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Chapter 1: Introduction

“People, irrespective of their degree of disability, are apt to do better in the community on most measures and do no worse when it comes to challenging behaviors... Very simply, the institution cannot replace the community in providing individuals... with the opportunities for the good life.”

-Raymond Lemay

“[J]ustice requires social arrangements that permit all (adult) members of society to interact with one another as peers.”

-Nancy Fraser

“The criticism of power wielded over the mentally sick or mad cannot be restricted to psychiatric institutions; nor can those questioning the power to punish be content with denouncing prisons as total institutions. The question is: How are such relations of power rationalized? Asking this is the only way to avoid other institutions, with the same objectives and the same effects, from taking their stead.”

-Michel Foucault

1. Introduction

The relationship between integration and disability justice is highly contested. Are disabled people¹ “better off” when they receive supportive services in segregated

¹ I generally make the deliberate decision in this project to use “identity-first” as opposed to “person-first” language, i.e., disabled people, not people with disabilities. Although individual disabled persons differ in terms of personal preference, there is a strong case to be made that the arguments behind “person-first” language are flawed. First, many disabled persons view their disability as a major aspect of their identity, and thus, distancing disabled persons from their disability linguistically may be inimical to the process of self-identification for disabled persons. Second, the implicit assumption behind ‘person-first’ language is that there is something dehumanizing about acknowledging that someone is disabled. This reinforces the highly problematic and pervasive narrative that disabilities are in some way deficiencies in personhood or that having a disability makes someone less human. Therefore, for political reasons, I use the category disabled person; however, I acknowledge that the decision about how to self-identify is contentious and the prerogative of individual disabled people.

settings?² Disability activists have tended to answer this question with a resounding “no.” Armed with the rallying cry of “nothing about us without us,” disabled activists have fought for inclusion in the public sphere in many forms—whether through deinstitutionalization and the independent living movement, the push for integrated education, or competitive, integrated employment (*See, e.g.*, Pelka 2012; Fleischer and Zames 2011; Shapiro 1994). However, some academics argue that integration does not always produce substantive equality for disabled people (*See, e.g.*, Colker 2008).

This project both supports the claims of disability activists and disputes many conventional claims that disabled people are “better off” in segregated settings. Claims that disabled people are “better off” in segregated settings usually do not include integration as a metric for determining what constitutes “better off.” The purpose of this project is to suggest that integration is one of the outcomes that should be measured when assessing whether a disabled person is “better off.” This is both for genealogical and normative reasons. Historically, disabled people have been cut off from society and placed in segregated settings, making the maintenance of these settings an operative

² I make the conscious choice to refer to settings as segregated or integrated, rather than to refer to “special needs” or other categories that imply disabled peoples’ needs are exceptional, rather than examples of the variance that inevitably surround any putative norm. Saying that a setting is segregated is more accurate and also avoids the use of stigmatizing language, generally considered offensive to the disability community, such as “special needs.”

feature of ableism.³ Moreover, the maintenance of segregated settings for disabled people harms their ability to participate equally in social benefits and perpetuates ableism. The fundamental contention of this project is that the problems people articulate with integration are generally problems with *naïve integration*, or integration that is carried out improperly, without the necessary supports, programs, or accommodations.

This chapter begins by outlining the key legal concepts at play in this project. I then provide a brief history of the segregation of disabled people, arguing that the impulse to segregate perpetuates the apparatus of ableism. I argue that even seemingly benign instances of segregation deny disabled people the opportunity to interact with nondisabled people as peers. Therefore, segregation denies participatory parity. I conclude by outlining the essential thesis of this project, which is the view that naïve integrationism is to blame for many of the seemingly problematic features of disability integration. Naïve integration is not in fact true integration but itself serves to perpetuate some of the most insidious features of ableism.

2. Disability Law in the United States

The Americans with Disabilities Act of 1990 and subsequent Americans with Disabilities Amendments Act of 2008 prohibit discrimination based on disability. The

³ Ableism has a variety of meanings, but generally, ableism refers to an apparatus whereby disabled people are placed at a disadvantage to able-bodied, minded, or neurotypical people. It is discrimination against disabled people, both through overt acts of prejudice or exclusion but also the exclusion of disabled people from aspects of social participation through built environments and social prejudices/expectations that render certain spaces inaccessible. Ableism is therefore the presumption that people are not disabled, and refers to social apparatuses built around that presumption.

ADA has been touted as “the emancipation proclamation for persons with disabilities.”⁴

The ADA is organized into five titles, with Title I concerning employment, Title II concerning public entities and transportation, Title III concerning public accommodations and commercial facilities, Title IV regulating telecommunications, and a miscellaneous Title V.⁵ This project will be focusing primarily on Titles I-III, as well as other disability rights legislation, including: The Individuals with Disabilities Education Act⁶ (IDEA) and Section 504 of the Rehabilitation Act of 1973.⁷

This project will at various points discuss the ways in which the courts have interpreted these laws. I will make the overarching point that the way these laws have been interpreted by courts has largely been through a lens of *naïve integrationism*—that is to say, courts have required programs to integrate disabled people without requiring the broader systemic change necessary to create supported integration. Supported integration entails providing disabled people with the structures and supports necessary to make social programs and spaces accessible. I will argue that it is possible to move beyond naïve integration and toward supported integration by innovatively using existing legal tools—specifically by leveraging the Title II integration mandate, otherwise known as the

⁴ See e.g. Ted Kennedy’s remarks in the September 14, 1989 Senate debate on the ADA: 135 Cong. Rec. S11173-01.

⁵ See 42 U.S.C. § 12101-12213 (2018).

⁶ See 20 U.S.C. §1400 (2018).

⁷ See 29 U.S.C. § 794 (2018).

Olmstead mandate.⁸ Although *Olmstead* will be discussed in more detail in subsequent chapters, the essential holding of *Olmstead* is that public entities shall administer programs, service, and activities to “qualified individual[s] with a disability” in the *most integrated* setting appropriate to their needs.⁹ This includes a mandate to provide community-based care and treatment to qualified individuals with disabilities when their health care provider deems it appropriate.¹⁰

The *Olmstead* opinion has been likened to *Brown v. Board of Education* for disabled people (Cerreto 2001).¹¹ Under *Olmstead*, disabled plaintiffs have successfully sued prisons, sheltered workshops, hospitals, treatment facilities, and long-term residential facilities to push for community-based services and public integration (Matthews 2018). *Olmstead* litigation is also being used to challenge segregation in schools.¹² This project explores the potential and limitations of *Olmstead* litigation to create genuine community integration for disabled people. In what follows, I set out my

⁸ For more about the *Olmstead* decision and its ramifications, see Chapter 2 concerning de-institutionalization. The remaining chapters discuss innovative uses of the *Olmstead* mandate as well.

⁹ *Olmstead v. L. C. by Zimring*, 527 U.S. 581, 592 (1999)

¹⁰ *Id.* at 602.

¹¹ Though, this is a fraught argument, as Ben-Moshe (2020) suggests. It ignores the interplay between race and disability, including the ways in which disability has been and still is racialized. Saying that *Olmstead* is the *Brown v. Board of Education* for disabled people, in many ways furthers the idea that disabled people are white—that the goals of disability and racial emancipation can in some sense be separated.

¹² See Chapter 3 for a more thorough discussion of the effects of *Olmstead* on education.

argument for why integration ought to be preferred to more restrictive, more segregated solutions.

3. The Impulse to Segregate

Many people make arguments for the segregation of disabled people—their segregation is often conceptualized as part and parcel of providing disability-specific services. Parents and caregivers of disabled people have often advocated for segregated settings.¹³ Similarly, many advocates who are not themselves mental health consumers advocate for more in-patient and therefore segregated treatment.¹⁴ These groups are often criticized as out of touch with the desires of disabled people themselves, however, as their primary membership consists of parents and caretakers of psychiatrically disabled people (*See* Fleischer and Zames 2011, 120). In academia, many scholars advocate for positions that are unpopular in the disability rights community, despite their personal relationships with disability. For example, Amber Knight (2016), who is herself physically disabled, suggests that a wider scope of paternalism for cognitively disabled people is justified, as does Michael Berube, the father of an intellectually disabled child (2010).

Eva Feder Kittay, a leading scholar on intellectual disability, lauds that her daughter Sesha “has been able to flourish because [they] have been able to secure good

¹³ *See e.g.* Avi Wolfman-Arent, *Segregated and satisfied: parents of special ed students blanch at calls for inclusion*, *WHYY* (July 27, 2017), <https://whyy.org/articles/segregated-and-satisfied-parents-of-special-ed-students-blanch-at-calls-for-inclusion/>.

¹⁴ *See e.g.* *Psychiatric Bed Shortages*, TREATMENT ADVOCACY CENTER (accessed June 17, 2020), <https://www.treatmentadvocacycenter.org/key-issues/bed-shortages>.

long-term care... at an excellent residence” (2013, 69). Indeed, Kittay criticizes community integration in the status quo, stating that “[w]hen unaccompanied by support, efforts on the part of the disability community to allow disabled children and adults to remain in their community mean that the care falls squarely and exclusively on the shoulders of (usually female) family members” (2013, 69). Although Sesha’s group home is by no means typical of the institutions discussed in Chapter 2, and Sesha’s impairments are severe, I will argue that seeing segregated settings as inevitable for people like Sesha displays a lack of imagination, in addition to presenting a false dichotomy—that her needs must be met by female caretakers in a system not designed for parents of children like Sesha, or she must be placed in a segregated setting.

Ruth Colker (2008) argues that equality is a function of ending relationships and subordination of disabled persons—that is, ending structural ableism. However, for Colker, integrationist policies have not helped the cause of disability justice in most circumstances and have, in some ways, hindered it. She suggests that “formal equality mantras like ‘The Constitution is color blind’ or ‘Separate is inherently unequal’ are too

simplistic to serve as the foundation for effective social policy” (2008, 38).¹⁵ She further argues:

Although an integrationist perspective played an important historical and structural role in helping to close some horrendous disability-only institutions, it fails to recognize that the government may need to retain some disability-only services and institutions for those who need or want them while protecting others from being coercively required to accept such services or being placed in such institutions. An absolutist integrationist perspective disserves the disability community by supporting an inappropriately high threshold for the development and retention of disability-only services and institutions” (2008, 10).

Colker admits that integration is an important tool for achieving substantive equality for disabled persons, yet does not view it as an end in itself.

While I sympathize with the claims of those who argue that integration has not always produced the most just results, I am not convinced that substantive equality or justice require abandoning integration as an “end in itself.” Rather, my claim is that integration *is* a desirable end in itself—it is both a *tool* for bringing about disability justice and a *constitutive element* of disability justice. Indeed, community integration is vital to the project of deconstructing the historical subordination experienced by disabled

¹⁵ This project takes issue with the conflation of these two types of statements—I would argue that saying separate is unequal may either be interpreted from an anti-subordination or an anti-classification lens, whereas saying that “The Constitution is color blind” implies that any classification is itself unequal. It is possible to maintain that separate is unequal without adhering to an anti-classification theory of constitutional rights.

persons. Forcible segregation has been a primary vehicle through which the oppression of disabled people has been enacted, whether through institutions, separate classrooms, or sheltered workshops.¹⁶ More subtly, but no less insidiously, some disabled persons' preferences toward segregated environments (which Colker discusses) might very well be shaped by the hostility they face in integrated environments—exclusionary environments are by their nature alienating. The problem therefore could be that integrated environments are not properly designed. My fundamental argument is that providing disability-specific services does not require segregated environments. Rather, supportive services can and should operate in the public sphere such as to increase the integration of disabled people. Opening the public sphere to disabled people is a vital element of ending their subordination.¹⁷

Nonetheless, while integration is part and parcel of the fight for substantive equality, integration does not itself produce disability justice. The policy of naïve integrationism pursued by the United States Government, as well as state and municipal

¹⁶ Although Colker recognizes the problems inherent to forcibly segregating disabled persons from the rest of society, there is a real danger that abandoning integrationism as a primary goal of disability advocates will lead to forcible segregation or lead to the de facto segregation of individuals who have the capacity to flourish in an integrated setting, provided the appropriate tools are made available. Under my view, it is naïve integrationism that is the problem, rather than integrationist tendencies themselves.

¹⁷ This does not mean that all disabled people must take part in integrated environments—for example, culturally Deaf communities resist being lumped in with the rest of the disability community and resist community integration. This is a perfectly valid response to decades of subordination. However, I would also argue that this is a view held by a small segment of the disability community, rather than the vast majority. Moreover, this does not negate the need for governmental policies to create inclusive, integrated environments.

governments, has in many ways hindered the fight for disability justice. This project seeks to provide a position beyond naïve integrationism. In the following section, I outline some of the normative assumptions underlying this project—namely a non-ideal approach to justice and the idea of participatory parity.

4. Fundamental Principles: A Non-Ideal Participatory Parity

Two normative principles drive this project—first, is the idea that the principles of justice cannot be determined in a vacuum. Justice must consider the non-ideal conditions in which we live. Second, justice requires participatory parity, or the conditions under which adult members of society can interact with one another as equals. I will discuss each in turn, highlighting these assumptions’ implications for the conception of disability justice advanced. While it is beyond the scope of this project to provide full justification for each of these foundational principles, I will also provide a *prima facie* argument for each.

4.1 Justice in a Non-Ideal World

Scholars have frequently critiqued “ideal theory.” Ideal theory refers to three distinct but interrelated assumptions— (1) the assumption of full compliance as opposed to partial compliance with principles of justice; (2) the idea that the principles of justice must be determined under unbiased conditions; and (3) the assumption that justice is an “end-state” principle, as opposed to a transitional principle—that we should be aiming for a full theory of justice rather than an incremental one (Valentini 2012). This project critiques ideal theory in all its variations, asserting that we must take the world as it is

when determining a just course of action. Justice is, in this sense, contingent on the conditions in which we find ourselves.

Why would this project adopt a non-ideal conception of justice—is it not better to articulate principles of justice that hold under all conditions, that create an ideal to which to strive? Is seeking utopia in some form not the goal of political theorizing? My response is two-fold: first, ideal theory is nonrealistic and ill-suited to the world in which we live and about which we are theorizing. Second, ideal theory harms oppressed groups. It is, as Charles Mills (2005) argues, ideological.

Mills admits that to some extent, normative theory is “ideal.” It concerns itself with what ought to be done and makes prescriptions based upon some conception of what is better. However, Mills objects to making idealized assumptions about the world when constructing these ideal theories—“ideal-as-model” (2005, 166). Idealized theory makes assumptions about how the world works in order to “simplify” ethical theory. In doing this, it makes critical assumptions about what human beings are like by abstracting away from real-world conditions. In a push to create an idealized social ontology, ideal theorists “will abstract *away* from relations of structural domination, exploitation, coercion, and oppression” (Mills 2005, 168). Moreover, ideal theorists frequently idealize human capacities—assuming that everyone is a “free” and “equal” participant in society whose capacities fall within a “normal range” to quote Rawls (1985; 1993). Ideal theorists will ignore how society *actually* works for a model of how they think it *ought* to work. As a result, ideal theorists will frequently be silent on oppression—indeed, in the Rawlsian Original Position, people are unaware of historical conditions of oppression like

structural racism or disability injustice. It is for these reasons that ideal theory is ideological.

There is no view from nowhere, as Iris Marion Young (1990) argues—knowledge is perspectival. Mills asserts that ideal theory abstracts away from the actual power relations we are seeking to deconstruct. Mills notes, “It is no accident that historically subordinated groups have always been deeply skeptical of ideal theory, generally see its glittering ideals as remote and unhelpful, and are attracted to nonideal theory, or what significantly overlaps it” (2005, 170). Ideal theory is ideological in that it tends to distort reality and favor the reality of a few—the few being middle-to-upper-class, white, nondisabled males. Ideal theory explicitly serves the interests of the privileged by disavowing the needs and very existence of the people on which theories of justice should focus and for which these theories ought to provide answers.

This neglect of “complicated” real-world conditions like racial injustices and disability has tangible consequences for how ideal theorists view the world. For example, traditional Rawlsian ideal theory¹⁸ ignores the very existence of disabled people (1993).¹⁹

¹⁸ Indeed, the Original Position is arguably the exemplar for what ideal theory is.

¹⁹ Although parties in the original position are unaware of exactly where they fall in terms of cognitive abilities, they are aware that their capacities fall within a “normal range,” (1985, 21) seeming to suggest from the outset that Rawls does not view persons with cognitive impairments capable of participating in or representing themselves in the original position. In *Political Liberalism*, Rawls goes on to explicitly state: “But given our aim, I put aside for the time being these temporary disabilities and also permanent disabilities or mental disorders so severe as to prevent people from being cooperating members of society in the usual sense. Thus, while we begin with an idea of the person implicit in the public political culture, we idealize and simplify this idea in various ways in order to focus first on the main question” (1993, 20).

The specification that agents in the Original Position fall within a “normal range” of intelligence, according to Simplican, leads to what she terms a *double disavowal* of disability in early Rawlsian thought. First, persons with cognitive disabilities are absent from the decision-making procedure that determines what the principles of justice are and therefore are left in a precarious position when those principles are decided. This simultaneously leads to a second disavowal of disability. Because contractors within the Original Position do not have specific knowledge about the treatment of people with intellectual disabilities under non-ideal conditions, “they are unaware of societal prejudice, built barriers, failures in long-term care, and the spatial segregation of people with disability” (2015, 75). This “constructs people with intellectual disabilities as peripheral to matters of justice and abnormal to human functioning” (2015, 76). Because disabled people are not included in the range of functioning considered by persons in the Original Position and because all knowledge of the plight of disabled people is decontextualized, persons with mild to severe intellectual, psychiatric and psycho-social disabilities are excluded from the Original Position at the outset. This seems immediately curious and troubling for a theory that intends to address the plight of the least advantaged and strives to create conditions of justice that are universal in any meaningful sense.

Of course, Rawlsian ideal theory is only one example of ideal theory; however, the basic criticism applies to ideal theory in any of the senses Valentini (2012) describes. When one assumes full compliance with the principles of justice, one does not consider the multitudes of ways in which people do not comply with these principles. Therefore, it

is easy to gloss over the real suffering perpetuated by people who do not act accordingly with principles of justice. Likewise, the assumption of utopian conditions distracts us from the realities of injustice—in the real world, people are not treated unjustly because they conform with idealized standards of personhood but rather because they deviate from them. Finally, ideal theory that tries to seek an abstract, “complete” theory of justice might neglect tangible improvements that can be made in people’s lives should a more incremental view of justice be taken.

It is for these reasons that this project embraces a non-ideal vantage point. I recognize that the arguments I am making may not be universal—they may very well be contingent. However, injustice is itself a contingency—deconstructing oppression requires attention to the circumstances that allow such oppression to happen in the first instance. The arguments I’m making might not apply in a utopian world where no one is disadvantaged due to their disability. Nonetheless, they apply now, in this world, to make society a more just place for disabled people.

4.2 Participatory Parity

The second principle driving this project is the idea of participatory parity. Participatory parity, a phrase popularized by Nancy Fraser, can be boiled down to the simple idea that: “justice requires social arrangements that permit all (adult) members of society to interact with one another as peers” (1998, 30). Participatory parity requires formal legal equality, though not necessarily uniformity, as well as both material and intersubjective conditions—that is, justice requires proper distribution of social benefits as well as mutual recognition by other people as peers. In an earlier paper on democratic

theory, I add a third condition to this idea—that society be accessible and “enabling”, incorporating the principle of embracing difference central to disability politics into the idea of participatory parity (Swadley 2016). As in that paper, the model of participatory parity and justice advanced by this paper is necessarily partial. Articulating a full-fledged theory of participatory parity and social inclusion is a lofty goal that cannot be achieved within the confines of a dissertation segment.

The idea that people ought to be able to participate socially on an equal basis is foundational to contemporary theories of justice. Participatory parity to some extent drives both distributive and recognition-based theories of justice—both seem to embrace the end goal of social inclusion, of a society of peers. Oppression-based theories, like Young’s (1990) also generally seek social inclusion as a primary aim of justice. Participatory parity encompasses the full spectrum of features that we expect to be present in a theory of justice. A society cannot be just if it denies people the ability to equally participate based on maldistribution. A society cannot be just if it denies people the ability to equally participate because of misrecognition or disparate treatment, and a society cannot be just if people are not able to access the spaces in which decisions are made and social lives are lived. Therefore, participatory parity is a central consideration in this project. If people cannot participate as equals because of domination, oppression, exploitation, maldistribution, inaccessibility, or misrecognition, they are not being given their due or treated justly.

It may be that participatory parity is an untenable or unrealizable goal. For example, Kevin Olson (2008) argues that participatory parity creates a paradox of

enablement—those who need participatory parity are the least likely to have it, even though theories of participatory parity presuppose these people have participatory parity by assuming that oppressed groups can enact it themselves. It may therefore be the case that participatory parity, in its purest form, is unrealizable. I sidestep this problem by, unlike Fraser, suggesting that participatory parity is not the only, or even primary criterion of justice. If we view ending oppression and domination more generally as the goal of justice theorizing (as Young 1990; 2000 does), maximizing participatory parity seems to follow as one normative requirement. Even if it is an unrealizable ideal, I would argue maximizing participatory parity ought to be a goal of any just society due to the adverse ethical implications associated with its absence (which Olson himself recognizes). Finally, if we subscribe to a more transitional theory of justice, it need not be a problem that full participatory parity is unrealizable—only that maximizing participatory parity alters existing social arrangements such that they are more just.

In this project, I will argue that what scholars call the *integration presumption* is vital to ensuring participatory parity. This is for multiple reasons. First, the genealogy of disability demonstrates that seclusion and separation have traditionally been the primary vehicles through which disability discrimination has occurred. Moreover, the ill effects of segregation carry into the present—government-sanctioned segregation of disabled people leads to a failure to properly distribute goods and benefits in society. Finally,

government-sanctioned segregation reinforces the idea that disability is not meant to be public—that people with disabilities do not *belong* in social spaces.²⁰

In the sections that follow, I outline reasons that integration must be part of the calculus for determining whether disabled citizens are being treated as political peers; yet, I conclude that federal disability policy has pursued integration poorly. That said, the situation is not as bleak as it may seem—existing disability law, leveraged properly by activists, provides the tools necessary to ensure that disabled people receive the services they need in their communities.

