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Protecting Persons with Mental Disabilities from Making False Confessions: The Americans with Disabilites Act as a Safeguard

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PROTECTING PERSONS WITH MENTAL DISABILITIES FROM MAKING FALSE CONFESSIONS: THE AMERICANS WITH DISABILITIES ACT AS A SAFEGUARD

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ABSTRACT

Individuals with mental disabilities are uniquely vulnerable to making false confessions under police interrogation, prompting a cavalcade of devastating consequences for both the individual confessors and the cause of justice. A growing body of evidence shows that mental disabilities impair the ability of sufferers to withstand the pressures of interrogation, as well as understand and invoke their Constitutional rights during questioning. Most current reform efforts focus on piecemeal legislation on the State level, such as mandatory electronic recording of interrogations. This article argues that Title II of the Americans with Disabilities Act provides an existing, nationwide framework for meaningful protection. Title II requires all public entities, including law enforcement agencies, to reasonably modify their activities in order to prevent discrimination against persons with disabilities. This article establishes that Title II generally applies to interrogation of the mentally disabled and proposes evidence-based options for reasonable modification of interrogation practices to reduce the risk of false confessions. Finally, it explores the limitations of the Title II framework and suggests regulatory measures to ensure strong protection for individuals with mental disabilities during police questioning.

INTRODUCTION

In the hit Netflix documentary "Making a Murderer," officials from the Manitowoc County Sheriff's Department interrogate a teenager named Brendan Dassey about the vicious rape and murder of 25-year-old Teresa Halbach.[1] It is

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1. *See* Matt McCall, *'Making a Murderer' Raises Questions About Interrogation Technique From Chicago*, CHI. TRIB. (Jan. 7, 2016), http://www.chicagotribune.com/news/local/breaking/ct-reid-confession-technique-met-20160106-story.html. *See generally Making a Murderer: Indefensible* (Netflix broadcast Dec. 18, 2015).

Dassey's fourth interrogation in a 48-hour period.[2] He has an IQ of between 69 and 74.[3] Officials inform his mother that they wish to question her son as a witness against his uncle, not as a suspect.[4] Over the course of three hours, investigators provide case details to Dassey and convince him to repeat elements of their narrative.[5] As New York Magazine reported, "it's pretty clear that it's the investigators, not Dassey, who are providing the vast majority of the 'details' of the murder, and that they simply keep wearing him down until he tells them what they want to hear. It's infuriating to watch."[6]

Brendan Dassey was charged two days later with sexual assault and murder along with his uncle, Steven Avery,[7] who is the primary subject of the Netflix documentary. Dassey recanted his statements,[8] unsuccessfully sought to have them suppressed at trial, and was subsequently convicted.[9]

While the veracity of Dassey's specific confession remains disputed,[10] persons with mental disabilities such as his are at particular risk of making false admissions, including outright confessions, under police interrogation.[11] In a 2004 study of 125 proven false confessions, nearly thirty percent involved at least one

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2. Brief of Defendant-Appellant at *79–80, State v. Dassey, 2013 WI App 30, 346 Wis.2d 278, 827 N.W.2d 928 (Table) (No. 2010AP3105), 2011 WL 6286867.

3. *Id.* at *78 (indicating an IQ of 74); *Making a Murderer: Indefensible* (Netflix broadcast Dec. 18, 2015) (evidencing Dassey's verbal IQ as 69 and overall IQ as 73, as given by the judge).

4. Brief of Defendant-Appellant at *81, State v. Dassey, 2013 WI App 30 (No. 2010AP3105).

5. *See, e.g.*, Calumet County Sheriff's Department Complaint No. 05-0157-955 at 584–87 (Mar. 1, 2006) (stating that investigators ask Dassey what happened to the victim's head, and Dassey responds that his uncle cut her hair. When the questioners ask "What else was done to her head?" Dassey says that his uncle punched the victim. When the questioners persist, Dassey says that he and his uncle stabbed the victim. Finally, an interrogator says, "All right, I'm just gonna come out and ask you. Who shot her in the head?" Dassey says that his uncle did, and the interrogator asks why Dassey did not report this sooner. Dassey responds, "Cuz I couldn't think of it.").

6. Jesse Singal, *The Science Behind Brendan Dassey's Agonizing Confession in Making a Murderer*, N.Y. MAG.: SCI. OF US (Jan. 11, 2016, 8:13 AM), http://nymag.com/scienceofus/2016/01/science-behind-brendan-dasseys-confession.html.

7. State v. Dassey, 2013 WI App 30, ¶¶ 2–3, 346 Wis. 2d 278, 827 N.W.2d 928.

8. *Teen Recants Murder Confession: Brendan Dassey Says He Didn't Rape a Photographer and Help His Uncle Kill Her*, ASSOCIATED PRESS (Apr. 24, 2007), http://host.madison.com/news/local/teen-recants-murder-confession-brendan-dassey-says-he-didn-t/article_088c183d-b85d-5483-8e16-d6a6cc9c373c.html.

9. *Dassey*, 2013 WI App 30, ¶ 2.

10. *See* Ryan Felton, *Controversial Making a Murderer Lawyer: 'I Don't Get Netflix at Home'*, GUARDIAN (Jan. 20, 2016, 10:29 EST), http://www.theguardian.com/culture/2016/jan/20/making-a-murderer-lawyer-len-kachinsky-i-dont-get-netflix-at-home (explaining Dassey's trial attorney believed he "didn't meet most" criteria of a false confession and that "his overall demeanor and everything else in that recording was going to convince a jury he was guilty[.]" Laura Nirider, co-director of the Center on Wrongful Convictions of Youth at Northwestern University School of Law, disagrees: "I don't know what [the trial attorney]'s looking at. But Brendan's confession fits the profile of a [false] confession to an absolute T.").

11. Confessions differ from admissions in that confessions include an acknowledgment of guilt, whereas admissions may include incriminating facts (e.g. the person's location at the time of the crime) but fall short of acknowledging guilt. For simplicity, this article refers to both types of statements as "confessions."

mental disability.[12] A 2010 review of DNA exonerations involving false confessions revealed that forty-three percent of false confessors suffered from mental disabilities.[13] This susceptibility arises from both interrogation techniques, which liberally use deception and psychological manipulation, and mental disabilities themselves, which frequently foster suggestibility and inattention to long-term consequences. Mental disabilities also undermine the protectiveness of legal safeguards against coercive interrogation, such as *Miranda* warnings. As a result, persons with mental disabilities are significantly disadvantaged with regard to police interrogation relative to non-disabled individuals.

The Americans with Disabilities Act[14] ("ADA") exists precisely to address this sort of disadvantage, but few courts have applied the law to interrogations of the mentally disabled. This article examines the ADA's potential to provide meaningful protection in this context. It concludes that the ADA applies to interrogations of the mentally disabled and entitles them to "reasonable modification" of interrogation practices in order to alleviate those disadvantages. Such reasonable modifications may include the mandatory presence of counsel during questioning or police training in and application of appropriate interrogation methods for the mentally disabled.

Because the ADA requires a showing of discrimination, it is appropriate to begin by exploring the relationship between mental disabilities and false confessions. The first section of this article describes common interrogation tactics, their effect on the mentally disabled, and how mental disabilities undermine the effectiveness of existing legal safeguards that could protect against false confessions. The second section then turns to the ADA, applying each of the law's components and examining some ideas for reasonable modification. Finally, the third section concludes by identifying weaknesses in the ADA framework and providing suggestions for reform.

I. Mental Disabilities and False Confessions

Persons with mental disabilities are at particular risk of making false confessions, with devastating consequences. First, persons with mental disabilities are particularly susceptible to the methods and pressures of interrogation. Second, mental disabilities impair the ability of individuals to understand and invoke their Constitutional rights, which are supposed to protect against coercive interrogations. Finally, the criminal justice system is ill equipped to identify false confessions and prevent their use as evidence against the mentally disabled.

A. Susceptibility to False Confessions

Mental disabilities render individuals particularly vulnerable to the methods and pressures of police interrogation.[15] Law enforcement officers are trained and permitted to use a range of deceptive tactics such as inventing evidence, overstating certainty of guilt, and implying that suspects will somehow benefit from making

12. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 970–73 (2004).

13. Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1095 (2010).

14. 42 U.S.C. §§ 12101–12213 (2012).

15. *See* Garrett, *supra* note 13, at 1064.

admissions.[16] Compared to the general population, persons with mental disabilities display greater suggestibility, tendency towards acquiescence, and inattentiveness to long-term consequences, which makes them especially vulnerable to deceptive tactics.[17]

1. Interrogation Methods Explained

Interrogation is a process designed to elicit information, often against the interrogated party's self-interest. Beyond this accepted maxim, there is disagreement about whether the purpose of modern interrogation methods is to learn the truth or simply extract confessions.[18] Unquestionably, skilled interrogators carefully impose a variety of psychological pressures on the suspect to achieve their goal.[19] A study of five hundred hours of police interrogations concluded that "contemporary interrogation strategies . . . are based on the manipulation and betrayal of trust."[20]

The most prevalent interrogation method in the United States is the "Reid Technique."[21] Developed by John E. Reid & Associates, the Reid Technique was initially popularized by a 1962 training manual that is now in its fifth edition (the "Reid Manual").[22] In a 2007 study of police departments in municipal areas with more than 150,000 inhabitants, approximately two-thirds of respondents indicated that their department had trained at least some officers in this trademarked[23] method of questioning suspects.[24]

The Reid Technique prescribes physical isolation of the subject[25] followed by a nine-step interrogation process.[26] First, the interrogator confidently asserts that the suspect is guilty of the offense.[27] Second, the interrogator provides a sympathetic, face-saving explanation for the crime that shifts moral culpability to the victim,

16. *See* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 12 (2010).

17. *See id.* at 20–22.

18. *See* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 8 (4th ed. 2001); Kassin et al., *supra* note 16, at 6 ("The purpose of interrogation is therefore not to discern the truth, determine if the suspect committed the crime, or evaluate his or her denials. . . . [T]he single-minded purpose of interrogation is to elicit incriminating statements, admissions, and perhaps a full confession in an effort to secure the conviction of offenders.").

19. Miranda v. Arizona, 384 U.S. 436, 449–55 (1966) ("[T]he police . . . persuade, trick, or cajole him out of exercising his constitutional rights."); Kassin et al., *supra* note 16, at 6.

20. Richard A. Leo, Miranda's *Revenge: Police Interrogation as a Confidence Game*, 30 L. & SOC'Y REV. 259, 259–60 (1996).

21. *In re* Elias V., 188 Cal. Rptr. 3d 202, 211 (Cal. Ct. App. 2015) (calling the Reid training manual "the leading law enforcement treatise on custodial interrogation"); Marvin Zalman & Brad W. Smith, *The Attitudes of Police Executives Toward* Miranda *and Interrogation Policies*, 97 CRIM. L. & CRIMINOLOGY 873, 896, 919–20 (2007).

22. FRED E. INBAU ET AL., CRIMINAL CONFESSIONS AND INTERROGATIONS (1st ed. 1962); FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (5th ed. 2013).

23. THE REID TECHNIQUE OF INTERVIEWING AND INTERROGATION, Registration No. 1714266; THE REID TECHNIQUE, Registration No. 1714267.

24. Zalman & Smith, *supra* note 21, at 900 (explaining the research methodology), 920.

25. *See* INBAU ET AL., *supra* note 18, at 51, 57–58.

26. *Id.* at 209.

27. *Id.* at 213.

accomplice, or any other plausible candidate.[28] In steps three through six, the interrogator rejects any protestations of innocence and transitions towards a confession.[29] In the seventh step, the interrogator offers two explanations for the person's guilt, one of which is more socially acceptable.[30] At this point, the suspect is encouraged to acknowledge culpability and assert the more socially acceptable reason.[31] In the final two phases, the suspect repeats and the interrogator documents the admissions.[32]

The Reid Technique generally involves deceit.[33] The interrogator cultivates a false sense of security by feigning sympathy for the suspect's predicament, rationalizing the crime, blaming others, and implying that the suspect will benefit from a confession ("minimization" techniques).[34] Other techniques aim to intimidate the suspect: the interrogator may invent incriminating evidence, misrepresent weak evidence as incontrovertible, repeatedly insist on the suspect's guilt, and flatly reject any alibi or alternative explanation, however reasonable ("maximization" techniques).[35]

While acknowledging the occurrence of false confessions, the authors of the Reid Manual dismiss the claim that their techniques might be responsible.[36] Indeed, the authors claim that the Reid Technique actually benefits innocent suspects by establishing the truth of their innocence.[37] They do, however, acknowledge that the purportedly innocuous Reid Technique may prove overwhelming to people with mental impairments.[38] The following section explores the vulnerability of such suspects in detail.

