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Integration as Discrimination Against People with Disabilities? Olmstead's Test Shouldn't Word Both Ways

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COMMENTS

INTEGRATION AS DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES? *OLMSTEAD*'S TEST SHOULDN'T WORK BOTH WAYS

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I. INTRODUCTION

Joe Argueta is retired, but he manages to stay busy.¹ He likes to ride the ferry from Marin County, where he lives, to San Francisco, where he runs into city bus drivers who greet him by name.² He enjoys going on cable car rides and meeting new people.³ Every Tuesday afternoon, he goes on a date with his girlfriend; he is thinking about taking her to the beach next time.⁴ He hangs out at a senior center a couple times a week, where he makes friends with fellow retirees, and he occasionally meets up with a friend to shoot some pool.⁵

Joe worked at local restaurants for fifteen years.⁶ He got along well with his bosses and coworkers and took pride in his work.⁷ Joe knew his role was important; once, on a day off from his food preparation job at a Fresh Choice restaurant, he went on a scary amusement park ride and declared, "I can't die! Who will do the potatoes?"⁸ Joe is now contemplating coming out of retirement to work one day a week at a bookstore.⁹ He lives in his own apartment with one roommate; his roommate does some of the household chores, but Joe is in charge of taking out the garbage.¹⁰ He looks forward to his annual vacation to Los Angeles and spends holidays with his "adopted" family.¹¹

Joe has not always had such a full and typical life. As a young man, Joe lived at Sonoma State Hospital,¹² a California institution for

1. Interview with Joe Argueta, Client, and Darien Cash, Cmty. Support Facilitator, Pac. Diversified Servs., in San Rafael, Cal. (Mar. 27, 2009).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. E-mail from Lisa Giraldi, Executive Director, Pac. Diversified Servs., to author (May 12, 2009, 20:20:49 PST) (on file with author).

7. *Id.*

8. *Id.*

9. Interview with Joe Argueta and Darien Cash, *supra* note 1.

10. *Id.*

11. *Id.*

12. Sonoma State Hospital, now called Sonoma Developmental Center, continues to operate; on March 25, 2009, it was home to 655 individuals. State of California, Department of Developmental Services, Sonoma Developmental Center

people with developmental disabilities, where he felt alone and became preoccupied with doctors and nurses because he craved the attention he received from them.¹³ He was medicated with a variety of anti-psychotic drugs and was physically and psychologically abused.¹⁴ Like many who lived in institutions, he was likely sterilized.¹⁵ He received little or no education and developed behaviors such as rocking, biting himself, and throwing tantrums, as he tried to cope with the boredom, loneliness, and stress of life in the institution.¹⁶

Population, <http://www.dds.ca.gov/Sonoma/SonomaPop.cfm> (last visited Mar. 29, 2009). The facility's population has gradually declined from 1,191 on September 28, 1994. *Id.* The State of California operates four developmental centers, the total population of which has declined from 3,906 on September 28, 1994, to 2,216 on March 25, 2009. *See* State of California, Department of Developmental Services, Developmental Services Homepage, <http://www.dds.ca.gov/DevCtrs/Home.cfm> (follow hyperlinks entitled "Fairview," "Lanterman," "Porterville," and "Sonoma," then follow "Population" hyperlink) (last visited Mar. 29, 2009). A fifth California developmental center closed in March of 2009. Linda Goldston, *After More Than 120 Years, Agnews is Closing This Week*, SAN JOSE MERCURY NEWS, Mar. 24, 2009. The State of California has recently opened two smaller residential facilities designed to serve up to fifty-five and sixty-three individuals, respectively, with the goal of addressing residents' behavioral needs to prepare them to return to community settings. State of California, Department of Developmental Services, Sierra Vista, <http://www.dds.cahwnet.gov/SierraVista/Index.cfm> (follow "About the Programs" hyperlink) (last visited May 1, 2009); State of California, Department of Developmental Services, Canyon Springs, <http://www.dds.cahwnet.gov/CanyonSprings/Index.cfm> (follow "Programs" hyperlink) (last visited May 1, 2009).

13. Lisa Giraldi, *Joe's Journey: From Institutionalization/Segregation to Inclusion 3* (notes from Lisa Giraldi).

14. *Id.*

15. E-mail from Lisa Giraldi, *supra* note 6.

16. *Id.*; Giraldi, *supra* note 13. For a brief history of the institutionalization and deinstitutionalization of people with mental disabilities in the United States, see Joanne Karger, Note, "*Don't Tread on the ADA*": *Olmstead v. L.C. ex rel. Zimring and the Future of Community Integration for Individuals with Mental Disabilities*, 40 B.C. L. REV. 1221, 1224-28 (1999). It is important to acknowledge that some of the more troubling aspects of Joe's experience in the institution are not necessarily reflective of current practices in such facilities, and that some problems, such as abuse and neglect, occur in both segregated and integrated settings. *See, e.g.*, Aaron Zitner, *Davis Apology Sheds No Light on Sterilizations in California*, L.A. TIMES, Mar. 16, 2003, § 1, at 26 (forced sterilization in California ended in the 1960s); *see* Stephen A. Rosenbaum, *Representing David: When Best Practices Aren't and Natural Supports Really Are*, 11 U.C. DAVIS J. JUV. L. & POL'Y 161, 172 n.30 (2007)

In the late 1960s, Joe's life changed as he, like thousands of others with mental disabilities, moved out of the institutional setting.¹⁷ He moved from the state hospital in rural Sonoma to a group home in urban San Francisco.¹⁸ Joe's early years outside of the institution were characterized by confusion, feelings of abandonment after being moved from the only home he had ever known, and further abuse.¹⁹

Eventually, with the support of caring service providers, Joe was able to form friendships, get his first real job, and begin to overcome the behaviors he developed during his days in the institution.²⁰ Joe, who used to say "I ain't got no people,"²¹ can now list the names of important people in his life.²² Joe's experience is echoed in the lives of many other formerly institutionalized men and women,²³ both those with developmental disabilities,²⁴ like Joe, and those with mental ill-

(noting that "[n]ot everything is rosy in the community, nor everything bleak in institutions").

17. E-mail from Lisa Giraldi, *supra* note 6. For a timeline of events relevant to disability issues, including events that prompted deinstitutionalization, see Michigan Disability Rights Coalition, Disability History, <http://www.copower.org/leader/DisabilityRightsHistory.htm> (last visited Mar. 29, 2009).

18. There are some ambiguities in Joe's records; he may have been living at Agnews, another California institution for people with developmental disabilities, at the time of his deinstitutionalization. E-mail from Lisa Giraldi, *supra* note 6.

19. Giraldi, *supra* note 13, at 4.

20. *Id.* at 5. Joe receives support in his daily activities from Pacific Diversified Services, a nonprofit agency that promotes inclusion of individuals with developmental disabilities in typical community settings. See Pacific Diversified Services—Welcome!, <http://www.pdsmarin.org> (last visited Mar. 29, 2009). He lives in his own apartment with a paid roommate who provides the support he needs at home through a supported living program of Casa Allegra Community Services. See Casa Allegra Community Services, Supported Life, http://www.casaallegra.org/CACS_SL.html (last visited Mar. 29, 2009).

21. Giraldi, *supra* note 13, at 2.

22. Interview with Joe Argueta and Darien Cash, *supra* note 1.

23. See, e.g., John v. Jacobi, *Federal Power, Segregation, and Mental Disability*, 29 HOUS. L. REV. 1231, 1248-49 (2003) (citing Amici Curiae Brief of National Mental Health Consumers' Self-Help Clearinghouse, et al., in Support of Respondents at 12-15, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) (No. 98-536), 1999 WL 143940) (describing the enriched lives of formerly institutionalized individuals).

