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Disability and Integration

Eleanor Roosevelt, the mother of international human rights law, posed the fundamental challenge for those who, like me, are charged with protecting civil rights:

Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.

The great scholar-activist of the disability rights movement, Jacobus tenBroek, expressed a similar insight when he wrote that the most fundamental of rights for people with disabilities was “the right to live in the world.”

One person who sought the right to live in the world—who sought equal justice, equal opportunity, and equal dignity in the small places, close to home—was Lois Curtis. Ms. Curtis was born in Atlanta. She is an artist, who works with acrylics and pastels to construct portraits that—to my eye at least—capture the joy that comes when one emerges from serious trials. Ms. Curtis also has been diagnosed as having schizophrenia and a mild intellectual disability. She spent much of her teenage and young adult years in state-run institutions. Even though her own treating professionals eventually said she didn’t need to be there, Ms. Curtis remained in a state psychiatric hospital. Through her own self-advocacy, Ms. Curtis began to challenge her situation. She then obtained the help of the Atlanta Legal Aid Society and filed a lawsuit under the Americans with Disabilities Act. In that lawsuit, she alleged that her continued and unnecessary institutionalization constituted unlawful discrimination.

In the landmark case of *Olmstead v. L.C.*—she was the “L.C.”—the Supreme Court held that unnecessary institutionalization of individuals with disabilities violates the ADA. The case has rightly been called the *Brown v. Board of Education* of the disability rights movement, and in the rest of this lecture, I want to talk about some of its underpinnings and implications. But

before I do, I want to pause for a minute and think about what the *Olmstead* decision meant in the small places close to Lois Curtis's home. By leaving the Georgia Regional Hospital in Atlanta, and moving to the community—where the rest of us live—Ms. Curtis got to experience life in the world. She found that she enjoyed long walks around the neighborhood, she reconnected with her family, she quit her three-pack-a-day smoking habit. With the help of a government grant, she produced her artwork, which is sold in galleries in Atlanta and across the Nation. And Ms. Curtis travels across the country to advocate for the rights of institutionalized persons with disabilities. Living in the world, as Lois Curtis is, might seem more dangerous than living in the caring cocoon of an institution—though history and current experience show that institutions are often fraught with their own dangers. But by living in the world, Ms. Curtis enjoys the same opportunities the rest of us have—to try, to risk, to fail, to succeed, but ultimately to choose for ourselves how we are to live our lives. That is the promise of the *Olmstead* decision for people with disabilities in this country, the promise Lois Curtis has experienced so fully.

In the remainder of this lecture, I'd like to explore the integration requirement that the *Olmstead* case recognized. I'll first discuss why integration is so centrally important for people with disabilities—and why the Court was right to see the failure to integrate as a form of discrimination. I'll then discuss just what integration means in the disability rights context. Next, I will describe how the *Olmstead* decision has transformed the disability rights litigation of the United States Department of Justice before turning to the questions the Court's decision left for the future: Does the ADA's integration mandate extend beyond cases like Lois Curtis's—where the plaintiff remains institutionalized notwithstanding the conclusion of the state's own treatment professionals that she can best be served in the community? And in what circumstances will budgetary constraints, or the state's need to serve a diverse population of people with disabilities, qualify the integration requirement?

These are incredibly important questions. *Olmstead* enforcement is a central priority of the Obama Administration. The President has declared the “Year of Community Living,” and he has directed the government to redouble its efforts to enforce the integration mandate. In this Administration, the Department of Justice has brought, intervened in, or participated as an amicus or an interested party in, *Olmstead* litigation in Connecticut, Florida, Georgia, Illinois, New York, North Carolina and Virginia, and we have ongoing investigations or litigation with an *Olmstead* component in California, Iowa, Maryland, Nebraska, New Jersey, Oregon, Pennsylvania, Texas and the District of Columbia. The issues I will discuss in the rest of this lecture are the most important emerging issues in this key area of disability law, and they are the ones we are facing on a day-to-day basis.

Why Integration?

Jacobus tenBroek, who urged that the right to live in the world was key to disability rights, also wrote that integration was “the answer” to achieving that right. Like Lois Curtis, Jacobus tenBroek lived integration in the small places, close to home. Professor tenBroek lost his eyesight at the age of 14, in 1925. Fifteen years later, he earned a Doctor of Laws degree from the University of California at Berkeley. The same year, he was instrumental in founding

the National Federation of the Blind—the first major nationwide organization that was run not just “for” people with disabilities but “by” them as well. Professor tenBroek soon took an appointment at his alma mater, where he taught in the speech and political science departments as well as in the law school. He continued to teach at Berkeley, and serve as a national leader of the nascent disability rights movement, until he died in 1968.

