

USING THE ADA’S “INTEGRATION MANDATE” TO DISRUPT MASS INCARCERATION

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ABSTRACT

As a result of the disability rights movement’s fight for the development of community-based services, the percentage of people with intellectual and developmental disabilities (I/DD) and mental illness living in institutions has significantly decreased over the last few decades. However, in part because of government failure to invest properly in community-based services required for a successful transition from institutions, individuals with disabilities are now dramatically overrepresented in jails and prisons. The Americans with Disabilities Act’s (ADA) “integration mandate”—a principle strengthened by the Supreme Court’s 1999 *Olmstead v. L.C.* decision, entitling individuals with disabilities to receive services in the most integrated setting appropriate to their needs—may provide one avenue to disrupt the school-to-prison pipeline and overrepresentation of people with I/DD and mental illness in prisons and jails. In this Article, we explore how the federal government and private parties have used—and are beginning to use in new ways—the integration mandate to advocate for the rights of individuals with disabilities to receive the supports they need to thrive in the community and avoid unnecessary entanglement with the criminal justice system.

TABLE OF CONTENTS

INTRODUCTION	918
I. OVERVIEW OF <i>OLMSTEAD V. L.C.</i>	926
A. <i>Case Background</i>	926
B. <i>The Elements of the Olmstead Decision</i>	928
C. <i>Recent Developments and the Expansion of Olmstead</i>	929
II. THE “INTEGRATION MANDATE” AS APPLIED TO MASS INCARCERATION	931
A. <i>Department of Justice Enforcement: Diversion</i>	933
B. <i>United States v. Georgia and Georgia Advocacy Office v. Georgia: Disrupting the School-to-Prison Pipeline for Students with Disabilities</i>	935
C. <i>Seth v. D.C.: Challenging Unjustified Imprisonment</i>	938
D. <i>M.G. v. Cuomo: Demanding Expansion of Community-Based Mental Health Housing</i>	943

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<i>E. United States v. Nino and United States v. Collins: Challenging Inpatient Competency Restoration Programs</i>	944
<i>F. People v. McCollum: Challenging Inappropriate Placement in a Locked Psychiatric Institution</i>	948
III. APPLYING <i>OLMSTEAD</i> TO NON-THERAPEUTIC SETTINGS	950
CONCLUSION.....	954

INTRODUCTION

Until the early 1970s, the tragic reality for many with intellectual and developmental disabilities (I/DD) and mental illness¹ in this country was one of segregation and exclusion in locked institutions, based on the premise that there was no place for such individuals in the community at large. As a result of the disability rights movement's fight for people with disabilities to be freed from large, state-run institutions and receive community-based services instead, the percentage of those with I/DD and mental illness living in institutions has significantly decreased over the last few decades.² Since the late 1960s, and for a variety of reasons, states have closed and downsized numerous institutions, with the number of Americans confined in mental hospitals reduced from approximately 560,000 in 1955 to 35,000 as of 2016.³ The number of institutionalized people with I/DD has also seen a dramatic decrease from 195,000 in 1967 to 21,000 in 2015.⁴ People with disabilities themselves, disability rights

1. In this Article, we use the terms "people with mental illness," "people with psychiatric disabilities," or "people with mental health needs" to describe those people who have been diagnosed with psychiatric conditions such as schizophrenia, bipolar disorder, and major depression, among others.

2. See, e.g., ROBERT BERNSTEIN ET AL., DIVERSION, NOT DISCRIMINATION: HOW IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT CAN HELP REDUCE THE NUMBER OF PEOPLE WITH MENTAL ILLNESS IN JAILS 5 (2017); ANDREW J. IMPARATO & MARGARET A. NYGREN, COMMUNITY LIVING AND PARTICIPATION FOR PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES: WHAT THE RESEARCH TELLS US 2-3 (2015); REBECCA VALLAS, DISABLED BEHIND BARS: THE MASS INCARCERATION OF PEOPLE WITH DISABILITIES IN AMERICA'S JAILS AND PRISONS 1 (2016); Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 4-5 (2012).

3. See GERALD N. GROB, THE MAD AMONG US: A HISTORY OF THE CARE OF AMERICA'S MENTALLY ILL 291 (1994) (559,000 confined in state psychiatric hospitals as of 1955, the high point of such confinement); E. Fuller Torrey, *A Dearth of Psychiatric Beds*, PSYCHIATRIC TIMES (Feb. 25, 2016), <https://www.psychiatristimes.com/psychiatric-emergencies/dearth-psychiatric-beds> ("Currently [as of Feb. 2016], there are about 35,000 state psychiatric beds available, or about 11 beds per 100,000 population."). The reasons for this reduction are complex and beyond the scope of this Article, but include the introduction of psychotropic medications, the growth of community-based mental health care, the enactment of Medicaid, and the tightening of civil commitment standards to require dangerousness in addition to mental illness. See generally GROB, *supra*; ALISA ROTH, INSANE: AMERICA'S CRIMINAL TREATMENT OF MENTAL ILLNESS 74-76 (2018).

4. AMIE LULINSKI & EMILY SHEA TANIS, USE OF STATE INSTITUTIONS FOR PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES IN THE UNITED STATES (2018). The Medicaid Home and Community Based Services (HCBS) Waiver, enacted in 1983, has played a major part in redirecting Medicaid funding from congregate institutions to community-based services. See generally *Home & Community Based Services*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/hcbs/index.html> (last visited Apr. 18, 2019) (discussing how the

advocates and allies, and experts in the I/DD and mental health fields commend this shift to community-based supports and services in place of segregated and isolated institutional settings.⁵

However, just as the deinstitutionalization movement took hold, the era of mass incarceration began. According to recent statistics, seven people were incarcerated for every one thousand in the general population—a rate four times as high as the level of incarceration in 1970, when these rates began to rise.⁶ Among other factors, the transition of people with I/DD and mental illness out of state-run institutions, coupled with states' failure to provide sufficient community-based supports and services to ensure their success in the community, led to the incarceration of those with I/DD and mental illness at alarming rates.⁷ Indeed, people

program allows beneficiaries to receive services in their own communities rather than in institutions); *Home & Community Based Services Authorities*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/hcbs/authorities/index.html> (last visited Apr. 18, 2019) (discussing the formation of HCBS in the 1980s).

5. BERNSTEIN ET AL., *supra* note 2; IMPARATO & NYGREN, *supra* note 2, at 1–3.

6. Margo Schlanger, *Anti-Incarcerative Remedies for Illegal Conditions of Confinement*, 6 U. MIAMI RACE & SOC. JUST. L. REV. 1, 1 (2016) (citing various reports from the U.S. Department of Justice and the U.S. Census Bureau); *see also* ROTH, *supra* note 3, at 74 (“Between 1971 and 2004, the prison population in the United States went from about 200,000 to 1.4 million, a 600 percent increase. Over the same period, jail populations went from about 130,000 to more than 700,000.” (citing MARC MAUER, *RACE TO INCARCERATE 19–20* (2006))).

7. While some have used these numbers to make the case for the failure of community-based supports and services and re-institutionalization, the evidence tells a different story. Rather, people with disabilities must have access to *comprehensive* and *high-quality* services in the community to avoid these outcomes. For a more thorough discussion of this topic, see, e.g., BERNSTEIN ET AL., *supra* note 2, at 6 (“Deinstitutionalization is often identified as the reason there are so many people with mental illness in America’s jails and prisons But, for a number of reasons, that is not a complete or accurate story. First, deinstitutionalization, as a policy or program, was supposed to be linked to and coordinated with the development of a comprehensive network of community mental health programs that were intended to replace hospital care and allow people with mental illness to live successfully in their communities. America failed to deliver on that promise—not because it lacked the ability to do so, but rather because lawmakers lacked the political will to fund and ensure the availability of much-needed services in localities nationwide, including outpatient treatment, residential and crisis services, and case management that coordinated between the mental health system and law enforcement and courts. At its core, the disproportionate involvement of people with mental illness in the criminal justice system (from police contact through incarceration) reflects the broken promise that community services would replace hospitalization. Deinstitutionalization was never meant to abandon people with mental illness or require them and their families to rely on their own devices for treatment and housing. . . . State spending on mental health services actually declined in the era of deinstitutionalization. . . . [O]nly fragments of what was intended to be a comprehensive system of community mental health services materialized.”); IMPARATO & NYGREN, *supra* note 2, at 1 (“Recent authors . . . have called for the increased availability of segregated residences, citing such concerns as long waiting lists for services, significant stress on family caregivers, high rates of staff turnover in community settings, and the lack of specialized caregiver training that results in supports and services that are unstable and sometimes unreliable. The calls have been to create larger, more segregated facilities that can provide more targeted support. These concerns are both real and significant. However, the solution is not to return to the building of large, segregated, isolated institutions Solutions should come from the experience of people with intellectual and developmental disabilities (IDD) and from five decades of research, practices and policies.”); SARAH LIEBOWITZ ET AL., *A WAY FORWARD: DIVERTING PEOPLE WITH MENTAL ILLNESS FROM INHUMANE AND EXPENSIVE JAILS INTO COMMUNITY-BASED TREATMENT THAT WORKS* 6 (2014) (“Inhumane, ineffective, and expensive mental institutions throughout the nation began shuttering in the 1950s, in a process called deinstitutionalization. . . . But governments did not simultaneously take steps to ensure the availability of, and funding for, the community-based alternatives that experts have been

with disabilities are dramatically overrepresented in prisons and jails. Research shows that about 32% of prisoners and 40% of jail inmates⁸ have at least one disability in contrast to 11% of the general population.⁹ About 20% of prisoners and 31% of jail inmates report having a cognitive disability—such as Down syndrome, autism, intellectual disability, or dementia, among others—in contrast to a less than 5% prevalence rate in the general population.¹⁰ As many as 10% of individuals in jails have an intellectual and/or developmental disability in contrast to 1.5% in the general population,¹¹ while one in five prison inmates have serious mental illness in contrast to around 4% of the general population.¹² The Judge David L. Bazelon Center for Mental Health Law (the Bazelon Center), in a report with the American Civil Liberties Union (ACLU) of Southern California, noted that “[j]ails have become warehouses for people with mental illness”¹³ and emphasized that the “lack of community mental health services, coupled with mass incarceration of non-violent offenders, has resulted in three jails—the Los Angeles County Jails, Rikers Island Correctional Facility in New York City, and Cook County Jail in Chicago—having the distinction of being the nation’s largest psychiatric institutions.”¹⁴ Of those with disabilities who are incarcerated, some have not even been convicted of a crime in cases where they have been found incompetent to stand trial or where their competency determination is in process.¹⁵ As Michael Perlin has noted: “[T]he vast majority of incompetency evaluations are held in maximum security facilities without regard to the severity of the crime or the dangerousness of the defendant”

recommending for decades.”); ROTH, *supra* note 3, at 74 (characterizing the view that closure of mental hospitals has led directly to increase of people with mental illness in the criminal justice system, by noting, “The trouble is, much of the story is wrong”); VALLAS, *supra* note 2 (“While widely regarded as a positive development, deinstitutionalization was not accompanied by the public investment necessary to ensure that community-based alternatives were made available.”); Bagenstos, *supra* note 2, at 11–12 (“The indictment of deinstitutionalization, as opposed to the failure to invest in community-based services and supports, does not rest on an empirical determination of what happened in the world so much as on a normative premise that institutionalization is preferable to community-based housing and supports.”).

8. Jails are locally operated facilities that hold individuals awaiting trial or sentencing as well as those generally serving sentences of one year or less. Prisons are state or federally run facilities for individuals with felony convictions or those serving sentences of more than one year. *FAQ Detail*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=qa&iid=322> (last visited Apr. 18, 2019).

9. JENNIFER BRONSON ET AL., BUREAU OF JUSTICE STATISTICS, *DISABILITIES AMONG PRISON AND JAIL INMATES*, 2011–2012, at 3 (2015).

10. *Id.*

11. Anna Scheyett et al., *Are We There Yet? Screening Processes for Intellectual and Developmental Disabilities in Jail Settings*, 47 *INTELL. & DEVELOPMENTAL DISABILITIES* 13, 14 (2009).

12. See, e.g., BERNSTEIN ET AL., *supra* note 2, at 19; VALLAS, *supra* note 2, at 1–2.

13. LIEBOWITZ ET AL., *supra* note 7, at 1.

14. *Id.* at 6.

15. See, e.g., Julianne Hill, *Prisons Are Housing Mental Health Patients Who’ve Committed No Crimes*, A.B.A. J., Jan.–Feb. 2019, http://www.abajournal.com/magazine/article/breakdown_prisons_mental_health_patients.

and "[t]he length of time for such evaluations often extends far beyond the possible maximum potential sentence."¹⁶

These statistics are disturbing in their own right, but an explanation of the heightened challenges and harms that people with disabilities experience while incarcerated is also essential to understanding the severity of this problem. As Margo Schlanger describes:

Prisoners with mental disabilities face grave difficulties in prison and jail; they can have trouble adapting to new requirements and understanding what is expected of them, getting along with others, and following institutional rules. In the absence of treatment and habilitation, they are more likely both to be victimized and to commit both minor and major misconduct.¹⁷

Individuals may also acquire additional disabilities during their incarceration. As Rebecca Vallas notes in a recent report from the Center for American Progress, "Poor conditions in jails and prisons and inadequate access to health care and mental health treatment can not only exacerbate existing conditions, but also lead to further psychological and mental health problems that individuals did not have prior to incarceration."¹⁸ It does not have to be this way.

