this system is often disproportionately used against minority groups ill-equipped to resist it.

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97. *See id.* at 248–49.

98. *See Yeskey*, 524 U.S. at 209–10.

99. *Compare Bryant*, 84 F.3d at 247–49, *with* Brown v. Meisner, 81 F.4th 706, 707–10 (7th Cir. 2023) (distinguishing claims of denied accommodations from claims of medical malpractice).

100. *Georgia*, 546 U.S. at 157.

101. *Id.*

102. Yates v. Collier, 868 F.3d 354 (5th Cir. 2017).

The first and second layers of the defect, which modern criminal procedure aims to address, are clear in the interplay between the second and third paragraphs of the famous footnote four in *United States v. Carolene Products*.[103] Footnote four outlines how the Court might scrutinize legislation more rigorously when it: (1) contravenes the Bill of Rights, (2) imposes restrictions on the political process that could otherwise facilitate the repeal of undesirable legislation, or (3) targets discrete and insular minorities whose interests may not be adequately protected by the political process.[104] In particular, the second and third paragraphs of footnote four correspond to the defects in criminal procedure.[105] The second paragraph represents the first layer of defect that the Bill of Rights sought to address.[106] The third paragraph represents the second layer of defect, which involves targeted application towards racial minorities or other discrete and insular minorities.

Compared to its original conception in 1789, modern criminal procedure is a form of anti-discrimination law—it endeavors to address how the second layer of defect led to the carceral system being discriminatorily used against racial minorities.[107] Specifically, the Warren Court sought to remedy this second-layer defect by broadening the scope

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103. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Professor John Hart Ely later expanded upon footnote four, developing it into a theory of constitutional interpretation focused on representation reinforcement, known as "Political Process Theory." Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 772–73 (1991). However, for the moment, concentrating solely on the political process aspects of footnote four is sufficient. Irrespective of the normative value of political process theory as a method of constitutional interpretation, the descriptive framework it provides for analyzing defects in socio-political systems is of great use.

104. *Carolene*, 304 U.S. at 152 n.4.

105. While the first paragraph refers specifically to the Bill of Rights and thus would also be highly relevant to the discussion of criminal procedure, its formalist approach does not have the same explanatory power for the purposes of the present discussion. The disconnect between the formalist paragraph one and the functionalist paragraphs two and three occurred due to footnote four's drafting process. Louis Lusky, *Footnote Redux: A "Carolene Products" Reminiscence*, 82 COLUM. L. REV. 1093, 1096–1104 (1982). The more functionalist approach in paragraphs two and three were in the original draft written by Justice Stone, whereas the formalist paragraph one was added to during the drafting process at the insistence of Chief Justice Hughes who was unsure of what Justice Stone was up to. *Id.* The paragraphs were then blended, with paragraph one taking a formalist approach and paragraphs two and three taking a more functionalist approach that provides a general thesis for when the Court will subject legislation to heightened scrutiny. *Id.*

106. The paragraphs are of course often overlapping. For example, the protections offered by the First Amendment sweep into all three. The Bill of Rights includes the First Amendment, if Congress is dominated by a single religious group and the majority of their constituents are of that group then there would be a strong interest by the representatives to pass legislation favoring the majority religion, and of course people of many religions people such as Jewish people are discrete and insular minorities.

107. Steiker *supra* note 8, at 844.

of criminal procedure protections, initially established to counteract the first-layer defect to address the second-layer defect.[108] Similarly, disability law functions parallel to constitutional criminal procedure; however, instead of addressing racially discriminatory applications, it confronts disability-based discrimination.

A. The First Layer of Political Process Defect: A Primed System

The criminal legal system is particularly vulnerable to political-process defects arising out of a populist majority discriminating against an unpopular minority. While the founders were particularly worried about the targeting of political minorities, which minorities the founders were worried is beside the point. The first layer defect is not about *which* "minority" is targeted, it can be political minorities, racial minorities, religious minorities, etc.—which minorities are chosen is what the second layer is about. Instead, it is about the nature of the carceral system as inherently primed for abuse by a tyrannical majority against minorities—with interests that may be adverse to the majority. That majority can then use the carceral system to create, exacerbate, and perpetuate other political process defects.

That is, by using the carceral system tyrannical majorities can target minorities to deprive them of their rights, lock them up, and label them as criminals. This allows the majority assert and maintain their power while increasingly depriving minorities of their rights and the political power necessary to bring about change. Those rights protected by the Fourth and Eighth Amendment are particularly vulnerable to abuse. Resultingly, criminal procedure attempts to guard against these potential abuses by creating a mechanism that protects *any* person, whether a minority or not, from the potential abuses inherent to the criminal legal system.

As Justice Black pointed out in *Chambers v. Florida*, "[t]yrannical governments ha[ve] immemorially utilized dictatorial criminal procedure and punishment to make scape goats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny."[109] This "dictatorial criminal procedure" can involve requiring or permitting certain seizures and arrests, as evidenced by the general warrants used by the British Crown in the leadup to the American Revolution,[110] by the use of the rack and screw as

108. *See infra* Part III(B)(1).

109. Chambers v. Florida, 309 U.S. 227, 236 (1940).

110. *See e.g.*, Riley v. California, 573 U.S. 373, 403 (2014).

punishment,[111] or by denials of an individual's right to face their accuser.[112]

The way in which the carceral system is abused can vary just as much as the substance, yet four examples stand out. First, active legislative means, for example by passing statutes that criminalize publicly criticizing the majority—such as occurred with the Sedition Act[113]—or by passing vague law designed to control minority populations such as occurred with vagrancy or "prowling" laws.[114] Second, a passive legislature or executive can abdicate its responsibility to protect certain citizens,[115] such as with the southern states in 1866 which refused to provide protection against vigilante violence to Black southerners.[116] Third, an executive that administers the laws discriminatorily by targeting minorities.[117] Fourth, judges discriminating against minority groups, such as by disparately sentencing minorities.[118]

Throughout these examples, there is one common thread—a concern over discretion. The discretion of the legislature in the laws they do or do not enact, the discretion of the executive (and their subordinates) in the administration of the laws, and the discretion of a judge in applying the laws. Given this structural threat and the temptation to use the carceral system to criminalize disfavored minority groups, the Founders established procedures in the Bill of Rights to prevent these outcomes. While the areas' protected and procedures specified vary by amendment, together the provisions create a baseline of protections that guard individuals' liberties from abuse in those discretionary zones.[119] Both the Fourth and Eighth Amendments provide salient examples of this concern over discretion.[120]

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111. Becky Little, *7 Famous Torture Devices, Real and Mythical*, HISTORY.COM (June 16, 2023), https://www.history.com/news/7-famous-torture-devices-medieval-iron [https://perma.cc/K7ZP-SSDC].

112. *See e.g.*, *Crawford v. Washington*, 541 U.S. 36, 44–45 (2004) (discussing the famous *Raleigh's Case*, 2 How. St. Tr. 1, 15-16, 24 (1603)).

113. *See e.g.*, Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798).

114. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (vagrancy ordinance).

115. Klarman *supra* note 103, at 765–66.

116. Jamison v. McClendon, 476 F. Supp. 3d 386, 398 (S.D. Miss. 2020) (citing RON CHERNOW, GRANT 588 (2017)); Memphis Riots and Massacres, H.R. Rep. No. 39-101, at 5-20 (1866).

117. *E.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (involving selective enforcement of a permitting ordinance against Chinese-owned laundromats).

118. *See* Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75, 90–95 (2015) (discussing judge-created racial disparities in federal sentencing).

119. JOHN HART ELY, DEMOCRACY AND DISTRUST 96–97 (1980).

120. *Id.*

The Fourth Amendment protects individuals from having their lives disrupted by law enforcement officials—empowered with discretion in who they search or seize—by requiring that the search or seizure be "reasonable," that sufficient evidence is provided, and/or requiring ex-ante review by an independent third party.[121] Each of these requirements substantively limits officers' discretion by establishing a system of procedures.[122] Correspondingly, this restricts one of the ways in which the carceral system can be used by a majority group to abuse a minority group, searching or seizing their "persons, houses, papers, [or] effects."[123] Moreover, these procedures limit discretion regardless of the substantive content or party—providing facially "neutral" protections rather than protections for certain groups, such as citizens or property owners.[124]

The Amendment was created in response to the targeting of political opposition as exemplified in the infamous 1763 case of *Wilkes v. Wood*.[125] *Wilkes* involved King George III's imprisonment of John Wilkes, a political opponent who publicly criticized the George III's "ministry and majesty."[126] The King responded by using general warrants to lock him up in the Tower of London in order to "suppress his political activity."[127] Cases like *Wilkes* were highly influential on the creation of the Fourth Amendment, which was crafted in response to fears of an executive targeting political dissidents.[128]

The Eighth Amendment similarly protects individuals from the infliction of "cruel and unusual" punishment[129] this was done in response to fears that such punishment would be inflicted on members of an unpopular group such as occurred in the case of William Prynne.[130] William Prynne was brought before the infamous "Star Chamber" and convicted of seditious libel for his writing of several "books and pamphlets" critical of King Charles I.[131] Prynne's punishment was to have his ears cut off, followed by being put on a pillory while having his ear

121. *Id.*

122. *Id.*

123. *See id.*; U.S. CONST. amend. IV.

124. *See* ELY *supra* note 119, at 96–97.

125. 8 ENG. REP. 489 (C.P. 1763), *reprinted in* 5 *The Founders' Constitution* 230 (P. Kurland & R. Lerner eds. 1987).

126. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1176–77 (1991) [hereinafter *Bill of Rights*].

127. *Id.* at 1177.

128. *Bill of Rights supra* note 126.

129. U.S. CONST. amend. VIII.

130. *See, e.g.*, *Bill of Rights supra* note 126.

131. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 870 (1960); *see also* Mark Kishlansky, *A Whipper Whipped: The Sedition of William Prynne,* 56 Hist. J. 603, 603–09 (2013); Bill of Rights, *supra* note 126, at 1182.

stumps gouged out.[132] Prynne's case exemplified the dangers of unfettered discretion in imposing punishment given that it may be used to target one's political opposition. As Professor John Hart Ely put it, "much of [the Eighth Amendment] surely had to do with a realization that in the context of imposing penalties [] there is tremendous potential for arbitrary or invidious infliction of 'unusually' severe punishments on persons of various classes other than 'our own.'"[133] The prohibition on cruel and unusual punishment limits discretion at yet another juncture in the carceral system primed for abuse, sentencing.[134]

In "The Puzzling Resistance to Political Process Theory," Professor Michael J. Klarman's discussion of the Warren Court's expansion of modern criminal procedure supports both the two-layer defect theory and helps explain why the judiciary is entrusted with protecting against the first—and ultimately the second—layer of defect.[135] Klarman's explanation of state legislatures' failure to enact legislation implementing criminal procedure, leaving its creation and implementation to "the unfettered discretion of politically unaccountable law enforcement officials,"[136] aligns with the first layer of political process defects that constitutional criminal procedure was initially designed to address.[137] While the legislatures' failure to hold the executive accountable does not constitute active legislation as envisioned in footnote four's concept of judicial review, it still exemplifies the concerns of its second paragraph. These concerns revolve around the misalignment of a government branch's incentive structures with the fundamental democratic interest of ensuring proper representation by the governed.

The first layer of defect involves a misalignment of interests between the legislature, the executive, and the people. The executive's (including police officers, prosecutors, corrections officers, etc.) interests often starkly oppose robust criminal procedure protections.[138] These procedures limit the executive's power and discretion in enforcing criminal laws, curtailing their ability to politically exploit criminal law, as seen historically with the British Crown.[139] That political benefit need not

132. *See* sources cited *supra* note 131.

133. ELY *supra* note 119, at 97.

134. *See id.*

135. *See generally* Klarman *supra* note 103.

136. *Id.* at 765.

137. *Id*. at 764–66. Klarman further argued that these democratic defects are further exacerbated because the criminal legal system has race and class-based disparities. id. at 766.

138. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533–39 (2001) [hereinafter Pathological Politics] (exploring police and prosecutors' incentives related to criminal law).

139. *See* sources cited *supra* note 131.

be intentionally malicious. If the executive believes that searching a person's house, with almost no evidence, is necessary for public safety, they might be greatly incentivized to target individuals or groups that they deem a threat.

Legislatures often show little interest in developing criminal procedure due to political repercussions, particularly in a carceral society like the United States.[140] For instance, if a "dangerous criminal" is acquitted due to a "technicality" created by criminal procedure that was legislatively created, the incumbent legislators' risk political backlash and removal from office.[141] Thus, they may prefer delegating this issue to the executive, who would bear the brunt of any political consequences. However, this approach sacrifices the liberties and representative interests of those targeted by the executive—often minority groups who are already marginalized in the political process—exacerbating the second layer of defect.[142] Compounding the issue, groups lacking political power are also the ones least likely to have their interests considered in the initial enactment of criminal laws.[143] The social, political, and legal consequences of a conviction (e.g., stigma, loss of voting rights, economic loss, or loss of liberty) then create a vicious cycle.[144] That is, once a group is targeted by the carceral system, the legislature becomes even less inclined to pass criminal procedure legislation due to the group's diminished socio-political power. Because of the failure to correct the abuses legislatively, the abuse faced by the targeted group continuously compounds.

Additionally, the legislature's motives for enacting criminal procedure may clash with other legislative interests, especially if the carceral system is used for political gain. Suppose the legislature targets a specific group, whether a discrete and insular minority or even a minority group that has caused actual harm, like child molesters. Passing criminal procedure laws could undermine the strong interests that prompted the

140. *Pathological Politics supra* note 138, at 529–33 (exploring lawmakers' incentives related to criminal law).

141. *Id.*

142. *See e.g.*, Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 331, 363–75 (1998); Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L. J. 923, 933–56 (2023); Jamelia Morgan, *Disability's Fourth Amendment,* 122 COLUM. L. REV. 489, 491–559 (2022) [hereinafter *Disability's Fourth Amendment*].

143. *See* Klarman *supra* note 103, at 77; *see also Pathological Politics supra* note 138, at 572–76.

144. *See generally* Elena Saxonhouse, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597 (2004).

enactment of the criminal laws in the first place.[145] Hence, the desire to pass one kind of law undermines the desire to pursue the other.

The judiciary ends up being the least affected by this interest misalignment and thus in the comparatively best position to correct it. In the case of Article III judges, due to life tenure the political consequences of creating a system of criminal procedure are blunted. Furthermore, given that many judges are unelected, they do not have a strong political interest in reducing the representative power of those impact by the carceral system.[146] While many states elect judges, terms and retention elections are often for long periods of time.[147] Additionally, despite elected judges often ruling and sentencing more adversely to criminal defendants during election years,[148] the politics of crime have a similar on the legislative and executive branches.[149] This makes the electoral concern largely non-unique, and thus not a reason elected judges are comparatively worse to other elected officeholders. The continuous oversight of criminal cases also increases the judiciary's institutional competence and places the human consequences of the system directly in front of the judges. Moreover, even if the judiciary has biases against certain minority groups, those biases are likely not unique to the judicial branch; more likely, those biases are common across all branches of government.[150] Therefore, the judiciary is in the comparatively best position protect the interests that robust criminal procedure is designed to protect.

B. The Second Layer of Political Process Defect: Discriminatory Application

The second layer of political process defect that impacts the carceral system is practical—not theoretical. The first layer involves a majority group with political power theoretically able to obtain and assert power over the carceral system to their advantage against another—often

145. *See generally Pathological Politics supra* note 138, at 519–72; Stuntz, *supra* note 20, at 6–12.

146. ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 86–105 (1987).

147. *See Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST. (Oct. 11, 2022), https://www.brennancenter.org/judicial-selection-map [https://perma.cc/7E6S-2G3A].

148. *See generally*, KATE BERRY, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES (2015), https://www.brennancenter.org/our-work/research-reports/how-judicial-elections-impact-criminal-cases [https://perma.cc/4SVL-EAZM].

149. *See*, *e.g.*, *Pathological Politics*, *supra* note 138, at 529–39; Udi Ofer, *Politicians' Tough-on-Crime Messaging Could Have Devastating Consequences*, TIME (Nov. 3, 2022), https://time.com/6227704/politicians-crime-messaging-mass-incarceration/ [https://perma.cc/B9Z5-UZ6Z]; Michael C. Campbell & Heather Schoenfeld, *The Transformation of America's Penal Order: A Historicized Political Sociology of Punishment*, 118 AM. J. SOCIO. 1375, 1390–1408 (2013).

150. *See id.* at 146.

minority—group. How and against which group this abuse occurs will differ based on the specific historically contingent circumstances of oppression and the traits associated with a given group.

The second layer involves the application as to which minority groups are targeted by a political majority who seeks to use the carceral system to achieve some greater goal at that minority group's expense. In the United States, the carceral system has a long history of discriminatory application against both racial minorities and disabled persons.[151] That history of carceral discrimination—against racial minorities in particular—led to the creation of "modern criminal procedure" during the early to mid-20th century.[152] This "modern criminal procedure" has a unique anti-discrimination tilt to it, as it attempts to expand the protections of the Bill of Rights which already are intended to protect against everyone (majority and minority alike) to protect a *specific* minority group—in particular racial minorities.[153] Disabled persons—often unnoticed—face many of these same abuses that racial minorities face, with the harm between the two groups often deeply intertwined.[154]

1. Race, the Political Process, and Criminal Procedure

The U.S. carceral system has long discriminated against individuals on the basis of race, from the era of slavery to the present; this history of discrimination is an example of the second layer of political process defect.[155] It was not until the early-to-mid 20th century that the Supreme Court began seriously confronting systemic racial discrimination within the carceral system.[156] This shift was a response to systemic violence, particularly in the use of the death penalty against Black defendants to perform what was essentially lynching, by a Court that was increasingly inclined and empowered to address racial discrimination. Ultimately, the Court established modern jurisprudence that reinforced and expanded upon those constitutional amendments designed to counteract the first

151. *See* Maclin *supra* note 142, at 363–75; Harawa *supra* note 142, at 933–56; *Disability's Fourth Amendment*, *supra* note 142, at 491–559; *see generally* Morgan *supra* note 14, at 1405; Bixby et al. *supra* note 15, at 1462; Thompson *supra* note 11; NEMBHARD & ROBIN, *supra* note 13, at 1–8.

152. *See generally* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) [hereinafter *Racial Origins*]

153. *Id.* at 59–81.

154. *See generally* Jamelia Morgan, *On the Relationship Between Race and Disability*, 58 HARV. C.R.-C.L. L. REV. 663 (2023).

155. *See* Maclin *supra* note 142, at 363–75; Harawa *supra* note 142, at 933–56; *Disability's Fourth Amendment supra* note 142, at 491–559.

156. *See Racial Origins supra* note 152, at 50–77.

layer of political process defects in the carceral system to remedy second layer defects.[157]

For nearly 350 years there has been racial discrimination in the United States carceral system. As early as 1680, race began to play a defining role in criminal conduct, specifically identifying Black persons within criminal codes.[158] The Virginia Slave Codes, passed in 1705, began separating criminal punishment and status on the basis of race.[159] Concurrently, slave patrols were created across the British and Spanish colonies.[160] These patrols shared many institutional design features with modern police forces deeply influencing modern police structure.[161]

In addition to the slave patrols and the direct criminalization of the Black identity that occurred prior to the Civil War, the *modern* carceral system was built during Reconstruction to maintain a system of white supremacy.[162] Across the country, legislatures passed "Black Codes" and vagrancy laws—which intentionally and disproportionately criminalized conduct by Black persons.[163] This was done to further white supremacy and create a system equivalent to slavery in light of the loophole in the Thirteenth Amendment that allows involuntary servitude as a criminal punishment.[164] Among many other injustices, racial minorities were denied their right to due process[165] and counsel,[166] convicted by all-white juries,[167] faced disproportionate sentencing,[168] had knowingly perjured testimony used against them,[169] endured police brutality,[170] subjected to selective prosecution,[171] and coerced into confessing even when they did

157. *See* Steiker *supra* note 8, at 838–46.

158. Ben Brucato, *Policing Race and Racing Police: The Origin of US Police in Slave Patrols*, 47 SOCIAL JUSTICE 115, 124 (2020) (discussing the "1680 Act for Preventing Negroes Insurrections").

159. *Id.* at 125.

160. *Id.* at 126–27.

161. *See id.* at 126–33.

162. MICHELLE ALEXANDER, THE NEW JIM CROW 33–44 (2010)

163. *See id.*

164. *Id.*; *see also* Carl Schurz, *Report on the Condition of the South*, S. Exec. Doc. No. 39-2, at 23 (1865).

165. *E.g.*, Powell v. Alabama, 287 U.S. 45 (1932).

166. *E.g.*, *id.*

167. *E.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879); Brownfield v. South Carolina, 189 U.S. 426 (1903); Norris v. Alabama, 294 U.S. 587 (1935).

168. *See*, *e.g.*, *Furman v. Georgia*, 408 U.S. 238, 363–70 (1972) (Marshall, J., concurring); *McCleskey v. Kemp*, 481 U.S. 279, 320–45 (1987) (Brennan, J., dissenting).

169. Mooney v. Holohan, 294 U.S. 103 (1935)

170. *See*, *e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936).

171. *E.g.*, *Yick Wo*, 118 U.S. 356 (1886).

not do what was alleged.[172] While Blackness was criminalized, white persons would go unpunished for mass lynchings perpetrated to terrorize Black communities into submission.[173] Often, those involved in the lynchings included prosecutors, judges, or members of law enforcement.[174] In addition to those extrajudicial lynchings, communities across the country also used the judicial system and application of the death penalty to add a veneer of legality to this system of lynching.[175]

During the 20th century, the use of the legal system to engage in what were essentially formalized lynchings catalyzed the development of modern criminal procedure. After World War I, and in light of growing public pressure, the Supreme Court took up several cases involving clear racial discrimination against Black defendants facing the death penalty, such as *Brown v. Mississippi*,[176] *Powell v. Alabama*,[177] and later *Payne v. Arkansas*.[178] Although these cases involved racial discrimination, the Court's decisions were not based on the Equal Protection Clause. Instead, and in contrast to prior decisions—which often invoked concerns of federalism to avoid Supreme Court intervention—the Court used the Due Process Clause both in itself and as a mechanism to increasingly incorporate the constitutional protections created by the Bill of Rights against the states.[179] Whether declaring confessions obtained through torture unconstitutional under the Due Process Clause[180] or incorporating

172. *E.g.*, *Payne*, 356 U.S. at 560. For further discussion see generally, *Racial Origins supra* note 152, at 50–77.

173. *Jamison*, 476 F. Supp. 3d at 398–402.

174. *Id.* at 398–99.

175. *See* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 79–80 (1990) (discussing capital sentencing by all-white juries as form of racial control); *see also* STEVEN BRIGHT & JAMES KWAK, FEAR OF TOO MUCH JUSTICE 218 (2023).

176. *See, e.g.*, *Brown*, 297 U.S. at 281–286 (discussing convictions of Black defendants resting upon confessions obtained by violence).

177. *E.g.*, *Powell*, 287 U.S. at 50 (regarding Black defendants who were denied due process of law and the equal protection of laws).

178. *E.g., Payne*, 356 U.S. at 569 (discussing a coerced confession in violation of the Due Process Clause and neglecting to address denial of equal protection under the Fourteenth Amendment). For further discussion on the racial origins of modern criminal procedure and the history of these cases, *see generally Racial Origins supra* note 152, at 50–77.

179. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 653, 668 (1964) (guaranteeing the right against self-incrimination); Mapp v. Ohio, 367 U.S. 643, 655–57 (1961) (guaranteeing Fourth Amendment rights); In re Oliver, 333 U.S. 257 (1948) (guaranteeing the right to a public trial); *Powell*, 287 U.S. at 73 (guaranteeing the right to counsel in capital cases); Gideon v. Wainwright, 372 U.S. 335 (1963) (guaranteeing the right to counsel in felony cases); Argersinger v. Hamlin, 407 U.S. 25 (1972) (guaranteeing the right to counsel for imprisonable misdemeanors); Robinson v. California, 370 U.S. 660 (1962) (guaranteeing the right against cruel and unusual punishment).

180. *Brown*, 297 U.S. at 279.

the right to counsel,[181] the Court's intention to counteract the "outrageous treatment of black defendants by southern criminal [legal] system" was clear.[182]

By the mid-20th century, the Warren Court would take up this mantle in stride, fully developing the modern system of criminal procedure. It is no coincidence that many of the most notable Warren Court cases involved minority defendants facing egregious violence and discrimination in the criminal legal system. A prominent example of this new set of process requirements includes the Court's expansion of the exclusionary evidence rule and the warrant requirement—tying it together with the reasonableness clause—to decrease areas of low-visibility police discretion where discrimination was primed to occur.[183]

In *Second Thoughts About First Principles*, Professor Carol Steiker described how various Warren Court-era criminal procedure cases support the idea that the Warren Court shaped criminal procedure as a response to racial discrimination.[184] For instance, in *Bumper v. North Carolina*, the Court was confronted with a case in which four white police officers lied in an attempt to obtain the consent of an elderly black woman to search her home for evidence against her grandson.[185] The Court held that lying about the existence of a warrant in order to obtain consent renders the consent void.[186] *Miranda v. Arizona* involved a series of consolidated cases challenging confessions obtained by police.[187] The Court held that statements made by a defendant in custodial interrogation are inadmissible if offered against the defendant by prosecution, unless law enforcement officers inform the defendant that they have the right to remain silent, that any statement can be used against them, and that they have "the right to the presence of an attorney, either retained or appointed."[188]

As Professor Gerald Caplan argued, *Miranda* was in no small part a response to the coercive practices that were being used against racial minorities in order to obtain confessions.[189] *Davis v. Mississippi* involved twenty-four young Black men who were rounded up and fingerprinted simply because a rape victim described her rapist as a "[Black] youth."[190] While the Court did not decide whether there are narrower circumstances

181. *Powell*, 287 U.S. at 49.
182. Klarman *supra* note 103, at 764.
183. Steiker *supra* note 8, at 842–44.
184. *Id.*
185. Bumper v. North Carolina, 391 U.S. 543 (1969); *see also* Steiker *supra* note 8, at 844.
186. *Bumper*, 391 U.S. at 549–550.
187. 384 U.S. 436, 491–99 (1966).
188. *Id.* at 444.
189. Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1470–71 (1985).
190. Davis v. Mississippi, 394 U.S. 721, 722 (1969).

where fingerprinting absent probable cause could be constitutional, it held that in this case the detention and fingerprinting of the Black minors without probable cause violated the Fourth Amendment.[191] In *Bivens,* the Court provided a private cause of action against federal officials in response to the federal government engaging in egregious Fourth Amendment violations against a Black suspect.[192] Furthermore, later cases like *Graham v. Connor* also involved racial minorities facing abuse under the criminal legal system and the Court's response to create a remedy under the Fourth Amendment. [193] These cases demonstrate how constitutional criminal procedure began to develop its initial ability to regulate the carceral system.

Yet, despite the Warren Court's efforts, there are still disparities throughout the carceral system. For example, disparate sentencing occurs due to factors such as implicitly or explicitly biased judges[194] and disproportionate sentencing guidelines, with the most famous example being the crack–cocaine sentencing disparity.[195] Moreover, disparities also exist prior to sentencing due to factors like charging decisions,[196] police brutality,[197] and overpoliced neighborhoods.[198] This systemic discrimination in the criminal legal system also affects other groups asides from racial minorities. In particular, individuals with disabilities also face severe disparities and have a similar history of discrimination.[199]

2. Disability, the Political Process, and Criminal Procedure

While racial minorities were one of the primary groups targeted by the carceral system were the group that the Warren Court focused on, another group was disparately treated and left without legal protections for a substantial period of time—disabled persons.[200] The history of the

191. *Id.* at 727–28.

192. *See Bivens*, 403 U.S. at 389; *see also* Steiker *supra* note 8, at 844.

193. 490 U.S. 386, 388 (1989) ("The case requires us to decide what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person. We hold that such claims are properly analyzed under the Fourth Amendment's "objective reasonableness' standard, rather than under a substantive due process standard."); *see also* Steiker *supra* note 8 at 838–46.

194. *See* Yang, *supra* note 118.

195. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1285–97 (1995); *see also* Terry v. United States, 141 S. Ct. 1858, 1864–68 (2021) (Sotomayor, J., concurring).

196. ALEXANDER *supra* note 162, at 121–49.

197. *See* NEMBHARD & ROBIN *supra* note 13, at 3–4.

198. *See id.*

199. *See infra* Part III(B)(2).

200. The Warren Court's focus in the creation of criminal procedure and its Equal Protection Clause jurisprudence were focused on resolving racial discrimination. *See supra* Part III(B)(i).

criminalization of disability and its impact on incarceration is parallel to the history and criminalization of race. In fact, many of the exact same mechanisms used against racial minorities have been used against persons with disabilities.[201] Moreover, the distinct nature of disability has resulted in an overlap with race and disability status that both uses disability status as a justification for racial discrimination and resulted in disability sitting undiscussed in the background of many major modern criminal procedure cases that focused on race discrimination alone.[202] The twin history of race and disability in the carceral system have gone largely unnoticed by courts, however, due to the collapse of constitutional criminal procedure, it should be brought back into the forefront as anti-carceral advocates look for alternative legal theories to achieve systemic change.

Similar to how the carceral system law specifically criminalized Black persons' public existence, laws were passed that targeted disabled persons public existence. In fact, the United States has a long history criminalizing people because of their disability. For example, starting in the mid-19th century, cities across the United States began criminalizing disability by making it a crime for disabled people to be in public, these would become known as "ugly laws."[203] One of the earliest examples of an ugly law is one that the City and County of San Francisco passed in 1867.[204] Its relevant part states:

> Any person who is diseased, maimed, mutilated, or in any way deformed so as to be an unsightly or disgusting object, or an improper person to be allowed in or on the streets, highways, thoroughfares or public places in the City or

In contrast, only a few sporadic cases involving disability, primarily regarding institutionalization, appeared during the end of the Warren Court era. *See*, *e.g.*, Baxstrom v. Herold, 383 U.S. 107, 108 (1966). There were a few more cases during the Burger Court era, yet the results of these case were a mixed bag for disability rights, with the infamous decision in *Cleburne* coming at the tail-end of the Burger Court. *Compare* Addington v. Texas, 441 U.S. 418 (1979), *and* Youngberg v. Romeo, 457 U.S. 307 (1982), *with* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). On the flipside, while in 1968 Congress passed the Architectural Barriers Act of 1968, Pub. L. No. 90–480, 82 Stat. 718 (1968) (codified at 42 U.S.C. §§ 4151–57), it did not pass broader civil rights protections until 1973 with the passage of § 504, the first broad disability anti-discrimination statute. Rehabilitation Act of 1973, Pub. L. No. 93–112, § 504, 87 Stat. 355, 394 (1973) (codified at 29 U.S.C. § 794(a)). And Congress did not pass the most comprehensive relevant disability rights statute until 1990 with the passage of the ADA. Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213).

201. *See infra* Part III(B)(2).

202. *See*, *e.g.*, *Payne*, 356 U.S. at 561–63; *Graham*, 490 U.S. at 388–89.

203. *See generally* SUSAN M. SCHWEIK, THE UGLY LAWS: DISABILITY IN PUBLIC 1–39 (2009).

204. *Id.* at 24-29.

> County of San Francisco, shall not therein or thereon expose himself or herself to public view . . . . [205]

Each violation of the law was a misdemeanor.[206]

Similar laws would crop up across the United States in cities like Chicago, New Orleans, Portland, Columbus, and even in entire states like Pennsylvania.[207] These "ugly laws" which limit the movement of disabled persons under threat of criminal prosecution criminalized being disabled in public, in a strikingly similar manner—although for different purposes—to how the Black codes and vagrancy laws limited the movement of Black persons in public and criminalized their existence. Much like how the Black codes and vagrancy ordinances were used to force Black people into prisons, starting in the nineteenth century ugly laws and other public health laws were used to forcibly segregate disabled persons while also depriving them of their rights.[208]

Beginning in the early 20th century, mental institutions and jails often forcibly sterilized disabled persons as part of this system of eugenics with the purpose to erase disabled persons from existence. This eugenics project was especially used against disabled persons with intersectional identities along the lines of race, gender, sexuality, and religion.[209] When this eugenics system was challenged in *Buck v. Bell*, the Court held that the system was constitutional as it was not, in its opinion, unconstitutional for states to sterilize individuals with disabilities without their consent.[210] In *Buck*, the Supreme Court upheld a eugenics law requiring sterilization of the "feeble-minded," resulting in the forcible sterilization of Carrie Buck, with Justice Holmes writing the infamous line "[t]hree generations of imbeciles are enough."[211] This deprived disabled persons—and those regarded as being disabled—of their autonomy, and often occurred in the complete absence of due process.[212] As the mental asylum system began to collapse in the latter half of the 20th century, it became increasingly

205. S.F., CAL., ORDINANCE 783, § 3 (July 9, 1867).

206. *Id.*

207. SCHWEIK *supra* note 203, at 291–96.

208. *See id.*; KIM E. NIELSON, A DISABILITY HISTORY OF THE UNITED STATES 50–54, 66–77 (2012).

209. NIELSON *supra* note 208, at 100–24.

210. Buck v. Bell, 274 U.S. 200 (1927).

211. *Id.* at 207.

212. *See generally* Adam Cohen, Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck (2016).

intertwined with the modern carceral system, which ultimately took its place.[213]

As previously discussed, the carceral system disparately impacts disabled persons. Children with disabilities are about four times more likely to be arrested in school.[214] Additionally, "an estimated 66 percent of incarcerated people" have a disability compared to the roughly 26% of the U.S. population that has a disability.[215] Moreover, police violence against disabled persons—much like similar violence against racial minorities—is pervasive as between 33% and 50% of police use of force incidents involve disabled persons and over 50% police killings are killings of persons with a disability.[216] The effect of this violence is often compounded for racial minorities, for example, "more than half of disabled African Americans have been arrested by the time they turn 28—double the risk in comparison to their white disabled counterparts."[217]

The similarities continue between disability and race, as many famous cases that attempted to remedy racial discrimination in the carceral system through the creation of *modern* criminal procedure involved disabled persons. In *Payne v. Arkansas*, Frank Andrew Payne, a 19-year-old Black man with an intellectual disability was sentenced to death by electrocution for first-degree murder—his conviction rested on a "coerced and false confession."[218] This "confession" was obtained by depriving Payne of food, sleep, clothing, and the ability to communicate with the outside world before he was eventually interrogated in a locked room.[219] During the interrogation, the Chief of Police used scare tactics; for instance, he told Payne that there were "30 or 40 people outside that wanted to get [Payne]."[220] He then stated that he would allow Payne to confess to him in private and if Payne "would come in and tell him the truth. . . [then he] would probably keep them from coming in."[221] As a result of these tactics, Payne "confessed" to the crime.[222] This case involves a police officer targeting a person with an intellectual disability

213. Alisa Roth, *The Truth About Deinstitutionalization*, THE ATLANTIC (May 25, 2021), https://www.theatlantic.com/health/archive/2021/05/truth-about-deinstitutionalization/618986/ [https://perma.cc/DCL7-UFKQ]; *see also Prisons: The New Asylums*, HARV. POL. REV. (Mar. 9, 2020), https://harvardpolitics.com/prisons-the-new-asylums/ [https://perma.cc/BH9Q-N42G].