Most legal scholars know Professor tenBroek for his contributions to constitutional scholarship: His 1949 article with Joseph Tussman, “The Equal Protection of the Laws,” set forth the analytical framework that structured a generation’s understanding of the Constitution’s equal protection guarantee, and his book on *The Antislavery Origins of the Fourteenth Amendment* remains a classic. Perhaps not surprisingly, Professor tenBroek made the key early contributions to the emergent legal theory of disability rights.

When Professor tenBroek wrote about integration as “the answer,” he wrote from experience. His article describing “The Right to Live in the World” begins with one of the most extraordinary author’s notes I have ever read. In the author’s note, Professor tenBroek responds, defiantly, to what he anticipates will be criticism that the article is based too much on personal experience. (He needn’t have worried, I think; much of the article is taken up with an incredibly thorough canvass of state statutes and court decisions, a canvass that could leave no doubt that Professor tenBroek had done his homework.) The author’s note takes up half a page, in tiny type. But one sentence encapsulates Professor tenBroek’s point: “This article is amply flecked with footnotes, citing a wide range of formal materials. The views expressed, the author believes, are verified by his personal experience as a disabled individual far more than by all the footnote references put together.”

Professor tenBroek argued that integration for people with disabilities followed from the basic principles of the civil rights movement that was, at the time he wrote, at the apotheosis of its power. “Are humans to be denied human rights?” he asked:

Are persons after all not to be persons if they are physically disabled? Are members of the community to be robbed of their rights to live in the community, their certificates cancelled upon development or discovery of disability? These rhetorical questions, the hallmarks of crusade and reform throughout American history, have in our generation become the plea of the disabled as well. As with the black man, so with the blind. As with the Puerto Rican, so with the post-polio. As with the Indian, so with the indigent disabled.

Although Professor tenBroek argued that a policy of integrationism was immanent in a wide range of legal developments, both statutory and common-law based, he lamented the courts’ failure to adopt such a policy to its fullest extent. “No courts have held or even darkly hinted,” he wrote, that a blind man may rise in the morning, help get the children off to school, bid his wife goodbye, and proceed along the streets and bus lines to his daily work, without dog, cane, or guide, if such is his habit or preference, now and then brushing a tree or kicking a curb, but, notwithstanding, proceeding with firm step and sure air, knowing that he is part of the public

for whom the streets are built and maintained in reasonable safety, by the help of his taxes, and that he shares with others this part of the world in which he, too, has a right to live.

Reading Professor tenBroek's words, one can appreciate both the analytic and the emotional core of the case for integration of people with disabilities. Professor tenBroek, of course, wrote against a backdrop of a long history of segregation, a history that did not begin or end with the eugenics movement of the early Twentieth Century. For centuries, people with disabilities were pushed aside, shut out, and ignored. Whether because of fear or because of misplaced paternalism, people with disabilities were forced to live in out-of-the-way facilities where basic, day-to-day decisions were made by others. People with disabilities became effectively invisible in the public square, and unfamiliarity combined with fear to encourage prejudice.

The Twentieth Century phenomenon of institutionalization of people with disabilities, which peaked in the mid-1950s, was but a later chapter in the same story. People with intellectual, developmental, and psychiatric disabilities were confined to institutions for their care and protection, but institutionalization massively restrained their freedom. And as more and more people moved out of institutions in the 1970s and 1980s, we learned that institutionalization was often unnecessary for their care and treatment. This was true even for individuals who all observers had previously thought needed to live in institutions.

Consider Nicholas Romeo, a resident of Pennsylvania's Pennhurst State School whose case went to the Supreme Court. He had what the Court characterized as a "profound[]" intellectual disability, "with an I.Q. between 8 and 10." His own counsel had conceded, in light of what he called "the severe character of his [disability]," that Romeo could never live outside of an institution. Yet "ten months after the court's decision," as the late Timothy Cook told us, "Nicholas Romeo moved to a community residence in Philadelphia," where he lived successfully. The residents released from Pennhurst were studied extensively, and Mr. Romeo's experience was typical. In the psychiatric disability area, too, individuals who were once thought to need long-term institutionalization have proven that they can live successfully in homes or apartments in the community with supportive services.