5. Why is separate unjust? A brief genealogy of the ableist roots of disability segregation

Throughout American political development, disabled people have been excluded from public life and public spaces. This section and project do not attempt to provide a complete chronology of disability exclusion throughout history. I merely seek to argue that the abuses suffered by disabled people historically are relevant to current assessments of segregated vs. integrated settings. The history of exclusion faced by

²⁰ Many of these arguments are indeed contingent—it is possible, for example, to imagine better, segregated systems. However, my response would be two-fold: (1) realizing what I call true integration is a prerequisite to providing a meaningful choice between integrated settings and segregated settings for disabled people, and (2) I am not taking issue with individual disabled people deciding that they want to pursue their lives in segregated settings, but rather am taking issue with the government prioritizing or facilitating solely segregated settings.

disabled people has been well-documented in other projects²¹ and is relevant to but not the focal point of the current discussion.

The first institutions for disabled people emerged in the mid-1800s. Reformers, like Dorothea Dix attempted to make institutions places of reform rather than places of segregation or punishment (*See* Foucault 1975; Dix qtd. in Am. J. Public Health 2006). The first state-run residential “schools” for disabled people were intended to be therapeutic in nature and were responses to perceived abuses against disabled people by their families, who often locked them in basements, holding pens, and almshouses. Although the earliest institutions were viewed as *temporary* measures and emphasized *rehabilitation*, these principles were quickly discarded in the wake of the eugenics movement, which began in the late 19th Century—“instead of being a means to an end, incarceration in the mid-nineteenth century became an end in itself” (Chapman et al. 2014, 8).

The eugenics movement, a pivotal driving force in late-Nineteenth to early Twentieth Century politics, positioned disabled persons as unfit for participation in public life. Eugenicists advocated for the segregation of ‘feebleminded’ people from society writ large. The term eugenics was coined by Sir Francis Galton in his 1883 book *Essays on Eugenics* and refers to concerted attempts to rid society of those deemed to deviate from standards of genetic and social perfection. ‘Feeblemindedness’ during the early twentieth

²¹ *See e.g.* Downey and Conroy (2020); Carey (2009); O’Brien (2013); Nielsen (2012); Murphy (2011); Chapman, Cary, and Ben-Moshe (2014); Foucault (1964); Pelka (2012); Schweik (2009); Shapiro (2011).

century was treated as a pressing public health concern, cast as an epidemic. The ‘feeble-minded’ were considered the “most prolific and potentially most dangerous” pathologized subset of the population, and experts estimated that ‘idiocy’ had grown by 200 per cent in the early 1900s (Carey 2009, 56-57). 30-40 per cent of the population were believed to be feeble-minded, and there were strong intersections between race, gender, class and feeble-mindedness (Carey 2009, 63). A dual relationship existed between poverty and intellectual disability, with intellectual disability said to cause poverty and those who were impoverished viewed as more likely to become disabled. Keeping disabled people in institutional custody became a way to study the growing “epidemic” of “feeble-mindedness,” to protect society from it—both by protecting society from people currently deemed “feeble-minded” and against future procreation by the “feeble-minded.”²²

The dependence of intellectually disabled persons on social support was viewed as a reason for excluding them from public life, with eugenicists advocating for institutionalization, typically on public safety grounds. However, institutionalization made people even more dependent on the state and therefore less deserving of the traditional rights of citizenship in the eyes of their communities. The tax burden imposed by intellectually disabled persons in institutions was frequently used to justify their continued exclusion from important rights, including not only the right to vote, but even the right to occupy public spaces. For example, in *Buck v. Bell*, Oliver Wendell Holmes

²² See e.g. *Buck v. Bell*, 274 U.S. at 207 (“Three generations of imbeciles are enough.”).

Jr. controversially stated that those who “sap the strength of the state” ought to sacrifice certain rights (such as fertility)²³ in order to keep the nation from being “swamped with incompetence.”²⁴

Contemporaneously, local precincts across the country enacted laws prohibiting unsightly (often interpreted as disabled) persons from appearing in public. The most famous of these statutes was Chicago’s. The city passed an ordinance banning anyone who was “diseased, maimed, mutilated, or in any way deformed, so as to be an unsightly or disgusting object” from appearing in the “public view.” A further part of the statute read:

Whereas the streets and sidewalks of the City of Chicago contain numerous beggars, mendicants, organ-grinders and other unsightly and unseemly objects, which are a reproach to the City, disagreeable to people upon the streets, an offense to business houses along the streets and often dangerous, Therefore be it ordered, That the mayor at once take steps to remove from the streets all beggars, mendicants, and all those who by way of making Exhibition of themselves and

²³ It is estimated that by the 1970s, at least 63,000 Americans were sterilized without their consent, though many more incidents likely went unreported (Pelka 2012, 11).

²⁴ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

their infirmaries seek to obtain money from people on and along the streets (qtd. in Schweik 2009).

The last of these statutes was not repealed until the 1980s, and the last recorded conviction occurred in 1974. The eugenics movement combined with the impulse to keep disabled people out of the public eye (and therefore public life) coalesced to bring into being institutions to house disabled people.

Initially, institutions were viewed as a mechanism of rehabilitation. By the mid-1800s, reformers attempted to make institutions places of reform, rather than places of mere segregation or punishment (*See* Foucault 1975). People deemed unfit for social life were confined out of a desire to bring them into line with social principles—the impetus was to reform rather than to confine or punish (*See* Foucault 1975; Chapman et al. 2014). Although the earliest institutions were viewed as *temporary* measures and emphasized *rehabilitation*, however, these principles were quickly discarded in the wake of the eugenics movement (Chapman et al. 2014, 8). Keeping disabled people in institutional custody became a way to study the growing “epidemic” of “feble-mindedness,” to protect society from it—both by protecting society from people currently deemed “feble-minded” and against future procreation by the “feble-minded.”²⁵

The purpose of this project is not to catalogue the history of institutions and their abuses—as this work has already been done, but rather to build upon this work through a historically-situated understanding of disability justice. Because the rampant abuse within

²⁵ *See e.g. Buck v. Bell*, 274 U.S. at 207 (“Three generations of imbeciles are enough.”).

these institutions first became a topic of interest in the mid Twentieth Century, this section will discuss the state of institutions circa 1960-1970. First, institutions did not provide any modicum of rehabilitation but rather subjected disabled people to permanent social exclusion—betraying their original rehabilitative aims. Moreover, abuse was rampant in these institutions. Institutionalized people were frequently kept in cages, subjected to unsanitary conditions, and were abused by staff. For example, an investigation by the Department of Justice revealed a systematic pattern of patient abuse in Pennhurst State School, with nine workers indicted for beating and abusing patients.²⁶ Due to inadequate staffing at Pennhurst, restraints were frequently used to control patients, and psychotropic medication was used for control rather than treatment. There was frequently excrement and urine on the ward floors, and outbreaks of pinworms and infectious diseases were common.²⁷

These abuses were not isolated to Pennhurst but were rather endemic to mass, state-run institutions. Pelka argues that “[b]y the mid-twentieth century, this institutional system had grown into an insular and extensive disability gulag” (2012, 49). Speaking about a visit to Letchworth Village Institution in New York in 1938, Gunnar Dybwad, a social work reformist, stated: “On one adult ward I saw incontinent ‘untidy’ men laying

²⁶ See *Workers Indicted in Patient Abuse*, New York Times (Nov. 4, 1983), <https://www.nytimes.com/1983/11/04/us/workers-indicted-in-patient-abuse.html> .

²⁷ See *Preserve Pennhurst* (last accessed March 27, 2020), <http://www.preservepennhurst.org/default.aspx?pg=36>.

in boxes of sawdust” (qtd. in Pelka 2012, 50). Dybwad notes that parents were not allowed to visit their institutionalized children. Moreover:

[R]esidents had minimal services. They were let loose in these day rooms, and of course, weaker ones were continually abused—sexually abused, and so on... I made the statement that you couldn’t possibly speak of “custodial care”—that was a famous statement by me—because “custody”, in the minimum, implied a sense of safety and security, and nobody in that institution was safe and secure (Dybwad qtd. in Pelka 2012, 52-53).

The abuses of residential facilities, the full documentation of which are beyond the scope of this project, are important to understanding the genealogy of disability segregation—and the necessity of disability integration. Disability segregation was borne out of an ableist, eugenic impulse to isolate, segregate, and ultimately eliminate disabled people from society writ large. Genealogy is an important tool for interrogating the reasons why we view certain social arrangements as desirable and ultimately inevitable—not to mention that abusive institutions, practices, and eugenics remain rampant in the status quo.

One of the central aims of critical disability theory is to “identify and defy practices that contribute to the prevailing cluster of assumptions that produces these pernicious effects” (Tremain 2017, 3). Just as Tremain uses genealogies of disability to “denaturalize” and “debiologize” disability as a philosophical concept, I too argue that the genealogy of disability exclusion is an important way to denaturalize the idea of disability segregation and to shed light on its injustices. By shedding light on the

contingency of the current status of disability service provision, I seek to articulate alternative modes of providing such services. I seek to interrogate why exactly we²⁸ are inclined to think that disability-specific services cannot be provided in integrated settings. Why do some disabled people prefer to be in segregated settings—is this inherent, or is it a byproduct of ableism? To what extent does the exclusive provision of disability-specific services in segregated settings inform peoples’ belief that segregated settings are inherently better? Integrated and segregated settings are not themselves “good” or “evil,” but rather meaning is imputed upon these systems, and power structures are built around the meaning we impute to them. The goal of this project is to note how these power systems operate and to demonstrate that a different political future is imaginable.

6. The Injustice of Disability Segregation

The pervasive history of segregating disabled people provides context for the injustices disabled people continue to face and reveals the political contingency of separate service provision. However, segregation perpetuates the apparatus of ableism in several concrete ways, which will be discussed in this section.

6.1 Anxiety Surrounding Disability and Ableist Segregation

Disability invokes an entrenched sense of anxiety for many, including people who view themselves to be advocates for disabled people (Simplican 2015). This anxiety is

²⁸ I use the “editorial we” and terms such as “ours” to demonstrate broad social ownership of the collective anxiety surrounding disability. Because ableism is such a pervasive apparatus, a disavowal of disability anxiety is impossible for anyone, disabled or nondisabled, or anywhere between.

both aesthetic and existential—most people are socially conditioned to fear bodily difference and perceived failures to attain certain levels of capacity, and people often experience existential anxiety because the existence of disability serves as a reminder that we are vulnerable. Disability might at any point “erode human capacities that are essential to flourishing and human relationships” (Simplican 2015, 3). Simplican argues that these entrenched anxieties are also political—society idealizes a certain form of democratic participation that reveals a “deep discrepancy between the ways we conceptualize the demands of political participation and the actual range of ways people act politically” (Simplican 2015, 3). For example, society tends to idealize the rational, independent actor, when many disability scholars (*See, e.g.*, Kittay and Carlson 2010) as well as behavioral economists (*See, e.g.*, Sunstein 2014) have established that people routinely behave irrationally. Moreover, people are more reliant on others to develop their capacities and exercise their autonomy than commonly acknowledged, according to feminist philosophers (*See, e.g.*, Mackenzie and Stoljar 2000). Disability, therefore, according to Simplican reveals our collective vulnerability in a myriad of ways. As a result, people experience profound anxiety around disabled people and the concept of disability itself.

Our collective anxiety surrounding disability creates false narratives about the “proper places” for disabled people and about children’s capacities and desires to live and learn in integrated settings, especially when they are offered the proper support. When we say that a child cannot learn in an integrated setting, for example, this is likely a reflection of our own anxieties surrounding what it would mean for a disabled child to be

in an integrated, classroom setting. Moreover, we are likely creating a self-fulfilling prophesy—when we presume that someone cannot participate in society on the same basis as others, we ensure that child will not do so (*See, e.g.*, Swadley 2016; Pavey 2003).²⁹

While our collective anxiety surrounding disability reflects the structures of ableism to which we have become acclimated, it can also prompt us to reconsider the proper venue for providing disability-specific services. As Simpican notes, the political anxieties surrounding democratic participation for disabled people can prompt a collective rethinking of not only disability, but also citizenship—“we can use anxiety as a prompt, causing us to rethink our relationship to disability and democracy” (2015, 3).

Indeed, making disability public is one of the most powerful political tools we have to dismantle ableism. Simpican suggests that “[b]eing disabled and public can change what it means to be disabled and, at the same time, change the dynamics of the public—as a physical and political space” (2015, 119). Because the activities of disabled people are so frequently patrolled, controlled, regimented, and kept private, the mere act of gathering in places where disabled people have previously been excluded can be considered a radical political act—and one that challenges the presumptions of ableism. As Simpican notes, “when people with intellectual disabilities and their allies gather in public settings—from hotel lobbies to buffet restaurants—they contest the prejudicial belief that disabled lives are miserable and best kept hidden” (Simpican 2015, 5). Being

²⁹ Chapter 3 will discuss this in more extensive detail.

in public is a way that disabled people can reclaim their agency and challenge prevailing stereotypes and social narratives about their agency, abilities, and vulnerabilities. The mere act of making disability public by allowing and encouraging disabled people to take up space previously denied to them is a powerful tool against ableism.

Suggestions that disabled people can be better served in segregated settings ignore how ableism operates. The idea that disabled people cannot be served in public settings more frequently operates to reinforce collective anxieties about how difficult or costly it would be to destabilize ableist structures than it does to benefit disabled people.

Therefore, this project will demonstrate that making disability public—and in the process making the public reckon with its collective discomfort surrounding disability—is a vital part of ensuring that disabled citizens are able to participate on an equal basis with their political peers. This project aims to demonstrate that disabled people can and do flourish in integrated educational, employment, and community settings—when they are provided with the appropriate support to do so.

6.2 Disability Segregation Maintains Substantive Inequalities

Colker (2008) maintains that in many circumstances, offering disability-specific services in segregated settings improves substantive outcomes, thereby advancing equality. However governmental policies favoring segregation frequently undermine disability justice. Segregation is both ideologically *and* materially related to worse outcomes for disabled people.

This project starts with Fraser’s assumption that “justice requires social arrangements that permit all (adult) members of society to interact with one another as

peers” (30). This project is also premised upon a support-based theory of personhood—the ideas that disabled people can and should make their own decisions based upon their own preferences, provided that appropriate support is given, and that disabled people should have full access to an array of social resources necessary to enact their expressed preferences. This is the conception of personhood advanced by the UNCRPD and is widely accepted within the disability community.³⁰ It is my contention that governmental policies favoring integration are necessary to redress the inequalities faced by disabled citizens and to afford them meaningful choices about how to conduct their lives, whether integrated into their communities or separate.

My argument is that a non-ideal theory of disability justice requires consideration of integration as a metric for determining participatory parity. My theoretical assumptions are: (1) based upon a non-ideal understanding of the world, and (2) modelled upon Elizabeth Anderson’s arguments regarding racial integration. Elizabeth Anderson (2010) discusses racial inequities, demonstrating that segregation exacerbates racial inequities for several reasons. Anderson argues that segregation yields group inequality when “the group practicing social closure controls the allocation of goods critical to securing power or advantage” (2010, 10). Anderson argues that racial segregation causes: (1)

³⁰ See, e.g., *Community Integration for People with Disabilities*, BAZELON CENTER FOR MENTAL HEALTH LAW (Accessed June 19, 2020), <http://www.bazelon.org/our-work/mental-health-systems/community-integration/> (detailing leading disability rights organizations’ support for “a vision in which people with disabilities are afforded opportunities to live in their own homes, work in regular, non-segregated employment, and make their own choices.”).

socioeconomic disadvantage, (2) racial stigma, which exacerbates existing disadvantages, and (3) causes democratic processes to be less accountable to the disadvantaged group. She concludes that in order to serve all citizens equally and to create systems that allow for equal participation, integration is a requirement for a just society.

The pervasive inequities caused by segregation lead Anderson to conclude: “If segregation is a fundamental cause of social inequality and undemocratic practices, then integration promotes greater equality and democracy. Hence, it is an imperative of justice” (2010, 2). This section will apply Anderson’s arguments in the context of disability segregation, arguing that many of Anderson’s arguments against racial segregation apply to the segregation of disabled people as well.

These arguments closely parallel phenomena in the disability community. For instance, disabled people experience poverty at twice the rate of nondisabled people (NCD 2017). As I will argue, a significant part of the reason disabled people live in poverty is that they are denied access to competitive, integrated employment—a key element of allowing people to escape poverty and live independent lives. The segregation of disabled people explicitly perpetuates the apparatus of ableism by maintaining separate spheres for disabled people—denying them access to their non-disabled peers because a world that permits their integration does not exist. Integration, as I will argue, is a

prerequisite for genuine choice regarding whether a disabled person will live in an integrated or segregated setting.

6.2.a Sheltered Workshops

Disabled people are routinely segregated in the sphere of employment, which atrophies their abilities, denies them access to integrated spaces, and traps them in an endless cycle of poverty. The economic segregation of disabled people directly contributes to socioeconomic disadvantage in several ways. For example, the segregation of disabled people often takes the form of work in “sheltered workshops” or 14(c) programs that explicitly allow employers to pay subminimum wage to disabled persons. According to the National Council on Disability (NCD), approximately 228,600 disabled people are in the 14(c) (subminimum wage) program (NCD 2017).³¹ Sheltered workshops are explicitly segregated settings in which disabled people generally perform menial labor with other disabled people, rather than participating in competitive, integrated employment. Most people are either forced into working in “sheltered workshops” or presumptively work in these spaces because they are not considered “capable” of working in competitive, integrated settings.

Although the alleged purpose of sheltered workshops is to give disabled people skills that they can use in competitive, integrated employment, only 5 per cent of sheltered workshop employees ever leave them to take a job in the community (NCD

³¹ This number was far higher before states started phasing out sheltered workshops. In 2012, over 400,000 people were in sheltered workshops (*See* NCD 2012).

2012, 10). The choice about whether to enter a sheltered workshop is rarely the choice of a disabled person—it is typically a choice made by the disabled person’s family, often without the consent of the disabled person.³²

It is not clear that these workers cannot or do not desire to flourish in competitive, integrated employment environments. According to studies, disabled people who had previously been served by sheltered workshops do not have higher rates of employment compared to people who receive other community-based services, such as supported employment (*See, e.g.,* Cimera 2011). Moreover, people who had previously been in sheltered workshops reported lower socioeconomic outcomes compared to disabled peers who received supported employment (NCD 2017).

Studies have found that by matching and controlling for diagnosis, the presence of secondary conditions, and gender, supported employees from non-sheltered workshops were just as likely to be employed as people in sheltered workshops (*See* Cimera 2011). Moreover, people participating in supported employment in a competitive setting earned substantially more, as well as worked more hours. Even more surprisingly, the cost of serving the comparable individuals in the community was lower than the support costs of similarly situated individuals in sheltered workshops. This is likely because supported employment provides disabled employees with long-term skills that they work to

³² *See, e.g.,* *Written Testimony of Elizabeth (Liz) Weintraub, Senior Advocacy Specialist AUCD Before the U.S. Senate Committee on the Judiciary Regarding Nomination of Brett Kavanaugh to the Supreme Court of the United States* (Sept. 7, 2018), <https://www.judiciary.senate.gov/imo/media/doc/Weintraub%20Testimony.pdf>.

develop, whereas being in sheltered settings does not provide the same intensive training and often atrophies peoples' skills (*See Cimera 2011, 24*).

Sheltered workshop advocates suggest that these programs give people who would not otherwise have jobs a sense of meaning. For example, the St. Lawrence New York NYSARC³³ coordinator argues, “For some people, because of their actual diagnosis and disability, they need the support of the workshop... And they literally cannot perform in a competitive setting.”³⁴ However, Cimera (2011) suggests that this is more myth than reality—workers with the exact same diagnosis and the presence of secondary conditions performed better in competitive, integrated employment than they did in sheltered settings.

The ability of disabled workers to perform in integrated settings is directly related to participatory parity. Working in sheltered workshops, where workers are generally paid subminimum wage, ensures a life of poverty for disabled workers—while earning a wage can be a way toward economic self-sufficiency and away from poverty, earning subminimum wage ensures dependency on caregivers. Moreover, the proliferation of subminimum wage jobs is an explicit way in which people who have resources

³³ The local New York-based chapter of the national Arc organization that serves intellectually and developmentally disabled people.

³⁴ David Sommerstein, *Advocates Fight to Keep Sheltered Workshops for Workers with Disabilities*, NPR (Apr. 14, 2015), <https://www.npr.org/2015/04/14/395287097/advocates-fight-to-keep-sheltered-workshops-for-disabled-workers>.

discriminate against disabled workers. By paying these workers a subminimum wage, employers are making it clear that disabled work is less valuable than nondisabled work.

While it might be argued that these workers could be simply paid minimum wage, that would not solve the root cause of the inequity that results from sheltered workshops. Sheltered workshops deter disabled people from pursuing work in their communities and frequently lead to the atrophy of disabled people's skills. The state-sanctioned segregated environments deny disabled people access to their nondisabled peers. Sheltered workshops are a way to keep disabled people out of the public sphere. Moreover, the economic model of sheltered settings relies on the devaluation of disabled work to continue "serving" disabled people. By allowing subminimum wage work, the government has made an implicit value judgment that disabled work is less valuable. The way that sheltered workshops pay for the "support" they provide is by exploiting the excess profit generated by disabled people's labor.

Disabled people working in sheltered settings need higher levels of support and supervision than disabled people who have been taught workplace skills. Sheltered workshops exploit this fact to pay workers less than they deserve. Therefore, as Anderson would argue, sheltered workshops concentrate wealth and resources in the hands of non-disabled people, leaving many disabled people without a "way out" of poverty. Subminimum wage jobs dissuade, discourage, and deter would-be workers from seeking competitive, integrated employment and send the message that disabled work is less valuable. As such, the existence of the subminimum wage is inimical to the idea of

participatory parity and one example of how segregated settings perpetuate injustices against disabled people.

6.2.b Social Security Disability Benefits and Socioeconomic Exclusion

The second way in which disabled people are deterred from participating in competitive, integrated employment in the United States is the structure of disability benefits. Disabled people who demonstrate that they cannot participate in “substantial gainful activity” (SGA) are frequently eligible for Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI), or both.³⁵ However, these programs frequently create what Stapleton et al. (2006) call a “poverty trap.” There are two major problems with these programs: (1) they do not provide enough money on which to live, and (2) they make it impossible for disabled people to participate in substantial gainful activity.