24. Stedman's Medical Dictionary defines "developmental disability" as a "loss of function brought on by prenatal and postnatal events in which the predomi-

ness, who have made the transition from life in institutions to life in the community.²⁵

In the landmark case of *Olmstead v. L.C. ex rel. Zimring*,²⁶ the United States Supreme Court held that unnecessary segregation of people with mental disabilities in institutions constitutes unlawful discrimination within the meaning of Title II of the Americans with Disabilities Act (ADA).²⁷ Specifically, the Court held that the ADA requires a state to move an individual from an institution to a more integrated setting when: 1) state treatment professionals have found that community placement is appropriate for the individual; 2) the move to a less segregated placement is “not opposed by the affected individual”; and 3) “the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.”²⁸ In the ten years since the *Olmstead* decision, much attention has focused on the third criterion and the scope of states’ defense.²⁹ Less attention has been paid to the

nant disturbance is in the acquisition of cognitive, language, motor, or social skills; e.g., mental retardation, autistic disorder, learning disorder, and attention-deficit hyperactivity disorder.” *STEDMAN’S MEDICAL DICTIONARY* 508 (Maureen Barlow Pugh ed.) (27th ed. 2000). Legal definitions vary somewhat, but California’s is representative; California limits “developmental disabilities” to those that originate before age eighteen, are expected to continue indefinitely, and constitute a “substantial disability,” which is further defined as one that significantly limits functioning in at least three of these “major life activit[ies]”: “(1) Self-care. (2) Receptive and expressive language. (3) Learning. (4) Mobility. (5) Self-direction. (6) Capacity for independent living. (7) Economic self-sufficiency.” *Lanterman Developmental Disabilities Services Act, CAL. WELF. & INST. CODE § 4512(a)(1)* (West 2009). California’s definition includes “mental retardation, cerebral palsy, epilepsy, and autism.” § 4512(a). Some states use similar definitions but require that the disability originate before age twenty-two. *See, e.g., N.Y. MENTAL HYG. LAW § 1.03* (McKinney 2009).

25. A woman with schizophrenia who spent most of her life in institutions before moving to a home in the community with appropriate support explained, “It’s better living in my house . . . because you have staff twenty-four hours a day like in the hospital but you can go to the bank, shopping, or Rite-Aid. It’s better out here. It feels like you’re in your normal home. You can’t live in the hospital all your life . . . I like having power over my own life.” *Jacobi, supra* note 23, at 1248-49.

26. *Olmstead*, 527 U.S. 581 (1999).

27. *Id.* at 587.

28. *Id.*

29. *See, e.g., Jennifer Mathis, Where Are We Five Years After Olmstead?*, *CLEARINGHOUSE REV. J. L. & POL’Y*, Jan. – Feb. 2005, at 561, 564.

first two criteria and a question that arises from them: While it is clear that *Olmstead* obligates states to deinstitutionalize individuals when the criteria are met, does it require the converse—that states continue to provide institutional care when one of the first two criteria is not met? In other words, does *Olmstead* create a “right” to continued care in a segregated environment such as an institution³⁰ when the individual with a mental disability, or more often, that individual’s parents or other family members, oppose the move to a more integrated community placement?

While some writers have prematurely concluded that *Olmstead* clearly does not create such a right,³¹ the case law is conflicting. This comment asserts that 1) the current state of the case law is sufficiently unsettled that more litigation will result, hampering states’ already slow progress in complying with *Olmstead*’s integration mandate; 2) a proper interpretation of *Olmstead* in light of the ADA’s overall purpose ultimately leads to the conclusion that there is no “right” to continued care in a segregated setting; 3) the implications of a right or lack of a right to continued services in segregated settings extend beyond the deinstitutionalization context, making the result more important; and 4) in light of the state of the law and its likely direction, professional advocates for individuals with disabilities face special challenges in serving the needs of their individual clients as well as the larger goals of the disability rights movement.

Part II summarizes *Olmstead*, focusing on the reasoning within the justices’ opinions that sheds the most light on whether the Court intended to impose on states an obligation to provide continued institutional care under specified circumstances. Part III summarizes the

30. Note that *Olmstead* is, in theory, implicated not only when deciding whether an individual has a right to be moved from a traditional institution, but also when deciding whether an individual has a right to be moved from one community setting to another. See *infra* Part IV. The unnecessary segregation barred by the ADA can occur in varying degrees and in a variety of settings. See *infra* Part IV.

31. Carlos A. Ball, *Looking for Theory in all the Right Places: Feminist and Communitarian Elements of Disability Discrimination Law*, 66 OHIO ST. L.J. 105, 162 n.287 (2002) (stating that “[c]ourts have on the whole refused to read *Olmstead* as requiring the continued institutionalization of individuals with disabilities”); Jennifer Mathis, *Community Integration of Individuals with Disabilities: An Update on *Olmstead* Litigation*, 25 MENTAL & PHYSICAL DISABILITY L. REP. 158, 160 (2001) (stating that courts have “uniformly rejected” the argument that *Olmstead* creates a right to remain in an institution).

conflicting cases addressing this question, describing both the current unsettled state of the law and the direction it is likely to take. Part IV describes the potential scope of the *Olmstead* decision; this background is essential to a full appreciation of the ramifications of a “right” or lack of a right to continued care in a more segregated setting. Part V focuses on the implications of the current state and likely direction of the law for disability rights advocates.

II. *OLMSTEAD*

Plaintiffs L.C. and E.W.³² are women with mental retardation who also have mental health diagnoses; L.C. has schizophrenia and E.W. has a personality disorder.³³ Both women remained in a Georgia institution even after the doctors responsible for their treatment determined that their needs could be met in community-based treatment programs.³⁴ Plaintiff L.C. brought a suit, in which E.W. intervened, in the Northern District of Georgia.³⁵ The suit alleged that the state’s failure

32. For background on the lives of L.C. and E.W., see Loretta Williams, *Long Term Care After Olmstead v. L.C.*, 17 J. CONTEMP. HEALTH L. & POL’Y 205, 222-23 (2000); Karger, *supra* note 16, at 1246 n.234.

33. *Olmstead*, 527 U.S. at 593. The fact that the two plaintiffs had both developmental disabilities and mental health diagnoses may explain the complete absence of any discussion of the distinctions between the two populations in the *Olmstead* decision. See Karger, *supra* note 16, at 1223 n.12 (noting that the term “individuals with mental disabilities” is used throughout the opinion without distinguishing between developmental and psychiatric disabilities). The deinstitutionalization of those with mental illness is somewhat more controversial as individuals with mental illness often fail to receive adequate services and may become homeless or be incarcerated after their discharge from institutions. See Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1436 (2007) (asserting that “deinstitutionalization has not been an overwhelming success” but acknowledging that it has been “generally more successful” for individuals with developmental disabilities than those with mental illness); Karger, *supra* note 16, at 1226-27; Tori DeAngelis, *Beyond Deinstitutionalization: Reintegration*, MONITOR ON PSYCHOLOGY, Jan. 2007, at 28 (interview with Robert Bernstein of the Bazelon Center for Mental Health Law, who attributes the greater difficulties in the deinstitutionalization of those with mental illness to poor implementation of deinstitutionalization plans, fewer resources, and resistance by mental health professionals).

34. *Olmstead*, 527 U.S. at 593.

35. *Id.*

to move the women from the institution to community-based treatment programs once their doctors determined such a move was appropriate violated Title II of the ADA, which states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”³⁶

In reaching the conclusion that states’ unnecessary segregation of individuals with disabilities in institutions constitutes discrimination within the meaning of Title II, the Court looked to the congressional findings in the opening provisions of the ADA, which summarize the problems the ADA was meant to address:

- (2) 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;
- (3) discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization . . . ;
- (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion . . . [and] segregation³⁷

The Court expressly found that these provisions apply to and should inform the interpretation of the entire Act,³⁸ a notion rejected by Justice Thomas in his dissent.³⁹

36. Americans with Disabilities Act, 42 U.S.C. § 12132 (2009).

37. 42 U.S.C. §§ 12101 (a)(2), (3), (5) (2009); *Olmstead*, 527 U.S. at 588-89.

38. *Olmstead*, 527 U.S. at 588 (stating that the opening provisions are “applicable to the statute in all its parts”).

39. *Id.* at 616-22 (1999) (Thomas, J., dissenting). Justice Thomas reasoned that the opening provisions did not dictate the definition of the word “discrimination” for the purposes of Title II. *Id.* He would have held that unnecessary segregation does not constitute discrimination absent evidence that the state has treated a similarly situated group more favorably, citing the “traditional” definition of discrimination applied in interpreting other anti-discrimination statutes. *Id.* Justice Kennedy was in partial agreement with Justice Thomas in that he did not read the ADA’s opening provisions to “displace” a traditional definition of discrimination, but rather to emphasize that isolation and segregation of people with disabilities were frequent manifestations of discrimination in the traditional sense. *Id.* at 613-14 (Kennedy, J., concurring). Justice Kennedy was not convinced that the plaintiffs had demonstrated

In addition to incorporating the ADA's congressional finding into its interpretation of Title II, the Court considered two regulations promulgated by the Attorney General pursuant to Title II. The first, known as the "integration regulation,"⁴⁰ requires public entities to provide services in the "most integrated"⁴¹ setting appropriate to the

that a similarly situated class of individuals was given preferential treatment, but thought they might be able to make such a showing and should have the opportunity to do so on remand. *Id.* at 614-15. For summaries of the drastically different interpretations of Title II by Justices Ginsburg and Thomas, see Jacobi, *supra* note 23, at 1238-41; Karger, *supra* note 16, at 1250-51. One writer has reasoned that the ADA's definition of discrimination as interpreted in *Olmstead* embraces communitarian theory by emphasizing the value of participation in community life, whereas a traditional definition of discrimination uses a "formalistic approach to equality" in keeping with liberal theory. Ball, *supra* note 31, at 153-56. John Jacobi describes a "traditional" definition of discrimination as "trivializing the wrongs done" to individuals with mental disabilities who are unnecessarily segregated in institutions. Jacobi, *supra* note 23, at 1246-47.