2. Mental Disabilities Under Interrogation

Mental disabilities, particularly intellectual impairments and psychotic disorders, render individuals especially vulnerable to false confessions. These conditions tend to make sufferers more compliant with police requests, more

28. *Id.*

29. *Id.* at 213–15.

30. *Id.* at 353.

31. *Id.* at 364.

32. *Id.* at 214.

33. Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 809 (2006).

34. *See* Kassin et al., *supra* note 16, at 12.

35. *See id.*

36. INBAU ET AL., *supra* note 18, at 426–29. For example, the authors declare it "absurd" to believe that introducing nonexistent evidence during an interrogation would induce an innocent person to confess. "[T]he natural human reaction would be one of anger and mistrust toward the investigator. The net effect would be the suspect's further resolution to maintain his innocence." Similarly, the authors theorize that in order for a suspect to become falsely convinced of his or her own guilt in the course of the interrogation, the suspect would need to (1) believe himself or herself capable of the crime and (2) suffer from a condition associated with memory loss, such as epilepsy, multiple personality disorder, or drug-induced blackouts. This confluence of circumstances, they assert, is highly unlikely. Research, meanwhile, has documented numerous cases of precisely this type of "internalized false confession."

37. *Id.* at 229.

38. *Id.* at 429 ("These suspects may not have the fortitude or confidence to challenge such evidence and, depending on the nature of the crime, may become confused as to their own possible involvement if the police tell them evidence clearly indicates they commited the crime.").

suggestible to police-generated narratives, and less able to communicate exculpatory information. As a result, the mentally disabled are more likely to make untrue but damaging admissions under questioning.[39]

Scholars have documented three basic types of false confessions.[40] "Voluntary false confessions" occur without police inducement and are generally prompted by a wish for notoriety, a desire to protect the perpetrator, or a psychotic break from reality.[41] "Compliant false confessions" are made in order to escape the stress of interrogation or obtain some other benefit.[42] Finally, "internalized false confessions" occur when the process of interrogation convinces a suspect of his culpability, even if he has no memory of the crime.[43] Intellectual disabilities, psychotic disorders, and other serious mental health conditions are contributing factors in compliant and internalized false confessions.

Intellectual disabilities are generally characterized by poor perceptual reasoning, verbal comprehension, memory, abstract thought, and problem solving.[44] Individuals with intellectual disabilities typically have IQ scores two standard deviations or more below the population mean (i.e. below 65-75), though clinical judgment is necessary to interpret test results based on the individual's adaptive functioning.[45] Sufferers often exhibit gullibility, naiveté, obliviousness to risk, and a tendency to follow others.[46] Studies indicate that persons with intellectual disabilities are also predisposed to accept and incorporate information communicated by others into their own beliefs and memories.[47] In the interrogation context, these tendencies may be exacerbated by communication impairments that impede sufferers from providing accurate information and a coherent narrative of key events.[48] When persons with intellectual disabilities are questioned, they are less likely to understand their situation and correctly interpret police questions, and more likely to believe fictitious accounts of the evidence.[49]

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39. Kassin et al., *supra* note 16, at 20–22.

40. Saul M. Kassin, *The Social Psychology of False Confessions*, 9 SOC. ISSUES & POL'Y REV. 25, 27 (2015).

41. Gilsi H. Gudjonsson & John Pearse, *Suspect Interviews and False Confessions*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 33, 35 (2011).

42. *Id.*

43. *Id.*

44. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 37 (5th ed. 2013) [hereinafter DSM-V].

45. *Id*.; Previous versions of the DSM put greater emphasis on IQ scores in diagnosing intellectual disabilities. Nancy Haydt et. al., *Advantages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in* Atkins *(Death Penalty) Cases*, 82 UMKC L. REV. 359, 379 (2014). In the context of Title I of the Americans with Disabilities Act, the Equal Employment Opportunity Commission's informal guidance defines an intellectual disability as an IQ threshold of below 70-75, coupled with impairments in adaptive functioning, beginning before the age of eighteen. *Questions and Answers about Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act (ADA)*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/types/intellectual_disabilities.cfm (last visited Jan. 7, 2017).

46. *Id.* at 38.

47. Kassin et al., *supra* note 16, at 9.

48. *See* DSM-V, *supra* note 44, at 42.

49. *See* Kassin et al., *supra* note 16, at 21.

Psychotic disorders, including schizophrenia, impair the ability of sufferers to ascertain reality and distinguish it from delusions and hallucinations.[50] Individuals with these disorders are therefore less likely to accurately report exonerating information and perhaps more susceptible to delusions about the outcome of confessing. In one illustrative case, a schizophrenic Michigan man contacted Detroit police about a well-publicized murder, offering to help crack the case.[51] Police visited the psychiatric hospital several times to question Eddie Joe Lloyd.[52] After numerous conversations, he expressed a desire to help "smoke out" the real perpetrator by confessing to the crime in writing and on tape.[53] The investigating officers permitted him this delusion and encouraged the confession.[54] Entirely on the basis of his confession, which contained police-fed details about the crime, Lloyd spent seventeen years in prison before exoneration by DNA evidence.[55]

Other mental disabilities, such as bipolar, depressive, and attentional disorders, can also increase vulnerability to police interrogation. Bipolar disorder often causes symptoms similar to psychotic disorders; during periods of mania, sufferers exhibit obliviousness to risk, recklessness, distractibility, and delusional self-belief.[56] Depression, on the other hand, frequently causes feelings of excessive or misplaced guilt, which may reach delusional or near-delusional levels,[57] as well as memory and concentration impairments that are often initially mistaken for dementia.[58] These symptoms may facilitate internalization of inaccurate police narratives of events. Similarly, attentional disorders are characterized by impulsive decision-making without consideration of the consequences.[59] Research indicates that inattentiveness to long-range consequences increases the risk of false confessions in order to obtain a short-term reward (such as the termination of the police questioning).[60]

The convergence of modern interrogation practices, which center around isolation, pressure, and deception, and mental disabilities, which increase suggestibility and impede accurate communication, heightens the risk of false confessions. In general, persons with serious mental disabilities are less able to comprehend their situation and withstand the pressures of the interrogation process than non-disabled suspects. As the next section describes, mental disabilities also

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50. DSM-V, *supra* note 44, at 87.

51. *Eddie Joe Lloyd*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3387 (last visited Sept. 6, 2016); Jodi Wilgoren, *Confession Had His Signature; DNA Did Not*, N.Y. TIMES (Aug. 26, 2002) http://www.nytimes.com/2002/08/26/us/confession-had-his-signature-dna-did-not.html.

52. NAT'L REGISTRY OF EXONERATIONS, *supra* note 51.

53. Wilgoren, *supra* note 51 (quoting Lloyd as saying, "I was trying to help. I was thoroughly tricked. Inveigled, enticed, tricked. Sometimes the pressures on you to sign a statement is not them twisting your arm. It can be psychological and mental.").

54. NAT'L REGISTRY OF EXONERATIONS, *supra* note 51.

55. *Id.*

56. DSM-V, *supra* note 44, at 124–29.

57. *Id.* at 123–25, 162–64.

58. *Id.* at 164.

59. *Id.* at 61.

60. *See* Kassin et al., *supra* note 16, at 33.

undercut the legal safeguards designed to protect suspects in the interrogation process.

B. Mental Disabilities Render Legal Safeguards Ineffective

Notwithstanding the Reid Manual's assertion that its methods are innocuous, courts have long acknowledged the coercive and risky nature of police interrogation.[61] Accordingly, safeguards have evolved to protect individuals and deter misconduct in the course of interrogation.[62] Constitutional safeguards include: (1) the privilege against self-incrimination,[63] which entitles suspects to a warning of their rights before interrogation, and (2) the right to assistance of counsel,[64] which protects suspects from interrogation under some circumstances without the presence of an attorney. Suspect statements obtained in violation of either safeguard are generally inadmissible in court.[65] This section describes the parameters of these safeguards and their capacity to protect individuals with mental disabilities.

1. *Miranda* Warnings

The first protection for suspects is the Fifth Amendment's privilege against self-incrimination.[66] The self-incrimination clause has a convoluted history[67] but entered a new era with the Court's *Miranda v. Arizona* decision.[68] *Miranda* generally requires law enforcement to deliver prophylactic warnings at the outset of a custodial interrogation and suppresses statements made in the absence of *Miranda* warnings.[69]

Miranda involved four consolidated cases of individuals who confessed under "incommunicado interrogation . . . in a police-dominated atmosphere."[70] The eponymous petitioner was an indigent 23-year-old with an eighth-grade education and described by the Court as a "seriously disturbed individual."[71] After being identified in a lineup, Miranda was interrogated and confessed to kidnapping and rape.[72]

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61. Miranda v. Arizona, 384 U.S. 436, 457–58 (1966); *see also* Rothgery v. Gillespie, 554 U.S. 191, 217 (2008) (stating that pre-trial interrogations are "critical stages" for the purpose of the Sixth Amendment right to counsel).

62. *See generally Rothgery*, 554 U.S. 191; *Miranda*, 384 U.S. at 444.

63. "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . . " U.S. CONST. amend. V.

64. "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

65. Miranda v. Arizona, 384 U.S. 436, 479 (1966); Massiah v. United States, 377 U.S. 206-207 (1964).

66. *See* U.S. CONST. amend. V.

67. *See* John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903*, 77 TEX. L. REV. 825 (1999) (providing a detailed historical examination of the self-incrimination clause).

68. 384 U.S. 436 (1966).

69. *Id.* at 444.

70. *Id.* at 445.

71. *Id.* at 457; State v. Miranda, 401 P.2d 721, 726 (1965).

72. State v. Miranda, 401 P.2d at 723.

The Court held that custodial interrogation is inherently coercive due to the imbalance of power and information between law enforcement and suspects.[73] Controversially, it issued specific policy prescriptions rather than a case-specific holding.[74] *Miranda* requires police, prosecutors, and prison guards to issue warnings prior to custodial interrogation, with the caveat that legislatures could devise and implement any equally effective alternative.[75] *Miranda* warnings inform suspects that they have the right to silence, that their statements may be used against them, that they have the right to an attorney's assistance and presence at all times during questioning, and that the state will appoint an attorney if the suspect cannot afford to retain one.[76] A suspect can invoke or waive the *Miranda* rights at any point during questioning.[77] When a suspect invokes the right to silence, police must cease any attempt at questioning until a significant period of time has passed.[78] If a suspect invokes the right to an attorney, police must cease all attempts at questioning, or provide the suspect with a lawyer.[79]

Miranda warnings are required only in the limited circumstance of custodial interrogation.[80] Custody generally occurs when a "reasonable person" would not feel free to terminate the interrogation and leave.[81] This standard assesses objective reasonableness, and does not vary based on the suspect's age or experience with the police.[82] Court rulings have also carved out exceptions to the definition of custody, such as when the suspect voluntarily travels or accompanies police to the site of questioning – even if he does so in the capacity of victim or witness and does not realize an interrogation will ensue.[83]

Research indicates that adults with serious mental disabilities have an impaired understanding of *Miranda* warnings relative to non-disabled adults.[84] The miscomprehension is both literal[85] (not understanding the meaning of the words) and abstract[86] (not understanding the reasons why one might invoke these rights).

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73. Miranda, 384 U.S. at 457–58. The Court also stressed that the American accusatory system requires that the state produce evidence against the suspect from its independent labors, rather than by the "cruel, simple expedient of compelling it from his own mouth." *Id.* at 460.

74. *See* Miranda, 384 U.S. at 467; Laurie Magid, *The Miranda Debate: Questions Past, Present, and Future*, 36 HOUS. L. REV. 1251 (1999) (providing an account of the controversy).

75. Miranda, 384 U.S. at 467.

76. *Id.* at 468–74.

77. *Id.* at 474.

78. *Id.* at 473–74.

79. *Id.* at 474.

80. *Id.* at 444.

