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ESSAY

The Paradox of Inclusion: Applying *Olmstead*'s Integration Mandate in Prisons

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In this Essay, I discuss Olmstead *and some potential opportunities and barriers to implementing* Olmstead*'s integration mandate in prisons. In particular, I address what I term the paradox of inclusion with respect to applying the integration mandate in prison. Recognizing that the central features and function of prisons conflict with the animating spirit of* Olmstead*, I discuss what is at stake in legal advocacy aimed at providing greater access and inclusion for people with disabilities in these carceral spaces. I contend that precisely because* Olmstead *conflicts with some of the central features and functions of the American punishment system, the* Olmstead *decision possesses properties that may allow for a more transformative reimagining of the rights of* all *incarcerated people, in addition to incarcerated people with disabilities.*

I. INTRODUCTION

I am thrilled to offer remarks in this symposium edition celebrating twenty years of the landmark *Olmstead* decision. Indeed, twenty years after the *Olmstead* decision it is clear that there is reason to celebrate. Over the past twenty years, countless numbers of people have been moved from institutions and into the community or kept out of institutions through *Olmstead*'s qualified right to receive

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state supports and services within one's community. In *Olmstead v. L.C.*, the Supreme Court ruled that unjustified institutionalization constitutes discrimination under Title II of the ADA.[1] Relying on statutory text as a basis for concluding that Congress's intent was to incorporate a "comprehensive view of the concept of discrimination advanced in the ADA," the Court emphasized that "Congress explicitly identified unjustified 'segregation' of persons with disabilities as a 'for[m] of discrimination.'"[2] Through its holding the Supreme Court endorsed and affirmed Congress's commitment to ending the shameful legacy of institutionalization of people with disabilities through the Americans with Disabilities Act. The Court's approval of an affirmative mandate of integration along with a discussion of the social and psychological harms and stigma experienced by disabled people due to social exclusion harkens back to the Supreme Court's decision in *Brown v. Board of Education* where it emphasized the psychological harms to Black children stemming from segregation.[3] Indeed, those similarities and *Olmstead*'s status as watershed opinion for the disability rights movement have led some to call the decision the *Brown v. Board of Education* of its generation.[4]

Yet, although the *Olmstead* majority adopted an expansive definition of discrimination, the holding itself was in fact carefully circumscribed, qualifying the right to community access and integration. According to the Court, under the ADA, people with disabilities must be placed in community settings rather than institutions, when three conditions are met:

> [T]he State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[5]

Beyond this, the majority opinion is far from a wholesale disavowal of institutionalization. In a concurring opinion, Justice Kennedy assumes that for those with so-called "severe disabilities," institutionalization is not only justifiable,

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1. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 597 (1999) ("Unjustified isolation, we hold, is properly regarded as discrimination based on disability.").

2. *Olmstead*, 527 U.S. at 600 (citing 42 U.S.C. § 12101(a)(2) (1990) ("[H]istorically, 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."); and § 12101(a)(5) ("[I]ndividuals with disabilities continually encounter various forms of discrimination, including ... segregation.")).

3. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 494 (1954).

4. *See, e.g.*, Samuel R. Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding "We the People"*: *The Disability Rights Cases*, 104 COLUM. L. REV. 49, 49 (2004).

5. *Olmstead*, 527 U.S. at 602. The right to community-based treatment is limited to reasonable modifications that do not pose a fundamental alteration to the State's services and programs. *Id.* at 603 ("The State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless. The reasonable-modifications regulation speaks of "reasonable modifications" to avoid discrimination, and allows States to resist modifications that entail a "fundamenta[l] alter[ation]" of the States' services and programs."). Indeed, the case was remanded to the lower court to determine whether deinstitutionalizing plaintiffs would be a fundamental alteration to the State's program.

but in some cases required.[6] And finally, as some legal scholars and commentators have emphasized, *Olmstead* is limited with respect to remedies.[7]

Despite these limitations, *Olmstead*'s integration mandate has been expanded to challenge institutionalization beyond state-run mental institutions.[8] A growing number of plaintiffs are applying *Olmstead*'s holding and animating principles to seek protections for incarcerated people with disabilities.[9] Indeed, scholars and practitioners have argued that *Olmstead*'s integration mandate offers legal pathways to disrupt mass incarceration,[10] improve conditions of confinement,[11] or reduce solitary confinement.[12] With every expansion, the question becomes whether *Olmstead*'s integration mandate can provide meaningful access and integration, or protect people with disabilities at risk of institutionalization, in

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6. Justice Kennedy's concurrence adheres to this view:

> For a substantial minority . . . deinstitutionalization has been a psychiatric *Titanic.* Their lives are virtually devoid of 'dignity' or 'integrity of body, mind, and spirit.' 'Self-determination' often means merely that the person has a choice of soup kitchens. The 'least restrictive setting' frequently turns out to be a cardboard box, a jail cell, or a terror-filled existence plagued by both real and imaginary enemies.