A brief overview of relevant federal disability rights laws is instructive here. Section 504 of the Rehabilitation Act of 1973 (Section 504) requires that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination."¹⁹ In 1976, President Gerald R. Ford issued an executive order instructing the Department of Health, Education, and Welfare (HEW) to issue regulations implementing Section 504 to include "establish[ing] standards for determining who are handicapped individuals and guidelines for determining what are discriminatory

16. Michael L. Perlin, "For the Misdemeanor Outlaw": *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 202, 204, 207 (2000) (further noting that "[t]he Supreme Court's decision in *Jackson v. Indiana*, banning indeterminate commitments in incompetency evaluation cases if there is no reasonable probability that the defendant will regain his competence within the 'foreseeable future,' has had surprisingly . . . little impact on these practices. Astonishingly, more than half the states allow for the indefinite commitment of incompetent-to-stand-trial defendants, in spite of *Jackson's* specific language outlawing this practice."); see also DISABILITY RIGHTS WASH., LOST AND FORGOTTEN: CONDITIONS OF CONFINEMENT WHILE WAITING FOR COMPETENCY EVALUATION AND RESTORATION 4–5 (2013).

17. Schlanger, *supra* note 6, at 2–3 (citing JOAN PETERSILIA ET AL., DOING JUSTICE? THE CRIMINAL JUSTICE SYSTEM AND OFFENDERS WITH DEVELOPMENTAL DISABILITIES 10–11 (2000); MORRIS L. THIGPEN ET AL., EFFECTIVE PRISON MENTAL HEALTH SERVICES: GUIDELINES TO EXPAND AND IMPROVE TREATMENT 6–7 (2004)).

18. VALLAS, *supra* note 2, at 3 (citing INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, ETHICAL CONSIDERATIONS FOR RESEARCH INVOLVING PRISONERS 44–47 (Lawrence O. Gostin et al. eds., 2006)); see also Michelle Andrews, *Even in Prison, Health Care Often Comes with a Copay*, NPR (Sept. 30, 2015, 11:08 AM), <http://www.npr.org/sections/health-shots/2015/09/30/444451967/even-in-prisonhealth-care-often-comes-with-a-copay>.

19. 29 U.S.C. § 794(a) (2018).

practices, within the meaning of section 504.”²⁰ The President also instructed every federal agency that distributes federal funds to “issue rules, regulations, and directives, consistent with the standards and procedures established by” HEW.²¹ In 1981, Executive Order 12250 transferred the coordination responsibility for Section 504’s implementation and enforcement among federal agencies to the Department of Justice (DOJ).²²

Section 504’s mandate applies to “any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.”²³ The law requires agencies to conduct their programs and activities in the most integrated setting appropriate for the individual defendant with a disability. In 1978, HEW issued Section 504 regulations requiring recipients of federal funds to “administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.”²⁴ The preamble to these regulations noted that “separate” treatment of individuals with disabilities “can be permitted only where necessary to ensure equal opportunity and truly effective benefits and services.”²⁵ Later, other agencies, including the DOJ, promulgated Section 504 regulations governing recipients of federal funding that included the same integration requirement.²⁶ Thus, it is well-established that to comply with the Section 504’s integration mandate, federal agencies must make reasonable modifications of their policies, procedures, or practices when necessary to avoid discrimination.²⁷ The federal Bureau of Prisons (BOP) is a program of DOJ and, therefore, must comply with Section 504.

In 1990, Congress enacted the landmark Americans with Disabilities Act (ADA) “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”²⁸ In passing this groundbreaking law, Congress recognized that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”²⁹ Significantly, Congress found that

20. Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (Apr. 29, 1976).

21. *Id.*

22. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980).

23. 29 U.S.C. § 794(a).

24. Nondiscrimination on the Basis of Handicap in Federally Assisted Programs, 43 Fed. Reg. 2138 (Jan. 13, 1978).

25. *Id.* at 2134.

26. *See, e.g.*, 28 C.F.R. § 39.130(d) (2019).

27. *See, e.g.*, *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (recognizing that “to assure meaningful access [under Section 504], reasonable accommodations in the grantee’s program or benefit may have to be made”).

28. 42 U.S.C. § 12101(b)(1).

29. *Id.* § 12101(a)(2).

“discrimination against individuals with disabilities persists in such critical areas as . . . *institutionalization*.”³⁰ Congress prohibited discrimination against individuals with disabilities by public entities, such as state and local governments: “[N]o 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.”³¹ As public entities, law enforcement, corrections, and justice system entities are prohibited by the ADA from discriminating against people with disabilities.³² This inclusion means that state and locally operated prisons and jails³³ must modify their policies, practices, and procedures to avoid discrimination and ensure equal access for individuals with disabilities *while* they are incarcerated.³⁴ The text of the ADA notes that it is based on

30. *Id.* § 12101(a)(3) (emphasis added).

31. *Id.* § 12132.

32. *Id.*; see also 28 C.F.R. § 35.104 (2019) (“Public entity means . . . Any department, agency, special purpose district, or other instrumentality of a State or States or local government”); U.S. DEP’T OF JUSTICE, COMMONLY ASKED QUESTIONS ABOUT THE AMERICANS WITH DISABILITIES ACT AND LAW ENFORCEMENT (2006), https://www.ada.gov/q&a_law.htm [hereinafter U.S. DEP’T OF JUSTICE, COMMONLY ASKED QUESTIONS] (“Title II of the ADA prohibits discrimination against people with disabilities in State and local governments services, programs, and employment. Law enforcement agencies are covered because they are programs of State or local governments, regardless of whether they receive Federal grants or other Federal funds.”); U.S. DEP’T OF JUSTICE, EXAMPLES AND RESOURCES TO SUPPORT CRIMINAL JUSTICE ENTITIES IN COMPLIANCE WITH TITLE II OF THE AMERICANS WITH DISABILITIES ACT (2017), <https://www.ada.gov/cjta.html> [hereinafter U.S. DEP’T OF JUSTICE, EXAMPLES AND RESOURCES] (“Pursuant to the ADA, state and local government criminal justice entities—including police, courts, prosecutors, public defense attorneys, jails, juvenile justice, and corrections agencies—must ensure that people with mental health disabilities or I/DD are treated equally in the criminal justice system and afford them equal opportunity to benefit from safe, inclusive communities.”).

33. Federal prisons are governed by Section 504. State-run prisons are subject to Title II of the ADA (and Section 504 when federal funds are involved), as are, by extension, locally run jails and correctional facilities, given that Title II applies to public entities, defined to include state and local governments and their departments and instrumentalities. 42 U.S.C. § 12131(1); Pa. Dep’t of Corr. v. *Yeskey*, 524 U.S. 206, 210 (1998). Where federal, state, and local governments choose to operate their correctional facilities through contracts with private companies, the federal, state, and local government entities are *not* thereby exempt from Section 504 or the ADA. See, e.g., 28 C.F.R. § 35.152(a) (“This section applies to public entities that are responsible for the operation or management of adult and juvenile justice jails, detention and correctional facilities, and community correctional facilities, either directly or through contractual, licensing, or other arrangements with public or private entities, in whole or in part, including private correctional facilities.”). Section 504 plainly governs “any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency.” 29 U.S.C. § 794(a) (2018). Most cases have held that private correctional facilities are not themselves public entities governed by the ADA or Section 504. See, e.g., *Phillips v. Tiona*, 508 F. App’x 737, 748–54 (10th Cir. 2013) (surveying current case law on the issue and holding that the Corrections Corporation of America, a private, for-profit corporation, was not subject to Title II of the ADA); *Edison v. Douberly*, 604 F.3d 1307, 1310 (11th Cir. 2010) (finding that defendant employees of a private prison management corporation operating prisons in Florida were not subject to Title II). However, inmates in private prisons could still file Section 504 or ADA claims against the relevant public entity responsible for overseeing the private facilities. See, e.g., 28 C.F.R. § 35.130(b); *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1069 (9th Cir. 2010).

34. See, e.g., *Yeskey*, 524 U.S. at 219 (finding that the ADA “unmistakably includes State prisons and prisoners within its coverage”); U.S. DEP’T OF JUSTICE, EXAMPLES AND RESOURCES, *supra* note 32.

the “remedies, procedures and rights” of Section 504,³⁵ and courts have interpreted the statutes consistently.³⁶

Private plaintiffs and the DOJ both have pursued litigation to advance the rights of incarcerated individuals with disabilities to receive reasonable modifications while incarcerated. Some examples of the sort of modifications that prisons and jails may be required to provide to incarcerated individuals with disabilities, under the ADA and its corresponding regulations, include: guaranteeing effective communication to individuals who are deaf or blind, such as through video relay phones or Braille materials; ensuring access to medications, prosthetic limbs, and hearing aids; providing accessible facilities; and avoiding the use of solitary confinement and segregation for individuals with mental illness or I/DD.³⁷

However, the ADA may, at times, require not just modifications to policies and practices in the correctional setting but also alternatives to incarceration itself when appropriate. The Title II regulations require public entities to “administer services, programs, and activities in the *most integrated setting* appropriate to the needs of qualified individuals with disabilities.”³⁸ What has become known as the ADA’s “integration mandate”—a principle strengthened by the Supreme Court’s 1999 *Olmstead v. L.C.*³⁹ decision, finding that “unjustified institutional isolation

35. 42 U.S.C. § 12133 (“The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.”).

36. See, e.g., *Cohon ex rel. Bass v. N.M. Dep’t of Health*, 646 F.3d 717, 725–26 (10th Cir. 2011); *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1088 n.21 (11th Cir. 2007); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003); *Delano-Pyle v. Victoria Cty.*, 302 F.3d 567, 574 (5th Cir. 2002); *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468 (4th Cir. 1999); *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999); *Theriault v. Flynn*, 162 F.3d 46, 48 n.3 (1st Cir. 1998); *Gorman v. Barch*, 152 F.3d 907, 912 (8th Cir. 1998); *McPherson v. Mich. High Sch. Athletic Ass’n*, 119 F.3d 453, 459–60 (6th Cir. 1997); *Helen L. v. DiDario*, 46 F.3d 325, 330 n.7 (3d Cir. 1995).

37. For surveys of ADA accommodations cases within prisons, see, e.g., *EQUIP FOR EQUAL, THE AMERICANS WITH DISABILITIES ACT IN JAIL & PRISON 3* (2016); *ANNA GUY, AMPLIFYING VOICES OF INMATES WITH DISABILITIES PRISON PROJECT, LOCKED UP AND LOCKED DOWN: SEGREGATION OF INMATES WITH MENTAL ILLNESS 5, 35* (2016); *MARGO SCHLANGER, AMERICAN CONSTITUTION SOCIETY, HOW THE ADA REGULATES AND RESTRICTS SOLITARY CONFINEMENT FOR PEOPLE WITH MENTAL DISABILITIES 2–7* (2016); *RACHEL SEEVERS, AMPLIFYING VOICES OF INMATES WITH DISABILITIES PRISON PROJECT, MAKING HARD TIME HARDER: PROGRAMMATIC ACCOMMODATIONS FOR INMATES WITH DISABILITIES UNDER THE AMERICANS WITH DISABILITIES ACT 16–35* (2016); *Jamelia N. Morgan, Caged in: The Devastating Harms of Solitary Confinement on Prisoners with Physical Disabilities*, 24 *BUFF. HUM. RTS. L. REV.* 81, 82, 85 (2018); *ADA Enforcement in Criminal Justice Settings*, [ADA.GOV, https://www.ada.gov/criminaljustice/cj_enforcement.html](https://www.ada.gov/criminaljustice/cj_enforcement.html) (last visited Apr. 3, 2019). DOJ’s most recent initiative in this area is its issuance of a Notice Regarding Investigation of the Hampton Roads Regional Jail, dated December 19, 2018. U.S. DEP’T OF JUSTICE, NOTICE REGARDING INVESTIGATION OF THE HAMPTON ROADS REGIONAL JAIL 1 (2018). DOJ alleges that the jail fails to provide prisoners with mental health disabilities adequate mental health care and access to programs, as well as subjecting them to prolonged confinement in restrictive housing conditions. *Id.*

38. 28 C.F.R. § 35.130(d) (emphasis added).

39. 527 U.S. 581 (1999).

of persons with disabilities is a form of discrimination⁴⁰—may provide an avenue to disrupt the mass incarceration of people with disabilities. Specifically, advocates are currently using the integration mandate in actions challenging the segregated and inferior conditions that often engender the school-to-prison pipeline for students with disabilities and ensuring that people with disabilities can gain access to community-based alternatives to incarceration when charged with crimes.⁴¹

In different contexts, scholars have urged litigators to use the requirements of the ADA and the principles articulated by the Court in *Olmstead* to challenge unjust incarceration and conditions of confinement of individuals with mental disabilities.⁴² This Article adds to such commentaries by exploring how lawyers are using the *Olmstead* precedent in current litigation to ensure that individuals with disabilities receive the support they need to thrive in the community and, thus, avoid becoming entangled with the justice system in the first place. This Article further discusses how, for those already incarcerated, there are specific instances in which the ADA's integration mandate may be useful in arguing for a less restrictive placement when appropriate.