To participate in either of these programs, recipients must continually demonstrate that they cannot participate in substantial gainful activity, which means that they must not earn over a certain income threshold (generally around \$1000 per month). The sudden loss of benefits experienced by beneficiaries when they reach substantial gainful activity for a set number of months is frequently called the “cash cliff” in the literature. Most beneficiaries of these programs therefore do not work, in order to avoid

³⁵ Whether a person receives SSDI or SSI depends on whether a person has paid into the Social Security retirement system. Moreover, SSI is explicitly means-tested and imposes strict asset limits. These are the main differences between the programs, although there are many other differences between them. The qualification criteria are roughly the same in terms of disability determination.

jeopardizing their benefits—even though the maximum SSI benefit is only 75 per cent of the federal poverty standard for one person (Stapleton et al. 2006). There is evidence that a significant proportion of SSDI beneficiaries would choose to work part-time but do not because of the cash cliff. A study by Westat suggests that if substantial gainful activity limits were removed, competitive employment rates would increase by 16 per cent, and the average annual income of working beneficiaries would increase between \$15,600 and \$22,500 (May et al. 2019).

There are therefore several ways in which this program maintains the social exclusion and segregation of disabled people. First, the system is unduly punitive. Disabled people are deterred from participating in any type of work for fear that they might lose vital benefits that allow them to survive. Second, many recipients fear that engaging in any type of SGA jeopardize their benefits, as the Social Security Administration (SSA) may deem them fit to work. Finally, people on SSI are frequently unable to marry their partner, because they might otherwise lose their benefits.³⁶

Social Security disability programs are one of the starkest examples of people who control social resources using the role separation of disabled people to not only control their behavior, but also to compound their poverty and dependence. When people are deterred from participating in integrated programs to receive disability-specific benefits, they are doomed to a life of poverty and inequity—as well as a life of social

³⁶ See e.g. Jim Sliney Jr., *The Marriage Penalty: Choosing Love or Money*, PATIENTS RISING (May 31, 2018), <https://patientsrising.org/the-marriage-penalty/>.

isolation and exclusion. A substantial body of research suggests that encouraging disabled people to seek competitive, *integrated* employment would substantially improve substantive economic outcomes for disabled persons, thereby allowing them to escape poverty. As will be discussed further in Chapter 4, most, if not all, disabled people can work in an integrated setting, if they are given the proper community supports. The government should be supporting options for disabled workers to pursue competitive, integrated employment, rather than deterring it through the ways in which benefit programs are structured.

6.2.c Segregated Education and the School to Poverty Pipeline

Youth with disabilities constitute 12 percent of all youth in the United States (Lipscomb et al. 2017, i). Data from the National Longitudinal Transition Study 2012 suggests that despite the IDEA, students with Individualized Education Programs (IEPs) lag behind their peers in important ways—in large part, due to segregation and lack of resources dedicated toward helping them succeed. Youth with IEPs generally feel positively toward school. However, they frequently need heightened support to complete tasks independently. The problem is that they frequently do not receive such support. For example, children with IEPs are more likely to struggle academically; yet they are less likely to receive school-based help in the form of before and after-school programs. Moreover, teachers, parents, and administrators expect less of these children than their peers—disabled people frequently do not receive career planning services, in part, because their teachers, counselors, and parents do not think that they will be able to live independently as adults. Lipscomb et al. (2017) found that only 78 per cent of parents of

students with IEPs think that their children will be able to live independently as adults, compared to 96 per cent of parents of children with no IEP.

Moreover, many more students with disabilities experience social isolation in their schools. Only two-thirds of students with an IEP are part of an extra-curricular activity, compared to more than three-quarters of their peers without an IEP. Moreover, only 50 per cent of youth with an IEP take part in activities organized outside of school, such as hanging out with friends, weekly. Two-thirds of children without IEPs report doing so (Lipscomb et al. 2017).

Chapter 3 will discuss education, including the problems inherent to segregated settings, in more detail; however, the above data allow us to draw several preliminary conclusions. First, many students with IEPs receive some or all of their education in segregated settings, and this appears to be correlated with lower levels of social inclusion. Moreover, key stakeholders view children with disabilities as less likely to lead independent lives, creating self-fulfilling prophecies wherein these students do not end up living or working independently. These are examples of stereotyping and role segregation, to use Anderson's framework.

Returning to Anderson's framework, both stereotyping and role segregation mean disabled students are less likely to achieve positive socioeconomic outcomes. By having their capacities stereotyped, disabled students are less likely to achieve. This sets disabled

students up for a lifetime of role segregation—often through the form of subminimum wage employment, discussed above.

7. Supported Integration vs. Naïve Integrationism

The above sections provide a *prima facie* argument for an integration presumption. While integration may not be sufficient to create disability justice, it is not irrelevant to disability justice either. When governmental policies prioritize segregated spaces over integrated ones with proper support, disabled people are denied a meaningful choice about what type of environment is better for them—integrated environments simply are not built for them. This means, as Anderson argues, that integration, as a matter of policy preference, is an imperative of justice.³⁷

How then do we account for arguments like Colker’s and other interlocutors? It seems clear that many integrated environments fail to provide disabled people with substantive equality. My answer to this is two-fold: (1) meaningful chances for integration are necessary but not sufficient to create disability justice, and (2) the

³⁷ Governmental policy is inherently going to favor one or the other due to resource constraints—and disabled people are empowered to make meaningful choices about how to live their lives when they are provided with community-based options. For example, my argument does not preclude disabled people banding together to form collectives or peer-support networks—but would require that people not be forcibly hospitalized. Likewise, Culturally Deaf people could live in segregated communities but would not be forced to by the structures of their government benefits programs.

instances of integration decried by many scholars and caretakers are not truly integration at all—rather, they are examples of what I will call *naïve integration*.

Naivety implies a lack of sophistication or complexity in structure, and that is exactly how integration has been carried out for disabled people. For example, deinstitutionalization has had profound benefits for many disabled people;³⁸ however, it has also left swathes of disabled people behind (*See* Bagenstos 2012). Indeed, *Olmstead* has been described as a “psychiatric *Titanic*” by a leading psychiatrist—a sentiment with which two ideologically disparate Supreme Court justices (Kennedy and Breyer) agreed (Bagenstos 2012, 1). It is now taken for granted in many academic circles that mass deinstitutionalization caused a host of social ills for many disabled people, including homelessness and criminalization. Again, as Bagenstos (2012) notes and Chapter 2 will argue, the reality is far more complicated, and the Pennhurst Longitudinal Study suggests that carefully considered integration remedies many of the ills of naïve integration. Nonetheless, there is a real sense in which deinstitutionalization has failed many disabled people, because it was not accompanied by a more radical change to support structures and benefits systems within the communities into which disabled people were integrated.

Likewise, the IDEA guarantees students a *free and appropriate public education* in the *least restrictive environment*, which is defined by law as the environment where students spend the most time with their nondisabled peers. Chapter 3 will discuss the examples of Amy Rowley and Neill Roncker, two students who were arguably not served

³⁸ *See, e.g.*, Downey and Conroy (2020), discussing the Pennhurst Longitudinal Study.

by the courts' emphasis on such naïve integration. However, as I will demonstrate, the problems faced by Rowley and Roncker were not the result of their receiving an education in an integrated setting. Instead, these problems were the result of courts again failing to provide them with adequate rights and services within integrated settings. The story is the same for employment, where workers for years faced the dilemma of being too disabled to be considered "qualified" while not disabled enough to merit protections under the ADA—and now are disadvantaged by their perceived lack of qualification.

The fundamental premise of this project is simple—when adequate supportive measures are provided, no disabled person should be *presumptively* segregated.³⁹ Not only does proper integration redress the forcible seclusion suffered by disabled people for years, it also yields better outcomes. This will be demonstrated by looking at deinstitutionalization, education, and employment. The goal of this project is to prompt one to think: is segregation the only way to provide disability-specific services? Or the best? Or are we under the influence of ableism when we make these claims? When disabled people prefer segregated settings, is that because they truly prefer segregated settings, or is it because they are persistently ostracized and denied services in integrated

³⁹ Environments that are voluntarily separate are different than segregated settings in that they are purposefully designed and willingly chosen. I do not take as much issue with these environments. However, we must view these environments in the context of the apparatus of ableism. It is possible that many disabled people might prefer separate environments because of the levels of discrimination and lack of access they face in current built environments. As I have noted, Culturally Deaf persons are largely exempt from the arguments I make, except insofar as they have been victims of forcible segregation.

settings? Asking such questions reveals the contingency of present arrangements and the ableism underpinning claims that disabled people are “better off” when they are placed in segregated settings.

Naïve integrationism is not inevitable, however. Already, disabled people and their legal advocates are building powerful claims based on the integration mandate of Title II of the ADA. For example, advocates in Oregon have successfully instated supported employment as opposed to sheltered workshops, and litigators have used the *Olmstead* mandate to progress toward the closure of entirely segregated school systems. *Olmstead* might not have realized its potential, but it is nonetheless a powerful tool in the arsenal of disability rights litigators and activists.

The supported integration envisaged by this project requires us to imagine a future in which naïve integration is not inevitable—but rather, people are provided the supports they need to flourish in their communities. These supports range from supported employment and educational services to supported housing options for people during mental health crises. The chapters that follow try to paint a different picture of disability integration—a picture in which people can receive the services and supports that are typically provided in segregated settings currently in integrated settings, a picture in which disabled people can make meaningful choices about their care. The acts of imagination called for by this project ought not but might seem radical; however, if one thinks about the ways in which the world is built to the exclusion of disabled body-minds, one can see the potential for an alternative future in which structures are not built to the

exclusion of disabled people but rather a fully supported and accessible inclusivity. This type of “radical” inclusivity is the goal at which this project aims.

8. Roadmap for the Rest of the Project

As mentioned previously, this project covers deinstitutionalization, education, and employment in turn. Chapter 2 focuses on the shift from institutionalization to community-based services. It argues that there is truth in the claim that deinstitutionalization has brought attention to the problems of homelessness in the disability community. There is also truth in the claim that carceral settings have far too frequently replaced institutional settings. Nonetheless, the problem is not that disabled people are being integrated into the community when they somehow ought not be. The true problem lies in the way that public officials carried out integration. The problem lies in cuts to vital social services and the failure to build proper infrastructure to support people in the community as *Olmstead* requires.

Chapter 3 focuses on education. Education is one of the primary venues in which scholars argue that disabled children benefit from segregated settings. This chapter challenges that presumption. Disabled students generally achieve better educational outcomes in integrated settings, provided they are given the support they need to flourish. Integrated schools do not guarantee equality; however, segregating students maintains the ableist premise that differential services can only be provided in segregated settings. The amount of funding spent on segregated settings, this chapter argues, would be better spent giving children individualized experiences in the most integrated setting possible. The problems plaguing the American education system currently do not stem from integrating

disabled students—rather, they are the result of naïve integrationism. Even Neill Roncker, many scholars' primary example of a student who cannot benefit from integration, could have received (and benefitted from) services in an integrated school if funding structures were simply set up to allow that—and he would have had access to his nondisabled peers.

Chapter 4 explores naïve integrationism in an employment context. This is perhaps where naïve integrationism is its starkest. The ADA as drafted in 1990 provided anti-discrimination protections to disabled workers, but only if they were disabled enough to be eligible for protections while simultaneously qualified enough to perform the essential functions of their job. This led to disproportionate numbers of plaintiffs losing their employment discrimination cases on the basis that they were not disabled enough to be eligible for protection under the ADA. Since the adoption of the ADA Amendments Act of 2008 (ADAAA), litigants are proving that they are disabled; however, they are frequently losing cases on the basis that they are viewed to be unqualified for their jobs. Disabled workers therefore are protected, but only if they are not so disabled that their employer can claim that they are not qualified. Moreover, thousands of disabled people still work in completely segregated settings. This chapter describes the ways in which *Olmstead* litigation can remedy the latter problem. However, the employment dilemma is one that cannot fully be solved by suing under the integration mandate. It will require more creative and sustained advocacy by the disability community. Chapter 4 concludes

by discussing the ways the policy and legal community can work together to create meaningful employment opportunities for disabled people.

The Conclusion of the project synthesizes these case studies to argue that segregation is not the answer to the inequalities faced by disabled people. Integration may not be sufficient to create disability justice; however, it is not irrelevant to disability justice either. Disabled people can and do thrive in integrated settings if the proper supports are available. Current law, in most places, provides a means of litigating for more expansive supports, and creative disability activists and litigators are utilizing the *Olmstead* mandate in innovative ways to bring about better outcomes in integrated settings. It is therefore possible to lament the current inequalities faced by disabled people while simultaneously working toward a more just, more integrated society. The Conclusion provides a picture of what integration can look like across the life of a disabled person, as well as addressing the unique challenges and opportunities presented by the COVID-19 global pandemic for disabled people.

Chapter 2: From Institutionalization and Incarceration to *Olmstead*

“Is it surprising that prisons resemble factories, schools, barracks, hospitals, which all resemble prisons?”

-Michel Foucault, *Discipline and Punish*

“I feel all institutions should be closed for good. I wish that families and government officials could be in an institution to see how it is for themselves. I lived in three of them and I can tell you how it was.”

-Carole Talley

*“Close the doors, close the doors,
close the doors
Behind us forever
... Cuz we deserve better*

-Self-Advocates Becoming Empowered Song

“Could it be that the very idea of Pennhurst (and similar places) contained within itself the seeds of its own ruin?”

Downey & Conroy, *Pennhurst and the Struggle for Disability Rights*

1. Introduction

Dorothea Dix, a social reformer in the 1840s, spearheaded the movement toward the “therapeutic” institutionalization of disabled people. Dix conducted a tour of Massachusetts to document the lives of disabled people. She lamented that families commonly abandoned disabled people. They were wards of the state. They were kept in prisons and almshouses. They were locked in basements and kept in holding pens. Her desire to create institutions and state-run schools was in response to “the strong claims of suffering humanity” she had witnessed (Dix, qtd. in Am. J. Public Health 2006). Therefore, the first state-run residential “schools” for disabled people were intended to be

therapeutic. They were “meant to offer some modicum of physical comfort and safety, perhaps even the possibility of an education or treatment” (Pelka 2012, 48).

However “noble” (or paternalistic) the motives of reformers such as Dix were, institutions quickly became entangled with the eugenics movement (*See* Pelka 2012; Chapman et al. 2014). As Chapman et al. (2014) argue, segregating disabled people soon became an end in itself. Institutions betrayed their rehabilitative aims and became sites of abuse and exclusion. Downey and Conroy suggest: “Once thought to be progressive training facilities, institutions like Pennhurst became a nightmare, or a kind of ‘purgatory’ for the oppressed, the epitome of what was wrong in failed public policy in the treatment of individuals with mental disabilities” (2020, 5). It is no wonder, therefore, that institutions were one of the primary targets of early disability advocacy. The parents’ movement of the 1950s and 1960s and the independent living and psychiatric survivor movements that emerged during the 1970s were both deeply informed by the experiences of people in confinement (*See e.g.* Fleischer and Zames 2013; Pelka 2012; Carey 2009; Downey and Conroy 2020).

This Chapter does not seek to document the abuses of institutions extensively. Disability scholars and activists have well documented such histories (*See, e.g.,* Pelka 2013; Shapiro 2011; Nielsen 2012; Trent 2017; O’Brien 2013; Downey and Conroy 2020). Even those most sympathetic to the idea of forcibly segregating disabled people generally agree that horrific abuses were perpetrated in institutions and state schools at the hands of the state. Yet, the institutionalization of disabled people is still advocated

because the movement toward deinstitutionalization is perceived as a failure.⁴⁰ The point of this Chapter is to dispel the myth that deinstitutionalization has “failed” and moreover that insofar as it was a failure, it failed because disabled people cannot live independent, fulfilling lives in their communities. Instead, as with education and employment, true integration cannot happen unless the state makes available the resources communities need to put the proper supports in place. It is true that too many disabled people are homeless and incarcerated—but this is not because of deinstitutionalization, but rather mainly due to rampant cuts and underfunding of public services needed to serve disabled people in their communities (*See, e.g.*, Ben-Moshe 2020; Bagenstos 2012).

This Chapter begins by discussing the wave of deinstitutionalization litigation starting in the 1970s and 1980s, to the *Olmstead* decision in 1999, culminating with subsequent *Olmstead* litigation. I then progress to discuss criticisms of deinstitutionalization, following this discussion by discussing programs and services that empirically enable effective community integration. I conclude that, naïve integrationism was responsible for the perceptual failures of deinstitutionalization—disabled people can and do live fulfilling lives in their communities when they are provided with the resources necessary to do so. In order to preserve a robust range of choices for disabled people and to ensure participatory parity, disabled people must be afforded a full range of supportive options in their communities. This project maintains that no disabled person

⁴⁰ To some extent, it has been; however, as Bagenstos (2012) notes, the story is much more complicated.

should be *presumptively* institutionalized, placed in long-term care facilities, or incarcerated.

2. Deinstitutionalization Litigation

The formalized movement for deinstitutionalization started during and drew traction from the independent living movement (*See* Fleischer and Zames 2011). In the 1960s, independent living centers for physically disabled people started to develop in places such as UC Berkeley and in New York City. The Berkeley Center for Independent living became a kind of “mecca for the handicapped [*sic*]” (*The New York Times* qtd. In Fleischer and Zames 2011, 39), a model for self-determination and independence for the disability community. Shortly, “Centers for Independent Living” emerged across the country. Contemporaneously to and influenced by this movement, psychiatric survivors and mental health consumers, as well as self-advocates in the intellectual and developmental disability (ID/D) community began to advocate for independent, community-based living (*See* Friedman 2014). These movements set the stage for broader litigation efforts aimed at ending the practice of institutionalization and ensuring that disabled people were able to live independent, self-determined lives in their communities. In what follows, this Chapter discusses these litigation efforts and their consequences.

2.1 Pennhurst and early deinstitutionalization litigation

One of the earliest and most notable class actions challenging the practice of institutionalization was brought against Pennhurst State School & Hospital in

Pennsylvania.⁴¹ Four plaintiffs along with the Department of Justice and PARC⁴² sued under state and federal statutes, as well as on constitutional grounds.

Judge Broderick criticized Pennhurst in a scathing opinion on several bases. First, he noted that, at its best, Pennhurst, as a large, poorly staffed institution, was impersonal and restrictive.⁴³ Residents had little to no control over their routines or treatment. Moreover, instead of enabling residents with skills they needed to live independent lives, residents' social and intellectual capacities tended to diminish over time spent in the institution.⁴⁴ The conditions faced by residents were abysmal, and the institution did not provide proper medical, occupational therapy, or psychological services for residents.⁴⁵ Occupants were routinely refused rehabilitative devices, such as adaptations to their wheelchairs or hearing aids due to poor resources.⁴⁶ Only 22 out of 300 nonverbal patients received communication classes.⁴⁷ Patients were frequently restrained, secluded, or forcibly given psychotropic medication as a means of controlling their behavior.⁴⁸ The patients also frequently exhibited signs and symptoms of abuse.⁴⁹ The mother of one

⁴¹ See *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977).

⁴² Then known as the Pennsylvania Association for Retarded Children. The organization is now known as The Arc of Pennsylvania.

⁴³ *Pennhurst*, 446 F. Supp 1302-3.

⁴⁴ *Id.* at 1302.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1304-5.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1306-8.

⁴⁹ *Id.* at 1309-10.

plaintiff who witnessed the conditions at Pennhurst remarked that she “would not leave a dog in conditions like that.”⁵⁰

Although the stated purpose of Pennhurst was to reintegrate disabled people into their communities by teaching them useful life skills, Pennhurst was not designed or equipped to habilitate people. Its sole function was to keep intellectually disabled people in a permanent holding pattern, often by restricting them from any outside contact.⁵¹ This was true of many institutions—the parents of institutionalized persons were frequently discouraged from visiting their institutionalized children, as Carey (2009) notes. Most people at Pennhurst and similar institutions were admitted at the prerogative of their parents. Although the law required that these children be informed of their right to leave at the age of 18, this was an illusory liberty. In practice, staff frequently petitioned courts to have people who expressed interest in leaving legally committed.⁵² Therefore, Judge Broderick concluded that people were not in reality free to leave Pennhurst at any point.

However, it is notable that Judge Broderick’s denunciation of institutions in Pennhurst transcended the abysmal conditions faced by residents. His opinion probed the core constitutional questions implicated by the forcible segregation of disabled people. Judge Broderick concluded that there is a constitutional right to habilitation.⁵³ His

⁵⁰ *Id.* at 1309.

⁵¹ *Id.* at 1306-8.

⁵² *Id.* at 1310.

⁵³ Although, this language is a bit outdated, there are strong reasons to think that Judge Broderick meant the types of supports envisaged by proponents of abolition (Ben-Moshe 2020). Judge Broderick held that people should be served in the most public setting possible, and habilitation was a means of ensuring that people had those opportunities.

holding was clear: “[w]e hold that when a state involuntarily commits retarded [*sic*] persons, it must provide them with such habilitation as will afford them a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as their capacities permit.”⁵⁴ Although there is no federal constitutional guarantee to habilitation, much like there is no federal constitutional right to education,⁵⁵ when a state undertakes to provide habilitative services, “it must do so in the least restrictive setting consistent with that individual’s habilitative needs.”⁵⁶

Most radically, Judge Broderick reasoned:

Institutions, by their very structure—a closed and segregated society founded on obsolete custodial models—can rarely normalize and habilitate the mentally retarded citizen to the extent of community programs created and modeled upon the normalization and developmental approach components of habilitation.⁵⁷

It is for this reason that many credit *Halderman v. Pennhurst* with embedding in constitutional jurisprudence an abolitionist framework of habilitation (*See* Ben-Moshe 2020). Although parts of the decision were overturned by the Supreme Court subsequently on statutory grounds, as well as concern for state sovereign immunity,⁵⁸

⁵⁴ *Pennhurst*, 446 F. Supp. at 1317-18.

⁵⁵ *See e.g. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution.”).