214. Hacker et al. *supra* note 16.

215. Bixby et al. *supra* note 15.

216. Thompson *supra* note 11; *see also* Morgan *supra* note 14.

217. Thompson *supra* note 11.

218. *Payne*, 356 U.S. at 561–63.

219. *Id.* at 561–64.

220. *Id.* at 564–65.

221. *Id.*

222. *Payne*, 356 U.S. at 564–66.

and, while it cannot be stated for certain, likely taking advantage of his intellectual disability in order to obtain a false confession. While race is in the foreground of the case, at the exact same time the individual within that racial group was targeted due to his intersecting disabled identity.

Graham v. Connor, the lodestar excessive force case mentioned earlier, was also dominated by disability. The plaintiff had diabetes, and his disability was a but-for cause of the chain of events that resulted in the police unconstitutionally seizing and brutally beating him.[223] His diabetic reaction was mistaken for drunkenness, and Graham's behavior trying to raise his blood sugar was one of the primary reasons why the police officers became interested in him—another reason being that the plaintiff was a Black man.[224] This type of explicit targeting of disability was of paramount concern to co-sponsors of the ADA, and a mischief that they sought to remedy.[225]

As both *Payne* and *Graham* demonstrate, due to their race and disability, many Black disabled persons are put into "multiple jeopardy" facing increased structural discrimination due to both their race and their disability.[226] While the creation of modern criminal procedure was directly in response to race, a similar pattern of disability discrimination is exemplified through institutionalization, eugenics, police violence, and even the laws themselves, threatening disabled persons everywhere and putting disabled persons of color in especially great risk.

This structural disability discrimination that has occurred throughout U.S. history created what Justice Marshall called "[a] regime of state-mandated segregation and degradation soon emerged that in its

223. *See Graham*, 490 U.S. at 388–89.

224. *Id.* Graham's race was likely also a substantial factor. *See* 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/2020/06/08/91cc7b0c-a9a7-11ea-94d2d7bc43b26bf9_story.html [https://perma.cc/5NEG-M2AQ]. This overlap should not be surprising given that disability both faces independent discrimination and has been used as a mechanism to justify racial discrimination. *See* NIELSON, *supra* note 207, at 56–65. For example, the junk science of phrenology, which argued that people of European descent had bigger skulls that made them more intelligent and "superior" to people of African descent, was used to justify racism and chattel slavery. *id.* at 56–60.

225. *See e.g.*, 136 CONG. REC. 11461 (1990) ("[I]t is not unusual for a person with cerebral palsy, who might walk in a staggering manner, to be mistaken for someone who is drunk"); 136 CONG. REC. 11471 (1990) ("persons who have epilepsy are sometimes inappropriately arrested because police officers have not received proper training to recognize seizures and to respond to them. In my situation[], appropriate training of officials will avert discriminatory action...").

226. *See* Beth Ferri, *A Dialogue We've Yet to Have: Race and Disability Studies*, *in* THE MYTH OF THE NORMAL CURVE 139, 139–150 (Curt Dudley-Marling & Alex Gurn Eds., 2010) (discussing the process of multiple jeopardy wherein individuals face discrimination that is then compounded by multiple marginalized identities that are discriminated against).

virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow."[227] Much like how the system of racial discrimination in the carceral system is evidence of discrimination against a discrete and insular minority in a system that is primed for political defects, so too is the case with disability. Congress passed disability laws to directly deal with this discrimination, including discrimination within the carceral system. In fact, the congressional record of the debates over the ADA is replete with mentions of disability discrimination by law enforcement.[228] Nonetheless this systemic discrimination has persisted as evidenced the disability-based disparities in the carceral system that has resulted in a carceral system filled with disabled persons who need the ADA's protections.[229] Those protections would include claims bear a striking functional resemblance to constitutional criminal procedure such as the failure-to-modify cases discussed.[230]

IV. WHY DISABILITY LAW IS INCREASINGLY USED OVER CONSTITUTIONAL CRIMINAL PROCEDURE, ITS BENEFITS, AND ITS DRAWBACKS

With disability law now established as falling within the scope of "criminal procedure," and with an explanation of why it functions as such, the remaining question is *why* disability law is increasingly used as criminal procedure, as well as the potential benefits and drawbacks of its use as criminal procedure. Constitutional criminal procedure has

227. *Cleburne*, 473 U.S. at 462 (Marshall, J., dissenting). Indeed, the carceral system is not the only place where persons with disabilities face the type of discrimination that characterizes discrete and insular minorities. For example, in 2023 the unemployment rate for people with a disability was 7.2% which is over double the 3.5% unemployment rate for those without disabilities. BUREAU LAB. STAT., PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS 1 (2023), https://www.bls.gov/news.release/pdf/disabl.pdf [https://perma.cc/7Z7L-VRVC]. Additionally, [i]n 2019, the rate of violent victimization against persons with disabilities was nearly four times the rate for persons without disabilities." ERIKA HARRELL, BUREAU JUST. STAT., CRIME AGAINST PERSONS WITH DISABILITIES, 2009–2019—STATISTICAL TABLES 1 (2021), https://bjs.ojp.gov/content/pub/pdf/capd0919st.pdf [https://perma.cc/J69P-4E5R].

227. As a Senate committee report for the Americans with Disabilities Act of 1989—which would become the Americans with Disabilities Act of 1990—best put it: "[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the ability of such individuals to participate in and contribute to society." S. REP NO. 101-116, at 15 (1989). For further discussion on how persons with disabilities qualify as discrete and insular minorities see Jayne Ponder, Note, *The Irrational Rationality of Rational Basis Review for People with Disabilities: A Call for Intermediate Scrutiny*, 53 HARV. C.R.-C.L. L. REV. 709, 727–43 (2019).

228. *See e.g.*, sources cited *supra* note 225.

229. *See supra* p. 252.

230. *See supra* Part II.

experienced a significant decline since its peak, with cutbacks to its substantive rules and enforcement mechanisms. This decline has created a vacuum, necessitating that litigators seek an alternative legal framework to regulate the carceral system. Failure to modify claims demonstrate how disability law is being increasingly used as criminal procedure. Disability law's use comes with unique advantages including its statutory structure, remedies, enforcement mechanisms, and targeted asymmetric protections. These advantages enable disability law to complement constitutional criminal procedure, filling the void left by its decline.

A. The Collapse of Constitutional Criminal Procedure

Over the last few decades, the scope of constitutional criminal procedure's liability rules has either been narrowed, faced serious threat of being narrowed, or even been eliminated altogether. In particular, attacks on the "evolving standards of decency"[231] analysis for Eighth Amendment claims that undergirds *Estelle* claims,[232] puts the ability for criminal procedure to regulate conditions of incarceration at risk. While the Eighth Amendment has undergone remarkable growth over the last few decades, the replacement of Justices Ginsburg and Kennedy has severely undermined that growth, as they were key votes in many major Eighth Amendment cases.[233] In contrast, Justices Alito, Thomas, and Scalia—before he died—have each called into question the constitutional legitimacy of *Estelle*.[234]

It is not clear whether the current justices beyond Justices Thomas and Alito are interested in overturning the "evolving standards of decency" caselaw, however, there is reason to think that this caselaw is in danger given the Court's originalist turn.[235] For example, Justice Gorsuch's opinion in *Bucklew v. Precythe*—which Justice Kavanaugh joined—shows some hostility to more robust Eighth Amendment protection.[236] Additionally, writs of certiorari for prison condition cases are often rejected by the new conservative majority over vigorous dissents by the

231. Trop v. Dulles, 356 U.S. 86, 100–01 (1958).

232. *See Estelle*, 429 U.S. at 102–06.

233. *See e.g.*, Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002); Kennedy v. Louisiana, 554 U.S. 407 (2008); Miller v. Alabama, 567 U.S. 460 (2012); Montgomery v. Louisiana, 577 U.S. 190 (2016); *Helling*, 509 U.S. 25 (1993); *Hudson*, 503 U.S. 1 (1992).

234. *See Miller*, 567 U.S. at 510 (Alito, J., dissenting); *see also* Glossip v. Gross, 576 U.S. 863, 898–99 (2015) (Scalia, J., concurring).

235. SHARON DOLOVICH, *Evading the Eighth Amendment*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 133, 133–60 (Meghan J. Ryan & William W. Berry III eds., 2020).

236. *See* Bucklew v. Precythe, 139 S. Ct. 1112, 1118–34 (2019).

three liberal justices.[237] Thus, even if the new majority does not limit prison conditions cases themselves, they may be content with lower courts doing so.

While the hollowing out of the substantive rights guaranteed by constitutional criminal procedure has already occurred for some rights or is currently threatened for others, the most concerning damage has been to the remedies and enforcement mechanisms for those rights. The ability to obtain a remedy for a constitutional criminal procedure violation in civil litigation has dissipated due to growing immunity doctrines and shrinking liability doctrines. For example, qualified immunity is an ever-growing liability shield against civil litigation for constitutional violations as it protects individual officers from liability unless they violate a *clearly established* constitutional right.[238] Qualified immunity has two parts: (1) that a constitutional right was violated and (2) that the right was *clearly established*; however, many courts will just skip to the second prong resulting in an ossification of constitutional law as courts avoid creating clearly established law.[239] This functionally allows officers to evade liability if similar past acts have been granted qualified immunity.[240]

Judge Don Willett puts the dangerous effects of qualified immunity in stark terms, stating:

> Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because those questions are yet unanswered. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads defendants win, tails plaintiffs lose.[241]

237. *See e.g.*, Simmons v. U.S., 142 S. Ct. 23 (2021)

238. The "doctrine of qualified immunity protects *government officials* 'from liability for civil damages insofar as their conduct does not *violate clearly established* statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 555 U.S. 223, 231–32 (2009) (citing *Harlow*, 457 U.S. at 818) (emphasis added).

239. *Zadeh*, 902 F.3d at 498–500 (5th Cir. 2018) (Willett, J., concurring) (discussing Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 12 (2015)).

240. Andrew Chung et al., *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/ [https://perma.cc/963X-EJSH].

241. *Zadeh*, 902 F.3d at 499 (Willett, J., concurring).

Moreover, even if a claim involving qualified immunity gets to a jury trial, said juries will often functionally give officers complete immunity.[242]

Should a litigant overcome qualified immunity, growing limitations on civil enforcement mechanisms and remedies available for constitutional criminal procedure pose a serious problem. Given that § 1983 only applies to state and local governments[243] and standing acts as a strong barrier to obtaining injunctive relief using federal common law official capacity suits,[244] enforcing constitutional criminal procedure against *federal* officers often requires bringing *Bivens* claims.[245] However, following its *Carlson* decision, the Court has consistently refused to extend *Bivens*, even in instances closely resembling the fact patterns in other previously blessed claims. For example, in *Correctional Services Corporation v. Malesko*, the Court declined to extend *Bivens* liability for Eighth Amendment violations pertaining to deliberate indifference to medical needs in the context of corporate agents of the Bureau of Prisons.[246] Furthermore, in *Minneci v. Pollard*, the Court refused to extend a *Bivens* claim to private prisons under federal contract, further limiting the scope of claims against unconstitutional prison conditions.[247]

Most recently in *Egbert v. Boule*—which involved a fact pattern remarkably similar to *Bivens*—the Court held there is no *Bivens* claim available for Fourth Amendment excessive force claims near the border when a border patrol agent is enforcing immigration laws.[248] In doing so, the Court announced a new test, stating that the Court will not provide a *Bivens* claim if there is "*any reason* to think that Congress might be better equipped to create a damages remedy."[249] This new test, in a case with a nearly identical fact pattern to Bivens, indicates that *Bivens* will be unavailable for nearly all excessive force claims, if not all Fourth Amendment claims going forward,[250] absent perhaps completely identical facts. These limitations to *Bivens* claims show no end in sight; in fact, several justices have questioned the constitutionality of *Bivens* claims, which similar to the attacks on *Estelle* may also render *Bivens* in danger

242. *See* Chung et al. *supra* note 240.