40. *Olmstead*, 527 U.S. at 592, 596.

41. *Id.* at 597. The principle that services for people with disabilities should be provided in the most integrated, or "least restrictive" setting possible has long permeated disability rights law. *See, e.g.*, Colker, *supra* note 33, at 1427-30, 1441 (summarizing and criticizing the history of the "integration presumption" in special education law, and summarizing the origins of the "least restrictive alternative" concept in constitutional case law); Jacobi, *supra* note 23, at 1250 (describing the application of the "least restrictive alternative" concept in the context of involuntary civil commitment and later extensions to other aspects of mental disability law); Karger, *supra* note 16, at 1236-37 (stating that "[t]he phrase 'least restrictive' has played a major role in disability litigation during the past twenty-five years"). Although the term "least restrictive" is historically significant and is a key term in current special education law, I do not use it in this comment because it is not precisely synonymous with "most integrated," the term used in the integration regulation. *Compare* 28 C.F.R. § 35.130(d) (2009) *with* 20 U.S.C. § 1412(5) (2009). "Least restrictive" can be used to refer to less intrusive or less drastic measures that are not necessarily more integrated. The term "most integrated," in addition to being more specific, casts the problem in a positive light, requiring states to examine how individuals can become more integrated into their communities rather than simply asking states to refrain from depriving individuals of liberty or dignity unnecessarily. For a discussion of the history of the concept of "least restrictive alternative" as it relates to involuntary commitment of individuals with mental illness, see 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, 214-18 (2000).

needs of qualified individuals with disabilities.”⁴² The second, the “reasonable-modifications regulation,” provides that a public entity must make “reasonable modifications” to its policies and procedures in order to avoid discriminating against individuals on the basis of disability.⁴³ The public entity, however, is not required to make modifications that would “fundamentally alter the nature of the service, program, or activity.”⁴⁴

In granting partial summary judgment for the plaintiffs, the district court did not allow for a cost-based defense for the State of Georgia; the court treated unnecessary institutionalization as per se discrimination.⁴⁵ In declaring a per se rule, the district court rejected the State’s argument that being required to immediately deinstitutionalize an individual whose doctor had deemed the move appropriate would “fundamentally alter” the State’s program.⁴⁶ The State argued that, even though community treatment is less expensive per capita than institutional treatment,⁴⁷ the cost of providing community treatment while continuing to operate institutions (necessary to meet the needs of those for whom community treatment is not appropriate), would require the state to fundamentally alter its programs, sacrificing the well-being of others with mental disabilities to avoid “discrimination” against those who were entitled to immediate community treatment.⁴⁸

The Court of Appeals for the Eleventh Circuit, by contrast, did acknowledge that a state’s duty to provide community treatment was “not absolute,” but found that a cost defense is appropriate in only the “most limited of circumstances,” and remanded the case for consideration of whether the additional cost of treating the two plaintiffs in the

42. 28 C.F.R. § 35.130(d) (2009). For a critique of the regulation and of courts as imposing an integration requirement not clearly intended by Congress, see Colker, *supra* note 33, at 1443-44.

43. 28 C.F.R. § 35.130(b)(7) (2009).

44. *Id.*

45. *Olmstead*, 527 U.S. at 595.

46. *Id.* at 595-96.

47. For an argument that integration efforts are sometimes motivated by potential cost savings rather than the well-being of individuals with disabilities, see Colker, *supra* note 33, at 1423 & n.27, 1428. *But see* Mathis, *supra* note 29, at 580 (noting that post-*Olmstead*, states have myopically viewed the development of community-based services as a financial burden rather than a cost-saving measure).

48. *Olmstead*, 527 U.S. at 594-95.

community was “unreasonable given the demands of the State’s mental health budget.”⁴⁹

The Supreme Court rejected the Eleventh Circuit’s version of a cost defense. A plurality portion of Justice Ginsberg’s opinion reasoned that it would be virtually no defense at all for states since the cost of providing services in the community for one or two plaintiffs would always seem reasonable compared to a state’s entire budget for mental health services.⁵⁰ The Court held instead that a state may invoke the “fundamental alteration” defense by showing that “immediate relief to the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities,”⁵¹ and the need to “administer services with an even hand.”⁵²

In developing its three-pronged test, the United States Supreme Court handed the disability community what has been viewed as a substantial victory; it affirmed that unjustified segregation of people with disabilities is unlawful discrimination.⁵³ But the Court also strengthened states’ cost-based defense, drawing criticism.⁵⁴ Some

49. *Id.* at 595-96.

50. *Id.* at 603-04 (plurality opinion).

51. *Id.* at 604.

52. *Id.* at 587. The fundamental alteration defense, as elaborated in the plurality portion of Justice Ginsberg’s opinion, is summarized in Karger, *supra* note 16, at 1248-49.

53. Rosemary L. Bauman, Note, *Disability Law, Needless Institutionalization of Individuals with Mental Disabilities as Discrimination Under the ADA—Olmstead v. L.C.*, 30 N.M. L. REV. 287, 393 (2000) (noting that *Olmstead*’s acceptance of a broader definition of discrimination is significant given courts’ earlier narrow construction of various aspects of the ADA); Karger, *supra* note 16, at 1249-50 (stating, in 1999, that “*Olmstead* offers great promise” and is “an important beginning of the realization of community integration”); Robert F. Rich et. al., *Critical Legal and Policy Issues for People with Disabilities*, 6 DEPAUL J. HEALTH CARE L. 1, 32 (2002) (calling *Olmstead* “a victory . . . in [the] quest for equal access to adequate and appropriate public services”).

54. RUTH COLKER, THE DISABILITY PENDULUM 130-31 (2005) (criticizing the *Olmstead* decision as improperly creating a cost defense where Congress did not intend to allow one); Karger, *supra* note 16, at 1240 (stating that “[o]ne commentator believes that Congress instructed the Department of Justice to omit the undue hardship provision with respect to cost” (citing Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 430-31 (1991)));

feared that the defense would “swallow the rule” of *Olmstead*,⁵⁵ a prediction that has not come to fruition.⁵⁶ The Court’s holding is the following:

States are required to provide community-based treatment for persons with mental disabilities when the State’s treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.⁵⁷

It is unlikely that the Court anticipated the use of its three-pronged test to argue that the ADA ever *required* states to keep anyone in an institution. Justice Thomas, in his dissent, hinted at possible problems of this nature when he accused the majority of imposing “a standard of care”⁵⁸ rather than banning discrimination. Although the Court explicitly stated that it was not creating a standard of care,⁵⁹ the language the Justices used throughout their opinions, which was intended to acknowledge the difficult position states find themselves in and express respect for states’ decision-making, is nevertheless useful to those who interpret *Olmstead* as imposing the unintended duty on states to keep individuals in institutions when one of the three criteria is not met.

The majority emphasized that “nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings,”⁶⁰ ex-

Karger, *supra* note 16, at 1251 (calling the third prong of the holding the “greatest obstacle to the goal of community integration”).

55. Bauman, *supra* note 53, at 303. See Karger, *supra* note 16, at 1223, 1258-64 (describing the holding’s third prong as “disappointing” and sharply criticizing the Supreme Court’s formulation of the fundamental alteration defense as providing states with too much freedom to avoid community integration).

56. See Mathis, *supra* note 29, at 564-72 (summarizing the various ways courts have limited the fundamental alteration defense).

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

58. *Id.* at 623 (Thomas, J., dissenting).

59. *Id.* at 604 n.14 (majority opinion).