⁵⁶ *Pennhurst*, 446 F. Supp. At 1319.

⁵⁷ *Id.* at 1318 (citations omitted).

⁵⁸ *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981) and *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

Judge Broderick frequently noted, the constitutional right to habilitation was never reversed by the Supreme Court (Ferleger 2012, 765).⁵⁹

However, since *Pennhurst*, no other federal court has held that the United States Constitution guarantees this right to habilitation in the community. Indeed, constitutional claims in disability cases have become functionally obsolete since the Supreme Court's decision in *City of Cleburne v. Cleburne Living Center*⁶⁰ in 1985 and subsequent decision in *Board of Trustees v. Garrett*⁶¹ in 2001 (See Waterstone 2014). Disability discrimination receives only rational basis scrutiny under the U.S. Constitution. This means that in order to pass constitutional muster, a state's policy must only be rationally related to a legitimate governmental interest, as opposed to intermediate scrutiny (sex)⁶² and strict scrutiny (race)⁶³ that require a more searching inquiry. As many constitutional law scholars have noted, rational bases accepted by courts frequently lack rationality and

⁵⁹ That said, it was never affirmed either.

⁶⁰ 473 U.S. 432 (1985).

⁶¹ 531 U.S. 356 (2001)

⁶² A policy must be substantially related to an important governmental interest.

⁶³ A governmental policy must be narrowly tailored to promote a compelling governmental interest.

a basis.⁶⁴ Indeed, the government rarely, if ever, loses on rational basis claims on the appellate and Supreme Court level.⁶⁵

However, some scholars, such as Ferleger (2012) have advocated for the resuscitation of constitutional arguments against disability segregation. Ferleger argues that segregation should be disallowed on both due process and equal protection grounds. He argues that the class of unwillingly institutionalized people with intellectual disabilities is a suspect or quasi-suspect class under the Constitution. Although the terms “suspect” and “quasi-suspect” classifications (which correspond with heightened levels of scrutiny) are generally reserved for race and gender respectively,⁶⁶ the Supreme Court has (infrequently) held that other classes may constitute “quasi-suspect” classes that demand more searching judicial scrutiny. For example, in *Plyler v. Doe*,⁶⁷ the Supreme Court held that immigrant children being fully denied their right to education by being charged tuition constituted a quasi-suspect class.⁶⁸ Ferleger suggests that when one narrows the class of disabled people to those who have had their freedoms maximally

⁶⁴ Dr. Craig Green, my Constitutional law professor, would probably appreciate that this quote made it into my dissertation.

⁶⁵ For instance, the government can freely discriminate against people selling filled milk (for no real reason other than to protect the milk industry). *See, e.g., United States v. Carolene Products*, 304 U.S. 144 (1938). The government can also enact immigration laws for racist reasons if there is a facially neutral reason for it. *See, e.g. Trump v. Hawaii*, 138 S.Ct. 2392 (2018). The only reason the government lost in *Cleburne* was that its reasons were facially discriminatory.

⁶⁶ As well as illegitimacy and national origin.

⁶⁷ 457 U.S. 202 (1982).

⁶⁸ Though the Court denied that immigrants generally were a suspect class and that education is a fundamental right.

violated, the class falls under what *Carolene Products*⁶⁹ termed a *discrete and insular minority* that have been historically oppressed and therefore qualify for strict scrutiny.

Ferleger moreover argues that the unwilling institutionalization of intellectually disabled people is irrational and therefore fails under traditional Equal Protection Clause analysis. He suggests that for each person who is institutionalized, there is a “twin” who is living successfully within the community who shares their functional impairments and limitations. This, according to Ferleger, suggests that institutions are both separate and unequal, because they lack the habilitation benefits of community-based services.

Although I am inclined to agree with Ferleger’s claims in principle, his logic is undercut by the current politics of the federal courts, as well as the practicalities of litigating civil rights suits in a post-Trump world. Equal Protection Clause arguments are rarely used by disability rights organizations and typically are put into briefs only if directly requested by clients or co-counsel. Qualitative research of disability litigation suggests that most impact litigation organizations feel similarly (Waterstone 2014). This does not reflect a mere bias on the part of disability rights community but rather reflects the fundamental willingness of courts to extend the Equal Protection Clause to cover categories other than sex and race. Indeed, it was a struggle to extend the Equal Protection Clause to sex and gender, and the only time in which the Supreme Court has expanded the Clause’s protections to new groups in recent history was *Plyler*. Although the constitutional claims do seem compelling and stronger, judicial politics and the

⁶⁹ *United States v. Carolene Products*, 304 U.S. 144 (1938).

passage of the Americans with Disabilities Act shortly after *Cleburne* was decided render more modest *Olmstead* claims appealing to litigants. Given that President Trump has now nominated nearly 200 (mostly white, mostly male, mostly abled) judges to the federal bar at the time of writing, as well as cemented a 6-3 Conservative majority in the Supreme Court, it is unlikely that Equal Protection Clause litigation will be a fruitful avenue going forward. *Olmstead*, as I will argue in the next section, provides more modest protections against institutionalization; however, it has more potential in a post-Trump era to serve as a legal tool for pursuing community integration in a variety of contexts.

2.2 *Olmstead and service provision in the “most integrated setting”*

Lois Curtis had spent half of her life being funneled from one institution to another when she teamed up with lawyer, Sue Jamieson, at Atlanta Legal Services, to challenge her detention. Jamieson recalls Curtis periodically calling her throughout the litigation, always asking the same question: “When can I get out of here?” (Ben-Moshe 2020, 252-53). Curtis’ case would go before the Supreme Court in what has been termed the *Brown v. Board of Education* for the disability community.⁷⁰ Curtis and co-plaintiff Wilson had been voluntarily committed to a psychiatric unit for treatment—both women were intellectually disabled, diagnosed with psychiatric disabilities.⁷¹ Both women’s doctors agreed that their needs could be appropriately met by state-funded, community-

⁷⁰ Though, as noted previously, this ignores the racialized nature of disability and reduces the disability rights movement to a movement for white people—which leads to the underrepresentation of disabled BIPOC in conversations about disability (Ben-Moshe 2020).

⁷¹ *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 587 (1999).

based programs, and both women wanted to leave; however, they remained institutionalized for several years.⁷² The Supreme Court considered whether this continued institutionalization despite the availability of community resources was justifiable under Title II (public services) of the Americans with Disabilities Act—the Court qualified its answer but held that the ADA generally prohibited needless segregation.⁷³

Neither the Supreme Court nor the lower courts addressed the question of whether the plaintiffs' detention and lack of treatment was constitutional—they resolved the question “solely on statutory grounds.”⁷⁴ Title II of the ADA reads:

Subject to the provisions of this subchapter, no qualified individual with a disability, shall be excluded from participation or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

The Court looked to the regulations promulgated with Title II to resolve the statutory question. Those regulations require that public entities administer programs in the “most integrated setting appropriate to the needs of qualified individuals with disabilities.”⁷⁵

This, according to the Court's interpretation, as well as the preamble to the Attorney

⁷² *Id.* at 593.

⁷³ *Id.* at 587.

⁷⁴ *Id.* at 588 (the Court also cited *Cleburne*).

⁷⁵ *Id.* at 592 (quoting 28 C.F.R. § 35.130(d) (1998)).

General’s regulations, requires public entities to serve individuals in settings where they have the maximal ability to interact with non-disabled persons.⁷⁶

Against the background of these settings, the District Court in *Olmstead* held that when “a disabled individual’s treating professionals find that a community-based placement is appropriate for that individual, the ADA imposes a duty to provide treatment in a community setting—the most integrated setting appropriate to that patient’s needs.”⁷⁷ The Supreme Court ultimately upheld this standard when determining whether service in community settings is required by the ADA. The Court reasoned that unjustified isolation is discrimination based on disability, while acknowledging that states may in some circumstances need to segregate individuals to provide habilitative services and treatment.

The Court was quick to caveat that nothing in the ADA required deinstitutionalizing persons “unable to handle or benefit from community settings,” because the ADA only applies to “qualified individuals with a disability.”⁷⁸ Moreover, states and their medical professionals have broad discretion in determining whether an individual “qualifies” for community services. States’ responsibilities are also limited to making “reasonable” modifications to community programs and are not required to make “fundamental alterations” to their services or programs.⁷⁹ Finally, litigants must take into

⁷⁶ *Id.*

⁷⁷ *Id.* at 595.

⁷⁸ *Olmstead*, 527 U.S. at 601.

⁷⁹ *Id.* at 603.

consideration a state's resources and ability to provide community services. Therefore, the statutory in *Olmstead* is far more tentative and has less jurisprudential force than the standard in *Pennhurst*. Indeed, scholars such as Ben-Moshe (2020) have criticized *Olmstead* for not going far enough—while *Pennhurst* represented abolitionist principles, *Olmstead* protections extend only to individuals courts deem to be “qualified.”

As will be argued throughout this project, the *Olmstead* mandate—that people receive services in the most integrated setting appropriate—has been effectively leveraged by disability rights organizations in a variety of contexts. *Olmstead* litigation is the strongest form of protection currently available to disabled plaintiffs. At the same time, statutory protections are generally regarded as weaker than constitutional protections, and *Olmstead*'s integration mandate is no exception. Had the Court found that there is a constitutional right to habilitation in the community, states would not have the excuse that treating people in the community is too expensive or constitutes a “fundamental alteration” to their programs and services. State entities would be constitutionally required to make fundamental alterations to ensure that disabled people received the support and services they need in the community. *Olmstead* indeed constituted a substantial victory for the disability community; however, like subsequent litigation in its racial analogue, *Brown v. Board of Education*, in many cases, its ability to influence radical desegregation efforts has been truncated by the federal courts.

The legacy of *Olmstead* has therefore been mixed. As some scholars have noted, the rate of deinstitutionalization between June 30, 1990 and June 30, 1999 was greater than the deinstitutionalization rate post-*Olmstead* (See Lakin et al. 2009). However,

Olmstead has made significant changes to the legal landscape surrounding deinstitutionalization. In part, the decrease in deinstitutionalization post-*Olmstead* can be attributed to the fact that few people were left in formal institutions by the time *Olmstead* was decided. The real significance of *Olmstead*, I argue, is its change to the general landscape of disability rights. *Olmstead* bluntly declares that segregated sections are discriminatory—this has led to a fundamental shift, as I will argue, in the possibilities available to disabled plaintiffs. Plaintiffs have used *Olmstead* in education and employment, for example, to challenge the needless placement of disabled people in segregated settings. Moreover, the same structural arguments that led the Supreme Court to hold that needless segregation is discriminatory have percolated the disability policy space as well—for instance, *Olmstead* gives advocates a language in which to challenge needless incarceration.⁸⁰ Therefore, despite its shortcomings, this project argues that the

⁸⁰ See e.g. Ira A. Burnim, “Using the Americans with Disabilities Act to Reduce the Incarceration of People with Mental Illness,” MACARTHUR FOUNDATION (Jan. 12, 2017), <http://www.safetyandjusticechallenge.org/2017/01/using-americans-disabilities-act-reduce-incarceration-people-mental-illness/>. The Bazelon Center and other disability organizations rely on the principles promulgated by *Olmstead* in policy contexts to advocate for systemic change, including decreased reliance on carceral settings for people with disabilities.

framework set forth by *Olmstead* provides a vital tool for disability organizations and advocates seeking to overcome disability segregation.

3. Criticisms of *Olmstead* and Deinstitutionalization

The idea that deinstitutionalization failed is frequently taken as axiomatic (*See* Bagenstos 2012). The founder of the controversial Treatment Advocacy Center⁸¹ described it as a “psychiatric *Titanic*,” (Torrey 1998, 11), a phrase quoted by two Supreme Court justices in an *Olmstead* concurrence.⁸² Torrey (1998) blames deinstitutionalization for the onslaught of psychiatrically disabled people living on streets and in jails and prisons. He also blames lack of treatment for increased violence perpetrated by psychiatrically disabled people. Torrey acknowledges that “[s]ome of [his] recommendations may not be politically correct, but [he believes] they are factually correct” (vii). Throughout his book, he suggests that psychiatrically disabled people have “nowhere to go” but the streets or jails and prisons. He calls mentally ill persons “walking time bombs” and begs America to transition “from legal folly to common sense.” He blames civil rights lawyers “wag[ing] a highly publicized fight to limit the

⁸¹ An organization primarily formed by psychiatrists and non-consumers who advocates for the increased use of inpatient care and forcible treatment of mentally ill individuals. Its views are highly controversial within the disability rights community.

⁸² *See Olmstead*, 527 U.S. 581, at 609 (Kennedy, J., joined by Breyer J., concurring in the judgment).

grounds for involuntary psychiatric hospitalization” for people’s difficulties in accessing treatment.

More recently, an editorial in the *Journal of the American Medical Association* penned by three bioethicists (Sisti, Segal and Emanuel 2015) called for a “return to the asylum,” recounting the same narrative. The authors claim that jails and prisons are becoming the “new asylums,” arguing that deinstitutionalization has increased the number of people who are homeless and funneled into the criminal justice system. Sisti then wrote a *New York Times* forum article in 2016,⁸³ arguing that psychiatric institutions are a necessity. He argues:

To give these people the care they deserve, we need to bring back psychiatric asylums. Not the dismal institutions that were shuttered in the past or settings of gothic fiction, but asylums based on the true meaning of the word: places of sanctuary and safety for vulnerable people.⁸⁴

This trend in scholarship represents what Ben-Moshe (2017; 2020) calls “the new asylums thesis.” Ben-Moshe (2017; 2020) criticizes this “new asylums thesis,” and the corresponding practice of calling prisons the “new asylums.” States undergoing deinstitutionalization are blamed for “dumping people in the streets” and creating the category of the “homeless mentally ill” (Ben-Moshe 2020, 136). She astutely notes that

⁸³ Dominic Sisti, *Psychiatric Institutions Are a Necessity*, *NEW YORK TIMES* (May 9, 2016), <https://www.nytimes.com/roomfordebate/2016/05/09/getting-the-mentally-ill-out-of-jail-and-off-the-streets/psychiatric-institutions-are-a-necessity>.

⁸⁴ *Id.*

deinstitutionalization is not necessarily the cause of ongoing mass incarceration among psychiatric disabled people. Why exactly is deinstitutionalization, which started rapidly declining during the 1950s through 1980s still blamed for the conditions the disability community faces today?

Ben-Moshe (2017; 2020) suggests that there is no “neat” connection between deinstitutionalization, homelessness, and imprisonment. Instead of studying the root causes of homelessness and focusing on ways to decrease housing insecurity and alleviate poverty, sociological studies since deinstitutionalization have generally sought to “quantify” homelessness. Ben-Moshe suggests that this history reaches back to the ways in which funding has historically been allocated to housing programs—housing programs have traditionally been the responsibility of local authorities and charities, whereas states are responsible for generally administering health services. Therefore, there is a financial incentive to identify homelessness as a mental health concern to shift the onus to states, who have more resources than municipalities, to address the problems. Moreover, mental health and housing instability are endogenous variables—“many of the behaviors and responses exhibited by people who are homeless can be attributed to that fact alone, such as being depressed, being agitated, mistrusting authority, having eating difficulties, and being unresponsive” (Ben-Moshe 2020, 140). Finally, the most “visible” people who are struggling with housing insecurity or who are unsheltered are frequently regarded as

mentally ill—the people who are not mentally ill yet housing insecure often “blend” with others on the street or seek shelter from friends and relatives.

Fundamentally, “[o]ne needs to call into question the assumption that there is anything normal about being housing insecure in an affluent society” (Ben-Moshe 2020, 140). Anyone facing housing instability faces what Jasbir Puar (2017) terms “debility.” Debility refers to conditions, generally sanctioned by the state, that in themselves alter our capacities in a way that presents as impairment. Whereas disability refers to differences between people, debilitation is a form of government-sanctioned oppression. Housing insecurity is fundamentally debilitating—housing insecurity itself causes people to present with symptoms that we frequently associate with innate or acute mental illness. This destabilizes the relationship between homelessness and mental illness.

Naïve integrationism offers an alternative explanation for why people who are homeless could be the same population that was once housed in institutions. Current trends in housing instability among psychiatrically disabled people and the I/DD community were not caused by deinstitutionalization but rather naïve integrationism. As both Ben-Moshe (2020) and Bagenstos (2012) astutely note, deinstitutionalization was accompanied by cuts to social programs and austerity in the 1980s. The 1960s and 1970s saw the expansion of programs such as Medicaid, SSI and SSDI, housing programs, and food stamps, which provided vital resources deinstitutionalized people needed to

successfully integrate into their communities (Bagenstos 2012; *See also* Mechanic and Rochefort 1990). However, these programs experienced a retrenchment in the 1980s.

The United States increasingly perceived itself to be in a fiscal crisis that needed to be remedied by reduced federal expenditures on “entitlement programs,” the use of block grants and funding cuts debilitated key social programs, and old age began to be viewed as an individual rather than collective problem. During this time, SSI and SSDI were cut dramatically, as were most welfare programs, such as food stamps, that kept disabled households afloat. A study conducted by Burkhauser et al. (1993) found that disabled men never fully recovered from the recession and cuts to social welfare programs in the early 1980s, according to data from the Current Population Survey (CPS) data between 1968 and 1988. The familial wealth of many disabled men receded to or below 1967 levels between 1981-1982. These effects were more pronounced for men with disabilities who were non-white or “poorly educated.” It was not until the economy recovered that disabled people recovered some of this wealth—but even then, people who relied on SSI (a means-tested program) were at a disadvantage. The retrenchment in social service provision meant that the disabled people who needed governmental insurance programs most—including those who had been institutionalized—stopped receiving benefits at sustainable levels.

Including the context of welfare cuts in the 1980s makes the social ills following deinstitutionalization seem more like a story of naïve integrationism than a story of failed attempts at deinstitutionalization. My argument is not that deinstitutionalization did not bear any relation to the emerging problem of the “homeless mentally ill”—or the fact that

psychiatrically disabled people are imprisoned at far higher rates than their abled or neurotypical counterparts. I agree, for example, that deinstitutionalization increased disabled people's encounters with the police—indeed, police officers often serve as a person's first point of contact with mental health services (Kane et al. 2017, 109).⁸⁵

Rather, my argument is that the picture is more complicated.

Supported integration is possible. People can and do live independently in their communities when they are empowered to do so by the appropriate supports and services; however, social service retrenchment in the 1980s made these resources less readily available. Indeed, the Pennhurst Longitudinal Study conducted on former residents of Pennhurst confirms this—the City of Philadelphia carefully managed the reintegration of Pennhurst residents, and nearly all former Pennhurst patients were able to improve their adaptive behaviors in community settings. In other terms, deinstitutionalization coupled with placement in scattered-site community settings allowed people to regain some of the skills that had atrophied during their time in institutions (Downey and Conroy 2000).

In what follows, this Chapter argues that evidence-based community-based services can overcome naïve integration for disabled people by replacing it with supported integration. However, local municipalities, states, and the Department of Housing and Urban Development (HUD) must start actively funding these programs for

⁸⁵ Which is problematic, because police officers are not adequately trained in de-escalation tactics or engaging with the disability community, and these encounters often result in violence. For example, Walter Wallace was recently shot in Philadelphia as his family begged police to deescalate the situation.

them to be effective. I conclude that the *Olmstead* mandate, while incomplete, provides a useful framework for policymakers to embrace systemic change that will enable disabled people to live independently in their communities.

4. Beyond Naïve Integration: The Future of Disability Desegregation

The provision of community services can act as a prophylactic measure to stop the needless incarceration and institutionalization of disabled people. This Section discusses a set of promising interventions that have been shown to allow people to live in their communities—but that are presently underutilized because states and municipalities are chronically under-resourced.

4.1 Assertive Community Treatment

An important way to prevent the over-policing and institutionalization of psychiatrically disabled or I/DD people is to prevent contact with the police, criminal justice system, or psychiatric institutions in the first place. This can be achieved through direct service provision within the community. One particularly promising intervention is Assertive Community Treatment (ACT). ACT involves the creation of a package of individualized community services designed to meet the support and service needs of people with severe mental health disabilities (*See e.g.* Bond and Drake 2015). An ACT team is generally comprised of psychiatrists, nurses, employment specialists, housing specialists, and a social worker. The goal is to help psychiatrically disabled people navigate the demands and difficulties of independent living. The ACT team is on-call 24-7 to help address individual needs and diffuse any potential crises. Forensic ACT (FACT)

is ACT that is specifically designed to help people who have had contact with the criminal justice system and aims to reduce needless incarceration (Lamberti et al. 2004).

Lamberti (2004) found that participants were likely to spend far fewer days in jail than those not receiving the same services. Non-participants spent an average of 43.5 days in jail, whereas study participants spent only 21.5 days in jail—a difference of almost 50 percent. Smaller, more localized studies have repeatedly confirmed that providing people the services they need in their communities can reduce needless incarceration and hospitalization. An Illinois study found an 83 percent decrease in jail days over the course of a year for participant in their ACT program, as well as an 85 percent decrease in the number of inpatient hospital days for study participants (The Thresholds State, County Collaborative Jail Linkage Project, Chicago 2001). In Oklahoma, participants who received ACT for the first time spent 65 percent fewer days in jail and 71 percent fewer days in hospitals than people who did not receive ACT.⁸⁶

Although the success of ACT provides clear evidence that providing people with the services they need in their communities works to reduce inpatient treatment and incarceration, most municipalities are woefully unprepared to handle the support needs of citizens. Currently, the ACT team in Philadelphia can only accommodate 350 people, for

⁸⁶ Oklahoma Department of Mental Health and Substance Abuse Services, *Program of Assertive Community Treatment (PACT), One Year Pre- and Post-Admission Comparison* (last modified June 16, 2010), <https://www.ok.gov/odmhsas/documents/one%20year%20pre%20and%20post%20admission%20comparison.pdf>.

example.⁸⁷ While this means that approximately 350 people have left long-term residential care in Philadelphia in the past year,⁸⁸ the fact remains that mental health care is too expensive for many people, and resources provided by large, poorer municipalities like Philadelphia remain scarce. Many states, like Pennsylvania, have not increased mental health funding in years. This compounds the problem, because in many states (including Pennsylvania), mental health services are administered at either the county or city-level. Therefore, it is up to struggling municipalities to increase the use and implementation of programs such as FACT that have a proven track record of keeping people off the streets and out of jails and inpatient units.