Ending the unnecessary institutionalization of people with disabilities is crucial to disability civil rights for two major reasons. First, unnecessary institutionalization deprives people with disabilities of important opportunities that are available to people without disabilities: the opportunity to access the "small places, close to home"—neighborhoods, schools, factories, farms, or offices, as Mrs. Roosevelt said, but also movie theaters and sporting arenas, bookstores, and gyms; the opportunity to seek out and make connections with a diverse array of people of one's own choosing; and, indeed, the opportunity to take risks, to be free from constant protection. The disability rights movement has taught us that there is dignity in risk, and that to be denied the right to choose how to live one's life—for good or for ill—is to be denied equal respect as a human being. Segregating people with disabilities into institutions often rests on a too-easy paternalism, a sense that those folks need to be protected from the vicissitudes of the world. Sometimes, to be sure, people—both with and without disabilities—need protection. But people with disabilities are too often shut off from important opportunities

in the community because of a stereotype-driven view that their disabilities render them uniquely in need of protection.

Second, unnecessary institutionalization reinforces public stereotypes and prejudices against people with disabilities. To make large numbers of people with disabilities live behind the walls of a psychiatric hospital, developmental center, or nursing home is to further entrench the same paternalistic attitudes that lead to institutionalization in the first place. And lack of familiarity breeds fear and prejudice. To break down those attitudes requires public visibility and interactions between people with and without disabilities, precisely what segregation makes impossible.

In her opinion for the Court in the *Olmstead* case, Justice Ginsburg relied on these two points in explaining that unnecessary institutionalization of people with disabilities is properly regarded as discrimination against them:

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

It should be no surprise that Justice Ginsburg, the Thurgood Marshall of the women's rights movement, put point so well. For it was the women's movement that was most responsible for teaching us that discrimination can be paternalistic, well-intentioned, and still wrong. The image of the pedestal as cage, perhaps the central metaphor of the constitutional law of sex discrimination that Justice Ginsburg created as a lawyer, captures the matter precisely. Just as the constitutional law of sex discrimination strikes a blow against a "romantic paternalism" that shuts women off from important opportunities, the *Olmstead* holding strikes a parallel blow against paternalistic exclusions of people with disabilities.

What is Integration?

When we think about integration in the context of *Brown v. Board of Education*, I imagine we probably have a very clear sense of what it is. Although the legal principles underlying *Brown* seemed to be quite contested in the Supreme Court's recent decision involving voluntary race-based student assignment plans in Louisville and Seattle, the ideal of integration in the race and schools context remains clear—no "white" schools or "black" schools, just schools.

What does integration mean in the context of disability? For ease of comparison with the *Brown* setting, one can start with the school context. In the early 1970s, in a set of cases that led to the adoption of the Education for All Handicapped Children Act in 1975, disability rights lawyers argued for the integration of children with disabilities in schools. They challenged school districts' decisions to place children with disabilities outside of the typical educational setting—in institutions and “special” schools, yes, but also in “special” classes. They urged that, to the greatest extent appropriate to the needs of each student with a disability, children with disabilities should receive their instruction alongside and fully interact with nondisabled children. Congress enshrined this principle, known as the least restrictive environment rule, in the Education for All Handicapped Children Act (since renamed the Individuals with Disabilities Education Act).

Outside of the education context, as *Olmstead* makes clear, a parallel principle holds. The ADA requires states and localities to serve individuals with disabilities in the most integrated setting appropriate to their individual needs. Under the Department of Justice's authoritative interpretation of its ADA regulations, the most integrated setting is the setting that ensures that the person with a disability will have the greatest opportunity to interact with nondisabled persons.

As institutions for people with psychiatric and intellectual disabilities began to depopulate during the 1960s, progressively more integrated settings were created outside of their walls: first smaller institutions, then large group homes, then small group homes, then one's own home or apartment, with services such as supported housing and assertive community treatment. Today, all of these settings coexist in many states. To the extent that some people with disabilities need to be in more segregated settings—a point the Supreme Court took as a given in *Olmstead*—the existence of a diverse array of settings is salutary. But to the extent that a state's past experiments have created a mental disability system that is skewed towards unnecessarily segregated placements, constraining the ability of an individual with a disability to be served in the most integrated setting appropriate, *Olmstead* requires the state to rebalance the ledger.

