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Olmstead as a Tool for Decarceration

Sarah Kahn

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Olmstead as a Tool for Decarceration

Sarah Kahn*

Olmstead v. L.C. ex rel. Zimring established that the Americans with Disabilities Act of 1990's integrated-care mandate requires the government to make reasonable accommodations to protect the right of people with disabilities to live in the most integrated setting possible. In response, counties began releasing people from restrictive mental-health institutions but did not provide the necessary resources, such as supportive housing and outpatient care, to allow people to live successfully in their communities. As many people contending with disabilities were left homeless and the United States increased its reliance on incarceration, shuttered mental-health institutions gave way to jails and prisons. Olmstead litigation focused on decarceration could establish counties' legal obligation to release eligible people from jails and prisons and to provide them with mental-health care in their communities.

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INTRODUCTION

The United States fails to provide mental-health care and housing to residents, instead relying on punitive carceral responses to social justice issues. Often, the law enforcement officer arresting a person during a mental-health crisis—rather than a social worker or mental-health professional—is the first county employee to interact with the person in crisis.¹ This overreliance on criminalization instead of treatment as a response to public-health crises disproportionately affects people of color, who are more likely to be arrested, charged, and murdered by law enforcement.²

1. *Jailing People with Mental Illness*, NAT’L ALL. ON MENTAL ILLNESS, <https://www.nami.org/Advocacy/Policy-Priorities/Divert-from-Justice-Involvement/Jailing-People-with-Mental-Illness> [<http://web.archive.org/web/20200422024053/https://www.nami.org/Advocacy/Policy-Priorities/Divert-from-Justice-Involvement/Jailing-People-with-Mental-Illness>] (last visited July 8, 2021) (“In a mental health crisis, people are more likely to encounter police than get medical help. As a result, 2 million people with mental illness are booked into jails each year. Nearly 15% of men and 30% of women booked into jails have a serious mental health condition.”).

2. Radley Balko, Opinion, *There’s Overwhelming Evidence that the Criminal Justice System is Racist. Here’s the Proof*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/>

In *Are Prisons Obsolete?*, Angela Davis writes that the “collective imagination[] fantasize[s incarcerated people] as people of color. The prison therefore functions ideologically as an abstract site into which undesirables are deposited, relieving us of the responsibility of thinking about the real issues afflicting those communities.”³ Instead of investing in the housing and mental-health care that could prevent crises or investing in non-law-enforcement crisis response teams, many communities are pouring more and more funding into jails that are left trying to contend with the increasing mental-health needs of the communities’ populations.⁴ The landmark disability rights case *Olmstead v. L.C. ex rel. Zimring*⁵ could provide civil rights attorneys with a legal tool to advocate for shifting mental-health treatment out of jails and into community-based services.

I. MENTAL HEALTH AND JAILS

A. America’s Mental-Health Crisis and Carceral Response

A 2018 study found that America is facing a rapidly growing mental-health crisis rooted in the lack of access to mental-health care and community services.⁶ After closing many of the cruelest and most restrictive mental institutions in the 1960s, the United States failed to build community-based alternatives such as supportive housing, outpatient mental-health care, and peer support.⁷ In the same years during which many mental institutions were shut down and federal funding for public mental-health care was slashed, the “war on drugs” was invented, and

2020/opinions/systemic-racism-police-evidence-criminal-justice-system/ [https://perma.cc/EW7W-AGBF] (“[W]e have systems and institutions that produce racially disparate outcomes, regardless of the intentions of the people who work within them Stop-and-frisk data, for example, consistently show that about 3 percent of these encounters produce any evidence of a crime A massive study published in May 2020 of 95 million traffic stops by 56 police agencies between 2011 and 2018 found that while black people were much more likely to be pulled over than whites, the disparity lessens at night, when police are less able to distinguish the race of the driver. The study also found that blacks were more likely to be searched after a stop, though whites were more likely to be found with illicit drugs.”).

3. ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 16 (2003).

4. At both the local and national levels, America invests heavily in law enforcement and incarceration while underfunding social-support services including housing and mental health care. See Annie Lowrey, *Defund the Police: America Needs to Rethink its Priorities for the Whole Criminal-Justice System*, ATLANTIC (June 5, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/defund-police/612682/> [https://perma.cc/8YQL-UA5J].

5. 527 U.S. 581 (1999).

6. COHENS VETERANS NETWORK & NAT’L COUNCIL FOR BEHAV. HEALTH, AMERICA’S MENTAL HEALTH 2018 4 (2018), <https://www.cohenveteransnetwork.org/wp-content/uploads/2018/10/Research-Summary-10-10-2018.pdf> [https://perma.cc/A92Q-3JRB].

7. See Jessica Placzek, *Did the Emptying of Mental Hospitals Contribute to Homelessness?*, KQED: THE CAL. REP. (Dec. 8, 2016), <https://www.kqed.org/news/11209729/did-the-emptying-of-mental-hospitals-contribute-to-homelessness-here> [https://perma.cc/P4B9-XDPY]; see also Eric Westervelt & Liz Baker, *America’s Mental Health Crisis Hidden Behind Bars*, NPR: MORNING EDITION (Feb. 25, 2020, 5:01 AM), <https://www.npr.org/2020/02/25/805469776/americas-mental-health-crisis-hidden-behind-bars> [https://perma.cc/EP24-DXXM].

with it came the increasing criminalization of financial and mental-health statuses.⁸ This “perfect storm of failed [federal] policies” forced millions of people suffering with mental illness into jails and prisons.⁹ Today, the three largest county institutions providing mental-health treatment in the country are the Los Angeles County Jail in California, Cook County Jail in Illinois, and Rikers Island Jail in New York.¹⁰

Law enforcement officers have increasingly become first responders to mental-health crises, and between a third to a half of people killed by police officers have a disability.¹¹ This disproportionately affects Black people, Indigenous people, and people of color (BIPOC), who are more likely to be targeted and arrested or killed by police.¹² Disability discrimination has become a weapon of systemic racism and a justification for violence enacted against BIPOC victims.

People with disabilities are at a higher risk of incarceration, but incarceration is deeply harmful to mental health recovery. During “recreation time” in Los Angeles, the county jail handcuffs and chains people placed in their mental-health unit to the metal tables bolted to the floor.¹³ Tim Belavich, the Director of Mental Health for the Los Angeles County jail system, says, “By default, we have become the largest treatment facility in the country. And we’re a jail[.] . . . I would say a jail facility is not the appropriate place to treat someone’s mental illness.”¹⁴ Yet sheriff departments suggest solving this crisis by investing more in the carceral system rather than investing in the community care and housing that could keep people from ever encountering law enforcement.

8. Westervelt & Baker, *supra* note 7. The war on drugs was a campaign led by President Nixon to control drug use. It relied on criminalization of drug use and substance use disorder. *Id.*

9. *Id.*

10. *Id.*

11. DAVID M. PERRY & LAWRENCE CARTER-LONG, THE RUDERMAN WHITE PAPER ON MEDIA COVERAGE OF LAW ENFORCEMENT USE OF FORCE AND DISABILITY 1 (2016), https://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf [<https://perma.cc/R7GK-WKEU>].

12. Rashawn Ray, *What Does the Shooting of Leonard Shand Tell Us About the Mental Health of Civilians and Police?*, BROOKINGS INST. (Oct. 16, 2019), <https://www.brookings.edu/blog/how-we-rise/2019/10/16/what-does-the-shooting-of-leonard-shand-tell-us-about-the-mental-health-of-civilians-and-police> [<https://perma.cc/3P2R-XT55>] (“People living with mental illness are more likely to experience use of force and be victims of officer-involved shootings. Yet, racial/ethnic minorities and low-income individuals are less likely to be diagnosed with a mental illness. Thus, their behavior may be categorized as noncompliance when it is actually about mental health.”); *see also* DORIS A. FULLER, H. RICHARD LAMB, MICHAEL BIASOTTI & JOHN SNOOK, TREATMENT ADVOCACY CENTER, OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS 1 (2015), <https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf> [<https://perma.cc/NC2A-7LMS>] (“[T]he risk of being killed during a police incident is 16 times greater for individuals with untreated mental illness than for other civilians approached or stopped by officers.” (emphasis added)); Stuart M. Butler & Nehath Sheriff, *Innovative Solutions to Address the Mental Health Crisis: Shifting Away from Police as First Responders*, BROOKINGS INST. (Nov. 23, 2020), <https://www.brookings.edu/research/innovative-solutions-to-address-the-mental-health-crisis-shifting-away-from-police-as-first-responders> [<https://perma.cc/485W-EHCA>].