Litigation based on *Olmstead* can change how resources are allocated by local municipalities; however, it cannot prompt fundamental alterations to the ways in which municipalities provide services. Therefore, systemic policy changes and resource allocation must occur at the state as well as the local level for these services to reach populations who need it most. Overcoming naïve integrationism is therefore not a simple function of smart litigation. Nonetheless, smart litigation can help prompt localities to use existing resources differently—to further the aims of integration. Impact litigation is already changing the way services are providing to disabled people, as subsequent

⁸⁷PMHCC, *Programs: Philadelphia Community Treatment Teams Incorporated (CTT)* (accessed Dec. 17, 2019), <https://www.pmhcc.org/index.php/programs/philadelphia-community-treatment-teams>.

⁸⁸ City of Philadelphia Homeless Services, *Supported Housing* (accessed Dec. 17, 2019), <http://philadelphiaofficeofhomelesservices.org/services/supportive-housing/>.

chapters will demonstrate. However, ending naïve integration will require a concerted balance of litigation and systemic policy work.

4.2 Supported Housing and Independent Living

Supported housing provides a comprehensive set of services for the psychiatric disability and I/DD communities, including subsidies for housing and social support to allow people to be successful tenants. Supported housing allows people to live in their own apartments and homes in the communities, and tenancy rights are frequently not conditioned on participation in treatment programs.⁸⁹ Supported housing embraces three core tenets: (1) people should receive immediate, permanent housing that is not conditioned on people's compliance with treatment regimens, (2) people in supported housing receive assistance managing their conditions and securing and maintaining employment, (3) residents are encouraged and assisted to integrate fully in their community through employment, volunteer work, or social activities.⁹⁰

People who live in supported housing settings have access to a comprehensive package of services designed to allow them to live independent lives in the community—such as, case management, treatment of psychiatric conditions or substance use, help securing employment, home health aide services. Oftentimes, supported housing is combined with ACT in order to help people maintain stability in their lives and housing

⁸⁹ See Bazelon Center for Mental Health Law, *Diversion to What?* (accessed July 25, 2020), http://www.bazelon.org/wp-content/uploads/2019/09/Bazelon-Diversion-to-What-Essential-Services-Publication_September-2019.pdf.

⁹⁰ See Bazelon Center for Mental Health Law, *A Place of My Own* (accessed July 25, 2020), <http://www.bazelon.org/wp-content/uploads/2017/01/A-Place-of-my-Own.pdf>.

situations. Generally, the disability advocacy community prefers scattered-site supported housing (as opposed to disability-only housing), as this is the most integrated form of supported housing available.⁹¹

Many municipalities already operate housing programs that are provided to disabled people. *Olmstead* therefore mandates that these services must be administered in the most integrated settings appropriate and feasible. Supported housing programs are frequently financed through Medicaid, as well as state and federal housing funds. Medicaid funds cannot cover rental subsidies; however, individuals' start-up costs may be provided by Medicaid.⁹² Oftentimes, disabled people who qualify for supported housing also qualify for federal rent subsidies like Section 8 housing. This helps offset the cost of rent.

Supported housing is one type of program that has been expanded through *Olmstead* settlement agreements entered by states with the U.S. Department of Justice. For example, the settlement agreement in *United States v. New York, O'Toole v. Cuomo* provided that adult home residents were eligible for supported housing unless they (a) had significant dementia, (b) would be dangerous to themselves or others in supported housing even if they received services, (c) need skilled nursing care that cannot be provided in a community context, or (d) needed services not available through any assistance programs.⁹³ Likewise, a settlement in *United States v. New Hampshire*

⁹¹ *Id.*

⁹² 42 C.F.R. §§ 441.301(c), 441.530(a), 441.710(a).

⁹³ "*A Place of My Own*", *supra* note 50.

provided for the development of more than 600 scattered-site supported housing units. A settlement in *United States v. North Carolina* required the development of 3000 scattered-site supported housing units. Many more such settlements have been negotiated. These examples all suggest that litigation in the *Olmstead* context can and has created substantial benefits for formerly institutionalized persons.

Supported housing is an effective way for states and municipalities to prevent the needless incarceration or homelessness of disabled people. For example, pilot studies in both Philadelphia and New York found that scattered-site supported housing dramatically decreased incarceration rates for individuals involved in the studies (*See e.g.* Culhane et al. 2002; Fairmount Ventures, Inc. 2011). An Ohio study found that individuals in supported housing who had been incarcerated were 40 percent less likely to be re-arrested and 61 percent less likely to be reincarcerated (Fontaine et al. 2012).

Moreover, supported housing is a *cost-effective* method of community treatment. For example, multiple studies have demonstrated the comparative cost-effectiveness of treating people in community settings vs. hospital or carceral settings (*See* Culhane et al. 2002; Dickey et al, 1997). The authors' proffered reasons for the reduction in costs were that: (1) these people were not homeless and therefore did not utilize shelter services, (2) people were hospitalized less frequently and therefore did not need expensive, acute services, and (3) people were incarcerated at a much lower frequency.

4.3 Acute Support Outside of Hospitals and Prisons

One might ask at this point: what about people who are experiencing acute mental health crises? Are people experiencing mental health crises not prime examples of why

we “need” inpatient care in the first place? My answer is that crisis services in the community are both cost-effective and more effective at preventing suicide, self-harm, or crime. Although interventions such as Crisis Intervention Teams that train officers to respond appropriately to people experiencing mental health crises do not have an established evidence base (Franz and Borum 2011), Mobile Crisis Teams, a related concept, have proven effective at deescalating mental health crises without the use of inpatient treatment.

Mobile Crisis Teams (MCTs) are teams of trained professionals whom police can call to deescalate mental health crises. The goal of MCTs is to divert people from arrest or inpatient care to services in their communities. They are typically comprised of at least one peer specialist and an on-call psychiatrist.⁹⁴ MCTs see individuals in place immediately—meaning in their communities—to assess an individual’s immediate support needs and should ideally be available 24 hours per day, 7 days per week. The most successful MCTs have access to community crisis apartments with appropriate peer support and on-call psychiatrists where people can stay as an alternative to being hospitalized.⁹⁵

MCTs are demonstrably more effective as a first-line response than police or emergency department contact and can minimize the probability of people being arrested or needing acute emergency care. Typical contacts between police officers and people

⁹⁴ Bazelon Center for Mental Health Law, “Diversion to What?” *supra* note 49.

⁹⁵ *Id.*

experiencing mental health crises result in an average arrest rate of 21 percent. However, when a MCT intervenes, the arrest rate is frequently below 7 percent (Lamb 2002, 1268). Moreover, in Verde Valley, Arizona, a well-resourced MCT was able to stabilize crises in the community for 55 percent of calls made by first responders (Frost 2016). Without the MCT's intervention, 90 of the 109 calls studied would have likely resulted in arrest or hospitalization. Moreover, it is notable that both mental health consumers *and* police officers prefer MCTs to police contact (Scott 2000).

The primary problem with MCTs is that they are frequently under-resourced. Because they are funded by municipalities, which frequently rely on state funding, it is unclear how many people are currently served by MCTs in large cities. For example, Philadelphia operates such a service, but its capacity is unclear. This service furthermore does not provide the apartments that would provide an adequate alternative to inpatient hospitalization. However, the places in which MCTs have been resourced and studied have shown the promise of these methods as opposed to inpatient treatment.

This project is agnostic to the question of whether people *ever* need inpatient treatment and rather speaks only to the question of whether people should be *presumptively* segregated. That is to say, I advocate an integration *presumption*. However, there is a growing evidence base to indicate that inpatient treatment, especially involuntary inpatient treatment, is neither therapeutic nor necessary in the vast majority of cases. For example, Stefan (2015) finds that people frequently experience more trauma than support in inpatient settings. Moreover, one of the most prominent predictors of suicide is inpatient hospitalization, though it is unclear from existing evidence whether

this is a correlative or causal link (*See e.g.* Qin and Nordentoft 2005). Although I am sympathetic to the idea, to argue against any form of inpatient treatment is beyond the scope of this project. What is clear from the foregoing analysis is that people are frequently hospitalized or arrested prior to receiving services and that in many of these cases, such treatment is unnecessary. If there were expanded community supports in place, many people who are currently served in inpatient settings might be better served in their respective communities.

4.4 Radical Abolition, Peer Support, and Anti-Psychiatry

At this point, I would be remiss if I did not consider the most prominent alternative to *Olmstead* frameworks—the idea that institutional settings should be abolished altogether. For example, Ben-Moshe (2014; 2020) argues for a radical abolition of psychiatry and carceral settings (including institutions). She suggests that abolition offers a useful framework for imagining a “noncarceral future” which transcends the policing and institutionalization of disabled people, especially in the I/DD and psychiatric disability communities (Ben-Moshe 2014, 268). Beyond merely changing the locale of service provision, an abolitionist approach seeks to undermine the epistemologies that lead to the needless incarceration and control over the lives of disabled people. As Ben-Moshe notes:

Community services are certainly smaller and more dispersed, but the relations of power/knowledge at their core remain intact. Professionals created the programs and run them with little change or input from service users. Under these conditions, it is not very surprising that many of these services foster further

segregation and marginalization of people with disabilities... The goal is not to replace one form of control...for another (2014, 268-69).

Ben-Moshe suggests that disabled people themselves are organizing abolitionist alternatives to repressive service provision that upend traditional psychiatry and notions of “cure.”

A prime example is mental health consumer-led anti-psychiatry initiatives. Stastny and Lehmann (2007) compiled the narratives of 61 therapists, psychiatrists, social scientists, lawyers, relatives, and ex-patients to document non-coercive and non-medical mechanisms for coping with the symptoms of psychiatric disabilities. Many of the suggestions are relatively mundane, including exercise and meditation. However, there are many other examples of consumers organizing independently to provide peer support to one another and to manage their symptoms without resorting to traditional psychiatric treatment. One such experiment, Soteria, provided accommodations for up to seven schizophrenic people experiencing psychotic breaks at a time. Soteria offered a communal, therapeutic living environment where mental health consumers built their skills and coping tactics. One of the driving principles behind Soteria was that psychiatric medications should not be used for six weeks and should only be used as a last resort if other therapeutic approaches failed. The Soteria model proved successful in treating “psychotic breaks” and preventing acute, inpatient hospitalization for many mental health consumers. Two-year outcomes were generally better among patients treated at Soteria, and only 19 percent of patients were continuously maintained on antipsychotic medications. This ultimately allowed most consumers treated at Soteria to integrate back

into their communities after their episodes had subsided, many without the assistance of psychiatric medication (*See* Bola and Mosher 2003; Mosher 1999).

Other models have been similarly successful. For example, Sweden operated a supported housing “hotel” between 1995-2004 in which people could “check-in” for indefinite periods of time. Maintenance workers were the only professionals available. This hotel was frequently utilized by people with psychiatric disabilities, prisoners seeking to reintegrate into society, or other populations for which apartment hunting might prove difficult or stressful (Ben-Moshe 2014, 261). In North America, Second Opinion Society in Yukon Canada is a psychiatric survivor-run service that provides drop-in lunches, holistic healing approaches and advocacy services for local people in need of services (Ben-Moshe 2014, 261). Finally, online communities have also proven to be effective tools for consumers who want to avoid traditional psychiatry. For example, *The Icarus Project*⁹⁶ is an online collective dedicated to people with bipolar disorder. Instead of pathologizing bipolar disorder, people in this collective view it as a “dangerous gift” that needs to be cultivated and taken care of. Coping strategies are emphasized rather than medical interventions, and people can seek assistance through online forums.

These models are all highly contentious within the psychiatric community. However, one might flip that sentiment and argue that traditional psychiatry is highly controversial within the disability community. Psychiatry creates an unequal balance of

⁹⁶ The Icarus Project NYC (last accessed Aug. 4, 2020), <http://nycicarus.org/>.

power between patients and medical professionals. Some psychiatrists harbor a distrust of the populations they work with, and many seek to utilize medications as a first-line intervention. Psychiatrists have historically been complicit in legally enforceable institutionalization against people with mental health disabilities. They have also engaged in contentious practices such as forced medication. The majority of mental health consumers who have been placed in inpatient settings are rightfully traumatized as the result of the treatment (or lack thereof) that they received (*See e.g.* Stefan 2016). Psychiatrists must contend with this history and the learned distrust of many members of the disability community. Services provided in the community must ultimately empower disabled people to make their own decisions, rather than merely providing coercive services in community settings.

That said, many people with mental health disabilities rely on traditional psychiatry to manage symptoms that range from unpleasant to intolerable. Whether to do so can and should be an individual's prerogative. As such, this project does not adopt a staunch anti-psychiatry perspective. Rather, I argue that the core tenet of abolitionist approaches should be acknowledged—that the power relationships inherent to certain models of service provision are coercive and unequal. Those power relationships are what I seek to abolish, rather than the practice of psychiatry wholesale. People should have a full range of service options available to them in their communities—whether they prefer medication-based approaches or more peer-supportive models.

This section therefore takes two key insights from the abolitionist approach: (1) coercive service provision in the community is not a suitable alternative to segregated

institutional services, and (2) psychiatrists who work with members of the disability community must be cognizant of practices like supported decision-making and enable their patients to make decisions for themselves regarding their medical treatment. A wide range of services should be offered in the community—and receive governmental funding—so that people with psychiatric disabilities and I/DD are enabled to make genuine choices regarding their treatment.

5. Conclusion

This Chapter makes three central claims: (1) although the idea that deinstitutionalization is responsible for a host of social ills is widely accepted, naïve integration rather than integration itself is the more likely culprit for these problems; (2) *Olmstead* litigation is a necessary but insufficient tool to overcome the segregation of disabled people; (3) systemic policy change motivated by the ideals of *Olmstead* is the most effective mechanism for bringing about supported integration.

Naïve integration, as I have noted multiple times, is a mindset that pervades disability policy. Naïve integration advocates for integration at all cost; however, the underlying goal of naïve integration is to absolve the government of its responsibility to provide the community-based supports necessary to further integration. Naïve integration is in this sense hollow rhetoric. True integration requires the provision of intensive supports in the community such that people do not *need* to be segregated. Integration is not a replacement for the services provided in segregated settings but rather should be supplemented with services tailored to furthering the goals of integration. As argued in Chapter 1, this is the best way to ensure that disabled people enjoy basic freedoms, such

as freedom of association. Even if individual disabled people ultimately decide to pursue a segregated lifestyle, the option of integration is a prerequisite to this decision.

The logic of presumptive segregation and the logic of naïve integration are both underpinned by ableism. The goal of institutions was all along to protect disabled people from society, as if they need protection as opposed to a society in which their needs are understood and validated. Conversely, the goal of naïve integrationism is to ignore that disabled people's needs exist altogether. Naïve integrationism is analogous to “color-blindness” in this way.

Substantial research has documented that integration works when the appropriate services are provided; however, naïve integration has been used as a red herring in the debate about disability service provision to re-entrench segregation. The focus of disability scholarship should align itself with the disability community, which generally eschews both naïve integrationism and segregation.

That said, many barriers exist to creating true integration. For instance, state and municipal governments frequently suffer from a shortage of resources. However, the responsibility for providing health, education, housing, and other public services falls largely on state and local governments. Integrated service provision can create significant savings in the long-term by avoiding the exorbitant expenses associated with mass incarceration and inpatient hospital care. However, policymakers must be convinced of the value of integrated service provision first. The logic of naïve integrationism and the ableism that underlies it must be replaced with a more social understanding of disability injustice—that although not all harms faced by disabled people are socially constructed,

society is responsible for constructing the idea of “normalcy” that paints disabled people’s needs as “abnormal” and an “individual responsibility.”

The logic of naïve integration is contingent. It can be displaced when scholars and policymakers take seriously the idea that disabled people deserve support not for paternalistic reasons but because society has framed their needs as beyond the scope of collective responsibility. Taking collective responsibility through true integration can overcome both naïve integrationism and paternalism, two key injustices faced by the disability community. As this project has and will argue, the *Olmstead* mandate is and will be critical to dismantling naïve integrationism. The idea that people should not be presumptively segregated in state service provision is simultaneously radical and common sense, and *Olmstead* litigation and policy advocacy can help open people’s minds to the possibility of a different future for disabled people.

In the chapters that follow, I analyze the ways in which naïve integrationism has pervaded education and employment jurisprudence and policy. I also look at the ways in which *Olmstead* litigation can and has been effective at undoing the presumption that disabled people belong in segregated spaces.

Chapter 3: The Integration Presumption in Disability Education

“In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting.”

–Roncker on Behalf of Roncker v. Walter⁹⁷

“What he must remember is that there is no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex.”

–W.E.B. DuBois, “Does the Negro Need Separate Schools?”

1. Introduction

In 1977, Amy Rowley, a hearing-impaired student, entered kindergarten. She was an exceptionally bright student and could read lips. During her Individualized Education Program (IEP) meeting, it was decided that Amy would attend school in a mainstream classroom and be provided with an FM hearing aid that would enable her to hear her teachers and classmates during certain activities. Amy successfully completed kindergarten.

When Amy was entering First grade, her parents requested that her IEP include the provision of a qualified sign language interpreter in lieu of other supportive provisions in her previous IEP. The administration, followed by an independent

⁹⁷ 700 F.2d 1058 (6th Cir. 1983).

examiner, denied this request on the basis that Amy “was achieving educationally, academically, and socially” without such assistance.

The Rowleys appealed this decision before a trial court. The Court determined there was a substantial gap between Amy’s potential educational achievement and her current performance. The Court found that Amy was “remarkably well-adjusted” and had “extraordinary rapport” with her teachers and peers. Nonetheless, Amy could only understand approximately 59 per cent of the words spoken to her, while she could identify 100 per cent of the words signed to her. This led the Southern District of New York to conclude that there was a substantial gap between her potential and current performance.⁹⁸

Rowley’s case was heard before the U.S. Supreme Court in 1982.⁹⁹ However, the Supreme Court held that the Education for All Handicapped Children Act of 1975 (EAHC, now IDEA) created no requirement that individualized services provided to children be sufficient to maximize each child's potential "commensurate with the opportunity provided other children."¹⁰⁰ Rather, the metric set by the court was grade-

⁹⁸ *Rowley v. Bd. of Educ.*, 483 F. Supp. 528 (S.D.N.Y. 1980).

⁹⁹ *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

¹⁰⁰ *Id.* at 197.

level appropriate attainment.¹⁰¹ Because Amy Rowley was performing at her grade level, it did not matter to the Court that she was not reaching her potential.¹⁰²

Rowley set a low bar for school districts in tailoring IEPs. Instead of looking at the child's potential and developing a set of individualized services aimed at achieving that potential, Rowley merely requires individualized services commensurate with the student's grade-level. It is my contention in this chapter that *Rowley* and many of the cases that followed set precedents that made "naïve integrationism" the law of the land for disabled students.

In this chapter, I begin by discussing the standard set by the Individuals with Disabilities Education Act (IDEA), comparing the plain text of the statute to the Court's interpretation in *Rowley*. I then turn to counter claims that the appropriate response to naïve integrationism in this context is to advocate for segregation. I conclude by discussing promising steps the Supreme Court has taken to move away from naïve integrationism in recent rulings such as *Endrew F. v. Douglas County School District*¹⁰³ and *Fry v. Napoleon Community School*,¹⁰⁴ arguing that such cases set precedents for more ambitious test cases by disability rights litigators. I maintain that the framework set forth in *Olmstead v. L.C. by Zimring*¹⁰⁵ is more effective than IDEA-based jurisprudence,

¹⁰¹ *Id.* at 198.

¹⁰² *Id.* at 209-10.

¹⁰³ *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

¹⁰⁴ *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017).

¹⁰⁵ 527 U.S. 581 (1999).

as the ADA moves beyond naïve integrationism to demand that community services be provided in the least restrictive settings.¹⁰⁶

2. *Rowley*, the Supreme Court, and Naïve Integrationism

Rowley had extraordinary effects on education case law that have only recently begun to be unraveled and partially overturned by the Supreme Court in cases such as *Fry* and *Endrew F* (Colker 2017). This section discusses the courts' tendency toward naïve integrationism post-*Rowley*, concluding that many of the problems critics such as Colker (2008) identify with the integration presumption in education stem from the tendency toward *naïve* rather than *supportive* attempts to integrate disabled students. I begin by discussing the legislative and jurisprudential history of the IDEA in order to set the backdrop for the discussion that follows in Section 2.2 about *Rowley* and subsequent court decisions.

2.1 The IDEA and the History of Disability Education Jurisprudence

Education is perhaps the issue that transformed the disability rights movement into a movement for civil rights. Early case law on disability education mirrored the arguments advanced in *Brown v. Board of Education*, and for good reason.¹⁰⁷ Prior to the passage of the Education for All Handicapped Children Act (EHA)¹⁰⁸ in 1975, over one million disabled children received no education, and over half of disabled children who

¹⁰⁶ *Id.* at 599.

¹⁰⁷ See e.g. *Pa. Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972) and *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), which will be discussed further in this section.

¹⁰⁸ Now the Individuals with Disabilities Education Act (IDEA).

were in school did not receive the requisite specialized services (Fleischer and Zames 2011). The ideals that eventually underscored the IDEA, such as a *free and appropriate public education* (FAPE) in the *least restrictive environment* (LRE) were established by two cases: *PARC v. Commonwealth of Pennsylvania* (1971) and *Mills v. Board of Education* (1972). The provisions of the IDEA have been hotly contested in courts, as parents have attempted to secure an adequate education for their children from chronically underfunded school districts.

The EHA was a direct legislative response to *PARC* and *Mills*. *PARC* ruled in favor of the plaintiffs on Fourteenth Amendment grounds, holding that the state is obligated to provide every mentally disabled child with access to a free public education.¹⁰⁹ *Mills* expanded this precedent, holding that every child is entitled to a free public education, irrespective of the nature or severity of the child's disability.¹¹⁰ The EHA and the Development Disabilities and Bill of Rights Act was passed in 1975 in response to and embracing the principles of *PARC* and *Mills*. The EHA (now IDEA) requires that individual states find, identify, and assess all children with disabilities within the state and tailor educational programs to suit the particular needs of children through the creation of "individualized education programs" (IEPs)¹¹¹. It relies on the principles of a free and appropriate public education in the least restrictive environment. The purpose of the act was to "[extend] to children with disabilities the principles of

¹⁰⁹ *Pa. Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972)

¹¹⁰ *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972)

¹¹¹ 20 U.S. Code § 1400.

equality of educational opportunities underlying the landmark 1954 Supreme Court decision in *Brown v. Board of Education*” (Fleischer and Zames 2001, 185).

