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"Don't Tread on the ADA": Olmstead v. L.C. ex rel. Zimring and the Future of Community Integration for Individuals with Mental Disabilities

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“DON’T TREAD ON THE ADA”:†
OLMSTEAD V. L.C. EX REL. ZIMRING AND
THE FUTURE OF COMMUNITY
INTEGRATION FOR INDIVIDUALS WITH
MENTAL DISABILITIES

Persons [with mental disabilities who are institutionalized] . . .
suffer not only a dramatic loss of physical freedom with . . . severely
detailed control and invasive treatment, they also cannot enjoy
those mundane, daily pleasures—working, shopping, enjoying the
companionship of family and friends, or simply being left alone—
the loss of which we on the outside would find to be not only
intolerable but a threat to our very sanity.¹

INTRODUCTION

Congress passed the Americans with Disabilities Act of 1990
(“ADA”) with the clear intention of eliminating the unnecessary seg-
regation and isolation of individuals with disabilities in institutions.²
Although progress has been made, after nine years, the goal of inte-
grating persons with disabilities³ into the community has yet to be
realized.⁴ Many states currently have long waiting lists of individuals

² See 42 U.S.C. § 12101(a)(2) (1994) (“historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination continue to be a serious and pervasive social problem”); 42 U.S.C. § 12101(a)(5) (“individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities”); 42 U.S.C. § 12101(b)(1)
(“[i]t is the purpose of this chapter to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”).
³ The ADA applies to all persons with disabilities, while the Supreme Court’s ruling in
Olmstead referred specifically to individuals with mental disabilities. Compare 42 U.S.C.
§ 12101(a)(1)–(b)(4), with 119 S. Ct. 2176, 2181, 2185, 2190 (1999). Consequently, although this
Note focuses on individuals with mental disabilities, it uses the more general terms “individuals
with disabilities” or “persons with disabilities” when the context requires reference to both those
with mental and those with physical disabilities.
⁴ See, e.g., Sharon Davis, People in State Institutions Waiting for Community Placement, in THE
ARC: A STATUS REPORT TO THE NATION ON PEOPLE WITH MENTAL RETARDATION WAITING FOR
with disabilities for whom qualified professionals have recommended community placement, but who remain confined to institutions, where they lose their independence, sense of competence and feelings of self-worth and dignity.\(^5\) In contrast, life at home or in a community-based group setting provides the opportunity for autonomy, privacy and freedom to associate with and form meaningful relationships with whomever one chooses.\(^6\)

The controversy regarding the integration of individuals with disabilities into the community centers on the language of the ADA and the implementing regulations of the Department of Justice.\(^7\) Title II of the ADA 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." The Department of Justice regulations that implement this anti-discrimination clause mandate that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."\(^8\) The "most integrated setting appropriate" for such individuals is often the home or the community as opposed to an institution.\(^9\) At the same time, the Department of Justice regulations further state that "[a] public entity shall make reasonable modifications in policies, practices, or procedures . . . unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."\(^10\)

The issue entered a new phase when, on June 22, 1999, in Olmstead v. L.C. ex rel. Zimring ("Olmstead"), the United States Supreme Court held that the unjustified segregation of individuals with mental

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\(^6\) See, e.g., Brief for Am. Assoc. on Mental Retardation, supra note 5, at *14-15.


\(^8\) 42 U.S.C. § 12132.

\(^9\) 28 C.F.R. § 35.130(d) (emphasis added).


\(^11\) 28 C.F.R. § 35.130(b)(7) (emphasis added).
disabilities in institutions constitutes discrimination under the ADA. The Court also held that the ADA requires states to provide community placement given the satisfaction of the following conditions: (1) the state's treatment professionals determine that such placement is appropriate; (2) the "affected individual" does not oppose the placement; and (3) the state can reasonably accommodate the placement without fundamentally altering its program, given the state's available resources and the needs of other individuals with mental disabilities.

The Supreme Court's decision in *Olmstead* has far-reaching implications for the right of persons with mental disabilities to receive treatment in the most integrated setting appropriate. Although the Court's ruling referred to individuals with mental disabilities, the ruling will have an impact on those with physical disabilities as well. This Note argues that it is highly significant that in the first part of its ruling, the Court made the powerful statement that the unjustified segregation of individuals with mental disabilities in institutions constitutes discrimination under the ADA. At the same time, however, it is disappointing that in the second part of its ruling, the Court conditioned the right of individuals with mental disabilities to live in the most integrated setting appropriate on a broader interpretation of the reasonable-modifications regulation. This Note urges future lower courts to follow the principle set by the Supreme Court in the first part of its ruling and to hold states to a stringent standard when evaluating a fundamental alteration defense. Finally, this Note also recommends that Congress should take the initiative and enact new legislation that

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12 It is important to note that the Supreme Court in its opinion in *Olmstead* used the term "individuals with mental disabilities" and did not distinguish between those with developmental disabilities and those with mental illness. See 119 S. Ct. at 2181, 2185, 2190. Because the Court did not differentiate between these two groups, this Note generally does not make such a distinction, unless specifically indicated.

13 See id. at 2185.

14 See id. at 2181, 2190.

15 See id. at 2181, 2185, 2190. Expressing the emotional intensity of this case, one disability rights group asked: "Will *Olmstead* be our *Brown v. Board of Education* . . . or will *Olmstead* be our *Lord Scott*?" See ADAPT, Bulletins and Upcoming Events (visited Feb. 16, 1999) <http://www.adapt.org/bulletin.htm>.

16 See *Olmstead*, 119 S. Ct. at 2181, 2185, 2190.

17 See id. at 2185; see also infra notes 258-71 and accompanying text.

18 See *Olmstead*, 119 S. Ct. at 2188-90; see also infra notes 319-88 and accompanying text.

19 See *Olmstead*, 119 S. Ct. at 2181, 2185, 2190; see also infra notes 389-93 and accompanying text.
would create a mechanism to encourage and ultimately enable states to provide services in the most integrated setting appropriate.20

Part I of this Note discusses the history of the institutionalization of individuals with mental disabilities in the United States, including the gradual recognition of the importance of community integration.21 Part II provides a brief explanation of the Medicaid system, the mechanism by which states fund home and community-based care for their citizens with disabilities.22 Part II also explores recent attempts to transform Medicaid into a more community-based system.23 Part III details early legislative efforts to combat discrimination against individuals with disabilities that set the stage for the ADA.24 Part IV examines relevant portions of the ADA and case law regarding the issue of community integration in the years leading up to *Olmstead*.25 Part V discusses the recent decision of the Supreme Court in *Olmstead*.26 Part VI analyzes the opinion of the Court and provides suggestions for the future.27

I. HISTORY OF THE SEGREGATION OF INDIVIDUALS WITH MENTAL DISABILITIES IN INSTITUTIONS AND THE EVOLUTION OF COMMUNITY INTEGRATION

The segregation of individuals with mental disabilities in institutions apart from the rest of society has been a critical facet of the lives of such individuals in the United States for more than a hundred years.28 In 1848, Massachusetts established the first public facility for persons with mental retardation, the present-day Fernald State School in Waltham.29 This facility, like other early institutions for individuals with mental disabilities resembled a school, providing short-term training for young people to enable them to return to the community.30

20 See infra notes 400-26 and accompanying text.
21 See infra notes 28-59 and accompanying text.
22 See infra notes 60-82 and accompanying text.
23 See infra notes 83-99 and accompanying text.
24 See infra notes 100-52 and accompanying text.
25 See infra notes 153-229 and accompanying text.
26 See infra notes 230-57 and accompanying text.
27 See infra notes 258-426 and accompanying text.
30 See id.
In the 1880s, however, the institutions began to change from this early model of a school to that of an asylum providing long-term custodial care.\(^{31}\) Several factors led to this development, including the admission of younger individuals with severe disabilities and the admission of older persons.\(^{32}\) Moreover, during these years, medical and academic professionals promoted the view that individuals with mental disabilities were likely to engage in criminal activities and sexually immoral behavior and were therefore a menace to society.\(^{33}\) Because of the perceived danger these individuals posed, the professionals further argued that they should be locked up and segregated from the rest of the community.\(^{34}\) Institutionalization thus came to be viewed as an effective solution, providing individuals with mental disabilities the paternalistic protection they needed and, at the same time, safeguarding the community at large.\(^{35}\)

Toward the end of the Nineteenth and beginning of the Twentieth Century, the United States experienced a rapid economic and social transformation from a predominantly rural to an increasingly urban and industrialized society.\(^{36}\) Nationalist sentiment grew, and with it grew xenophobia caused by the large number of immigrants who had settled in this country.\(^{37}\) Paralleling this fear was a distrust of anyone viewed as different, including individuals with mental disabilities.\(^{38}\) The superintendents of the large institutions and state legislatures used harsh rhetoric to describe these individuals.\(^{39}\) For example, in 1918, the Georgia State Legislature created a "Commission on the Feeble-Minded" to help "relieve the State of the menace of the uncared-for feeble-minded who are such a fertile source of crime, poverty, prostitution and misery . . . ."\(^{40}\) Furthermore, the pseudo-scientific and popular eugenics movement, which advocated principles of selective

\(^{32}\) See id. at 124-25.
\(^{34}\) See Martin W. Buty, The Imperative Call of Our Present to Our Future, 7 Psycho-Asthenics 5-8 (1902), reprinted in Trent, supra note 33, at 142-43.
\(^{35}\) See Trent, supra note 33, at 189.
\(^{36}\) See Scheerenberger, supra note 31, at 137-38.
\(^{38}\) See id.
\(^{40}\) Id. (citation omitted).
breeding to purify the human species, called for the sterilization and segregation of individuals with mental disabilities to prevent them from passing on their "defective" genes to future generations. Although the influence of the eugenics movement slowly declined in the years following World War I, sterilization continued as a practice at institutions for many years. From 1937 to 1970, for example, Georgia allowed superintendents of institutions to recommend sterilization for residents who were "likely . . . to procreate a child."

In the late 1960s and early 1970s, disability rights advocates, who gained momentum from the civil rights movement, became an increasingly vocal group. One of the major goals of these disability rights advocates was to help individuals leave the institutions in which they had long been confined. Additionally, sociological studies exposed the abuse and neglect occurring in institutions and thereby contributed to the impetus for change. "Deinstitutionalization"—the discharge of individuals from institutions and their subsequent care in the community—thus began as a positive response to the many years

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41 See Scheerenberger, supra note 31, at 152-56, 158; Trent, supra note 33, at 213 ("[T]he modern eugenics movement which is principally led by sociologists and psychologists, many of whom have little or no insight into the pathological conditions underlying many of these defects, teaches that all or nearly all mental defect is to be attributed to heredity or to faulty parentage . . . .") (quoting Charles Bernstein, 1917); see also Random House Webster's College Dictionary 453 (2d ed. 1999) (defining eugenics as "a science concerned with improving a species . . . by such means as influencing or encouraging reproduction by persons presumed to have desirable genetic traits").

42 See Trent, supra note 33, at 190.

43 Brief for Respondents at *2, Olmstead (No-98-536) (citation omitted).


45 See John W. Party, Mental and Physical Disability Rights: The Formative Years and Future Prospects, 20 MENTAL & PHYSICAL DISABILITY L. REP. 627, 627 (1996). During this time some disability rights advocates began to promote the philosophy of independent living, which rejected "the authoritarian medical model" in favor of "a paradigm of individual empowerment and responsibility for defining and meeting one’s own needs." See Gina McDonald & Mike Oxford, History of Independent Living (visited Jul. 6, 1999) <http://www.acils.com/acil/ilhistory.html>.

of segregation and isolation in institutions. In recent years, however, deinstitutionalization has developed a negative connotation, referring to the release of large numbers of vulnerable individuals into the streets without adequate planning and support programming. One commentator has noted that "deinstitutionalization has become a convenient scapegoat for our society's current neglect of the less fortunate and most vulnerable, whether they reside in large institutions, boarding homes, or on the streets. In response to this negative public perception, disability advocates are urging the integration of individuals with disabilities into the community through the provision of appropriate services and support programs.