81. Yarborough v. Alvarado, 541 U.S. 652, 653 (2004).

82. *Id.* at 654.

83. Oregon v. Mathiason, 429 U.S. 492, 494–95 (1977).

84. Kassin et al., *supra* note 16, at 8; *see also* Virginia G. Gooper & Patricia A. Zapf, *Psychiatric Patients' Comprehension of* Miranda *Rights*, 32 L. & HUM. BEHAV. 390, 401 (2008).

85. Richard Rogers et al., *Knowing and Intelligent: A Study of Miranda Waivers in Mentally Disordered Defendants*, 31 L. & HUM. BEHAV. 401, 411, 415 (2007) (finding that after hearing their rights, nearly 20% of subjects in a 2007 study cited the cost of an attorney as a reason to waive the right to counsel, demonstrating that they lacked literal understanding of the warnings just issued).

86. *Id.* at 411 (finding that over half (54.1%) of subjects who opted to waive their right to silence could not generate a single nonpsychotic reason to exercise this right. Even among those who opted to exercise their right, over a quarter (27%) could not provide a nonpsychotic reason for this decision.).

Moreover, in contrast to non-disabled persons, previous experience with the justice system does not improve mentally disabled individuals' understanding of their rights.[87]

In order to exercise *Miranda* rights, a suspect must invoke them explicitly and unequivocally.[88] A statement such as "maybe I should talk to a lawyer" or refusal to sign a *Miranda* waiver do not meet this standard.[89] Likewise, a suspect's near-total silence for an extended period does not suffice to invoke the right to remain silent.[90] For an individual with a mental disability that impairs verbal abilities, communication skills, and confidence, the requirement of clarity and directness is a disadvantage.

Generally a suspect must exercise *Miranda* rights explicitly, but those same rights can be waived *im*plicitly.[91] The government must establish the validity of a defendant's waiver of *Miranda* rights by the preponderance of the evidence.[92] Waivers, whether explicit or implicit, are only valid if made knowingly, voluntarily, and intelligently.[93] This inquiry has two parts. First, the waiver must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception."[94] Second, a waiver must be made with "a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it."[95] This, in turn, is determined by the totality of the circumstances.[96]

While this appears to be a reasonably rigorous test, in practice "the Court has focused almost entirely on the voluntariness of the waiver."[97] Courts often require only a minimal factual understanding of *Miranda* rights, rather than an appreciation of their implications.[98] Taken to its logical conclusion, this means that

87. *Id.* at 414.

88. Davis v. United States, 512 U.S. 452, 459 (1994).

89. United States v. Plugh, 648 F.3d 118, 125 (2nd Cir. 2011) (holding an unequivocal refusal to waive rights though the signing of a written waiver does not constitute an invocation of those rights); *Davis*, 512 U.S. at 462 (finding that the statement "maybe I should talk to a lawyer" is not an clear invocation of the right to counsel). *But see* Ballard v. State, 24 A.3d 96 (Md. Ct. App. 2011) (holding that the statement, "You mind if I not say not more and just talk to an attorney about this," was an unequivocal invocation of the right to counsel).

90. Berghuis v. Thompkins, 560 U.S. 370, 379–82 (2010) (holding no invocation by a suspect who was near-silent for two hours and forty-five minutes).

91. Edwards v. Arizona, 451 U.S. 477, 485–86, 486 n.9 (1981) (holding a waiver is implied if the suspect reinitiates communication with police after invoking his or her rights); North Carolina v. Butler, 441 U.S. 369, 371–76 (1979) (holding that a waiver may be implied where the suspect speaks to interrogators without invoking his or her rights, provided that the suspect understood the warnings).

92. Lego v. Twomey, 404 U.S. 477, 489 (1972).

93. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

94. Colorado v. Spring, 479 U.S. 564, 573 (1987); Moran v. Burbine, 475 U.S. 412, 421 (1986).

95. *Spring*, 479 U.S. at 573 (quoting *Moran*, 475 U.S. at 421.)

96. *Id.*

97. Michael C. Mims, *A Trap for the Unwary: The Sixth Amendment Right to Counsel After* Montejo v. Louisiana, 71 LA. L. REV. 345, 353 (2010).

98. *See, e.g.*, Sanford v. State, 962 S.W.2d 335, 347 (Ark. 1998) (finding a valid waiver where a mental health expert testified that the defendant understood "some aspects of probably every statement" on the waiver form); People v. Cheatham, 551 N.W.2d 355, 367 (Mich. 1996) ("To knowingly waive *Miranda* rights, a suspect need not understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him.").

it would suffice for a suspect to understand that they can consult an attorney even if the suspect does not understand what an attorney is or the role an attorney might play.[99]

This reductive approach is convenient for finders of fact due to the difficulty in ascertaining a mentally impaired person's actual level of comprehension at the time of the waiver. Indeed, courts weigh a range of factors that may or may not be probative of a person's understanding of the warnings. For example, courts tend to give great weight to the impressions of the police, and to contemporaneous indications that individuals understand the warnings, such as the suspect's willingness to initial a waiver form.[100] For reasons discussed above, mentally disabled persons may mistakenly believe they understand their rights or may feign understanding out of embarrassment or fear of upsetting the police. Courts also frequently cite the suspect's experience in the criminal justice system as a positive factor in finding a valid waiver,[101] even though research shows that such history does not generally increase *Miranda* comprehension among the mentally impaired.[102]

2. The Right to Counsel

In addition to *Miranda* rights, the Constitution provides a right to counsel during interrogation under the Sixth and Fourteenth Amendments.[103] This serves to "protect the fundamental right to a fair trial"[104] by promoting parity between the government and the accused.[105] Criminal defendants have the right to assistance of counsel in federal and state prosecutions at all critical stages in a criminal proceeding, including pre-trial interrogations.[106] This right is both broader and

99. Kassin et al., *supra* note 16, at 8.

100. *See, e.g.*, United States v. Taylor, 745 F.3d 15, 23 (2nd Cir. 2014) (stating in dicta that, "In general, a suspect who reads, acknowledges, and signs an 'advice of rights' form before making a statement has knowingly and voluntarily waived *Miranda* rights."); Garner v. Mitchell, 557 F.3d 257, 263 (6th Cir. 2009) (finding a valid waiver principally because police had no reason to believe that the suspect misunderstood the warnings); Moore v. Dugger, 856 F.2d 129, 134 (11th Cir. 1988) (noting the suspect was calm and responsive and did not appear confused); *Sanford*, 962 S.W.2d at 347 (noting the defendant initialed a waiver form and did not ask any questions about the form); Robinson v. United States, 928 A.2d 717 (D.C. 2007) (noting the defendant stated that he understood his rights, initialed a waiver form, and did not express confusion about his rights).

101. *See, e.g.*, U.S. v. Richardson, 265 F. App'x. 52, 56 (3rd Cir. 2008) (finding a valid waiver where the defendant had a low IQ and learning disabilities but had a variety of jobs and previous arrests); Smith v. Mullin, 379 F.3d 919, 933–34 (10th Cir. 2004) (finding a valid waiver where the defendant had the cognitive abilities of a twelve-year-old but had experience in the justice system); Henderson v. DeTella, 97 F.3d 942, 949 (7th Cir. 1996) (finding a valid waiver where a defendant had limited comprehension abilities but a significant criminal record); Correll v. Thompson, 63 F.3d 1279, 1288 (4th Cir. 1995) (finding a valid waiver where the defendant had an IQ of 68, but had numerous experiences with law enforcement and *Miranda* warnings).

102. Rogers et al., *supra* note 85, at 414–16.

103. Gideon v. Wainwright, 372 U.S. 335, 343–44 (1963) (incorporating the Sixth Amendment right to counsel to the states); Johnson v. Zerbst, 304 U.S. 458, 468–69 (1938) (discussing the entitlement to counsel in federal cases).

104. Strickland v. Washington, 466 U.S. 668, 684 (1984).

105. Mims, *supra* note 97, at 348.

106. Rothgery v. Gillespie, 554 U.S. 191, 217 (2008) (stating that pre-trial interrogations and other confrontations with the police are "critical stages" for the purpose of the Sixth Amendment right to counsel).

narrower than the right to counsel under *Miranda* and its progeny. Unlike under *Miranda*, the Sixth Amendment right to counsel applies to both custodial and non-custodial interrogations, but only attaches at the time of indictment,[107] and only applies where conviction will definitely result in actual imprisonment[108] or a suspended term of imprisonment.[109]

Once the accused invokes the Sixth Amendment right to assistance of counsel, agents of the state may not interrogate the defendant or "deliberately elicit" incriminating disclosures from the defendant unless the defendant has counsel present or validly waives this right.[110] When an indicted defendant is not in state custody, police and prosecutors may continually pressure him to answer questions without counsel present, provided that the defendant is informed of the right to counsel at each occasion.[111] To stop police questioning, the defendant must explicitly invoke the right to counsel at every confrontation.[112]

In order for a person to exercise the Sixth Amendment entitlement to counsel during questioning, the law therefore requires him to: (1) understand that the police are adversaries rather than allies, (2) understand that he has the right to an attorney during questioning, (3) understand the role and potential benefit of an attorney's presence, (4) withstand persistent police badgering to proceed without an attorney, and (5) clearly and firmly express his desire for an attorney. Together, these requirements entail a high level of perceptiveness, cognition, and memory – all of which may be undermined by mental disabilities.

The standards for a valid waiver of the Sixth Amendment right to counsel mirror those under *Miranda*.[113] Indeed, even after Sixth Amendment rights have attached, a waiver of *Miranda* rights suffices to demonstrate a valid waiver of the Sixth Amendment right to counsel.[114] As a result, similar problems arise for defendants with mental disabilities in both contexts. While the waiver must technically be knowing, intelligent, and voluntary, the court inquiry tends to focus on the voluntariness and only superficially address the person's comprehension.[115]

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107. *Id.* at 213.

108. Argersinger v. Hamlin, 407 U.S. 25, 40 (1972).

109. Alabama v. Shelton, 535 U.S. 654, 674 (2002).

110. *See* Massiah, *supra* note 65 at 206.

111. Montejo v. Louisiana, 556 U.S. 778, 794–95 (2009).

112. *Id.*

113. Patterson v. Illinois, 487 U.S. 285, 291–92 (1988) (holding that a waiver must be given knowingly, intelligently, and voluntarily); *id.* at 297 (rejecting the notion that "the Sixth Amendment is 'superior' to the Fifth or that it should be 'more difficult' to waive"); Brewer v. Williams, 430 U.S. 387, 403 (1977) (holding that the State did not produce evidence to show a "knowing and intelligent waiver" of Sixth Amendment rights).

114. *Patterson*, 487 U.S. at 296–97.

115. Mims, *supra* note 97, at 356.

C. The Absence of Corrective Measures to Protect the Mentally Disabled

False confessions are likely to result in wrongful convictions.[116] The American criminal justice system does not have adequate means to identify and counteract the effect of false confessions on investigators and finders of fact. The investigative process is unlikely to identify false confessions as such, in part due to confirmation bias by law enforcement. While the Fifth Amendment requires suppression of "involuntary" confessions, the voluntariness inquiry does not adequately protect persons with mental disabilities. As a result, once a false confession is made, it frequently devastates the case of the accused.

1. Detection of False Confessions by Law Enforcement

Investigators who extract false confessions are not likely to identify them as such. Because accusatory interrogations generally occur when police already suspect culpability, confirmation bias often operates when a confession is made.[117] Moreover, research shows that investigators overestimate their ability to distinguish truth from fabrication.[118] Compared to laypeople, law enforcement personnel report greater confidence[119] and exhibit greater bias towards believing guilt,[120] but perform no better in distinguishing true and false confessions and only slightly better than chance.[121] These psychological factors work against investigators accurately identifying false confessions.

While the Reid Manual emphasizes the need for corroboration of confessions,[122] this corroboration may not consist of physical evidence or other independent proof of guilt.[123] Rather, corroboration frequently consists of details in the confession that correspond to the crime scene. The problem is that innocent suspects may actually have acquired – and internalized – this information from the police, media, or rumors.[124] Moreover, while consistencies between a confession and

116. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. REV. 891, 921–22 (2004) (explaining the disadvantages that mount from a false confession); *id.* at 995–96 (reporting that 81% of innocent defendants who made false confessions and took their cases to trial were convicted, regardless of the exculpatory evidence).