Though the IDEA has origins in Fourteenth Amendment civil rights litigation, commentators such as Bagenstos (2009) have noted that courts subsequently construed the IDEA as a piece of benefits legislation, rather than a civil rights act for students. Specifically, courts have held that IDEA is not an anti-discrimination statute but rather an entitlement program with specific requirements for qualification and explicit limits on the breadth of benefits it provides.¹¹² Moreover, the fact that disability discrimination merely receives rational scrutiny under the Fourteenth Amendment¹¹³ means that it receives the lowest level of constitutional security of any protected class. Almost any state interest other than explicit animus is sufficient to override a disability equal protection claim under the Fourteenth Amendment. This is the reason that disability advocates, as discussed in Section 4, have either construed the IDEA in novel ways or turned to the

¹¹² See e.g. *Ellenberg v. N.M. Military Inst.*, 478 F.3d 1262 (10th Cir. 2007) (holding that “the IDEA is simply not an anti-discrimination statute.”).

¹¹³ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (holding that treatment of persons with mental disabilities subject to rational basis analysis); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001) (applying rational basis to persons with disabilities more generally).

Americans with Disabilities Act (ADA) in order to create parity between students with and without disabilities.

2.2 Rowley, FAPE, and the Turn Toward Naïve Integrationism

Amy Rowley's case set an enduring precedent that embedded naïve integrationism in IDEA jurisprudence. In this case, the Court explicitly rejected the idea of substantive equality for students with disabilities by eschewing results-based metrics and the idea of a student's "potential" as factors in determining whether they were receiving FAPE. After *Rowley*, students and parents appealing disability discrimination could no longer use the IDEA as a means of doing so. Rather, the bill became an entitlement program, with explicit boundaries set for both who qualified and what benefits they could hope to receive.

Rowley is a prime example of naïve integrationism, because it is a case where a student was expected to be integrated pursuant to federal law; however, the school district and courts were unwilling to provide the requisite resources and community supports to achieve substantive equality or true integration. Amy Rowley's legitimate need for an American Sign Language (ASL) interpreter was denied simply because she was intelligent enough to perform at her grade level despite understanding very little of what was happening in the classroom.

Despite its roots in Fourteenth Amendment litigation, the IDEA is ironically not understood as a civil rights bill by federal courts. Therefore, Courts have held that it does not demand substantive equality or integration for students. Rather than creating a demanding standard, the Supreme Court set minimal requirements for grade-level

progression. As the Dissent penned by Justices White, Brennan, and Marshall noted, this standard does not even provide a baseline level of formal equality—indeed, “the basic floor of opportunity is intended to eliminate the effects of a handicap [*sic*], at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible.”¹¹⁴ However, the IDEA, as interpreted, does not provide this equal opportunity to learn, but rather provides something more minimal. Therefore, the IDEA does not provide formal equality, let alone substantive equality, for students with disabilities.

In addition to facing courts’ tendency toward naïve integrationism in IDEA litigation, parents generally face additional barriers in successfully litigating IDEA cases due to the level of deference afforded to educational professionals in determining what constitutes an appropriate IEP. The Ninth Circuit held in *County of San Diego v. California Special Education Hearing Office*:

The court reviews *de novo* the appropriateness of a special education placement under the IDEA. Nevertheless, when reviewing state administrative decisions, courts must give due weight to judgments of education policy. Therefore, *the IDEA does not empower courts to substitute their own notions of sound educational policy for those of the school authorities which they review. (emphasis added)*

This case and similar decisions indicate that heightened deference continues to be given to educational professionals, teachers, school administrators, physicians, and social

¹¹⁴ *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982) (Dissent).

workers when drafting IEPs, and parents often lack the legal savvy to navigate the process alone (Fleischer and Zames 2012, 185). Commentators have noted that this is especially true for families who are poor, uneducated, not fluent in English, or a member of a racial or ethnic minority groups (*See* Fleischer and Zames 2012).

Naïve integrationism coupled with substantial deference to school authorities has stacked the deck against parents seeking to litigate in favor of better educational opportunities for their children under the IDEA. One immediate policy response to this naïve integrationism might be to segregate children and provide more specialized disability services in separate environments. The next section pushes back against such proposals by suggesting that: (1) students can generally flourish when they are provided services in place—that is to say, provided community supports in the most integrated settings, and (2) the reason many students have not been able to secure such supports is due to the low bar for educational attainment set by the IDEA and the naïve integrationist precedents that followed its passage.

3.3 Rachel Holland, Neill Roncker, and the Least Restrictive Environment

One of the more controversial mandates of the IDEA is that it requires that education be provided in the most integrated and “least restrictive environment,” (LRE) which, in practice means that education must be provided in the most integrated setting possible. Colker (2009) argues extensively against this “integration presumption,” suggesting that integrated environments are not always best for students with disabilities, and as a matter of policy, we should focus our attention on the attainment of educational and social outcomes for students with disabilities—what she terms “substantive

equality.” This section interrogates the idea that substantive equality can be achieved without a strong presumption in favor of integration. I maintain that most, if not all, children with disabilities can benefit from integrated settings and establish this premise through case law on LRE requirements.

The seminal case on LRE is *Sacramento City Board of Education v. Rachel H.*¹¹⁵ Rachel Holland was an 11-year-old child with mental disabilities. Her IQ was estimated at 44, and she attended special education programs in her school district from 1985-89. In 1989, her parents requested that she be put in a regular classroom full-time; however, the District rejected their request, proposing a placement that divided Rachel’s time between special and regular education classrooms—a placement that would have required Rachel to move between classrooms 6 times per day.¹¹⁶ Because of the District’s noncompliance, the Hollands enrolled Rachel in a regular kindergarten class at a private school, where she remained in regular classes until the second grade, when the District Court rendered its opinion in her case.

The parents and the school district disagreed as to whether Rachel would be better served in a segregated or integrated setting. Her parents argued that she learned social and academic skills better in a regular classroom than she would in a segregated setting, while the School District argued that she was too severely disabled to benefit from being in a fully-integrated setting.¹¹⁷ A hearing officer found that: (1) Rachel was motivated to

¹¹⁵ 14 F.3d 1398 (9th Cir. 1994).

¹¹⁶ *Id.* at 1400.

¹¹⁷ *Id.* at 1400.

learn in her integrated classroom by imitation and modelling and therefore achieved better academic outcomes; (2) she was not disruptive in an integrated setting, and (3) the School District overstated the cost of placing her in an integrated setting.¹¹⁸ The District Court agreed with the findings of the hearing officer, and the decision was affirmed by the Ninth Circuit Court of Appeals.¹¹⁹

The Ninth Circuit agreed with the District Court's findings that Rachel received substantial academic and non-academic benefits from being in an integrated setting. Moreover, the Court held that she was not a detriment to other students—nor did she take up too much of the teacher's time. Indeed, Nina Crone, Rachel's second-grade teacher testified that Rachel was not disruptive and only required a part-time aide to fully benefit from an integrated setting.¹²⁰ The Court of Appeals also agreed with the District Court's finding that integrating Rachel was not too costly an endeavor.¹²¹

The Ninth Circuit held that courts deciding whether to integrate students under the IDEA must consider: “(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the student has] on the teacher and children in the regular class; and (4) the costs of mainstreaming [the student].” This mandate, it must be noted, is subject to the limitations set forth in *Rowley*. However, Rachel Holland is an exemplar of how integration can work and does work for

¹¹⁸ *Id.* at 1401.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 1402.

some students who might otherwise be put into segregated settings. Why, when integration can produce positive outcomes, might people be skeptical of its value?

The reasons to be skeptical of an integration presumption for *all* students are illustrated well by *Roncker On Behalf of Roncker v. Walter*,¹²² heard by the Sixth Circuit in 1983. In *Roncker*, the issue was whether Neill Roncker should have been “mainstreamed.” Neill was nine years old and had an IQ below 50, which in his district generally meant that he would be educated in a segregated setting.¹²³ His parents and some clinical professionals thought that Neill would benefit from contact with non-disabled children; however, the School District decided to place him in a completely segregated county school.¹²⁴ The Ronckers disagreed with such a placement and appealed to the Ohio State Board of Education, who found that Neill should be placed in the county school but also given opportunities to interact with non-disabled peers. No provision was made for how that was to be accomplished.¹²⁵

Neill began to attend school in a segregated classroom at Pleasant Ridge, an integrated public elementary school. His contact with non-disabled peers was limited to lunch, the gym, and recess.¹²⁶ At trial, both the School District and the parents agreed that Neill could not be placed in integrated classrooms. However, the parents prioritized contact with non-disabled peers, whereas, the School District emphasized the educational

¹²² 700 F.2d 1058 (6th Cir. 1983).

¹²³ *Id.* at 1060.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1061.

¹²⁶ *Id.*

benefits of the county school.¹²⁷ The trial court held that the school district did not abuse its discretion in placing Neill in a school where he would receive no contact with his non-disabled peers.¹²⁸

This decision was reversed by the Sixth Circuit upon appeal. The Sixth Circuit reasoned that:

The [IDEA] does not require mainstreaming in every case but its requirement that mainstreaming be provided to the maximum extent appropriate indicates a very strong congressional preference... *The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept.*¹²⁹

The test, according to the Court, and in line with the holding in *Rowley*, is whether the services that make a segregated setting superior can feasibly be provided in a non-segregated setting.¹³⁰ While the Sixth Circuit acknowledged that Neill was not making progress in his more integrated setting, the Court remanded the case to the District Court to determine whether the services that were provided by the county school could be provided at Pleasant Ridge.¹³¹

Colker argues that *Roncker* is a prime example of why the integration presumption is inappropriate. She argues: “In a case like *Roncker*, however, the

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 1063 (*emphasis added*).

¹³⁰ *Id.*

¹³¹ *Id.*

integration presumption seems to serve a cosmetic benefit—creating the appearance of integration through the placement in a regular school—without the child having a meaningful integrated experience” (2009, 106). Colker relies heavily on findings by the District Court cited by the dissenting opinion in making this judgment:

Neill Roncker was not progressing in his present placement but was regressing. His ability to interact with the non-handicapped children was at best minimal. His opportunity to interact with non-handicapped children there was also very minimal. Yet, despite these findings, the panel's decision requires the District Court to determine on remand whether it would be “feasible” to provide an equivalent of what is now provided in the 169 schools in classrooms located in regular elementary schools.¹³²

These findings lead Colker to conclude that although the Court should have primarily considered whether the disability-only institution was a high-level institution that would have provided substantially more educational benefit to Neill, the preoccupation with integration distracted the Court from considering what types of supports would have yielded substantive equality.

Colker, in many places, presents a false dichotomy between segregated settings where intensive, disability-specific services can be provided, and integrated settings where they are not. However, I suggest that Colker’s real problem with rulings such as *Roncker* is not the integration presumption but rather the presumption toward *naïve*

¹³² *Roncker*, 700 F.2d at 1064 (*Justice C.G. Kennedy dissenting*).

integration. Because of the relatively low bar set by *Rowley* for determining when a student is receiving FAPE, courts do not adequately focus on the educational opportunities afforded to students with disabilities—indeed, they are encouraged to give deference to school districts and determine only whether the district is providing grade-appropriate educational opportunities. One need not choose between robust educational opportunities for students with disabilities and integrating them. It is not the integration presumption but rather the presumption that students can be integrated without the provision of adequate educational opportunities and supports that distorts peoples' focus away from substantive equality for students with disabilities.

In the case of Neill Roncker, Colker, as well as the dissenting and majority opinions, portray Neill's education in terms of this false dichotomy—better educational opportunities in a completely segregated school or subpar educational opportunities in a more integrated environment. I do not dispute that Neill needed robust services and supports; however, it does not follow that Neill needed to be educated in a completely segregated environment. Neill could have and should have been provided with robust community services in an integrated school where he had the maximum opportunity to interact with students who were non-disabled, as well as with disabled students. If schools developed appropriate supports such that children could be educated in more integrated environments, then children like Neill could receive the services they need in

the community rather than separate from it. The problem is that community funding streams provided only the option of a segregated school.

One of the reasons schools lack the resources to provide adequate community supports in more integrated settings is that these resources are typically diverted to segregated settings. This is a relic of perverse funding incentives built into early special education legislation, which led to students being segregated because schools received more money to educate students in segregated settings.¹³³ However, it is not apparent that segregated settings are necessary to educate students with disabilities. Nor are segregated settings automatically preferable. Recent suits against The Georgia Network for Educational and Therapeutic Support (GNETS) schools suggest that students educated in segregated settings often receive inferior educational supports—students are being siphoned off into segregated settings for minimal gains in educational attainment.¹³⁴ In Sacramento, up to 50 per cent of students with disabilities are placed in segregated

¹³³ See United States Commission on Civil Rights (1997). *Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504*, at 181.

¹³⁴ See Andy Miller (2017). “Parents, advocates sue state, claim inequities in GNETS schools,” *Georgia Health News*. Available at: <http://www.georgiahealthnews.com/2017/10/parents-advocates-sue-state-claim-inequities-gnets-schools/>.

settings; yet, between 2008 and 2017, only one student in a segregated setting met state high school graduation requirements.¹³⁵

Neither segregated nor integrated settings guarantee equal educational opportunities—they must both be buttressed by the appropriate supports, including proper funding. However, assuming the necessary services can be provided in integrated settings, which they often if not always can be, my claim is that integrated settings are: (1) more equal than segregated settings when historical injustices and biases are taken into account, and (2) likely to prompt both educational and psycho-social growth in ways that cannot be achieved as robustly in segregated settings.

It is moreover important to note that the integration presumption is just that—a presumption. It can be overridden in the minority of cases in which students can receive no educational or social benefit from mainstreaming principles. I would suggest, however, that these cases are probably rare, as empirical literature has extensively documented the effects of integration on educational progress, social development, and self-esteem for students with disabilities (*See e.g.* Ryndak, Jackson, and White 2013; Sauer and Jorgenson 2016; Helmstetter 1988; Fisher and Meyer 2002). For example, recent studies have demonstrated that students who spend more time in integrated settings have higher test scores in reading and mathematics than students who spend most of their time in segregated settings (Wagoner and Blockerby 2004; Blockorby 2007). That said,

¹³⁵ See Mario Koran (2019), “The California city where students with disabilities are 'segregated'”, *The Guardian*. Available at: <https://www.theguardian.com/us-news/2019/sep/19/sacramento-california-school-segregation-disabled-lawsuit>.

the purpose of this chapter is to provide a theoretical lens through which to criticize decisions such as *Roncker* rather than a thorough review of the empirical evidence in favor of integration. By reframing the problem as naïve integrationism rather than integrationism more generally, it is possible to transcend the binary debate between integrated vs. segregated settings. This will allow the conversation surrounding mainstreaming to proceed to a more nuanced discussion that interrogates the failures of some mainstreaming principles while still maintaining that integration is a constituent feature of substantive equality for people with disabilities.

Fortunately, the Supreme Court has shown signs of moving away from the minimalist standards set forth by *Rowley*. In the sections that follow, I discuss steps that have been taken to mitigate or overturn the ill effects of *Rowley* (depending on which commentator you believe). I then discuss why such steps might not necessarily be fruitful. I conclude by discussing disability advocates' attempts to hold school districts accountable for providing robust community services by leveraging the Supreme Court's holding in *Olmstead*.

3. *Andrew F. and Fry*: The Supreme Court Steps Away from Naïve Integrationism

In recent years, the Supreme Court has taken steps to move beyond the standards set by *Rowley*, and according to some commentators, has fully overturned *Rowley* in a series of two decisions issued in the 2016-17 Supreme Court term (Colker 2017)—

*Endrew F. v. Douglas County School District*¹³⁶ and *Fry v. Napoleon Community Schools*.¹³⁷

3.1 *Endrew F. and “Appropriately Ambitious” Goals*

Endrew F. is an autistic child who had received annual IEPs from the Douglas County School District from preschool to fourth grade. His parents became concerned around fourth grade that his progress had stalled and therefore appealed the school district’s IEP plan for his fifth-grade year, as it gave him roughly the same supports he had previously been provided.¹³⁸ Because the school refused to provide Endrew F. with additional, more intensive services, the parents removed him from public schools and enrolled him in a specialized private school, where it is alleged that he progressed substantially. The parents then sought reimbursement from the school district for the placement by appealing Endrew F.’s IEP.¹³⁹ Both the District Court and the Tenth Circuit denied their requests for reimbursement, with the Tenth Circuit interpreting *Rowley* to mean that schools need only be “reasonably calculated” to provide students with “*de minimis*” educational benefits.¹⁴⁰ The Tenth Circuit’s ruling, it could be said, upheld the principles of naïve integrationism in its interpretation of *Rowley*—it required that Endrew

¹³⁶ 137 S. Ct. 988 (2017).

¹³⁷ 137 S. Ct. 743 (2017).

¹³⁸ *Endrew F.*, 137 S. Ct. at 991.

¹³⁹ *Id.*

¹⁴⁰ *Endrew F. v. Douglas Cty. Sch. Dist. Re-1*, 798 F.3d 1329, 1338 (10th Cir. 2015)

F. be educated in a public school setting without the resources necessary to enable him to make academic progress.

Many education advocates saw *Endrew F.* as a chance for the Supreme Court to revisit and overturn the principles espoused in *Rowley*. For example, an amicus brief written by the Bazelon Center and former Department of Education Officials suggested that: (1) educational methods have become more sophisticated since *Rowley*, and (2) the IDEA has changed since *Rowley*, such that the standards it espouses are no longer appropriate for students with disabilities.¹⁴¹ The amicus brief poignantly argued:

No one would question that “appropriate” treatment for tuberculosis changed dramatically with the development of antibiotics. Given the improvements in teaching methods and assistive technologies, it is realistic and therefore appropriate to set high expectations and high achievement goals for students with disabilities.¹⁴²

Although the Supreme Court ultimately did not overturn the primary holding of *Rowley* for students performing at grade level, disability organizations such as the Bazelon Center hailed the decision as “a significant step forward for students with disabilities and their families” on the basis that it provides for a much more demanding standard than

¹⁴¹ Brief of Former Officials of the U.S. Department of Education as Amicus Curiae in Support of Petitioner at 7-10, *Endrew F. v. Douglas Cty. Sch. Dist.* Re-1, 132 S. Ct. 988 (2017) (No. 15-827).

¹⁴² *Id.* at 7.

lower courts have typically required when applying *Rowley*'s analysis to cases involving students who might not be performing at grade level.

The Supreme Court did maintain that the ways in which *Rowley* has been applied by lower courts are wholly inappropriate for students who are not performing at and arguably cannot perform at grade level—which includes many students with disabilities. In a unanimous decision, the Court held that a student's "educational program must be *appropriately ambitious* in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom."¹⁴³ Students must be enabled to "make progress"—not merely achieve some nebulous educational benefit.¹⁴⁴ This holding overturned the Tenth Circuit's ruling,¹⁴⁵ and remanded the case to the District Court for further proceedings to determine whether Andrew F.'s IEP enabled him to make progress toward "appropriately ambitious" goals. The District Court upon remand found that: "the April 2010 IEP offered to [Andrew F.] by the District in this case was insufficient to create an educational plan that was reasonably calculated to enable Petitioner to make progress, even in light of his unique circumstances, based on the continued pattern of unambitious goals and objectives of his prior IEPs."¹⁴⁶ The parents

¹⁴³ *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017) (*emphasis added*).

¹⁴⁴ *Id.*

¹⁴⁵ Rather ironically penned by now-Supreme Court Justice Neil Gorsuch.

¹⁴⁶ *Andrew F. v. Douglas Cty. Sch. Dist.*, 290 F. Supp. 3d 1175, 1183 (D. Colo. 2018)

were therefore awarded damages in the amount the parents paid to send Andrew F. to the private school which provided more intensive services.

While *Andrew F.* is not an example where a student benefited from public education, it is easy to imagine that had he been provided intensive behavioral supports in an integrated setting, he would have benefitted from them. The parents' concern was not the environment in which he was placed but rather the services that Andrew F. was being provided (or lack thereof). Intensive behavioral services in the form of paraprofessional assistance, counseling and therapy, and other behavioral interventions are routinely offered in integrated settings. However, the school district chose not to provide them.

The result for Andrew, however, is not the most important result from this case. Because of the precedent set by *Andrew F.*, students with disabilities, their parents, and advocacy organizations across the country have been equipped with the jurisprudential tools to demand “appropriately ambitious” goals not “*de minimis*” progress. For example, the National Youth Law Center, the Council of Parents Attorneys and Advocates (COPAA), the Bazelon Center for Mental Health Law, and Disability Rights Oregon have challenged the state of Oregon's practice of providing shortened school days to students under the standards set forth by *Andrew F.*¹⁴⁷

Because *Rowley* is still good law for students who are achieving at grade-level, naïve integrationism in some ways is still the law that governs the IDEA. However, for

¹⁴⁷ See “Federal Lawsuit: Oregon Failing to Ensure that All Children Can Attend a Full Day of School,” Jan. 25 2019. Available at: <http://www.bazelon.org/wp-content/uploads/2019/03/press-release-version-for-Bazelon-website.pdf>.

students who are not achieving at grade-level, courts can no longer accept nebulous, *de minimis* educational benefits as being sufficient to constitute an IEP. Rather, students with disabilities must be provided with the requisite opportunities to achieve real academic progress in integrated settings as provided for by the IDEA.