243. 42 U.S.C. § 1983

244. *See infra* p. 258; *Bivens*, 403 U.S. at 404–06 (1971) (Harlan, J., concurring) (discussing common law federal official capacity suits).

245. *See Bivens*, 403 U.S. at 406–12 (1971) (Harlan, J., concurring).

246. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66–74 (2001).

247. Minneci v. Pollard, 565 U.S. 118, 125–26 (2012).

248. *Egbert*, 596 U.S. at 493–98.

249. *Id.* at 492 (emphasis added); *see also id.* at 518–19 (Sotomayor, J., dissenting).

250. *See id.* at 492; *see also id.* at 502–04 (Gorsuch, J., concurring); *id.* at 505, 517–27 (Sotomayor, J., dissenting).

of being overturned.[251] Each of these developments poses a substantial limitation to the enforceability of constitutional criminal procedure against *federal* officials.

Furthermore, jurisdictional barriers and qualified immunity have made *Monell* liability ever more important, yet limitations on *Monell* liability pose a danger to this increasingly necessary legal theory. In *City of Los Angeles v. Lyons*, a police brutality case, the Court held that a plaintiff must have standing for *each* remedy they seek and that to have standing to seek injunctive relief—not damages—"injured plaintiffs must show, with some degree of certainty, that they will be subjected to exactly the same police practice in the future."[252] This is true even if there is a pattern of past constitutional violations.[253] While this may be slightly easier in conditions of confinement cases like *Estelle*, for excessive force cases and many other criminal procedure cases, obtaining injunctive relief becomes nearly impossible absent an explicitly identifiable authorized policy that risks harming a plaintiff in the future. This means the actions of individual officers are almost never enough to provide standing for injunctive relief. As a result, bringing a *Monell* claim and finding some very specific and rare plaintiffs will almost certainly be a requirement.[254]

In addition to its importance for injunctive relief, *Monell* is important to bypassing qualified immunity. The doctrine of qualified immunity is meant to protect *individuals*, so if plaintiffs can bring a claim against a municipality or government directly, they can avoid qualified immunity attaching.[255] Resultingly, unlike with individual liability claims under *Bivens* or §1983, qualified immunity does not apply to *Monell* liability.[256] Still, there is a catch with *Monell* liability, as when it expanded the definition of "persons" to include municipalities, *Monell* struck a balance. *Monell* held that § 1983 does not create vicarious liability for municipalities, shielding them from liability for the individual actions of its officers.[257] However, the Court balanced this limitation by allowing plaintiffs to sue a municipality for some action—which can include a failure to act[258] —it undertook e.g., a policy, practice, or custom, but

251. *Id.* at 502–04 (Gorsuch, J., concurring); *see also id.* at 501–02.

252. Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 MINN. L. REV. 2257, 2271 (2020) (discussing City of L.A. v. Lyons, 461 U.S. 95, 105 (1983)).

253. *Lyons*, 461 U.S. at 105.

254. *See* Floyd v. City of N.Y., 959 F. Supp. 2d 540, 603–606 (S.D.N.Y. 2013)

255. Owen v. City of Independence, 445 U.S. 622, 652–54 (1980).

256. *Id.*

257. Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 163, 166 (1993) (discussing *Monell*, 436 U.S. at 691–701).

258. *Harris*, 489 U.S. at 395–96.

absent such a policy, practice, or custom, suit is not possible through *Monell* liability.[259]

This tenuous balance designed to avoid vicarious liability left the door open to *Monell* being constricted, which has happened over the past few decades, cutting off a necessary liability theory in order to remedy constitutional violations. In *Board of the County Commissioners v. Brown*, the Court held that in addition to identifying conduct attributable to the municipality, "a plaintiff must show that the municipal action was taken with the *requisite degree of culpability* and must demonstrate a *direct causal link* between the municipal action and the deprivation of federal rights."[260] Moreover, for failure to train claims, plaintiffs must establish that "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."[261] Furthermore, the Court has narrowed the class of cases eligible for *Monell* liability. For example, in *Connick v. Thompson*, the Court held that a failure to train prosecutors in their *Brady* obligations does not give rise to *Monell* liability in single-incident cases.[262] This growing jurisprudence has increased the difficulty for establishing *Monell* liability while also substantively limiting *Monell*'s scope and, correspondingly, a necessary avenue for injunctive relief and damages in light of *Lyons* and qualified immunity. As a result, enforcing constitutional criminal procedure through civil litigation is increasingly difficult and ineffective.

B. The Benefits and Drawbacks of Using Disability Law as Criminal Procedure.

The erosion of constitutional criminal procedure has compelled litigants to seek alternative pathways for asserting their claims while aiming to achieve the same or similar results as constitutional claims. As discussed, disability law has increasingly been utilized to meet this need, with litigants bringing claims analogous to those typically made under constitutional criminal procedure. However, for disability law to effectively fill this void, it must offer an advantage over constitutional criminal procedure claims; otherwise, litigants would be just as well to continue using constitutional claims. Fortunately, disability claims possess several advantages over constitutional claims that render disability law an attractive alternative or, at the very least, an effective supplement. These advantages include: (1) disability law's broad substance and its legal form (statutory rather than constitutional), along with the interpretive benefits

259. *Leatherman*, 507 U.S. at 166.

260. *Brown*, 520 U.S. at 404 (emphasis added).

261. *Harris*, 489 U.S. at 388.

262. Connick v. Thompson, 563 U.S. 51, 64 (2011).

its legal form provides; (2) the broader range of remedies and enforcement mechanisms inherent to disability law; and (3) disability law's targeted asymmetric protections which enable more precise addressing of relevant political process defects.

1. Statutory Versus Constitutional Interpretation:

That disability law involves statutory rather than constitutional interpretation provides it with several distinct advantages over constitutional criminal procedure. These advantages are both substantive, in terms of the recency and design of the legal text, and formal, in that judges may be more willing to interpret statutory texts—especially disability law—more broadly than functionally identical constitutional texts. The shifts in the primary methods of judicial interpretation for constitutional and statutory text (that is, the shifts to originalism and textualism), while detrimental to constitutional criminal procedure, have often been beneficial to disability law. In essence, originalism has restricted the protections afforded by constitutional criminal procedure, whereas textualism has likely expanded the protections under disability law. Furthermore, any interpretation of disability law is likely to have effects beyond the carceral setting, increasing the stakes for any decision. This results in a higher likelihood of interest alignment and plaintiff-favorable decisions. Furthermore, using disability law in place of constitutional criminal procedure offers a jurisprudential clean slate for anti-carceral advocates, who are now able to get a second bite at the apple.

First, disability law has a substantive advantage over constitutional criminal procedure in both its recency and breadth. Because the ADA was the last comprehensive federal civil rights act passed,[263] the ADA and disability law generally has greatly improved upon mistakes from previous statutes.[264] For example, the ADA provided more explicit protections at the outset, such as a more explicit private right of action in its text, to correct the issues in the Civil Rights Act of 1964 and Title IX that required judicially implied private rights of action.[265] Some of the other strong

263. The ADA was passed in 1990. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327. Other comprehensive federal civil rights statutes include but are not limited to: Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-18, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)); Voting Rights Act of 1965, Pub. L. No. 89-110, §5, 79 Stat. 437, 439 (codified as amended at 52 U.S.C. § 10303 (2012)); Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.)

264. *See supra* Part III (B) (ii).

265. *Compare* Cannon v. Univ. of Chi., 441 U.S. 677, 711–17 (1979), *with* 42 U.S.C. § 12133 (incorporating by reference a private right of action), *and* Barnes v. Gorman, 536 U.S. 181, 184–86 (2002).

protections the ADA offers include vicarious liability,[266] broad coverage,[267] abrogation of sovereign immunity,[268] an expansive definition of disability,[269] and a prohibition on disparate impact discrimination.[270] While some of disability law's protections have only been decided by circuit courts or are the subject of circuit splits, the availability (even if limited) of these protections provide considerable versatility and uses across government actions as compared to constitutional criminal procedure. For example, the prohibition on disparate impact discrimination may provide a greater ability to obtain standing for injunctive relief than what would otherwise be available under § 1983.[271] Moreover, the recency of the ADA ensures it was designed closer to the current expectation of the growingly textualist and originalist judiciary as compared to other statutes: e.g., it includes expansive findings explicitly in the text rather than in committee reports.[272]

Second, while originalism—a method of constitutional interpretation—can undermine modern constitutional criminal procedure as compared to the previously dominant living constitutionalist or political process approaches,[273] textualism—a method of statutory interpretation that often corresponds with originalism, which is a method of constitutional interpretation—may be a boon to disability law.[274] Rather than building upon the expansive criminal procedure infrastructure created by the

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[266] *See infra* Part IV (B) (2).

267. *See, e.g.*, *Georgia*, 546 U.S. at 153–54, 157–59.

268. *See id.* at 151; *Lane*, 541 U.S. at 517-18, 538; Dare v. California, 191 F.3d 1167, 1174–75 (9th Cir. 1999); *but see* Bd. of Trs. v. Garrett, 531 U.S. 356, 360 (2001); Klingler v. Dep't of Revenue, 455 F.3d 888, 891 (8th Cir. 2006).

269. *See* 42 U.S.C. § 12102.

270. While there is an existing circuit split over whether disability law prohibits disparate impact discrimination, *compare* Doe v. BCBS of Tennessee, Inc., 926 F.3d 235, 241 (6th Cir. 2019), *with* Payan v. L.A. Cmty. Coll. Dist., 11 F.4th 729, 735–37 (9th Cir. 2021), the case for its prohibition of disparate impact discrimination is fairly strong. *See generally* Joshua M. Alpert, *Disability Environmental Justice: How § 504 of the Rehabilitation Act Can Be Used for Environmental Justice Litigation*, 59 HARV. C.R.-C.L. L. REV. 401, 405–33 (2024). Resultingly, presuming a cause of action for disparate impact discrimination exists, those claims could be used to effectively regulate police departments and other parts of the carceral system. *See* Morgan *supra* note 14, at 1460–62.

271. *Cf.* Brandon Garrett, *Standing While Black: Distinguishing "Lyons" in Racial Profiling Cases*, 100 COLUM. L. REV. 1815, 1822–1846 (2000) (discussing how racial profiling cases can be distinguished from *Lyons*).

272. 42 U.S.C. § 12101.

273. *See supra* Part IV(A); s*ee e.g.*, *Glossip*, 576 U.S. at 898–99 (Scalia, J., concurring) (suggesting originalism as a means of loosening constitutional restrictions on the death penalty).

274. *Compare Bryant*, 84 F.3d at 248–49 (using pragmatist and purposivist principles to construct a narrow understanding of the term "program "in the ADA), *with Yeskey*, 524 U.S. at 209–10 (using textualist principles to construct a broad understanding of the term "program" in the ADA).

Warren Court, the rise of originalism in the modern Court has resulted in actual or threatened cutbacks to constitutional criminal procedure.[275] In particular, many originalists argue that the Warren Court's criminal procedure jurisprudence is inconsistent with the original understanding of the Bill of Rights.[276] This creates a problem for modern constitutional criminal procedure because freezing the understanding of the Constitution to the public meaning of those words in 1787 or 1791 means modern jurisprudential developments such as the exclusionary rule,[277] Fourth Amendment reasonable expectation of privacy standard,[278] *Bivens* claims,[279] and evolving understanding of the Eighth Amendment[280] could be on the chopping block.

In contrast, dueling cases between Judge Posner and Justice Scalia over whether disability law applies to prisons and prisoners demonstrates how textualism has often—although not always[281]—resulted in an expansion of the protections available under disability law as compared to the previously dominant purposivist or pragmatist approaches.[282] Prior to

275. *See* 2005 National Lawyer's Convention, *Transcript, Originalism and Criminal Law and Procedure*, 11 CHAP. L. REV. 277, 282–83 (2008) (describing how Justice Scalia's originalism often, but not always, counseled lesser protections for criminal defendants).