Much of the litigation discussed in this Article is in its early stages, and judicial acceptance of this application of *Olmstead* is nascent at best. Although extension of the *Olmstead* imperative to the criminal justice system may seem inconsistent with the treatment and services orientation of the case, this Article argues that there is nothing in the ADA, the *Olmstead* decision, or its underlying rationale that preclude its application to the criminal justice context.

40. *Id.* at 600; see also U.S. DEP'T OF JUSTICE, STATEMENT OF THE DEPARTMENT OF JUSTICE ON ENFORCEMENT OF THE INTEGRATION MANDATE OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND *OLMSTEAD V. L.C.* 1–2 (2011).

41. See *infra* Part II.

42. See, e.g., Perlin, *supra* note 16, at 232–33 (“Under *Olmstead*, policies that require the automatic (or de jure) commitment of all incompetency and insanity pleaders to maximum security facilities—notwithstanding the nature of the charge or the individual dangerousness of the defendant—potentially violate the ADA, in part, at least, because of their explicit and implicit lack of individualization. After *Olmstead*, individualized determinations must be made in each case as to whether or not such maximum security institutionalization is necessary Certainly, a significant number of individuals in each of these categories could be treated in settings less restrictive than the state’s maximum security forensic facility”) (emphasis added); Schlanger, *supra* note 6, at 3–5 (arguing that where certain conditions of confinement create environments that are particularly harmful to individuals with mental disabilities and are illegal under the Eighth Amendment, ADA, or other source of law, “plaintiffs should seek, and courts should grant, court-enforceable remedies diverting prisoners away from incarceration, in order to keep vulnerable populations out of jail and prison” and urging “a new generation of anti-incarcerative remedies in conditions lawsuits, unconnected to a population order, whose purpose is to keep vulnerable would-be prisoners out of harm’s way by promoting workable alternatives to incarceration”).

I. OVERVIEW OF *OLMSTEAD V. L.C.*A. *Case Background*

For people with I/DD and mental illness, *Olmstead* is the most significant ADA case the U.S Supreme Court has decided since the law was passed in 1990.⁴³ *Olmstead* is noteworthy for its broad recognition of the rights of people institutionalized in congregate facilities to live and receive needed services and supports in the community. Critically, *Olmstead* endorsed the congressional finding in the ADA that institutionalization constituted discrimination.⁴⁴ The case concerned two individuals with intellectual and psychiatric disabilities, L.C. and E.W.⁴⁵ Both women were in and out of institutional settings in Georgia and filed suit claiming that their confinement in a segregated environment violated their constitutional rights to due process and their statutory rights to nondiscrimination under Title II of the ADA.⁴⁶

The plaintiffs in *Olmstead* were not the first to argue that individuals with I/DD and mental illness had a right to receive services in community-based settings. The case built on landmark right to treatment and right to habilitation cases in the late 1970s and early 1980s that recognized the viability and necessity of community-based care for people with disabilities.⁴⁷ The constitutional effect of these cases, however, had stalled after the Supreme Court's 1982 decision in *Youngberg v. Romeo*.⁴⁸ In *Youngberg*, the Court held that institutionalized persons have a liberty interest in safety and freedom from undue restraint, and that such persons have a right to "minimally adequate care and treatment" to serve those liberty interests.⁴⁹ However, the Court qualified these statements by adding that "courts must show deference to the judgment exercised by a

43. This Section is largely drawn from a prior article by one of the co-authors, Robert D. Dinerstein, *The Olmstead Imperative: The Right to Live in the Community and Beyond*, 4 INCLUSION 16, 16–20 (2016); see Bagenstos, *supra* note 2, at 4–5, 9, 32, for additional discussion of the historical background and significance of the *Olmstead* case.

44. 42 U.S.C. § 12101(a)(3) (2018).

45. The women were later identified as Lois Curtis and Elaine Wilson. Ms. Wilson is now deceased. See Derrick Henry, *Elaine Wilson Obituary*, LEGACY.COM (Dec. 10, 2004), <https://www.legacy.com/obituaries/atlanta/obituary.aspx?n=elaine-wilson&pid=2907375>; Sue Jamieson, *Olmstead Champion Meets the President*, WHITEHOUSE.GOV (June 22, 2011, 2:06 PM), <http://www.whitehouse.gov/blog/2011/06/22/olmstead-champion-meets-president>.

46. *Olmstead v. L.C.*, 527 U.S. 581, 588 (citing Complaint at ¶¶ 87–91).

47. See, e.g., *Evans v. Washington*, 459 F. Supp. 483, 484–86 (D.D.C. 1978) (involving Forest Haven, outside Washington, D.C.); *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1325–28 (E.D. Pa. 1978) (involving Pennhurst, outside Philadelphia); *N.Y. Ass'n for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715, 716–19 (E.D.N.Y. 1975) (involving Willowbrook in Staten Island, New York); *Wyatt v. Stickney*, 344 F. Supp. 373, 387 (M.D. Ala. 1972) (involving Partlow, Bryce, and Searcy Hospitals in Alabama). The substantial, subsequent history of all of these cases is omitted.

48. See, e.g., David Ferleger, *The Constitutional Right to Community Services*, 26 GA. ST. U. L. REV. 763, 778–79 (2010); Michael L. Perlin, "Their Promises of Paradise": *Will Olmstead v. L.C. Resuscitate the Constitutional "Least Restrictive Alternative" Principle in Mental Disability Law?*, 37 HOUS. L. REV. 999, 1022 (2000).

49. *Id.* at 318–20.

qualified professional," and that decisions by such professionals are "presumptively valid."⁵⁰ Thus, though community-based programs continued to expand as an alternative to institutions, they did so without significant judicial imprimatur.

As early as five years following the passage of the ADA in 1990, a federal appellate court concluded that the ADA required public entities to administer services to people with disabilities in the most integrated setting appropriate to their needs.⁵¹ Later that year, the initial *Olmstead* complaint was filed in federal court.⁵² In *Olmstead*, the lower courts did not address the constitutional question presented, nor did the Supreme Court.⁵³ Rather, the Court, citing the "integration regulation" issued under Title II of the ADA, concluded that Title II of the ADA banned unnecessary institutionalization as a form of discrimination on the basis of disability.⁵⁴ Justice Ginsburg, writing for the Court's majority, noted:

Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. . . . Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment. . . . Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.⁵⁵

The Court qualified its holding by noting that:

States are required to provide community-based treatment for persons with mental disabilities when the state's treatment professionals determined that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably

50. *Id.* at 322–23.

51. *Helen L. v. DiDario*, 46 F.3d 325, 332 (3d Cir. 1995).

52. *Complaint, L.C. v. Olmstead*, No. 1:95-cv-01210-MHS (N.D. Ga. May 11, 1995).

53. *Olmstead v. L.C.*, 527 U.S. 581, 588 (1999) ("This case, as it comes to us, presents no constitutional question. The complaints filed by plaintiffs-respondents L.C. and E.W. did include such an issue. . . . But neither the District Court nor the Court of Appeals reached those Fourteenth Amendment claims. . . . Instead, the courts below resolved the case solely on statutory grounds. Our review is similarly confined." (citations omitted)).

54. *Id.* at 592–97.

55. *Id.* at 600–01 (citations omitted).

accommodated, taking into account the resources available to the state and the needs of others with mental disabilities.⁵⁶

B. The Elements of the Olmstead Decision

It is worth focusing on the three elements of the *Olmstead* holding, not only for what the Court wrote but also because further examination of them lays bare the concerns motivating the Court in its holding. The first requirement—that a state’s professionals determine whether community-based treatment is appropriate⁵⁷—is a tacit reference to the *Youngberg* decision described above. In the years leading up to the *Youngberg* case, there were differences of opinion among professionals regarding whether all individuals, including people with severe and profound intellectual impairments and severe mental illness, could be served in community-based settings.⁵⁸ But between the late 1970s and 1999, when *Olmstead* was decided, almost all professional disagreement about the appropriateness of community-based services for all people with I/DD had vanished, so that this first element seemed to be stating a truism rather than marking out controversial territory.⁵⁹ The Court was careful in *Olmstead* not to require community placement when professionals deemed it inappropriate, and it seemed to recognize a continued role for institutions that many would not support. But as events have played out, the stance of professionals on community placement has not been an impediment to community integration. Further, lower courts have interpreted *Olmstead* as not limiting plaintiffs to relying on the determinations of the states’ professionals and have permitted plaintiffs to rely on other sources of evidence—including their own experts—to show that they can be served in community settings.⁶⁰

The second element—that the affected persons not oppose treatment⁶¹—provided a basis for recognizing the value of individual choice. However, this formulation still left open the unacknowledged question of what a state must do if an individual under guardianship does

56. *Id.* at 607.

57. *Id.*

58. *Wyatt v. Ireland*, 515 F. Supp. 888, 890 (M.D. Ala. 1981).

59. In the late 1970s, especially in *Wyatt v. Ireland*, defendants presented experts who testified that people who were labeled as having severe or profound intellectual disability needed to be institutionalized. The Court rejected that position. (One of the Authors of this Article, Robert Dinerstein, was counsel for “litigating” amicus curiae Department of Justice in the case.) That view changed over time, as noted in the text. The issue for people with mental illness developed somewhat differently. After the Supreme Court’s decision in *O’Connor v. Donaldson*, 422 U.S. 563, 576 (1975), holding that the state could not confine a nondangerous person with mental illness to an institution if the person could survive outside of the institution with the help of family and friends, there was significant momentum to deinstitutionalize chronic mental health patients from institutions, and prevent their long-term confinement in the first place.

60. *Bagenstos*, *supra* note 2 (citing *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 258-59 (E.D.N.Y. 2009); *Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 291 (E.D.N.Y. 2008); *Frederick L. v. Dep’t of Pub. Welfare*, 157 F. Supp. 2d 509, 540 (E.D. Pa. 2001)).

61. *Olmstead*, 527 U.S. at 607.

not oppose community placement but his or her guardian does. Because the Court conceptually viewed community placement as a reasonable accommodation, it quoted language from the Title II regulations providing that people cannot be forced to accept a reasonable accommodation in support of the proposition that community placement could not be required over a person's objection.⁶²

The most controversial *Olmstead* element, arguably, was the third one. The state of Georgia had asserted that inadequate funding, not discrimination, was the reason for the plaintiffs' continued institutional confinement.⁶³ The lower courts and the Supreme Court rejected this argument, but the latter showed greater sympathy for the demands this standard imposed on state resources, while holding the following:

Unjustified isolation . . . is properly regarded as discrimination based on disability. . . . [W]e recognize, as well, the States' need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the States' obligation to administer services with an even hand. . . . In evaluating a State's fundamental alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably.⁶⁴

The Court elaborated on this last sentence by observing that if, for example, the state "were to demonstrate that it had a comprehensive, effective plan for placing qualified persons with mental disabilities in less restrictive settings and a waiting list that moved at a reasonable pace, not controlled by the State's endeavors to keep its institutions fully populated," the state would have met the reasonable-modifications standard.⁶⁵ Commentators and advocates were concerned that this interpretation of the fundamental alteration defense could serve as a brake on deinstitutionalization efforts.⁶⁶ That fear has not come to pass. Instead, *Olmstead* has come to stand for a ringing endorsement of community integration of people with mental disabilities in multiple aspects of daily life.

C. Recent Developments and the Expansion of *Olmstead*

With the start of the Obama Administration, and its announcement that 2009 would be named "The Year of Community Living," *Olmstead*

62. *Id.* at 602–03.

63. *Id.* at 594–95 (citations omitted).

64. *Id.* at 597.

65. *Id.* at 605–06.

66. See, e.g., Mary C. Cerreto, *Olmstead: The Brown v. Board of Education for Disability Rights: Promises, Limits, and Issues*, 3 LOY. J. PUB. INT. L. 47, 68 (2001).

enforcement took off.⁶⁷ The DOJ clarified, through technical guidance to states, that integrated settings “are located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual’s choosing; afford individuals choice in their daily life activities; and, provide individuals with disabilities the opportunity to interact with nondisabled persons to the fullest extent possible.”⁶⁸ Under the leadership of Civil Rights Division officials, including its Special Counsel for *Olmstead* Enforcement, the DOJ brought statewide investigations leading to letters of findings and consent decrees on behalf of people with I/DD or psychiatric disabilities institutionalized in Delaware, Georgia, Mississippi, Nebraska, New Hampshire, Puerto Rico, and Virginia.⁶⁹ These investigations have extended *Olmstead* beyond individual state institutions to include all of a state’s institutions for people with disabilities—an enforcement approach as sweeping as federal efforts to address statewide violations of civil rights in the historical realms of education and voting rights. Moreover, this extension of *Olmstead* applied not only to traditional psychiatric institutions and institutions for people with I/DD but also nursing homes and adult care homes.