3.2 *Beyond the IDEA: Fry v. Napoleon Community Schools*

Although *Endrew F.* was groundbreaking precedent, it did not overturn *Rowley*. Fundamentally, under the IDEA, students are not entitled to equal educational opportunity or progress. The IDEA is “simply not an anti-discrimination statute,” and nothing about the holding in *Endrew F.* changes that.¹⁴⁸ However, a more complicated but arguably more groundbreaking decision was issued later in the Supreme Court’s term in *Fry*.¹⁴⁹

The central tension resolved by *Fry* was between §1415(l) of the IDEA and the section’s requirement that suits brought that seek relief available under the IDEA first exhaust the IDEA’s administrative procedures. §1415(l) provides that nothing in the IDEA “restrict[s] or limit[s] the rights [or] remedies” provided by other federal laws, particularly antidiscrimination statutes, for children with disabilities; however, if students must first exhaust the IDEA’s administrative procedures, (1) bringing ADA claims becomes cumbersome, and (2) plaintiffs are frequently denied damages under other civil

¹⁴⁸ *Ellenberg v. N.M. Military Inst.*, 478 F.3d 1262 (10th Cir. 2007)

¹⁴⁹ 137 S. Ct. 743 (2017).

rights bills, like the ADA and §504 of the Rehabilitation Act, because “appropriate” relief has already been provided under the IDEA.

The Supreme Court in *Smith v. Robinson*¹⁵⁰ had previously held that where parents sought “virtually identical” claims under the ADA and §504 of the Rehabilitation Act as the relief available under the IDEA, the IDEA foreclosed the additional claims. In other words, the IDEA became the sole vehicle through which students could claim disability-related protections from schools. However, Congress overturned *Smith* in a provision of the IDEA by adding the exhaustion requirement in §1451(l). The first half of §1415(l) reaffirms that the ADA and §504 of the Rehabilitation Act are “separate vehicles” that are “no less integral than the IDEA ‘for ensuring the rights of handicapped children.’”¹⁵¹

In *Fry*, the school district denied Ehlana Fry, a student with cerebral palsy’s, request to bring her trained service dog, a goldendoodle named Wonder, to school with her. Wonder met the ADA’s definition of a trained service animal, because he was trained to perform tasks for her. In particular, Wonder aided Ehlana by: “retrieving dropped items, helping her balance when she uses her walker, opening and closing doors, turning on and off lights, helping her take off her coat, [and] helping her transfer to and from the toilet.”¹⁵² Ehlana’s existing IEP provided for a human aid who provided one-on-

¹⁵⁰ 468 U.S. 992, 994 (1984).

¹⁵¹ *Fry*, 137 S. Ct. at 746.

¹⁵² *Id.* at 750.

one support for Ehlena throughout the day—therefore, Wonder was superfluous according to school officials.¹⁵³

The Frys subsequently removed Ehlena from school and began to homeschool her. They also filed a complaint with the U.S. Department of Education’s Office for Civil Rights (OCR), raising claims under Title II of the ADA and §504 of the Rehabilitation Act. The OCR agreed, explaining that under these statutes, schools are obligated to go beyond merely providing educational services: “[a] school could offer a FAPE to a child with a disability but still run afoul of the laws’ ban on discrimination.”¹⁵⁴ The OCR findings stated that the school could have satisfied FAPE through the use of a human aide; however, anti-discrimination laws required school officials, as state actors, to allow Wonder into the classroom. In other words, the ADA and §504 of the Rehabilitation Act require more than FAPE from schools in many cases. After the OCR findings, Ehlena’s school district said that Wonder could come to school with her; however, the Frys, worried about retaliation, found a different school in a different district where “administrators and teachers enthusiastically received both E.F. and Wonder.”¹⁵⁵ They then filed a suit in federal court seeking damages under the ADA and §504 of the Rehabilitation Act.

The District Court originally dismissed the Frys’ suit, holding that they were required to first exhaust the IDEA’s administrative procedures. The Sixth Circuit

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 751.

affirmed the ruling on similar grounds. The Sixth Circuit reasoned that the harms to Ehlena were generally “educational”—Wonder’s absence primarily harmed Ehlena’s independence and social confidence at school. Therefore, the IDEA’s exhaustion requirements applied, according to the divided panel.¹⁵⁶ It is important to note that before going to the Supreme Court, both parties in the litigation agreed that the Sixth Circuit’s standard went too far and potentially denied plaintiffs relief that is not available under the IDEA.¹⁵⁷

The Supreme Court held in favor of the Frys. The Court reasoned that the purpose of the IDEA is to ensure FAPE for all students with disabilities. Therefore, FAPE is the “yardstick” for “measuring the adequacy of the education that a school offers to a child with a disability.”¹⁵⁸ The administrative procedures under the IDEA test just that—whether a school has met its FAPE requirements. In a case that merely contests the denial of FAPE, plaintiffs cannot escape exhaustion requirements by bringing their suits under other statutes.¹⁵⁹ However, if plaintiffs are seeking accommodations, the denial of which creates harms independent and separate from FAPE denial, claims seeking such accommodations or damages for not providing them are not subject to the exhaustion requirement under §1415(l) of the IDEA.¹⁶⁰ The Court reasoned that this is because the

¹⁵⁶ *Id.* at 752.

¹⁵⁷ *Id.* at 753.

¹⁵⁸ *Fry*, 137 S. Ct. at 753.

¹⁵⁹ *Id.* at 754.

¹⁶⁰ *Id.*

sole duty of administrative officers in FAPE hearings is to determine that FAPE is being provided—they cannot provide any other form of relief.

That said, it is sometimes difficult for courts to tell when plaintiffs are seeking relief for the denial of FAPE and when she is seeking relief for something unrelated to FAPE. The Supreme Court held that it is necessary to look to the *substance* of a plaintiff's claims instead of the labels being used—that is to say the “gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading.”¹⁶¹ If a plaintiff is contesting the adequacy of educational benefits provided, then that plaintiff must first exhaust; however, if, as in Ehlena's case, the plaintiff is seeking relief that is not directly related to the adequacy of their education but rather a required accommodation, exhaustion is not required in a post-*Fry* world.

The opinion, written by Justice Kagan, outlined two questions that test whether the gravamen of a complaint is an IDEA claim or other type of anti-discrimination claim:

[C]ould the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library? And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?¹⁶²

Thus, the ruling in *Fry* is both narrow and broad simultaneously. For students, such as Amy Rowley, the holding in *Fry* might have permitted substantial relief. Amy's

¹⁶¹ *Id.* at 755.

¹⁶² *Id.* at 756.

accommodation request (a qualified ASL interpreter), as Colker (2017) notes, clearly falls within the purview of an accommodation that a public facility would be required to provide or that the school itself would have been required to provide to a visitor.

By clearly articulating that students are entitled to accommodations not provided by the IDEA, the Court in *Fry* transcended naïve integrationism somewhat. However, the Court tempered this move with dicta aimed at preventing inventive pleading that would make it so people could bring educational claims under the ADA or §504 of the Rehabilitation Act. Ironically, *Fry* overturned the actual holding of *Rowley*; however, it did not erase its legacy in IDEA litigation, as discussed in Section 3.1. Naïve integrationism remains the law of the land in education policy to the extent that courts follow the requirements of *Rowley*, *Endrew F.* and *Fry*.

4. The Promises of *Olmstead*

Although naïve integrationism is currently binding precedent, creative pleading by disability advocacy organization and cause lawyers has the potential to disrupt the pattern of naïve integrationism in federal disability education jurisprudence. This section discusses the ramifications of the Supreme Court's decision in *Olmstead v. L.C. by Zimring*¹⁶³ for disability jurisprudence going forward.

Olmstead, discussed in more detail in Chapter 2, is broadly viewed as a mechanism to challenge the unnecessary segregation and institutionalization of people with disabilities. It has been used to challenge the unnecessary institutionalization in

¹⁶³ 527 U.S. 581 (1999).

hospital settings but has also been used by advocates to challenge the placement of people with disabilities in sheltered workshops,¹⁶⁴ and is beginning to be used as a theoretical basis for challenging the needless segregation of students with disabilities in educational settings.¹⁶⁵ Title II of the ADA and therefore the *Olmstead* mandate arguably apply to schools, because they are state-run services, and Title II prohibits discrimination against qualified individuals with disabilities in all programs, activities, and services of public entities.

The Department of Justice in 2016 initiated a lawsuit against the Georgia Network for Educational and Therapeutic Support (GNETS), a segregated school system maintained for students with disabilities “who might otherwise require residential or other more restrictive placements.”¹⁶⁶ The schools, often maintained in Jim Crow-era buildings, do not provide students with grade-level-appropriate instruction and completely segregate students with disabilities from their non-disabled peers.¹⁶⁷ The Department of Justice relied entirely on an *Olmstead* theory, rather than any IDEA claims

¹⁶⁴ See *Lane v. Kitzhaber*, 283 F.R.D. 587 (D. Or. 2012).

¹⁶⁵ See e.g. Complaint for Equitable Relief, *J.N. v. Oregon Dep't of Educ.*, Case 6:19-cv-00096-AA (D. Or. 2019), (Doc. 1). Available at: <https://youthlaw.org/wp-content/uploads/2019/01/JN-v-Oregon-Department-of-Education-Final-Complaint-January-22-2019.pdf>.

¹⁶⁶ See Georgia Network for Educational and Therapeutic Support, Ga. Dep't Educ., <http://www.gadoe.org/Curriculum-Instruction-and-Assessment/Special-Education-Services/Pages/Georgia-Network-for-Special-Education-and-Supports.aspx> (last visited 10/5/2019).

¹⁶⁷ U.S. Department of Justice, Letter of Findings: RE: United States' Investigation of the Georgia Network for Educational and Therapeutic Support, D.J. No. 169-19-71 (July 15, 2015). Available at: https://www.ada.gov/olmstead/documents/gnets_lof.pdf.

in its complaint, claiming that: (1) GNETS programs are segregated, institutional settings, (2) the institutions operate to the detriment of integrated alternatives, (3) GNETS students are qualified to receive supports in more integrated settings and do not oppose the provision of these supports in more integrated settings, and (4) the state could reasonably modify these programs and provide them in more integrated, less restrictive settings.¹⁶⁸

Likewise, a complaint filed in early 2019 in the matter of *J.N. v. Oregon Department of Education* represents a novel legal approach to the unnecessary discipline and education of students using an *Olmstead* claim. The Complaint asserts that Oregon has violated Title II of the ADA and §504 of the Rehabilitation Act by unnecessarily shortening the school day of hundreds of students with disabilities.¹⁶⁹ Specifically, the Complaint argues that:

State agencies and officials thus may not permit practices that result in the unnecessary segregation of children with disabilities who can be educated effectively for the full day in school alongside their nondisabled peers if given needed services and supports. Congress enacted the ADA and Section 504 to directly address the discrimination that people with disabilities face when they are

¹⁶⁸See Complaint, *United States v. Georgia*, No. 1:16-cv-03088 (N.D. Ga. Aug. 23, 2016). Available at: <https://www.justice.gov/crt/file/887356/download>.

¹⁶⁹ Complaint at 11.

unnecessarily excluded from public life, such as the public-school system, due to their disabilities.¹⁷⁰

Moreover, the Complaint alleges that Title II of the ADA “prohibits the unnecessary segregation of individuals with disabilities and requires public entities to administer their services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”¹⁷¹

These claims are novel and arguably fall squarely within the *Olmstead* mandate. *Olmstead* requires any “public entity [to] administer . . . programs . . . in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”¹⁷² Moreover, “the treatment, services, and habilitation for a person with developmental disabilities . . . *should be* provided in the setting that is least restrictive of the person's personal liberty.”¹⁷³ These holdings combined mean that in cases in which qualified individuals with disabilities can be provided services in the community rather than in segregated settings, there is a legal presumption that these services ought to be provided in the community.

Educational entities, such as schools, are arguably subject to the *Olmstead* mandate. Schools, under the *Fry* and *Endrew F.* rulings, have the twin obligations of providing FAPE but also providing: (1) any services that must be provided in other places

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 43.

¹⁷² *Olmstead*, 527 U.S. at 587.

¹⁷³ *Id.* at 599.

of public accommodation (such as a hospital), or (2) that an adult in the school would be entitled to receive. Necessary behavioral supports to stay in the classroom arguably fall under the first category of services—as schools provide behavioral and counselling services, they are obliged via *Olmstead* to provide these services in the most integrated setting. To prevent exclusion of people with disabilities from public life, schools are required to make reasonable accommodations for students, which arguably includes behavioral supports. While shortened school days almost undoubtedly violate FAPE, they also fall awry of the *Olmstead* mandate to provide services in-place, rather than in segregated settings.

In this way, the ruling in *Fry* has substantially clarified schools' legal duties. Colker argues that the ADA and *Fry* may be used to argue for ASL interpreters for students who need them; however, I would argue that the *Fry* decision also has important consequences for cognitively disabled students as well. Behavioral supports may or may not be part and parcel of providing FAPE, but they arguably go beyond the bounds of FAPE. They are services that are: (1) provided by a public entity, and (2) enable the integration of students with disabilities in their respective communities. Title II of the ADA therefore creates much more demanding standards for schools than have been previously acknowledged by courts—and courts may be forced to acknowledge these more demanding standards in light of *Fry*.

Although it is possible to put forth a plausible legal theory mandating that schools provide these services in the most integrated setting and least restrictive environments, it is unclear whether courts will adopt this standard. The one court in which this issue has

been tried has given mixed signals regarding *Olmstead* theories as applied in an educational context, ultimately ruling in favor of defendants.

In 2015, a class of plaintiffs sued the City of Springfield MA *in S.S. ex rel. S.Y. v. City of Springfield*,¹⁷⁴ asserting that the City's decision to place students with disabilities in segregated, inferior schools rather than "neighborhood schools" ran afoul of Title II of the ADA's integration mandate. Although the Complaint acknowledged that these students were receiving FAPE, it claimed that they were receiving FAPE in a segregated setting, which violated the principles of *Olmstead* in the ways outlined above. Defendants filed a motion to dismiss based on the plaintiffs' failure to state a claim under Title II of the ADA; however, the District Court denied the motion on the grounds that that: "Plaintiffs have alleged that Defendants discriminated against S.S. in violation of Title II by placing S.S. in a segregated educational environment even though, had he been provided with reasonable accommodations, he could have been placed in a neighborhood school," and that "plaintiffs have adequately pled that the exclusion of S.S. from the neighborhood schools was by reason of his disability."¹⁷⁵

However, the District Court in this matter later ruled in favor of defendants, suggesting that the claims being alleged were IDEA claims masquerading as ADA claims.¹⁷⁶ The judge referenced the two questions asked in *Fry*—whether similar services would need to be provided by other public entities, and whether an adult at the school

¹⁷⁴ 146 F. Supp. 3d 414 (D. Mass. 2015).

¹⁷⁵ *Id.* at 416.

¹⁷⁶ *Id.*

could petition for the same services to be provided. The judge in his ruling reasoned that: “Plaintiffs assert their case is an ‘equal access’ case, rather than one seeking FAPE, yet when these two hypotheticals are asked of the ADA claim in this case, the answer to both is clearly no.”¹⁷⁷ Because of this, the Court found that plaintiffs needed to exhaust the procedures provided by the IDEA.

However, it is important to note that this holding was limited to the specific circumstances of this case—the Court was initially sympathetic to the argument that there might have been a gap between FAPE and the ADA in terms of what Springfield schools were required to provide. However, the named plaintiff dropped out of the case, leaving only the associational plaintiffs—organizations that represent people with disabilities rather than individual plaintiffs with disabilities.¹⁷⁸ It is unclear what the Court would have held had the case involved both named, individual plaintiffs in addition to associational plaintiffs.

Nonetheless, the question of whether *Olmstead* can be reasonably applied to educational contexts is a live one. In many of the cases where the theories have been raised, there have been settlement agreements. Therefore, precedent does not yet exist to confirm or deny *Olmstead*’s application in a K-12 context. However, based on the arguments made above, it seems likely that courts will hold schools accountable via not only the IDEA but also the ADA in future. This has significant consequences for the

¹⁷⁷ *S.S. v. City of Springfield*, 332 F. Supp. 3d 367, 377 (D. Mass. 2018)

¹⁷⁸ *Id.* at 378.

future of naïve integrationism—*Olmstead* is a far more robust ruling than any of the previous IDEA-based precedent. It requires the provision of adequate services to enable people to flourish in community contexts and therefore might provide a way for courts to transcend naïve integrationism without abandoning IDEA-based precedent.

5. Conclusion

This chapter has documented the history of naïve integrationism in education jurisprudence. As argued, it seems difficult, if not impossible, to separate the mandates of the IDEA from naïve integrationism. The IDEA requires students to be integrated insofar as possible; however, because the IDEA is not an anti-discrimination bill, it does not require that students receive the supports that they might need to flourish in integrated settings. Therefore, while *Endrew F.* means that the standard in IDEA cases is no longer *de minimis*, the standard still fails to achieve sufficiently ambitious goals for students like Amy Rowley who might be high-achieving students yet held back by schools' failures to accommodate their disabilities. However, this chapter has also revealed a promising way forward through the *Olmstead* mandate. Because *Olmstead* requires that all public entities, including schools, take sweeping steps to end the unnecessary segregation of students with disabilities, it seems likely that *Olmstead* litigation could address some of the gaps between school districts' obligations to provide FAPE and the services that students with disabilities need to actually flourish in integrated settings.

How might the cases of Amy Rowley and Neill Roncker have been decided if the tests implemented by *Fry* and *Endrew F.* been applied? It seems reasonable to assume that in a post-*Fry* world, Amy Rowley would have received the accommodations she

requested, just as any adult employee or visitor of the school would have been entitled to an ASL interpreter. However, the case of Neill Roncker is less clear. Under *Fry*'s framework, a meaningful gap between the provision of FAPE and the supports that the ADA requires means that students like Neill would be entitled to receive the necessary community supports in an integrated setting insofar as possible. Moreover, as I have argued, the *Olmstead* mandate means that segregated schools might run afoul of Title II of the ADA. Therefore, it is more likely that the intensive services that Neill needed to make educational progress would have been provided in an integrated school, even if he had been in a segregated classroom.

Why does this matter? Why push to integrate students? Is disability dissimilar to gender, where segregated colleges have proven to be effective ways to educate young women? It is true that students can make academic and social progress in segregated environments. However, the odds are stacked against disabled students who are placed in completely segregated settings. First, there is a risk of stereotyping and role segregation. Students who grow up in segregated settings are not given the opportunity to interact on an equal basis with their peers and therefore cannot decide whether they would like to in the future. Whereas there is little doubt that women educated in sex-segregated schools will go on to join an integrated workforce, the same expectations do not exist for disabled students. State-sanctioned integration, insofar as possible, therefore allows maximal choice as disabled youth proceed into adulthood. Moreover, segregated services deprive students of the ability to interact with their peers—and therefore are arguably less suited to students' social development. The current narrative regarding education presumes that

disabled children cannot simultaneously reap the social benefits of integration and the educational supports provided in segregated settings—but what if they could? What if the only reason students fail to achieve academically in integrated settings is the lack of disability-specific services? Disability-specific services are vital government services and ought to be provided in either segregated or integrated settings. However, a preference toward segregated settings: (1) sets the expectation that segregation is a normal part of being disabled, and (2) denies disabled students many of the social and extracurricular benefits associated with being in a mainstreamed classroom.

This chapter supports the premise that people with disabilities should be integrated insofar as possible. Far from detracting from substantive equality, the integration presumption is a vital component of substantive equality. Integrated schools do not guarantee equality; however, separate schools are not fundamentally equal either. The problems that commentators like Colker have raised should be addressed by more thorough and substantive attempts to integrate students properly rather than placing them in segregated settings. The problem currently plaguing the American educational system is naïve integrationism rather than the integration presumption itself. Students can and should be served in the most integrated setting and least restrictive environment possible, and the theories advanced by *Olmstead* litigation in the educational context provide a

glimpse at a promising way to meaningfully reform the special education system through systematic, strategic legal action.

Chapter 4: A Way Forward Toward Integrated Employment

“In the workshop, they are supposed to help you get out and get a real job—but they don’t. They always say I’m ‘not ready’—but I am.”

Peggy Carney (member of Speaking for Ourselves)

1. Introduction

Poverty and disability are endogenous—poverty causes disability, and the structural injustices associated with disability cause poverty. Disabled people are approximately twelve per cent of the population but make up over half of American citizens living in long-term poverty (NCD 2017). The introduction to this project discussed some of the reasons for this—disabled people are deterred from working by the very programs through which they fund their existence (and their healthcare services). Moreover, when disabled people enter the workplace, they are frequently role stereotyped. Frequently, disabled people are placed in “sheltered workshops” without their consent, where they are paid subminimum wage.

Poverty is a major barrier to community integration for disabled people, and therefore, attention must be paid to the laws and policies that perpetuate impoverishment. This Chapter argues that the fault is largely in the structure of our employment programs. Instead of incentivizing competitive, integrated employment and protecting disabled employees, our incentive structures deter people from working. Moreover, once disabled people enter the workplace, they frequently lack the necessary supports and are not served by the civil rights laws that are supposed to protect them. This Chapter makes three main arguments: (1) The Americans with Disabilities Act (ADA), especially the

Title I employment mandate, reinforces naïve integrationism in the field of employment; (2) The *Olmstead* integration mandate has been successful in ending one employment practice that has historically harmed disabled people—sheltered workshops; and (3) the *Olmstead* mandate is itself insufficient to create employment opportunities—systemic policy changes in the spirit of *Olmstead* must be taken to remedy disability discrimination in the workplace.

This Chapter begins by arguing that the structure of Title I of the ADA (and the ADAAA) reinforces naïve integrationism. Specifically, Title I requires that plaintiffs prove that they are disabled but not “too disabled.” Moreover, courts have introduced strict requirements on what constitutes a reasonable accommodation. Next, this Chapter also argues that the ADA’s integration mandate has been successful in ending one employment practice that has historically harmed disabled people—sheltered workshops. Therefore, this Chapter argues that there is a tension within the ADA—while it is a tool of naïve integrationism in its employment provisions, it transcends those limitations to some extent through the integration mandate. Finally, this Chapter concludes by discussing emerging policy alternatives that could mitigate some of the problems that disabled people face in the workplace.