13. Westervelt & Baker, *supra* note 7.

14. *Id.*

In neighboring Orange County, Sheriff Don Barnes has stated that “the Orange County jail has become the de facto mental hospital of Orange County,” and has requested and received annual budget increases for jail mental-health care while the social-services budget has shrunk each year.¹⁵ From 2010 to 2020, the Orange County Board of Supervisors more than doubled the Orange County Sheriff’s Department’s budget (from \$92 million to \$198 million) and reduced the Orange County Health Care Agency budget by \$18 million and the Social Services Agency budget by \$12 million in the same time span.¹⁶ Around forty percent of people incarcerated in Orange County’s jails have serious mental-health needs.¹⁷ Instead of investing more in community alternatives,¹⁸ Orange County is expanding the currently empty James A. Musick Facility, adding almost 900 new beds and making available over 2,000 beds to the county’s jail capacity.¹⁹ Hundreds of these new beds will be reserved for people with mental-health needs, and funding for these beds will come from state funding meant to support expansions with a focus on treatment and programming for incarcerated people.²⁰

Orange County and Los Angeles are not alone. As community activists call for more community-based mental-health care and housing, many counties are investing in expensive construction of “mental health jails.”²¹

15. Nick Gerda, *OC Mental Health Jail Expansion Draws Pushback and Debate*, VOICE OC (Dec. 8, 2020), <https://voiceofoc.org/2019/10/oc-mental-health-jail-expansion-draws-pushback-and-debate> [<https://perma.cc/2BVZ-LM2R>] [hereinafter Gerda, *OC Mental Health Jail Expansion Draws Pushback and Debate*]; Nick Gerda, *OC Shifted Millions from Public Health in Last Decade While Doubling Sheriff Spending*, VOICE OC (Dec. 8, 2020), <https://voiceofoc.org/2020/06/oc-shifted-millions-from-public-health-in-last-decade-while-doubling-sheriff-spending> [<https://perma.cc/5KRD-3YMY>].

16. Gerda, *OC Mental Health Jail Expansion Draws Pushback and Debate*, *supra* note 15.

17. *Jail Profile Survey*, CA.GOV: BSCC CAL., https://www.bscc.ca.gov/s_fsojailprofilesurvey/ [<https://perma.cc/NY5W-6FXH>] (June 15, 2021) (click “View Link” next to “Jail Profile Survey Query”; select “Monthly” under “Facility” and click continue; select date range; select one or more jurisdictions; hold control key and select “New mental health cases opened during this month” and “(ADP totals) Jurisdiction”; click “query”).

18. *See generally* EVE GARROW & JULIA DEVANTHÉRY, ACLU, “THIS PLACE IS SLOWLY KILLING ME.”: ABUSE AND NEGLECT IN ORANGE COUNTY EMERGENCY SHELTERS (2019), https://www.aclusocal.org/sites/default/files/aclu_social_oc_shelters_report.pdf [<https://perma.cc/UM9U-PGXR>] (detailing the neglect, abuse, harassment, and squalid conditions in Orange County’s few available emergency shelters, which do not provide permanent housing solutions and do not have space for everyone who needs housing in Orange County).

19. Alma Fausto, *OC Supervisors Award \$261 Million Contract for Musick Jail Expansion*, ORANGE CNTY. REG. (May 5, 2020, 4:20 PM), <https://www.oregister.com/2020/05/05/oc-supervisors-award-261-million-contract-for-musick-jail-expansion/> [<https://perma.cc/79JD-E87J>].

20. Gerda, *OC Mental Health Jail Expansion Draws Pushback and Debate*, *supra* note 15; Fausto, *supra* note 19.

21. *See, e.g.*, Daily News, Opinion, *A Mental Health Jail is an Oxymoron; Diversion is What’s Needed: Guest Commentary*, L.A. DAILY NEWS (Aug. 28, 2017), <https://www.dailynews.com/2014/06/24/a-mental-health-jail-is-an-oxymoron-diversion-is-whats-needed-guest-commentary> [<https://perma.cc/K6ET-CPVD>]; Westervelt & Baker, *supra* note 7.

B. Psychological Research Shows that People Can't Get Well in a Cell

The construction of “mental health jails” increases the number of people who are incarcerated but fails to improve the care available to incarcerated people. While there is no single definition of a “mental health jail,” the phrase refers to jail facilities intended to house an incarcerated population struggling with mental illness.²² There are no established standards for such a jail or how it could serve people with mental-health diagnoses, but counties often justify jail expansion—and access state funding reserved for improving treatment in jails—by calling a proposed jail a “mental health jail.”²³ Money is poured into jail construction instead of hiring new psychologists to treat incarcerated people, improving conditions in existing jails, or funding community-based treatment and housing. Even if minor improvements to mental-health staffing could be achieved, effective mental-health treatment in jails is thwarted by the violent, traumatic, and punitive nature of jails. No amount of funding can turn a jail, which is fundamentally punitive, into a therapeutic setting.

The Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services outlines four key components to mental-health recovery, each of which is made impossible by incarceration.²⁴ The first is Health: “Overcoming or managing one’s disease(s) or symptoms . . . [and] making informed, healthy choices that support physical and emotional wellbeing.”²⁵ Developing healthy coping mechanisms and decision-making skills requires the availability of choice. Every moment of an incarcerated person’s life—from sleeping patterns, to eating choices, to interacting with others—is controlled by the jail. Incarcerated people are denied the basic autonomy and agency necessary for mental-health recovery.

22. See, e.g., STEPHANIE BROOKS HOLLIDAY, NICHOLAS M. PACE, NEIL GOWENSMITH, IRA PACKER, DANIEL MURRIE, ALICIA VIRANI, BING HAN & SARAH B. HUNTER, RAND CORP., ESTIMATING THE SIZE OF THE LOS ANGELES COUNTY JAIL MENTAL HEALTH POPULATION APPROPRIATE FOR RELEASE INTO COMMUNITY SERVICES 4 (2020), https://www.rand.org/pubs/research_reports/RR4328.html [<https://perma.cc/EBN3-GD79>].

23. See *Agenda State Report*, ORANGE CNTY. BD. SUPERVISORS (May 5, 2020), http://cams.ocgov.com/Web_Publisher/Agenda05_05_2020_files/images/A19-000745.HTM [<https://perma.cc/BQX3-R2VY>]; Editor, *The OC Sheriff is Dumping ICE to Focus on Increasing Mental Health Services*, NEW SANTA ANA (Mar. 27, 2019), <https://newsantaana.com/the-oc-sheriff-is-dumping-ice-to-focus-on-increasing-mental-health-services/> [<https://perma.cc/PPT3-ABLN>] (discussing how Orange County Sheriff-Coroner Don Barnes accessed \$80,000,000 from CAL. GOV'T CODE § 15820.925 (SB 1022), which authorizes state funding for program and treatment space for jails. Barnes justified using money intended for treatment space to build new jail beds by pointing to the recent forty percent increase in mental health cases in the Orange County jails. He told New Santa Ana Blog that the Orange County Sheriff's Department needed to “focus on enhancing our mental health services and expanding the number of beds available for individuals with mental health needs.” He did not explain why adding additional beds, rather than improving or adding treatment and programs for people already in existing beds, would help address this mental health crisis).

24. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUM. SERVS., SAMHSA'S WORKING DEFINITION OF RECOVERY 3 (2012), <https://store.samhsa.gov/sites/default/files/d7/priv/pep12-recdef.pdf> [<https://perma.cc/949T-TFDH>] [hereinafter SAMHSA'S WORKING DEFINITION OF RECOVERY].

25. *Id.*

The second is Home: having “[a] stable and safe place to live.”²⁶ Incarcerated people with mental illness live in constant fear and are uniquely vulnerable to harassment, abuse, and assault by other incarcerated people and jail staff.²⁷ Incarceration is mentally and emotionally traumatizing, violent, and stressful.²⁸

The third is Purpose: conducting “[m]eaningful daily activities . . . [and having] the independence, income and resources to participate in society.”²⁹ Incarcerated people cannot work in their community, volunteer, or contribute to their families; for those who are able to make any money while incarcerated—an opportunity sometimes afforded people in prisons but rarely offered in jails—wages are usually less than a dollar (on average between fourteen and sixty-three cents for non-industry jobs) per hour, and in eight states, prison labor is unpaid for in government-run facilities.³⁰ This means that an eight-hour work day in a California prison might result in a total pay of \$2.96, while a single fifteen-minute call home from jail can cost up to \$17.80, depending on the facility.³¹ Incarcerated people are denied the independence and opportunity to participate in society necessary for mental-health recovery. Without meaningful access to education or career advancement, there is little opportunity to experience successes or to build or even imagine a future.

The final component is Community: having “[r]elationships and social networks that provide support, friendship, love, and hope.”³² Incarceration is isolating and alienating. Incarcerated people are cut off from loved ones, whom they

26. *Id.*

27. Cynthia L. Blitz, Nancy Wolff & Jing Shi, *Physical Victimization in Prison: The Role of Mental Illness*, 31 INT'L J.L. & PSYCHIATRY 385, 385 (2008) (“Rates of physical victimization for males with any mental disorder were 1.6 times (inmate-on-inmate) and 1.2 times (staff-on-inmate) higher than that of males with no mental disorder. Female inmates with mental disorder were 1.7 times more likely to report being physically victimized by another inmate than did their counterparts with no mental disorder.”).

28. See, e.g., Voices from Solitary, *Voices from Solitary: On Suicide Watch*, SOLITARY WATCH (Apr. 17, 2019), <https://solitarywatch.org/2019/04/17/voices-from-solitary-on-suicide-watch> [<https://perma.cc/5KGL-B44M>] (“People on ‘suicide watch’ are typically held in a bare ‘strip cell,’ removed from social interactions and usually without basic furnishings, hygienic items, or clothing beyond a ‘suicide smock.’ Some strip cells contain holes in the floor rather than toilets. This method of isolating people on suicide watch has been widely implemented in prisons across the country, under the rationale that suicides will be prevented by blocking access to anything that may be contrived to aid suicidal actions. Suicide watch in many cases becomes a substitute for mental health treatment, and has received criticism not only for its cruelty but also for its inefficacy.”).