A recent decision by a district court in New York illustrates the point. In *Disability Advocates, Inc. v. Paterson*, a case in which the United States has intervened as a plaintiff, a disability rights organization challenged the state's placement of people with psychiatric disabilities into “adult homes.” Adult homes are essentially large, privately-run nursing homes for people with psychiatric disabilities. After a trial, the district court ruled that the adult homes were segregated settings, and that virtually all of their residents would be more appropriately served in their own apartments with supportive services. It thus ruled that the state had violated *Olmstead*.

The court rejected the argument that New York's services for people with psychiatric disabilities reflected a “linear continuum,” in which individuals moved to progressively less segregated environments as their recovery proceeded. The court found that the state “did not develop different types of service settings as part of any deliberate effort to create a ‘linear continuum’ through which individuals needing housing would transition; rather, [it] over time

began creating more integrated forms of housing as its thinking evolved about the best way to promote recovery.” As the *DAI* holding makes clear, the mere fact that a state’s policymakers once made investments based on the premise that more segregated settings were necessary cannot control an individual’s rights today. Once the premise that more segregated settings are necessary for her is debunked, *Olmstead* gives her the presumptive right to receive services in an appropriate, more integrated setting.

The district court’s ruling in *DAI* highlights another aspect of the integration that the ADA demands. Integration may require supportive services. Depending on the nature of the disability, those services may be extensive. In one recent *Olmstead* case in California, the court described the community-based services received by the plaintiff as follows: “Ms. Brantley receives: daily professional nursing services to monitor her hypertension, monitor and control her seizures and monitor her weight loss; daily personal care services to assist with her feeding, toileting, and ambulation, as well as to monitor her whereabouts; daily social services to improve her mood and behaviors, which relate to her dementia; semi-weekly physical therapy maintenance to reduce her risk for falls and to maintain her current functioning; semi-weekly occupational therapy services to maintain her functional strength; and nutritional monitoring in connection with her hypertension and her recent weight loss.”

It is fair to ask whether living in an apartment with full-time attendants and services is really integration. The proper question, though, is whether it is more integrated than alternative, more congregate living situations. Most adults don’t live in a dormitory, or with roommates. Where a person with a disability must live with others with disabilities—not by choice, but because of a state’s decision to fund only congregate placements—her life becomes less her own. Her routines must bend to the needs of the others living with her and the available staffing. And her ability to move freely in the world, to interact with others with and without disabilities as she chooses, will necessarily be less. *Olmstead* guarantees integration so that individuals with disabilities are in the best position to choose for themselves how to go about their days, and with whom to interact on what terms.

Olmstead’s Transformation of Litigation at the Department of Justice

Olmstead makes clear that litigation involving institutionalized persons with disabilities need not focus only on the question whether those persons are receiving appropriate treatment within the institution. That is an important question, to be sure, and the constitutional and statutory protections of the rights of institutionalized persons continue to be significant sources of litigation, even after *Olmstead*. But *Olmstead* says it is not the only question, or even necessarily the first question. Under *Olmstead*, we cannot simply ask whether people are being well treated after they are put in institutions; we need to ask the logically prior question whether they belong in institutions in the first place.

In the Obama Administration, where I work these days, we are transforming our litigation so that we can best realize the full promise of *Olmstead*. We continue to work to ensure that people with disabilities receive the treatment to which they are entitled when they are in institutions, but we have transformed the way in which we carry out our responsibilities under

the Civil Rights of Institutionalized Persons Act (CRIPA). Traditionally, our investigations and litigation under CRIPA have focused on institutional conditions. We have asked, essentially, what it would take to turn the institution we are investigating into the best institution it could possibly be. But in our investigations of facilities for individuals with intellectual, developmental, and psychiatric disabilities, we often find that substandard conditions at those facilities are caused or exacerbated by having too many people in those facilities—and too many who do not belong there. In the letters of findings that we have issued and the court papers we have filed over the last few months, we have made clear that *Olmstead* issues are deeply intertwined with problems of inadequate conditions, and we have resisted any effort to try to solve the conditions problem without looking at whether all of the people in the facility belong there. We have also been investigating possible *Olmstead*-only cases, in which we sue a state for violating *Olmstead* but do not at the same time challenge the conditions at its facility.