117. *See* Carole Hill et al., *The Role of Confirmation Bias in Suspect Interviews: A Systematic Evaluation*, 13 LEGAL & CRIMINOLOGICAL PSYCH. 357, 368 (2008); *see also* Saul M. Kassin et al., *"I'd Know a False Confession If I Saw One": A Comparative Study of College Students and Police Investigators*, 29 L. & HUM. BEHAV. 211, 218 (2005).

118. Kassin et al., *supra* note 117, at 218.

119. *See id.* at 212 (providing a compendium of studies on the ability of investigators to distinguish truth from deception).

120. *Id.* at 218.

121. *Id.* at 216.

122. Inbau et al., *supra* note 18, at 432.

123. *Id*. at 433.

124. Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 408–10 (finding that 94% of false confessions made by DNA exonerees were contaminated with details that supposedly only the perpetrator would know).

crime scene are seen as ironclad proof, inconsistencies are often disregarded as deliberate fabrication, evasion, or faulty recollection by the suspect.[125]

Because of investigator biases and the frequent unavailability of independent corroboration, law enforcement is all too likely to interpret false confessions as reliable. Defendants who have made false confessions must therefore hope that the court will exclude their confession from evidence at trial.

2. Suppression of Involuntary Confessions

The due process clauses of the Fifth and Fourteenth Amendments prevent the admission into evidence of "involuntary" statements made by a defendant to law enforcement.[126] Because this standard requires a preliminary showing of objectively coercive behavior by law enforcement, it does not adequately protect persons with mental disabilities.[127]

In 1936, the voluntariness standard was introduced with the landmark decision in *Brown v. Mississippi*[128], which suppressed an uncorroborated confession elicited by police violence.[129] A decade later, the Court suppressed a confession procured through non-violent but still abusive methods,[130] reasoning that the American adversarial system of justice compels the state to prove its case through independent investigation, rather than compelling it from the suspect's mouth.[131] "Protracted, systematic and uncontrolled . . . interrogation . . . is subversive to the accusatorial system. It is the inquisitorial system without [that system's] safeguards."[132] Therefore, the Court declared, "a confession . . . must be the expression of free choice."[133]

This voluntariness test was further developed in two subsequent cases. In 1961, *Rogers v. Richmond* stated explicitly that confessions elicited by physical or

125. *See* Inbau et al., *supra* note 18, at 434 (explaining that guilty suspects may acknowledge their guilt but lie about details to conceal their true motivations for the crime); *id.* at 440 (explaining confessions may omit information in order to minimize moral guilt or due legitimate memory lapse caused by drugs, alcohol, or trauma).

126. The voluntariness standard developed as an interpretation of the due process clause because, at the time of the seminal cases, the Fifth Amendment's protection from compulsory self-incrimination applied only to federal criminal proceedings. *See* Brown v. Mississippi, 297 U.S. 278, 285 (1936); *see also* Malloy v. Hogan, 378 U.S. 1, 10 (1964) (holding that the Fourteenth Amendment prevents the states from abridging the Fifth Amendment protection from compulsory self-incrimination).

127. Daniel Harkins, *Revisiting* Colorado v. Connelly*: The Problem of False Confessions in the Twenty-First Century*, 37 S. ILL. U. L.J. 319, 329 (2013).

128. 297 U.S. 278 (1936).

129. *Id.* at 286 ("It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process"). The accused, two black tenant farmers, confessed to murdering a white man after police brutally whipped them over the course of several days and repeatedly hung one suspect from a tree. *Id.* at 281–83. The confessions were the only evidence of culpability. *Id.* at 284.

130. Watts v. Indiana, 338 U.S. 49, 52–54 (1949) (holding that six days of nine-hour, nighttime interrogations were "so grave an abuse of the power of arrest as to offend the procedural standards of due process").

131. *Id.* at 54–55.

132. *Id.* at 55.

133. *Id.* at 53.

psychological coercion cannot stand regardless of their reliability[134] and that the reliability of a confession is not probative of its voluntariness.[135] The Court also stated the voluntariness test as whether "the behavior of the State's law enforcement officials was such as to overbear [the suspect's] will to resist" the interrogation.[136] This, in turn, depends on the "totality of the circumstances" of a given interrogation,[137] including its length and location.[138] The Court's 1986 decision in *Colorado v. Connelly* declared that a defendant must first show police impropriety in order to show that a confession was involuntary.[139] The *Connelly* defendant approached a police officer and, without prelude, confessed to a murder, provided specific details, and led police to the victim's body.[140] A psychiatrist testified that the defendant, a schizophrenic, had hallucinated a divine command to either confess or commit suicide.[141] The Court nevertheless deemed the confession admissible, holding that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'"[142] and such coercion must be "causally related to the confession."[143]

The voluntariness test thus contains two distinct inquiries. First, there must be coercive overreach by law enforcement. Second, this coercion must overwhelm the suspect's ability to resist the interrogation. The preliminary showing of coercion depends on objective factors, such as the length, location, and other conditions of the interrogation, without regard to the defendant's mental capacity, limitations, and fragility.[144] "A diminished mental state is only relevant to the voluntariness inquiry if it made mental or physical coercion by the police more effective."[145]

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134. Rogers v. Richmond, 365 U.S. 534, 540–41 (1961) (explaining that coerced confessions are inadmissible "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system–a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against the accused out of his own mouth").

135. *Id.* at 543–44.

136. *Id.* at 544.

137. Haynes v. Washington, 373 U.S. 503, 513 (1963).

138. *See, e.g.*, Mincey v. Arizona**,** 437 U.S. 385, 398–99 (1978) (considering that defendant was sedated in an intensive-care unit during the interrogation); Greenwald v. Wisconsin**,** 390 U.S. 519, 519–21 (1968) (considering that defendant was deprived of food, sleep, and medicine for over twelve hours).

139. Colorado v. Connelly, 479 U.S. 157, 167 (1986).

140. *Id.* at 160–61.

141. *Id*. at 161.

142. *Id*. at 167.

143. *Id*. at 164.

144. *See* United States v. Salameh, 152 F.3d 88, 117 (2nd Cir. 1998) (holding that while the defendant's alleged torture by Egyptian law enforcement immediately prior to his interrogation by US agents "would likely weaken one's mental state, one's mental state does not become part of the calculus for the suppression of evidence unless there is an allegation that agents of the United States engaged in some type of coercion"); United States v. Guerro, 983 F.2d 1001, 1003–04 (10th Cir. 1993) (reversing the suppression of a confession where the defendant was described by the trial court as "more suceptible to suggestion, intimidation – even though it may not have been overt – than any witness I have ever seen in my experience on the bench").

145. United States v. Chrismon, 965 F.2d 1465, 1469 (7th Cir. 1992) (regarding a defendant with low intelligence).

This two-part test provides insufficient protection to persons with mental disabilities. By requiring an objective showing of police coercion, it disregards the particular impact of conventional interrogation techniques on persons with mental disabilities.[146] For example, courts have generally accepted the use of deception and trickery by police during interrogation.[147] As described above, such methods put the mentally disabled at heightened risk of false confessions.[148]

The weakness of the voluntariness test is the final failure in a system that consistently overlooks the vulnerability of mentally disabled individuals. First, interrogation tactics exploit their suggestibility and other symptoms. Second, individuals with mental disabilities have more difficulty understanding and exercising their Constitutional rights. Finally, once mentally disabled persons falsely confess, the criminal justice system is ill equipped to protect them from the consequences. As a result of these factors, persons with mental disabilities are at a distinct disadvantage in the context of interrogation as compared to the non-disabled. The Americans with Disabilities Act exists precisely to remedy this type of disadvantage.

II. The Americans with Disabilities Act as a Safeguard Against False Confessions

Title II of the Americans with Disabilities Act of 1990 ("ADA") has potential to protect persons with mental disabilities during police interrogation. The ADA is a sweeping statute with the objective of eliminating discrimination against the disabled; it requires public entities to "reasonably modify" their practices to prevent discrimination on the basis of disability.[149] While few courts have addressed the rights of mentally disabled persons in police interrogation under the ADA, this article concludes that the statute offers a plausible framework for meaningful protection.

A. Overview of the ADA and Title II

The ADA was enacted as a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[150] It significantly expanded the protections of the Rehabilitation Act of 1973, which forbids discrimination on the basis of disability by federal executive agencies and federally financed programs and entities.[151] The ADA extended this prohibition to the realms of private employment, all government activities, public accommodations and commercial facilities, and telecommunications.[152]

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146. Harkins, *supra* note 127, at 329–30; *see supra* Part IA.

147. Gohara, *supra* note 33, at 805 ("Few federal courts have circumscribed the use of specific deceptive interrogation techniques, and only in rare cases have federal courts deemed deceptive interrogation practices coercive.").

148. *Id.*

149. 42 U.S.C. § 12101(b)(1) (2009).

150. *Id.*

151. 29 U.S.C. § 794(a) (2014).

152. *See* Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 62 (2000) (comparing the approaches of the Rehabilitation Act and the ADA).

In the years following the ADA's passage, courts progressively narrowed the scope of its application, particularly the statutory definition of disability.[153] Two Supreme Court rulings created an "inappropriately high" standard for individuals to access the statutory protections.[154] In response, Congress passed the ADA Amendments Act of 2008 ("2008 Amendments") for the express purpose of restoring the original intent of the ADA.[155]

Title II of the ADA prohibits discrimination against or exclusion of persons with disabilities from the services, programs and activities of a public entity.[156] Public entities must reasonably modify their policies and practices to avoid discrimination, unless doing so would fundamentally alter the nature of the public activity.[157] The following sections examine whether Title II demands such modification of police interrogation practices for persons with mental disabilities and how such modifications might look in practice.

B. Is Modification of Police Interrogation Practices Required by Title II?

Title II mandates that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[158] Therefore, in order for Title II to require modification of police interrogation practices for the mentally disabled, the following must be true: (1) the interrogated person is a qualified individual with a disability; (2) police interrogation is an activity of a public entity; and (3) the individual under interrogation is denied the benefits of interrogation or otherwise faces discrimination in the course of interrogation as a result of the disability. Each component is addressed in turn below.

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153. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 481–82 (1999) (holding that the determination of whether an individual has a disability must consider the impact of corrective measures and that guidance to the contrary from the Equal Employment Opportunity Commission violated the plain language of the ADA) *superceded by statute*, ADA Amendment Acts of 2008. Pub. L. No. 110-325, Stat. 3553 (2008); Toyota Motor Mfg., , Inc. v. Williams, 534 U.S. 184, 185 (2002) (holding that an impairment that hinders the performance of manual tasks is only a disability if it is a "permanent or long term" and "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives").

154. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 481–82 (1999) (holding that the determination of whether an individual has a disability must consider the impact of corrective measures and that guidance to the contrary from the Equal Employment Opportunity Commission violated the plain language of the ADA) *superceded by statute*, ADA Amendment Acts of 2008. Pub. L. No. 110-325, Stat. 3553 (2008); Toyota Motor Mfg., , Inc. v. Williams, 534 U.S. 184, 185 (2002) (holding that an impairment that hinders the performance of manual tasks is only a disability if it is a "permanent or long term" and "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives").;ADA Amendment Acts of 2008, Pub. L. No. 110-325, 112 Stat. 3553 (2008).

155. The ADA Amendments Act of 2008 is subtitled "An Act to restore the intent and protections of the Americans with Disabilities Act of 1990." Pub. L. No. 110-325, 112 Stat. 3553 (2008)

156. 42 U.S.C. § 12132 (1990).

157. 28 C.F.R. § 35.130(b)(7) (2011).

158. 42 U.S.C. § 12132 (1990).