29. SAMHSA’S WORKING DEFINITION OF RECOVERY, *supra* note 24.

30. Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL’Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages> [<https://perma.cc/R5PL-83UQ>]; Daniel Moritz-Rabson, *‘Prison Slavery’: Inmates Are Paid Cents While Manufacturing Products Sold to Government*, NEWSWEEK (Aug. 28, 2018, 5:12 PM), <https://www.newsweek.com/prison-slavery-who-benefits-cheap-inmate-labor-1093729> [<https://perma.cc/28NG-NHBK>].

31. Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, PRISON POL’Y INITIATIVE (Feb. 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html [<https://perma.cc/Y6MU-VF65>].

32. SAMHSA’S WORKING DEFINITION OF RECOVERY, *supra* note 24.

can only see through glass once a week or less during brief jail visits and not at all during suspended visitation, such as during a pandemic. Incarcerated people often lose relationships while inside and struggle to rebuild them after they are released.³³

Mental-health advocates have recognized that incarceration is antithetical to mental-health recovery. The National Alliance on Mental Illness states that individuals with mental illness get worse, not better, in jails.³⁴ A criminal record makes it difficult to get needed help, treatment, housing, and jobs after people are released: Californians with criminal records face over 4,800 laws that impose restrictions on their freedom to participate in professional fields, live in certain areas, receive government resources, and successfully reenter society.³⁵

Incarceration also affects people with mental-health needs in uniquely detrimental ways. Competency hearings often delay trial, interfering with a person's due process rights and extending their time in confinement, and people are often not able to remain mentally stable while living in a jail setting.³⁶ As a result of increasingly harsh policies and conditions of confinement, as well as the de-emphasis on rehabilitation as a goal of incarceration in American corrections, "the personal challenges posed and psychological harms inflicted in the course of incarceration have grown over the last several decades in the United States."³⁷ For people with mental illness, who have unique needs and are more likely to be victimized or exploited, the effects of isolation, violence, stress, and institutionalization are even more dangerous.³⁸

33. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 601 (1999).

34. *Jailing People with Mental Illness*, *supra* note 1 ("Once in jail . . . [t]hey stay longer than their counterparts without mental illness. They are at risk of victimization and often their mental health conditions get worse.").

35. CHRISTINE KARAMAGI, SELENA TEJI & VISHNU SRIDHARAN, CALIFORNIANS FOR SAFETY & JUST., REPAIRING THE ROAD TO REDEMPTION IN CALIFORNIA 7 (2018), https://www.prisonpolicy.org/scans/californiansforsafetyandjustice/csj_secondchances.pdf [<https://perma.cc/Y8TF-KR47>].

36. A competency hearing is scheduled when a person may be unable to assist in their own defense or understand the charges against them. If the person is found incompetent, they will be committed to a mental institution until they are well enough to stand trial. If they are found competent, their trial will continue forward. Margaret Wilkinson Smith, Note, *Restore, Revert, Repeat: Examining the Decomensation Cycle and the Due Process Limitations on the Treatment of Incompetent Defendants*, 71 VAND. L. REV. 319, 322, 330 (2018).

37. Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, in PAPERS PREPARED FOR THE "FROM PRISON TO HOME" CONFERENCE (U.S. Dep't of Health & Human Servs. ed., 2002), <https://aspe.hhs.gov/system/files/pdf/75001/Haney.pdf> [<https://perma.cc/2QAE-5TU6>].

38. SASHA ABRAMSKY & JAMIE FELLNER, HUM. RTS. WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 2–3 (Joseph Saunders & James Ross eds., 2003), <https://www.hrw.org/reports/2003/usa1003/usa1003.pdf> [<https://perma.cc/3XET-3BZM>].

II. THE ADA, *OLMSTEAD*, AND THE INTEGRATED-CARE MANDATE RENDER “MENTAL HEALTH JAILS” ILLEGAL

The rapidly growing group of people who are incarcerated as a result of their mental illness may have some protection under the Americans with Disabilities Act (ADA), which guarantees the right of people with disabilities to receive care in their communities rather than in restrictive institutions. *Olmstead v. L.C. ex rel. Zimring* articulated the meaning of the integrated-care mandate of the ADA, which prohibits the government from unnecessarily segregating people based on their disability.³⁹ This type of discriminatory segregation is what happens when counties fail to provide treatment and housing, to respond to mental-health crises with law enforcement, and to adequately fund alternatives to incarceration. This criminal legal response to the mental-health crisis causes people who could otherwise live successfully in their communities to be segregated in carceral facilities.⁴⁰ *Olmstead* litigation that focuses on a jail as the central segregating institution could be used as a tool to either challenge the concept of a “mental health jail” or enforce releases from jail into diversion programs and other alternatives to incarceration.

A. *The Olmstead Mandate for Integrated Care*

Olmstead established the reach of the ADA’s mandate for integrated care.⁴¹ Title II of the ADA prohibits discrimination on the basis of a person’s disability.⁴² In the opening provisions of the ADA, Congress states, “[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”⁴³ To address this problem, Congress specifically prohibited discrimination against individuals with disabilities, including unnecessary segregation.⁴⁴

The ADA empowered and directed the U.S. Attorney General to create regulations “consistent with this chapter and with the coordination regulations . . . applicable to recipients of Federal financial assistance under section 794 of title 29,” otherwise known as section 504 of the Rehabilitation Act of 1973.⁴⁵ One of the regulations that section 504 imposes on recipients of federal funding is to “administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.”⁴⁶ In keeping with the mandate of the

39. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

40. *Id.* at 600.

41. *Id.*

42. 42 U.S.C. § 12132.

43. 42 U.S.C. § 12101(a)(2).

44. 42 U.S.C. §§ 12101(a)(2), (3), (5) (“(3) discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization”; (5) “individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . failure to make modifications to existing facilities and practices, . . . [and] segregation.”).

45. 42 U.S.C. § 12134(b).

46. 28 C.F.R. § 41.51(d) (2021).

ADA, the Attorney General issued the regulation that a “public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”⁴⁷

The preamble to the Attorney General’s Title II regulations defines “the most integrated setting appropriate to the needs of qualified individuals with disabilities” to mean “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.”⁴⁸ An accompanying regulation, the “reasonable-modification regulation,” requires public entities to “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.”⁴⁹

The meaning and impact of the integrated-care mandate was defined when the Supreme Court interpreted the ADA in *Olmstead*.⁵⁰ In 1999, two women diagnosed with mental illnesses, L.C. and E.W., brought a lawsuit seeking to enforce this integration mandate and win release from mental institutions.⁵¹ In May 1993, L.C., who was living in a residential psychiatric facility, had stabilized and her treatment team recommended that she be released and receive outpatient treatment through a community-based state program;⁵² “Despite this evaluation, [she] remained institutionalized until February 1996.”⁵³ E.W. was voluntarily admitted to a psychiatric unit in February 1995, and in March 1995, E.W.’s team sought to discharge her to a homeless shelter, but her attorney objected to the plan as inappropriate for her needs.⁵⁴ By 1996, E.W.’s psychiatrist had concluded that she could be treated through a community-based program; nevertheless, she remained institutionalized until the District Court’s decision in the *Olmstead* case in 1997.⁵⁵ The women sued Georgia health-care providers who kept them in restrictive residential mental-health facilities long after state employees had evaluated them and found them both to be ready for a more integrated step-down program in their communities.⁵⁶

The Supreme Court found that such segregation is discrimination because it “perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life” and “severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options,

47. 28 C.F.R. § 35.130(d) (2021).

48. 28 C.F.R. pt. 35, app. B (2021) (analyzing 28 C.F.R. § 35.130(d) (2021)).

49. 28 C.F.R. § 35.130(b)(7) (2021).

50. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

51. *Id.* at 588.

52. *Id.* at 593.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

economic independence, educational advancement, and cultural enrichment.”⁵⁷ Because of that, “[u]njustified isolation . . . is properly regarded as discrimination based on disability.”⁵⁸

Olmstead's final holding asserts that states must provide community-based treatment for citizens with mental disabilities when “treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.”⁵⁹ Yet many people with disabilities remain segregated in jails and prisons across the country because of charges related to disabilities affecting their mental health, even though these people are eligible for diversion and could recover more successfully in community-based treatment.⁶⁰

B. Jails are a Segregated Setting

The U.S. Department of Justice (DOJ) defines “segregated settings” as including, but not being limited to,

- (1) congregate settings populated exclusively or primarily with individuals with disabilities;
- (2) congregate settings characterized by regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals’ ability to engage freely in community activities and to manage their own activities of daily living; or
- (3) settings that provide for daytime activities primarily with other individuals with disabilities.⁶¹

Jails and prisons fall under the second described type of institution. Jails are congregate settings in which regimentation and deprivation of autonomy, opportunity, and comfort are the central and pervasive elements. Restrictions on incarcerated individuals are extreme, and they are completely segregated from their communities and outside lives.

Often, incarcerated people with mental illness are even more segregated and restricted within jails and prisons than their incarcerated neighbors without similar mental illness.⁶² Jails and prisons often rely on isolation and physical

57. *Id.* at 600–01.

58. *Id.* at 597.

59. *Id.* at 607.

60. Westervelt & Baker, *supra* note 7 (“Many were left to fend for themselves [after asylum closures]. Substance abuse and homelessness sometimes followed, as did encounters with police, who often are called first to help deal with the effects of or related to mental crises The lack of available treatment beds nationally means more people with a mental illness are stuck in jails until one becomes available, often for painfully long periods.”).