Additionally, over the past two decades, many studies have documented the benefits associated with community integration. For example, individuals residing at home or in the community attain a greater degree of independence as well as dignity and self-worth. Similarly, such individuals can actively participate in and make decisions that affect their lives. Moreover, they feel a part of the community and develop meaningful relationships with individuals who do not have disabilities, including both family members and friends. Persons with disabilities living at home or in the community also engage in simple activities that characterize the everyday lives of others living in mainstream society, such as attending movies, participating in religious activities, eating in restaurants and attending sporting events.

Research has demonstrated other advantages to community integration as well. For example, persons with disabilities who live at home or in the community are more likely to develop greater competence and better adaptive skills than individuals who live in institutional settings. Integrated educational programs enable individuals with disabilities to acquire a more advanced level of skills and to obtain post-

47 See Parry, supra note 45, at 627.
48 See id.; see also Rhoden, supra note 46, at 375 ("Deinstitutionalization, once hailed as an ideal social reform, is now decried as a near disaster.").
49 Parry, supra note 45, at 627.
50 See, e.g., Community-Based Care for the Disabled: Hearing on H.R. 2020 Before the Subcommittee on Health and the Environment, 105th Cong. (1998) (statement of Michael Aubinger, on behalf of American Disabled for Attendant Programs Today (ADAPT)) (hereinafter Aubinger Statement); Bessette, supra note 5, at 143.
51 See, e.g., Brief for Am. Assoc. on Mental Retardation, supra note 5, at *14-15; Cook, supra note 37, at 455.
52 See Brief for Am. Assoc. on Mental Retardation, supra note 5, at *14.
53 See Cook, supra note 37, at 455.
54 See Brief for Am. Assoc. on Mental Retardation, supra note 5, at *14.
55 See id.
56 See id. at *14-15.
education work in integrated settings, where they receive higher wages. Finally, the integration of individuals with disabilities reduces stereotyping and enhances the perspective of individuals who do not have disabilities. Long-term contact between persons with disabilities and those without disabilities improves tolerance for diversity on the part of siblings, parents and educators, as well as other members of the general population.

II. FUNDING OF SERVICES FOR INDIVIDUALS WITH MENTAL DISABILITIES THROUGH THE MEDICAID SYSTEM

A. Brief Description of Medicaid

While community integration has clearly documented benefits, individuals with disabilities remain confined and isolated in institutions largely due to financial concerns of the states. The issue of cost, consequently, is intricately entwined with the issue of community integration. In 1965, with the passage of Title XIX of the Social Security Act, Congress established Medicaid, a system of matching federal and state funds, to provide "medical assistance on behalf of families with dependent children and of the aged, blind, or disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services." Although a state's participation in the Medicaid system is optional, if a state chooses to participate it must comply with all federal requirements. For example, one of the federal requirements is that "[medical] assistance . . . be furnished with reasonable promptness to all eligible individuals." States are able to determine the various parameters of their own programs, including eligibility requirements, amount of payments to facilities and administrative procedures.

57 See Cook, supra note 37, at 454.
58 See id. at 448-49.
59 See id.
61 See id.
64 42 U.S.C. § 1396a(a)(9).
Although states have a certain degree of latitude in determining eligibility, they must include specific groups of individuals—for example, individuals with disabilities who receive Supplemental Security Income (“SSI”) from the federal government. In addition to the mandatory groups, states can provide coverage for other individuals as well. The optional groups include: (1) institutionalized individuals eligible according to a specific income level set by the state; (2) individuals who would be eligible if institutionalized, but who are receiving care under home and community-based service waivers; (3) elderly adults or adults with disabilities who have incomes above those requiring mandatory coverage but below the Federal Poverty Level (“FPL”); and (4) working individuals and persons with disabilities who have family income less than 250% of FPL who would qualify for SSI if they did not work.

Before 1981, Medicaid provided assistance for long-term care only if the individual resided in an institution. That year, Congress attempted to change the “institutional bias” of Medicaid by passing § 1915(c) of Title XIX of the Social Security Act, which created the Home and Community Based Services (“HCBS”) Waiver Program for the treatment of individuals with mental retardation in the community. In 1986, Congress also extended the waiver program to provide community-based services for individuals with chronic mental illness. The term “waiver” derives from the fact that the Secretary of the Department of Health and Human Services (“HHS”) can choose to waive certain requirements of Title XIX. The state is then able to utilize a portion of its Medicaid funds, which otherwise would have been designated for institutional use, to provide home or community-based services. To obtain waivers, a state applies for a certain number of waiver slots and guarantees that the cost of the home or commu-

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68 See 42 U.S.C. § 1396a(a)(10)(A)(ii)(IV), (VI), (X), (XIII).
69 See Sally K. Richardson, Dir., Foreword to Health Care Financing Administration, Medicaid Bureau, Approaches to Quality Under Home and Community-Based Services Waivers, at iii (1993).
70 See id.
73 See 42 U.S.C. § 1396n(c)(1); 42 C.F.R. § 441.300 (1998).
nity-based services will not exceed that of institutional care. The state
must also inform all eligible individuals of the possible alternatives and
provide these individuals with the opportunity to make a choice.

Under the HCBS Waiver Program, states have the flexibility to
select the particular services that are most appropriate for their target
population. The waiver program allows states to choose from the
following services: "case management services, homemaker/home
health aid services and personal care services, adult day health services,
habilitation services, [and] respite care." Because the waiver program
is optional and dependent on the discretion of each state, there is
currently a wide disparity among the states with respect to the amount
of funds used for home and community-based programming. Moreover,
some states do not utilize all the waiver slots for which they have
applied. For example, of the 2,106 waivers allotted to Georgia by the
Secretary of HHS in 1996, the State only used 700. Consequently,
states such as Georgia that provide limited home and community-based
services have long lists of individuals waiting to receive services in the
community. Thus, the HCBS Waiver Program has not succeeded in
eradicating the institutional bias of the Medicaid system.

B. Recent Congressional Efforts to Reform the
Institutional Bias of Medicaid

As a result of the failure of the waiver program to provide a
sufficient number of community placements, disability advocates have
recently looked to Congress to enact additional legislation that would
encourage states to provide more home and community-based serv-
cices. In 1997, the 105th Congress saw the introduction of a bill in the
Senate and another in the House of Representatives to help change

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74 See 42 U.S.C. § 1396n(c)(2)(D); 42 C.F.R. § 441.302(e).
75 See 42 U.S.C. § 1396n(c)(2)(C); 42 C.F.R. § 441.302(d).
77 See 42 U.S.C. § 1396n(c)(4)(B).
78 See, e.g., Scott S. Greenberger, Groups fight state for Medicaid home care: Advocates for
disabled say Texas violates federal law by paying only for care in nursing homes, THE AUSTIN
79 See, e.g., Brief for the United States as Amicus Curiae Supporting Respondents at **20–21,
Olmstead (No. 98-536) [hereinafter Brief for the United States].
80 See id. at *21.
82 See, e.g., Auberger Statement, supra note 50.
83 See Long-Term Care and Deficit Reduction Act of 1997, S. 879, 105th Cong. (1997);
the institutional bias of Medicaid and increase the proportion of individuals receiving home and community-based services.84 Senator Feingold (D-Wis.) introduced Senate Bill 879 ("S. 879") on June 11, 1997, known as the "Long-Term Care Reform and Deficit Reduction Act of 1997."85 Former House Speaker Newt Gingrich (R-Ga.) introduced House Bill 2020 ("H.R. 2020"), known as the "Medicaid Community Attendant Services Act of 1997" ("MiCASA"), on June 24, 1997, as an amendment to Title XIX of the Social Security Act.86

Although the two bills differed in certain respects, each provided for some form of financial assistance to the states to help them make the transition to increased home and community-based services.87 MiCASA, actively promoted by American Disabled for Attendant Programs Today ("ADAPT"), a national grassroots disability rights organization, had over seventy co-sponsors, many more than S. 879, and also received considerably more publicity.88 For example, Christopher Reeve gave his support to MiCASA, stating, "I think the home environment is much more psychologically conducive to health than a nursing home environment so I would certainly support [H.R. 2020]."89 At the end of the 105th Congress, S. 879 remained stalled in the Senate Finance Committee, and H.R. 2020 similarly had not moved out of the House Subcommittee on Health and the Environment of the House Commerce Committee.90

Because these earlier bills met with only limited success, members of ADAPT are currently urging support for the "Medicaid Community Attendant Services and Supports Act of 1999" ("MiCASSA"), which is still in the early stages of development.91 The drafters of this prospect-

84 See S. 879; H.R. 2020.
85 See S. 879.
86 See H.R. 2020.
88 See, e.g., Liberty Resources, Medicaid Community Attendant Services Act: There's no place like home! (visited Oct. 18, 1998) <http://www.libertyresources.org/nc/ca-index.html> (providing summary of and background for MiCASA, noting "ADAPT are the foot soldiers of the MiCASA Movement.").
91 See Memorandum from ADAPT to MiCASSA Supporters, at i (Feb. 1, 1999) (providing text of prospective MiCASSA bill) (on file with author) [hereinafter MiCASSA].
The role that disability advocates would like Congress to play at the present time in passing MiCASSA parallels congressional efforts that began twenty-five years ago to combat discrimination against individuals with disabilities. This early civil rights legislation includes the Rehabilitation Act of 1973 and the Developmental Disabled Assistance and Bill of Rights Act of 1975 ("DDA Act"). These statutes helped to inspire the overall vision of the ADA as well as its specific provisions.
with respect to community integration. In order to understand fully the impact of the ADA on the issue of community integration, it is first necessary to examine this prior legislation.

A. Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 ("§ 504") was the first federal statute to deal with discrimination against individuals with disabilities and is often referred to as "the civil rights bill of the disabled." The purpose of § 504 was to rectify "the country's shameful oversights," which caused the handicapped to live among society 'shunted aside, hidden, and ignored.' The relevant portion of § 504 reads, "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." The coordinating regulations of the Department of Justice state that entities that receive federal funding must "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." Congress later incorporated these anti-discrimination principles into Title II of the ADA.

Although § 504 was an attempt to combat discrimination against individuals with disabilities, it fell short of its ultimate goal for several reasons, including limited applicability and choice of language. Section 504 focuses only on discriminatory actions taken by federally-funded programs and excludes programs managed by private employers or state and local activities that do not receive federal assistance. In addition to its limited applicability, § 504 has problematic language, centering on the use of the words "otherwise" and "solely." Section 504 uses the language "[n]o otherwise qualified handicapped individ-

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102 See Burgdorf, supra note 44, at 414.
103 See infra notes 153–225 and accompanying text for a discussion of the role of the ADA in relation to the issue of community integration.
105 See Alexander v. Choute, 469 U.S. 287, 296 (1985) (quoting Representative Vanik, who originally introduced § 504 as an amendment to Title VI, 117 Cong. Rec. 45974 (1971)).
110 See Coleman & Debruge, supra note 109, at 57.
111 See Burgdorf, supra note 44, at 522 n.93.
Consequently, plaintiffs attempting to bring claims under § 504 have the difficult burden of establishing the prima facie element that they are "otherwise qualified." The phrase "solely by reason of . . . disability" is likewise problematic, implying that only discrimination motivated solely by an individual's disability is actionable. Such an interpretation leaves open the question of discrimination based on other motivations.