276. *See, e.g.*, Gerard v. Bradley, *The Bill of Rights and Originalism*, 1992 UNIV. ILL. L. REV. 417, 441–43 (1992) (arguing that the Bill of Rights must be understood on originalist terms).

277. Akhil Reed Amar, A*gainst Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 HARV. J. L. & PUB. POL'Y 457, 459–60 (1997).

278. *See* Carpenter v. United States, 138 S. Ct. 2206, 2235–46 (2018) (Thomas, J., dissenting) (criticizing the reasonable expectation of privacy standard as having no basis in the text and history of the Fourth Amendment); *id.* at 2264–5 (Gorsuch, J., dissenting) (same); *but see* Orin S. Kerr, *Katz as Originalism*, 71 DUKE L. J. 1047, 1050 (2022) (arguing that the originalist opposition to the Fourth Amendment is unfounded).

279. *See Egbert*, 596 U.S. 502–04 (Gorsuch, J., concurring).

280. *See Miller*, 567 U.S. at 510 (Alito, J., dissenting) ("The Court long ago abandoned the original meaning of the Eighth Amendment.").

281. In the modern textualist era, while disability law's substantive rights have often been expanded, the remedies for a violation have been limited. *See e.g.*, Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212 (2022).

282. This claim only refers to the interpretation of the given statute, not the higher-level concerns of how the text interacts with the Constitution, e.g., whether sovereign immunity has been validly abrogated, which necessarily involves constitutional interpretation. Other areas of disability law outside of that discussed here (Title II and § 504) also provide evidence for this claim. For example, a limited reading of the Individual with Disabilities Education Act's ("IDEA") exhaustion requirement was rejected by the more purposivist Ninth Circuit majority opinion in *D.D. v. L.A. Unified Sch. Dist.*, prompting a cross ideological dissent from both conservative textualists and several of the more liberal judges on the Ninth Circuit. 18 F.4th 1043, 1058–62 (9th Cir. 2021) (Bumatay, J., dissenting). In a textualist opinion by Justice Gorsuch, the Supreme Court unanimously adopted the limited interpretation of the IDEA's exhaustion requirement—allowing the plaintiffs to seek damages under the ADA that they would have been otherwise unable to seek under a broader interpretation of the exhaustion requirement. Perez v. Sturgis Pub. Sch., 598 U.S. 142 (2023).

Yeskey, Judge Posner wrote the Seventh Circuit majority opinion in *Bryant v. Madigan*,[283] which was by no means a textualist opinion. In the opinion, he stated that claims involving "prison's simply failing to attend to the medical needs of its disabled prisoners" do not allege discrimination.[284] Judge Posner's opinion spoke almost entirely to Congressional intent with little mention of the ADA's text.[285] In fact, later in his opinion Judge Posner explicitly disregarded the text which otherwise clearly applied to prisons or prisoners.[286] Judge Posner justified this disregard on his *assertion* that Congress could not have intended the statute to apply to prisoners since the rights of prisoners in other contexts are often curtailed.[287] Contrastingly, *Yeskey* was a textualist opinion by Justice Scalia that held that Title II applies to prisons given the clear language of the text; this interpretation was accepted even though Title II's application to prisons may not have been expected or even desired by Congress.[288]

All of this is not to say that the Court necessarily consistently follows an originalist or textualist methodology but rather that some commitment to a particular judicial methodology acts as a weight in the justices' decision-making process. That weight may currently have some effect as some of the current justices claim to follow the methodology of originalism and textualism.[289] That commitment to originalism or textualism acts as one of many value sets that go into the decision-making process which might sway the outcome of the case—others might include the sources of law they find acceptable, their desired legal outcome, or the consequences of the decision.[290] Depending on the level of methodological commitment to originalism or textualism, it may function as a default rule to be overcome by those other influences in the decision-making process. The weight of these concerns may vary depending on the nature of the law. In the case of disability law, the commitment to textualism has often but not always resulted in decisions favorable to a broad conception of disability law—those unfavorable decisions are often when the commitment to textualism gives way to broader policy concerns.[291]

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283. 84 F.3d at 246.

284. *Id.* at 249.

285. *Id.*

286. *Id.* at 248–49.

287. *Id.*

288. *Yeskey*, 524 U.S. at 210–12.

289. *See, e.g.*, William Eskridge, Brian Slocum, & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1614–24 (2023).

290. *See generally* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

291. *Compare* Sutton v. United Air Lines*,* 527 U.S. 471 (1999), *with Yeskey*, 524 U.S. 206, *and Perez*, 598 U.S. 142.

Third, since disability law is statutory rather than constitutional, it has the effect of lowering the stakes of any interpretive matter, which may make courts more willing to read the text broadly. The strong ideological valence of originalism, which locks into place a particular view of how rights ought to operate even compared to textualism has closed the doors on a lot of constitutional claims.[292] In contrast, the justices on the Supreme Court and judges on lower courts across the ideological spectrum have demonstrated a willingness to provide broader readings of statutes—even civil rights statutes.[293] These results may occur even though similar arguments are made with respect to both the constitutional and statutory claims.[294] While one cannot say with certainty why courts may be more willing to read statutes more broadly, a strong explanation may be the alterability of a statutory decision as opposed to a constitutional one. That is, if Congress truly opposes a court decision, then they can overrule it, as opposed to a constitutional decision, which is functionally much less alterable by the democratic branches.[295]

Fourth, in contrast to constitutional criminal procedure—which is largely intertwined with the carceral system—disability law decisions will often have effects beyond the carceral system, creating a level of interest alignment in favor of plaintiff friendly decisions. Taking the perspective of a legal realist, there is likely a bias against criminal defendants and incarcerated persons; they are by their very nature outcasts from society, so it can be quite easy to take a "lock em up and throw away the key"

292. *See supra* Part IV (A).

293. *See*, *e.g.*, Bostock v. Clayton Cnty., 590 U.S. 644, 662–63 (2020) (holding that Title VII protects employees from being fired "for being gay or transgender"); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341 (7th Cir. 2017) (en banc) (concluding that "discrimination on the basis of sexual orientation is a form of sex discrimination."); *Yeskey*, 524 U.S. at 213 (extending the ADA to cover state prisons); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 287 (2023) (Gorsuch, J., concurring) (emphasizing race based admissions violate the Civil Rights Act of 1964); Young v. UPS, 575 U.S. 206, 210–11 (2015); Williams v. Kincaid, 45 F.4th 759, 776–79 (4th Cir. 2022) (applying a textualist interpretation of the ADA to hold that gender dysphoria is a covered disability).

294. *Compare* Washington v. Davis, 426 U.S. 229, 238–39 (1976) (holding that the Equal Protection Clause does not prohibit disparate impact discrimination), *with Griggs*, 401 U.S. at 435–36 (holding that Title VII prohibits disparate impact discrimination). *But compare Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (sustaining Equal Protection challenge for gender nonconforming transgender employee), *with Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 796 (11th.Cir. 2022) (en banc) (holding that school bathroom policy did not discriminate against transgender student under Equal Protection Clause or Title X).

295. *Cf.* Ramos v. Louisiana, 140 S. Ct. 1390, 1412–14 (2020) (Kavanaugh, J., concurring) (discussing why the ability for the democratic branches to overrule a Supreme Court decision more easily in statutory cases counsels for a stricter form of *stare decisis* compared to constitutional cases where only a constitutional amendment or the Court itself can overrule a Court decision).

mentality.[296] As a result, both the public and judges may be less inclined to give credence to the concerns of incarcerated persons and those who broadly come into contact with the carceral system.[297]

By the nature of constitutional criminal procedure, the law—especially Eighth Amendment law—is intended to protect those persons affected by the carceral system to whom society is less sympathetic. For example, a person bringing an Eighth Amendment claim is by definition a "convicted criminal" and Eighth Amendment law is only going to have a meaningful immediate effect on convicted persons.[298] This creates a serious misalignment of interests between society writ large—which judges are drawn from—and the plaintiff bringing the claim, which, to the extent bias plays a role in decision making, may seriously affect any decision.

In contrast, disability law sweeps more broadly, as it protects both incarcerated persons and non-incarcerated persons alike. Whether access to a fan is considered a reasonable accommodation affects both an incarcerated person with a disability—like one that makes them heat sensitive and at risk of death if they are out in the Texas sun during a day with a high heat index— and the guard in that same prison who has a similar disability. Given that almost any disability law decision profoundly affects the claims of people across society, this creates a level of interest alignment that may induce more favorable decisions than those which might otherwise occur if the decision only affected incarcerated persons.[299] Moreover, by framing the plaintiff as a disabled person rather than a criminal, judges are likely to be more sympathetically inclined.[300]

One might argue that this change in the interests at stake could cut both ways, as judges who favor unfettered private markets might be less willing to impose broader readings of disability law on the private sphere. However, previous attempts at taking a narrow reading of the ADA to protect the private sphere were rejected by Congress. For example, when

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296. *See* Regina Austina, *"The Shame Of It All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173, 175–77 (2004) (discussing the stigmatization of incarcerated people in the voting rights context).

297. *See id.* at 174 (arguing that "extending the vote to ex-offenders [would allow] them to participate fully in political debates") .

298. Palermo v. Rorez, 806 F.2d 1266, 1271 (5th Cir. 1987) (citing Ingraham v. Wright, 430 U.S. 651 (1977)).

299. *Cf.* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522–33 (1980) (discussing how changing social conditions created an interest alignment between white elites and Black persons, thus paving the way for *Brown v. Board of Education*).

300. Jasmine Harris & Karen Tani, *The Disability Frame*, 170 U. PA. L. REV. 1663, 1678–80 (2022).

the Court took a constrained reading of what it means to be an "individual with a disability" Congress responded by passing the ADA Amendments Act of 2008, which rejected those Court decisions reading the ADA narrowly and provided broader protections.[301] Moreover, disability law has many escape hatches to avoid greatly affecting business interests.[302] Furthermore, in disability law cases the Roberts Court has tended to use limitations on remedies rather than rights to limit liability.[303] Thus, private sphere or "free market" concerns do not loom particularly large in this area of disability law.

Finally, disability law provides a jurisprudential clean slate for claims similar to those brought using constitutional criminal procedure; thus, anti-carceral advocates are given a second bite at the apple while having the knowledge gained from the first bite. Assuming there is a failure to recognize a theory on constitutional grounds, in many cases that same theory can be brought using disability law.[304] Given that disability law functions similarly to constitutional criminal procedure, a lot of the exact same arguments that are made for constitutional criminal procedure claims will be made for disability law claims.[305] For example, there is overlap between the "exigency analysis" for disability law failure-to-modify during arrest claims and the exigency analysis for Fourth Amendment excessive force claims, thus defendants will make many of the same arguments such as those surrounding officer safety.[306] By using disability law, plaintiffs will now be able to distinguish previous caselaw, more effectively respond to the arguments, and of course avoid pitfalls in constitutional criminal procedure caselaw. In effect, anti-carceral advocates will get a second chance to win the same arguments, realistically only needing to win once, whereas defendants will have to win both times.

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301. ADA Amendments Act of 2008, Pub. L. No. 110–325, § 2(a) (3–7), § 3–7, 122 Stat. 3553, 3553–58 (2008). The Act was passed with 402 yeas to 17 nays in the House, Roll Call Vote on the Passage of the ADA Amendments Act of 2008, OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES (June 25, 2008, 6:11 PM), https://clerk.house.gov/Votes/2008460 [https://perma.cc/YTE6-XQVP], and by unanimous consent in the Senate. 154 CONG. REC. S8356 (daily ed. Sept. 11, 2008).