Id. at 609.

7. *See, e.g.*, Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 150 (1999); Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 966 (2004).

8. *See, e.g.*, Fisher v. Oklahoma Health Care Authority, 335 F.3d 1175 (10th Cir. 2003) (Medicaid funding); Lane v. Kitzhaber, 283 F.R.D. 587 (D. Or. 2012) (sheltered workshops); Kerrigan v. Philadelphia Bd. of Election, No. 07-687, 2008 WL 3562521, at *19 (E.D. Pa. Aug. 14, 2008) (polling places).

9. *See, e.g.*, Seth v. District of Columbia, No. 18-1034(BAH), 2018 U.S. Dist. LEXIS 167177, at **2–3 (D.D.C. Sept. 28, 2018) (dismissing case with prejudice where plaintiff argued that civil commitment to a federal prison was a violation of the ADA because he was unnecessarily segregated due to his disability); Vasquez v. Cty. Of Santa Clara, No. 5:16-cv-05436-EJD, 2017 U.S. Dist. LEXIS 210479, at **1–2 (N.D. Cal. Dec. 20, 2017) (granting summary judgment for defendant where plaintiff's estate challenged his placement in segregated housing stating it was discrimination based on his disability status); Reaves v. Dep't of Corr., 195 F. Supp. 3d 383 (D. Mass. 2016) (finding plaintiff likely to succeed on claim that prison violated ADA by not providing appropriate access to programming, socialization & entertainment opportunities, and outdoor recreation); Davila v. Pennsylvania, No. 3:11-CV-01092, 2016 U.S. Dist. LEXIS 7665, at *21 (M.D. Pa. Jan. 20, 2016) (granting summary judgment for defendants on the claim by pre-trial detainee that he was segregated during his detention due to his disability status); Black v. Wigington, No. 1:12-CV-03365-RWS, 2015 U.S. Dist. LEXIS 13003 at **43–44 (N.D. Ga. Feb. 4, 2015) (denying defendant's motion for summary judgment where plaintiff alleged prison denied access to programming and segregated him away from the general population because of his disability), *rev'd on other grounds*, Black v. Wigington, 811 F.3d 1259 (8th Cir. 2016); Biselli v. Cty. of Ventura, No. CV 09-08694 CAS (Ex), 2012 U.S. Dist. LEXIS 79326, at **43–45 (C.D. Cal. June 4, 2012) (denying defendant's motion for summary judgment where decedent's estate argued placement in restrictive housing was discriminatory based on his disability status); Henderson v. Thomas, 913 F. Supp. 2d 1267, 1317 (M.D. Ala. 2012) (holding HIV positive prisoners challenge to prison's policy of segregation as a violation of ADA).

10. Robert D. Dinerstein & Shira Wakschlag, *Using the ADA's "Integration Mandate" to Disrupt Mass Incarceration*, 96 DENV. L. REV. 917, 933 (2019).

11. *See, e.g.*, Margo Schlanger, *Prisoners with Disabilities* in REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE (2017).

12. *See, e.g.*, Jamelia N. Morgan, *Caged in: The Devastating Harms of Solitary Confinement on Prisoners with Physical Disabilities*, 24 BUFF. HUM. RTS. L. REV. 81, 155–67 (2018) (discussing legal strategies to challenge use of solitary confinement).

places beyond the state hospital, whether in group homes, sheltered workshops, or prisons.