The coordinating regulations of § 504 include a provision that has ultimately provided a loophole, allowing defendants in discrimination cases to offer an affirmative defense for practices that appear to violate the statute. The "undue hardship regulation" states that "[a] recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program." Although there is no bright-line test to determine what constitutes an undue hardship, the regulations list several guiding factors: "(1) The overall size of the recipient's program . . .; (2) [t]he type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) [t]he nature and cost of the accommodation needed." The undue hardship regulation allows defendants to claim that compliance with the plaintiff's demands would be too expensive and would place an excessive cost burden on the plaintiff.

The United States Supreme Court twice attempted to define the scope of § 504. First, in 1979, in Southeastern Community College v. Davis, the Court held that § 504 does not compel educational institutions to take affirmative action to make significant modifications in

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113 See Burgdorf, supra note 44, at 522 n.93. Burgdorf further explains, "[a]rguably, the notion of otherwise qualified should be subsumed in the question of discrimination on the basis of disability: if an individual is denied an opportunity because of a failure to meet qualifications standards, then that individual is not being disadvantaged on the basis of disability, but rather because of a failure to meet applicable job standards." Id. at 442. An added problem is that the term "otherwise" is somewhat offensive and demeaning toward an individual with a disability, characterizing the disability as a negative attribute. See id.
114 See 29 U.S.C. § 794(a) (emphasis added); Burgdorf, supra note 44, at 522 n.93.
115 See id.
116 See Wood, supra note 60, at 505.
117 28 C.F.R. § 41.53 (emphasis added).
118 See 28 C.F.R. § 42.51(c); 45 C.F.R. § 84.12(c) (same).
119 See Wood, supra note 60, at 505.
their programs to accommodate individuals with disabilities when such
modifications would create a fundamental alteration in the nature of
the program. In Davis, a woman who suffered from a severe hearing
disability brought a claim against Southeastern Community College, a
state institution that received federal funding, alleging, inter alia, that
the college's denial of her admission to the nursing program violated
§ 504. The Court stated that in certain circumstances it may be
unreasonable and discriminatory for a program to refuse to take affir-
mative action and make modifications to meet the needs of "qualified
handicapped persons." The Court defined an "otherwise qualified
person" as one who could meet the requirements of the program in
spite of the individual's disability. Therefore, the Court held that Southeastern Community College did
not violate § 504 because the statute does not compel entities to take
affirmative action to make substantial modifications that would funda-
mentally alter the nature of the program. The Court further held
that such substantial modifications "would constitute an unauthorized
extension of the obligations imposed by [§ 504]." Following Davis,
several federal court decisions applied the narrow holding of the case
to the provision of home and community-based services and held that
§ 504 did not create a statutory right to receive treatment in the
community.

The Supreme Court continued the analysis begun in Davis con-
cerning the scope of § 504 in its 1985 decision in Alexander v. Choate.
In Choate, the Court held that disparate-impact discrimination does
not necessarily constitute a prima facie case of discrimination under
§ 504. Medicaid recipients brought a class-action claim against the
State of Tennessee for reducing from 20 to 14 the number of inpatient
hospital days for which the State would pay each year under Medi-

121 See 442 U.S. at 411, 414.
122 See id. at 400-02.
123 See id. at 412-13.
124 Id. at 406.
125 See id. at 409.
126 See Davis, 442 U.S. at 411.
127 See id. at 410.
128 See, e.g., Kentucky Ass'n for Retarded Citizens, Inc. v. Connecticut, 674 F.2d 582, 585 (6th
129 See 460 U.S. at 299.
130 See id. at 309.
caid. The plaintiffs alleged that such a reduction violated § 504 because it would have a disproportionate effect on individuals with disabilities and was therefore discriminatory. The Court disagreed, holding that not all instances of disparate impact constitute discrimination under § 504. Following the line of reasoning in Davis, the Court further stated that the reduction in the number of inpatient days did not deny the plaintiffs “meaningful access to the benefit” of receiving Medicaid services. The Court stated that modifications to a program may be necessary when weighing the rights of individuals with disabilities to be integrated into society against the interests of the state to maintain the integrity of its program. The Court reasoned that the “administrative costs of [plaintiffs’ requests] would be well beyond the accommodations that are required under Davis.” Therefore, the Court held that in this instance, disparate impact discrimination did not violate § 504.

B. The Developmental Disabled Assistance and Bill of Rights Act of 1975

Following the passage of the Rehabilitation Act of 1973 but prior to the passage of the ADA, Congress enacted the Developmental Disabled Assistance and Bill of Rights Act in 1975, which established a system of federal-state grants. Under the DDA Act, the federal government gives money to states to help them create programs for the care and treatment of individuals with developmental disabilities. Although states utilizing federal funding to run their programs must meet minimum standards, participation is voluntary. The “Bill of Rights” provision of the DDA Act states that individuals with developmental disabilities have a right to “appropriate treatment” in “the setting that is least restrictive of . . . personal liberty.” The phrase

131 See id. at 289.
132 See id. at 290. The United States District Court for the Middle District of Tennessee dismissed the complaint, holding that the reduction in the number of inpatient days was not the type of discrimination that § 504 prohibited. See id. at 292 n.6. The United States Court of Appeals for the Sixth Circuit disagreed, holding that the plaintiffs had established a prima facie case of discrimination under § 504 because the reduction would disproportionately affect individuals with disabilities. See id. at 291–92.
133 See id. at 309.
134 See Choute, 469 U.S. at 301–02.
135 See id. at 300.
136 See id. at 308.
137 See id. at 309.
139 See id. § 6000(b)(1).
140 See id. § 6000(c).
141 See id. § 6009(2).
"least restrictive" has played a major role in disability litigation during the past twenty-five years.142

The United States Supreme Court addressed the issue of the right to treatment in the least restrictive environment under the DDA Act in Pennhurst State School & Hospital v. Halderman.143 In Pennhurst, a 1981 decision, the Court held that under the "Bill of Rights" provision of the DDA Act, individuals with disabilities do not have a substantive right to receive treatment in the least restrictive environment.144 In Pennhurst, an individual with mental retardation who was a resident at the Pennhurst State School and Hospital ("Pennhurst") brought a claim on behalf of herself and the other residents at Pennhurst, alleging that the unsanitary, inhumane and dangerous conditions at the institution violated the residents' rights under the DDA Act.145 The plaintiff argued that the Court should require the Commonwealth of Pennsylvania to close Pennhurst and create alternative community-based living arrangements.146 The Court stated that it had to look beyond the explicit language of the DDA Act and instead "look to the provisions of the whole law, and to its object and policy . . . ."147 The Court reasoned that an analysis of the "Bill of Rights" provision in the context of other specific provisions of the DDA Act reveals that it merely represents a preference on the part of Congress for community-based treatment and does not require states to provide such treatment.148 The Court further observed that there is nothing in the "Bill of Rights" provision to suggest that a particular kind of treatment is a condition for receiving federal funding under the DDA Act, and that the funding sections of the DDA Act are separate from the "Bill of Rights" provision and merely encourage states to participate.149 Therefore, the Court held that in spite of the language of the statute, individuals with disabilities do not have a substantive right under the DDA Act to receive community-based treatment.150 Additionally, the Court held that the DDA Act does not compel the Commonwealth of Pennsylvania to close Pennhurst and create alternative community

142 See Parry, supra note 45, at 628.
143 See 451 U.S. 1, 18 (1981).
144 See id. at 18–19.
145 See id. at 6.
146 See id.
147 Id. at 18 (quoting Philbrook v. Glodgett, 421 U.S. 707, 713 (1975)).
148 See Pennhurst, 451 U.S. at 19.
149 See id. at 23–24.
150 See id. at 18.
placements.\textsuperscript{151} *Pennhurst* has subsequently become the seminal case used by states in their arguments against deinstitutionalization.\textsuperscript{152}

\section{IV. THE ADA AND CASE LAW LEADING UP TO OLMSTEAD}

In response to the limitations of earlier legislation such as § 504 of the Rehabilitation Act of 1973 and the DDA Act of 1975, Congress enacted the ADA in 1990 with the clear objective of ending discrimination for individuals with disabilities.\textsuperscript{153} One commentator has stated, "The ADA constitutes a second-generation civil rights statute that goes beyond the 'naked framework' of earlier statutes and adds much flesh and refinement to traditional nondiscrimination law."\textsuperscript{154} The ADA passed by a large majority in both houses and with bipartisan support.\textsuperscript{155} When enacting the ADA, Congress noted that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals[.]"\textsuperscript{156} Similarly, upon signing the ADA into law, President Bush made the following statement: "The Americans with Disabilities Act presents us all with an historic opportunity. It signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life."\textsuperscript{157} At the time, Congress estimated that there were approximately 43,000,000 Americans with mental or physical disabilities.\textsuperscript{158}

The legislative history of the ADA reveals considerable discussion about the importance of integrating individuals with disabilities into the community.\textsuperscript{159} For example, the House Report stated that "[t]he ADA is a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation."\textsuperscript{160} Similarly, the House Report compared the institutional segregation of individuals with disabilities to the segregation that African-Americans experienced, stating that "segregation

\textsuperscript{151} See id.

\textsuperscript{152} See Bessette, supra note 5, at 143.


\textsuperscript{154} Burgdorf, supra note 44, at 415.

\textsuperscript{155} See id. at 433–34 (noting that the House passed the ADA bill on July 12, 1990 by a vote of 377 to 28 and the Senate passed the bill on July 13, 1990 by a vote of 91 to 6).

\textsuperscript{156} 42 U.S.C. § 12101(a)(8).


\textsuperscript{158} See 42 U.S.C. § 12101(a)(1).


\textsuperscript{160} Id., \textit{reprinted} in 1990 U.S.C.C.A.N. 267, 449 (emphasis added).
Section 12132 of Title II of the ADA, the relevant portion of the legislation to this Note, 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.” The ADA omits the word “otherwise” preceding the phrase “qualified individual with a disability,” which proved problematic in § 504 because it required plaintiffs to establish the prima facie element that they were “otherwise qualified.” Moreover, the ADA, in contrast to § 504, also excludes the term “solely” preceding the phrase “by reason of such disability.” The word “solely” implied that only discrimination motivated by an individual’s disability was actionable and left open the question of discrimination based on other motivations. With the omission of these two words, the language of the ADA is broader and less limiting than that of § 504.

The ADA specifies that the Department of Justice has the authority to establish implementing regulations with regard to public entities. The ADA further indicates that these regulations must be consistent with the coordinating regulations of § 504. The implementing regulations of the Department of Justice for the ADA state that “a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” This provision parallels the similar provision in the coordinating regulations of § 504. The interpretation of the phrase “in the most integrated setting appropriate” is at the center of the current debate concerning the provision of home and community-based services.

In addition to the words “in the most integrated setting appropriate,” the phrases “reasonable modifications” and “fundamentally alter”
in the implementing regulations are also significant in relation to the provision of home and community-based services. The relevant provision states: "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the service, program, or activity." This provision enables states to offer an affirmative defense for an alleged violation of the statute. At the same time, Title II of the ADA does not mention the concept of "undue hardship" with respect to cost, which was included in § 504. One commentator believes that Congress instructed the Department of Justice to omit the undue hardship provision with respect to cost because Congress felt that the benefits of integration greatly surpassed the hardship that would result from additional costs.