61. C.R. DIV., U.S. DEP’T OF JUST., STATEMENT OF THE DEPARTMENT OF JUSTICE ON ENFORCEMENT OF THE INTEGRATION MANDATE OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND *OLMSTEAD V. L.C.* (2011), https://www.ada.gov/olmstead/q&a_olmstead.htm [<https://perma.cc/9YEC-5V37>].

62. Elliot Oberholtzer, *Police, Courts, Jails, and Prisons All Fail Disabled People*, PRISON POL’Y INITIATIVE (Aug. 23, 2017), <https://www.prisonpolicy.org/blog/2017/08/23/disability> [<https://perma.cc/9E38-2NQC>] (“Human Rights Watch suggests that use of force abuses against

restraints—including exclusion from programs, solitary confinement, chains, or strait jackets—to address the mental-health challenges of incarcerated people.⁶³ The problem is so pervasive that the DOJ created regulations: (1) prohibiting discrimination against people with disabilities inside carceral institutions, (2) mandating that people with disabilities be given access to programs and facilities, and (3) prohibiting unnecessary reliance on solitary confinement and segregation because of a person’s disability.⁶⁴

Courts have found that services provided in jails are subject to the integration mandate, and incarcerated people have successfully challenged isolation within jails and delays in competency procedures under *Olmstead*.⁶⁵ The Third Circuit found that unreasonable delays in the competency evaluation, treatment process, and transfer to civil commitment for a person who was found incompetent to stand trial

disabled people in prisons is ‘widespread and may be increasing.’ The AVID Prison Project reports that disabled people in prison, particularly those with mental illnesses, are disproportionately disciplined with segregation and solitary confinement, which have been linked to suicide, self-harm, and other serious mental health consequences.”); *see also* RACHAEL SEEVERS, MAKING HARD TIME HARDER: PROGRAMMATIC ACCOMMODATIONS FOR INMATES WITH DISABILITIES UNDER THE AMERICANS WITH DISABILITIES ACT 4 (2016), <http://avidprisonproject.org/Making-Hard-Time-Harder/assets/making-hard-time-harder—pdf-version.pdf> [<https://perma.cc/YD3Q-V55J>] (“The U.S. has also seen a rise in the number of people with mental illness and developmental and cognitive disabilities in prison. National surveys now indicate that as many as 31 percent of inmates in state prisons report having at least one disability. While prison is hard for everyone, incarceration is even more challenging for inmates with disabilities. Research shows that inmates with disabilities are sentenced to an average of fifteen more months in prison as compared to other inmates with similar criminal convictions. The time they serve is also harder, with more sanctions imposed and less access to positive programming than other inmates. Prisoners with disabilities are also four times more likely to report recent psychological distress as compared to inmates without disabilities. In a system intended to control and sanction behavior believed to violate the many regulations that govern prison life, inmates with disabilities who need accommodations are often overlooked, ignored, or even punished.”); DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUST. STATS., NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1, 4, 8, 10 (2006), <https://bjs.ojp.gov/content/pub/pdf/mhppji.pdf> [<https://perma.cc/EU6P-AR64>] (finding that incarcerated people with mental health needs experienced higher rates of homelessness before arrest, more instances of disciplinary actions, higher rates of recidivism, were more likely to be injured in a fight while incarcerated, and were more likely to serve longer sentences).

63. ABRAMSKY & FELLNER, *supra* note 38, at 79–80, 150–51.

64. 28 C.F.R. § 35.152 (2021); *see also* Lauren Brinkley-Rubinstein, Josie Sivaraman, David L. Rosen, David H. Cloud, Gary Junker, Scott Proescholdbell, Meghan E. Shanahan & Shabbar I. Ranapurwala, *Association of Restrictive Housing During Incarceration with Mortality After Release*, 2 JAMA NETWORK OPEN, Oct. 2019, at 1 (“This cohort study included 229 274 people who were released from incarceration in North Carolina from 2000 to 2015. Compared with individuals who were incarcerated and not placed in restrictive housing, individuals who spent any time in restrictive housing were 24% more likely to die in the first year after release, especially from suicide (78% more likely) and homicide (54% more likely); they were also 127% more likely to die of an opioid overdose in the first 2 weeks after release.”); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 333 (2006) (“[I]ncarceration in solitary [can cause] either severe exacerbation or recurrence of preexisting illness, or the appearance of an acute mental illness in individuals who had previously been free of any such illness.”).

65. Sahar Takshi, Note, *Behind Bars and in the Hole: Applying Olmstead to Incarcerated Individuals with Mental Illness*, 27 GEO. J. ON POVERTY L. & POL’Y 319, 342 (2020).

violated the integration mandate.⁶⁶ Another plaintiff claimed that the Washington Department of Corrections violated the ADA by placing him in isolation and sometimes using physical restraints as a response to symptoms of his mental illness, including self-harm behaviors; the district court found that a reasonable jury could agree.⁶⁷

As restrictive and often abusive inpatient treatment facilities are closed in response to the movement towards community-based care, states are nonetheless failing to adequately invest in care and housing and jails are filling up with people who never received the community care their state promised to provide.⁶⁸ After the *Olmstead* decision, Georgia set a goal of releasing all residents of its psychiatric facilities into community-based care.⁶⁹ Many of its mental institutions were converted into prisons, symbolizing a new era when incarceration would become the country's response to its mental-health crisis.⁷⁰

C. *Olmstead in the Context of Community Movements to Stop Jail Expansion*

Almost every state has penal code statutes that allow eligible people to apply for diversion programs instead of receiving a jail or prison sentence. Under California law, people who are convicted of a first-time, nonviolent drug offense are eligible to be diverted to community treatment programs.⁷¹ California law also provides an opportunity for pretrial diversion, which suspends charges while the accused person completes a treatment plan and dismisses the accused person upon successful completion of the program, allowing people to end up with no criminal record.⁷² A person is eligible for pretrial mental-health diversion if (1) the person suffers from a Diagnostic and Statistical Manual of Mental Disorders (DSM)⁷³ diagnosable mental disorder, (2) the mental disorder was a significant factor in the

66. *Geness v. Cox*, 902 F.3d 344, 365 (3d Cir. 2018).

67. *Brown v. Wash. Dep't of Corr.*, No. C13-5367 RBL-JRC, 2015 WL 4039322, at *11 (W.D. Wash. May 13, 2015), *report and recommendation adopted*, No. C13-05367 RBL, 2015 WL 4039270 (W.D. Wash. July 2, 2015).

68. Jenna Bao, *Prisons: The New Asylums*, HARV. POL. REV. (Mar. 9, 2020), <https://harvardpolitics.com/prisons-the-new-asylums> [<https://perma.cc/AAB9-RZTU>] (“People with mental illness are 4.5 times more likely than members of the general population to be arrested. As a result, in 2009, the prevalence of mental illness in prisons and jails was three to six times that of the general population . . . [T]he deinstitutionalization seen in the 1950s played a pivotal role in shifting the seriously mentally ill from long term healthcare institutions to the justice system.”).

69. Doug Monroe, *Asylum: Inside Central State Hospital, Once the World's Largest Mental Institution*, ATLANTA (Feb. 18, 2015), <https://www.atlantamagazine.com/great-reads/asylum-inside-central-state-hospital-worlds-largest-mental-institution> [<https://perma.cc/9T7F-CCFB>].

70. *See, e.g., id.*

71. CAL. PENAL CODE § 1000 (West 2018).

72. CAL. PENAL CODE § 1001.36 (West 2020).

73. The DSM is the American Psychiatric Association's handbook used by health care professionals in the United States as the authoritative guide to the diagnosis of mental disorders. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013), <https://cdn.website-editor.net/30f11123991548a0af708722d458e476/files/uploaded/DSM%2520V.pdf> [<https://perma.cc/2UV6-92VD>].

commission of the charged offense, (3) the mental disorder would respond to treatment, (4) the person consents to treatment and waives their right to a speedy trial, (5) the person agrees to comply with the treatment plan, and (6) the judge does not believe that the person poses a public safety threat.⁷⁴ Certain crimes, such as violent crimes and sex crimes, are not eligible for diversion under section 1001.36 of the California Penal Code;⁷⁵ however, far fewer people than are eligible are granted diversion. District attorneys are often reluctant to agree to diversion in plea negotiations, and judges are often reluctant to release people even if they are eligible.⁷⁶ Even when the district attorney and judge may want to grant the diversion petition, some people are prevented from entering community treatment because there is no space available in the appropriate community housing, mental-health treatment facility, or drug rehabilitation program.⁷⁷

Counties that have implemented plans to expand alternatives to incarceration have found that it results in better outcomes and reductions in costs. In Los Angeles, community activists prevented construction of a new “mental health jail.”⁷⁸ The decision came a few years after the county established the Office of Diversion and Reentry, which was tasked in part with placing eligible people in diversion programs.⁷⁹ The RAND Corporation has conducted a comprehensive study finding six-month and twelve-month housing stability rates of ninety-one percent and seventy-four percent, respectively.⁸⁰ During the first year after being placed in housing, only fourteen percent of eligible people had new felony convictions, as opposed to national recidivism averages of forty-four percent during

74. CAL. PENAL CODE § 1001.36(b)(1)(A)–(F) (West 2020).

75. CAL. PENAL CODE § 1001.36(b)(2) (West 2020).

76. See, e.g., Todd Spitzer, Opinion, ‘Mental Disorder’ Now a Get-Out-of-Jail-Free Card, ORANGE CNTY. REG. (July 9, 2018, 8:01 PM), <https://www.ocregister.com/2018/07/07/mental-disorder-now-a-get-out-of-jail-free-card> [<https://perma.cc/2Y4S-YDWA>].