This Essay responds to this question with respect to the last site for expansion—namely, *Olmstead* and the protections it provides for incarcerated people. Crafting legal strategies to identify the ways in which *Olmstead* can be applied in prisons is vitally important. Those familiar with the American criminal legal system are well aware that we are in an era of mass incarceration. According to the Prison Policy Initiative, "[t]he American criminal justice system holds almost 2.3 million people in 1,719 state prisons, 109 federal prisons, 1,772 juvenile correctional facilities, 3,163 local jails, and 80 Indian Country jails as well as in military prisons, immigration detention facilities, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories."[13] Criminal law scholars have pointed to the War on Drugs, harsh sentencing policies, aggressive policing of low-level offenses, and mass criminalization as causes of the unprecedented rise in incarceration rates within the U.S. Of the 2.7 million incarcerated people, data indicates that, as compared to the general population in free society, incarcerated people are disproportionately disabled.[14] Approximately twenty-six percent of incarcerated people have physical disabilities,[15] over fifty percent of people incarcerated in prison or jail have psychiatric disabilities,[16] and more than fifty percent of incarcerated people with disabilities have co-occurring chronic illnesses.[17] In a 2015 U.S. Department of Justice report, about forty percent of women and thirty-one percent of men in prison and forty-nine percent of women and thirty-nine percent of men in jail reported a disability.[18] The report defined disability as including hearing, vision, cognitive, and ambulatory disabilities.[19] It also included disabilities that provide challenges with self-care and independent living, which refer to the ability to navigate daily life schedules, activities, and events without assistance.[20]

In the sections that follow, I highlight both potential opportunities and barriers to implementing *Olmstead*'s integration mandate to prisons.

II. EXTENDING *OLMSTEAD* TO PRISONS–OPPORTUNITIES FOR POSITIVE CHANGE

Though litigation in this area is limited, but burgeoning, *Olmstead* protects against unjustified isolation and segregation within carceral institutions. When a state fails to place incarcerated people with disabilities in the most integrated setting appropriate for the person's needs it may constitute discrimination on the

13. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html.

14. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 249151, DISABILITIES AMONG PRISONERS AND JAIL INMATES, 2011–12, 1 (2015) ("Prisoners were nearly 3 times more likely and jail inmates were more than 4 times more likely than the general population to report having at least one disability.").

15. *Id.*

16. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 213600, MENTAL HEALTH Problems of Prison and Jail Inmates 1 (2006), https://www.bjs.gov/content/pub/pdf/mhppji.pdf.

17. DISABILITIES AMONG PRISONERS AND JAIL INMATES, *supra* note 14, at 1, 6.

18. *Id.* at 1.

19. *Id.*

20. *Id.*

basis of disability, in violation of the integration mandate of the ADA.[21] Beyond this, the Department of Justice has promulgated regulations that specifically apply to program access in prisons and jails.[22] The regulations add substance to the integration mandate and provide that:

> Public entities shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individuals. Unless it is appropriate to make an exception, a public entity -
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> (i) Shall not place inmates or detainees with disabilities in inappropriate security classifications because no accessible cells or beds are available;
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> (ii) Shall not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment;
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> (iii) Shall not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would otherwise be housed; and
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> (iv) Shall not deprive inmates or detainees with disabilities of visitation with family members by placing them in distant facilities where they would not otherwise be housed.[23]

As legal scholars have acknowledged, these regulations as applied to incarcerated people can be brought to challenge prison conditions, placements in solitary confinement, and even institutional failures to provide pathways for reentry.[24] For example, litigation in recent years has applied *Olmstead* to challenge pre and post-conviction institutionalized placements, diverting people with disabilities from the criminal legal system,[25] the school-to-prison pipeline,[26] and mandatory inpatient competency restoration proceedings.[27] I discuss two areas of prison litigation to

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21. The ADA regulations include what is often termed the "integration mandate" which provides that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (2019). "[T]he most integrated setting appropriate" is defined as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. Part. 35, App. B (2011). *See also* McClendon v. City of Albuquerque, No. 95 CV 24 JAP/KBM, 2016 WL 9818311, at *15 (D.N.M. Nov. 9, 2016) ("The 'integration mandate'—arising out of Congress' explicit findings in the ADA, the regulations implementing Title II, and the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999)—requires that a governmental entity providing services to individuals with disabilities must do so "in the most integrated setting appropriate to their needs.").

22. 28 C.F.R. § 35.152 (2019).

23. *Id.* § 35.152(b)(2).

24. Dinerstein & Wakschlag, *supra* note 10, at 925.

25. *Id.* at 935–38 (discussing diversionary programs).

26. *Id.* at 935–38.

27. *Id.* at 944–49; *see also* Alexandra Douglas, *Caging the Incompetent: Why Jail-Based Competency Restoration Programs Violate the Americans with Disabilities Act Under* Olmstead v. L.C., 32 GEO. J.

provide examples of how the regulations would apply in challenges to conditions of confinement, and in particular, solitary confinement and barriers to reentry.