60. *Id.* at 601. The National Council on Disability, in a 2003 report on *Olmstead* issues, explained that the argument in favor of a right to continued institutional care “relies on the dicta” quoted here. NATIONAL COUNCIL ON DISABILITY,

plaining that the ADA only requires that “qualified” individuals, defined by the ADA as those who meet “the essential eligibility requirements”⁶¹ for a particular service, be deinstitutionalized.⁶² Justice Ginsberg stated in the plurality portion of her opinion that for some individuals, “no placement outside the institution may ever be appropriate.”⁶³ This language is clearly intended to *limit*, not expand, what the ADA requires of states. Justice Kennedy expressed concerns about the consequences of deinstitutionalization in his concurrence for the purpose of emphasizing that states must not be *forced* to deinstitutionalize people for whom such changes are not appropriate. However, Justice Kennedy’s expressions of concern would, at least when taken out of context, reinforce the view that states *may* not deinstitutionalize certain individuals. Justice Kennedy pointed out that “the depopulation of state mental hospitals has its dark side”⁶⁴ for those with mental illness who often face homelessness and lack of treatment in community settings. He stressed that it would be “tragic” to “drive those in need of medical care and treatment out of appropriate care into settings with too little assistance and supervision” and implored courts to “apply today’s decision with greatest deference to the medical decisions of . . . treating physicians.”⁶⁵

Perhaps more problematic to a proper interpretation of the three-pronged test and more useful to those arguing that *Olmstead* obligates states to continue institutional care when the three criteria are not met is the Court’s discussion that there is no “federal requirement that

OLMSTEAD: RECLAIMING INSTITUTIONALIZED LIVES (2003), available at <http://www.ncd.gov/newsroom/publications/2003/reclaimlives.htm#ChapIII> (under heading 2) [hereinafter RECLAIMING INSTITUTIONALIZED LIVES].

61. 42 U.S.C. § 12131(2) (2009).

62. *Olmstead*, 527 U.S. at 602.

63. *Id.* at 605 (plurality opinion).

64. *Id.* at 609-10 (Kennedy, J. concurring). Justice Kennedy emphasized the results of deinstitutionalization for individuals with mental illness, who often stop taking medication outside of the institutional setting and whose ability to function deteriorates as a result. *Id.* The phenomenon he describes is a significant factor in making deinstitutionalization more controversial and problematic for those with mental illness than for those with developmental disabilities. See *Olmstead*, 527 U.S. at 593; see also Karger, *supra* note 16, at 1256 (describing Justice Kennedy’s “fear” as arising from the “negative connotations” surrounding deinstitutionalization).

65. *Olmstead*, 527 U.S. at 610 (Kennedy, J., concurring).

community-based treatment be imposed on patients who do not desire it.”⁶⁶

The second prong of the *Olmstead* test is properly interpreted to mean that “[i]f an individual opposes community placement, the ADA does not *require* a public entity to accommodate the individual by transferring him or her into the community.”⁶⁷ The Court cites for this proposition a Title II regulation that states: “Nothing in this part shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept”⁶⁸ and the preamble to that regulation, which states that “persons with disabilities must be provided the option of declining to accept a particular accommodation.”⁶⁹

The Court’s purpose for citing the regulation and preamble appears harmless; the Court appears to be trying to emphasize, again, that states will not be treated as discriminating for failure to deinstitutionalize a person who opposes the move. But by stating that there is “no federal requirement that community-based treatment be imposed on patients who do not desire it,”⁷⁰ and then citing the regulation and preamble, the Court appears to reinforce its proposition by pointing to a *contrary* “federal requirement.” In other words, the Court appears to be suggesting not only that states are not required to deinstitutionalize someone who opposes the move, but that they are, on the contrary, required to provide such a person the option of declining community placement in favor of institutional care. The language of the preamble, quoted out of context as it is in the opinion, appears to leave room for the argument that regulations implementing Title II create an affirmative duty for states to “provide[] the option”⁷¹ of continued institutionalization when a person “chooses not to accept”⁷² community treatment. While the use of the words “must be provided” suggests an affirmative duty, a closer reading of the preamble reveals that it primarily envisions situations in which a public agency offers a person

66. *Id.*

67. Mathis, *supra* note 31, at 158 (emphasis added).

68. 28 C.F.R. § 35.130(e)(1) (2009).

69. 28 C.F.R. pt. 35, app. A (2009).

70. *Olmstead*, 527 U.S. at 602.

71. 28 C.F.R. pt. 35, app. A (2009).

72. 28 C.F.R. § 35.130(e)(1) (2009).

with a disability something special or separate as an accommodation, but the person prefers to instead participate in the services provided to the general public. This language is most likely meant to guard against the creation of new forms of segregation under the guise of “accommodation,” not to entitle people to continued segregation.⁷³

Even if the regulation obligates states to provide individuals with disabilities the “option” of declining any particular community placement offered to them, it does not necessarily follow that the state has the additional duty to continue to provide institutional care. At most, the regulation, as expanded upon in the preamble, emphasizes that people with disabilities may “take or leave” state services, not that the state must continue to provide services in a segregated form.

The ease of slipping into an incorrect interpretation of *Olmstead* is demonstrated by the discussion of the “individual does not oppose” prong in a case note published shortly after the *Olmstead* decision was issued.⁷⁴ In “*Don’t Tread on the ADA*”: *Olmstead v. L.C. ex rel. Zimring and the Future of Community Integration for Individuals with Mental Disabilities*, Joanna Karger stated that “[t]he second condition included as part of the Court’s holding is that the affected individual *must* not oppose the community placement.”⁷⁵ The sentence suggests that if the “condition” is not met, a state *must not* deinstitutionalize the individual in question, when it would be more accurate to say that if a person opposes the move, a state *may* keep the person in an institution without “discriminating.” Karger’s discussion focuses on the significance of the terms “affected individual” and “does not oppose” rather than on whether the prong creates a condition under which a state *must not* deinstitutionalize a person. The use of the word “must” ap-

73. The commentary in the preamble appears to be an attempt to guard against “accommodations” that segregate people with disabilities and frustrate the ADA’s goals:

[T]he public entity must administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities, i.e., in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible, and that persons with disabilities must be provided the option of declining to accept a particular accommodation.

28 C.F.R. pt. 35, app. A.

74. Karger, *supra* note 16, at 1254-55.

75. *Id.* at 1254 (emphasis added).

pears to be inadvertent; a court would later make the same mistake by assuming that a state may not deinstitutionalize a person who opposes the move.⁷⁶

Karger's thorough note anticipated many issues that would arise from the *Olmstead* decision.⁷⁷ It did not, however, anticipate the question of whether the three-pronged test creates a "right" to institutional care, demonstrating how easily *Olmstead's* test can inadvertently be reversed and wrongly interpreted to set forth not only circumstances under which continued institutionalization is discrimination, but also circumstances under which moving someone out of an institution is discrimination.

The confusion that is created in *Olmstead* by language that appears to be supportive of the argument for an ADA-based right to institutional care flows from the Court's discussion of hypothetical conditions beyond the facts of the case. It was undisputed that the *Olmstead* plaintiffs' doctors had determined that community placement was appropriate for the plaintiffs, and that they not only were unopposed to community treatment, but wanted it badly enough to sue.⁷⁸ The court, in belaboring the *limits*⁷⁹ of its holding out of an abundance of caution, inadvertently fueled an unintended interpretation of the holding. The question of what *Olmstead* means when the three criteria are not satisfied would play out in future cases, but with no clearer results.

III. THE CONFLICTING CASE LAW REGARDING STATES' OBLIGATION TO PROVIDE CONTINUED CARE IN SEGREGATED SETTINGS

Courts have offered a confused assortment of responses to the argument that Title II of the ADA obligates states to continue to provide

76. See *infra* Part III.C.

77. See, e.g., Karger, *supra* note 16, at 1252 (exploring the possible ramifications of the first prong when an individual disagrees with the state's treatment professionals about proper placement); *id.* at 1255 (asking whether the term "affected individual" in the second prong might be interpreted to refer to a parent or guardian rather than the individual with a disability); *id.* at 1255-56 (discussing the words "not oppose" in the second prong as creating an "easier condition" than consent).

78. *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 602-03 (1999).

79. See RECLAIMING INSTITUTIONALIZED LIVES, *supra* note 60 (citing *Black v. Dep't of Mental Health*, 83 Cal. App. 4th 739 (2000)).

institutional care when *Olmstead*'s three criteria—treatment professionals' decision that community care is appropriate, the individual's lack of objection, and the state's ability to reasonably accommodate the placement⁸⁰—are not met. The relevant cases, considered below in chronological order, all involve efforts by families to prevent their disabled relatives from being moved into community settings in the midst of either states' efforts to comply with *Olmstead* by moving people out of institutions, or other families' efforts to compel states to provide community care pursuant to *Olmstead*.

A. Richard C.: *The Federal Courts' First Encounter
with the Question*

Just three months⁸¹ after the Supreme Court's decision in *Olmstead*, a United States district court took up the question in an auspicious but uncertain decision. A number of residents of a Pennsylvania institution called Western Center filed a class action lawsuit against Pennsylvania's Secretary of the Department of Public Welfare, and the parties reached a settlement agreement.⁸² Four residents of the Center and their "legal guardians and/or family members" filed two motions to intervene as of right,⁸³ in part on the basis that moving residents out of the Center (which the Department of Public Welfare had closed) despite their objections violated *Olmstead*.⁸⁴ In rejecting the argument that *Olmstead* obligated states to provide continued institutional care,⁸⁵ the district court emphasized that the Supreme Court in

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

81. *Olmstead* was decided June 22, 1999; Richard C. *ex rel.* Kathy B. v. Houstoun, 196 F.R.D. 288, 289 (W.D. Pa. 1999) was decided September 29, 1999.