Perhaps the most noteworthy recent development in implementation of the *Olmstead* decision is its extension to settings that go beyond residential institutions and community-based residences. Specifically, one prominent extension has been *Olmstead*’s application to sheltered workshops—both private plaintiffs and the DOJ have pursued litigation to eliminate this segregated form of work for people with I/DD and mental illness.⁷⁰ In 2016, the DOJ sued the state of Georgia alleging that the state’s administration of the Georgia Network for Educational and Therapeutic Support violated Title II of the ADA by unnecessarily segregating schoolchildren with behavior related disabilities away from their nondisabled peers.⁷¹ Although not yet reflected in case law or executive enforcement, there are other areas in which *Olmstead* may spur development of more integrated approaches to activities of daily life, such as supported decision-making (a less restrictive alternative to

67. *Olmstead: Community Integration for Everyone*, ADA.GOV, <https://www.ada.gov/olmstead> (last visited Apr. 17, 2019). For a discussion of the efforts to enforce *Olmstead* late in the Clinton Administration and during the Bush Administration (including a critique of the latter’s efforts), see Dinerstein, *supra* note 43, at 18–19.

68. U.S. DEP’T OF JUSTICE, *supra* note 40.

69. *Olmstead: Community Integration for Everyone*, *supra* note 67.

70. Lane v. Brown, 166 F. Supp. 3d 1180, 1184–85, 1192 (D. Or. 2016); Consent Decree at 4, United States v. Rhode Island, No. 1:14-cv-00175 (D.R.I. Apr. 9, 2014).

71. Complaint, United States v. Georgia, *infra* note 99.

guardianship),⁷² sexual rights,⁷³ and voting.⁷⁴ This Article focuses on how advocates are currently invoking *Olmstead* to try to tackle different aspects of the mass incarceration of people with disabilities.

II. THE "INTEGRATION MANDATE" AS APPLIED TO MASS INCARCERATION

As described above, since the Supreme Court decided *Olmstead* in 1999, litigants have largely used the decision to argue for a shift from large state-run institutions to community-based settings in the residential context. However, what about when the "institutions" involved are jails and prisons? Does the "integration mandate" still apply? The DOJ has indicated that it does. As it notes in its guidance document⁷⁵ on Title II and criminal justice entities:

States, counties, and cities, which often administer both criminal justice and disability service systems, have obligations under the ADA to ensure people with mental health disabilities or I/DD receive services in the most integrated setting appropriate to their needs. Services such as scattered-site supported housing, Assertive Community Treatment (ACT), crisis services, intensive case management, respite, personal care services, behavior support, nursing care, peer support, and supported employment services can support a

72. Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 157, 193 (2010) ("[B]y limiting an individual's right to make his or her own decisions, guardianship marginalizes the individual and often imposes a form of segregation that is not only bad policy, but also violates the Act's mandate to provide services in the most integrated and least restrictive manner."). For an early definition and discussion of supported decision-making, see Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 8, 9–10 (2012).

73. Natalie M. Chin, *Group Homes as Sex Police and the Role of the Olmstead Integration Mandate*, 42 N.Y.U. REV. L. & SOC. CHANGE 379, 379 (2018) ("Some courts have begun to expand the reach of the integration mandate beyond the physical walls of confinement. It is through this lens that sexual rights can rise from the shadows as an essential aspect of full community integration alongside supports that include employment, education, and skills for daily living.").

74. *Kerrigan v. Philadelphia Bd. of Election*, No. 07-687, 2008 WL 3562521, at *19 (E.D. Pa. Aug. 14, 2008) ("[T]here are genuine issues of material fact as to whether Defendants select inaccessible polling places and whether they give priority to providing access to voting in the most integrated settings.").

75. The Trump Administration has withdrawn or proposed to withdraw a number of civil rights- and disability rights-oriented guidance documents. See, e.g., Michelle Diamant, *Education Department Defends Rollback of Special Ed Guidance*, DISABILITY SCOOP (Oct. 24, 2017), <https://www.disabilityscoop.com/2017/10/24/ed-department-defends-rollback/24338>; see also Laura Meckler & Devlin Barrett, *Trump Administration Considers Rollback of Anti-Discrimination Rules*, WASH. POST. (Jan. 3, 2019), https://www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html (discussing DOJ consideration of removal of disparate impact liability from existing civil rights regulations). At this writing, however, there is no indication DOJ is planning to withdraw the guidance on applicability of Title II to the criminal justice system. Further, guidance documents are simply articulations by federal agencies of existing regulations and legal precedent that they are charged with enforcing. These documents do not create new law and, thus, the withdrawal of any guidance document would not affect the reach of the ADA that we discuss in this Article."

jurisdiction's efforts to divert people with these disabilities from the criminal justice system and serve them in their communities.

State and local governments must prevent unnecessary institutionalization of people with disabilities. Governments have complied with this obligation by using community-based treatment services to keep people with disabilities out of the criminal justice system. These governments have recognized that the responsibility for effectively serving people with mental health disabilities or I/DD cannot fall to law enforcement alone. Therefore, they ensure that their disability service systems offer sufficient community-based services and support criminal justice entities to coordinate with, and divert to, community-based services.⁷⁶

Thus, according to the Department of Justice—the agency charged with ADA Title II enforcement—there is no question that the ADA's “integration mandate” can, and should, be applied in the criminal justice context.

The Bazelon Center also recently noted that “[t]he avoidable incarceration in jail of people with mental illness is a form of ‘unjustified’ institutionalization”⁷⁷ and that “[d]iversion programs not only improve public safety and public health, but they are also consistent with the purpose of the Americans with Disabilities Act (ADA) and with the landmark decision in *Olmstead v. L.C.*”⁷⁸ Although some individuals with I/DD and mental illness do commit crimes and must be held accountable for them when appropriate, the behavior leading to their involvement in

76. U.S. DEP'T OF JUSTICE, EXAMPLES AND RESOURCES, *supra* note 32. The document also describes how correctional facilities can comply with the integration mandate with regards to individuals currently incarcerated:

Under Title II, state and local government entities must, among other obligations:

- Administer services, programs, and activities, including disability services, in the most integrated setting appropriate to the needs of qualified individuals with disabilities.
 - Examples of how local law enforcement, corrections, and justice system leaders have facilitated compliance with this obligation:
 - Established prison classification and placement procedures that generally place prisoners with disabilities in facilities offering the same programs and opportunities as prisoners without disabilities.
 - Provided prisoners with mental health disabilities or I/DD with the services necessary to permit them to reside and participate in the same programs as prisoners without disabilities.
 - Adopted policies to avoid unnecessarily placing prisoners with mental health disabilities or I/DD in restrictive housing, limited the time these prisoners remain in restrictive housing, provided treatment and enhanced opportunities for out-of-cell therapeutic activities, and continuously monitored the mental health of prisoners in restrictive housing. Also made reasonable modifications to conduct rules and disciplinary, classification, and restrictive housing hearings to help limit the number of prisoners with these disabilities unnecessarily placed in restrictive housing.

Id.

77. BERNSTEIN ET AL., *supra* note 2, at 19.

78. LIEBOWITZ ET AL., *supra* note 7, at 2.

the justice system is too frequently a result of not receiving appropriate community-based services that address disability-related needs. Further, due to a lack of understanding and prejudice toward individuals with disabilities, incarceration itself often does nothing to provide a habilitative or therapeutic environment to remedy the underlying basis for these persons' problematic conduct.⁷⁹

As mentioned above, litigants have recently been successful in extending *Olmstead* principles to settings that go beyond residential institutions. Below are some examples of recent litigation seeking to expand *Olmstead* in a manner that may be effective moving forward in decreasing the disproportionate rate of incarceration for people with disabilities.

A. Department of Justice Enforcement: Diversion

The Department of Justice has done critically important work in the last decade in using the ADA to divert people with disabilities from the corrections system to community-based treatment programs. Examples include:

- *Olmstead* settlement agreements in Georgia (2010),⁸⁰ Delaware (2011),⁸¹ Virginia (2012),⁸² and New Hampshire (2014)⁸³ required those states to target community-based health services to (among others) individuals with mental illness or I/DD who have histories of involvement in the criminal justice system to prevent recidivism. These agreements also required the creation of statewide crisis systems for individuals with I/DD or mental illness, including the creation of "mobile crisis teams" to work with law enforcement and assist with de-escalation, crisis planning, and preventing crises that could lead to unnecessary entanglement with the criminal justice system.⁸⁴
- A 2012 settlement agreement with Portland, Oregon, led to the creation of a crisis center available to first responders seeking to divert

79. BERNSTEIN ET AL., *supra* note 2, at 9; see also *Position Statement on the Criminal Justice System*, THE ARC OF THE UNITED STATES, https://www.thearc.org/file/16-117-The-Arcs-Position-Statements_B4_Criminal-Justice-System.pdf (last updated 2014).

80. Settlement Agreement at 11, *United States v. Georgia*, No. 1:10-CV-249-CAP (N.D. Ga. October 19, 2010).

81. Settlement Agreement at 2, *United States v. Delaware*, No. 1:11-cv-00591 (D. Del. July 6, 2011).

82. Settlement Agreement at 3, *United States v. Virginia*, No. 3:12cv059-JAG (E.D. Va. July 17, 2012).

83. Settlement Agreement at 5, *United States v. New Hampshire*, No. 1:12-cv-00053 (D.N.H. Feb. 12, 2014).

84. Settlement Agreement, *United States v. Georgia*, *supra* note 80 at 9-10; 16-17; Settlement Agreement, *United States v. Delaware*, *supra* note 81 at 4-6; Settlement Agreement, *United States v. Virginia*, *supra* note 82 at 7-9; Settlement Agreement, *United States v. New Hampshire*, *supra* note 83 at 5-8.

individuals with disabilities from the criminal justice system into the community mental health system.⁸⁵

- A 2018 stipulation between the United States and the Los Angeles County Jails to amend a settlement agreement to respond to Plaintiff-Intervenors' concerns regarding the integration mandate by, among other things, modifying the language to focus release planning for prisoners with mental illness on "individualized assessments" of the prisoners' needs, "coordinating with community-based providers to identify available services," and "facilitating the transition of care to community-based providers."⁸⁶ In 2015, individuals with mental illness who intervened in this ongoing litigation focused on inadequate mental health care in Los Angeles County Jails, arguing that part of the settlement agreement covering discharge procedures violated the ADA as well as their constitutional rights.⁸⁷ Specifically, Plaintiff-Intervenors noted that the settlement "violates the integration mandate" by requiring the County to provide "direct linkage" to "restrictive institutional settings for persons with 'intense need for assistance,'"⁸⁸ which would "unnecessarily segregate and isolate Plaintiff-Intervenors when reasonable alternatives, such as permanent supportive housing, are available and are required to be provided to those for whom they are clinically appropriate."⁸⁹

- A 2016 settlement agreement with Hinds County, Mississippi, requiring the County jail to "work toward the goal of population reduction in a manner that preserves public safety, prioritizes diversion for unnecessary criminal justice involvement, and reduces recidivism," particularly for individuals with mental health disabilities.⁹⁰ The County agreed to establish a criminal justice coordinating committee to enhance coordination between criminal justice and mental health agencies to prevent unnecessary arrest and detention and connect individuals with disabilities to mental health services.⁹¹ The agreement also requires the jail to notify community mental health providers when releasing an inmate with serious mental illness so the individual can transition safely into the community.⁹² To aid in this transition, the jail must provide released inmates with details related to a follow-up appointment at the relevant

85. Settlement Agreement at 33, *United States v. City of Portland*, No. 3:12-cv-02265 (D. Or. Dec. 17, 2012).

86. Joint Stipulation to Amend Paragraph 34 of the Joint Settlement Agreement Regarding the Los Angeles County Jails at 6, *United States v. County of Los Angeles*, No. 15-cv-05903 (C.D. Cal. Dec. 6, 2018).

87. Proposed Complaint in Intervention at 1, *United States v. County of Los Angeles*, No. 15-cv-05903 (C.D. Cal. Sept. 28, 2015).

88. *Id.* at 2.

89. *Id.* at 22.

90. Settlement Agreement at 5, *United States v. Hinds Cty.*, No. 3:16-cv-00489 (S.D. Miss. July 19, 2016).

91. *Id.* at 50–51.

92. *Id.* at 43.

mental health center and give them sufficient medications to cover the time between release and the scheduled appointment.⁹³

• Consent decrees with the Baltimore Police Department⁹⁴ and Ferguson Police Department⁹⁵ included provisions to advance policies and training for officers to improve coordination with community behavioral health providers, divert people with mental disabilities to the behavioral health system rather than jails or hospitals, and require the implementation of a Crisis Intervention Team (CIT) first-responder model to assist in deescalating crises, reducing unnecessary force, minimizing arrests, referring individuals to the behavioral health crisis system, and overall reducing the inappropriate involvement of individuals with mental disabilities in the criminal justice system.