A. Solitary Confinement

The integration mandate and the regulations in 28 C.F.R. § 35.152 provide a basis for challenging both housing placements and security classifications of people with disabilities where those determinations are driven by lack of accessible spaces in lower housing classification levels.[28] The regulations also prohibit medical isolation, a form of solitary confinement.[29] Prisons and jails may not isolate incarcerated people in medical units unless they are receiving treatment. Finally, where a person is placed in a higher security classification because of lack of accessible cells, or is automatically placed in restrictive housing solely because of disability, such placement will violate the regulations where the "facilities that do not offer the same programs as the facilities where they would otherwise be housed."[30]

The integration mandate also provides a legal basis to challenge the use of solitary confinement as a behavior management tool for people with disabilities in prison.[31] Incarcerated people with disabilities can be disciplined for rule violations due to difficulties comprehending strict prison rules,[32] and often such rule violations lead to stints in solitary confinement. Solitary confinement, which is defined as twenty-two hours or more per day in a small cell with limited social and environmental stimulation, is a form of torture.[33] The use of solitary confinement as a management tool creates a vicious and tragic cycle: placing people in solitary confinement leads to detrimental effects on mental health, which compounds

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LEGAL ETHICS 525, 56–74 (2019) (arguing that jail-based competency restoration programs violate *Olmstead's* integration mandate).

28. 28 C.F.R. § 35.152(b)(2)(i) (2019).

29. 28 C.F.R. § 35.152(b)(2)(ii); *see also* Morgan, *supra* note 12, at 146.

30. 28 C.F.R. § 35.152(b)(2)(iii).

31. *See, e.g.*, Vasquez v. City. of Santa Clara, No. 5:16-cv-05436-EJD, 2017 U.S. Dist. Lexis 210479 (N.D. Cal. Dec. 20, 2017) (granting summary judgment for defendant where plaintiff claimed that he was housed in administrated segregation based on conduct linked to his psychiatric disabilities). In finding for the defendants, the court cited *Olmstead* for its holding that unjustified isolation is discrimination based on disability, but the court found that the Defendant did not isolate Vasquez because of his disability. *Id.* at **20–21. In another case, the district court cited *Olmstead* for the same proposition, but the court denied summary judgment holding that there was a genuine issue of material fact as to plaintiff's disability discrimination claim. Biselli v. Cty. of Ventura, No. CV 09-08694 CAS (Ex), 2012 U.S. Dist. LEXIS 79326 (C.D. Cal. June 4, 2012). In this case, the plaintiff's son died by suicide while in pretrial detention. The court found that the evidence showed that the plaintiff's son was placed in administrative segregation for behavior linked to his mental illness, without input from mental health staff, and despite indications that such placement was detrimental to his mental health. The Court found that there was evidence that would lead a rational jury to conclude that the plaintiff's son could have been housed in a more integrated environment without posing a security risk. *Id.* at 45.

32. *Serious Mental Illness (SMI) Prevalence in Jails and Prisons*, TREATMENT ADVOCACY CTR., (Sept. 2016), https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/smi-in-jails-and-prisons.pdf.

33 . *Solitary confinement should be banned in most cases*, UN NEWS (Oct. 18, 2011), https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says.

existing mental health issues, or creates new ones.[34] Unable to cope with the harsh conditions of prison life, or conform one's behavior to the strict rules and routines of prison without appropriate mental health supports, even those who make it out of solitary may find themselves right back.[35]

Finally, *Olmstead*'s integration mandate provides a legal basis for challenging denials of program access and pro-social opportunities within prisons and jails. Placements in isolation often accompany restrictions on program access. Where incarcerated plaintiffs with disabilities have been denied access to programs due to segregation, some plaintiffs have relied on *Olmstead*'s integration mandate to challenge those programs denials and restrictions.[36]

B. Reentry

Recent cases also rely on *Olmstead* to challenge the denial of appropriate community-based, disability-related supports and services required for reentry. One recent case, *M.G. v. Cuomo*, relies on *Olmstead* to challenge continued confinement *after* incarceration.[37] Six incarcerated people with psychiatric disabilities held in secure prisons past their release dates filed a class action lawsuit alleging that the defendants' failure to make available community-based housing and provide supportive services that the plaintiffs required upon release violated the ADA's integration mandate.[38] As a result, plaintiffs alleged that they were held in state prison past their lawful release dates (in some cases over a year).[39] The plaintiffs also alleged the defendants subjected them to solitary confinement and even revoked the approved release status for alleged prison rule violations.[40] Plaintiffs seek relief in the form of the community-based mental health housing programs where the defendants have imposed such placements as a precondition for discharge from prison, and an effective plan for community integration.[41]

In another case, *Prisoner A v. State of Vermont*, the plaintiff sued the state of Vermont, among other relevant state agencies, on the grounds that his continued

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34. *See e.g.*, Craig Haney*, The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUST. 365, 368, 374 (2018).