77. CAL. CORR. STANDARDS AUTH., CAL. DEP’T OF CORR. & REHAB., JAILS AND THE MENTALLY ILL: ISSUES AND ANALYSIS 18 (2009), https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Mental%20Health%20Diversio%20Program/2338%20Jails%20and%20the%20Mentally%20Ill.pdf [<https://perma.cc/WMG7-87FN>] [hereinafter CSA REPORT].

78. Martin Macias Jr., *LA County Cancels Mental Health Jail Project in Favor of “Care First” Approach*, COURTHOUSE NEWS SERV. (Aug. 13, 2019), <https://www.courthousenews.com/la-county-cancels-mental-health-jail-project-in-favor-of-care-first-approach> [<https://perma.cc/GSU6-SV35>].

79. *Office of Diversion and Reentry*, HEALTH SERVS. L.A. CNTY., <https://dhs.lacounty.gov/office-of-diversion-and-reentry/our-services/office-of-diversion-and-reentry> [<https://perma.cc/LK85-DDKJ>] (last visited July 9, 2021) (“The Office of Diversion and Reentry (ODR) was created in September 2015 by the Board of Supervisors. Its mission is to develop and implement county-wide criminal justice diversion for persons with mental and/or substance use disorders, to provide reentry support services based on individual’s needs, and to reduce youth involvement with the justice system.”).

80. SARAH B. HUNTER & ADAM SCHERLING, RAND CORP., LOS ANGELES COUNTY OFFICE OF DIVERSION AND REENTRY’S SUPPORTIVE HOUSING PROGRAM: A STUDY OF PARTICIPANTS’ HOUSING STABILITY AND NEW FELONY CONVICTIONS (2019), https://www.rand.org/pubs/research_reports/RR3232.html [<https://perma.cc/8S5A-48SD>].

the first year after release.⁸¹ Despite these efforts, Los Angeles still has thousands of people currently eligible for diversion living in the “mental health unit” of the Los Angeles jail. The RAND Corporation published a study showing that over 3,300 individuals—more than half of the people incarcerated in the “mental health unit” in Los Angeles’s jail—were eligible for diversion but had not been diverted because of a lack of available community alternatives.⁸²

People who are trapped in jail because of a lack of available treatment beds, particularly people who are trapped in the psychiatric unit of a jail, which is more restrictive and isolated than general population units, can show the “unjustified isolation . . . based on disability” described in *Olmstead*.⁸³ Those who are eligible for other types of diversion are able to attend classes or otherwise fulfill diversion requirements while living in their communities. Because of their disabilities, those people who need treatment beds, additional support, or mental-health care in order to be released are not provided the same opportunity. The DOJ acknowledges that “[s]tate and local governments must prevent unnecessary institutionalization of people with disabilities. Governments have complied with this obligation by using community-based treatment services to keep people with disabilities out of the criminal justice system.”⁸⁴

Even though there may be other factors contributing to a person’s isolation, including the criminal act for which that person is charged, a plaintiff can show discrimination because their disability was a proximate cause of the isolation, and “the existence of additional factors causing an injury does not necessarily negate the fact that the defendant’s wrong is also the legal cause of the injury.”⁸⁵ Even if other incarcerated people without a disability are unable to access diversion, courts could find that the plaintiffs are excluded from integration with their communities because of disability:

Moreover, as we noted earlier, the fact that individuals other than the class members have been unable to obtain benefits does not of itself demonstrate that the plaintiffs do not face conditions that are more onerous for them because of their particular disabilities. The absence of disparate impact would not prove that [the New York City Division of AIDS Services and Income Support] is effective enough to provide

81. *Id.*; MARIEL ALPER, MATTHEW R. DUROSE & JOSHUA MARKMAN, BUREAU OF JUST. STATS., NCJ 250975, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005-2014) (2018), <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf> [<https://perma.cc/KBF4-4ADL>].

82. HOLLIDAY, *supra* note 22.

83. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999).

84. C.R. DIV., U.S. DEP’T OF JUST., EXAMPLES AND RESOURCES TO SUPPORT CRIMINAL JUSTICE ENTITIES IN COMPLIANCE WITH TITLE II OF THE AMERICANS WITH DISABILITIES ACT (2017), <https://www.ada.gov/cjta.html> [<https://perma.cc/G7ZM-EYZH>].

85. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 278 (2d Cir. 2003) (finding that the “additional factors”—inherent limitations attendant HIV/AIDS status—did not preclude a finding of discrimination based on disability in an *Olmstead* claim against New York’s HIV/AIDS support programs (citing *Hydro Invs., Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 15 (2d Cir. 2000))).

benefits under a state of affairs where the social services system functioned smoothly. Where the District Court has clearly identified disability-related challenges that make access more difficult for the plaintiff class than for those without disabilities, and has found the accommodative scheme to be “broken,” we hold that the plaintiffs have demonstrated that their disabilities are a cause of the denial of access to benefits.⁸⁶

Relying on jails to fill the role of treatment centers severely harms disabled communities. As activists call for integrated, community-based care and housing, counties across the nation are responding to mental-health crises by pouring more and more of their budgets into law enforcement and expanding carceral facilities.⁸⁷ This drains money from social services, leaving even more people without the resources they need to live stable lives in their communities, simultaneously increasing the likelihood that they will end up confronted by police. Plaintiffs have alleged that governments “are violating the ADA’s integration mandate by failing to provide sufficient community-based treatment facilities as alternatives to jail[.]” leading police “to arrest subclass members and institutionalize them in jail where subclass members can receive some type of treatment.”⁸⁸ Counties can come into compliance with the integration mandate by developing community-based programs that comply with the integration mandate and benefit the class of people who are impacted by the criminal legal system because of their disability.⁸⁹

In April 2021, the DOJ found that Alameda County’s failure to provide mental health services in the most integrated setting appropriate to patients’ needs puts Alameda community members with disabilities at serious risk of incarceration in violation of the ADA.⁹⁰ The DOJ indicated that a failure to provide basic mental-health services in the community, resulting in a greater risk of incarceration for people with mental illnesses, constitutes the risk of institutionalization described in *Olmstead*.⁹¹

Olmstead presents a novel approach to fighting the expansion of the carceral state and forcing counties to invest in housing and community-based care. *Olmstead* litigation could increase investment in community-based care that allows people at risk of arrest to live more safely and successfully in their community. Advocates fighting the expansion of carceral responses to social justice issues and community

86. *Id.* at 279–80.

87. *See, e.g.,* Lowrey, *supra* note 4.

88. *McClendon v. City of Albuquerque*, No. 95 CV 24 JAP/KBM, 2016 WL 9818311, at *15 (D.N.M. Nov. 9, 2016).

89. *Id.*

90. *Alameda County, John George Psychiatric Hospital, and Santa Rita Jail Investigative Findings and Next Steps*, U.S. DEP’T OF JUST. (Apr. 22, 2021), <https://www.justice.gov/crt/case-document/file/1388976/download> [<https://perma.cc/XH2A-82SC>] [hereinafter *Alameda County*]; Press Release, U.S. Dep’t of Just., Justice Department Finds Alameda County, California, Violates the Americans with Disabilities Act and the U.S. Constitution (Apr. 22, 2021), <https://www.justice.gov/opa/pr/justice-department-finds-alameda-county-california-violates-americans-disabilities-act-and-us> [<https://perma.cc/NC4D-XGLZ>].

91. *Alameda County*, *supra* note 90.

harms have long argued that society's failures to provide services and support, rather than the individual characteristics of criminalized people, are the root of public safety problems.⁹² *Olmstead* litigation could establish counties' legal obligation to rely on social services and support, rather than social control and punishment, to protect the health of their communities.

III. THE FUNDAMENTAL ALTERATION DEFENSE IN THE JAILS CONTEXT

A. *Fundamental Alteration*

The greatest obstacle to bringing an *Olmstead* case with a jail as the central institution is the government's fundamental alteration defense:

States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.⁹³

A reasonable accommodation is one that does not fundamentally alter existing services.⁹⁴ If the government can demonstrate that the requested modification would "fundamentally alter the nature of the service, program, or activity," the government is not required to make it.⁹⁵ If the state can prove that releasing people would require a fundamental alteration of the nature of the services it provides, would cause a prohibitive financial burden on the state, or would require the government to create new programs, then the government can avoid an order mandating it to release people to community care.⁹⁶

Several factors can be considered in a fundamental alteration defense, including "the state's ability to continue meeting the needs of other institutionalized mental health patients for whom community placement is not appropriate, whether the state has a waiting list for community placements, and whether the state has developed a comprehensive plan to move eligible patients into community care settings."⁹⁷ In order to establish the government's obligation to release people and

92. Mariame Kaba, *So You're Thinking About Becoming an Abolitionist*, LEVEL (Oct. 29, 2020), <https://level.medium.com/so-youre-thinking-about-becoming-an-abolitionist-a436f8e31894> [<https://perma.cc/VD4K-QVTD>] ("While some people might think of abolition as primarily a negative project — 'Let's tear everything down tomorrow and hope for the best' — PIC abolition is a vision of a restructured society in a world where we have everything we need: food, shelter, education, health, art, beauty, clean water, and more. Things that are foundational to our personal and community safety.")