B. United States v. Georgia and Georgia Advocacy Office v. Georgia: Disrupting the School-to-Prison Pipeline for Students with Disabilities

One case this Article briefly mentioned above, *United States v. Georgia*,⁹⁶ is an *Olmstead* case in the education realm that has implications for the school-to-prison pipeline.⁹⁷ In 2015, the DOJ investigated Georgia's state-wide program—the Georgia Network for Educational and Therapeutic Support (GNETS)—and found that it violated Title II of the ADA by: (1) unnecessarily segregating students with disabilities from their peers; and (2) providing opportunities to GNETS students that were unequal to those provided to other students throughout the state.⁹⁸ The investigation eventually culminated in a 2016 lawsuit against the state, alleging that the state's administration of the GNETS system violated the ADA's integration mandate by "unnecessarily segregating students with disabilities from their peers" and providing "unequal" educational opportunity to GNETS students.⁹⁹ In 2017, the DOJ's lawsuit was put on hold pending a decision from the U.S. Court of Appeals for the Eleventh Circuit regarding the DOJ's authority to bring suit.¹⁰⁰ Later that year, parents of children with disabilities and advocacy groups filed a class

93. *Id.*

94. Consent Decree, *United States v. Police Dep't*, No. 1:17-cv-00099-JKB (D. Md. January 12, 2017).

95. Consent Decree, *United States v. City of Ferguson*, No. 4:16-cv-00180-CDP (D. Ed. Mo. April 19, 2016).

96. Complaint, *United States v. Georgia*, *infra* note 99, at 1–4.

97. By using the phrase school-to-prison pipeline, this Article refers to the varying forces that shuttle students with disabilities from segregated and inferior schools straight into the juvenile justice system.

98. Letter from Vanita Gupta, Principal Deputy Assistant Att'y Gen., to Nathan Deal, Governor of Ga., and Sam Olens, Att'y Gen. of Ga. (July 15, 2015), https://www.ada.gov/olmstead/documents/gnets_lof.pdf.

99. Complaint at 1, *United States v. Georgia*, No. 1:16-CV-03088 (N.D. Ga. Aug. 23, 2016) [hereinafter Complaint, *United States v. Georgia*] at 1–2, 23.

100. Order at 3–4, *United States v. Georgia*, No. 1:16-CV-03088 (N.D. Ga. Aug. 11, 2017).

action lawsuit in federal court¹⁰¹ alleging that: (1) the state of Georgia discriminated against thousands of public school students with disabilities by providing them with a separate and unequal education via GNETS; and (2) the state, in denying GNETS students the opportunity to be educated with their nondisabled peers in neighborhood schools, violates the ADA, Section 504, and the Fourteenth Amendment to the U.S. Constitution.¹⁰² Throughout, the state has continued to defend the GNETS program.

The state of Georgia is unique in having established a statewide educational program—GNETS—that systematically segregates students with behavioral disabilities. Over 5,000 students with disabilities, the disproportionate majority of whom are African-American, have been sent to the GNETS centers.¹⁰³ Most of the GNETS centers are housed in completely separate schools (including some that were formerly schools for African-American students in the Jim Crow days).¹⁰⁴ Other GNETS centers are kept inside regular schools; however, they are typically housed in separate, locked wings or only accessible through separate entrances, meaning they effectively operate as a separate school within the school.¹⁰⁵

As described in both complaints, GNETS students are not only segregated from their nondisabled peers, but these students also receive an inferior education. Typically, GNETS students are not taught by certified teachers—many are primarily taught through computers.¹⁰⁶ Students cannot access the basic classes they need to earn a diploma, resulting in a graduation rate for GNETS students of only 10% (compared to a statewide rate of nearly 80%).¹⁰⁷ Many GNETS centers do not provide access to basic school services like gyms, libraries, or science labs.¹⁰⁸ In addition,

101. One of the Authors of this Article, Shira Wakschlag, is directly involved in this litigation as counsel for The Arc, a plaintiff in the action, along with the Georgia Advocacy Office and class counsel, the Center for Public Representation, the Bazelon Center, the Goodmark Law Firm, and DLA Piper LLP.

102. Class Action Complaint at 2–3, Ga. Advocacy Office v. Georgia, No. 1:17-cv-03999 (N.D. Ga. Oct. 11, 2017) [hereinafter Class Action Complaint, Ga. Advocacy Office v. Georgia].

103. *Id.* at 3.

104. *Id.* at 28–29.

105. *Id.* at 3–4, 29; Complaint, United States v. Georgia, *supra* note 99, at 13; *see also* Letter from Vanita Gupta, *supra* note 98; Rachel Aviv, *Georgia's Separate and Unequal Special-Education System*, NEW YORKER (Oct. 1, 2018), <https://www.newyorker.com/magazine/2018/10/01/georgias-separate-and-unequal-special-education-system>; Alan Judd, *In Psychoeducational School, Behavioral Experiment for Troubled Child*, ATLANTA J.-CONST. (May 5, 2016), <http://specials.myajc.com/psychoedexperiment>; Alan Judd, *Georgia 'Psychoeducational' Students Segregated by Disability, Race*, ATLANTA J.-CONST. (Apr. 28, 2016), http://specials.myajc.com/psychoeducation/?ecmp=AJC_internallink_4292016_AJCToMyAJC_psycho_ed_atlanta; Alan Judd, *Physical Restraint Common at Psychoeducational Schools*, ATLANTA J.-CONST. (May 8, 2016), <http://specials.myajc.com/psychoedrestraint> [hereinafter Judd, *Physical Restraint Common at Psychoeducational Schools*]; Timothy Pratt, *The Separate, Unequal Education of Students with Special Needs*, ATLANTIC (Mar. 21, 2017), <https://www.theatlantic.com/education/archive/2017/03/the-separate-unequal-education-of-students-with-special-needs/520140>.

106. Class Action Complaint, Ga. Advocacy Office v. Georgia, *supra* note 102, at 30.

107. *Id.* at 31.

108. *Id.* at 28.

GNETS students are deprived of important co-curricular opportunities that other students enjoy, such as playing sports or participating in the school play.¹⁰⁹ Thus, GNETS students are denied the many positive educational benefits available in their zoned schools, such as learning appropriate social skills and behaviors, responding to higher educational expectations, experiencing fewer disruptions to learning, and receiving, overall, a better quality of education.¹¹⁰

GNETS also uses harsh and ineffective techniques to manage student behavior, including physical restraint. The *Atlanta Journal-Constitution* reported that, during a two-year period, GNETS students were physically restrained nearly 10,000 times.¹¹¹ That number is almost five times greater than the combined number of restraints occurring in approximately 2,300 other Georgia schools during this same time period.¹¹²

Overall, the atmosphere at GNETS centers is punitive rather than educational. Parents and students have described GNETS as similar to a prison system, with no way out.¹¹³ As the complaint notes:

Although advertised as “therapeutic,” GNETS are anything but. At GNETS, students do not receive the services they need to improve their behavior. Often, their behavior worsens when placed in GNETS because of the harsh and punitive atmosphere that prevails. Staff routinely use physical restraints and otherwise rely on harsh and ineffective methods of discipline. . . . GNETS are . . . “dumping grounds” used by the State and local school districts for students whom local school districts do not want to educate.¹¹⁴

In a recent article in *The New Yorker* magazine, featuring an in-depth investigation of the GNETS system, the grandmother of a GNETS student was quoted as referring to it as a “pipeline-to-prison program,” and the mother of a GNETS student said that her son had internalized the punitive experience of the program so deeply that “he has begun to introduce himself to strangers by saying, ‘Hi, I’m Jamir, I’m bad.’”¹¹⁵

The plaintiffs in both the DOJ and private cases argue that GNETS’ practice of segregating students with behavior-related disabilities in an inferior educational system, when they could be served in their zoned schools if the state provided the appropriate supports to which they are entitled, violates the ADA’s integration mandate.¹¹⁶ At the time of this

109. *Id.* at 30–31.

110. *Id.* at 3–5.

111. *Id.* at 32.

112. Judd, *Physical Restraint Common at Psychoeducational Schools*, *supra* note 105.

113. Letter from Vanita Gupta, *supra* note 98.

114. Class Action Complaint, Ga. Advocacy Office v. Georgia, *supra* note 102, at 4, 27.

115. Aviv, *supra* note 105.

116. Class Action Complaint, Ga. Advocacy Office v. Georgia, *supra* note 102, at 5; Complaint, United States v. Georgia, *supra* note 99, at 1–2.

writing, the court has not yet ruled on the state's motion to dismiss in either the DOJ or the private actions.

When students with behavior-related disabilities are placed in punitive, inferior, and segregated programs that do not offer meaningful educational opportunities or therapeutic supports, a cycle of low expectations and punishment ensues, often leading to the school-to-prison pipeline for these students. Challenging such programs as a violation of the ADA's integration mandate is, thus, one avenue through which litigants may be able to use *Olmstead* to disrupt the school-to-prison pipeline, which results in the disproportionate incarceration of individuals with disabilities.¹¹⁷

C. Seth v. D.C.: Challenging Unjustified Imprisonment

Markelle Seth is a twenty-five-year-old African-American resident of the District of Columbia (DC or the District) with intellectual disability who is languishing in federal prison despite not having been convicted of a crime.¹¹⁸ Mr. Seth has filed a civil rights lawsuit¹¹⁹ alleging that DC and its Department on Disability Services (DDS)—the agency charged with providing home- and community-based services (HCBS) to eligible residents with I/DD—has (among other allegations) violated the ADA's integration mandate by failing to provide him with services and treatment in the most integrated setting appropriate to his needs.¹²⁰

When Mr. Seth was twenty, he was charged in federal court with sexual offenses involving children who lived in his household.¹²¹ The court ordered a series of evaluations to determine whether Mr. Seth was competent to stand trial.¹²² Based on these evaluations, the court concluded that Mr. Seth was not competent to stand trial and that there was no reasonable likelihood that he would ever become so.¹²³

After Mr. Seth was charged, but before he was found unrestorable to competency, the District—through DDS—found him eligible for its

117. See also First Amended Class Action Complaint, *S.S. v. City of Springfield*, No. 3:14-cv-30116-MGM (D. Ma. February, 11 2015) (alleging that the City of Springfield operates a discriminatory public school system denying hundreds of children with mental health disabilities equal educational opportunity and the opportunity to be educated with their peers without a disability in violation of the ADA's integration mandate). The court denied class certification and granted the defendant's motion for judgment on the pleadings. Memorandum and Order on Defendants' Motion For Judgment On The Pleadings, *S.S. v. City of Springfield*, No. 3:14-cv-30116-MGM (D. Ma. July 19, 2018). The plaintiffs have appealed. Brief of Appellants/Cross-Appellees, *The Parent/Professional Advocacy League v. City of Springfield*, No. 18-1778 (1st Cir. December 10, 2018).

118. Complaint at 2, *Seth v. District of Columbia*, No. 1:18-cv-01034 (D.D.C. May 1, 2018) [hereinafter Complaint, *Seth v. District of Columbia*].

119. Both Authors of this Article are involved directly in this case as counsel for Mr. Seth, along with lawyers from the Skadden and Brown, Goldstein & Levy law firms.

120. Complaint, *Seth v. District of Columbia*, *supra* note 118, at 3.

121. *Id.*

122. *Id.*

123. *Id.* at 5.

community-based services due to his intellectual disability.¹²⁴ DDS retained an expert to conduct a thorough evaluation of Mr. Seth, who concluded that Mr. Seth is not a predator and, with comprehensive supervision by appropriately trained staff, and an array of specifically identified treatment and services, he could be placed in a community setting in the District without creating a substantial risk to the public.¹²⁵ DDS subsequently identified an appropriate community-based program willing to accept Mr. Seth and provide all of the supervision and services recommended by its expert.¹²⁶ DDS also stated that, based on its evaluation, if Mr. Seth were found unrestorable to competence, it would petition to civilly commit him under a local DC statute—the only available means for the District to remove him from federal custody and provide him with supervised community-based services through a selected provider in the DC community.¹²⁷

Nevertheless, after a change in DDS leadership, the agency inexplicably changed its position and refused to assume responsibility for, and take custody of, Mr. Seth, resulting in his civil commitment to the custody of the Attorney General and confinement in a BOP facility.¹²⁸ The BOP is required by statute to release Mr. Seth to the District's custody if the District moves for civil commitment and provides the services for which Mr. Seth is eligible.¹²⁹

The BOP assigned Mr. Seth to the Federal Medical Center (FMC) Butner (North Carolina), a prison with medical services that describes itself as “[a]n administrative security federal medical center.”¹³⁰ On May 1, 2018, to challenge the District's failure to provide services to him in DC, Mr. Seth sued the District and DDS in the United States District Court for the District of Columbia, alleging violations of the ADA, Section 504,

124. As a result of the long-running, but now concluded, litigation in *Evans v. Bowser*, 87 F. Supp. 3d 1, 3 (D.D.C. 2015), DC's lone congregate institution for people with intellectual disability, Forest Haven, has been closed since 1991. Thus, class members, as well as all other District residents with intellectual disability who need residential habilitative services receive them in community-based programs. See Martin Auster Muhle, *After Forest Haven Closed, Deaths Came to D.C. Group Homes*, WAMU (Mar. 15, 2016), https://wamu.org/story/16/03/15/after_an_institution_closed_deaths_came_to_dc_group_homes.