35. *See, e.g.*, BRAD BENNETT ET AL., S. POVERTY LAW CTR., SOLITARY CONFINEMENT: INEFFECTIVE, INHUMANE, AND WASTEFUL 9 (2019), https://www.splcenter.org/sites/default/files/com_solitary_confinement_0.pdf ("A vicious cycle emerges in which individuals who are unable to conform to behavioral expectations due to their mental illnesses are placed in solitary confinement, which contributes to a further deterioration of their mental state, which causes them to be relegated to solitary confinement for an even longer period of time.").

36. *See, e.g.*, Reaves v. Dep't of Corrs., 195 F. Supp. 3d 383 (D. Mass. 2016) (arguing prison violated ADA for, among other claims, failing to provide appropriate access to programming, socialization, entertainment opportunities, and outdoor recreation); Black v. Wigington, No. 1:12-CV-03365-RWS, 2015 U.S. Dist. LEXIS 13003 (N.D. Ga. Feb. 4, 2015). The court in *Reaves* granted the plaintiff's motion for preliminary injunction. *Reaves*, 195 F. Supp. 3d at 390. The court in *Black* granted summary judgment in part on the grounds that there was a factual dispute as to whether Black was housed in the most appropriate integrated setting or was excluded from participating in, or denied the benefits of programs, services, or activities of the jail on account of disability. *Black*, 2015 U.S. Dist. LEXIS 13003, at *43.

37. Complaint at 20, M.G. v. Cuomo, No. 1:19-cv-00639 (S.D.N.Y. Jan. 23, 2019).

38. *Id.* at 1.

39. *Id.* at 1-2.

40. *Id.* at 2.

41. *Id.* at 46–47.

incarceration violated the integration mandate, among other legal claims.[42] Even though Prisoner A had served his minimum sentence as of July 13, 2013, he continued to be held in prison because the state defendants failed to provide him with disability-related support in the community.[43] Without the support in the community, the plaintiff argued that he was at risk for "continued unnecessary and harmful institutionalization."[44] A review of the docket shows that the judge dismissed the case in June 2016 in light of private settlement between the parties.[45]

III. THE PARADOX OF THE INTEGRATION MANDATE IN PRISON

The structural harms that face incarcerated people with disabilities warrant immediate attention and advocacy. *Olmstead* provides a viable legal tool for challenging exclusion, isolation, unjustified incarceration, and failures to accommodate the needs of people with disabilities. At the same time, the integration mandate poses several tensions in the prison context. To begin with, the goal of access or inclusion for people with disabilities poses somewhat of a paradox in prison and jails. How can advocates concerned with protecting the civil and human rights of incarcerated people with disabilities appropriately advocate for inclusion into spaces that are arguable not designed to offer those protections? As I have argued elsewhere,

> [T]he goal of fully integrating people with disabilities into the harsh conditions of confinement that characterize most prisons seems imprudent. In particular, "[b]ecause of the ways that prisons are constructed, imagined, and maintained, rampant ableism and racism affect the daily lives of many prisoners." Though effective at reducing immediate or ongoing harms, legal remedies that grant program access and greater inclusion into carceral spaces structurally incapable of treating incarcerated people with disabilities humanely may be unable to meaningfully protect the lives of clients with disabilities in the long-run.[46]

Stated succinctly: can the goals of *Olmstead*, not only the integration mandate, but the underlying rationale and values, ever truly be applied in prison and jails?

A complete answer to this question requires acknowledging the limitations of the *Olmstead* decision in the prison context. As noted above, *Olmstead*'s promise of integration is limited in several ways. First, the fundamental alteration defense limits the extent to which prisons are required to address disability discrimination—even system-wide deficiencies on this basis—within their institutions. Under the Title II regulations, "[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

42. Complaint, Prisoner A v. Vermont, Civil Action No. 2:15-cv-00221-wks (D. Vt. Oct. 15, 2015).
43. *Id.* ¶ 17.
44. *Id.* at 4.
45. Civil Docket for Case, Prisoner A v. Vermont, Civil Action No. 2:15-cv-00221-wks (D. Vt. June 7, 2016).
46. Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 987 (2019) (internal citation marks omitted).

can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[47] Courts are mixed as to precisely what set of factors are sufficient to make out a fundamental alteration defense, although some courts have held that a defense based on cost alone is likely not enough.[48] On the one hand, perhaps this defense may not prove to be much of a barrier to relief, where for example integration requires granting an incarcerated person access to congregate programming.[49] On the other hand, where integration requires structural changes—perhaps shifting programs from one location to another, or reassigning housing—the defense may pose more of a barrier to relief for plaintiffs.[50]