302. *See* 42 U.S.C. § 12188(a) (limiting the relief available in public accommodations cases under Title III to injunctive relief); 42 U.S.C. § 12111(5) (exempting businesses with less than 15 employees from Title I of the ADA); US Airways, Inc. v. Barnett, 535 U.S. 391, 402 (2002) (limiting reasonable accommodation to only those that would be feasible in the run of cases); 42 U.S.C. § 12111(10) (providing the undue hardship defense); 42 U.S.C. § 12201(f) (proving the fundamental alteration defense).

303. *See*, *e.g.*, *Cummings*, 596 U.S. 212.

304. *See supra* Part II.

305. *Supra* Part II.

306. *See supra* Part II (A)(1).

2. Remedies, Enforcement, and Immunities

In addition to the substantial jurisprudential benefits provided by its statutory design, disability law also offers several advantages over constitutional criminal procedure in terms of remedies, enforcement, and its avoidance of immunities. First, disability law circumvents most immunity doctrines, such as qualified immunity, and those immunity doctrines that it might not circumvent are less concerning in the carceral context. Second, disability law greatly simplifies the process of obtaining injunctive relief, damages, and attorneys' fees compared to constitutional criminal procedure. Finally, due to its robust liability regime and broad private right of action, disability law can be more effectively enforced by private litigants than constitutional criminal procedure.

One of the greatest strengths of disability law is that it avoids most of the immunity doctrines that plague constitutional criminal procedure. Unlike § 1983 claims, disability law does not establish individual liability; instead, liability is imposed on the public entity or recipient of federal funds (in the case of § 504).[307] As a result, qualified immunity is inapplicable because it is designed to shield individuals from liability.[308] Thus, the lack of qualified immunity prevents one of the largest barriers to constitutional criminal procedure claims from applying to disability criminal procedure.

While qualified immunity might not be a concern for disability law, there is still a concern over a separate type of immunity—sovereign immunity. Ever since Title II was passed, there has been a concern over whether it validly abrogates sovereign immunity pursuant to § 5 of the Fourteenth Amendment.[309] Yet, while sovereign immunity is certainly a concern for Title II generally, it is a less of a concern in the criminal procedure context. If the Court decides to hold Title II does not validly abrogate sovereign immunity, it makes little practical difference as to whether disability law can function *comparatively* better than constitutional criminal procedure. First, even if sovereign immunity was not validly abrogated, plaintiffs could still use disability law for injunctive relief under *Ex Parte Young*.[310] Second, even if plaintiffs could not use

307. *See* Goe v. Zucker, 43 F.4th 19, 35 (2d Cir. 2022); Alsbrook v. Maumelle, 184 F.3d 999, 1005 n.8 (8th Cir. 1999).

308. *See supra* Part IV(A).

309. *See Georgia*, 546 U.S. at 156 (2006); *id.* at 160–63 (Stevens, J., concurring); *see generally Lane*, 541 U.S. 509 (exhibiting the disagreement on the Supreme Court as to the extent of Title II's waiver of sovereign immunity); *id.* at 534–35 (Souter, J., concurring); *id.* at 536–37 (Ginsburg, J., concurring); *id.* at 551–54 (Rehnquist, C.J., dissenting); *id.* at 557 (Scalia, J., dissenting); *id.* at 565–66 (Thomas, J., dissenting); Joshua D. Blecher-Cohen, Note, *Disability Law and HIV Criminalization,* 130 YALE L. J. 1560, 1596–97 (2021).

310. *See Garrett*, 531 U.S. at 374 n.9 (discussing Ex Parte Young, 209 U.S. 123 (1908)).

Title II to obtain damages, they would still be able to obtain damages using § 504, which relies on waiver doctrine to overcome sovereign immunity rather than abrogation doctrine.[311] Finally, even if Title II did not *fully* abrogate sovereign immunity, there is a valid abrogation of sovereign immunity in cases where constitutional rights were also violated—e.g., claims for violations of constitutional criminal procedure.[312] Thus, disability law is not put in a *comparatively* worse position to constitutional criminal procedure. In fact, disability law still ends up in a comparatively better position because § 1983 constitutional criminal procedure claims may have to deal with the two prongs of qualified immunity: (1) that a right was violated and (2) that the right was clearly established.[313] In contrast, to overcome sovereign immunity, disability law would only have to contend with the first prong and not the second "clearly established" prong.[314]

Limitations on the ability to obtain attorneys' fees for some criminal procedure claims also act as a substantial barrier to vindicating constitutional claims. In particular, the Prison Litigation Reform Act ("PLRA") significantly limits the ability to collect attorneys' fees in prison litigation, undermining constitutional criminal procedure's efficacy.[315] Since carceral litigants—and other civil rights litigants—are often poor and the damages awarded are typically small, many attorneys cannot afford to take these cases, which lead to a large number of cases being either unlitigated or having unrepresented plaintiffs.[316] To address this, Congress enacted 42 U.S.C. § 1988, a fee-shifting provision in civil rights claims allowing the prevailing party to recuperate reasonable attorneys' fees.[317] This incentivizes attorneys to take civil rights cases they otherwise would not have, thus making it easier for plaintiffs to find representation.[318] However, for claims made by incarcerated persons, such as those under the Eighth Amendment, the PLRA limits attorneys' fees recoverable under § 1988, stating:

311. *See Barnes*, 536 U.S. at 184–85.

312. *Georgia*, 546 U.S. at 159.

313. Zadeh v. Robinson, 902 F.3d 483, 489 (5th Cir. 2018).

314. In fact, bringing disability law claims alongside constitutional claims may help prevent judges from jumping to the clearly established prong of qualified immunity to avoid determining whether a right exists. A court would be forced to decide the first prong as to whether a right exists in order to answer the question of whether sovereign immunity was validly abrogated. *See supra* notes 239–42 and accompanying text.

315. *See* 42 U.S.C §1997e(d).

316. *Cf.* S. REP. No. 94-1011, at 2 (1976) (discussing civil rights litigants).

317. 42 U.S.C. § 1988; s*ee* Scott Hamilton, *The Civil Rights Attorneys' Fees Awards Act of 1976*, 34 WASH. & LEE L. REV. 205, 205–06 (1977).

318. *See Hamilton supra* note 317, at 206, 220, 223.

> Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.[319]

This second sentence has been widely interpreted to mean that attorneys' fees are capped at 150 percent of the monetary award.[320] Consequently, the issue of unlitigated or unrepresented claims resurfaces when the costs of litigation often far exceed this cap, especially in cases involving nominal damages.[321] This limitation impacts the caselaw, as meritorious *pro se* claims may never be heard in a court of law.[322] Furthermore, the cap hampers the ability of incarcerated persons to obtain justice and reduces the regulatory effectiveness of constitutional criminal procedure, as some prison officials may be incentivized to violate incarcerated persons' rights under the assumption that claims will be either unenforced or unrepresented.

However, due to a statutory quirk the PLRA does not restrict the recovery of attorney's fees under the Rehabilitation Act or the ADA, as these laws attorneys' fees provisions are not part of § 1988, which is the attorneys' fees provision that the PLRA restricts.[323] The ADA and the Rehabilitation Act have their own independent attorneys' fees provisions, allowing full recovery of reasonable attorneys' fees for disability law claims.[324] Because attorneys can recoup the full measure of reasonable attorney's fees for ADA and Rehabilitation Act litigation, litigants are more likely to be successful in disability law claims, as attorneys there is an increased probability that attorneys will take those cases. Moreover, represented plaintiffs are more able to effectively assert their rights which

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319. 42 U.S.C. § 1997e(d)(2).

320. *See, e.g.*, *Walker v. Bain*, 257 F.3d 660, 667 (6th Cir. 2001); Blissett v. Casey, 147 F.3d 218, 221 (2d Cir. 1998); Collins v. Montgomery Cnty. Bd. of Prison Inspectors, 176 F.3d 679, 683 (3d Cir. 1999).

321. *See, e.g.*, Eleanor Umphres, *150% Wrong: The Prison Litigation Reform Act and Attorney's Fees*, 56 AM. CRIM. L. REV. 261, 270–72 (2019) (recounting the facts and attorney's fees award in *Royal v. Kautzky*, 375 F.3d 720 (2004)).

322. *See* Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1, 13–21 (2008) (discussing how fee-shifting provisions incentivize lawyers to avoid taking certain classes of cases including cases where constitutional violations have clearly occurred).

323. § 1988 applies to § 1981, § 1981a, § 1982, § 1983, § 1985, § 1986, Title IX, the Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act, Title VI of the Civil Rights Act, and the Violence Against Women Act (34 U.S.C. § 12361). 42 U.S.C. § 1998; 42 U.S.C. § 1997e (d)(1).

324. 42 U.S.C. § 12205; 29 U.S.C. § 794a(b).

would provide a greater deterrent to prison officials because they would correspondingly face an increased risk of litigation under disability law.

Disability law's broad liability and remedial structure also give it distinct advantages. Disability law is enforced both by the U.S. Department of Justice and through private rights of action, enabling plaintiffs to receive both injunctive relief and compensatory damages.[325] At the same time, disability law statutes have a liability standard equal to or lower than that of *Monell* liability for injunctive relief claims. *Monell* claims require proving two levels of intent: one for the underlying claim of deprivation of rights (e.g., deliberate indifference for an Eighth Amendment claim)[326] and one for the policies or customs that establish the government entity's fault.[327] For the latter, the intent standard may be deliberate indifference, depending on whether the custom, practice, or policy was direct or indirectly responsible for the deprivation of rights.[328] Claims of vicarious liability, an employer's liability for their employees' action, are not permitted under § 1983.[329] Disability law, by contrast, typically has a lower intent standard for its underlying claim which functionally resembles strict liability, as plaintiffs statutorily entitled to injunctive relief for a violation. [330] Furthermore, there is a compelling argument that disability law, especially Title II, imposes vicarious liability, which functions equivalent to strict vicarious liability for claims seeking injunctive relief.[331] Currently, there is an active circuit split with the Fourth, Fifth, and Ninth circuits holding that Title II imposes vicarious

325. *Barnes*, 536 U.S. at 185–87; *See* 42 U.S.C. § 12133.

326. *E.g.*, *Estelle*, 429 U.S. at 104.

327. *See, e.g.*, *Brown*, 520 U.S. at 406–15 (explaining that "quite apart from the state of mind required to establish the underlying constitutional violation," plaintiffs "must demonstrate" intent by the municipal actor).

328. The Court made this distinction clear in *Brown*, saying "proof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably," but that when "the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation [i.e. deliberate indifference] must be applied . . . ." *id.* at 405.

329. *Connick*, 563 U.S. at 60.

330. Delano-Pyle v. Victoria Cnty., 302 F.3d 567, 574–75 (5th Cir. 2002) (describing and in accord with similar cases in other Circuits).

331. In her dissent in *Jones v. City of Detroit*, Judge Moore persuasively argues that vicarious liability should be available because of the ADA's unique context and vicarious liability's status as a theory of liability rather than a remedy, procedure, or right, which renders inapplicable any argument that vicarious liability is foreclosed by *Gebser v. Lago Vista Indep. Sch. Dist.* 524 U.S. 274, 292 (1998) (holding Title IX does not provide for vicarious liability). Jones v. City of Detroit, 20 F.4th 1117, 1123-27 (6th Cir. 2021) (Moore, J., dissenting); *see also Delano-Pyle*, 302 F.3d at 574–75.

liability, whereas the Sixth and Eleventh circuits have held the opposite.[332] If Title II is interpreted as imposing vicarious liability, it would provide a significant advantage over claims under § 1983, which does not allow for vicarious liability.[333] Consequently, in claims seeking injunctive relief under disability law, there would be no need to prove a second intent requirement—as there is for *Monell* claims. Even if disability law did not provide for vicarious liability, and instead required plaintiffs to prove a policy or practice akin to *Monell,* disability law would still present an equal or lower intent requirement than constitutional criminal procedure, as the intent required under disability law would always be equivalent to strict liability.