The interpretation of the phrases "in the most integrated setting appropriate" and "fundamentally alter" came to the forefront of the debate concerning the provision of home and community-based services in Helen L. v. DiDario. In Helen L., a 1995 decision, the United States Court of Appeals for the Third Circuit held that under the ADA individuals are entitled to receive treatment in the most integrated setting appropriate and that a public entity violates the ADA when it requires an individual to receive nursing home care against her wishes when she is qualified to receive home-based care. In Helen L., the plaintiff, a forty-three year-old mother who contracted meningitis, was paralyzed from the waist down and confined to a wheelchair. Consequently, she had difficulty with activities such as bathing and shopping. The Pennsylvania Department of Public Welfare ("DPW") offered two programs for individuals with physical disabilities who needed help with certain daily activities. One, funded through Medicaid, provided nursing home care; the other provided home or community-based care through an "attendant care program," as authorized

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173 28 C.F.R. § 35.130(b)(7) (emphasis added).
174 See id.
175 See 28 C.F.R. § 41.53.
176 See Cook, supra note 37, at 430–31.
178 See id. at 333, 337–38.
179 See id. at 328.
180 See id.
181 See id.
by a Pennsylvania statute. Professionals evaluated the plaintiff and found her eligible for attendant care services. The Commonwealth of Pennsylvania, however, placed her on a waiting list to receive attendant care services, requiring her to remain in a nursing home. The plaintiff brought a claim against the Pennsylvania DPW, alleging that the DPW had violated Title II of the ADA by forcing her to live in the segregated setting of a nursing home.

The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of the DPW, finding that the DPW had not discriminated against her based on her disability but rather due to a lack of funds. The United States Court of Appeals for the Third Circuit, however, reversed, holding that under the ADA individuals are entitled to receive services in the most integrated setting appropriate and that denial of such services by a public entity constitutes a violation of the ADA. The United States Supreme Court declined to grant certiorari.

The Third Circuit reasoned that "integration is fundamental to the purposes of the Americans with Disabilities Act" and that the legislative history of the ADA reveals that unjustified segregation is the type of discrimination the drafters intended to eliminate. The court noted that all parties agreed that the most integrated setting appropriate for the plaintiff was her home. The DPW, however, argued that it could not provide treatment in the plaintiff's home without fundamentally altering its mental health system. Funding for both the nursing home and attendant care programs had already been set for the fiscal year, and according to Pennsylvania's Constitution, funds from one program could not be transferred to the other. The court responded that the explanation of the DPW concerning the need to shift funds was inadequate. Moreover, the court stated that the plaintiff was not asking the DPW to make a change in either the requirements for admission to the program or in the substantive nature of the

182 See Helen L., 46 F.3d at 328-29.
183 See id. at 329.
184 See id.
185 See id.
186 See id.
187 See Helen L., 46 F.3d at 329.
189 See Helen L., 46 F.3d at 332-33.
190 See id. at 337.
191 See id.
192 See id.
193 See id.
program, both of which would constitute a fundamental alteration.\textsuperscript{194} The court concluded that providing attendant care for the plaintiff in her home would not create a fundamental alteration in Pennsylvania's attendant care or nursing home program.\textsuperscript{195}

The court further stated that the DPW could not justify administering its attendant care program in a discriminatory manner because of a state funding mechanism already in place and then argue that compliance with the ADA would involve a fundamental alteration of its program.\textsuperscript{196} The court referred to the legislative history of the ADA, which stated that "[t]he fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services under . . . [Title II of the ADA]."\textsuperscript{197} The Third Circuit thus held that the DPW's failure to provide services in the most integrated setting appropriate for the plaintiff constituted a violation of the ADA.\textsuperscript{198}

Ironically, according to the statement of facts presented in the court's decision, the Commonwealth of Pennsylvania was spending, on average, $45,000 per year to care for the plaintiff in a nursing home while the cost of appropriate home care would have been only $10,500.\textsuperscript{199} Therefore, by requiring the DPW to provide home care for the plaintiff, the court was not imposing a large expense on the Commonwealth of Pennsylvania.\textsuperscript{200} One commentator suggested that the Third Circuit in Helen L. did not adequately address the issue of cost in relation to the provision of home and community-based services because it only discussed costs with regard to this particular case—that is, the court made a simple comparison between the cost of providing care for one particular individual in her home and the corresponding cost of maintaining the same individual in an institution.\textsuperscript{201} The court therefore failed to provide standards to help guide future courts to determine the impact of cost.\textsuperscript{202}

Following Helen L., there have been several district court cases concerning the issue of community placement under the ADA.\textsuperscript{203} For

\begin{footnotesize}
\begin{enumerate}
  \item See Helen L., 46 F.3d at 337.
  \item See id.
  \item See id. at 338.
  \item See id. at 333, 339.
  \item See Helen L., 46 F.3d at 338.
  \item See id.
  \item See Wood, supra note 60, at 501, 513.
  \item See id. at 501.
  \item See, e.g., Kathleen S. v. Department of Pub. Welfare, 10 F. Supp. 2d 460 (E.D. Pa. 1998);
\end{enumerate}
\end{footnotesize}
example, in 1996, in *Williams v. Wasserman*, the United States District Court for the District of Maryland held that while the ADA does not require states to create a new program or fundamentally alter an existing community-based program, the ADA does require states to provide community placement to qualified individuals with disabilities. In *Williams*, a group of residents in state institutions brought a claim against the State of Maryland, alleging that Maryland did not follow the determination of the state's professionals, who had recommended that the residents were able to live in the community. Maryland argued that placing the plaintiffs in a community setting would necessitate a redesign of its mental health program through the creation of a large number of community placements. The plaintiffs claimed that they were not asking for fundamental changes in Maryland's mental health system but rather were requesting "admission to an existing program of treatment on behalf of plaintiffs for whom such treatment is recommended." Both sides gave a different assessment of the expected cost. The court reasoned that the Third Circuit's holding in *Helen L.* would not require a fundamental alteration in a state's program that involved the transfer of a large amount of funds from institutions to community care. The court, however, denied Maryland's motion for summary judgment, rejecting its claim that providing community placement for the plaintiffs would require a "precipitous" transfer of funds to create 'hundreds' of community treatment slots.

Similarly, in 1998, another district court case relied on the Third Circuit's decision in *Helen L.* In *Kathleen S. v. Department of Public Welfare*, the United States District Court for the Eastern District of Pennsylvania held that the Commonwealth of Pennsylvania's DPW violated the ADA's integration mandate by its failure to provide community-based services to individuals for whom such services were appropriate and by its utilization of discriminatory methods of admini-
stration in planning. In *Kathleen S.*, 255 residents at Haverford State Hospital ("HSH") brought a claim against the DPW, alleging violation of the ADA as a result of the DPW’s failure to provide community placement and to develop a plan that began within a reasonable time period and moved at a reasonable pace. The plaintiffs argued that they were not asking the DPW to create new programs but rather to expand the DPW’s capacity to provide existing programs to additional individuals. The plaintiffs also argued that cost was not a factor. Because the DPW was closing an entire institution and because the cost of providing community placement was less than that of providing institutional care, the Commonwealth of Pennsylvania would actually realize a savings by placing the plaintiffs in community-based settings. As noted by the Secretary of Public Welfare in her announcement regarding plans to close HSH, the closing of institutions reflected a nationwide trend toward community integration and "[a]n integrated system of community and residential support . . . makes good sense for the consumer, the taxpayer and the entire community." Prior to this announcement, the DPW had convened a Task Force that issued a report delineating a re-structuring of the mental health system of Pennsylvania with the goal of creating a more integrated system. The Task Force had recommended the consolidation of HSH and another facility by placing many of the residents in community-based settings. The DPW, however, did not issue a plan regarding the consolidation until seven months had elapsed.

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212 See id. at 476.
213 See id. at 462; see also Plaintiffs’ Post-Trial Memorandum at 9–10, 32 *Kathleen S.*, 10 F. Supp. 2d at 382–84 [hereinafter *Kathleen S.* Post-Trial Mem.]. See infra notes 382–88 and accompanying text for a discussion of state plans moving at a reasonable pace.
214 See *Kathleen S.* Post-Trial Mem., supra note 213, at 24–26. See infra notes 347–55 and accompanying text for a discussion of the difference between expansion of existing services and creation of new programs.
215 See *Kathleen S.* Post-Trial Mem., supra note 213, at 21–23.
216 See id. at 23.
217 *Kathleen S.*, 10 F. Supp. 2d at 463.
218 Id. at 463–64.
219 See id. at 463. The DPW had not recommended community placement for all of the plaintiffs. See id. at 465. Under the provisions of its plan for closing HSH, the DPW had agreed to fund an independent assessment for any resident who requested one. See *Kathleen S.* Post-Trial Mem., supra note 213, at 33. The plaintiffs alleged that the DPW had not followed through with the provisions of its plan and that it had failed to conduct a comprehensive assessment of all of the residents of HSH. See id. at 33, 39. The plaintiffs’ independent expert identified several residents, for whom the DPW had not recommended community placement, as capable of living in the community. See id. at 11. See also infra notes 277–98 and accompanying text for a discussion of assessments made by state and independent professionals.
The court held that in enacting the ADA, Congress intended to strengthen the mandate instituted in § 504 and its coordinating regulations that individuals with disabilities should be integrated into the community. Relying on the Third Circuit's reasoning in *Helen L.*, the district court found that unnecessary segregation constitutes a form of discrimination under the ADA. The court rejected the DPW's argument that the plaintiffs were seeking deinstitutionalization and that the "planning and preparation of community services and facilities" for the plaintiffs would create a fundamental alteration in the mental health program of the Commonwealth of Pennsylvania. Therefore, the district court held that the DPW's failure to provide community placement for individuals for whom its own professionals had determined that such placement was appropriate violated the integration regulation of the ADA. Similarly, the court held that the DPW used discriminatory methods of administration by failing to plan adequately for the placement of individuals in the community and by failing to provide a reasonable rate of placement.

Thus, the Third Circuit's decision in *Helen L.* became the standard on which subsequent courts have relied. The decision of the United States Court of Appeals for the Eleventh Circuit in *Olmstead v. L.C. ex rel. Zimring* similarly relied on *Helen L.* It is interesting that in the case of *Helen L.*, the United States Supreme Court refused to grant certiorari, while in the case of *Olmstead*, the Court agreed to do so. As will be discussed in the next two sections, the Supreme Court's ruling in *Olmstead* represents a departure, in certain respects, from the decision of the Third Circuit in *Helen L.*

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221 See id. at 468.
222 See id.
223 See id. at 470–71.
224 See id. at 472, 476.
224 See supra notes 203–25 and accompanying text.
225 See *Helen L.*, 10 F. Supp. 2d at 472, 476.
226 See supra notes 203–25 and accompanying text.
229 See infra notes 230–426 and accompanying text.
V. Olmstead v. L.C. ex rel. Zimring: The Decision of the Supreme Court

In 1999, in *Olmstead v. L.C. ex rel. Zimring*, the United States Supreme Court held that the unjustified segregation of individuals with mental disabilities in institutions constitutes discrimination under the ADA. The Court also held that the ADA requires states to provide placement for individuals with mental disabilities in community settings rather than in institutions when: (1) the state's treatment professionals determine that such placement is appropriate; (2) the affected individual does not oppose the placement; and (3) the state can reasonably accommodate the placement without creating a fundamental alteration, given the state's available resources and the needs of other individuals with mental disabilities.

In *Olmstead*, L.C., a woman with mild mental retardation and schizophrenia, brought a claim against the State of Georgia. L.C. alleged that because Georgia's professionals had recommended that her needs could be more appropriately met in a community-based setting, her continued confinement in a state psychiatric hospital constituted a violation of Title II of the ADA, the Title II implementing regulations of the Department of Justice and the Due Process Clause of the Fourteenth Amendment. E.W., a woman with mild mental retardation and a personality disorder, intervened and stated an identical claim. Georgia argued that it had not provided community placement for L.C. and E.W. because of a lack of funds and that such placement would fundamentally alter its mental health system. Georgia further argued, *inter alia*, that its failure to provide community placement for L.C. and E.W. did not constitute discrimination "by reason of" their disabilities under Title II.