82. Richard C. *ex rel.* Kathy B. v. Houstoun, 196 F.R.D. 288, 289 (W.D. Pa. 1999), *aff'd sub nom.* Richard C. v. Snider, 229 F.3d 1139 (3d Cir. 2000).

83. *Richard C.*, 196 F.R.D. at 289.

84. *Id.* at 290-91.

85. One writer described the case as holding "that the state could choose to place a person with a disability in a less restrictive setting against the will of the person with the disability" and called the case "potentially troubling precedent" because institutional care is generally more expensive than community care. Rich, *supra* note 53, at 33. This concern about deinstitutionalization as a cost-saving measure rather than one motivated by concern for the well-being of individuals served is echoed in Ruth Colker's article. *See supra* note 54.

Olmstead decided when the ADA *requires* states to move people to *more* integrated settings in order to avoid discriminating against those with disabilities by segregating them without justification.⁸⁶

While the Supreme Court acknowledged that states needed “lee-way” to accommodate those who might need to remain in institutional care and was careful not to “impel States to phase out institutions,” the court in *Richard C.* emphasized that it “does not logically follow that institutionalization is required if any one of the three *Olmstead* criteria is not met.”⁸⁷ In other words, the case focused on the big picture—that Title II of the ADA, by its nature an anti-discrimination law, bans unjustified segregation, a form of discrimination. It does not convert any possible placement decision that is arguably less than ideal, whether it is to a more integrated or less integrated setting, into a form of discrimination.⁸⁸ In the words of the Supreme Court, *Olmstead*, in interpreting Title II, “does not create a standard of care,” but rather holds “that States must adhere to the ADA’s nondiscrimination requirement with regard to the services they in fact provide.”⁸⁹

While the court in *Richard C.* took the time to address the argument that *Olmstead* had been violated, it did not address the movants’ other grounds for intervening and instead denied their motions as untimely.⁹⁰ Therefore, while the case seemed to reach a sound conclusion about whether *Olmstead* ever obligates states to continue institutional care, it did so in dicta. A California state court would soon address the issue and reach a compatible conclusion.

B. Black: A Sound State Court Decision in a Tragic Case

The plaintiff in *Black* was the brother and conservator of Craig Black, a man with a mental illness who was moved out of a California state hospital to a privately owned mental healthcare facility.⁹¹ While living in the private facility, Craig Black was given incorrect dosages

86. *Richard C.*, 196 F.R.D. at 292. See Rich, *supra* note 53, at 33.

87. *Richard C.*, 196 F.R.D. at 292.

88. Mathis, *supra* note 31, at 160.

89. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603 n.14 (1999).

90. *Richard C.*, 196 F.R.D. at 295-96.

91. *Black v. Dep’t of Mental Health*, 83 Cal. App. 4th 739, 743 (2000).

of lithium and died as a result.⁹² The plaintiff sued the State Department of Mental Health in California state court. Plaintiff alleged that the state violated the ADA when it placed Craig in the private facility.⁹³ Plaintiff did not allege that his brother was improperly moved to a *more* integrated setting, but rather that the private facility was a *less* integrated setting “because [it] was not a facility that could meet [decendent’s] treatment needs.”⁹⁴ While plaintiff argued the reverse of what is argued in the other cases examined here, the result is nevertheless consistent with *Richard C.* in finding that *Olmstead* did not create a standard of care which requires a state to keep a person in an institution when one or more of the three criteria is not met. Plaintiff alleged that *Olmstead*’s first criterion was not satisfied because Craig was not moved to the private facility on the basis of an assessment that it was appropriate for him.⁹⁵ Instead, the placement was based upon “what was available,” as the hospital where he had been receiving treatment was closing.⁹⁶

Black followed in *Richard C.*’s footsteps in holding that the ADA does not create a standard of care;⁹⁷ the court declared, “[W]e do not believe [*Olmstead*] was either holding or signaling that a medically inappropriate transfer from institutionalization to community placement is, by itself, a violation of the integration mandate.”⁹⁸ As the National Council on Disability explained, “The fact that the state may

92. *Id.*

93. *Id.* at 744.

94. *Id.* at 746-47.

95. *Id.* at 754.

96. *Id.* at 746-47; RECLAIMING INSTITUTIONALIZED LIVES, *supra* note 60.

97. In attempting to forecast the conclusion courts would reach about whether deinstitutionalization can constitute discrimination under the ADA, writers have taken note of a federal district court’s order in *Richard S. v. Department of Developmental Services*, a case in which several residents of a California developmental center sought to prevent individuals from being discharged from the center. A.B.A., *Community-Home-Based Services*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 890, 891 (2000). The court ruled that the “premature discharge” of developmental center residents “may be a bad medical decision or poor policy, [but] it does not constitute disability-based discrimination.” *Id.*; *Richard S. v. Dep’t of Developmental Servs.*, No. SA CV 97-219-GLT (ANX) (C.D. Cal. Mar. 27, 2000). See Mathis, *supra* note 31, at 160; RECLAIMING INSTITUTIONALIZED LIVES, *supra* note 60.

98. *Black v. Dep’t of Mental Health*, 83 Cal. App. 4th 739, 755 (2000).

not, in a particular case, have a duty to transfer an institutional resident to the community [because one of the three prongs is not satisfied] does not translate into an affirmative duty to keep him or her in an institution.”⁹⁹ In other words, the Supreme Court, in creating the three-pronged test, was “merely identifying the outer limits of a state’s duties under the integration mandate, not establishing new ones.”¹⁰⁰

Black, in addition to reinforcing that *Olmstead*’s test does not create conditions under which integration violates the ADA, also serves to illustrate two important points. First, to say that the ADA does not obligate states to continue to provide care to people with mental disabilities in less integrated settings is not to say that there is not or should not be any legal recourse available when states conduct themselves irresponsibly in serving people with mental disabilities, whether in moving people to more integrated placements or otherwise. The court in *Black* pointed out that if the state had misled the plaintiff about the kind of facility where his brother would be placed, as the plaintiff alleged, the court did “not condone” such conduct and that it “may be actionable under other theories.”¹⁰¹ In a regulation entitled “Relationship to Other Laws”¹⁰² and in the preamble to the Title II regulations, the Attorney General made clear that state tort claims “are not preempted by the ADA.”¹⁰³ For integration to be optimally effective, it must be provided with the proper level of support to meet each individual’s needs, and the ADA does not remove any existing legal responsibility states may have to provide adequate care.

However, it is important not to confuse the conviction that states ought to provide care in a responsible fashion with a belief that the ADA, whose purpose is to define and proscribe *discrimination*, ought to provide a remedy for flawed, but not discriminatory, decisions by states in the care of individuals with disabilities.

99. RECLAIMING INSTITUTIONALIZED LIVES, *supra* note 60, at ch. 3 § 2(ii).

100. *Id.* (quoting *Black*, 83 Cal. App. 4th at 755).

101. *Black*, 83 Cal. App. 4th at 752 n.10.

102. 28 C.F.R. § 35.103 (2009) (stating that “[t]his part does not invalidate or limit the remedies, rights, and procedures of any other Federal laws, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them”).

103. 28 C.F.R. pt. 35, app. A (2009).

Second, it is clear that parents' and other relatives' fears about what might happen if their loved ones with disabilities are moved to a less restrictive setting are sometimes well-founded. As Joe's story demonstrates, the horrors of abuse and neglect can happen in institutional and community settings alike, and the transition to community living is not always smooth.¹⁰⁴ It is important to acknowledge this fact if family members are to be allies in efforts to secure high-quality, more integrated services for individuals with disabilities.¹⁰⁵

While the notion that the ADA and *Olmstead* do not require states to provide continued institutional care seemed to gain momentum in *Richard C. and Black*, a Pennsylvania court would soon reach a contrary conclusion.