Where a state has inappropriately institutionalized people with disabilities, it must take two sorts of action to provide a remedy for its *Olmstead* violation. First, it must ensure that people who do not belong in institutions are moved out. The state must have a process in place, for each institutional resident, that provides an independent determination of the resident's appropriate placement according to appropriate professional standards. If that process determines that the resident should be placed in a less segregated setting, the state should follow that determination. And the state should provide extensive means of educating residents and their parents or guardians about the benefits of community placement.

Where a state has persistently resisted compliance with *Olmstead*, this requirement of an individualized process may not be sufficient to provide a remedy for the violation of the ADA. Rather, it may be necessary for the state to agree (or be ordered by a court) to follow specific targets and timetables for moving people out of its institutions. For example, in DAI (the New York case I discussed above), the court concluded that virtually all residents of the adult homes could live and thrive in apartments with supportive services. We have therefore supported a proposed remedy that would require the state to move a pre-set number of adult home residents each year to those more integrated settings. And in our litigation against the State of Georgia—litigation that challenges both the conditions in the state's psychiatric hospitals and the inappropriate placement of hundreds of individuals with disabilities in those hospitals—we have asked the court to appoint a monitor who will set binding targets and timetables for downsizing.

But a state must do more than move people with disabilities out of the inappropriate institutional placements. *Olmstead* cannot work unless individuals who are discharged from institutions have somewhere to go. That somewhere has to be safe, it has to provide adequate and appropriate services, and it has to be the most integrated setting appropriate to the individual resident. We have been seeking enhancements to community capacity in a number of our open *Olmstead* matters. In the New York case, we have supported a proposed remedy that would order the state to provide supportive housing services for the individuals who are moved out of the adult homes. And in our Georgia case, we have asked that a court-appointed monitor identify the ways in which community services must be enhanced in order to move residents of the psychiatric hospitals into appropriate, integrated placements. We are working closely with our

partners at HHS, HUD, and elsewhere to seize opportunities to use available federal funding in a way that enhances community capacity and promotes integration.

Emerging Issues under Olmstead

As we pursue our invigorated *Olmstead* enforcement, we are confronting a number of emerging issues. Many of these issues boil down to the question whether an *Olmstead* claim can exist in cases that do not present the precise sort of fact pattern that Lois Curtis’s case presented. Recall that Ms. Curtis was institutionalized, in the Georgia Regional Hospital, at the time she filed her suit. And the professionals that the state itself had selected to supervise her treatment had determined that she did not need to be in the institution. What about cases that do not present these sorts of facts?

An increasingly important set of cases is brought by individuals who are not currently institutionalized, but who are threatened with the loss of state-provided services that make it possible for them to live in the community. These plaintiffs contend that the loss of the services will put them at sufficient risk of inappropriate institutionalization to make out a claim under *Olmstead*. The leading case addressing this situation is the Tenth Circuit’s 2003 decision in *Fisher v. Oklahoma Health Care Authority*. The *Fisher* plaintiffs challenged Oklahoma’s decision to cap prescription drug reimbursements for participants in its Medicaid Home- and Community-Based Services (HCBS) waiver program. The state announced that it would reimburse HCBS recipients for up to five prescription drugs each month, though it would continue to reimburse unlimited numbers of prescription drugs for Medicaid recipients who received their services in nursing homes. The plaintiffs were individuals who received HCBS services and who were prescribed more than five different drugs. They argued that the impact of the state’s decision would be to force them to live in a nursing home to receive the medication they needed, and that a nursing home was not the most integrated setting appropriate for them.

The state argued that *Olmstead* did not apply to individuals who were not institutionalized and were free to remain in the community if they wished. The Tenth Circuit rejected that argument. It explained:

First, there is nothing in the plain language of the regulations that limits protection to persons who are currently institutionalized. The integration regulation simply states that public entities are to provide “services, programs, and activities in the most integrated setting appropriate” for a qualified person with disabilities. Those 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. Second, while it is true that the plaintiffs in *Olmstead* were institutionalized at the time they brought their claim, nothing in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA's integration requirements.

Importantly, *Fisher* did not require the plaintiffs to show that institutionalization would be an imminent result of the state’s change in policy—that they were on the threshold of

institutionalization. The court concluded that the state's new policy would require one of the plaintiffs to spend 36% of her monthly income on prescription medication, and it would require the other two plaintiffs to spend about 8% of their monthly incomes on prescription medication. Given the plaintiffs' pre-existing poverty, the court concluded that the 5-drug-a-month policy placed them at sufficient risk of institutionalization to warrant an injunction against the state.