1. Qualified Individual with a Disability

Title II only protects a "qualified individual with a disability."[159] The ADA defines this term as an "individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[160] This requirement therefore has two subparts: (1) the presence of a disability within the meaning of Title II, and (2) the eligibility of the individual to participate in police interrogation.

a. Disabilities under the ADA

The ADA's definition of disability spans a broad range of impairments.[161] A disability refers to "a physical or mental impairment that substantially limits one or more of the major life activities of [the sufferer]; a record of such an impairment; or being regarded as having such an impairment."[162] The regulations expressly include "any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities" as well as drug addiction and alcoholism.[163] In addition to this expansive definition, the ADA's rules of construction require the term to be interpreted "in favor of broad coverage . . . to the maximum extent permitted [by the statute]".[164]

While encompassing a wide spectrum of conditions, the definition contains a severity requirement: the impairment must substantially limit a major life activity[165] such as caring for oneself, learning, reading, concentrating, thinking, communicating, or working.[166] Even this limiting language, however, must be interpreted in favor of broad coverage per the 2008 Amendments.[167] For example, the episodic nature of an impairment does not prevent it from constituting a disability if it meets the severity threshold when symptomatic.[168] Likewise, the substantial limitation inquiry may not consider any mitigation of symptoms achieved through medication, other assistive technology, or "learned behavioral or adaptive neurological modifications."[169]

b. Eligibility for Interrogation

In addition to the existence of a disability, Title II protection requires the person to otherwise meet the "essential eligibility requirements" to participate in the

159. *Id.*
160. *Id.* § 12131(2).
161. *Id.* § 12102(1)(A)–(C).
162. *Id.*
163. 28 C.F.R. § 35.104 (2011) (defining "disability").
164. 42 U.S.C. § 12102(4)(A) (2012).
165. *Id*. § 12102(1)(A).
166. *Id.* § 12102(2)(A).
167. *Id.* § 12102(4)(B).
168. *Id.* § 12102(4)(D).
169. *Id.* § 12102(4)(E)(i)(IV).

public entity's activity.[170] The Department of Justice's guidance on Title II states that the essential eligibility requirements may vary widely and in some cases be quite minimal.[171] For example, in cases where a public entity makes its service or activity available to all members of the public upon request, the only eligibility criterion is requesting access.[172]

In the case of an involuntary activity, such as arrest or imprisonment, the government may recognize eligibility simply by compelling the person's participation. For example, the Eighth Circuit considered a paraplegic's ADA claim regarding post-arrest transportation to the police station and determined that the plaintiff met the essential eligibility requirements simply by virtue of the arrest.[173] Applying this reasoning to police interrogation, which is frequently involuntary, the essential eligibility requirement is the mere fact of the interrogation. In certain cases, of course, an acute mental disability may render an individual incapable of responding intelligibly to questions. Law enforcement officers are unlikely to knowingly attempt interrogation of such individuals, who may reasonably be considered ineligible for police questioning and would therefore not require modification of interrogation practices. Short of this extreme circumstance, virtually all persons subject to interrogation, therefore, meet the eligibility requirements irrespective of any mental disability. As such, those with sufficiently severe mental disabilities are "qualified individual[s]" for Title II protection.

2. Activity of a Public Entity

The second statutory requirement of Title II is that police interrogation be an activity of a public entity.[174] The broad definition of "public entity" includes "any department, agency . . . or other instrumentality of a State or States or local government".[175] While few courts have addressed whether Title II applies to police interrogation specifically, the overwhelming weight of related case law supports this application.

The Supreme Court has held that Title II applies to correctional and other involuntary activities.[176] In *Pennsylvania. Dep't of Corr. v. Yeskey*, a state prisoner sued under the ADA after being excluded from a prison boot camp program due to his history of hypertension.[177] The state contended that the language of Title II, particularly the terms "eligibility" and "participation," connote *voluntary*

170. 28 C.F.R. § 35.104 (2012).

171. *Id.* § 35.104 app. B.

172. *Id.*; *see also* Robertson v. Las Animas Cty. Sheriff's Dep't, 500 F.3d 1185, 1195 (10th Cir. 2007) (deeming a deaf inmate eligible for phone services and televised circuit viewing of courtroom proceedings because such services are available to all inmates); Concerned Parents to Save Dreher Park Ctr. v. City of W. Palm Beach, 846 F. Supp. 986, 990 (S.D. Fla. 1994) (concluding that a city-sponsored recreation program had such a broad spectrum of activities and offerings that the only criterion for participation is a request to particpate).

173. Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998).

174. 42 U.S.C. § 12132.

175. 42 U.S.C. § 12131(1)(b) (2012).

176. Pennsylvania. Dep't of Corr. v. Yeskey, 524 U.S. 206, 211 (1998). Federal regulations issued by the Department of Justice in 2010 specifically provide for the application of Title II to detention and correctional activities. 28 C.F.R. § 35.152 (2012).

177. *Yeskey*, 524 U.S. at 208.

participation in the activity and therefore do not apply to prisoners held against their will.[178] The Court, however, rejected this interpretation and held that the voluntariness of participation is irrelevant to the application of Title II.[179] Expressing support for a liberal application of the ADA to public activities, Justice Scalia wrote for the majority, "the fact that the statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."[180] Lower courts, citing *Yeskey*, have applied Title II to a range of involuntary police activities. The Eighth Circuit concluded that transportation of an arrestee to the police station falls within the scope of the ADA.[181] A federal district court similarly held that Title II covers the apprehension by police of a bipolar man pursuant to an involuntary commitment order.[182] Likewise, at least two cases, explored in depth below, have specifically found that police interrogation comes within the scope of Title II.

The first case, *Calloway v. Boro of Glassboro Department of Police*,[183] dealt with interrogation at a police station.[184] In that case, Cora Calloway, a deaf and functionally illiterate woman, voluntarily went to her local police station to report a physical assault by her neighbor.[185] The neighbor, when questioned by police about the accusation, claimed that Calloway had assaulted the neighbor's child.[186] Unable to locate a sign language interpreter, the police officers proceeded to question Calloway with the assistance of an uncertified interpreter (an acquaintance of the sergeant).[187] Calloway subsequently sued and the court "express[ed] no hesitation in placing station-house investigative questioning, an 'ordinary operation of a public entity,' within the ambit of the [ADA]."[188]

In the second case, police went to the home of a deaf family in response to a 911 report of a domestic dispute.[189] The officers handcuffed Robert Seremeth, which prevented him from communicating in sign language or writing, and proceeded to wake and interview his four children without an interpreter.[190] Even though the sheriff's office had a contract for professional interpretation services, which would have provided a qualified interpreter within the hour, the responding officers instead opted to summon a fellow officer who was studying introductory sign language but lacked the requisite skills to communicate with the family.[191]

178. *Id.* at 211.

179. *Id.*

180. *Id.* at 212 (quoting *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 499 (1985).

181. Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998)912 (considering where a paraplegic sought damages for injuries he sustained while being transported in a police van that did not have wheelchair restraints).

182. Schorr v. Borough of Lemoyne, 243 F. Supp. 2d 232, 238 (M.D.Pa. 2003).

183. 89 F. Supp. 2d 543 (D.N.J. 2000).

184. *Id.* at 554.

185. *Id.* at 547.

186. *Id.*

187. *Id.* at 548.

188. *Id.* at 555.

189. Seremeth v. Bd. of Cty. Comm'rs Frederick Cty., 673 F.3d 333, 335 (4th Cir. 2012).

190. *Id.*

191. *Id.* at 335–36.

Seremeth later sued and the Fourth Circuit determined that "in light of *Yeskey*'s expansive interpretation, the ADA applies to police interrogations"[192] and "the investigation of criminal conduct."[193]

3. Discrimination Due to Disability

The third prerequisite for modified services is that the disability causes the sufferer to be "denied the benefits" or otherwise discriminated against by the public entity.[194] There are strong arguments that mentally disabled individuals are both denied the benefits of interrogation and otherwise discriminated against in the interrogation context. As a preliminary matter, it is clear that interrogation has at least the potential to provide benefits to individuals. The police department in *Calloway* contended that investigative questioning does not come under the language of Title II because it confers no benefit on the suspect.[195] The district court rejected this argument, explaining that police questioning provides the clear benefit of an opportunity "to provide information to the police concerning the commission of crimes, whether in a witness or suspect capacity."[196] More specifically, it gives suspects an opportunity to assert one's innocence and provide exculpatory information.[197] A disability that impedes a suspect from taking advantage of these opportunities can therefore be said to deprive the suspect of the benefits of police questioning.

There is a second form of discrimination as well. Title II regulations specifically provide that, "[a] public entity may not . . . utilize criteria or methods of administration [of its programs] . . . [t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities."[198] If the objective of interrogation, per the Reid Manual, is to learn the truth and secure justice, not elicit a confession,[199] then standard interrogation practices undermine this objective with respect to persons with mental disabilities.[200] For example, if the interrogation process manipulates a suspect into implicating himself (or an innocent third party) in a crime, the truth may go undiscovered and the perpetrator unpunished.

All the elements of Title II generally apply to police interrogation of individuals with mental disabilities who come under ADA protection, so long as the disability meets the severity threshold and they are capable of partaking in police questioning. It is also clear that police interrogation constitutes an activity of a public entity, despite the fact that participation is often mandatory. Finally, mental disabilities may deny sufferers the benefits of interrogation, such as the opportunity

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192. *Id.* at 338.

193. *Id.* at 339.

194. 42 U.S.C. § 12132 (2014).

195. Calloway v. Boro of Glassboro Dep't of Police, 89 F. Supp. 2d 543, 555 (D.N.J. 2000).

196. *Id.* at 556.

197. Inbau et al., *supra* note 18, at 8 ("Unfortunately, there are occasions when an innocent suspect is interrogated, and only after the suspect has been accused of committing the crime will his or her innocence become apparent . . . based on his or her behavior or explanations. . . . ").

198. 28 C.F.R. § 35.130(b)(3)(ii) (2015).

199. Inbau et al., *supra* note 18, at 8.

200. *See supra* Part I.

to assert their innocence and provide exculpatory information, and undermine the truth-seeking purpose of interrogation. Having established that the statute protects persons with mental disabilities during interrogation, it is time to explore the substance of that protection.

C. Reasonable Modifications Generally

Title II compels public entities to make reasonable modifications to their activities where necessary to avoid discrimination on the basis of disability, unless the modification would fundamentally alter the nature of the activity.[201] Such modifications must afford "meaningful access" to the public program.[202] This section first examines the meaning of reasonable modification before assessing specific modifications to interrogation practices.

Neither Title II nor its regulations define or otherwise elaborate upon the meaning of reasonable modification. Courts often turn to the provisions of the Rehabilitation Act and Title I of the ADA for guidance, since the requirement of reasonable modification generally mirrors the reasonable accommodation standard.[203] All sources agree that the reasonableness of a modification is a highly fact-specific inquiry.[204] Indeed, regulations under Title I state "it may be necessary . . . to initiate an informal, interactive process" with the disabled employee to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[205] The Ninth Circuit has extended the interactive process requirement to public entities under Title II, obligating them to conduct an investigation and consult experts to determine appropriate accommodations.[206]

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201. 28 C.F.R. § 35.130(b)(7) (2015).

202. Alexander v. Choate, 469 U.S. 287, 301 (1985) (holding that section 504 of the Rehabilitation Act "requires that an otherwise qualified handicapped individual be provided with meaningful access to the benefit" afforded others).

203. McGary v. City of Portland, 386 F.3d 1259, 1266 n.3 (9th Cir. 2004) (stating that reasonable accommodation under Title I and reasonable modification under Title II create identical standards); Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 783 (7th Cir. 2002) (noting that the ADA and Rehabilitation Act have the same standards for reasonable accommodation); Staron v. McDonald's Corp., 51 F.3d 353, 355–56 (2nd Cir. 1995); Helen L. v. DiDario, 46 F.3d 325, 331 (3rd Cir. 1995) (stating that the ADA public entity provisions and regulations are patterned after those of the Rehabilitiation Act); *see also* Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926, 931 (8th Cir. 1994) (interpreting the reasonable modification standard with reference to Rehabilitation Act cases).

204. Bircoll v. Miami-Dade Cty., 480 F.3d 1072, 1085–86 (11th Cir. 2007) (citing *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1527 (11th Cir. 1997)); Crowder v. Kitagawa, 81 F.3d 1480, 1485–86 (9th Cir. 1996) (citing the Rehabilitation Act case of *Chalk v. United States Dist. Court*, 840 F.2d 701, 705 (9th Cir. 1988)); *Staron*, 51 F.3d at 356.

205. 29 C.F.R. 1630.2(o)(3) (2015). Several circuits have interpreted this interactive process as mandatory for employers under certain circumstances. *See, e.g.* Jones v. United Parcel Serv., 214 F.3d 402, 408 (3rd Cir. 2000); Kleiber v. Honda of Am. Mfg., 485 F.3d 862, 871 (6th Cir. 2007); Ballard v. Rubin, 284 F.3d 957, 960–64 (8th Cir. 2002).