C. In re Easley: *Losing Sight of the ADA's Purpose*

The Pennsylvania Department of Public Welfare, as part of its effort to comply with *Olmstead's* integration mandate, petitioned the court to have seventy-two-year-old Ruth Easley, who had a developmental disability and had lived in a state institution for most of her life, committed to a community group home over her guardian's objections.¹⁰⁶ A state appellate court found that to deinstitutionalize Ms. Easley over her guardian's objections was tantamount to doing so over her own objections, and that the second criterion of *Olmstead* was therefore not satisfied.¹⁰⁷

With no discussion of the contrary argument, the court assumed that *Olmstead* obligated states to keep individuals in institutions when the three criteria are not met.¹⁰⁸ To justify its holding that the state could not move Ms. Easley to a group home over her guardian's objections, the court not only ignored the ADA's overall purpose but also

104. See *supra* pp. 178-79 and note 16.

105. Stephen Rosenbaum, a disability rights attorney and parent of an individual with a disability, cautions against an overzealous focus on integration to the exclusion of other factors in decisions about how and where individuals should receive services. Rosenbaum, *supra* note 16, at 166-69, 171-79. He also warns attorneys not to allow their focus on integration to breed mistrust of or hostility toward parents of individuals with disabilities. *Id.*

106. *In re Easley*, 771 A.2d 844, 846-47 (Pa. Commw. Ct. 2001).

107. *Id.* at 853.

108. *Id.*

resorted to two lines of reasoning that further call its decision into question.

First, the court resorted to describing Ms. Easley's disability in catastrophic and demeaning terms. The court listed her levels of functioning in terms of "mental age,"¹⁰⁹ a concept that perpetuates inappropriate stereotypes about people with cognitive disabilities and has historically been used to exclude them from settings that are chronologically age-appropriate.¹¹⁰ The court described Ms. Easley's "mental age" as, in various skill areas, "one year, ten months," "two years, eight months," "one year, six months," and "two years, one month."¹¹¹ Ironically, the court then listed Ms. Easley's hobbies, all of which are age-appropriate for a seventy-two-year old woman: "looking at the pictures in magazines, watching television, and going to church."¹¹²

In addition to speaking of Ms. Easley's "mental age," the court described her "debilitating" medical problems, including a hernia, "hypercholesterolemia" (high blood pressure), "seborrhea" (dermatitis, a common skin condition), and "asteorosis" (it appears that the court meant "osteoporosis").¹¹³ The court emphasized that Ms. Easley required medications, including "skin lotion."¹¹⁴ The apparent purpose of the description of Ms. Easley's disability and health concerns was to emphasize how inappropriate community placement was for her. Many seventy-two-year-olds without cognitive disabilities likely list hernias, high blood pressure, osteoporosis, or skin rashes among the conditions they live with day to day. Such routine conditions do not make evident an individual's need for commitment to a state institution. While the court's description of Ms. Easley seems almost comical, this kind of reasoning—which focuses on what is "wrong" with a person—has traditionally been used to justify placing individuals with

109. *Id.* at 846.

110. See Samuel Flaks, Note, *Nathan Isaacs' IDEIA: Legal Evolution and Parental Pro Se Representation of Students with Disabilities*, 46 HARV. J. ON LEGIS. 275, 284 (2009) (describing a statute that allowed schools to exclude children who had not achieved a "mental age" of five years, and the reforms in the law inspired by the statute).

111. *Easley*, 771 A.2d at 846.

112. *Id.* at 846-47.

113. *Id.*

114. *Id.* at 846.

disabilities in unnecessarily segregated settings. It is just this sort of flimsy justification that the ADA is meant to address.¹¹⁵

Second, and more significantly, the court converted the “individual does not object” prong of the *Olmstead* test into a requirement of legally cognizable “consent.”¹¹⁶ This strained interpretation of the ADA ignores the ADA’s preference for more integrated settings, which is reflected in the careful choice of the words “does not object.” The ADA treats more integrated settings as the default choice, which states may deviate from if an individual with a disability objects to such a placement. The court, by requiring “consent,” converts the most segregated setting possible into the preferred or default setting and creates a high threshold for allowing a person to be moved out of such a setting. Under *Easley*’s ADA interpretation, individuals with significant disabilities could easily be deprived of the opportunity to experience life in more integrated settings. While parents’ and family members’ concerns about integration are a factor that must be dealt with under a proper interpretation of the ADA, it could become a more significant obstacle to states’ efforts to comply with *Olmstead*’s integration mandate if *Easley* controlled.

The dissent in *Easley*, in finding that Ms. Easley’s guardian was not entitled to decide whether she could be transferred from the institution to a group home, stated that the ADA’s proscription of discrimination “does not conversely translate into having the right to oppose the transfer from a more restrictive setting.”¹¹⁷ Although the dissent did not go so far as to acknowledge that *Olmstead*’s three prongs create *no* obligation to continue institutional care as *Black* and *Richard C.* did, it spoke of Ms. Easley in more respectful terms.¹¹⁸ It acknowledged that individuals with disabilities who have legal guardians should themselves be involved in decisions about where they will live.¹¹⁹

In light of conflicting state cases and a district court case that answers the question at hand only in dicta, a circuit court decision regarding whether the ADA requires states to provide institutional care

115. See 42 U.S.C. § 12101(a)(5) (2009) (listing “overprotective rules and policies” among the forms of discrimination people with disabilities encounter).

116. *Easley*, 771 A.2d at 851-53.

117. *Id.* at 865.

118. *Id.* at 864.

119. *Id.*

when one of the *Olmstead* criteria is not met could provide much needed clarity. The next decision, unfortunately, failed to provide such clarity.

D. *Ligas*: No Clarification from the Seventh Circuit

Ligas was a class action suit brought on behalf of individuals with disabilities who lived in Illinois institutions but were capable of living in the community.¹²⁰ The plaintiffs sought to require the state to provide care in community settings.¹²¹ The “Golden Intervenors,”¹²² a group of representatives of “patients who could live in the community but do not want to, preferring instead to remain in institutional care,” sought to intervene, fearing that they would be forced into community care.¹²³ The District Court for the Northern District of Illinois denied the Golden Intervenors’ petition for intervention as of right and its alternative request for permissive intervention, and the intervenors appealed to the Seventh Circuit Court of Appeals.¹²⁴ The court ultimately affirmed the denial of intervention as of right on the basis that the Golden group had not demonstrated that “the disposition of the action threaten[ed] to impair [their] interest” and that the existing parties “fail[ed] to represent adequately their interest.”¹²⁵

The appellees also argued that the Golden group did not “possess an interest related to the subject matter”¹²⁶ of the suit, relying on *Richard C.*’s conclusion that *Olmstead* and the ADA do not create a “right” to continued institutional care for individuals who oppose community placement.¹²⁷ The court brushed aside this argument with apparent irritation in a brief footnote: “The appellees make a cursory

120. *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 773 (7th Cir. 2007).

121. *Id.*

122. The group of “Golden Intervenors” is named after one of the proposed intervenors in the group. *Id.* at 773 n.1.

123. *Id.*

124. *Id.*

125. FED. R. CIV. P. 24(a)(2); *Ligas*, 478 F.3d at 773-74.

126. FED. R. CIV. P. 24(a)(2).

127. Initial Brief: Appellee-Respondent at 20 & n.4, *Ligas*, 478 F.3d 771 (No. 06-1327).

and fragmented argument that the Golden group has no legally recognizable interest in the right to live in institutional settings.”¹²⁸

The “cursory,” but not especially “fragmented” argument in appellees’ brief was that “[t]he Golden Intervenors identify their ‘interest’ in this lawsuit as ‘not being denied a meaningful right to institutional care’”¹²⁹ and that “[a]t least one court has held that *Olmstead* does not create a ‘right’ to institutional placement that would justify intervention in a community integration lawsuit.”¹³⁰ Appellees’ brief proceeded to quote language from *Richard C.* stating that “it does not logically follow that institutionalization is required if any one of the three *Olmstead* criteria . . . is not met.”¹³¹

Because the appellees did not hang their hat on the argument that *Olmstead* does not create a “right” to continued institutionalization, and because the court found ample grounds to deny intervention without it, *Ligas* missed the opportunity to bring clarity to the confusion created by *Richard C.*, *Black*, and *Easley*.

While the language of the ADA, with its focus on unnecessary segregation as a form of discrimination, supports the view that the *Olmstead* holding only dictates when states must move individuals to more integrated settings, not when they must continue to provide more segregated settings, the uncertainty created by the four cases discussed above leaves the door open for further litigation by those who feel that integrated settings are not appropriate for their loved ones with disabilities. To understand the potential ramifications of such litigation, it is important to understand fully the implications of *Olmstead* for an array of services for people with disabilities.

IV. THE IMPLICATIONS OF *OLMSTEAD* FOR DEINSTITUTIONALIZATION AND BEYOND

In the immediate wake of *Olmstead*, states were faced with an obvious requirement to take steps toward providing community-based

128. *Ligas*, 478 F.3d at 773 n.2 (citing *Richard C.*).