Second, *Olmstead* does not itself provide incarcerated people with any entitlement to a *specific* standard of care.[51] In *Olmstead*, the state of Georgia argued that requiring community placements went beyond *access* to the state's "particular package of health care services," which included placements in state hospitals or existing community placements, but instead "forced [the state] to change the *content* of the package of services it provided."[52] Justice Ginsburg's majority opinion explicitly rejected any claim that the holding imposed any such standard of care:

> We do not in this opinion hold that the ADA imposes on the States a "standard of care" for whatever medical services they render, or that the ADA requires States to "provide a certain level of benefits to individuals with disabilities." . . . We do hold, however, that States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide.[53]

The lack of an affirmative standard of care weakens protections for incarcerated people with disabilities. If the ADA does not require a "certain level of benefits," then, arguably, the standard of care remains the constitutional floor. Prisons are of course required to provide medical and mental health care and provide for the basic human needs of incarcerated people.[54] Despite the valiant efforts of directly impacted communities, activists, community organizers,

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47. 28 C.F.R. § 35.130(b)(7)(i) (2019).

48. *Olmstead*, 527 U.S. at 606 n.16; Frederick L. v. Dep't of Pub. Welfare, 364 F.3d 487, 495 (3d Cir. 2004); Fisher v. Oklahoma Health Care Auth., 335 F.3d 1175 (10th Cir. 2003); Makin v. Hawaii, 114 F. Supp. 2d 1017 (D. Haw.1999).

49. *See, e.g.*, Henderson v. Thomas, 913 F. Supp. 2d 1267, 1305 (M.D. Ala. 2012) (discussing how disabled prisoners were banned from robust therapeutic community programs).

50. Onishea v. Hopper, 171 F.3d 1289, 1303–05 (11th Cir. 1999) (holding that district court did not clearly err in finding that hiring of additional guards posed an undue financial burden).

51. *See, e.g.*, Margo Schlanger, *Anti-Incarcerative Remedies for Illegal Conditions of Confinement*, 6 U. MIAMI RACE & SOC. JUST. L. REV. 1, 24 (2016) ("Under *Olmstead*, the ADA doesn't require states to provide services to people with disabilities, but it does require that when services are provided, the setting be as integrated as practicable.").

52. SAMUEL BAGENSTOS, DISABILITY RIGHTS LAW: CASES AND MATERIALS 232 (2d. ed. 2013) (emphasis in the original). Justice Thomas channeled this argument in his dissent. *See Olmstead*, 527 U.S. at 623 ("At bottom, the type of claim approved of by the majority does not concern a prohibition against certain conduct (the traditional understanding of discrimination), but rather concerns imposition of a standard of care.").

53. *Olmstead*, 527 U.S. at 603 n.14.

54. Estelle v. Gamble, 429 U.S. 97 (1976).

prisoners' rights attorneys, and good faith actors within prison systems, reports indicate widespread failures to abide by even this constitutional minimum standard.[55]

For instance, it is no secret that prison systems nation-wide are struggling to manage the medical and mental health care and accommodation needs of the incarcerated people they hold. Reports of system-wide deficiencies based on staffing shortages, delays in treatment, medical neglect, and death demonstrate the horrifying realities of prison health care—whether private or state-run.[56] So, although integration would respond to denials of health care access—for example, access to confidential visits with a health care professional, access to group-based therapeutic programs, etc.— based on disability, *Olmstead* does not require prisons to take affirmative steps to create new, or improve existing, health care systems or programs. Equality in health system access—even a failing health care system—is seemingly all that is required.

Third, the *Olmstead* court's reasons for holding that Congress had in mind a more expansive view of discrimination do not align perfectly in the prison context. The two reasons Justice Ginsburg identified for recognizing that unjustified isolation in institutions constitutes discrimination may as a criminal law policy matter weigh *against* recognition. Imprisonment following conviction of a crime itself presumes the person sentenced to incarceration is not someone who can "handle and benefit from community settings."[57] However, whether that presumption may be rebutted where the incarcerated person has been deemed eligible for work release programs or the like, which do permit community access is an open question. For incarcerated persons, a sentence of imprisonment functions as a justification that such persons are "incapable or unworthy of participating in community life."[58] The second rationale similarly seems inapposite, as imprisonment is by design focused on "diminish[ing] the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."[59]