93. *United States v. Mississippi*, 400 F. Supp. 3d 546, 551 (S.D. Miss. 2019) (quoting *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 607 (1999)).

94. *Id.* at 576.

95. *Id.* n.8; *see also Olmstead*, 527 U.S. at 592.

96. 28 C.F.R. § 35.130(b)(7) (1998); *see also Olmstead*, 527 U.S. at 592.

97. *Frederick L. v. Dep't of Pub. Welfare*, 364 F.3d 487, 495 (3d Cir. 2004); *accord Olmstead*, 527 U.S. at 605–06.

provide community-based care as an alternative to incarceration, litigation would have to overcome these defenses, which are uniquely challenging in the jail context.

Simply moving services from a more restrictive setting into a community setting does not constitute a fundamental alteration.⁹⁸ However, Title II of the ADA does not require public entities to create new programs that provide previously unprovided services for people with disabilities.⁹⁹ Title II of the ADA does mandate that if a person is being provided mental-health treatment by the county in a segregated setting and a treatment professional has determined that an integrated-community placement is appropriate, the county has an obligation to make reasonable accommodations to allow that person to receive treatment in the less restrictive setting.¹⁰⁰ Although that does not mean that the county must create new community services, it may mean that a county has an obligation to expand existing services, including by building supportive housing, expanding outpatient treatment resources, and providing other integrated support for patients living at home.¹⁰¹ Cost can be a consideration in the fundamental alteration analysis, but “a singular focus upon a state’s short-term fiscal constraints will not suffice to establish a fundamental-alteration defense.”¹⁰²

B. State’s Fundamental Alteration of the Nature of Community Programs Defense

In *Olmstead* litigation that focuses on a jail as the segregated institution, the state could raise several credible fundamental-alteration defenses. The ADA does not require fundamental alteration of the essential nature of a program.¹⁰³ The state can bring an affirmative defense that the proposed changes will fundamentally alter their program or service if those changes preclude the purpose of the program.¹⁰⁴ Abolitionists argue that carceral models harm rather than protect the health and safety of communities, but the state would likely argue that incarcerating people serves a primarily penological purpose and a community alternative such as supportive housing, outpatient care, or caseworker and peer support is not intended to serve penological purposes such as retribution, deterrence, and incapacitation. Moving someone whom the state believes needs to be incarcerated could force community-based programs to fundamentally alter the nature of the programs’ services to accommodate penological purposes.

98. *Townsend v. Quasim*, 328 F.3d 511, 519 (9th Cir. 2003).

99. *Id.* at 518.

100. *See* *United States v. Mississippi*, 400 F. Supp. 3d 546, 550–51 (S.D. Miss. 2019); *Olmstead*, 527 U.S. at 607.

101. *See Mississippi*, 400 F. Supp. 3d at 555–57.

102. *Frederick L.*, 364 F.3d at 495.

103. *See* 42 U.S.C. § 12201(f) (2018).

104. *See Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 413 (1979) (analyzing fundamental alteration in the context of section 504 of the Rehabilitation Act of 1973 and finding that a nursing school was not required to accommodate a deaf student because the purpose of the school was to train nurses who could function in traditional nursing jobs, which require hearing and verbally communicating with patients and doctors).

The state might argue that because a jail serves a primarily punitive purpose, releasing eligible people into alternative programs would fundamentally alter this purpose. In *Greist v. Norristown State Hospital*, Greist, who had murdered members of his family and been committed after pleading not guilty by reason of insanity, sought release from the mental hospital.¹⁰⁵ The court denied release, finding that “[t]o require state courts to release such individuals into the community would fundamentally alter the nature of Pennsylvania’s involuntary commitment program by making an essential purpose of the program—protecting the community—impossible to accomplish.”¹⁰⁶

If the government can argue that a public program’s purpose and essential nature, such as the penological functions of a jail, would be frustrated by releasing people, the government may overcome a lawsuit.¹⁰⁷ However, if plaintiffs can collect data to show that people with unmet mental-health needs are eligible for diversion, they could argue that there is no penological justification for incarcerating those people. A California Corrections Standards Authority report found that “[s]ome counties’ jails are not equipped to handle [incarcerated people with mental health needs],” but they “simply do not have any other treatment beds to put them in.”¹⁰⁸ The report stated,

It is clear—there are nowhere near enough mental health treatment facilities in communities. Those that do exist are not anxious to take what they call “penal code patients,” and especially not those they believe to be violent and/or aggressive. So, while diversion to treatment facilities is often the best choice, it is often not a realistic possibility.¹⁰⁹

In the case of a county that cannot release diversion-eligible people into the community solely because there are too few available beds, the state could not argue that expanding community treatment and diversion options to accept currently incarcerated eligible participants would pose a safety risk to or alter the purpose of the criminal legal system. The essential nature of a jail is to serve penological purposes of incapacitation, retribution, and deterrence.¹¹⁰ None of these purposes are served when a person who is eligible for diversion based on state law and a county’s criteria remains incarcerated. For diversion-eligible people,

105. *Greist v. Norristown State Hosp.*, No. CIV. A. 96-CV-8495, 1997 WL 661097, at *4 (E.D. Pa. Oct. 22, 1997), *aff’d*, 156 F.3d 1224 (3d Cir. 1998) (upholding under the ADA a fundamental alteration defense because of danger to the community in pre-*Olmstead* litigation).

106. *Id.*

107. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999) (establishing that the government can defend against an *Olmstead* claim if the requested changes constitute a fundamental alteration to its nature).

108. CSA REPORT, *supra* note 77, at 10.

109. *Id.*

110. *See United States v. Irely*, 612 F.3d 1160, 1206, 1212–13 (11th Cir. 2010) (analyzing the reasonableness of a below-guidelines prison sentence based on whether it fulfilled the penological purposes of retribution, incapacitation, and deterrence (quoting 18 U.S.C. § 3553(a)(2)(c) (2020))).

rehabilitation—not incapacitation, retribution, or deterrence—is the most appropriate goal, and that goal is better served by integrated care.¹¹¹

Mental-health diversion was established because people with mental illness, especially those who are charged with a crime that arises from symptoms of that illness, have unique mental-health treatment and support needs and experience better outcomes and lower recidivism in community-based treatment than jail.¹¹² Diversion serves the purpose of rehabilitation, a goal which is especially achievable when a person's actions are caused by a treatable disorder.¹¹³ Jails are unable to serve the purpose of rehabilitation with similar efficacy because they are not equipped to provide mental-health treatment.¹¹⁴

The lack of available resources in communities leaves law enforcement and carceral facilities to act as mental-health treatment facilities, a function they were never intended to serve.¹¹⁵ Rather than requiring a fundamental alteration, transferring eligible people out of jails and into community care would allow government programs to serve their intended essential purpose.

C. State's Fundamental Alteration Defense Based on Prohibitive Cost

The state could also argue that the cost of shifting services from jails to community settings is prohibitive and would disrupt its ability to provide other programs. The reason that many jails are currently underutilizing diversion programs and housing is a lack of funding or a failure to invest funding in community-based treatment instead of jails.¹¹⁶ However, it is established that if a court were focusing “only on immediate costs, . . . it would be inconsistent

111. *Pretrial Diversion*, NAT'L CONF. STATE LEGISLATURES (Sept. 28, 2017), <https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-diversion.aspx> [<https://perma.cc/Q5SJ-GCHW>] (explaining that diversion aims to address criminogenic needs rather than to punish behavior).

112. *See* CAL. PENAL CODE § 1001.35 (West 2021) (providing an introduction to the California pretrial mental health diversion statute); *see also* CSA REPORT, *supra* note 77, at x (“It is treatment effective and cost effective to divert from jail everyone, especially people with mental illnesses, who can be safely managed in the community.”).

113. BRIAN STETTIN, FREDERICK J. FRESE & H. RICHARD LAMB, TREATMENT ADVOC. CTR., MENTAL HEALTH DIVERSION PRACTICES: A SURVEY OF STATES 4 (2013), <https://www.treatmentadvocacycenter.org/storage/documents/2013-diversion-study.pdf> [<https://perma.cc/Y35Y-JPFX>] (“It stands to reason that where offenses are caused by lack of treatment, the antidote to re-offense is treatment, not incarceration.”).

114. *See Mental Illness, Human Rights, and US Prisons*, HUM. RTS. WATCH (Sept. 22, 2009, 11:16 AM), <https://www.hrw.org/news/2009/09/22/mental-illness-human-rights-and-us-prisons> [<https://perma.cc/P69E-8GWG>] (“[P]risons are ill-equipped to respond appropriately to the needs of prisoners with mental illness. Prison mental health services are all too frequently woefully deficient, crippled by understaffing, insufficient facilities, and limited programs.”).

115. *See* Westervelt & Baker, *supra* note 7 (stating that today, the three largest county institutions providing mental health treatment in the country are the Los Angeles County Jail in California, Cook County Jail in Illinois, and Rikers Island Jail in New York).