129. Initial Brief: Appellee-Respondent at 20, *Ligas*, 478 F.3d 771 (No. 06-1327).

130. *Id.* at 20 n.4 (citing *Richard C.*). The appellees’ brief, like the court’s decision, relegated the issue to a footnote. *Id.*

131. *Id.*

services to people with mental disabilities who no longer needed to live in institutions. Ten years later, it is important to consider both what *Olmstead* meant and continues to mean for the deinstitutionalization process, and perhaps more importantly, what implications *Olmstead* has for efforts to ensure that people with mental disabilities have access to the “most integrated setting appropriate”¹³² along a spectrum.¹³³

A. *Olmstead and the Deinstitutionalization Movement*

One criticism of the *Olmstead* decision is that it provided states with little concrete guidance as to how they should conduct themselves in order to comply with the call to avoid discriminating against institutionalized individuals with mental disabilities, given that the states’ obligation to deinstitutionalize is not absolute.¹³⁴ If states do not have to immediately deinstitutionalize everyone who is capable of living in the community, what *should* they do? In a plurality portion of the *Olmstead* decision,¹³⁵ Justice Ginsburg suggested a means by which a state might demonstrate that it has met its obligation to deinstitutionalize people who can live in the community while also satisfying its obligation to “maintain a range of facilities” and “administer services with an even hand” to the diverse population of people with

132. 28 C.F.R. § 35.130(d) (2009).

133. The two major implications of *Olmstead* discussed here are far from the only potential ramifications of the decision. See Perlin, *supra* note 41, at 228-39 (expressing hope that *Olmstead* would lead to changes in practices that subject misdemeanor and non-violent felony criminal defendants with mental illness to prolonged maximum-security confinement); Karger, *supra* note 16, at 1223 (asserting that “the ruling will have an impact on those with physical disabilities as well”).

134. See, e.g., *Ligas*, 478 F.3d at 773 (commenting that “with three dissenters and multiple concurrences, including a swing vote that joined in only part of the opinion, *Olmstead* has left the exact route to implementing this integration mandate somewhat murky.”).

135. Part III.B of the opinion was joined by Justices O’Connor, Souter, and Breyer. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999). Justice Stevens, who joined the rest of Justice Ginsburg’s opinion, wrote a concurrence in which he asserted that the Court should have simply affirmed the judgment of the court of appeals, which had remanded the case to the district court for reconsideration of the state’s cost defense. *Id.* at 607-08 (Stevens, J. concurring).

mental disabilities who receive state services.¹³⁶ Justice Ginsburg suggested that if a state could “demonstrate that it had a comprehensive, effectively working 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,” it would have satisfied its obligation under *Olmstead*.¹³⁷

Although not binding, Justice Ginsburg’s “comprehensive plan” portion of the opinion has, in practice, been followed by at least one court¹³⁸ and by many states. Of the fifty states and District of Columbia, twenty seven have published documents they describe as “*Olmstead* plans,” while another seventeen have published documents described as “alternative strategies.”¹³⁹ Whether all of these efforts by states to demonstrate that they have effectively working plans to move people out of institutions has measurably hastened the pace of actual deinstitutionalization is, of course, a separate inquiry; there has been some criticism of the slow pace of deinstitutionalization post-*Olmstead*.¹⁴⁰

136. *Id.* at 587.

137. *Id.* at 605-06 (plurality opinion).

138. *Frederick L. v. Dep’t of Pub. Welfare*, 422 F.3d 151, 155-57 (3d Cir. 2005) (holding that a state could not invoke the fundamental alteration defense when it had failed to “demonstrate a commitment to community placement” through a “comprehensive, effectively working plan” including measurable goals that would allow the courts to hold the state accountable). *See also* *Makin v. Russell*, 114 F. Supp. 2d 1017, 1035 (D. Haw. 1999), *cited in* *Mathis*, *supra* note 31, at 159 (treating the waiting list method as one way of demonstrating that the state has met its obligation under *Olmstead*). For a discussion of *Frederick L.*, see *Mathis*, *supra* note 29, at 570-71.

139. *See* Center for Personal Assistance Services, University of California, San Francisco, State *Olmstead* Plans and Alternative Strategies, <http://www.pascenter.org/olmstead/olmsteadplans.php> (last visited Mar. 30, 2009). *See also* *Mathis*, *supra* note 29, at 561-62 (2005) (explaining that states have created plans pursuant to *Olmstead* but that implementation of those plans has “remained modest” and that progress toward community integration has been “disappointingly slow”).

140. *See* *Mathis*, *supra* note 29, at 561-62; Samantha A. DiPolito, Comment, *Olmstead v. L.C.—Deinstitutionalization and Community Integration: An Awakening of the Nation’s Conscience?*, 58 *MERCER L. REV.* 1381, 1381 (2007)

As the process of moving people with mental disabilities out of institutions proceeds, the most obvious potential ramification of litigation that asserts a “right” to continued institutional care under *Olmstead* is the further slowing of deinstitutionalization. When small groups of families seek to intervene in community integration class actions as they did in *Richard C.* and *Ligas*, they threaten to delay or even prevent relief for the larger class of people with disabilities who want the opportunity for a life in the community promised by *Olmstead*. Smaller-scale cases like *Easley* tie up state resources that might otherwise have furthered a state’s efforts to comply with *Olmstead*, and suits for damages such as *Black* have the potential to make state officials reluctant to change anyone’s placement for fear that any misstep could constitute actionable “discrimination.” But even the most extreme result possible, within the context of deinstitutionalization, is arguably somewhat limited in its potential impact. California’s progress in reducing the population of its state developmental centers exemplifies the slow but steady progress that is underway. The total number of individuals living in institutions is small considering the state’s large population and the total number of people with developmental disabilities served by the state.¹⁴¹

Nevertheless, *Olmstead*, and therefore the answer to the question at hand, remain important for two reasons. The first is that *Olmstead* is still an important tool in litigation where states have been especially slow to comply.¹⁴² The second reason is discussed below.

141. See *supra* note 13. At the end of March 2009, California Regional Centers served a total of 202,311 “active clients,” 2,357 of whom were placed in developmental centers. DEP’T OF DEV. SERVS., STATE OF CALIFORNIA, Monthly Consumer Caseload Report (Mar. 2009), available at http://www.dds.cahwnet.gov/FactsStats/docs/Mar09_caseload.pdf. The number of individuals living in developmental centers given in the report appears to include individuals in the state’s two newer, smaller residential facilities described at *supra* note 13. Especially given that *Olmstead* emphatically does *not* hold that states must deinstitutionalize those who “are unable to handle or benefit from community settings,” it is at least arguable that California is nearing the point at which it will have complied with *Olmstead* by reducing the populations in its institutions for people with developmental disabilities to the individuals who need institutional care. *Olmstead*, 527 U.S. at 602. Whether this is true depends on how one defines “institution.” See *infra* note 152.

142. According to Equip for Equality, an Illinois disability advocacy group that served as co-counsel in *Ligas*, Illinois ranked fifty-first among the states and District of Columbia for placing people with developmental disabilities in the com-

*B. Olmstead's Implications for Services in More Integrated Settings
Along a Spectrum*

The facts of *Olmstead* specifically required the Court to decide when the ADA's proscription of discrimination in the form of unjustified segregation requires a state to move a person out of the most segregated setting possible—an "institution"—and into some less segregated setting. But whether a setting is "segregated" or "integrated" is not an all-or-nothing inquiry. Integration is not "binary;"¹⁴³ "community-based" services fall everywhere along the spectrum in terms of how integrated they really are.¹⁴⁴ *Olmstead* on its facts moves states toward minimizing the most obvious and egregious form of unnecessary segregation.¹⁴⁵ However, its underlying principles also obligate a state to move an individual further along the spectrum. The "integration regulation" relied upon by the Court requires that services be provided, not merely "outside of traditional institutions," but "in the most integrated setting appropriate" to an individual's needs.¹⁴⁶

munity as of November 2008, when it announced the proposed consent decree in the case. Press Release, Equip for Equality et al., People with Developmental Disabilities Celebrate Agreement with State in Landmark Case (Nov. 13, 2008), available at <http://www.equipforequality.org/news/pressreleases/ligasmaramfiles.php> (follow hyperlink under heading "Press Releases"). That group has in recent years fought efforts by the State of Illinois to reopen an institution that was ordered closed in 2002. Equalizer Online Fall 2006, <http://www.equipforequality.org/news/equalizer/fall2006/01community.php> (last visited Mar. 30, 2009). Clearly, the struggle for deinstitutionalization is far from over in Illinois. See also Mathis, *supra* note 29, at 573-77 (highlighting important *Olmstead* class actions against several states, including California). In 2005, Mathis viewed *Olmstead* litigation as "the most viable avenue" to obtain services in integrated settings due to states' slow progress in complying with *Olmstead*. *Id.* at 582. Furthermore, in considering the continued relevance of *Olmstead* in deinstitutionalization, it is important to be mindful of the impact of long waits for community care in the lives of individuals with disabilities and their families, even when only small numbers of individuals are impacted. For an account of one young man's experience, told by his conservator, see Barbara Bromley, *Free at Last: One Family's Journey of Deinstitutionalization*, J. OF CHILD AND FAM. STUD., June 2003, at 125-34.