125. Complaint, Seth v. District of Columbia, *supra* note 118, at 4–5.

126. *Id.*

127. *Id.* at 4.

128. *Id.* at 5.

129. Pursuant to 18 U.S.C. § 4246(a) (2018), federal civil commitment is inappropriate if the state makes “suitable arrangements for State custody and care of the person.” Section 4246(d) provides that “[t]he Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility.”

130. Complaint, Seth v. District of Columbia, *supra* note 118, at 7; *FMC Butner*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/buh/index.jsp> (last visited Apr. 17, 2019). Subsequently, BOP transferred Mr. Seth to Federal Medical Center Devens (Massachusetts). Amended Complaint at 11 n.6, Seth v. District of Columbia, No. 1:18-cv-01034 (D.D.C. Oct. 26, 2018) [hereinafter Amended Complaint, Seth v. District of Columbia]. Both FMC Butner and FMC Devens are far from Mr. Seth's home in the District of Columbia.

the D.C. Human Rights Act of 1997,¹³¹ and the Citizens with Intellectual Disabilities Civil Rights Restoration Act of 2015.¹³² In particular, he alleged that the District's failure to provide him with services and treatment in the most integrated setting appropriate constituted unjustified isolation in violation of *Olmstead*, and disparate impact discrimination under the ADA, because the District regularly provides community-based supervisory services to DC residents who are found not competent to stand trial due to mental illness through the Department of Behavioral Health. However, the District is failing to do so for those with intellectual disability.¹³³ The complaint states:

As in *Olmstead*, numerous professionals, including DDS's own professionals, who have treated and evaluated Markelle, have concluded that he can and should be served in the community, Markelle wants to return to and be treated in the District, and there are community-based options available to him that can both meet his needs and provide for the community's security. By refusing to serve Markelle, DDS leaves him in a federal prison facility—often in segregated housing—that is unable to provide the necessary treatment, safe facilities, and integrated services required by the ADA.¹³⁴

Following the filing of the lawsuit, DDS's prior director stated in a declaration that “the decision by DDS to allow Mr. Seth to languish and regress in federal custody rather than carry out its mission and mandate [is] inexplicable other than as a matter of discrimination.”¹³⁵

As described in the civil rights complaint against the District, during his federal incarceration, Mr. Seth is often cited for violations of the rules, such as not removing his headphones quickly enough, disagreeing with other inmates about what television channel to watch, or not tucking in his shirt.¹³⁶ As a result, he has spent much of his time in solitary confinement,¹³⁷ which is both nontherapeutic and harmful to people with intellectual disability. His “therapy” has consisted of, for example, petting a dog through a slot in his solitary confinement cell.¹³⁸

131. D.C. CODE § 2-1401.01 (2019).

132. *Id.* § 7-1301.01. The Disability Services Reform Amendment Act of 2018, which amends this statute, was enacted on March 12, 2018. 65 D.C. Reg. 2,823 (Mar. 12, 2018). This statute eliminates civil commitment for most individuals with intellectual disability moving forward but keeps intact the current procedures regarding individuals like Mr. Seth who are found incompetent to stand trial in criminal cases. *Id.*

133. Amended Complaint, *Seth v. District of Columbia*, *supra* note 130, at 56, 67–68; Complaint, *Seth v. District of Columbia*, *supra* note 118, at 33, 42–43.

134. Amended Complaint, *Seth v. District of Columbia*, *supra* note 130, at 70; Complaint, *Seth v. District of Columbia*, *supra* note 118, at 44.

135. Exhibit 1, Declaration of Laura L. Nuss at 10, *Seth v. District of Columbia*, No. 1:18-cv-01034 (D.D.C. Oct. 26, 2018).

136. Complaint, *Seth v. District of Columbia*, *supra* note 118, at 27.

137. *Id.*

138. Amended Complaint, *Seth v. District of Columbia*, *supra* note 130, at 9.

As noted by Nancy Thaler, a nationally renowned expert on best practices in I/DD services, who filed a declaration in support of Mr. Seth, it is well-established that the problematic behavior of individuals with I/DD often worsens within the rigid confines of prison life.¹³⁹ People with I/DD may have considerable difficulty understanding the purpose behind rules and the consequences that come when violating them. They also may be frightened by the lack of supportive behavior from prison personnel. For those who cannot effectively communicate their dissatisfaction verbally, they may act out how they are feeling in ways that do not conform with the rules. For those who have experienced trauma, such as Mr. Seth, this environment can be particularly destructive.¹⁴⁰ Thus, Mr. Seth's continued segregation is likely to have a negative long-term impact on his mental health and may lead to the deterioration of his daily living skills. The vicious cycle he is currently experiencing, which consists "of triggers and punishments followed by triggers and more punishment," is precisely what justifies prioritizing people in Mr. Seth's situation for community placements rather than incarceration in prisons.¹⁴¹ According to Ms. Thaler, supporting in-the-community individuals with I/DD who have committed criminal offenses, including sexual offenses, is common practice throughout the United States.¹⁴² It is well-established that people in Mr. Seth's situation, and others with I/DD exhibiting problematic behaviors, can live successfully in the community without presenting a harm to others, provided they receive appropriate training, treatment, and supervision.¹⁴³ "Indeed, DDS's own retained expert stated that [Mr. Seth] should be returned to the District, where he [could] be placed in a supervisory program without posing a danger to himself or others."¹⁴⁴

In his proposed amended complaint, Mr. Seth alleges that the District has authority to take custody of him and has HCBS waiver slots (matched with federal funding) sufficient to provide services to him.¹⁴⁵ The District also has a qualified and experienced provider ready and willing to serve Mr. Seth with one-on-one staff supervision, appropriate housing with limited opportunity to interact with children, therapy, sex education with the Georgetown Developmental Disability Administration Health Initiative, an on-call crisis team, behavior management, and environmental safety plans.¹⁴⁶ Thus, the only barrier to providing Mr. Seth with the most integrated setting appropriate to his needs—namely, a DC-based disability-services provider organization that can provide him with

139. Exhibit 2, Declaration of Nancy Thaler at 2, 10–11, *Seth v. District of Columbia*, No. 1:18-cv-01034 (D.D.C. Oct. 26, 2018).

140. *Id.* at 14.

141. *Id.*

142. *Id.*

143. Amended Complaint, *Seth v. District of Columbia*, *supra* note 130, at 4.

144. Complaint, *Seth v. District of Columbia*, *supra* note 118, at 3.

145. Amended Complaint, *Seth v. District of Columbia*, *supra* note 130, at 4, 47.

146. *See id.* at 34–37.

needed supervision in the community—is the District’s refusal to do so.¹⁴⁷ Mr. Seth claims that this is a violation of *Olmstead*’s integration mandate.¹⁴⁸

On September 28, 2018, the federal district court in DC granted DC’s motion to dismiss the complaint with prejudice, noting: “While a discrimination action is a creative effort to bring attention to this troubling situation, the allegations fail to support claims under the antidiscrimination laws and ultimately cannot provide the relief Seth seeks.”¹⁴⁹ Without explaining the reasoning behind granting the motion to dismiss with prejudice, the judge noted that, among other things, Mr. Seth’s *Olmstead* claim failed because it consisted of just “bare allegations” without any “specific allegations supporting the claim that he was denied accommodations—that is, community-based services—by the defendants due to his intellectual disability.”¹⁵⁰ Based on the dangerousness finding made by the U.S. District Court for the District of North Carolina, the DC federal court concluded that:

Although the defendants may, at one time, have believed that community-based services would be an appropriate alternative for Seth, their decision not to move forward with accepting responsibility for his custody, care, and treatment indicates that they no longer find community-based treatment appropriate. . . . This argument rests on the assumption that “the defendants are obligated to provide services to [Seth] despite his being in federal custody and his federal civil commitment.” No such obligation exists.¹⁵¹

Furthermore, the court rejected plaintiff’s unjustified isolation claim, which also was based on *Olmstead*. Even though the court concluded that Mr. Seth had not satisfied two of the three *Olmstead* factors (in part because of his alleged dangerousness and the District’s refusal to serve him based on his presence in federal custody), it significantly *did not* conclude that *Olmstead* was inapplicable in a criminal justice setting.¹⁵²

Mr. Seth filed a motion to alter or amend the judgment, along with a request for leave to file an amended complaint, in late 2018.¹⁵³ In his motion, Mr. Seth argues that the district court committed clear error when

147. As discussed *infra*, and as noted above with regard to *Olmstead*, a state may attempt to show that providing community-based services to a person found incompetent to stand trial constitutes a fundamental alteration of its program or services if no such programs exist. Whatever the merits of such a defense in a federal prison context, the existence of a well-functioning, community-based services system in the District of Columbia, including the identification of a specific program that can provide appropriate services to Mr. Seth, negates its viability in the Seth case.

148. Amended Complaint, *Seth v. District of Columbia*, *supra* note 130, at 3–4, 49–50.

149. *Seth v. D.C.*, No. 18-103 (BAH), 2018 WL 4682023, at *1 (D.D.C. Sept. 28, 2018).

150. *Id.* at *13.

151. *Id.* at *14.

152. *Id.* at *29–31.

153. Plaintiffs’ Motion to Alter or Amend Judgment & Motion for Leave to File Amended Complaint at 1, *Seth v. District of Columbia*, No. 1:18-cv-01034 (D.D.C. Oct. 26, 2018).

it dismissed his complaint with prejudice, because such dismissals are warranted only in extraordinary circumstances where no set of facts could cure the alleged deficiencies.¹⁵⁴ In contrast, here, the judge explicitly identified specific missing factual information as the basis for its dismissal.¹⁵⁵ Ordinarily, plaintiffs should be afforded the ability to amend a complaint that a judge finds lacking in sufficient facts to survive a motion to dismiss.¹⁵⁶ In 2019, the court denied this motion and Mr. Seth has filed a notice of appeal.¹⁵⁷

D. M.G. v. Cuomo: Demanding Expansion of Community-Based Mental Health Housing

In early 2019, Disability Rights New York and the Legal Aid Society filed a class action lawsuit in the Southern District of New York¹⁵⁸ on behalf of New York inmates with mental illness who have completed their sentences or reached their approved parole dates but are being held in prison (some in solitary confinement) due to a lack of community-based mental health housing programs available to serve them upon release.¹⁵⁹ As noted in the complaint: "While residing in prison pending a vacancy in a community-based mental health housing program, Plaintiffs are not free to come and go or participate in community life. Plaintiffs are locked in secure prison facilities, have no autonomy and no privacy, and continue to be treated as prisoners."¹⁶⁰ In addition to constitutional claims, the complaint alleges violations of the ADA and Section 504 for the state's "failure to provide services to Plaintiffs in the most integrated setting."¹⁶¹

Defendants—Governor Cuomo, the New York State Office of Mental Health, and the New York State Department of Corrections and Community Supervision—share responsibility for discharging people with serious mental illness from prison, including by planning for and approving housing in the community to which they may be released and providing a comprehensive discharge plan to each person with serious

154. Memorandum in Support of Plaintiff's Rule 59(e) Motion to Alter or Amend the Judgment and Rule 15(a)(2) Motion for Leave to File Amended Complaint at 8–9, *Seth v. District of Columbia*, No. 18-103 (BAH) (D.D.C. Oct. 26, 2018) (No. 1:18-cv-01034) [hereinafter Memorandum in Support of Plaintiff's Rule 59(e) Motion, *Seth v. District of Columbia*].

155. *Seth*, 2018 WL 4682023, at *8–11, *13–16.

156. As part of its motion, counsel filed a proposed amended complaint and included several additional declarations, including some referenced above, in support of the *Olmstead* allegations in the complaint. Memorandum in Support of Plaintiff's Rule 59(e) Motion, *Seth v. District of Columbia*, *supra* note 154, at 1, 8.

157. Order, *Seth v. District of Columbia*, No. 1:18-cv-01034 (D.D.C. March 8, 2019); Plaintiff's Notice of Appeal, *Seth v. District of Columbia*, No. 1:18-cv-01034 (D.D.C. June 7, 2019).

158. Ashley Southall, *Mentally Ill Prisoners Are Held Past Release Dates, Lawsuit Claims*, N.Y. TIMES (Jan. 23, 2019), <https://www.nytimes.com/2019/01/23/nyregion/prisoners-mentally-ill-lawsuit.html>.

159. Class Action Complaint at 1–2, *M.G. v. Cuomo*, No. 7:19-cv-00639 (S.D.N.Y. Jan. 23, 2019).

160. *Id.* at 2.