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231 See id. at 2181, 2190.
232 See Brief for Respondents at **5-6, *Olmstead* (No. 98-536).
233 See *Olmstead*, 138 F.3d at 895.
234 See id. Both L.C. and E.W. are currently living and thriving in the community. See The Bazelon Centre for Mental Health Law, *Who Are L.C. and E.W.?* [http://www.bazelon.org/landew.html] (last visited July 6, 1999). L.C. is living in a group home for three persons, receiving assistance but continually acquiring new skills and adjusting to a very different kind of life from that she had known for most of her years in an institution. See id. E.W. is living in her own apartment and receiving support services. See id. Both traveled to Washington, D.C. to be present during the Oral Arguments of the *Olmstead* case. See id.
235 See *Olmstead*, 119 S. Ct. at 2184.
236 See id.
The United States District Court for the Northern District of Georgia granted partial summary judgment in favor of L.C. and E.W., holding that Georgia's actions violated Title II of the ADA and its implementing regulations.\textsuperscript{237} The United States Court of Appeals for the Eleventh Circuit affirmed this decision, but also remanded the case to the district court to determine whether the additional expense to Georgia as a result of the community placement was unreasonable and would fundamentally alter the State's mental health program.\textsuperscript{238} On remand, the district court found that the cost of providing placement in the community for the two women would not be excessive in comparison to the State's entire mental health budget.\textsuperscript{239}

The Supreme Court affirmed the decision of the Eleventh Circuit "in substantial part."\textsuperscript{240} In a 6–3 decision authored by Justice Ginsburg, the Court held that unjustified segregation constitutes "discrimination based on disability."\textsuperscript{241} The Court rejected the arguments presented by the State of Georgia, and supported by Justice Thomas in his dissent, that L.C. and E.W. did not experience discrimination "by reason of" their disabilities and that the segregation of individuals with disabilities is not actionable discrimination under the ADA because discrimination necessarily requires a comparison class of similarly situated individuals.\textsuperscript{242} The Court explained, "[w]e are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA" and cited three non-disability discrimination cases to support its conclusion.\textsuperscript{243} The Court also found that Congress had intended the ADA to extend the scope of previous disability rights

\textsuperscript{237} See Olmstead, 138 F.3d at 895. The district court did not address the plaintiffs' constitutional claims. See id. at 895 n.3.

\textsuperscript{238} See id. Because the district court did not address the constitutional claims, the Eleventh Circuit also declined to do so. See id.

\textsuperscript{239} See Olmstead, 119 S. Ct. at 2185 n.7.

\textsuperscript{240} See id. at 2181.

\textsuperscript{241} See id. at 2185. Justices Stevens and Kennedy issued separate concurring opinions. See id. at 2190 (Stevens, J., concurring); id. at 2191–94 (Kennedy, J., concurring). Justice Stevens stated that he would have preferred to affirm the opinion of the Eleventh Circuit. See Olmstead, 119 S. Ct. at 2190 (Stevens, J., concurring). In his concurring opinion, Justice Kennedy indicated that he saw the need to apply a great deal of deference to the medical recommendations of treating physicians; expressed concern about the repercussions of deinstitutionalization; and concluded that the case should be remanded to the lower courts to determine whether discrimination occurred as a result of dissimilar treatment of those with and those without mental disabilities. See id. at 2191–94 (Kennedy, J., concurring). Justice Thomas wrote the sole dissenting opinion, objecting to the Court's definition of discrimination and stating that discrimination requires "differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic." See id. at 2194–99 (Thomas, J., dissenting).

\textsuperscript{242} See id. at 2186.

\textsuperscript{243} See id. at 2186 & n.10.
legislation, such as § 504 and the DDA Act, and that Congress had explicitly identified unjustified segregation as a form of discrimination in the congressional findings of the ADA.\textsuperscript{244} Moreover, the Court noted that unnecessary segregation perpetuates the stereotypic assumption that individuals with disabilities are unable to be part of the community and seriously curtails the opportunities available to individuals with disabilities to experience aspects of everyday living such as educational activities and employment and to form relationships with friends and family.\textsuperscript{245} Thus, the Supreme Court held that the unjustified isolation of individuals with mental disabilities in institutions constitutes discrimination under the ADA.\textsuperscript{246}

At the same time, however, the Court noted that the responsibility of the states to provide community placement is not "boundless."\textsuperscript{247} Recognizing that states have a need to provide a range of services to a large population of individuals with diverse mental disabilities and an obligation to administer services in an equitable manner, the Court interpreted fundamental alteration as encompassing more than a simple comparison of cost between placement in the community for a particular individual and placement in an institution for that same individual.\textsuperscript{248} Rather, the Court found that future courts must consider additional factors in light of a state's available resources—namely, overall costs, the range of services a state provides to other individuals with mental disabilities and the responsibility of a state to provide services in an equitable manner.\textsuperscript{249} The Court reasoned that states need sufficient "leeway" to manage their mental health systems.\textsuperscript{250} Accordingly, the Court held that a state could meet its burden by showing that "it had a comprehensive, effectively working plan . . . and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated . . . ."\textsuperscript{251} The Court also noted that individuals could not receive community placement ahead of others on the waiting list merely by filing a lawsuit.\textsuperscript{252}

In keeping with its explanation of the fundamental alteration defense, the Supreme Court rejected the interpretation of the Eleventh

\textsuperscript{244} See \textit{Olmstead}, 119 S. Ct. at 2186–87.
\textsuperscript{245} See \textit{id.} at 2187.
\textsuperscript{246} See \textit{id.} at 2185.
\textsuperscript{247} See \textit{id.} at 2188.
\textsuperscript{248} See \textit{id.} at 2185.
\textsuperscript{249} See \textit{Olmstead}, 119 S. Ct. at 2185.
\textsuperscript{250} See \textit{id.} at 2185.
\textsuperscript{251} See \textit{id.} at 2189.
\textsuperscript{252} \textit{Id.}
Circuit, stating that the lower court erroneously focused on a simple cost comparison. The Supreme Court found the latter to be unduly restrictive and virtually unworkable for the states. Additionally, the Court pointed out that the interpretation of the term "fundamental alteration" used in the implementing regulations of the Department of Justice must be consistent with the Department’s regulations for § 504, which included a provision pertaining to "undue hardship." The Court noted that the regulations for § 504 define "undue hardship" to mean more than mere cost; rather, the concept involves a case-by-case analysis of additional factors such as the overall size and type of the program. Therefore, the Court affirmed the Eleventh Circuit’s opinion in part, vacated it in part and remanded the case to the district court for an examination of a variety of factors beyond a simple cost comparison to determine if the community placement represented a fundamental alteration of Georgia’s program.

VI. DISCUSSION OF THE SUPREME COURT’S OPINION AND RECOMMENDATIONS FOR THE FUTURE

A. Unjustified Segregation Constitutes Discrimination Under the ADA

The United States Supreme Court’s ruling in *Olmstead* represents a critical first step toward achieving the goal of community integration for individuals with disabilities, a goal envisioned by the drafters of the ADA nine years ago. For persons with disabilities who are currently living in institutions and waiting to receive placement in the community, the first part of the Supreme Court’s ruling in *Olmstead* offers great promise. In a powerful statement, the Court declared that the unjustified segregation of individuals with mental disabilities in institutions constitutes discrimination under the ADA. Such recognition on the part of the Supreme Court is particularly noteworthy in light of the nation’s unfortunate history of segregating individuals with mental disabilities in institutions and echoes the intent of Congress in

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253 *See id.* at 2188–89.
254 *See Olmstead*, 119 S. Ct. at 2188–89.
255 *See id.* at 2190 n.16.
256 *See id.*
257 *See id.* at 2190.
259 *See 119 S. Ct. at 2185.
260 *See id.*
enacting the ADA.\textsuperscript{261} Moreover, the Court's ruling accepts the documented benefits of community integration and acknowledges the negative impact of institutionalization—for example, the perpetuation of stereotypic images of individuals with disabilities and the lack of opportunity for those individuals in institutions to engage in ordinary life experiences.\textsuperscript{262} Ideally, the positive tone of the Court's ruling in \textit{Olmstead} will not only create optimism among individuals with disabilities, but will also impact future decisions of lower courts and serve as a harbinger of change to the states, leading them to emulate the standard set by the Court.\textsuperscript{263} In this respect, the Court's ruling in \textit{Olmstead} represents an important beginning of the realization of community integration.\textsuperscript{264}

It is likewise significant that the Court clearly rejected the argument presented by the State of Georgia and supported by Justice Thomas in his dissent that Georgia's failure to provide community placement for L.C. and E.W. did not constitute discrimination by reason of such disability.\textsuperscript{265} Thomas stated that the Court "has never endorsed an interpretation of the term 'discrimination' that encompassed disparate treatment among members of the same protected class."\textsuperscript{266} The Court responded decisively that the dissent's view was incorrect on the basis of both "precedent and logic."\textsuperscript{267} According to the Court, in enacting the ADA, Congress intended a more expansive definition of discrimination.\textsuperscript{268} Consequently, following the Court's ruling in \textit{Olmstead}, states will no longer be able to argue, as they have in the past, that their failure to provide community placement does not constitute discrimination by reason of such disability.\textsuperscript{269}

\textsuperscript{261} See supra notes 28-43, 150-61 and accompanying text.
\textsuperscript{262} See 119 S. Ct. at 2187; see also supra notes 51-59 and accompanying text.
\textsuperscript{263} See Bill Rankin, \textit{Ruling Extends Rights of Mentally Disabled: Georgians Win Partial Victory in Picking Home}, ATLANTA J. & ATLANTA CONST., June 23, 1999, at F4 ("The state now knows it can no longer keep people in an institution when they don't need to be there. Period.") (quoting Susan Jamieson, attorney for Atlanta Legal Aid, who represented respondents).
\textsuperscript{264} See 119 S. Ct. at 2185.
\textsuperscript{265} See id. at 2186. Justice Kennedy pointed out that the Court's statement about the dissimilar treatment of those with mental disabilities and those without mental disabilities suggests a theory under which the respondents may have been able to prove discrimination based on their mental disabilities. See id. at 2192 (Kennedy, J., concurring).
\textsuperscript{266} Id. at 2194 (Thomas, J., dissenting).
\textsuperscript{267} Id. at 2186 n.10.
\textsuperscript{268} Id. at 2186.
\textsuperscript{269} See, e.g., Brief for Petitioners at *20-21, \textit{Olmstead} (No. 98-536).
Furthermore, the Court's ruling concerning discrimination by reason of such disability may have additional implications in the future. The question of whether actionable discrimination under the ADA may occur among classes of individuals with disabilities or whether it must necessarily occur between individuals with disabilities and those without disabilities has troubled courts for years.\textsuperscript{270} Therefore, the Court's ruling in \textit{Olmstead} may provide support in future disability rights discrimination cases that do not involve community placement but nonetheless pertain to the issue of discrimination among classes of individuals with disabilities—for example, discrimination based on the differential treatment of persons with severe and mild mental retardation or those with mental and physical disabilities.\textsuperscript{271}

\textbf{B. The ADA Requires States to Provide Community Placement Upon Fulfillment of Three Conditions}

While the first part of the Court's ruling in \textit{Olmstead} represents an important achievement for individuals with mental disabilities, the second part has very different implications.\textsuperscript{272} In the latter, the Court held that the ADA does not require states to provide placement in the community in all situations, but rather imposes such an obligation upon the fulfillment of three specified conditions.\textsuperscript{273} Although the Court presented the three conditions as a unit, the first two differ from the third in that they pertain to the meaning of the term "appropriate" in the integration regulation, while the third relates to a clarification of the reasonable-modifications regulation.\textsuperscript{274} Each of these conditions may make it more difficult for an individual to receive community placement in the future.\textsuperscript{275} It is the third, however, that creates the greatest obstacle to the goal of community integration.\textsuperscript{276}

\textsuperscript{270} Compare, e.g., \textit{Flight} v. \textit{Gloeckler}, 68 F.3d 61, 63 (2d Cir. 1995) (finding that failure to make modifications based on severity of disability was not discrimination because the Rehabilitation Act \"[d]oes not clearly establish an obligation to meet [a disabled person's] particular needs vis-à-vis the needs of other handicapped individuals, but mandates only that services provided non-handicapped individuals not be denied to a disabled person because he is handicapped.\") (citing \textit{P.C. v. \textit{McLaughlin}}, 913 F.2d 1033, 1041 (2d Cir. 1990)), \textit{with} \textit{Jackson ex rel. Jackson v. Fort Stanton Hosp. & Training Sch.}, 757 F. Supp. 1243, 1299 (D.N.M. 1990) (finding that severity of disability is itself a disability under \$ 504 and that severity of disability cannot be the sole reason for denying access to community programs).