143. Jacobi, *supra* note 23, at 1251.

144. *Id.*

145. *Id.* at 1247.

146. 28 C.F.R. § 35.130(d) (2009); Jacobi, *supra* note 23, at 1250-51.

Joe Argueta's life provides a concrete example of the integration spectrum.¹⁴⁷ Sonoma State Hospital represents the most segregated setting possible, both as a residence and as a place to spend his "work day." Joe's success with Pacific Diversified Services (PDS) and Casa Allegra demonstrate that for him, full inclusion in typical community settings with support from staff is the most integrated setting appropriate for his daytime activities and that a regular apartment in the community, with live-in support from a paid roommate, is the most integrated home setting appropriate to Joe's needs.¹⁴⁸ When Joe first moved out of the institution, he lived in a group home with a number of other people with disabilities.¹⁴⁹ This setting was more integrated than the state hospital, but more segregated than supported living. He attended a "sheltered workshop" during the day, where many individuals with disabilities congregated in one building to do menial work and other activities under staff supervision.¹⁵⁰ In the sheltered workshop, he spent his day in a setting more integrated than the state hospital but more segregated than the community settings he accesses with help from PDS.¹⁵¹ If a move from one setting to another along the spectrum is appropriate for an individual's needs,¹⁵² that individual does not oppose it, and a state can provide it without fundamentally altering its programs, *Olmstead* is no less applicable than in the case of an individual living in a traditional institution.¹⁵³ For example,

147. See *supra* text accompanying notes 1-22.

148. E-mail from Lisa Giraldi, *supra* note 6 (summarizing Joe's progress and successes in the community setting).

149. *Id.*

150. *Id.* One former participant in a sheltered workshop program describes the difference between sheltered workshops and supported employment in the community, saying that "to me [the sheltered workshop] looked like an institution or a warehouse" and that "[i]f people work out in the community, they develop a wider range of contacts, unlike going to a segregated building every day." MICHAEL J. KENNEDY, CTR. ON HUMAN POLICY, SYRACUSE UNIV., FROM SHELTERED WORKSHOPS TO SUPPORTED EMPLOYMENT (1988), <http://thechp.syr.edu/kdy-work.htm>.

151. See *supra* text accompanying notes 2-12.

152. Jacobi, *supra* note 23, at 1253 (citing DAVID BRADDOCK ET AL., THE STATE OF THE STATES IN DEVELOPMENTAL DISABILITIES 13 (5th ed. 1998)).

153. Jacobi, *supra* note 23, at 1251. Jacobi also notes that efforts to comply with *Olmstead* should focus not only on individuals living in institutions, but those

someone like Joe should be able to invoke *Olmstead* to require the state to move him from a group home to an apartment with supported living services if he can demonstrate that the three criteria are met.¹⁵⁴

In a society that is moving (if, by some accounts, too slowly)¹⁵⁵ away from housing people with disabilities in traditional institutions, it would be easy to miss the full importance of *Olmstead* and its requirement that states work toward providing services in the most integrated setting appropriate for each individual. However, when one acknowledges the unlawful discrimination that occurs when people spend decades living in settings that amount to “mini-institutions,”¹⁵⁶ and as a result miss the opportunity to live fuller, more normal lives, the scope and potential longevity of *Olmstead* come into focus. Even

living in the community who need better services to avoid being institutionalized. *Id.* at 1250-51.

154. Another way to look at the applicability of *Olmstead* to integration along a spectrum is to describe a person as being “institutionalized” when he lives in a segregated setting such as a group home, even though such a setting looks different from a state hospital, the stereotypical “institutional” setting. Mathis, *supra* note 29, at 561 and n.5, in describing the ongoing problem of slow progress pursuant to *Olmstead*, states that many individuals remain “unnecessarily institutionalized” in, inter alia, “board and care facilities.” Mathis characterizes the problem as one of “transinstitutionalization” of people from state-operated to privately operated institutions. *Id.* at 581. The argument framed in this manner may be more palatable to skeptical courts, sounding less like an extension of *Olmstead* and more like the straightforward application of *Olmstead* to “institutions” despite superficial differences in the forms those institutions may take. A settlement agreement was recently approved in a California lawsuit that defined an “institution” as a residential facility that houses sixteen or more individuals with disabilities. Memorandum from Barbara Dickey & William Leiner, Attorneys with Disability Rights California, to Interested Persons 2 (Apr. 27, 2009), available at http://www.disabilityrightsca.org/advocacy/CPFvDDS/Summary_of_Settlement-2009-04-27.pdf. This definition encompasses many types of facilities other than developmental centers, including “skilled nursing facilities, and large private Intermediate Care Facilities and Community Care Facilities.” *Id.* at 3. Under this definition, the class of “institutionalized” Californians included not only the roughly 2,300 individuals living in Developmental Centers, but also another 4,500 people living in other facilities. Press release, Disability Rights California, Major Lawsuit Settled, Helping 7,000 People with Developmental Disabilities Live in the Community Instead of Institutions (Apr. 27, 2009), available at http://www.disabilityrightsca.org/advocacy/CPFvDDS/Press_Release-2009-04-24.pdf.

155. See Mathis, *supra* note 29, at 561-62; DiPolito, *supra* note 140, at 1381.

156. Jacobi, *supra* note 23, at 1252.

if every large state institution were to eventually close its doors, *Olmstead* would provide the standard for when states must provide people with disabilities more integrated settings, both for residential and day services, in which to live their lives. Given the great importance of *Olmstead*, the question at hand also becomes more important: Do *Olmstead*'s three criteria obligate states to continue to provide care in a more restrictive setting when the criteria are not met, namely, when the individual with a disability or, more often, his family member, objects to the more integrated setting? The uncertainty created by *Richard C.*, *Black*, *Easley*, and *Ligas* has the potential to hamper progress along the spectrum if individuals with disabilities and their families invoke *Olmstead* to try to prevent services from being provided in more integrated settings.

V. CONCLUSION

After the four cases that grapple with the argument that states can “discriminate” on the basis of disability by moving a person with a disability to a more integrated setting, several things are clear. First, more litigation, driven by family members’ concerns about more integrated settings, will likely occur until the law becomes more settled. Second, the ultimate answer to the question is likely to be that *Olmstead* does not lay out conditions under which a state may be found to have discriminated under the ADA by moving someone to a more integrated setting. The reasoning in *Richard C.* is the most persuasive and the most compatible with the ADA’s purpose, which is to eliminate discrimination against people with disabilities in various forms, including unnecessary segregation. Reasoning similar to that in *Richard C.* will, most likely, ultimately prevail. Third, until the question is answered clearly, at least at the circuit court level, the persisting litigation will hinder efforts by states, individuals, and families who seek community care to shift services away from more segregated settings toward more integrated settings. This challenge will manifest itself not only in the context of deinstitutionalization, but also in contexts in which people seek more integrated services along a spectrum. Fourth, with the foregoing in mind, disability advocates, particularly those who work for organizations whose larger objective is to advance the rights of all people with disabilities, will face partic-

ular challenges in deciding whether and how to represent clients who wish to argue that *Olmstead* creates a right to institutional care.¹⁵⁷

*Megan Chambers**

157. Interview with Stephen Rosenbaum, Staff Attorney, Disability Rights California, in Oakland, Cal. (Mar. 27, 2009). Mr. Rosenbaum explained that there is often a tension between an attorney's obligations to his client and his responsibilities to the purposes of an organization that uses advocacy in individual cases to work toward larger goals. He explained that different attorneys handle the dilemma differently; sometimes it is necessary to turn down a case that is incompatible with the organization's mission, and sometimes an attorney might use a very specific retainer agreement to ensure that the client understands that his or her case is being accepted with the understanding that his or her goals in the case are compatible with the goals of the organization. *Id.* The tension experienced by public interest attorneys is summarized in Dean Hill Rivkin, *Reflections on Lawyering for Reform: Is the Highway Alive Tonight?*, 64 TENN. L. REV. 1065, 1066-69 (1997). Rivkin states that attorneys have been "accused by many of trying to save the world, of being lawyers for causes, not clients." *Id.* at 1066.

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