Unlike individual § 1983 claims, punitive damages are not available under disability law, which gives § 1983 claims a unique advantage.[334] However, under disability law compensatory damages are in effect more broadly available than they are for constitutional claims.[335] The largest hurdle for disability law claims compared to constitutional ones is the need to prove intentional discrimination, usually through a showing of deliberate indifference.[336] Yet, this extra intent requirement makes little difference as many of the relevant § 1983 cases already require proving deliberate indifference. Relevant Eighth Amendment claims already require a demonstration of deliberate indifference, as do failure to train *Monell* claims. [337] Moreover, Fourth Amendment *Bivens* claims are often unavailable preventing a plaintiff from obtaining compensatory damages in relevant suits against federal officials.[338]

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332. *Compare* Duvall v. Cty. of Kitsap, 260 F.3d 1124, 1138 (9th Cir. 2001), *Delano-Pyle*, 302 F.3d at 574–75, *and* Rosen v. Montgomery Cty., 121 F.3d 154, 157 at n.3 (4th Cir. 1997) *with Jones*, 20 F.4th at 1118, *and* Ingram v. Kubik, 30 F.4th 1241, 1256 (11th Cir. 2022).

333. *See Monell*, 436 U.S. at 691 ("[A] municipality cannot be held liable under § 1983 on a respondeat superior theory").

334. *Compare* Smith v. Wade, 461 U.S. 30, 30 (1983) (holding punitive damages are available for § 1983), *with Barnes*, 536 U.S. 181, 189 (holding punitive damages are unavailable under § 504 and Title II), *and* Newport v. Fact Concerts, 453 U.S. 247, 271 (1981) (holding that municipalities may not be held liable for punitive damages under § 1983).

335. *But see Cummings*, 596 U.S. at 230 (holding emotional distress damages are unavailable under § 504).

336. S.H. ex rel Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 262–65 (3rd Cir. 2013); *see also* Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 275–77 (2d Cir. 2009); Meagley v. City of Little Rock, 639 F.3d 384, 389–90 (8th Cir. 2011); Mark H. v. Lemahieu, 513 F.3d 922, 938–39 (9th Cir. 2008); Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1153 (10th Cir. 1999); Liese v. Indian River Cty. Hosp. Dist., 701 F.3d 334, 344–49 (11th Cir. 2012). However, some circuits have hinted something more than deliberate indifference may be required. *See e.g.*, Smith v. Harris Cty, 956 F.3d 311, 318 (5th Cir. 2020).

337. *E.g.*, *Estelle*, 429 U.S. 97, 104; *Harris*, 489 U.S. at 388.

338. *See*, *e.g.*, *Egbert*, 596 U.S. at 494–98; Hernandez v. Mesa, 589 U.S. 93, 103–14 (2020).

Since both Eighth Amendment claims and failure to train claims already require demonstrating deliberate indifference for liability—the same intent requirement as disability law for obtaining compensatory damages—of the claims discussed, only some Fourth Amendment claims have a lower intent requirement than disability law for obtaining compensatory damages.[339] However, while in theory obtaining compensatory damages for Fourth Amendment violations might be easier than it is for disability law claims, in practice this is not the case due to limitations on claims brought using either a theory of individual liability or *Monell* liability.

Individual liability claims must navigate the "Escherian Stairwell" of qualified immunity doctrine to obtain liability.[340] Thus, in many cases, obtaining damages for individual liability claims will be blocked by qualified immunity.[341] However, assuming that a claim of qualified immunity is denied, the Fourth Amendment objective reasonableness standard is met, representation is obtained, and the decision-making process is not infected by jury bias, then in those rare cases, disability law would not be needed to fill the void because constitutional criminal procedure would result in plaintiffs obtaining damages.

While qualified immunity is not an issue in *Monell* claims, proving a violation is exceedingly difficult in those few Fourth Amendment claims where obtaining compensatory damages does not require demonstrating deliberate indifference. Since failure to train claims require demonstrating deliberate indifference, plaintiffs will have to prove that an affirmative policy, practice, or custom, caused the Fourth Amendment violation.[342] In these few cases where an affirmative policy, practice, or custom is linked to a Fourth Amendment violation, then obtaining damages using *Monell* liability may be slightly easier in theory.

However, in practice if there is a disability law violation, there is unlikely to be much difference between using disability law to obtain compensatory damages or *Monell* liability. For example, in many cases failure-to-modify during arrest claims—which are analogous to Fourth Amendment excessive force claims—will involve giving an officer notice of the need for a modification either explicitly or due to the need being obvious (as in the case of a paraplegic arrestee).[343] Many disability law claims like those discussed in Part II involve failure-to-modify theories, where an officer is put on notice for a need to modify and thereafter failed

339. *See Smith*, 461 U.S. at 52.
340. *See supra* Part IV(A).
341. *See supra* Part IV(A).
342. *See Harris*, 489 U.S. at 388.
343. *See supra* Part II(A).

to modify their practices, which itself is likely to meet the deliberate indifference standard.[344] The officer's deliberately indifferent violation will in turn trigger vicarious liability, making state or local government liable for compensatory damages.[345] Thus, the existence of vicarious liability and the types of disability claims most likely to be brought means that in theory *Monell* might make it easier than disability law in certain instances to obtain damages, but in practice it will not.

Still, while disability law is often superior to constitutional criminal procedure given disability law's broadly available remedies and more enforceable substantive rights in civil litigation, constitutional criminal procedure has the unique advantage, the exclusionary rule. In contrast to disability law, constitutional criminal procedure uniquely provides for the exclusionary rule—excluding evidence illegally obtained from use in criminal trials.[346] While disability law may be a more effective deterrent to law enforcement, if one has a rights-based or judicial process-based objection to the use of illegally obtained evidence, then constitutional criminal procedure still has a role to play. As a result, even if disability law-based criminal procedure begins to the void left in constitutional criminal procedure's wake, constitutional criminal procedure still has some unique value.[347]

3. The Benefits of Asymmetric Protections in Decision-making

Unlike other civil rights statutes, the ADA's protections are asymmetric, which because of the disparate impact law enforcement activities and the carceral system have on disabled persons, serves as an advantage over constitutional criminal procedure. The asymmetric protections of disability law allow it to better target and resolve the second layer of political process defects that *modern* criminal procedure attempted to remedy.[348] Moreover, the carceral system's disparate impact and benefits of universal design may result in disability law having a prophylactic effect that allows it to solve some of the effects created by the first layer of political process defects—which criminal procedure was *originally* targeted at.[349]

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344. *Cf.* Csutoras v. Paradise High Sch., 12 F.4th 960, 969 (9th Cir. 2021) (discussing the deliberate indifference standard and disability in the education context).

345. *See supra* notes 331–33 and accompanying text.

346. *See Mapp*, 367 U.S. at 657.

347. For a discussion of the virtues and vices of the exclusionary rule alongside whether it is able to best achieve its various goals, s*ee generally* William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J. L. & PUB. POL'Y 443 (1997).

348. *See supra* Part III(B).

349. *See supra* Part III(A).

As opposed to race or sex, where all individuals are protected because they have a race or sex—e.g., Black, white, male, female—disability is not a status condition that everyone has, someone either does or does not have a disability. Resultingly, to be afforded the protections offered by disability law, a plaintiff must prove that they meet the broad definition of disability.[350] If someone does not meet the definition of disability, they are not able to bring a claim using disability law.[351]

Given that only disabled individuals can bring claims under disability law, it might to appear to some that disability law is a poor fit as a form of criminal procedure, as the limited number of people protected and correspondingly capable of enforcing the regulatory regime limits its efficacy.[352] However, the disparate impact of the criminal legal system on disabled persons turns this limit into a benefit because the limited nature of the right may counteract institutional and political factors that otherwise might render a judge hesitant to expand the scope of liability.[353] Moreover, disability law's broad definition of disability and expansive liability structure means that many individuals are still likely able to bring a claim—potentially even a disparate impact claim—in a manner sufficient to create sufficient, if not greater, deterrence than available under constitutional criminal procedure, to protect those most vulnerable to the carceral system's abuses whether or not they have a disability.[354]

At the same time, non-disabled persons may receive a collateral benefit as a result of the attempts to accommodate persons with disabilities. The idea that measures used to accommodate persons with disabilities can also improve conditions for non-disabled persons is called the "curb-cut effect."[355] The concept is named after how the disability rights movement sought accommodations—specifically curb cuts—to make the roads and sidewalks more accessible for persons with mobility disabilities.[356] As a result of those curb cuts many non-disabled persons

350. *See* 42 U.S.C § 12102.

351. *See Payan*, 11 F.4th at 737; 42 U.S.C § 12201; 42 U.S.C. § 12132.

352. *See generally*, Thompson *supra* note 11; Morgan *supra* note 14; Bixby et al. *supra* note 15.

353. *See supra* Part IV(B)(1)–(2).

354. *See supra* Part IV(B)(1)–(3).

355. Kristen Parisi, *What is the Curb Cut Effect? 5 Ways Disability Rights Benefit Everyone*, NBC TODAY (July 27, 2020), https://www.today.com/health/what-ableism-5-things-able-bodied-people-don-t-realize-t187771 [https://perma.cc/5PHF-32LL]. Curb cuts are the small ramps built into sidewalks that you often find at crossings in order to make it easier to get from the sidewalk to the road.

356. *Id.*

were benefitted, for example, parents using strollers, people walking with luggage, or elderly persons using a walker.[357]

In the carceral context, there are many intuitive examples of how the curb-cut effect can occur. One example is how increased training or awareness over the use of force with persons with disabilities, if effective, may result in decreased use of force by officers or increased calling of non-police to respond to a situation, which results in lower amounts of police brutality overall.[358] A second example is how reasonable accommodations for persons with disabilities endangered by excessive heat may result in the increased placement of air conditioning units or shaded areas in jails and prisons, which improves conditions overall. A third example is how accommodations for persons with disabilities with OUD or healthcare conditions may result in prisons being required to hire more medical staff or buy new medical technology, which may improve medical care conditions for everyone in the prison.

Moreover, the curb-cut effect may not even result from specific accommodations sought, but rather because many people can qualify for the broad definition of disability under the ADA. That broad definition means that many individuals may be eligible for protection under the ADA, which could create uncertainty for carceral actors as to whether their failure to modify or any current policies they have that disparately disabled persons pose a risk of liability under disability law. As a result, the more common disability criminal procedure litigation becomes, the more carceral actors may choose to be overcautious, playing on the safe side instead of risking liability.[359] Thus, in the mirror image of modern constitutional criminal procedure, disability law may provide more targeted protections for those facing the second layer of political process defect, while simultaneously providing ancillary protections in response to the first layer of defect.

CONCLUSION

357. *Id.* The last example of elderly persons may still qualify as having a disability depending on the definition and circumstances.

358. For example, there is conflicting evidence over the efficacy of Crisis Intervention Training in lessening the incidences of police violence against disabled individuals, in no small part due to the difficulty of measuring the underlying data. *See generally* Michael S. Rogers, Dale E. McNiel, & Renée L. Binder, *Effectiveness of Police Crisis Intervention Training Programs*, 47 J. AM. ACAD. PSYCHIATRY & L ONLINE 1 (2019).

359. *Cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 649–51 (1984) (discussing how uncertainty over "decision rules" such as those involving the appropriate level of punishment or defenses negating intent may cause individuals to adopt a "safe-side principle" and therefore adhere more strongly to the rule of law).

If criminal procedure is a series of liability rules regulating the carceral system that are enforceable through litigation, then there can be no question that disability law functions as a form of criminal procedure. The unique nature of disability law and the carceral system gives disability law many advantages for its use as criminal procedure, surpassing existing and increasingly narrow constitutional jurisprudence. While *Mapp v. Ohio* may have fired the opening shot in the constitutionally based criminal procedure revolution under the Warren Court, *Yeskey* threw down the gauntlet for a disability law-based criminal procedure revolution. Still, whether the Supreme Court will rise to the challenge by expanding on what it started with *Yeskey* or whether it will overturn expansive circuit court caselaw, retrenching as it has with constitutional criminal procedure, remains to be seen.