206. Duvall v. Cty. of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001) (holding that a public entity "is required to undertake a fact-specific investigation to determine what constitutes a reasonable accommodation"); Wong v. Regents of the Univ. of California, 192 F.3d 807, 818 (9th Cir. 1999) ("Because the issue of reasonableness depends on the individual circumstances of each case, this determination requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to meet the program's standards. As we have observed in

Despite the fact-intensive nature of the reasonableness determination, certain factors appear consistently in the case law. The first factor is the modification's practical burden on the public entity. In assessing the question of reasonable accommodation under the Rehabilitation Act in the employment context, the Supreme Court stated that accommodation is not reasonable if it causes "undue financial and administrative burdens."[207] Likewise, regulations under Title I of the ADA create an exception for "undue hardship," which it defines as "significant difficulty or expense." The regulations require difficulty and expense to be assessed in light of a non-exhaustive list of factors, including the net cost, overall financial resources of the covered entity, and the impact of the accommodation on the entity's ability to operate.[208] For example, if the public entity provides similarly modified services in other circumstances, they do not cause an undue burden under Title II.[209]

Another factor in determining reasonableness is whether the accommodation presents a health or safety risk to third parties. In the context of police activities, courts have regularly acknowledged a Title II exception for exigent circumstances.[210] A widely-cited Fifth Circuit opinion held that "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve suspects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life."[211] In that case, law enforcement responded to a woman's emergency call requesting that her nephew be hospitalized for mental health treatment, as he was intoxicated, armed with a knife, and threatening suicide.[212] After unsuccessfully warning the suspect to disarm and stand down, an officer shot and wounded him.[213]

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the employment context, 'mere[] speculat[ion] that a suggested accommodation is not feasible' falls short of the 'reasonable accommodation' requirement; the Acts create a 'duty to "gather sufficient information from the [disabled individual] and qualified experts as needed to determine what accommodations are necessary to enable [the individual to meet the standards in question]."'").

207. Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 287 n.17 (1987) (citing *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 412 (1979)).

208. 29 C.F.R. § 1630.2(p)(2) (2015).

209. *See* Soto v. City of Newark, 72 F. Supp. 2d 489, 496 (D.N.J. 1999) (concluding that it was not an undue hardship for a public facility to provide a sign-language interpreter for a wedding because the facility regularly provided interpreters for other events).

210. *See* Bahl v. Cty. of Ramsey, 695 F.3d 778, 785 (8th Cir. 2012) (finding that, in the matter of a deaf motorist questioned without an interpreter, public safety concerns rendered accommodation unreasonable); Bircoll v. Miami-Dade Cty., 480 F.3d 1072, 1086 (11th Cir. 2007) (waiting for an interpreter before questioning a motorist suspected of a DUI was unnecessary given the exigencies of the situation); *cf.* Waller *ex rel.* Estate of Hunt v. City of Danville, 556 F.3d 171, 175 (4th Cir. 2009) (declining to rule definitely on whether an "exigent circumstances" exception to the ADA exists and instead stating exigent circumstances help determine reasonableness). Courts also frequently cite the dicta of *Rosen v. Montgomery County Maryland*, 121 F.3d 154, 156–58 (4th Cir. 1997), to support the exigent circumstances exception. *See, e.g.* Bircoll v. Miami-Dade Cty., 410 F. Supp. 2d 1280, 1283–84 (S.D. Fla. 2006). In *Rosen*, a deaf plaintiff alleged violations of the ADA where arresting officers made no effort to communicate in writing and ignored his requests for an interpreter and a TTY telephone so he could contact his lawyer. 121 F.3d at 156. The *Rosen* court expounded at length upon the Title II, including the exigent circumstances exception, but ultimately resolved the case on the basis that the plaintiff had not claimed a legally congnizable injury. *See id.* at 158.

211. Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000).

212. *Id.* at 797.

213. *Id.*

The suspect sued under Title II of the ADA and Section 504 of the Rehabilitation Act.[214] While his claim failed due to exigent circumstances, the Fifth Circuit noted that, "once the area was secure there was no threat to human safety . . . [law enforcement officers] would have been under a duty to reasonably accommodate [the suspect's] disability . . . "[215] In *Calloway* and *Seremeth*, law enforcement claimed that the exigent circumstances exception applied to the interrogations. The *Calloway* court rejected this argument by distinguishing secure station house questioning from police operations in the field, where "well-established exigencies necessitate certain action for the protection of the public."[216] The *Seremeth* court similarly reasoned that because domestic disturbance calls are often dangerous, the officers were "obligated to assure themselves that no threat existed against them, Seremeth's children, or anyone else [by questioning the inhabitants]. . . . Moreover, the exigency justified keeping Seremeth handcuffed behind his back, as is standard procedure in dangerous situations."[217]

In addition to modifications that pose a practical burden or public safety risk, public entities need not implement modifications that would "fundamentally alter" the nature of the program.[218] Some courts consider this as part of the reasonableness analysis,[219] while others examine the question only after determining that the accommodation is reasonable.[220] The pivotal case on fundamental alterations is *PGA Tour, Inc. v. Martin*,[221] in which the Supreme Court considered whether allowing a professional golfer to use a golf cart rather than walk between shots would fundamentally alter the nature of the PGA Tour.[222] The Court held that it would not, because "the use of carts is not inconsistent with the fundamental character of golf, the essence of which has always been shotmaking."[223] The opinion explains that the walking requirement has changed over time and varies between tournaments, while the shotmaking feature has remained constant.[224] The operative principle, therefore, is that an accommodation does not fundamentally alter the activity if the alteration comports with how the same activity is conducted in other contexts.[225]

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214. *Id.* at 797–98.

215. *Id.* at 802.

216. Calloway v. Boro of Glassboro Dep't of Police, 89 F. Supp. 2d 543, 555–556 (D.N.J. 2000).

217. Seremeth v. Bd. of Cty. Comm'rs Frederick Cty., 673 F.3d 333, 340 (4th Cir. 2012).

218. 28 C.F.R. § 35.130(b)(7) (2011).

219. *See* Darian v. Univ. of Mass. Bos., 980 F. Supp. 77, 88 (D. Mass. 1997).

220. *See* Pathways Psychosocial v. Town of Leonardtown, 133 F. Supp. 2d 772, 789 (D. Md. 2001).

221. 532 U.S. 661 (2001).

222. *Id*. at 661; *but see* Falchenberg v. New York State Dept. of Educ., 338 F. App'x 11 (2nd Cir. 2009) (holding that the teaching student's request for a certification exam that would not require knowledge of spelling, puncutation, and other writing fundamentals would fundamentally alter the specific certification test, without discussing whether these elements are a fundamental part of teacher certification generally), *cert. denied*, 558 U.S. 1136 (2010); *Darian*, 980 F. Supp. at 88 (examining the impact of the accommodation with respect to the specific school's standards rather than educational programming generally).

223. *PGA Tour*, 532 U.S. at 663.

224. *Id.* at 683–85.

225. *See* Alboniga v. Sch. Bd. of Broward Cty., 87 F. Supp. 3d 1319, 1338 (S.D. Fla. 2015) (reasoning that a school board could not claim that allowing a service animal in the building fundamentally altered its activities when it had previously allowed a service animal on site without significant disruption).

Taken together, the rules and case law indicate that a modification is reasonable and required under Title II if: (1) it does not pose unreasonable financial or administrative burdens; (2) it does not pose an immediate health or safety risk to others, and (3) it is already incorporated into the activity in certain contexts. The next section applies these standards to potential modifications of police interrogation practices in order to protect persons with mental disabilities.

D. Modifications to Police Interrogation for the Mentally Disabled

Experts have suggested a range of modifications to reduce the risk of false confessions, particularly for vulnerable populations such as the mentally disabled.[226] These suggestions include the mandatory presence of counsel or another professional advocate, and police training in and application of appropriate questioning practices for vulnerable populations.[227] These recommendations would significantly alleviate discrimination without imposing undue hardship on law enforcement or fundamentally altering the nature of interrogation. Before exploring whether they constitute reasonable modifications, it is appropriate to first examine the only major case to date that has addressed reasonable accommodation in this context.

1. *Folkerts v. City of Waverly*, Iowa

Travis Folkerts, a 33-year-old man with a severe intellectual disability, was interrogated over allegations of lascivious conduct with a minor.[228] The investigating officer, aware of Folkerts's disability though not the full extent of his limitations, "more fully explained" his Miranda rights and interrogated him in a conference room rather than the station's regular interrogation room.[229] The officer estimated that he asked ten non-leading questions, "because it seemed apparent that it would be easy to get [Folkerts] to say something that he did not do." [230] At some point during the encounter, Folkerts asked the officer to call his mother/guardian.[231] After Folkerts told his mother that he was nervous, she asked the officer if he wanted her to come to the station, noting that her presence might make her son even more nervous.[232] The officer told the mother he would rather she not be there if it would just cause her son to be more nervous.[233] Folkerts's mother later claimed that the officer never informed her that her son was in legal trouble or undergoing interrogation.[234]

Folkerts' guardians later filed a variety of claims against the city and investigating officer, including a claim alleging failure to make reasonable accommodations under [Title II].[235] The trial court declined to decide whether the ADA applied to the interrogation, but stated that "any burden to provide reasonable

226. Kassin et al., *supra* note 16, at 25–30.
227. *Id*. at 30–31.
228. Folkerts v. City of Waverly, 707 F.3d 975, 979–80 (8th Cir. 2013).
229. *Id.* at 979.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.* at 979–80.
235. *See id.* at 979–80..

accommodation was made," particularly by the phone call to Folkerts' mother/guardian.[236] Summary judgment was granted in favor of the defendants. The Eighth Circuit affirmed, finding that:

> no reasonable jury could conclude that the defendants failed to make reasonable accommodations for Travis's disability. [The investigator] altered his questioning style, more fully explained the *Miranda* rights, interviewed Travis in a less intimidating room, drove Travis to his parents' home and explained the situation to them, and arranged alternative and friendlier booking procedures. The dispositive accommodation [was the] phone call to [Folkerts' mother/guardian]. [237]

The *Folkerts* courts identified two potentially effective modifications: (1) tempering the mode of interrogation and (2) involving a third-party advocate for a disabled person. Both approaches have potential to offset the disadvantages faced by the mentally disabled during interrogation. In Folkerts' case, the tempered mode of questioning provides the stronger argument that the investigator accommodated Folkerts' disability. Conversely, the court's conclusions regarding the investigator's call to Folkerts' mother are untethered from both the purpose of Title II and the evidence regarding interrogation of the mentally disabled. The purpose of Title II is to eliminate discrimination by actually accommodating the disability, but the *Folkerts* courts appear content to assess the effort level put forth by the public entity. The Eighth Circuit reasoned that calling Folkerts' mother/guardian was a "dispositive accommodation."[238] While it may have been a commendable effort by the officer, it did not provide Folkerts with any meaningful assistance, in part because his mother did not understand the situation.[239] It is the equivalent of a public entity expending great effort – but failing – to build an access ramp for a wheelchair-bound individual. Moreover, even if Folkerts' mother had been present, the existing evidence reveals that the presence of a relative is generally ineffective in assisting the person under interrogation.[240] This is akin to providing an access ramp that does not generally support wheelchairs.

The following sections explore two possibilities for meaningful accommodations: (1) the presence of counsel or other professional advocate, and (2) training in and application of appropriate questioning practices for vulnerable populations.

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236. Folkerts v. City of Waverly, No. 10–cv–2041 EJM, 2011 WL 6328681, at *5 (N.D. Iowa Dec. 16, 2011).

237. *Folkerts*, 707 F.3d at 984.

238. *Id*.

239. The Eighth Circuit opinion in particular seems to take the position that the mother/guardian should have inferred that her son was under suspicion and interrogation by virtue of the fact that he was at the police station and "nervous." Yet Folkerts could have been at the police station in the capacity of a crime victim, witness, or simply someone who appeared in need of assistance. These scenarios are particularly plausible for severely disabled individuals, who have a disproportionate amount of contact with police, and would have reasonably made Folkerts nervous. *See* Follette et al., *nfra* note 275, at 44.

240. *Kassin et al., supra* note 16, at 30.