\textsuperscript{271} See, e.g., \textit{Flight}, 68 F.3d at 63; \textit{Jackson}, 757 F. Supp. at 1299.

\textsuperscript{272} See \textit{119 S. Ct.} at 2181, 2185, 2190.

\textsuperscript{273} See \textit{id.} at 2181, 2190.

\textsuperscript{274} See \textit{id.} at 2183, 2188-90.

\textsuperscript{275} See \textit{infra} notes 277-399 and accompanying text.

\textsuperscript{276} See \textit{infra} notes 319-88 and accompanying text.
1. Determination by the State's Treatment Professionals

The first condition specified by the Court is that the state's treatment professionals must determine that community placement is appropriate. At the oral arguments, there was considerable discussion by the Justices concerning which professionals should be allowed to make a recommendation for community placement. The Justices expressed concern that a "battle of the experts" might unfold, with the state's professionals arguing that community placement is not appropriate for a particular individual and a second group of professionals, testifying on behalf of the individual, arguing the opposite. In Kathleen S., for example, an independent expert recommended that community placement was appropriate for certain individuals for whom the state's professionals had determined that such placement was inappropriate. Therefore, it is likely that the Court specified that the professionals should be those of the state because it wanted to avoid a situation involving contradictory professionals. Moreover, it is also quite possible that with respect to professional judgment, the Court wanted to give the states sufficient leeway to manage their own programs, as it had done in other parts of its opinion.

Unfortunately, however, the Court in Olmstead did not address the question of impartiality in a judgment made by the state's professionals. A conflict of interest arises when a state employee—that is, the professional—must make a decision that adversely affects the financial situation of his or her employer—that is, the state. There is the possibility that the state's professionals will place the interests of the state above those of the individual for whom they are recommending some form of care. According to one commentator, the terms "pro-

277 See 119 S. Ct. at 2181, 2190.
279 See Id. at *38.
280 See Kathleen S. Post-Trial Mem., supra note 213, at 11.
281 See 119 S. Ct. at 2181, 2188, 2190.
282 See id.; see also infra notes 319-93 and accompanying text.
283 See Susan Stefan, Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard, 102 Yale L.J. 630, 655-61 (1992) (arguing that the Supreme Court's paradigm of the neutral mental health professional does not reflect reality).
284 See id. at 655.
285 See, e.g., Jackson ex rel. Jackson v. Fort Stanton Hosp. & Training Sch., 964 F.2d 980, 992 (10th Cir. 1992) (holding that professionals must make their recommendations for community placement based on cost considerations); see also Stefan, supra note 283, at 655.
professionals" and "professional judgment" automatically connote a false sense of neutrality and objectivity. In reality, professionals do not make decisions in a vacuum; personal and ideological biases inherently influence their decisions. Therefore, the Court in Olmstead should have specified, at a minimum, that the determinations regarding community placement made by the state's professionals cannot be based on criteria such as administrative and cost concerns.

While the Court explicitly indicated that it is the state's professionals who are to make the recommendations for community placement, the Court was less clear regarding the degree of deference courts in the future should give to the decisions of the state's professionals. In reference to reliance on determinations made by the state's professionals, the Court used the rather vague expression that "the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program." The terms "generally may" and "reasonable assessments" used by the Court hopefully leave open the possibility that an individual in the future might contest the recommendation of the state's professionals. In such a case, the burden will be on the individual to prove that the state's professionals either were not qualified to make such an assessment or that the state's professionals did not make a reasonable assessment.

Following the Court's decision in Olmstead, individuals with disabilities arguing for community placement and their attorneys may find themselves in an awkward position. It is important to remember that in many cases, it was the state's professionals who had recommended community placement. For L.C. and E.W., for example, the
state's professionals determined that community placement was appropriate for the two women prior to their discharge from the state psychiatric hospital. Therefore, individuals with disabilities may benefit if courts defer to the opinions of the state's professionals because such deference implies that the state would have to provide community placement for the individuals. At the same time, however, individuals with disabilities and their attorneys may find themselves asking whether they want the courts to invest so much deference and power in the decisions of professionals paid by the state. Hopefully, the state's professionals will exercise objectivity and fairness to the fullest extent possible in keeping with their role as "professionals." Depending on the facts of the case, however, an individual may want to contest the recommendation of the state's professionals and present a second opinion from an independent professional.

2. Affected Individual Does Not Oppose Community Placement

The second condition included as part of the Court's holding is that the affected individual must not oppose the community placement. This condition, although it does not contain the word "appropriate," also speaks to the issue of appropriateness in the integration regulation. The Court seemed to be concerned with the impact of the decision regarding community placement on the individual, and to a certain extent this requirement does protect the person. The specific language used by the Court—namely, the "affected individual" and "not oppose"—warrants attention.

Based treatment would be appropriate for L.C. and E.W. . . .); Helen L. v. DiDario, 46 F.3d 325, 329 (3d Cir. 1995), cert. denied, Pennsylvania Secretary of Pub. Welfare v. Idell S., 516 U.S. 813 (1995) ("DPW agrees that 'the most integrated setting appropriate to [the plaintiff] is her home . . . ."); Kathleen S. v. Department of Pub. Welfare, 10 F. Supp. 2d 460, 465 (E.D. Pa. 1998) ("[There are] approximately 95 class members who have been identified by DPW as appropriate for treatment in the community but . . . for whom facilities and services are not presently available for their treatment in the community.").

291 See 119 S. Ct. at 2188.
292 See, e.g., Brief for Respondents at *5, Olmstead (No. 98-536) (noting that Georgia professionals had identified 523 individuals in institutions who could be served more appropriately in the community, but who remained institutionalized).
293 See supra notes 283-88 and accompanying text.
295 See, e.g., Kathleen S. Post-Trial Mem., supra note 213, at 11, 33, 39.
296 See 119 S. Ct. at 2181, 2190.
297 See id. at 2188 (finding that both the requirement that the state's professionals recommend that community placement is appropriate and the requirement that the individual not oppose the placement determine whether the individual is "qualified" for community placement).
298 See id.
299 See id. at 2181, 2190.
The Court did not elaborate on the meaning of the term "affected individual." Since a parent or guardian is often involved in situations pertaining to individuals with mental disabilities, the requirement as articulated raises a question regarding the respective roles of the individual and the parent or guardian. There is the possibility that an individual may clearly express a desire to be placed in the community, while the individual's parent or guardian opposes such placement. The State of Connecticut, for example, provides parents and guardians with the right to notice and a hearing prior to the transfer of their children or wards to the community. Hopefully, because the Court used the words "affected individual," future courts will interpret this phrase to mean the individual, and not a third party guardian, in cases in which there is a difference of opinion.

The Court used the words "not oppose," apparently following the language of the implementing regulations of the ADA. The Court noted that there is no federal requirement that community placement be imposed on an individual who does not want such placement. The Court cited the implementing regulations of the ADA, which state that an individual should not be required to accept an unwanted placement and that an individual must have the option of declining a particular placement. The requirement of "not oppose" is an easier condition to fulfill than "consent to," which would necessitate some indicia of consent on the part of the individual.

See id.
See, e.g., Stanley S. Herr, Representation of Clients with Disabilities: Issues of Ethics and Control, 17 N.Y.U. Rev. L. & Soc. CHANGE 609, 614 (1989/1990) ("guardians . . . may have interests that conflict or at least diverge in some respects from those of the person with mental disabilities.").
See, e.g., David H. Neely, Handicapped Advocacy: Inherent Barriers and Partial Solutions in the Representation of Disabled Children, 33 Hastings L.J. 1359, 1399 (1982) (arguing that the law is unclear for lawyers of clients with mental disabilities "regarding how the client's expressed desires are to be represented if they conflict with those of the guardian.").
See 119 S. Ct. at 2181, 2190.
See id. at 2188.
See id. The requirement that the individual not oppose the placement is somewhat analogous to the requirement in the federal Medicaid statute which mandates that states participating in the HCBS Waiver Program must inform eligible individuals of the possible alternatives and provide such individuals with a choice of services. See supra note 75 and accompanying text.
It is noteworthy that the holding of the Court concerning the appropriateness of the placement vis-à-vis the role of the decision of the state’s professionals and the role of the affected individual reflects the Court’s strong opposition to deinstitutionalization.\(^{312}\) The Court pointed out that the ADA does not mandate community placement for all individuals with disabilities—that is, the state’s professionals must recommend that the community is the appropriate setting for the particular individual, and the affected individual must not oppose such placement.\(^{313}\) At the oral arguments, the justices expressed concern regarding the repercussions of a massive emptying of the institutions.\(^{314}\) Justice Kennedy articulated this apprehension in his concurring opinion.\(^{315}\) This fear reflects the negative connotations associated with the term deinstitutionalization.\(^{316}\) Although deinstitutionalization began as a positive step in response to the pervasive institutionalization of persons with disabilities, its meaning has changed over the years, and deinstitutionalization has come to symbolize the release of large numbers of individuals onto the street without adequate support programming.\(^{317}\) Disability advocates have agreed that the ADA does not mandate deinstitutionalization and that community placement is not the appropriate option for all individuals with disabilities.\(^{318}\)

3. Reasonable Modifications/Fundamental Alteration

In addition to the two conditions pertaining to the concept of appropriateness, the Court also held that the reasonable-modifications regulation limits the obligation of states to provide community placement.\(^{319}\) According to the regulation: "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."

\(^{312}\) See Olmstead, 119 S. Ct. at 2189 ("the ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk.").

\(^{313}\) See id. at 2187 ("We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings.").

\(^{314}\) See Oral Arg., supra note 278, at **47-48.

\(^{315}\) See Olmstead, 119 S. Ct. at 2191-92 (Kennedy, J., concurring).

\(^{316}\) See supra notes 48-49 and accompanying text.

\(^{317}\) See supra notes 45-49 and accompanying text.

\(^{318}\) See supra note 52 and accompanying text.

\(^{319}\) See Olmstead, 119 S. Ct. at 2188-90.

the concept of fundamental alteration by stating that future courts should consider the following: (1) the overall cost to the state; (2) the range of existing services the state provides to other individuals with disabilities; and (3) the state's obligation to provide these services in an equitable manner.321 Prior to Olmstead, courts had struggled with the scope of the fundamental alteration defense.322 The Third Circuit in Helen L. referred to a change in the nature of a program or a change in the requirements for admission to a program as fundamental alterations, but was reluctant to find a fundamental alteration due to a lack of funds.323 The problem with the concept of fundamental alteration, as with that of undue hardship in § 504, is that there is no bright-line test to determine what constitutes a reasonable modification and what constitutes a fundamental alteration.324 Rather, as the Supreme Court in Alexander v. Choate suggested, an evaluation of a fundamental alteration involves balancing the right of the individual to be integrated into society against the right of the state to maintain the integrity of its mental health system.325

In discussing the issue of cost, the Supreme Court in Olmstead was clear that courts in the future should consider overall expenses to the state rather than a simple cost comparison.326 The latter involves a comparison between the cost of providing services in the community for a particular individual and the corresponding cost of providing services for that same individual in an institution.327 In a simple comparison, care in the community is less expensive.328 The Court noted, however, that as the number of residents in an institution decreases, states still incur certain fixed overhead expenses, leading to a higher per capita cost, unless the facility is closed.329 According to the Court, these fixed costs must be considered in determining the overall cost.