161. *Id.* at 3, 20.

mental illness preparing to return to the community from prison.¹⁶² Plaintiffs allege that their continued confinement in prison is not based on defendants' determination that such placement is clinically necessary but that they are confined solely because defendants have failed to provide sufficient housing and supportive services in more integrated settings.¹⁶³

The lawsuit seeks an injunction requiring defendants to create an effective plan for community integration, which includes developing a sufficient array of community-based mental health housing for members of the class. As the complaint notes: "Plaintiffs do not seek an order requiring their release from prison. Rather, Plaintiffs ask that Defendants make release possible by developing the community-based mental health housing programs that Defendants have imposed as a precondition for Plaintiffs' discharge from prison, and by creating an effective plan for community integration."¹⁶⁴ The complaint notes that New York already has a continuum of residential services to integrate people with serious mental illness being released from prison into the community, but that existing programs and services "have been developed and administered in a manner and on a scale that are inadequate for Plaintiffs' needs, resulting in unlawful, unconstitutional, and unnecessary institutionalization in state prisons."¹⁶⁵ At the time of this writing, the defendants had yet to respond to the complaint.¹⁶⁶

E. United States v. Nino and United States v. Collins: Challenging Inpatient Competency Restoration Programs

*United States v. Nino*¹⁶⁷ and *United States v. Collins*¹⁶⁸ stand as two recent examples of protection and advocacy organizations filing briefs in *criminal* cases as amicus curiae to provide input to the court on more appropriate placements for defendants with intellectual disability in competency restoration proceedings under Section 504.

In *Nino*, the Arizona Disability Law Center and the William E. Morris Institute for Justice filed an amicus curiae brief on May 10, 2018, before the United States Court of Appeals for the Ninth Circuit, arguing

162. *Id.* at 24–25.

163. *Id.* at 33.

164. *Id.* at 3.

165. *Id.* at 34.

166. It is worth mentioning that this case shares similar themes with the 1966 U.S. Supreme Court case, *Baxstrom v. Herold*, 383 U.S. 107, 108–09 (1966), with regard to New York's practice of confining inmates with mental illness beyond their imposed sentences without procedural safeguards in place. In *Baxstrom*, the Court held that the Equal Protection Clause required that a prisoner nearing the end of his sentence in the New York Department of Correction hospital for mentally ill prisoners must be given a jury review of the determination of his sanity in order to conform with proceedings granted to others in the state who were civilly committed. *Id.* at 110. The Court further held that such a prisoner was entitled to an additional hearing to determine whether he was "so dangerously mentally ill" that he must remain in the state's correctional hospital. *Id.* at 112–13. Given that the case was brought prior to the enactment of Section 504 and the ADA, these claims were not raised.

167. 750 F. App'x 589 (9th Cir. 2019).

168. No. 3:16-cr-00352-HZ-02, 2019 WL 908238 (D. Or. Feb. 22, 2019).

that the mandatory detention in a locked inpatient facility of individuals found incompetent to stand trial—without an individualized determination of the most integrated setting appropriate for their needs—violates Section 504.¹⁶⁹ As described above, Section 504, on which the ADA is based, prohibits undue institutionalization of individuals with disabilities and requires the federal government (and any program or activity receiving federal financial assistance) to conduct its programs and activities in the most integrated setting appropriate for the individual with a disability.¹⁷⁰ The regulations for Section 504 require recipients of federal funds to “administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.”¹⁷¹

In this case, the United States filed charges against the defendant, an individual with intellectual disability, for knowingly making a false and fictitious statement during the purchase of firearms when he checked “yes” in response to whether he was the actual buyer of the firearms at issue, because he was actually purchasing the firearms for another individual.¹⁷² The defendant was found incompetent to stand trial and remanded to the custody of the Attorney General for competency restoration in a locked inpatient federal medical center run by the federal BOP.¹⁷³ The defendant filed an interlocutory appeal with the Ninth Circuit Court of Appeals to challenge the district court’s order placing him with BOP.¹⁷⁴ The Arizona Disability Law Center and the William E. Morris Justice Institution, through an amicus curiae brief, supported the defendant before the Ninth Circuit.¹⁷⁵

The amicus brief argues that, under Section 504, the Attorney General and BOP are required to make reasonable accommodations with regard to how they deliver competency restoration services to comply with Section 504’s integration mandate and the DOJ’s corresponding regulations.¹⁷⁶ The argument is based on the notion that the *Olmstead* decision applies equally to programs and activities receiving federal financial assistance, some of which are covered only by Section 504 and not the ADA, given explicit statements by Congress, the Executive branch,

169. Redacted Proposed Brief by Amici Curiae in Support of Defendant-Appellant at 1–3, *United States v. Nino*, 750 F. App’x 589 (9th Cir. 2019) (No. 4:16-cr-01937).

170. See 29 U.S.C. § 794(a) (2018).

171. Guidelines for Determining Discriminatory Practices, 43 Fed. Reg. 2,138 (Jan. 13, 1978); see also 28 C.F.R. § 39.130(d) (2019) (quoting DOJ Section 504 regulations, using *identical* language). This Section 504 integration regulation was the model for the comparable one DOJ promulgated in its ADA Title II regulation and that was at the heart of the Court’s decision in *Olmstead*. See *Olmstead v. L.C.*, 527 U.S. 581, 591–92 (1999).

172. Indictment at 1–2, *United States v. Nino*, No. 4:16-cr-01937 (D. Ariz. Oct. 12, 2016), *aff’d*, 750 F. App’x 589 (9th Cir. 2019).

173. *United States v. Nino*, No. 4:16-cr-01937 (D. Ariz. Nov. 17, 2017), *aff’d*, 750 F. App’x 589 (9th Cir. 2019).

174. *Nino*, 750 F. App’x at 589.

175. Redacted Proposed Brief by Amici Curiae in Support of Defendant-Appellant, *supra* note 169, at 2.

176. *Id.* at 12.

and the courts, noting that the two statutes should be interpreted consistently.¹⁷⁷

Under 18 U.S.C. § 4241(d), when a hearing demonstrates by a preponderance of the evidence that a defendant is not mentally competent to stand trial, the court “shall commit the defendant to the custody of the Attorney General.”¹⁷⁸ The statute goes on to explain:

The Attorney General shall hospitalize the defendant for treatment in a suitable facility—(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and (2) for an additional reasonable period of time until—(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or (B) the pending charges against him are disposed of according to law; whichever is earlier.¹⁷⁹

The BOP operates five federal medical centers, each of which is a locked inpatient medical institution in a prison complex.¹⁸⁰ The process of assessing the need for competency restoration of an inmate does not include an individualized determination of the most integrated setting appropriate for the individual to receive this service and, even if it did, the only placement currently available for such a program is the federal medical centers.¹⁸¹

Competency restoration services fall within the DOJ’s program and activities subject to Section 504. Most, if not all, individuals found incompetent to stand trial under 18 U.S.C. § 4241(a) (a person “presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense”) will meet Section 504’s definition of an individual with a disability, because the person would have a mental impairment that substantially limits at least one major life activity.¹⁸² Thus, individuals with disabilities who are able to participate in outpatient competency restoration services in their communities, and are not opposed to doing so, are being denied a community-based option in violation of Section 504. Mandatory detention in an inpatient institution for all individuals found

177. See *supra* notes 35–36.

178. 18 U.S.C. § 4241(d) (2018).

179. *Id.*

180. Redacted Proposed Brief by Amici Curiae in Support of Defendant-Appellant, *supra* note 169, at 4–5.

181. *Id.* at 5.

182. 18 U.S.C. § 4241(d). See 28 C.F.R. § 39.103 (2019), for Section 504 definition of “handicapped.”

incompetent to stand trial precludes an individualized assessment of their needs and placement in the most integrated setting where their needs can be met. As the brief notes: "The absence of a continuum of competency restoration services in less restrictive settings and the allocation of all resources to institutional placements results in unjustified segregation of people with mental disabilities."¹⁸³

The brief further explains that twenty-nine states and the District of Columbia allow for community-based and outpatient competency restoration as a treatment option.¹⁸⁴ These community-based programs allow participants to "attempt competency remediation without losing liberty, employment, income from employment or Social Security benefits, and housing. Participants avoid disruption in continuity of services, treatment, or care from community service providers and access to their support system . . . participants receive services in a familiar environment."¹⁸⁵

Anticipating a fundamental alteration defense, the brief adds that community-based competency restoration programs cost less than inpatient commitment and do not alter the nature of these programs. The brief explains that the state governments that have implemented such programs actually benefit from having a continuum of treatment and services available as they have seen reduced recidivism rates and cost savings.¹⁸⁶ Lastly, the brief argues that the apparent statutory conflict between Section 504 and 18 U.S.C. § 4241(d) can only be reconciled by interpreting the latter as not requiring mandatory inpatient commitment without an individualized determination.¹⁸⁷ The Ninth Circuit denied the petition for rehearing¹⁸⁸ without addressing the Section 504 argument. Mr. Nino then filed a petition for writ of certiorari with the U.S. Supreme Court.¹⁸⁹ At the time of this writing, this motion remains pending.

In *Collins*, Disability Rights Oregon filed an amicus curiae brief before the United States District Court for the District of Oregon on behalf of a defendant with intellectual disability who was charged with tax fraud, found incompetent to stand trial, and, thus, at risk of being sent to a federal medical center under 18 U.S.C. § 4241(d) for competency restoration.¹⁹⁰ The brief's arguments in *Collins* largely mirror the ones in *Nino*—that mandatory inpatient competency restoration at federal medical centers,

183. Redacted Proposed Brief by Amici Curiae in Support of Defendant-Appellant, *supra* note 169, at 16.

184. For a full list of relevant state statutes providing for community-based competency restoration programs, see *id.* at 17 n.15.

185. *Id.* at 20.

186. *Id.* at 20–21.

187. *Id.* at 21–24.

188. *United States v. Nino*, 750 Fed. App'x. 589, 589–90 (9th Cir. 2019).

189. Motion to Stay the Mandate, *United States v. Nino*, No. 17-10546 (9th Cir. May 2, 2019).

190. Motion for Leave to File an Amicus Curiae Brief at 1–4, *United States v. Collins*, No. 3:16-cr-00352-HZ-02 (D. Or. Oct. 19, 2018).

absent an individualized determination of the most integrated setting appropriate, violates Section 504.¹⁹¹ The *Collins* brief emphasizes that a community-based competency restoration program is a currently available alternative for the defendant in Oregon, and the federal medical centers do not provide any information about their capacity to individually tailor their programs or appropriately accommodate individuals with intellectual disability, rendering such placement unduly restrictive and inappropriate for the defendant.¹⁹² The brief further notes that sending the defendant to a federal medical center will cause him to “lose all established supports, placing him at risk of recidivism and harming his ability to reintegrate following the period of his restoration services.”¹⁹³ In an order from the district court in December 2018 that does not address the arguments in the amicus curiae brief, the judge ordered the defendant committed to the custody of the Attorney General pending a report on its compliance with the commitment statute.¹⁹⁴ At the time of this writing, Mr. Collins has filed a notice of appeal.¹⁹⁵

F. People v. McCollum: Challenging Inappropriate Placement in a Locked Psychiatric Institution

On December 20, 2018, several national disability advocacy groups filed an amicus curiae brief¹⁹⁶ before the Second Appellate Division of the New York Supreme Court in support of defendant Darius McCollum’s motion for leave to appeal his commitment order.¹⁹⁷ The case, *People v. McCollum*,¹⁹⁸ involves an individual with autism who has repeatedly been charged with the unauthorized operation of New York city trains and buses.¹⁹⁹ In response to the most recent charge at issue in this case, Mr. McCollum pleaded not responsible by reason of mental disease or defect and sought conditional release under a court order that would allow him to receive appropriate, community-based services tailored to his needs for

191. *Id.* at 10.

192. *Id.* at 10–13.

193. *Id.* at 11. In addition to the Section 504 argument, the brief outlines a due process argument against inpatient competency restoration that is beyond the scope of this Article. *Id.* at 13–18.

194. Order at 1, *United States v. Collins*, No. 3:16-cr-00352-HZ-02 (D. Or. Dec. 14, 2018) (“The Court finds by a preponderance of the evidence that Defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to stand trial. Pursuant to 18 U.S.C. § 4241, Defendant is committed to the custody of the Attorney General. The Court orders the Attorney General to issue a report showing compliance with the requirements of 18 U.S.C. § 4247 before requiring Defendant to surrender to BOP custody.”).

195. Notice of Appeal, *United States v. Collins*, No. 3:16-cr-00352-HZ-02 (D. Or. March 4, 2019).

196. Notice of Motion of The Bazelon Center For Mental Health Law, The Autistic Self Advocacy Network, The Arc of the United States, and The National Disability Rights Network for Leave to File Brief as Amici Curiae at 1–2, *People v. McCollum*, No. 2018-14953 (N.Y. App. Div. Dec. 20, 2018).