In *Marlo M. v. Cansler*, a case in which the Department of Justice argued in support of the plaintiffs, a district court in North Carolina recently applied this principle. The court issued a preliminary injunction to bar the state from eliminating the state "wraparound" services received by two plaintiffs, Marlo M. and Durwood W. Each of the plaintiffs has both psychiatric and intellectual disabilities; Marlo M. also has a physical disability. For years, each has lived in a single-person apartment in the community, with the help of state-provided services. The court concluded that the elimination of these services posed a "substantial" risk of institutionalization and thus likely violated *Olmstead*:

Plaintiffs have behavioral and special needs, and benefit from a stable environment and personalized treatment. Information in the record indicates they each have conditions or behaviors which make them poor candidates for group housing. With respect to Durwood W., the facts show he was placed in his present living situation after he failed in, and was discharged from, a group home because of his inability to conform his behavior. It appears that if forced from their present settings, both Plaintiffs face a substantial risk of institutionalization. In addition, Marlo[] M.'s apartment is uniquely suited to her physical needs, designed with low counter tops and other modifications to accommodate a person of short stature.

A federal district court in California recently engaged in a similar analysis in enjoining cuts to the state's In-Home Support Services program. That case is currently pending on appeal, and we have filed an amicus brief in the Ninth Circuit defending the district court's *Olmstead* analysis.

By contrast, a federal district court in Virginia held that the plaintiffs would not likely prevail on a challenge to the state's decision to build a new institution for people with developmental disabilities to replace a (larger) one that it was closing. The court concluded that the mere building of a new institution did not imply that individuals who wanted to live in the community would instead be placed in the new facility; rather, the state had promised that nobody would be placed in the new facility if a community setting was the most integrated setting appropriate and they did not object to community placement. The court thus rejected the arguments of the plaintiffs, and the United States as *amicus*, that the state's decision to commit a large portion of its limited resources to building a new institution necessarily detracted from its ability to serve individuals with disabilities in the most integrated setting appropriate.

The cases seem to be converging on the principle that a plaintiff *can* make out an *Olmstead* claim even if she is not yet institutionalized, but only if she is challenging a state decision that in fact places her at substantial risk of institutionalization. What about the other aspect of *Olmstead*'s facts—the decision by the state's own treatment professionals? Can a

plaintiff make out an *Olmstead* claim even if the state’s own treatment professionals have *not* concluded that she can be appropriately served in the community?

In our view, the answer to that question is yes. The regulation that creates the integration mandate does not refer to treating professionals; it simply requires services to be administered “in the most integrated setting appropriate to the needs of” the individual. The regulation does not in any way purport to limit the evidence on which a plaintiff may rely in showing that a more integrated setting is appropriate. Moreover, as one leading decision from Pennsylvania explains, a requirement that *Olmstead* plaintiffs come to court armed with the recommendation of a state’s treating professional would “allow States to avoid the integration mandate by failing to require professionals to make recommendations regarding the service needs of institutionalized individuals with mental disabilities.” The district court in the *DAI* case agreed with this point and looked to the weight of the evidence before it—not just the testimony from state “treatment professionals”—to conclude that virtually all adult home residents can appropriately receive services in their own apartments.

Another important, emerging issue concerns the extent of the state’s obligation to comply with the integration mandate in the face of resource constraints. In the portion of her *Olmstead* opinion in which she spoke for only a plurality, Justice Ginsburg explained that “[t]he State’s responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless.” In particular, the state may defend against an *Olmstead* claim, like any other claim for reasonable modifications under the ADA, by demonstrating that providing relief to the plaintiff would “fundamentally alter” the nature of the service the state is providing. “Sensibly construed,” Justice Ginsburg said, “the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.”

In her *Olmstead* opinion, Justice Ginsburg seemed to be most concerned with the prospect of queue-jumping—that an individual ought not to get priority in moving out of an inappropriate institutional placement simply because she beat other similarly situated individuals to the courthouse. She explained that if “the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State’s endeavors to keep its institutions fully populated,” then “a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions.” The assumptions here seem to be that a large number of people with disabilities are inappropriately institutionalized and that it would be impractical to move all of these people to community-based settings at once; so long as a state has implemented an effective process to move them out, the folks at the bottom of the queue have to wait their turn.