321 See 119 S. Ct. at 2185. The factors recommended by the Court for future courts to consider when evaluating a fundamental alteration defense are similar to and appear to be as extensive as the factors included by the Department of Justice to describe "undue hardship" in the coordinating regulations of § 504. See supra note 118 and accompanying text. In rejecting a simple cost comparison, the Court in Olmstead specifically mentioned the "undue hardship" factors in a footnote. See 119 S. Ct. at 2190 n.16.


323 See 46 F.3d at 337.

324 See, e.g., Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 137 (2d Cir. 1995) (noting that undue hardship is a "relational term" that warrants a cost/benefit analysis).


326 See Olmstead, 119 S. Ct. at 2188-89.

327 See id.

328 See id.

329 See id. at 2189 n.15.
to the state of providing community placement. The Court noted that states will be unable to close every institution because there will always be individuals who must live in such facilities, and further, that the ADA does not require "states to phase out institutions." Again, as with the Court's requirements that the state's professionals approve the placement and the individual not oppose it, this statement reflects the Court's concern about and disapproval of deinstitutionalization. The Court further emphasized that some individuals living in the community may need to return to an institution from time to time to receive acute psychiatric care, as was the case with L.C. and E.W. As a result of the Court's rejection of the simple cost comparison in favor of overall expenses to the state, individuals with disabilities seeking placement in the community in the future will no longer be able to argue a simple cost comparison. By focusing on the overall cost to states, the Court has made it easier for states to prove a fundamental alteration defense by showing that they will incur excessive expenses that will fundamentally alter the nature of their mental health system.

Moreover, in its efforts to emphasize the impact of the overall cost on the capacity of states to provide community-based services, the Court failed to point out that fixed overhead expenses do not automatically result in a fundamental alteration of a state's program. Studies indicate that in the face of reduced institutional populations, states can deal with fixed costs by implementing measures such as staff sharing and/or institution consolidation. The Court should have specified that it is not sufficient for states merely to point to the existence of certain fixed costs. Rather, states should be required to demonstrate that they are considering alternative approaches to the issue of costs and that they are also actively seeking more funding. Furthermore, the Court should have noted that certain policies will be cost-effective in the long-term and that the benefits of community

330 See id. at 2189.
331 Olmstead, 119 S. Ct. at 2189.
332 See id.
333 See id.
334 See, e.g., Helen L., 46 F.3d at 329.
335 See Olmstead, 119 S. Ct. at 2188-89.
336 See, e.g., Brief Amici Curiae for American Psychiatric Association and the National Alliance for the Mentally Ill Supporting Respondents at **28-29, Olmstead (No. 98-536) [hereinafter Brief for Am. Psychiatric Assoc.].
337 See id. at *29; Brief for United States, supra note 79, at *22.
338 See id. at *29 ("Unsubstantiated claims of . . . costs . . . are no substitute for proof.").
339 See, e.g., Brief for Am. Psychiatric Assoc., supra note 336, at *29.
integration may in some instances outweigh the additional costs required. A stronger message from the Court would have given a sense of urgency and a need for acceleration in keeping with the earlier part of its opinion hailing community integration.

Also in its attempt to highlight the role of overall cost, the Supreme Court hastily rejected the Eleventh Circuit's construction of the reasonable-modifications regulation as overly narrow and restrictive. The Supreme Court itself recognized that the Eleventh Circuit had found that a determination of a fundamental alteration should consist of an examination of "other things" in addition to cost. In fact, some of the "other things" mentioned by the Eleventh Circuit were quite extensive. The Eleventh Circuit remanded the case to the district court to determine, inter alia, "(1) whether the additional expenditures necessary to treat L.C. and E.W. in community-based care would be unreasonable given the demands of the State's mental health budget; (2) whether it would be unreasonable to require the State to use additional available Medicaid waiver slots . . . ; and (3) whether any difference in the cost of providing institutional or community-based care will lessen the State's financial burden." As Justice Stevens stated in his concurrence, the Supreme Court should have affirmed the decision of the Eleventh Circuit, noting that if the district court chose to adopt a purely cost-based analysis, such a decision should have been appealed as an arguable error on the part of the district court.

The second factor noted by the Supreme Court for consideration in an evaluation of a fundamental alteration defense is the range of services provided by the state. The Department of Justice has determined that the ADA does not require states to create new programs because to do so would require a fundamental alteration. A further question, however, pertains to the expansion of already existing programs. Does the ADA require states to expand their current programs to provide treatment in the most integrated setting appropri-

534 See id. at *27-28; Brief for Respondents at *49, Olmstead (No. 98-536).
535 See id. at 2185.
536 See id. at 2188.
537 See id.
539 Id.
540 See Olmstead, 119 S. Ct. at 2190 (Stevens, J., concurring).
541 See id. at 2185.
542 See Brief for the United States, supra note 79, at *20 n.3.
543 See, e.g., Kathleen S. Post-Trial Mem., supra note 213, at 24-26.
The Department of Justice has stated that although the creation of new programs would constitute a fundamental alteration, the expansion of existing programs would not. Lower courts similarly have held that the ADA requires states to expand existing programs to provide services in the most integrated setting appropriate. For example, in *Kathleen S.*, the plaintiffs argued that "if a public entity could avoid its obligations under the integration mandate simply by contending that additional capacity in existing programs must be developed, it would nullify the meaning of the mandate." The Court in *Olmstead* did not specifically answer this question. It appears, however, that its answer would be that the ADA requires states to expand their existing programs, unless doing so would necessitate a fundamental alteration.

By including range of services as one of the bases of a fundamental alteration defense, the Court has again, as with overall cost, given the states greater opportunity to legitimate their reluctance to provide community placement. It will be relatively easy for a state to hide behind a defense that the requested community placement will fundamentally alter the state's range of services by diverting resources from where they are needed. For example, a state could henceforth argue that because it has the enormous responsibility of administering a wide array of services, it cannot redirect resources of time, persons, funds, etc. to expand a program to meet the needs of a small group of individuals. The state could therefore argue that such an expansion would create a fundamental alteration in its overall system.

The third factor mentioned by the Court as basic to a fundamental alteration defense is the equitable distribution of a state's resources.

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350 See id.
351 See Brief for the United States, *supra* note 79, at *20 n.3.
352 See, e.g., Williams, 937 F. Supp. at 530.
354 See 119 S. Ct. 2176-90.
355 See *id.* at 2189.
356 See *id.* It is interesting that approximately 75% of Medicaid funding goes to institutional care while only 25% goes to community-based care. See MiCASSA, *supra* note 91, § 2(a)(1). One could ask: does such a proportion really constitute a meaningful "range" of services?
357 See Brief of the National Conference of State Legislatures, as Amici Curiae Supporting Petitioners at **9-10, Olmstead* (No. 98-536) (arguing that it should not be a fundamental alteration for a state to continue to keep an individual confined to an institution when immediate placement of that individual would disrupt the state's allocation of resources) (hereinafter Brief of State Legislatures).
358 See *id.*
359 See *Olmstead*, 119 S. Ct. at 2189.
360 See *id.* at 2185.
The Court articulated this concept in several different forms throughout the opinion without explaining its precise meaning at any time.\(^{361}\) The Court recognized that states have an obligation "to administer services with an even hand" and "to mete out those services equitably."\(^{362}\) Similarly, the Court held that the states could prove the fundamental alteration defense by demonstrating that "immediate relief for the plaintiffs would be inequitable . . . ."\(^{363}\) The Court further noted that the placement of individuals with mental disabilities in community settings must take into account the needs of other individuals with disabilities.\(^{364}\)

By including the equitable distribution of resources, the Court clearly had in mind a desire for some degree of fairness.\(^{365}\) Yet, because this third factor is so vague, it is open to varying interpretations.\(^{366}\) The Court expressed concern about the impact that the immediate release of individuals who file lawsuits may have on the services that a state provides to a diverse population of individuals with mental disabilities.\(^{367}\) Moreover, the Court explained that individuals who file lawsuits to receive community placement cannot jump ahead of others on the waiting list to receive that placement.\(^{368}\) Because of its concern for the equitable distribution of resources, the Court apparently did not want states to put the needs of those awaiting community placement ahead of the needs of those requiring institutional care.\(^{369}\) The same argument, however, holds true in the reverse—where is the equity for individuals who have been waiting for community placement for five, ten or even fifteen years?

An additional question concerns individuals currently living at home, who are on waiting lists to receive community placement or additional community-based services.\(^{370}\) It is unclear how these individuals fit into the equity equation.\(^{371}\) Although the Court phrased the

\(^{361}\) See id. at 2185, 2189.
\(^{362}\) Id. at 2185.
\(^{363}\) Id. at 2189.
\(^{364}\) See Olmstead, 119 S. Ct. at 2181, 2190.
\(^{365}\) See id.; see also Random House Webster's College Dictionary 445 (2d ed. 1999) (defining "equitable" as "fair").
\(^{366}\) See Olmstead, 119 S. Ct. at 2185.
\(^{367}\) See id. at 2189.
\(^{368}\) See id. at 2190.
\(^{369}\) See id.
\(^{371}\) See id. The Supreme Court in Olmstead did not indicate whether "others with mental disabilities" and "a large and diverse population of persons with mental disabilities" include those individuals who are living at home and waiting to receive community placement. See 119 S. Ct. at 2181, 2189, 2190.
provision of services to individuals with mental disabilities in terms of an equitable distribution of resources, the result seems to be a playing of one group against the other in the hope that none of the groups—individuals in institutions requiring institutional care, those waiting for community placement and those at home waiting for community services—is hurt to any great extent. Such an approach does not appear to be equitable and certainly does not advance the goal of community integration. With equitable distribution, as with the first two factors, the Court has given the states room to maneuver in providing placement for individuals in community-based settings.

Moreover, while states may argue that increased costs and/or the need to provide an equitable range of services are the reasons for their failure to provide community placement, it is important to point out that states sometimes mask inappropriate motivations under the guise of more acceptable ones. For example, states may experience bureaucratic resistance to change on the part of administrators or reluctance to phase down institutions because of a loss of jobs to administrators and other employees. There may be pressure from state politicians to preserve the status quo with respect to institutions in order to maintain jobs for their constituents. Resistance may also come from members of the community who may have a “not in my backyard” reaction to the creation of group homes for individuals with mental disabilities. These motivations have nothing to do with cost, range of services or equitable distribution. In the past, states have sometimes used the defense of excessive costs to conceal their true motivation. The Court’s explication of the fundamental alteration defense in terms of range of services and equitable distribution—as well as cost—provides the states with additional ways to hide their true intentions.