116. *See* CSA REPORT, *supra* note 77, at 4–5 (“Some cost-shifting—moving mental health money and criminal justice money around—might be needed to fund alternatives, diversion and treatment that helps get mentally ill people out of jail and keeps those who are out of custody from coming back.”).

with *Olmstead* and the governing statutes.¹¹⁷ This right to care extends to circumstances when integrated care would incur costs that strain the state's budget.¹¹⁸ In *M.R. v. Dreyfus*, Washington was facing budget challenges and an across-the-board reduction in general fund appropriations to all state agencies in Washington.¹¹⁹ These budget reductions resulted in cuts to the Medicaid funding for in-home care services (along with other services).¹²⁰ The Ninth Circuit found that the plaintiffs challenging the reduction of covered services were likely to succeed on the merits because their right to integrated care was not overcome by the state's budgetary restrictions.¹²¹

The budgetary defense especially lacks merit in the context of jails. The long-term cost of incarceration is higher than the cost of care-first approaches, housing-first models, and diversion programs.¹²² Alternatives to incarceration reduce costs to counties because incarceration is one of the most expensive responses to unstable behavior.¹²³ In many cases, the government does not lack the necessary funding; it has simply engaged in a "pattern and practice of under-funding community services and its over-reliance on institutional treatment has created a systemic deficiency in the array of available community services."¹²⁴

Diversion and community care also reduce recidivism, interrupting costly cycles of repeated incarceration. Providing supportive housing not only costs less than incarceration but also reduces the number of expensive hospitalizations and need for crisis response by helping people achieve mental stability.¹²⁵ Research shows that recidivism rates for people with serious mental illness who are jailed are between fifty-four and sixty-eight percent,¹²⁶ but the recidivism rate for people

117. *Frederick L. v. Dep't of Pub. Welfare*, 364 F.3d 487, 495 (3d Cir. 2004).

118. *See M.R. v. Dreyfus*, 697 F.3d 706, 706 (9th Cir. 2012).

119. *Id.*

120. *Id.*

121. *Id.*

122. *See* Gary A. Zarkin, Alexander J. Cowell, Katherine A. Hicks, Michael J. Mills, Steven Belenko, Laura J. Dunlap & Vincent Keyes, *Lifetime Benefits and Costs of Diverting Substance-Abusing Offenders from State Prison*, 61 CRIME & DELINQ. 829, 844 (2012) (finding that if just ten percent of people eligible for diversion were sent to community-based substance abuse treatment programs rather than prison, the criminal justice system would save \$8.5 billion when compared to current practices); *see also* JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH L., A PLACE OF MY OWN: HOW THE ADA IS CREATING INTEGRATED HOUSING OPPORTUNITIES FOR PEOPLE WITH MENTAL ILLNESSES 6 (2014), <http://www.bazelon.org/wp-content/uploads/2017/01/A-Place-of-my-Own.pdf> [<https://perma.cc/879B-87AP>].

123. *See, e.g.*, FAIRMOUNT VENTURES, INC., EVALUATION OF PATHWAYS TO HOUSING PA 3 (2011), <https://centercityphila.org/uploads/attachments/cit0g2r8x0029f6qdp9b8ja-pathways-to-housing.pdf> [<https://perma.cc/43KE-X922>].

124. *Kenneth R. ex rel. Tri-Cnty. CAP, Inc./GS v. Hassan*, 293 F.R.D. 254, 260 (D.N.H. 2013) (finding that plaintiffs' assertion that unnecessary detention in nursing homes violated the integration mandate were sufficient to establish commonality for class certification).

125. *See* JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH L., *supra* note 122.

126. Amy Blank Wilson, Jeffrey Draine, Trevor Hadley, Steve Metraux & Arthur Evans, *Examining the Impact of Mental Illness and Substance Use on Recidivism in a County Jail*, 34 INT'L J.L. & PSYCHIATRY 264, 264–68 n.4 (2011).

placed in housing and community care by Los Angeles's Office of Diversion and Reentry was only fourteen percent.¹²⁷ This argument was directly addressed in the *Olmstead* decision, which held that a cost-centered fundamental alteration defense would be overcome if the county could "provide services to plaintiffs in the community at considerably *less* cost than is required to maintain them in an institution."¹²⁸

Finally, the state might argue that although treatment in the community may be more cost-effective in individual cases, it could not fully benefit from these savings because it needs to maintain the existing jail even if the jail population is reduced.¹²⁹ In *Frederick L. v. Department of Public Welfare*, the court found that "courts may not merely compare the cost of institutionalization against the cost of community-based health services because such a comparison would not account for the state's financial obligation to continue to operate partially full institutions with fixed overhead costs."¹³⁰ This defense lacks merit because reducing the jail population, even without closing the jail, does result in considerable cost savings.¹³¹

The insufficiency of this defense is even more stark in counties where activists are fighting the construction of new "mental health jails." If a county cancels construction of a planned jail, it is benefitting from shutting an existing facility, relieving it of the "obligation to continue to operate partially full institutions with fixed overhead costs."¹³² Cancelling a planned segregated setting such as a jail saves millions or even billions of dollars, and therefore the state cannot claim that funding community-based care is fiscally impossible.¹³³

D. State's Fundamental Alteration Defense Based on Existing Services Fulfilling the County's ADA Obligations or Because There is No Requirement to Create a New Program

Some courts have found that the state is "not required to create new programs that provide heretofore unprovided services to assist disabled persons."¹³⁴

127. Memorandum from Christina R. Ghaly, Director, Los Angeles Cnty. Dep't of Health Servs., to Los Angeles Cnty. Bd. of Supervisors (Sept. 9, 2019), http://file.lacounty.gov/SDSInter/bos/bc/1061487_PROGRESSREPORTONSCALINGUPDIVERSIONANDREENTRYEFFORTS FORPEOPLEWITHSERIOUSCLINICALNEEDS.pdf [<https://perma.cc/B856-Y5RE>].

128. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 595 (1999) (quoting Appeal to Petition for Writ of Certiorari, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) (No. 98-536), at 39a).

129. *Frederick L. v. Dep't of Pub. Welfare*, 364 F.3d 487, 493 (3d Cir. 2004).

130. *Id.*

131. See JOHN SCHMITT, KRIS WARNER & SARIKA GUPTA, CTR. FOR ECON. AND POL'Y RSCH., *THE HIGH BUDGETARY COST OF INCARCERATION 2* (2010), <https://www.cepr.net/documents/publications/incarceration-2010-06.pdf> [<https://perma.cc/SB3H-23V9>].

132. *Frederick L.*, 364 F.3d at 493.

133. *States Save Millions by Reducing Inmate Population and Closing Prisons*, EQUAL JUST. INITIATIVE (Jan. 30, 2014), <https://eji.org/news/closing-prisons-saves-states-millions> [<https://perma.cc/3T3W-ZE3F>]; see also *County Supervisors Cancel \$1.7 Billion Contract for Downtown Jail Facility*, CBS L.A. (Aug. 13, 2019, 9:55 PM), <https://losangeles.cbslocal.com/2019/08/13/county-supervisors-cancel-1-7b-contract-for-downtown-jail-facility> [<https://perma.cc/3FQP-9Y2T>].

134. *Townsend v. Quasim*, 328 F.3d 511, 518 (9th Cir. 2003).

However, many counties' diversion programs already provide housing, mental-health care, case workers, and other integrated services.¹³⁵ The requirement under the ADA is simply to expand these services and make them available to people who are eligible for them.¹³⁶

The state might also argue that it is already providing these services to some people, and that it has therefore already fulfilled its obligations under the ADA. However, courts have consistently found that the existence of a service that is underutilized or not available is insufficient to fulfill this obligation. *Olmstead* articulated the boundary of what constitutes reasonable modifications: if the state had an “effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State’s endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met.”¹³⁷ Absent such an effectively working plan to place people in the appropriate treatment, the state could not meet the reasonable-modifications standard even if “existing state programs provided community-based treatment of the kind for which [plaintiffs] qualified.”¹³⁸ For example, in *Mississippi*, the court found that although “[o]n paper, Mississippi ha[d] a mental health system with an array of appropriate community-based services,”¹³⁹ those services were inadequate because they were unavailable, inaccessible, or served a tiny fraction of those who needed them.¹⁴⁰ There is an opportunity to set precedent by using *Olmstead* to establish a county’s legal obligation to divest from incarceration and invest in community-based care.

IV. HOUSING AS AN OUTCOME OF OLMSTEAD LITIGATION

Olmstead does not simply establish a person’s right not to be segregated based on their disability; it establishes the government’s responsibility to provide integrated care.¹⁴¹ One common component of the *Olmstead* plans reached through litigation settlements is expansion of affordable and supportive housing. Plaintiffs may seek “injunctive relief requiring the State to develop and provide an adequate array of identified community-based treatment services,” such as “mobile crisis services, Assertive Community Treatment (“ACT”), supported housing, and

135. See, e.g., Eric Westervelt, *In Los Angeles, A Program to Get Those with Mental Illness Away from Jails*, NPR: ALL THINGS CONSIDERED (Feb. 25, 2020, 4:18 PM), <https://www.npr.org/2020/02/25/809368257/in-los-angeles-a-program-to-get-those-with-mental-illness-away-from-jails> [<https://perma.cc/HF57-2WHA>] (explaining how in Los Angeles, the Diversion and Reentry housing court places participants in treatment and housing).

136. 28 C.F.R. § 35.130(b)(7) (1998); see also *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 607 (1999).

137. *Olmstead*, 527 U.S. at 584.