Fourth, the direct threat defense, as in the free world, but especially in prisons and jails, poses a formidable barrier to inclusion.[60] The direct threat defense

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55. *See, e.g.*, Lippert v. Baldwin, No. 10 C 4603, 2017 U.S. Dist. LEXIS 64687 (N.D. Ill. Apr. 28, 2017) (arguing that state's prison healthcare system is grossly inadequate, poorly managed violates constitutional standards); Complaint, Parsons v. Ryan, Civ. Action No. 2:12-cv-00601 (D. Ariz. Mar. 22, 2012) (federal class action lawsuit against the Arizona Department of Corrections' medical, mental health, and dental care system). *Parsons v. Ryan* settled in October 2014. Defendants have faced civil contempt and sanctions for failures to comply with the terms of the Stipulation. *See Parsons v. Ryan* Case Update, Prison Law Office (rev'd Oct. 2019), https://prisonlaw.com/wp-content/uploads/2019/10/AZ-Case-Update-rev.-October-2019-FINAL.pdf.

56. Steve Coll, *The Jail Health-Care Crisis*, NEW YORKER (Feb. 25, 2019), https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis; Blake Ellis & Melanie Hicken, *CNN Investigates: 'Help me before it's too late,'* CNN (June 25, 2019), https://www.cnn.com/interactive/2019/06/us/jail-health-care-ccs-invs.

57. *Olmstead*, 527 U.S. at 600.

58. *Id.*

59. *Id.*

60. Dinnerstein & Wakschlag, *supra* note 10, at 952 ("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.").

permits exclusion in that it "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others."[61] To determine whether an individual poses a direct threat, the ADA requires that the public entity "make an individualized assessment."[62] Such an assessment must be "based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence[.]" [63] That said, although the Title II regulations permit public entities to "impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities," the regulations prohibit public entities from making safety requirements that are based on "mere speculation, stereotypes, or generalizations about individuals with disabilities," rather than actual safety risks.[64] To determine whether an individual poses a direct threat, public entities must assess "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."[65] Yet, looming behind every discussion of prison reform (along with any prison policy or practice) is the concern that reforms—whether in the form of greater access, fewer restrictions, or more accommodations—will compromise safety and security of prisons and jails. Unsurprisingly, security concerns will invariably be prioritized over access and accommodations, even assuming good-faith compliance with the ADA by state prison actors. This is particularly true where harmful conduct—conduct that may be caused by or linked to disability—is labeled solely as threats warranting a punitive response (solitary confinement, use of force, etc.) and not as opportunities for treatment and care.

IV. *OLMSTEAD* AS A PATHWAY TO REIMAGINING THE CARCERAL STATE?

The previous discussion identifies barriers to implementing *Olmstead*'s integration mandate in the American carceral system—at least as the carceral system is currently constituted. At the same time, *Olmstead* possesses properties that allow for a more transformative re-imaging of the rights of *all* incarcerated people, in addition to incarcerated people with disabilities. As the disability rights movement celebrates the twentieth anniversary of the *Olmstead* decision, the time could not be more appropriate for discussing *Olmstead* and its more transformative applications to the American carceral state.

In recent years, there has been a robust bipartisan debate on the merits of criminal justice reform. Although this should not suggest total consensus as to the goals of both sides of the debate, it does suggest that there is a growing momentum towards the objective of at least reforming the American punishment system. At the same time, it is important to recognize that the current movement is not simply about criminal justice reform. Abolitionists in organizations like Black Youth Project 100, INCITE!, Dignity and Power Now, and Black Lives Matter have

61. 28 C.F.R. § 35.139(a) (2019).
62. *Id.* § 35.139(b).
63. *Id.*
64. 28 C.F.R. § 35.130(h).
65. *Id.*

challenged reformers to resist proposals that expand rather than dismantle the state's power and capacity to punish, or merely reconstitute punishment or the punishment system it in other forms.[66] Abolitionists disavow the use of prisons as a "catchall solution . . . to social problems,"[67] while acknowledging the social control function served by the criminal legal system overall. They recognize that criminalization is informed and reinforced by racism, heteropatriarchy, and ableism, which in turn render certain groups more susceptible to surveillance, policing, and imprisonment. Similarly, in recent years, disability justice advocates, informed by an abolitionist praxis, have brought to the forefront issues relating to the criminal legal system and its impact on people with disabilities, particularly, low-to-no income, disabled people of color.[68] Disability justice advocates have called on mainstream disability rights organizations to take up the challenge and address the mass criminalization and mass imprisonment of people with disabilities.