2. Mandatory Presence of Counsel or Other Professional Advocate

The most effective modification would likely be the mandatory presence of counsel during interrogation. As Chief Justice Warren wrote in *Miranda*, "with a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial."[241] Counsel can intervene to stop questioning if it becomes manipulative and advise the suspect to remain silent rather than confess.

The presence of counsel meets all of the standards of reasonableness previously discussed. With respect to the practical burden, this modification would not require the police to provide or pay an attorney. Indeed, this would subvert the very purpose of the modification, which is to provide an advocate for the person under interrogation. Rather, the modification would simply require the police to refrain from interrogation until counsel can be retained or the individual becomes constitutionally entitled to free counsel upon indictment.[242] If an exigent circumstance exists – such as a missing person or ticking bomb – then the police could proceed without counsel.

In general, there is no undue hardship or fundamental alteration to the activity if the public entity regularly provides or allows the accommodation in other circumstances not involving a disability. It is difficult to imagine a case where this is truer than the presence of counsel during interrogation. First, and most obviously, interrogation occurs in the presence of counsel whenever the suspect invokes his or her constitutional right to have counsel present. In addition, a number of states have either rules of evidence or child-protection laws that prohibit interrogation of children without the presence of counsel or a parent/guardian.[243]

A less protective version of this modification would be to mandate the presence of any trained, professional advocate, such as a mental health practitioner. Studies show that mandating the presence of nonprofessionals, such as relatives, is generally ineffective in protecting the person under interrogation. Such individuals tend to behave passively and encourage cooperation with the authorities.[244] Researchers have observed this both in the U.S., where some state laws require the presence of a parent during the interrogation of a juvenile, as well as in the United Kingdom, where the law requires the presence of an "appropriate adult" during

241. Miranda v. Arizona 384 U.S at 470 (1966) (citing *Crooker v. State of California*, 357 U.S. 433, 443–48 (1958) (Douglas, J., dissenting)).

242. *See supra* Part I. Subsection B.

243. *See, e.g.,* W. VA. CODE § 49-4-701(l) (2016) (statements by juveniles under fourteen to law enforcement are not admissible unless made in the presence of counsel; statements by juveniles over fourteen but under sixteen are not admissible unless made in the presence of counsel or the juvenile's parent or guardian.").; 705 ILL. COMP. STAT. ANN. 405/5-170(a) (2012) (juveniles under thirteen at the time of the act of which they are accused may not be questioned about certain crimes except in the presence of counsel); COLO. REV. STAT. 19-2-511(1) (1997) (statements by juveniles in custody are inadmissible unless made in the presence of counsel or a parent or guardian advised of the juvenile's rights).

244. Kassin et al *supra* note 16, at 30.

interrogation of persons with mental disabilities.[245] The presence of counsel or another professional advocate is thus necessary to offset the disadvantages faced by the mentally disabled during interrogation.

3. Police Training in and Application of Modified Questioning Practices

The guilt-presumptive, confrontational, and deceptive nature of interrogation practices increases the vulnerability of the mentally disabled and makes false confessions more likely. Training in and application of alternative questioning techniques may reduce this risk, particularly if it focuses "not only on the limits of human lie detection, false confessions, and the perils of confirmation biases – but on the added risks to individuals who are . . . mentally retarded, psychologically disordered, or in other ways vulnerable to manipulation."[246] Specific modifications may include limiting the duration of interrogations,[247] and avoiding false evidence ploys and "minimization" tactics that normalize the crime and imply leniency.[248]

Applying such modifications would not burden law enforcement by reducing the effectiveness of interrogation.[249] A variety of jurisdictions have implemented reforms to reduce the deceptive and psychologically coercive aspects of interrogation.[250] In 1984, the British Parliament enacted the Police and Criminal Evidence (PACE) Act after a spate of high-profile false confession cases.[251] PACE introduced safeguards such as audio and/or video recording of interrogations,[252] mandated breaks for food[253] and rest,[254] and placed an affirmative burden of proof on law enforcement to show beyond a reasonable doubt that confessions were not obtained by "oppression" or "in consequence of anything said or done which was likely . . . to render [the confession] unreliable. . . . "[255] In the early 1990s, the Home Office developed an interviewing model called PEACE,[256] which "abandons the

245. *Id.*; [INSTITUIONAL AUTHOR] Police and Criminal Evidence Act, Code of Practice C, §1.7(b) (1984) (Eng.) [hereinafter Code C] (an "appropriate adult" can be (1) a relative, guardian or other person responsible for the suspect's care, (2) someone "experienced in dealing with mentally disordered or mentally vulnerable people but who is not . . . employed by the police", or (3) if these options are unavailable, any "responsible" adult not employed by the police); *Id.* § 11.17 (the observed inefficacy of this statute is particularly notable because the interrogator must inform the "appropriate adult" that they are not expected merely to observe, but to advise the suspect, observe that the questioning is conducted properly and fairly, and facilitate communication with the suspect).

246. *Kassin et al., supra* note 16, at 30.

247. *Id.*, at 28 (suggesting that in proven false confession cases, the average interrogation lasted over sixteen hours).

248. *Id.* at 28–30.

249. *Id.* at 27–28.

250. *Id.*

251. Philip S. Gutierrez, *You Have the Right to [Plead Guilty]: How We Can Stop Police Interrogators from Inducing False Confessions*, 20 S. CAL. REV. L. & SOC. JUST. 317, 346 (2011).

252. *See* POLICE AND CRIMINAL EVIDENCE ACT, CODE OF PRACTICE E (1984) (Eng.).

253. Code C § 12.8.

254. *Id.* § 12.2.

255. Police and Criminal Evidence Act, §76(2) (1984) (Eng.).

256. Christian A. Meissner et al., *Accusatorial and Information-Gathering Interrogation Methods and Their Effects on True and False Confessions: A Meta-Analytic Review*, 10 J. EXP. CRIMINOLOGY 459, 463 (2014) (indicating PEACE is an acronym for Preparation and Planning, Engage and Explain, Account, Closure, and Evaluate).

accusatory confrontational approach and its use of trickery and deceit, and instead employs a less oppressive approach for interviewing suspects, which asks them what happened rather than asking them to confess."[257] Investigators are prohibited from deceiving suspects.[258] The use of psychologically manipulative tactics fell "without a corresponding decline in confession rates."[259] Confessions are also more likely to be truthful than those elicited by accusatorial, deceptive techniques.[260] New Zealand and Norway have also adopted the PEACE approach as national policy.[261]

Electronic recording of interrogations is a vital component of this modification. It provides judges with an objective and accurate account of the interrogation from which to determine whether the investigator used appropriate techniques.[262] Such a record is particularly crucial for interrogations of mentally disabled individuals, who may have difficulty recalling or articulating the sequence of events, leaving the judge only with the interrogator's perspective. As of August 2015, fourteen states and the District of Columbia had adopted legislation mandating the electronic recording of interrogations,[263] demonstrating that this is neither unduly burdensome nor a fundamental alteration to police practices.

The modifications explored in this section are not the only possibilities under Title II. In the absence of a specific request for a particular modification, public entities generally have discretion regarding how they ensure that persons with disabilities have meaningful access to their programs.[264] As *Folkerts* demonstrates, courts have largely unfettered discretion in reviewing the adequacy of such modifications in the context of interrogation. It is the position of this article that such discretion should be guided and tempered by the considerable body of evidence regarding the susceptibility of persons with mental disabilities to false confessions. The Department of Justice could advance this cause by issuing evidence-based guidance on reasonable modifications for interrogations of the mentally disabled. Establishing a baseline for how to accommodate persons with mental disabilities during interrogation would assist both police in fashioning modifications and courts in assessing the adequacy of such modifications.

III. Limitations and Reforms

This section discusses two significant limitations to the ADA's potential to protect persons with mental disabilities from making false confessions. First, as

257. Gutierrez, *supra* note 251, at 347.

258. Meissner et. al, *supra* note 256, at 463.

259. Kassin et al., *supra* note 16, at 27.

260. Meissner et al., *supra* note 257, at 481 (finding that information-gathering interrogation approaches "showed superior diagnosticity by significantly increasing the elicitation of true confessions and significantly reducing the incidence of false confessions" compared to accusatorial approaches).

261. Kassin et al., *supra* note 16, at 28.

262. *See False Confessions & Recording of Custodial Interrogations*, INNOCENCE PROJECT, http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/false-confessions-recording-of-custodial-interrogations (last visited Sept.. 15, 2016).

263. *Id.* The states are Connecticut, Illinois, Maine, Maryland, Michigan, Missouri, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oregon, Vermont, and Wisconsin.

264. *See* Seremeth v. Bd. of Cty. Comm'rs Frederick Cty., 673 F.3d 333, 340-341 (4th Cir. 2012) (stating that reasonable modifications need not represent "best practices").

discussed above, is the question of when the obligation to provide reasonable modification is triggered. Second, the remedies available under the ADA may provide little practical help to someone who has falsely confessed during an interrogation that was conducted in violation of the ADA.

A. Determining the Trigger for Modification

Authorities generally agree that a public entity only needs to provide reasonable modification when it has knowledge of the disability and need for accommodation.[265] Some courts have gone farther and held that only a direct request for accommodation triggers the legal obligation.[266] In either case, the nature of mental disabilities may undermine the ability of sufferers to access modified interrogation practices.

Title II and its regulations do not specify the level of knowledge that a public entity must have of a disability in order to trigger the reasonable modification requirement. In the absence of such a directive, there are three options for trigger points: (1) when the public entity receives a request for accommodation, (2) when the public entity has actual knowledge of the disability and need for accommodation, and (3) when the public entity has constructive knowledge of the disability and need for accommodation.

In general, the Eleventh Circuit has taken the most restrictive approach to the trigger question,[267] holding in *Rylee v. Chapman* that "the [public entity's] duty to provide a reasonable accommodation is not triggered until the plaintiff makes a 'specific demand' for an accommodation."[268] Yet a closer reading of the case suggests more nuance than the foregoing statement suggests. The *Rylee* plaintiff claimed that law enforcement failed to accommodate his hearing impairment by providing an interpreter during his arrest, booking, interrogation, and initial hearing.[269] The court, in dismissing the claim, continually reiterates not only that there was no request, but also that the police had no reason to believe accommodation was necessary.[270]

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265. *See* Robertson v. Las Animas Cty. Sheriff's Dep't, 500 F.3d 1185, 1196 (10th Cir. 2007); Randolph v. Rodgers, 170 F.3d 850, 858 (8th Cir. 1999) (noting that "public entities are not required to guess at what accommodations they should provide").

266. *See* Rylee v. Chapman, 316 F. App'x 901, 906 (11th Cir. 2009).

267. *See* id.; Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1363 (11th Cir. 1999) (holding that an employee could not establish a claim for failure to accommodate because she did not make a "specific demand" for accommodation); Wood v. President and Trustees of Spring Hill Coll. in City of Mobile, 978 F.2d 1214, 1222 (11th Cir. 1992) (finding that, in a case brought under the Rehabilitation Act, any error in jury instructions regarding reasonable accommodation was harmless because the schizophrenic plaintiff never alleged that she asked her college for accommodation; thus, "it is clear that reasonable accommodation was simply not an issue in this case.").

268. *Rylee*, 316 F. App'x at 906.

269. *Id.* at 902–903.

270. *Id.* at 906 (noting that Rylee's wife had informed the 911 operator that her husband could read lips; that there was no evidence that the arresting deputies believed he could not read lips; that upon his arrival at the station house, Rylee was asked if he could read lips by the booking officer and responded affirmatively; that during his interrogation, the investigating officer wrote down his questions after verifying that the man could read and write; and that at his subsequent court appearance, he had his uncle present as an interpreter and thus did not need a court-provided interpreter).

Most authorities, in contrast, take the position that knowledge is sufficient to trigger the ADA requirements. In the employment context, the Equal Employment Opportunity Commission has issued official guidance indicating that constructive knowledge[271] of an employee's need for accommodation is sufficient to trigger the employer's obligation under Title I if the employer also knows or should know that the disability prevents the employee from requesting accommodation.[272]

Likewise, several circuits have held that a specific request is unnecessary if the disability is already known, either because the disability is obvious or because the disabled individual or a third party has informed the public entity. [273] A public entity must also have knowledge that the disabled individual requires accommodation.[274] While this knowledge typically arises from the individual's request for accommodation, it may also be self-evident due to the nature of the disability.[275] For example, the Tenth Circuit found a triable issue of fact as to whether law enforcement officers knew that a functionally deaf man required accommodation based upon the discovery of cochlear implant batteries in his possession.[276] The general rule, therefore, is that authorities must accommodate when the disability is obvious or disclosed, regardless of whether disclosure took the form of a formal request.