197. These groups included The Arc, the Autistic Self Advocacy Network, the Bazelon Center for Mental Health Law, and the National Disability Rights Network. Shira Wakschlag, one of this Article’s Authors, was involved in the drafting of the brief on behalf of The Arc. *Id.*

198. No. 51424, slip op. (N.Y. Sup. Ct. Oct. 5, 2018).

199. *Id.* at 2.

the first time in his life.²⁰⁰ The trial court accepted his plea, but found him to have a “dangerous mental disorder” under state law because of his autism and ordered him to be committed to a secure psychiatric facility for the most dangerous and violent offenders.²⁰¹ The trial court ordered this disposition even though Mr. McCollum had never committed a violent crime, the court explicitly acknowledged that it is unprecedented for a nonviolent offender to be committed to such a facility, and Mr. McCollum did not fit the factors the court had outlined for a finding of dangerousness.²⁰² This opinion is also the first in New York to find an individual to have a “dangerous mental disorder” because of autism, a developmental disability.²⁰³

The amicus curiae brief argues that involuntary confinement is not appropriate for a person with a developmental or other disability for whom community-based services can provide effective behavioral supports.²⁰⁴ The brief notes that the trial court decision reflects a fundamental failure to understand either the importance of community-based services and supports or the difference between mental health and developmental disability diagnoses that are critical to ensuring that individuals with disabilities receive appropriately tailored services.²⁰⁵ Because the evidence demonstrating that people with disabilities who have challenging behaviors can be served better in the community than in institutional placements, New York law, which provides that a defendant may be found “mentally ill” only if commitment to a state psychiatric facility is “essential” precludes such commitment.²⁰⁶ The brief notes the variety of services available to Mr. McCollum in the community through New York’s disability services agency, services that can be individually tailored to his needs.²⁰⁷ These include supports for housing, transportation, and behavioral issues.²⁰⁸ These services stand in contrast to his institutional placement, which cannot be individually tailored and is likely to exacerbate his challenging behaviors and traumas.²⁰⁹

The brief argues that the principle of community integration, reflected in both state law and the ADA, requires the state to avoid needless institutionalization of Mr. McCollum given that appropriate,

200. *Id.* at 1, 27.

201. *Id.* at 1–2.

202. *Id.* at 33, 35.

203. Brief of Amici Curiae The Bazelon Center For Mental Health Law, The Autistic Self Advocacy Network, The Arc of the United States, and The National Disability Rights Network in Support of Defendant-Appellant Darius M.’s Motion for Leave to Appeal at 5, *People v. McCollum*, No. 2018-14953 (N.Y. App. Div. 2018) [hereinafter Brief of Amici Curiae, *People v. McCollum*].

204. *Id.* at 6–17.

205. *Id.* at 6.

206. N.Y. CRIM. PROC. LAW § 330.20(1)(d) (McKinney 2019); Brief of Amici Curiae, *People v. McCollum*, *supra* note 203, at 6–7.

207. Brief of Amici Curiae, *People v. McCollum*, *supra* note 203, at 9–11.

208. *Id.* at 11–12.

209. *Id.* at 12.

community-based settings are available to him and are proven conclusively to deliver better outcomes for people with disabilities while also ensuring public safety.²¹⁰ As the first reported case in New York to find that a defendant diagnosed with autism is “mentally ill” or has a “dangerous mental disorder” for the purpose of involuntary commitment in a secure psychiatric facility, this case has significant implications for individuals with autism or other developmental disabilities who may now be at risk of involuntary, long-term placement in institutions that are incapable of meeting their needs.²¹¹ As stated in the brief:

The trial court’s decision flies in the face of the legal and medical necessity to limit involuntary commitment to circumstances in which it is “essential.” The relevant New York statute, N.Y. Crim. Proc. Law § 330.20 (“CPL § 330.20”), includes this explicit requirement—and a contrary approach would conflict with the Americans with Disabilities Act (“ADA”) and Supreme Court precedent. The principle of community integration—reflected in CPL § 330.20 (as properly interpreted), and enshrined in the Americans with Disabilities Act as recognized by the Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999)—requires public entities to avoid needless institutionalization of individuals with disabilities who can be served in community settings. Decades of research and experience compel the conclusion that community-based services deliver better outcomes for individuals who do not require institutionalization, and better serve the purpose of CPL § 330.20 to balance individual rights and public safety.²¹²

In 2019, the court denied Mr. McCollum’s appeal without explanation.²¹³

III. APPLYING *OLMSTEAD* TO NON-THERAPEUTIC SETTINGS

There are a variety of considerations at play when determining how *Olmstead* might be applied in the criminal justice context. The “fundamental alteration” defense embedded in the ADA stands for the proposition that the government does not have an unqualified obligation to limit disability discrimination. The regulations for Title II of the ADA state: “A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, *unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.*”²¹⁴ This defense prevents litigants from demanding that the State create entirely new services to meet

210. *Id.* at 4–5.

211. *Id.* at 18–19.

212. *Id.* at 4–5.

213. Decision and Order on Motion, *People v. McCollum*, No. 2018-14953 (N.Y. App. Div. February 1, 2019).

214. 28 C.F.R. § 35.130(7)(i) (2019) (emphasis added).

their needs²¹⁵ (though more extensive relief has frequently been achieved via consent decrees and settlement agreements).²¹⁶ In *Olmstead*, the state of Georgia resisted court intervention, among other reasons, on the grounds that the plaintiff's demands would "fundamentally alter[]" the State's activity, in that it was already using all available funds to provide services to other persons with disabilities.²¹⁷ In evaluating the State's fundamental alteration defense, the Supreme Court held that the court "must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably."²¹⁸

There is no clear formula to determine whether a proposed modification will constitute a fundamental alteration of a state or local government's service system under the ADA. It is well-established, though, that cost alone is not sufficient to mount this defense.²¹⁹ As the United States Court of Appeals for the Third Circuit has noted, if a state could satisfy the fundamental alteration defense based on cost alone, such an interpretation would "swallow the integration mandate whole."²²⁰ Congress and the courts have recognized that compliance with *Olmstead* may require "substantial short-term burdens, both financial and administrative"²²¹ to achieve the goal of community integration.²²²

Another qualification to consider is that in defining a "qualified individual with a disability," the Title II regulations state that the ADA "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of

215. See, e.g., *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1208 (D. Or. 2012) (describing the "forbidden remedy" of "requiring defendants . . . provide . . . a certain standard of care or level of benefits").

216. See, e.g., *supra* notes 80-84; Settlement Agreement, *United States v. Georgia*, No. 1:10-CV-249-CAP (N.D. Ga. October 19, 2010); Settlement Agreement, *United States v. Delaware*, No. 1:11-cv-00591 (D. Del. July 6, 2011); Settlement Agreement, *United States v. Virginia*, No. 3:12cv059-JAG (E.D. Va. July 17, 2012); Settlement Agreement, *United States v. New Hampshire*, No. 1:12-cv-00053 (D.N.H. Feb. 12, 2014).

217. *Olmstead v. L.C.*, 527 U.S. 581, 595 (1999).

218. *Id.* at 597.

219. See, e.g., *Steimel v. Wernert*, 823 F.3d 902, 915 (7th Cir. 2016); *Pashby v. Delia*, 709 F.3d 307, 323 (4th Cir. 2013); *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 614 (7th Cir. 2004) (finding that evidence that a modification would "substantially increase" a state's expenditures cannot, alone, defeat an integration claim under Title II); *Frederick L. v. Dep't of Pub. Welfare*, 364 F.3d 487, 496 (3d Cir. 2004) ("[S]tates cannot sustain a fundamental-alteration defense based solely upon the conclusory invocation of vaguely-defined fiscal constraints."); *Townsend v. Quasim*, 328 F.3d 511, 519-20 (9th Cir. 2003); *Fisher v. Okla. Health Care Auth.*, No. 02CV-762P(C) (N.D. Okla. Nov. 1, 2002), *rev'd*, 335 F.3d 1175, 1186 (10th Cir. 2003).

220. *Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 381 (3d Cir. 2005).

221. *Fisher*, 335 F.3d at 1183 (quoting H.R. REP. NO. 101-485, pt. 3, at 50 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 473).

222. For a more in-depth analysis of the fundamental alteration defense, see, e.g., Jennifer Mathis, *Where Are We Five Years After Olmstead?*, 38 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 561, 561-62 (2005); Salzman, *supra* note 72, at 157-58.

others.”²²³ A “direct threat” is defined as a “significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures.”²²⁴ In determining whether an individual poses a direct threat, the ADA requires that the public entity:

[M]ake an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.²²⁵

The Title II regulations further state that “[a] public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities,” but qualify this limitation by noting that “the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.”²²⁶ While the concept of direct threat was not raised in *Olmstead*, it is important to consider when applying the integration mandate in the criminal justice context.

As the cases, briefs, and other authorities discussed in Part III of this Article indicate, applying the principles of the *Olmstead* decision to at least some aspects of the criminal justice system is fully consistent with the analytical framework of that case. In the context of disrupting the school-to-prison pipeline, diversion programs, incompetency determinations, and post-incompetency commitments, advocates for defendants with disabilities can point to the treatment purposes that underlie these interventions and apply the tripartite test of *Olmstead* in a straightforward manner: that placement in a community-based program is required if the treating professionals recommend it, the person does not oppose it, and placement would not constitute a fundamental alteration of the governmental program. Judicial recognition of this analysis would make an important contribution to reducing the incarceration and institutional confinement of people with disabilities who become inappropriately enmeshed in the criminal justice system.

But could *Olmstead* be extended even further to argue that, in certain instances, individuals with mental disabilities who are serving penal sentences must be placed in community-based programs in lieu of jails or prisons? We have not found a case that has so held, but we can speculate, at least tentatively, on how the analysis should proceed. As noted above,

223. 28 C.F.R. § 35.139(a) (2019).

224. *Id.* § 35.104(4).

225. *Id.* § 35.139(b).

226. *Id.* § 35.130(h); see also U.S. DEP’T OF JUSTICE, COMMONLY ASKED QUESTIONS, *supra* note 32; *The Americans with Disabilities Act: Title II Technical Assistance Manual*, ADA.GOV, <https://www.ada.gov/taman2.html> (last visited Apr. 17, 2019).

although some individuals with mental disabilities do commit crimes and must be held accountable for them where appropriate, it is vital to consider that the behavior leading to their involvement in the justice system is too frequently a result of not receiving appropriate community-based services that address disability-related needs. Further, incarceration often does nothing to provide a habilitative or therapeutic environment to remedy the underlying basis for problematic conduct due to a lack of understanding and prejudice.²²⁷

First, Title II of the ADA applies only to someone who is a “qualified individual with a disability.”²²⁸ The statute defines such an individual as one “who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”²²⁹ A person with a disability, who is serving a criminal sentence, might not be considered “qualified” for a community-based alternative if there were legitimate penological justifications—such as deterrence or retribution—to incarcerate the person. On the other hand, if a person became eligible for work-release or other less restrictive programs, that person could become a qualified individual who should then be eligible for placement upon satisfaction of the *Olmstead* criteria. Where such programs already exist, and are simply not being offered to individuals with mental disabilities, it seems that it would be relatively easy to overcome a fundamental alteration defense.

Second, if an individual with a disability who is convicted of a crime were deemed too dangerous to serve in a community-based program, the professionals making the determination in the first part of the tripartite *Olmstead* test presumably would conclude it was not appropriate for the person to enter a community-based program (at least while the person was still considered dangerous). Even if a determination of an individual’s possible dangerousness were not part of the professional’s assessment, which seems unlikely,²³⁰ a state agency could assert a direct threat defense to challenge the proposed placement.

Thus, the very structure of Title II of the ADA and the *Olmstead* integration mandate are flexible enough to be presumptively applied in the criminal justice context.

227. See BERNSTEIN ET AL., *supra* note 2, at 9.

228. 42 U.S.C. § 12132 (2018).

229. *Id.* § 12131(2).

230. For example, in the *Seth* case discussed above, all the professionals who assessed Markelle Seth for a determination of whether community-based placement was appropriate for him considered whether the proposed placement would protect the community as well as provide him with needed services. Complaint, *Seth v. District of Columbia*, *supra* note 118, at 4, 17, 23.

CONCLUSION

As Margo Schlanger has pointed out: “Opposition to mass incarceration has entered the mainstream. But except in a few states, mass decarceration has not, so far, followed.”²³¹ As described above, advocates, lawyers, and governmental officials have increasingly deployed the *Olmstead* framework creatively in non-institutional civil contexts. Those who are concerned about mass incarceration may also want to explore using the integration mandate to make at least a dent in that phenomenon as it affects the many people with disabilities who constitute a disproportionate percentage of the jail and prison population in this country.

In this Article, we have identified those cases (and their underlying rationales) that have begun to use *Olmstead* in just this manner, whether to divert people with disabilities from the criminal justice system entirely; provide services to them in more integrated settings and expand the community-based settings that are available; or recognize that people evaluated for competency to stand trial or determined unrestorably incompetent to stand trial must be housed in community-based, therapeutic settings rather than segregated, punitive ones. While some of the cases and amicus briefs discussed above have not yet been successful in securing the requested relief, it is important to note that, where opinions have been issued in these cases, they either ignored the *Olmstead* analysis entirely or did not rule out the possibility that it could apply in the criminal justice context under a different set of facts. Although all of the litigation described in this Article is in its early stages, if pursued thoughtfully, using the integration mandate in this context has the potential to begin to reverse the disturbing trend of over-incarceration of people with disabilities and permit a renewed focus on providing them with the humane, community-based supports to which they are entitled.

231. Schlanger, *supra* note 6, at 1–2.