138. *Id.* at 595.

139. *United States v. Mississippi*, 400 F. Supp. 3d 546, 549 (S.D. Miss. 2019).

140. *Id.* at 557–62.

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

supported employment.”¹⁴² Trial courts have ordered diverse remedies, including an “adequate and flexible array of residential support services and housing alternatives; housing near community services; effective crisis intervention services 24/7; family support; vocational support; transportation; [and] recreation.”¹⁴³

Courts have found that when lack of housing is the barrier preventing people from accessing treatment in their communities, states may be required under the ADA to provide housing. A court in Minnesota found that a county’s failure to provide housing that would facilitate access to integrated-treatment options may constitute a violation of the integrated-care mandate.¹⁴⁴ A court in Illinois found that an *Olmstead* settlement requiring the state to ensure that residents had access to housing was fair, adequate, and reasonable.¹⁴⁵ A New York court found that the integration mandate required the state to provide supportive housing to residents of a more restrictive Adult Home when those residents were qualified to live in housing in their community.¹⁴⁶ Dozens of states are working to develop permanent supportive housing and affordable housing as part of their *Olmstead* plans after reaching a settlement agreement.¹⁴⁷ A successful *Olmstead* claim would not only establish counties’ obligations but also provide access to stable housing and integrated care to those people.

In 2013, the U.S. Department of Housing and Urban Development (HUD) released guidance to HUD-assisted housing providers, supportive housing providers among them, on how providers can support state and local endeavors to meet *Olmstead* obligations.¹⁴⁸ HUD guidance explains,

Following the *Olmstead* decision, there have been increased efforts across the country to assist individuals who are institutionalized or housed in other segregated settings to move to integrated, community-based settings. . . . As a result, there is a great need for affordable, integrated housing opportunities where individuals with disabilities are able to live

142. Kenneth R. *ex rel.* Tri-Cnty. CAP, Inc./GS v. Hassan, 293 F.R.D. 254, 260 (D.N.H. 2013).

143. Court Master’s Report Pursuant to Paragraph 299, *Bates v. Mayhew*, No. CV1989088, 2011 WL 11723788, at *2 (Me. Super. Aug. 16, 2011).

144. *Murphy ex rel. Murphy v. Minn. Dep’t of Hum. Servs.*, 260 F. Supp. 3d 1084, 1117 (D. Minn. 2017) (finding that plaintiffs had “plausibly assert[ed] viable integration mandate claims” where they alleged that the county had failed to provide housing options that would allow them to receive treatment in the community).

145. *Williams v. Quinn*, 748 F. Supp. 2d 892, 903 (N.D. Ill. 2010).

146. *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d 184, 314 (E.D.N.Y. 2009), *vacated sub nom. based on lack of standing*, *Disability Advocs., Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012).

147. Kevin Martone, Nat’l Low Income Housing Coal., *Olmstead Implementation*, in 2019 ADVOCATES’ GUIDE 6-20, 6-21 (2019), https://nlihc.org/sites/default/files/AG-2019/06-05_Olmstead-Implementation.pdf [<https://perma.cc/J4U8-9CGG>].

148. *Statement on the Role of Housing in Accomplishing the Goals of Olmstead*, U.S. DEP’T OF HOUS. & URB. DEV., <https://www.hud.gov/sites/documents/OLMSTEADGUIDNC060413.PDF> [<https://perma.cc/3AB2-LBJH>] (last visited July 10, 2021).

and interact with individuals without disabilities, while receiving the health care and long-term services and supports they need.¹⁴⁹

The guidance describes an example of post-*Olmstead* federal programs, the Money Follows the Person (MFP) program. The program was authorized by Congress in 2005 and extended in 2010 under the Patient Protection and Affordable Care Act, which authorized the Centers for Medicare & Medicaid Services to offer incentives to states to shift programming out of segregated settings and into integrated care in the community.¹⁵⁰ The MFP program acknowledges that a lack of access to affordable housing is often a barrier to achieving that goal.¹⁵¹ The guidance instructs HUD programs to aim to increase access to nonsegregated supportive and affordable housing.¹⁵² In addition to establishing a county's obligation to provide integrated care, *Olmstead* litigation could result in new state bills that would open funding for supportive housing, shifting some of the funding currently reserved for jail expansion into community care.

The Corporation for Supportive Housing (CSH) states that supportive housing plays a key role in creating opportunities for people with disabilities to live in their communities as mandated by *Olmstead*.¹⁵³ CSH defines supportive housing as “housing without limits on length of stay, affordable to people with extremely low or no income” and calls it a “proven model that works for people facing severe obstacles to housing stability, including those with disabilities.”¹⁵⁴ As opposed to shelters (housing that imposes conditions on residents, housing that is temporary, and housing serving only people with disabilities), permanent supportive housing complies with *Olmstead* by providing people with disabilities the opportunity to live long-term in “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible” as required under the ADA.¹⁵⁵ Under *Olmstead*, counties should all provide integrated permanent supportive housing that is accessible to community members with disabilities and allows them to access other forms of support.

V. OLMSTEAD AS A LEGAL TOOL FOR FIGHTING JAIL EXPANSIONS: PREDICTIVE DATA CAN SUPPORT OLMSTEAD LITIGATION

For communities organizing to prevent construction of a county “mental health jail,” *Olmstead* can provide a powerful legal tool. The Fourth Circuit made clear that an *Olmstead* claim is not limited to instances of actual institutionalization;

149. *Id.* at 1.

150. *Id.* at 5.

151. *Id.*

152. *See id.* at 5–11.

153. CORP. FOR SUPPORTIVE HOUS., SUPPORTIVE HOUSING & OLMSTEAD, THE DIALOGUE 1 (2016), <https://www.csh.org/wp-content/uploads/2012/12/olmstead-2016.pdf> [<https://perma.cc/JRQ8-B6E2>].

154. *Id.*

155. 28 C.F.R. pt. 35, App. B (1998).

instead, it protects those facing a “risk of institutionalization.”¹⁵⁶ The DOJ issued a determination that the ADA and the *Olmstead* decision “extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings.”¹⁵⁷ The Tenth Circuit similarly held that the ADA’s “protections would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation.”¹⁵⁸

Any person who is living in the community with unmet mental health needs, including medication, mental-health treatment, housing, peer support, case-worker support, assisted employment, and other services, and is not receiving services is at increased risk of interaction with law enforcement. Any person facing this risk could be a part of a plaintiff class with a cognizable *Olmstead* claim. This would be true even if they are not currently incarcerated and even though they cannot prove with certainty that they will be incarcerated in a proposed “mental health jail.” The extreme risk of such incarceration, when community alternatives that could prevent segregation are not being provided, would give them an ADA right to challenge the jail expansion.

VI. SOLUTIONS THROUGH INTEGRATION OF LEGAL AND NON-LEGAL ADVOCACY

The decades of organizing and activism by community advocates working to expand alternatives to incarceration cannot succeed without broader systemic support. Ultimately, money has to be appropriated, and counties have to shift their focus from incarceration to treatment. In many cases, this involves moving intractable political players and sheriff’s departments invested in maintaining and expanding their budgets.

Olmstead litigation could act as a supporting effort to promote the goals of community activism. Often, the threat of a lawsuit provides leverage that community organizations do not have alone. Successful settlements can bypass slow political progress and force counties to move more quickly. We owe it to our communities to protect our neighbors, to keep them home, and to provide the integrated care necessary to living successfully with a disability. This is not only a moral duty but also a legal one, and it is an investment in our communities. It is an economic justice, racial justice, and disability justice issue. People who are caught in the system cycle through it, facing homelessness, hospitalization, and reincarceration. People who receive integrated care in their community are more likely to become stable, less likely to cause harm, and more able to give back to their

156. Pashby v. Delia, 709 F.3d 307, 322 (4th Cir. 2013).

157. C.R. DIV., U.S. DEP’T OF JUST., *supra* note 61.

158. Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1181 (10th Cir. 2003); *see also* Steimel v. Wernert, 823 F.3d 902, 912 (7th Cir. 2016) (holding that protection is not limited to those who are already institutionalized).

community.¹⁵⁹ Communities must “assure equality of opportunity, full participation, independent living, and economic self-sufficiency” for everyone, regardless of disability.¹⁶⁰

159. CTR. FOR HEALTH & JUST. AT TASC, NO ENTRY: A NATIONAL SURVEY OF CRIMINAL JUSTICE DIVERSION PROGRAMS AND INITIATIVES 4 (2013), https://www.centerforhealthandjustice.org/tascblog/Images/documents/Publications/CHJ%20Diversio%20Report_web.pdf [<https://perma.cc/74YY-UHA8>] (“[A]mong people with mental health problems in state prisons and local jails, 74 percent and 76 percent, respectively, also have substance use disorders.”); JOHN ROMAN, WENDY TOWNSEND & AVINASH SINGH BHATI, CALIBER ASSOCS. & THE URB. INST., RECIDIVISM RATES FOR DRUG COURT GRADUATES: NATIONALLY BASED ESTIMATES, FINAL REPORT (2003), <https://www.ojp.gov/pdffiles1/201229.pdf> [<https://perma.cc/MH2P-26CM>] (finding that recidivism rates for graduates of drug courts were significantly lower than recidivism rates for people sentenced to jail or prison in meta-analysis of studies across the United States).

160. 42 U.S.C. § 12101(a)(7).