The various strands of these movements help cast the potential expansions of the *Olmstead* decision in a new light. As scholars and practitioners have already recognized, *Olmstead* is a valuable legal tool for advocates in the movement to end mass incarceration.[69] But what has not yet been discussed, is how *Olmstead* provides a useful framework for not just legal reform via greater access and inclusion, but rather a more transformative re-imaging of the rights of *all* incarcerated people, not only incarcerated people with disabilities.

Olmstead requires prisons to address and confront segregation in restrictive housing as a potential site for disability discrimination. *Olmstead* provides a basis to challenge and interrogate stereotypes, stigma, and generalizations that result in the segregation of people with disabilities *within* prison. These challenges may help challenge stereotypes and stigma that lead to dehumanization of people with disabilities not only within prisons but also beyond the prison walls. For example, enforcing the integration mandate in prison will require that prisons re-evaluate the basis for exclusion or segregation. It will require them to examine the criteria for participation and whether and how those criteria align with the program's goal and institutional security. Even in prison, where, as noted, security threats are a common basis for exclusion, direct threat exceptions carved under the Title II regulations permits exclusion only where that threat is not based on mere speculation, stereotypes, or generalizations about individuals with disabilities. Though the decisions of prison officials are entitled to deference according to the constitutional law governing prisoner's rights,[70] exclusions and disqualifications made based on the direct threat defense may be challenged consistent with the Title II regulations.

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66. Daniel Berger et al., *What Abolitionists Do*, JACOBIN (Apr. 24, 2017), https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration.

67. RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, & OPPOSITION IN GLOBALIZING CALIFORNIA (Earl Lewis et al. eds., 2007).

68. *See, e.g.*, Talila Lewis & Dustin Gibson, *The Prison Strike Challenges Ableism and Defends Disability Rights*, TRUTHOUT (Sept. 5, 2018), https://truthout.org/articles/the-prison-strike-is-a-disability-rights-issue; *The Olmstead Case*, JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH LAW, http://www.bazelon.org/the-olmstead-case (last visited Mar. 17, 2020).

69. *See, e.g.*, Dinerstein & Wakschlag, *supra* note 10, at 931.

70. Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REPORTER 245, 245 (2012).

Olmstead reinforces the notion that improving the conditions for the most marginalized has the potential to improve the conditions for all. This is particularly true with respect to challenges to restrictive housing. Though early legal battles have dealt primarily with the overuse of solitary confinement for incarcerated people with psychiatric disabilities, solitary confinement is neither the only site for isolation, nor is it only affecting people with psychiatric disabilities. As noted, failure to provide access to programs in the most integrated settings—whether educational, vocational, job, or therapeutic programs—may amount to the unjustified segregation of incarcerated people with disabilities. Failure to accommodate blind and low-vision incarcerated people in facilities that permit them the same access to programs as the facilities where they would otherwise be housed may similarly violate the integration mandate. Remedies to any of the potential violations will likely require systems-level changes. Reducing the use of solitary confinement will require revamping disciplinary policies, housing and security classifications, use of force policies, mental health treatment programs, and the like. Similarly, accommodating the needs of people with disabilities–whether through providing equal access to group programs or ensuring an equitable distribution of programs across facilities will require an evaluation of the programmatic and budgetary priorities of the entire system. In short, reducing segregation and improving access to less restrictive settings in prisons for people with disabilities can lead to positive changes system wide.

Finally, *Olmstead*, and the ADA more broadly, challenge blanket policies, which drive standard operating procedures and prioritize uniformity over the individual needs and concerns of the people incarcerated. Mandatory placements in restrictive housing based on mental health classifications like "seriously mentally ill," blanket strip search policies for all, including survivors of sexual violence, broad exclusions from food job assignments for HIV-positive prisoners, and sweeping bans on participation in congregate programs, are all examples of policies and practices that have or can be challenged as violative of the ADA's prohibitions against discrimination. In this way, *Olmstead* provides a guidepost for reimagining and shifting the terms of inclusion within American prisons. Taken to its full potential, implementing *Olmstead* provides a pathway to contesting the standard and pervasive institutional logics that form the foundations of the American punishment system itself: first, command, as depicted in the rigid schedules, regimented, and repetitive routines that characterize prison life; second, compliance, with, of course, the formal and informal institutional policies; and finally, control, as in total control of bodies and minds, in the Foucauldian formulation. *Olmstead* may serve to undermine these institutional logics through focusing on individuals and requiring individualization, while at the same time centering on the question of whether the American punishment system as currently constituted can ever further that central animating purpose.