372 See Olmstead, 119 S. Ct. at 2181, 2189, 2190.
373 See id.; see also Brief for Am. Psychiatric Assoc., supra note 336, at **28-29 (“discrimination against one individual is hard to justify on the ground that it benefits another individual . . . .”)
374 See supra notes 326-39 and accompanying text.
375 See Brief for Respondents at *49, Olmstead (No. 98-536); Amicus Curiae Brief of 58 Former State Commissioners and Directors of Mental Health and Developmental Disabilities in Support of Respondents at **23-26, Olmstead (No. 98-536) [hereinafter Brief of Former State Commissioners].
376 See Brief of Former State Commissioners, supra note 375, at *26.
377 See id. at *25.
378 See id. at *24.
379 See id.; Brief for Respondents at **9-10, Olmstead (No. 98-536).
380 See Brief of Former State Commissioners, supra note 375, at *26.
381 See Olmstead, 119 S. Ct. at 2185.
The Supreme Court suggested that a state could satisfy the fundamental alteration defense if, for example, it had a "comprehensive, effectively working plan" with a waiting list moving at a "reasonable pace."\(^{382}\) While the development of a state plan would certainly be a positive step, the Court did not go far enough since it provided no guidance to the lower courts concerning the parameters of a comprehensive plan or the rate of a reasonable pace.\(^{383}\) If, for example, an individual had been institutionalized for ten years and a state plan required a further three-year wait to receive placement in the community, would such a time-frame constitute a reasonable pace? While such a pace may be reasonable for the state, it clearly is not reasonable for the individual.\(^{384}\) Again, the Court has left the states too much opportunity to avoid the introduction of change in the manner in which they deliver services to individuals with disabilities.\(^{385}\) The Court did not stress the importance of developing an effective plan.\(^{386}\) Nor did the Court mandate a state plan as a prerequisite for satisfying the fundamental alteration defense.\(^{387}\) The Court should have been more directive to the lower courts by noting some basic components that a comprehensive plan should encompass—for example, the substantiation of costs, the reduction of overhead costs by consolidation, full utilization of a state's allotted HCBS waivers and a system of monitoring to ensure compliance.\(^{388}\)

The factors specified by the Court as important for evaluating a fundamental alteration defense are imprecise and therefore provide too much latitude for states to procrastinate and avoid making changes toward a more community-based system.\(^{389}\) Before the Court's decision in *Olmstead*, piecemeal litigation occurred among various lower courts regarding the issue of community placement.\(^{390}\) The Court's opinion, unfortunately, will not put an end to this type of litigation.\(^{391}\) It is

\(^{382}\) *Id.* at 2189.

\(^{383}\) See *id.* The requirement that a waiting list move at a reasonable pace is similar to the vague requirement of "reasonable promptness" in the federal Medicaid statute. See *supra* note 64 and accompanying text.

\(^{384}\) See, e.g., *Kathleen S.*, 10 F. Supp. 2d at 473 (finding a three-year state plan to transfer individuals to community-based settings to be "unreasonable").

\(^{385}\) See *Olmstead*, 119 S. Ct. at 2189.

\(^{386}\) See *id.*

\(^{387}\) See *id.* (stating that a comprehensive plan is merely an "example" of how to satisfy the reasonable-alterations regulation).

\(^{388}\) See, e.g., MiCASSA, *supra* note 91, § 4(a)(1), (c)(1)-(11); see also infra notes 410-26 and accompanying text.

\(^{389}\) See supra notes 319-88 and accompanying text.

\(^{390}\) See Brief of the States, *supra* note 172, at *8.

\(^{391}\) See *Olmstead*, 119 S. Ct. at 2188-90.
therefore critical for future lower courts to be mindful of the principle set forth by the Supreme Court in the first part of its opinion that unnecessary segregation constitutes discrimination under the ADA, and to hold the states to a stringent standard when evaluating a fundamental alteration defense. In this regard, lower courts can play an important role in preventing states from shirking their statutory obligation to provide services in the most integrated setting appropriate.

In summary, in its ruling in Olmstead, the Court stated that the ADA requires states to provide community placement for individuals with mental disabilities when the following three conditions are met: (1) the state's treatment professionals determine that such placement is appropriate; (2) the affected individual does not oppose the placement; and (3) the state can reasonably accommodate the placement without creating a fundamental alteration to its program, given the state's available resources and the needs of other individuals with mental disabilities. The first two conditions speak to the appropriateness of the placement for the individual with disabilities. The third, however, pertains to the needs of the states, and the Court has essentially conditioned the right of individuals with mental disabilities to receive services in the most integrated setting appropriate on an expanded explanation of the reasonable-modifications regulation. The Court's attempt to clarify the concept of fundamental alteration gives the states too much leeway in arguing a fundamental alteration defense. If, as the Supreme Court noted in Choate, the concept of fundamental alteration should be a balancing of the right of the individual to be placed in the community and the right of the state to manage its mental health program, then the expanded explication of fundamental alteration has tipped the balance in favor of the states. Hopefully, courts in the future will have the insight to hold states to a strict standard when evaluating a fundamental alteration defense.

C. The Role of Congress in the Aftermath of Olmstead

Because the Supreme Court's opinion will likely lead to continued litigation in the lower courts with inconsistent results, it is important
for the United States Congress to take the initiative at this juncture. Congress should enact new legislation that would create a mechanism to encourage states to provide services in the most integrated setting appropriate, thereby complying with the intent of the drafters of the ADA. MiCASSA, the proposed bill supported by ADAPT and described in Part II, has the potential to develop into such legislation.

As indicated by the Court's focus on the overall cost to the states, one of the major obstacles thwarting the extension of community integration is the issue of cost. Although the placement of individuals with disabilities in the community rather than in institutions will ultimately result in savings to the states, states remain concerned about the short-term impact of providing community placement due to fixed overhead costs. After the Court delivered its opinion, Tommy Olmstead, the Commissioner of the Department of Human Resources in Georgia, commented that "it's a matter of financing. We either need to get more money . . . or we've got to close hospitals." Federal financial assistance to the states for community placement would ease the short-term financial burden on states and mitigate the effect of cost in the debate over community placement. MiCASSA proposes financial incentives to the states to encourage systemic changes in their programs and thus enables them to make the transition to a more community-based mental health system. Increased financial assistance will make it less likely that states will be able to hide behind a defense of a fundamental alteration based on excessive costs.

Moreover, MiCASSA provides a number of suggestions as to how states might use financial incentives to bring about real change in their mental health systems. The proposed bill thus contains some of the specifics that are absent from the Court's discussion of state plans. For example, MiCASSA suggests that states conduct a needs assessment

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400 See supra notes 389-93 and accompanying text.
401 See, e.g., MiCASSA, supra note 91, §§ 1-7.
402 See id.
403 See Olmstead, 119 S. Ct. at 2188-89; Brief of State Legislatures, supra note 357, at *4 (arguing that the ADA does not impose a "costly mandate on state mental health programs"); Wood, supra note 60, at 501.
404 See, e.g., Brief for the United States, supra note 79, at *21.
405 Rankin, supra note 263, at F4 (quoting Tommy Olmstead, Commissioner of the Department of Human Resources).
406 See supra notes 60-61, 326-46 and accompanying text.
407 See MiCASSA, supra note 91, § 4.
408 See, e.g., Brief of State Legislatures, supra note 357, at *5.
409 See MiCASSA, supra note 91, §§ 4(c)(1)-(11).
410 Compare MiCASSA, supra note 91, § 4(c)(1)-(11), with Olmstead, 119 S. Ct. at 2189.
to determine the number of individuals currently in institutions for whom community placement is appropriate, the availability of community-based settings to accommodate these individuals and the anticipated change in demand for home or community-based services.\textsuperscript{411} Such an assessment would enable a state to set up a specific timetable for the provision of community placement for individuals with disabilities.\textsuperscript{412} In addition, a state could utilize the incentives to develop and implement strategies to change current state policies and procedures that perpetuate an institutional bias in the state's mental health system.\textsuperscript{413} Alternatively, states could use the financial assistance to initiate training for professionals or para-professionals, alleviate fixed costs as individuals move out of institutions or help with other transitional costs.\textsuperscript{414} By allowing the states to decide how funding would best assist their programs, MiCASSA gives states flexibility in the management of their complex mental health programs, an issue deemed important by the Supreme Court.\textsuperscript{415} At the same time, by encouraging the states to adopt some of these procedures, MiCASSA would help the states move in the direction of a more community-based mental health system.\textsuperscript{416}

MiCASSA additionally specifies that a state must maintain a quality assurance program, including an external system for the monitoring of services by the individuals with disabilities, their family members, disability organizations and members of the community.\textsuperscript{417} The states must also establish a procedure for appealing denials of eligibility and reporting grievances, as well as a process for filing complaints about abuse and neglect.\textsuperscript{418} Moreover, MiCASSA proposes that the Secretary of HHS conduct periodic reviews of the progress of the individuals that the state serves.\textsuperscript{419} Given the states' flexibility and autonomy in the design and implementation of their mental health programs, it is crucial that there be a system for the independent monitoring of state compliance with their plans.\textsuperscript{420} There is nothing in the Court's opinion to ensure follow-through on the part of the states.\textsuperscript{421}

\textsuperscript{411} See MiCASSA, supra note 91, § 4(c)(1).
\textsuperscript{412} See id. § 4(a)(1).
\textsuperscript{413} See id. § 4(c)(2).
\textsuperscript{414} See id. § 4(c)(5), (7), (8).
\textsuperscript{415} See Olmstead, 119 S. Ct. at 2189 (holding that states need sufficient leeway to maintain a range of services).
\textsuperscript{416} See MiCASSA, supra note 91, § 2(b).
\textsuperscript{417} See id. § 3(b)(1)(B).
\textsuperscript{418} See id.
\textsuperscript{419} See id.
\textsuperscript{420} See id.
\textsuperscript{421} See 119 S. Ct. at 2189.
Furthermore, MiCASSA provides methods for involving the individual with disabilities in the decision-making process regarding placement.422 Although the Supreme Court’s opinion stated that an individual with disabilities must not oppose community placement, the Court failed to indicate how important it is for individuals with disabilities to receive adequate information in order to make informed decisions.423 The role of the individual in the decision-making process concerning community placement is central to MiCASSA, which specifies that the individual must have sufficient information to be able to make “real choices” concerning services that meet his or her needs in the most integrated setting appropriate.424 The prospective bill also states that neither federal nor state policies should impede an individual’s choice.425 Thus, a bill such as MiCASSA will help fill in the gaps that remain after the Supreme Court’s ruling in Olmstead.426

CONCLUSION

It is highly significant that in its recent ruling in Olmstead, the Supreme Court clearly stated that unjustified segregation in institutions constitutes discrimination under the ADA. This statement holds out great promise for the future for individuals with mental disabilities. Unfortunately, in another part of its ruling, the Court conditioned the right of individuals with mental disabilities to live in the most integrated setting appropriate on an expanded explanation of the reasonable-modifications regulation. By giving the states too much leeway and by virtually providing the states with a road-map of how to argue the fundamental alteration defense, the Court has created a potentially serious obstacle to the goal of community integration. Hopefully, courts in the future will hold states to a strict standard when evaluating a fundamental alteration defense. As a result of the increased litigation that will likely occur, Congress should enact legislation, such as MiCASSA, to enable individuals with disabilities to enjoy the benefits of life outside an institution, a life enriched by friendships and a multitude of experiences. The issue of community integration is a prime

422 See, e.g., MiCASSA, supra note 91, § 2(b)(2) (specifying that each state should develop “a comprehensive consumer-responsive statewide system... that provides real consumer choice and direction...”).
423 See supra notes 299-311 and accompanying text. The federal statutory requirements under the HCBS Waiver Program also emphasize the importance of individuals receiving adequate information. See supra note 75 and accompanying text.
424 See MiCASSA, supra note 91, § 2(c)(1).
425 See id. § 2(c)(3).
426 See id. §§ 1-7.
concern in the disability rights community. What is needed now is a rekindling and a re-energizing of interest on the part of the general population. It has been almost a decade since the passage of the ADA; it is time for Congress to act again. The Supreme Court's opinion in *Olmstead* should serve as a catalyst, providing momentum to Congress to forge ahead with new legislation for the millennium.

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