This jurisprudence raises important issues for persons with mental disabilities. First, the existence, nature, and extent of mental disabilities are often not "obvious." Some symptoms of mental disability, such as confusion, nervousness, and poor verbal skills, overlap with behaviors that non-disabled individuals may exhibit when subjected to the stressful and disorienting experience of police interrogation.[277] Second, many individuals with severe mental disabilities are unaware of or unable to articulate their impairment.[278] Finally, individuals may be

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271. "Constructive knowledge" refers to "knowledge that one using reasonable care or diligence should have." *Constructive Knowledge*, BLACK'S LAW DICTIONARY (10th ed. 2014).

272. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOCCM S 902 INTRO., ENFORCEMENT GUIDELINES: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002).

273. Robertson, 500 F.3d at 1196-97 (applying the jurisprudence of Title I claims, which hold that an employee must disclose non-obvious disabilities to the employer in order to trigger the right to reasonable accommodation, to Title II cases involving public entities); Chisolm v. McManimon, 275 F.3d 315, 330 (3rd Cir. 2001); Brady v. Wal-Mart Stores, Inc., 531 F.3d 127, 135 (2nd Cir. 2008) (holding that an employer has a duty to accommodate an obvious disability, in a Title I employment context); *See* Kiman v. N.H. Dep't of Corr., 451 F.3d 274, 283 (1st Cir. 2006) ("[S]ometimes the [person]'s need for an accommodation will be obvious; and in such cases, different rules may apply.")

274. *Robertson*, 500 F.3d at 1197 (citing *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 164 (5th Cir. 1996)).

275. *Robertson*, 500 F.3d at 1197; *Kiman*, 451 F.3d at 283.

276. *Robertson*, 500 F.3d at 1196–97.

277. INBAU ET AL., *supra* note 18, at 158–59 (describing common behaviors of both truthful and deceptive suspects); William C. Follette, Deborah Davis & Richard A. Leo, *Mental Health Status and Vulnerability to Police Interrogation Tactics*, 22 CRIM. JUST. 42, 44 (2007).

278. Lisette van der Meer et al., *Insight in Schizophrenia: Involvement of Self-Reflection Networks?*, 39 SCHIZOPHRENIA BULL. 1352, 1352 (2013) (weakinsight is a common feature of psychotic disorders and correlates with poor prognosis); Tania M. Lincoln et al., *Correlates and Long-Term Consequences of Poor Insight in Patients with Schizophrenia. A Systematic Review*, 33 SCHIZOPHRENIA BULL. 1324, 1324

reluctant to disclose their disability to police, either because mental disabilities are often characterized by problems with assertiveness or because they do not realize the potential benefit of disclosure.[279] Indeed, they may expect disclosure to result in mistreatment.

On the other hand, the actual or constructive knowledge standard would likely result in ADA coverage in egregious cases. Brendan Dassey, for example, attended special education classes and the interrogators felt compelled to verify that he, at the age of sixteen, understood the difference between truth and a lie.[280] Likewise, schizophrenic Eddie Joe Lloyd was institutionalized in a mental hospital at the time of his interrogation.[281] In such cases, interrogators have constructive if not actual knowledge of the disability. Department of Justice regulations could assist in clarifying the knowledge standard. The first step would be to indicate that constructive knowledge suffices to trigger the Title II obligation in the case of mental disability – particularly for involuntary activities. Regulations could also require police, when there is reason to believe that the suspect suffers from a mental disability, to undertake some inquiry to determine the severity. These reforms would facilitate broader coverage of Title II's protections for persons with mental disabilities in a context where the consequences of non-accommodation are potentially devastating to both the individual and the cause of justice.

B. Finding an Adequate Remedy for Violations

Another limitation is that remedies available under the ADA are unlikely to repair the potentially catastrophic consequences of a false confession. If a mentally disabled person undergoes an interrogation that violates the ADA, Title II may allow the person to vindicate their rights through a lawsuit for compensatory damages and/or injunctive relief,[282] but there are several limits to the practical availability and usefulness of such remedies.

Compensatory damages, including damages for pain and suffering, are generally available to victims of ADA violations. However, if the violator is a State (as opposed to a municipality or county), the Eleventh Amendment may preclude

(2007) (indicating between 50% and 80% of schizophrenia sufferers partially or totally lack insight into their condition).

279. Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 513–14 (2002) (explaining that many mentally retarded individuals become adept at concealing their disability).

280. Interview of Brendan Dassey by Calumet County Sheriff's Department Investigator Mark Wiegert, at Two Rivers Police Dept.(Mar. 24, 2006).

281. Wilgoren, *supra* note 51.

282. 42 U.S.C. § 12133 (2012) (entitling victims of Title II violations to the same sources of redress available under Section 794a of the Rehabilitation Act, which ban disability discrimination in federally funded programs); 29 U.S.C. § 794a(a)(2) (2012) (entitling victims of Rehabilitation Act violations to the same remedies available under Title VI of the Civil Rights Act of 1964, which bans racial discrimination in federally funded programs); Cannon v. Univ. of Chi., 441 U.S. 677, 703 (1979) (finding an implied private right of action under Title VI); Franklin v. Gwinnett Cty. Pub. Schs., 503 U.S. 60, 70–71 (1992) ("[A]bsent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."); *C.f.* Barnes v. Gorman, 536 U.S. 181, 189 (2002) (indicating punitive damages may not be awarded in suits under § 202 of the ADA and § 504 of the Rehabilitation Act).

monetary damages under Title II.[283] More crucially, the possibility of damages will neither deter nor remedy violations. Deterrence is unlikely because the individual investigators generally have no personal liability.[284] Damages are also of limited assistance to someone who has been convicted and imprisoned due to a false confession arising from an ADA-violating interrogation.[285]

Injunctive relief is a "drastic and extraordinary remedy, which should not be granted as a matter of course."[286] When a statute such as the ADA provides for equitable remedies, the seeker of an injunction must show that (1) he has (or is likely to) prevail on the merits, (2) he has (or is likely to) suffer irreparable harm in the absence of an injunction, (3) the balance of equities is in his favor, and (4) the injunction serves (or does not disserve, in the case of a permanent injunction) the public interest. [287] For a permanent injunction, one must also show the insufficiency of monetary damages and other remedies at law.[288] Theoretically, a mentally disabled criminal defendant could seek an injunction to prevent the evidentiary use of a confession that was obtained in violation of the ADA. The hurdles would be high, however. It would be particularly difficult to show the likelihood of success on the merits in the absence of significant case law in this area, and convince a court to disregard the risk of a guilty person going free as a result of the injunction.

Is there any effective remedy? There are two possible avenues to suppress the confession at trial. The first is through state exclusionary rules. While the Court-created exclusionary rule only applies to confessions obtained in violation of the Constitution and not federal statutes such as the ADA, state rules are sometimes broader. For example, the Texas Code of Criminal Procedure expressly forbids admission of any evidence obtained in violation of federal statutes.[289] Other states, such as Pennsylvania and Arkansas, do not expressly preclude admission based on federal statutory violations, but contain general exclusionary language that may cover ADA violations.[290] Such rules may ultimately prove to be effective remedies for Title II violations. A second possibility is to leverage the ADA violation in order to suppress the confession as involuntary. While the voluntariness test does not

283. Tennessee v. Lane, 541 U.S. 509, 531 (2004) (finding that Title II valid abrogated immunity with respect to lawsuits specifically concerning access to courts and judicial services); United States v. Georgia, 546 U.S. 151, 159 (2006) (holding that a prisoner could seek damages from the state for ADA violations to the extent that his claims alleged independent violations of the Constitution, but leaving unsettled the permissibility of claims alleging Title II violations that are not also Constitutional violations); *see* U.S. CONST. amend. XI (shielding states from private lawsuits by citizens unless the state waives or Congress validly abrogates sovereign immunity).

284. Vinson v. Thomas, 288 F.3d 1145, 1156 (9th Cir. 2002); Alsbrook v. City of Maumelle, 184 F.3d 999, 1005 n.8 (8th Cir. 1999) (en banc); *see also* Miller v. King, 384 F.3d 1248, 1277 (11th Cir. 2004).

285. *See* Nancy Leong & Aaron Belzer, *Enforcing Rights*, 62 UCLA L. REV. 306, 348-49 (2015).

286. Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165 (2010).

287. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (setting forth the requirements for a preliminary injunction); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (articulating the four-factor balancing test for a permanent injunction).

288. *eBay*, 547 U.S. at 391.

289. 1966 Tex. Crim. Stat. 38.23.

290. Pa.R.Crim.P. 581 (suppressing evidence obtained "in violation of the defendant's rights"); Ark. R. Crim. P. 16.2 (forbidding the admission of "illegally obtained" evidence if "the violation upon which it is based is substantial").

reliably protect the mentally disabled because it requires a preliminary showing of objectively coercive police behavior,[291] the defendant could argue that the ADA violation constitutes the necessary coercion. With the coercion prong thus satisfied, the court would then consider the mental disability as a factor in its analysis of whether to suppress the confession.

CONCLUSION

As Brendan Dassey completes his eleventh year in prison, it bears consideration on how the application of Title II during his interrogation might have affected his fate. Dassey's enrollment in special education classes provided at least constructive knowledge that he suffers from a mental impairment that substantially affects his ability to learn, but it did not preclude him entirely from participating in police questioning.[292] Dassey thus met the definition of a qualified person with a disability. Since there were no exigent circumstances at the time of his interrogation(s), this article posits that the Sheriff's Department should have desisted until counsel was present or altered the manner of questioning to be less manipulative. If the former had occurred, Dassey likely would not have confessed at all, forcing the government to "produce the evidence against him by its own independent labors. . . . "[293] If the latter had occurred, there would likely be more confidence in the veracity of any confession Dassey might have made.

Similarly, Eddie Joe Lloyd may have avoided seventeen years imprisonment if the ADA had been applied to his interrogation. Lloyd's residence at a psychiatric facility provided at least constructive knowledge to police that he suffered a serious mental disability that impeded his ability to care for himself, entitling him to modifications under Title II. Requiring the presence of an attorney would, again, likely have prevented any confession at all, either because no questioning would have occurred or because an attorney would have disabused Lloyd of his delusions about the likely use of a confession. Alternatively, a modified questioning approach would have, at a minimum, created an electronic record of the entire encounter and alerted finders of fact to Lloyd's motivation for the confession.

Because the impact of false confessions can be so singularly devastating for suspects, sufficient protections must be available to mitigate the acute vulnerability of persons with mental disabilities. While Constitutional safeguards offer the optimal remedy for exclusion of confessions from evidence, they do not reliably protect the mentally disabled due to (1) an impaired understanding of rights, (2) an impaired ability to exercise rights, and (3) insufficient judicial consideration of mental disabilities in suppression proceedings and decisions. While criminal justice

291. Colorado v. Connelly, 479 U.S. 157,167 (1986).

292. Dassey's participation in special education programs means that he was determined to be an eligible "child with a disability" under Wisconsin law. W.S.A. § 115.782(3); Wis. Adm. Code § PI 11.35(2). Under the state's special education eligibility criteria, a child has an intellectual disability if he has an intelligence test score of two or more standard deviations below the mean as well as "significant limitations in adaptive behavior." Wis. Adm. Code § PI 11.36(1)(b). This is substantially similar to the DSM definition and the criteria cited in the EEOC's informal guidance on intellectual disabilities. *Infra* note 45. Because Dassey had been deemed eligible for special education under Wisconsin law, he would likely be considered an individual with a disability for ADA Title II purposes.

293. Miranda v. Arizona, 384 U.S. 436, 460 (1966).

reformers seek legislative change on the state level, such as mandatory electronic recording of confessions, the ADA provides an existing fifty-state framework for meaningful protection. Widespread and meaningful implementation of this framework will likely require the Department of Justice to issue standards clarifying that law enforcement must reasonably modify interrogation practices when there is constructive knowledge that a suspect has a mental disability, along with evidence-based standards for such modification. Such action is appropriate in order to protect persons with mental disabilities from the catastrophic and pronounced risk of false confessions.