But many of the *Olmstead* cases that arise today do not involve queue-jumping. They involve states that do not have an effective, comprehensively working plan to move people with

disabilities out of inappropriate institutional settings, but that claim that tight budgets prevent them from providing appropriate community services. Or they involve states that claim that fiscal realities require them to cut services to people with disabilities who are already receiving them in the community. How ought a court to address these sorts of claims by states?

Any fair-minded observer must acknowledge that state budgets are unusually tight these days. But we ought to pay heed to a few basic principles when considering claims that states can't afford to serve people with disabilities in the community. First, the *Olmstead* decision requires a state to make a meaningful and effective commitment to serving individuals with disabilities in the most integrated setting appropriate to their individual needs. States that failed to invest in community services when fiscal times were rosy cannot credibly claim that the current budget situation is the cause of their failure to serve people with disabilities in integrated settings. Even when fiscal times are tight, states still have room to move people out of institutions and into more appropriate community settings. In many cases—not all, to be sure—an individual who moves from an institution to the community will cost the state less money while receiving the same or better quality of services. And many states leave federal money on the table—such as the Money Follows the Person program, which provides an enhanced Medicaid match to states. In states that have done a poor job of moving people with disabilities out of inappropriate institutional settings, we frequently find that the state has failed to use all of the Money Follows the Person slots that have been allocated to it.

Second, the mere fact of tight budgets cannot serve as an open license to cut programs that provide services to people with disabilities who are living in the community. The Tenth Circuit's decision in *Fisher* illustrates the point. There, the state defended its HCBS prescription drug cap on the ground that it would save \$3.2 million per year during a "fiscal crisis." The court did not deny that a fiscal crisis existed, but it rejected the state's defense. The court first explained that, because the state was continuing to provide unlimited prescription drugs in nursing homes, its funding choices would impede rather than promote integration. And the court concluded that the state had not shown why capping the prescription drug benefits of HCBS participants was a better way of saving money than a number of alternatives that did not enhance segregation—alternatives "such as requiring prior authorization for prescriptions or reducing nursing home payments by \$160 per year per patient." A state cannot choose to solve a fiscal crisis by taking steps that impede integration when other available solutions would promote integration.

While tight budgets may affect how and how quickly a state complies with the ADA's integration mandate, they do not relieve the state of its obligation to take effective steps to end inappropriate institutionalization. A state that does not have a comprehensive, effectively working plan to serve people with disabilities in the most integrated setting appropriate cannot avoid the application of *Olmstead* by simply pointing to a fiscal crisis.

Conclusion

In this lecture, I have offered a brief tour of the *Olmstead* decision, how it has affected the work of the United States Department of Justice, and the important emerging issues we are

facing in enforcing it. I have talked about technicalities like Medicaid waivers and fundamental alteration defenses. I have also discussed a number of the leading cases. But what I hope you take from this lecture is not the technical legal discussion. What I hope you take from this lecture is a deeper understanding of the importance of integration in Mrs. Roosevelt's "small places, close to home." The right to live in the world like everyone else, to decide where to go and what to do based on one's own desires and not the desires and convenience of others, to make choices and face the consequences—all of this is the hallmark of an adult citizen. What *Olmstead* is about—what we are always trying to keep in mind as we go about our *Olmstead* enforcement—is ensuring that people with disabilities are treated as full citizens.

I close by quoting at some length from Professor tenBroek's definition of what the right to live in the world means for people with disabilities:

The right to live in the world consists in part of the right to live out of it. The blind, the deaf, the lame, and the otherwise physically disabled, have the same right to privacy that others do; not only the right to rent a home or an apartment, public or private housing, but the right to live in it; the right to determine their living arrangements, the conduct of their lives; the right to select their mates, raise their families, and receive due protection in the safe and secure exercise of these rights. * * *.

But the world in which the disabled, too, have a right to live is also on the streets, the highways and byways, in public buildings, and other public places, in the schools and colleges, in the public service and private callings, in the factories, shops and offices, in short, in all the places where men are, go, live, work, and play. The policy of the law * * * should be by negative ban and positive fostering, to permit, enable and encourage men to be a part of their communities to the full extent of their physical capacities.

That is what *Olmstead* is all about.