2. Title I of the ADA: Naïve Integrationism in the Text of the ADA

2.1 A “windfall for defendants”

The Americans with Disabilities Act’s relationship with employment outcomes for disabled people has been fraught. The bill was hailed as “one of the most formative pieces of American social policy legislation in the 20th Century” (NCD 1997)—in part,

because of its potential to increase the ability of disabled people to participate in competitive, integrated employment. Yet, the ADA has not had these outcomes. During the period following the passage of the ADA, the employment rate for disabled people remained stagnant at best (Burkhauser and Stapleton 2004), with some scholars even finding that the ADA produced worse employment outcomes for disabled persons (Acemoglu and Angrist 2001).¹⁷⁹ Moreover, prior to the passage of the ADA Amendments Act of 2008 (ADAAA), plaintiffs lost Title I cases brought under the ADA at alarming rates. One study found that plaintiffs alleging employment discrimination under Title I of the ADA lost their cases 97 per cent of the time (Allbright 2010). A staggering proportion of these plaintiffs failed to advance past summary judgment, a stage at which judges can rule in favor of one party and against the other without a formal trial (Colker 1999). According to Bagenstos (2009), before the passage of the ADAAA, the only plaintiffs who fared worse in courts than disabled employees were prisoners, who were frequently not represented by counsel. Most of these early losses in court were attributed to overly-restrictive judicial interpretations of what it means to be a person with a disability under the Act in a series of cases known in the literature as the *Sutton*

¹⁷⁹ Many scholars have also disputed these results (*See e.g.* Kruse and Schur 2003). That said, many like Durlak (2017), and myself, view the socio-legal effects of the ADA to be far more complicated and expansive than merely reducing the unemployment rate. The law is slow to change culture; however, it is arguable that the ADA has instilled more positive workplace expectations and improved outcomes among employees with disabilities. Asking a piece of civil rights legislation to reduce unemployment might not be the right outcome to measure—this is why this project finds the court outcomes much more troubling.

Trilogy,¹⁸⁰ as well as the Court's subsequent ruling such as *Toyota v. Williams*.¹⁸¹ No plaintiff who has sued over disability-related employment discrimination has ever been successful in front of the Supreme Court (Stein et al. 2014).

After the passage of the ADAAA, in which Congress formally superseded the *Sutton Trilogy* and cautioned against overly-restrictive interpretations of what it means to be a person with a disability, preliminary data suggests that more plaintiffs are surviving summary judgment. More courts are also ruling on the second element of a *prima facie* case under the ADA—whether the plaintiff is qualified to do their job (Befort 2013).¹⁸² However, now, plaintiffs are struggling to prove the second prong of a *prima facie* case—in a stroke of irony, courts are now finding that disabled plaintiffs are not qualified to perform their essential job functions (Befort 2013).¹⁸³ This is because the ADAAA does not alter the fundamental structural features of the ADA. That said, studies on the ADAAA's effects are much more limited than initial studies on the ADA, in part,

¹⁸⁰ The trilogy of cases includes: *Sutton v. United Air Lines*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); *Albertsons v. Kirkingburg* 527 U.S. 555 (1999).

¹⁸¹ 534 U.S. 184 (2002).

¹⁸² A *prima facie* employment case under the ADA requires: (1) the plaintiff is a person with a disability, (2) the plaintiff is qualified to perform essential job functions, and (3) that the plaintiff suffered an adverse employment action. The burden then shifts to the employer to demonstrate a non-discriminatory reason for the action. If the employer does that, the plaintiff must then show that the employer's proffered reason is pretext for discrimination.

¹⁸³ Indeed, the evidence that many plaintiffs must produce in order to show that they face "substantial limitation[s]" when performing a "major life activity" can be used to show that they are not qualified to do their jobs (NCD 2004).

because the ADAAA does not apply retroactively, and litigation has been slowly making its way through the federal court system.

The Act has been called a “windfall for defendants” (Colker 1999). This Chapter argues that despite the best efforts of activists, Congress and the federal courts both have interpreted the ADA from a lens that reinforces naïve integrationism. Both presumed that a simple piece of anti-discrimination legislation would be suitable to stop the structural inequalities that disabled people face in the workforce, not acknowledging that the problems are much more profound.

2.1 The Sutton Trilogy, Williams, and *Judicial Backlash*

Conventional wisdom suggests that *Sutton* is where ADA employment litigation started to “go wrong,” so to speak (*See* Burgdorf 1997, Mayerson 1997, Diller 2000). Even scholars who do not think the judiciary was necessarily hostile to the ADA attribute early litigation losses for Title I plaintiffs to the precedent set by *Sutton* and *Williams* (*See* Bagenstos 2009). Before this holding, the disability community had a win in the Supreme Court regarding the definition of disability in *Bragdon v. Abbott*,¹⁸⁴ where the Court held that asymptomatic HIV constituted a disability. However, *Sutton* and *Williams* raised the threshold for proving the disability prong of the ADA. Therefore, this section will begin by discussing the early precedent set by these cases. Because these cases have subsequently been superseded by the ADAAA, I will not spend a significant amount of

¹⁸⁴ 524 U.S. 624 (1998).

time discussing them—I rather use them to provide a backdrop against which to argue that Title I of both the ADA and ADAAA reinforce naïve integrationism.

The complaint in *Sutton* was brought by two twin sisters who had severe myopia (otherwise known as nearsightedness). The petitioners’ uncorrected vision was either 20/200 or 20/400, depending on which eye was measured. Therefore, without corrective lenses, the sisters could not conduct many “major life activities” as prescribed by the ADA. However, the sisters both wore glasses to correct their vision to 20/20 that allowed them to “function identically to individuals without a similar impairment.”¹⁸⁵ In 1992, the sisters applied to be commercial airline pilots at United Airlines. Both sisters met the requirements regarding age, education, and experience, and both were invited to interview with the company. However, during their interviews, they were both told that the airline had made a mistake—the sisters did not meet United Airlines’ minimum vision requirement, which required 20/100 or better vision, uncorrected. United Airlines did not offer either of them a position.

Both sisters sued. They alleged United Airlines discriminated against them either: (1) based on their disability, or (2) because United Airlines regarded them as having a disability, both of which they alleged violate the ADA.¹⁸⁶ Their suit alleged that the first element of a *prima facie* case under the ADA—whether the plaintiff has a disability—should be determined without regard to corrective measures. The EEOC “Interpretive

¹⁸⁵ *Sutton*, 527 U.S. at 475.

¹⁸⁶ *Id.* at 476.

Guidance” at the time maintained that corrective measures were irrelevant to determining disability status.¹⁸⁷ However, United Airlines argued that an impairment is not a substantial limitation on a major life activity if it has been corrected.¹⁸⁸

The Supreme Court held that because the sisters were not “substantially limited” in any major life activities (because their vision was corrected), they were not disabled under the ADA.¹⁸⁹ Notably, the activity of work required an unusually high threshold of impairment per the *Sutton* Court. To claim that a plaintiff is “substantially limited” in performing the major life activity of “working,” the *Sutton* Court reasoned that a person must be substantially restricted in their ability to perform a “class of jobs” or a “broad range of jobs in various classes.”¹⁹⁰ The inability to perform a singular job was not a substantial limitation on the major life activity of working, according to the *Sutton* Court. Therefore, the sisters’ disqualification as pilots did not constitute a “substantial limitation” on the “major life activity” of “working.”

In a concurring opinion, Ruth Bader Ginsburg reasoned that the ADA was not intended to encompass such a wide variety of individuals. She suggested that

[P]ersons whose uncorrected eyesight is poor, or who rely on daily medication for their well-being, can be found in every social and economic class; they do not

¹⁸⁷ *Id.* at 480.

¹⁸⁸ *Id.* at 481.

¹⁸⁹ *Id.* at 489-91.

¹⁹⁰ *Id.* at 491.

cluster among the politically powerless, nor do they coalesce as historical victims of discrimination.¹⁹¹

This reasoning reinforced the Court's underlying logic—that the ADA protected people who met some arbitrary threshold rendering them “disabled enough.” However, as many scholars and advocacy organizations noted, this heightened threshold created a catch-22 for disabled plaintiffs—the evidence that plaintiffs needed to provide to prove that they were disabled could be used to show they were not qualified to do their jobs (NCD 2004).

A few years later in *Toyota v. Williams*,¹⁹² the Court maintained the need to create a stringent legal test or “demanding standard” to determine who was disabled under the ADA. Williams had carpal tunnel syndrome, which affected her ability to work; however, the Court was hesitant to hold that “performing manual tasks” was to be considered a “major life activity.”¹⁹³ Manual tasks, Justice O'Connor reasoned, did not restrict Williams from “performing tasks that are of central importance to most people's daily lives.”¹⁹⁴ An impairment, the Court reasoned, was necessary but not sufficient to prove that someone was disabled under the ADA—the impairment must “*substantially* limit” a “major life activity.” Williams' carpal tunnel only prevented her from performing a subset of manual tasks, and therefore did not *substantially* limit her in performing major life activities. The Court pointed out that the Court of Appeals, in its decision,

¹⁹¹ *Sutton*, 527 U.S. at 494 (Ginsburg concurring).

¹⁹² 534 U.S. 184 (2002).

¹⁹³ *Id.* at 187.

¹⁹⁴ *Id.*

disregarded whether Williams could tend to her personal hygiene, perform household chores, bathe, and brush her teeth—all manual tasks that are *actually* (according to the Court) centrally important to people’s daily lives.¹⁹⁵ The Court reiterated the central logic of *Sutton*—that the ADA entitles a person to *a* job, not necessarily the role of their *choice*. Unless a person was limited in completing a broad range of tasks necessary for a broad range of professions, they were not considered disabled under early ADA jurisprudence.

Activists, advocates, legal scholars, and even members of Congress¹⁹⁶ were taken aback by the Supreme Court’s rulings in these cases.¹⁹⁷ They took action to protect future plaintiffs in the form of the ADAAA. However, some of the implications of these early cases included:

- A person whose disability was mitigated or controlled (e.g. by medication) was not considered disabled under the ADA.
- Work was not considered by courts to be a major life activity unless the plaintiff was prevented from performing a broad class of job-related tasks. Therefore,

¹⁹⁵ *Id.* at 201-202.

¹⁹⁶ Key congresspeople involved in the passage of the ADA filed an amicus brief to this effect in *Williams*.

¹⁹⁷ Of interest is the fact that none of the attorneys centrally involved in these cases were cause lawyers—indeed many of the lawyers were not even employment law experts according to a study conducted by Stein (2014). Many of these cases originated from local plaintiffs, and disability rights organizations did not become involved until the cases reached the appellate or Supreme Court level—at which point they could only serve as *amici*.

proving that a plaintiff was unable to work a particular job did not by itself establish a *prima facie* disability claim.

- The evidence that plaintiffs used to establish that they were disabled was often strong enough for employers to use that same evidence to suggest the plaintiff was unqualified to perform the essential functions of their job.

To date, no disabled person has ever been successful in bringing an employment discrimination claim argued before the Supreme Court since *Sutton*, despite the Court hearing six such cases (Stein 2014). This low win rate can be attributed to the Court's holdings in *Sutton* and *Williams*.

There are two general explanations given for the decisions in *Sutton* and *Williams*. One explanation is that the Court was lashing back against the dramatic expansion of civil rights brought on by the ADA (*See e.g.* Burgdorf 1997, Mayerson 1997, Diller 2000). Another is that tensions within the disability rights movement brought about a bill that treated disability as a protected class, allowing the courts to create high thresholds for class membership (*See* Bagenstos 2009). I reject the latter of these arguments, as well as the former to some degree. As I will argue in Subsection 2.3, the language of the Title I itself is primarily to blame. This language is not in any way the fault of disability activists; it was a path-dependent vestige of the wording in Section 504 of the Rehabilitation Act of 1973—language that made it into the bill with no debate and no legislative history. Indeed, no one knows who wrote this part of the legislation or why (Shapiro 1993; Fleischer and Zames 2001). The courts were certainly hostile to the ADA;

however, without the path-dependency of the statutory language surrounding disability, judges might not have been able to limit the ADA's scope as much as they did.

Before proceeding to the structural problems in Title I, however, it is necessary to discuss the ADA Amendments Act of 2008 and how it replicates the fundamental issues with Title I.

2.2 *"Fixing" the ADA: The Structure of the ADAAA*

In 2004, the National Council on Disability (NCD), a group of presidentially appointed movement advocates, released a policy briefing condemning *Sutton* and similar cases. This brief suggested that Courts had ignored existing case law on the Rehabilitation Act, undermined congressional intent, and interpreted the ADA in narrow and broadly incoherent ways. The report talked about the 'Catch-22' in which disabled plaintiffs found themselves:

[E]ither your condition is not serious enough to constitute a disability or it is too serious for you to be qualified. The end result is that it is a rare plaintiff who is in a position to challenge even the most egregious and outrageous discrimination involving a condition that can be mitigated.

As a result, the NCD included a draft bill in the publication, proposed to Congress as the ADA Restoration Act of 2007 (ADARA). The bill's language controversially eliminated 'substantial limitation[s] of one or more major life activities' from the definition of disability, defining disability instead in terms of having an impairment or a record of an impairment. It also prohibited courts from using mitigating measures as a justification for denying a person coverage under the ADA. Congress quickly abandoned the ADARA

due to a massive outcry from the business community and conservative think-tanks such as the Heritage Foundation. These groups thought the more expansive conception of disability might enact undue hardships on employers and “weaken the at-will employment doctrine that makes the American labor market so strong.”¹⁹⁸ Instead, Congress passed the ADA Amendments Act of 2008 (ADAAA) that does not structurally alter the definition of disability contained in the ADA. Rather, it clarifies legislative intent, suggesting that cases should focus more on whether a person has been discriminated against on the basis of a disability rather than the question of whether a person has a disability. It includes guidance that vastly expands upon the idea of ‘substantially limiting’ and ‘regarded as,’ as well as suggesting that mitigating measures should not be regarded as a reason that people should not receive ADA protections.

The ADAAA changes the definition of disability under the ADA in a few important ways. First, limitations do not need to be severe or significant for an impairment to “substantially limit” a “major life activity.” The Act expanded the definition of “major life activities” to include performing tasks such as manual tasks, walking, seeing, thinking, concentrating, bending, and communicating.¹⁹⁹ The ADAAA also expanded the definition of “major life activities” to include “the operation of major bodily functions.” For example, immuno-compromised individuals are now automatically included, as are people with neurological and mental health conditions. Moreover, an

¹⁹⁸ See the Heritage Foundation’s (2008) publication “The ADA Restoration Act: Defining Disability Down” for one such example of these criticisms.

¹⁹⁹ See 29 C.F.R. §1630.2(i) for more examples.

episodic impairment, such as epilepsy would be substantially limiting. Finally, only one major life activity needs to be substantially limited for a person to qualify for protection under the ADAAA.²⁰⁰ The ADAAA also strengthens the “regarded as” prong of the ADA, which prohibits employers from discriminating against people who have an actual or perceived impairment.²⁰¹

In these ways, the ADAAA provides an essential corrective and clarification of the legislative intent underlying the ADA. That said, it still leaves room for courts to ask questions about whether a person is disabled, depending on when they filed their claim, because it does not apply retroactively. Empirical studies suggest that courts are now choosing to include more people within the category of ‘disabled persons.’ However, these analyses are necessarily tentative and preliminary. The ADAAA does not retroactively grant expanded coverage to people who filed ADA claims before it went into effect. Therefore, litigation is just now making its way through the federal appellate system.

More problematically, the ADAAA did not address questions of qualification, meaning that it does not solve the problems traditionally faced by employees with intellectual, developmental, psycho-social, and psychiatric disabilities. These employees, even under the ADA as enacted, lost their cases because courts deemed them

²⁰⁰ For a more thorough summary of these changes, see *Notice of Rights Under the ADA Amendments Act of 2008 (ADAAA)*, EEOC-NVTA-0000-14, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (May 6, 2014), https://www.eeoc.gov/laws/types/adaaa_notice_of_rights.cfm.

²⁰¹ See *id.*

“unqualified” for their positions—they typically did not face the same problems showing that they were disabled. Because courts have so restrictively interpreted what it means to be a ‘qualified’ person with a disability, plaintiffs with such disabilities can still be expected to fare poorly in court, despite the attempts of the ADAAA to even the playing field for persons with disabilities. Indeed, before the passage of the ADAAA, two-thirds of mentally ill employees were found to be unqualified for their positions, instead of being found to be non-disabled (Hensel and Jones 2006). Courts have frequently not held mental qualifications to the same scrutiny as physical requirements for positions. Furthermore, changes to mental qualifications are often said to fundamentally alter the structure of the position in question, thereby circumventing requirements for reasonable accommodations in many cases. For example, job descriptions are often challenged on the basis that they require an employee to lift 20 pounds. In contrast, judges have been traditionally hesitant to make changes to job structures that might accommodate employees with psychiatric disabilities, such as reduced hours or a less stressful work environment. For example, *Tomlinson v. Wiggins*²⁰² specifically held that there is no guarantee under the ADA²⁰³ to a stress-free work environment, although reduced stress

²⁰² No. 12-CV-1050, 2013 U.S. Dist. LEXIS 69707 (W.D. Ark. May 16, 2013).

²⁰³ From this point, the ADA and the ADAAA will be used interchangeably, as it often is in present litigation.

levels allow employees with psychiatric disabilities to fulfill their job obligations to a higher caliber than they might be able to otherwise.

Therefore, it is predictable that many plaintiffs with psychiatric disabilities will be viewed as not disabled enough to trigger ADA protections or too disabled to receive protection under Title I. This is due to ‘underqualification.’ Therefore, the ADA, even as modified by the ADAAA, provides fewer protections for disabled employees than comparable equalities provisions in other countries.²⁰⁴

2.3 Naïve Integrationism and Title I of the ADA

As noted in Subsection 2.1, scholars have generally attributed the failure of plaintiffs in Title I litigation to either judicial backlash or tensions within the disability rights movement. It is my contention, however, that Title I of the ADA has been drafted in such a way that a naïve integrationist interpretation of the ADA’s employment provisions is virtually inevitable. This was due in large part to the somewhat random drafting of Section 504 of the Rehabilitation Act, rather than conscious choices on the part of movement elites, as suggested by Bagenstos (2009). Hostile courts certainly

²⁰⁴ The UK, for example, bypasses many of the questions related to qualifications by (a) a more robust construal of what constitutes reasonable accommodations, and (b) provisions requiring that employers not discriminate against employees based on symptoms of their illnesses. This has led to more charitable interpretations of non-discrimination employment law in tribunal cases involving mentally ill plaintiffs.

played a role; however, without restrictive statutory language, they would not have been able to damage the disability rights movement to the extent that they did.

The ADA, it is important to remember, was drafted by a council full of Reagan appointees (Shapiro 1993, 9). Nonetheless, the members of what would become the National Council on Disability drafted a sweeping civil rights bill. The definition of disability discrimination included in the original draft of the ADA was radical. It provided that:

Discrimination on the basis of handicap should be broadly construed to apply the requirements of the statute to all situations in which a person is subjected to unfair or unnecessary exclusion or disadvantage because of some mental or physical impairment, perceived impairment, or history of impairment... The nondiscrimination requirement should expressly include a duty to make reasonable accommodations, which should be defined as providing or modifying devices, services, or facilities, or changing practices or procedures in order to allow a particular person to participate in a particular program, activity, or job... In addition, *there should be a requirement of eliminating discriminatory qualifications standards, selection criteria, and eligibility requirements*, with a delineation of the standards and legal tests to be used to determine when such

qualifications, criteria, and requirements constitute discrimination (NCD 1986, *italics added*).

Justin Dart, one of the drafters, noted that the original bill was considered far too ambitious by both Bush and Reagan. Dart remembers:

We sent it over to the White House, and very shortly we got a call from somebody over there... And he said... ‘we have your draft of your policy *Toward Independence* and I have got halfway through the first chapter.’... And he said, “What in the world are you people thinking about up there? The President is not going to touch this with a ten-foot pole. This goes even farther than Kennedy” (Justin Dart qtd. in Pelka 2012, 432).

Because this interpretation of disability discrimination was considered too radical for the current political climate, the definition of disability that made it into the ADA as passed borrows heavily from the statutory language of Section 504 of the Rehabilitation Act. Section 504 defines disability as a “substantial limitation” of a “major life activity.” However, this was primarily a question of political necessity.

Movement activists, as well as sympathetic senators, decided to adopt the Section 504 definition of disability as a “substantial limitation” of a “major life activity.” It is important to note that although it had tangible consequences for disability rights and litigation, Section 504 of the Rehabilitation Act of 1973 passed with no congressional debate. Indeed, no one knows who initially drafted the legislative language or why (Shapiro 1993; Fleischer and Zames 2001). Because Section 504 formed the basis for disability being regarded as a civil right, it was adopted by the drafters of the ADA. It

was much easier to argue for merely extending Section 504 to cover the private sector in addition to the federal government than to draft an entirely different civil rights bill (NCD 1997).

This decision was not uncontroversial. Indeed, when the ADA was initially introduced, it sparked substantial disputes among disability activists. Senate staff members were “grilled for hours” by disabled persons who objected to the weaker version of the bill. Activist Bonnie O’Day remembers, “lots of people felt let down” (qtd. in NCD 1997). However, the disability rights community ultimately formed a coalition around the bill for fear that a competing Republican bill might effectively gut the ADA.

Naïve integrationism was therefore baked into the ADA because of the random decision of a Congressional staffer in the 1970s, about which there is no record or debate. This language and employment provisions of the ADA more generally perpetuate naïve integrationism in a few ways.

First, the requirement that employees be “qualified” for their positions creates a legal loophole frequently exploited by employers. Courts’ treatment of workers with psychiatric disabilities demonstrates this point. While psychiatrically disabled workers have generally been regarded as disabled by courts, they have always faced problems proving that they are qualified for their jobs (*See* Befort 2013). Two thirds of psychiatrically disabled employees were found unqualified for their positions prior to the passage of the ADA (Hensel and Jones 2006). Courts do not hold mental qualifications to the same level of scrutiny as physical requirements. Changes to mental qualifications are often considered fundamental alterations to the structure of the position—exempting

employers from providing accommodations. The courts' insistence that no right to a stress-free work environment exists is one example of this.²⁰⁵

One egregious abuse of the qualification provision in the ADA is the Fourth Circuit's holding in *Darcangelo v. Verizon Md. Inc.*²⁰⁶ Fran Darcangelo, a plaintiff with bipolar disorder, was terminated due to her disability. She worked for Verizon for over 20 years and had previously received accommodations, including time off to attend doctor's appointments. Verizon abruptly discontinued these accommodations despite their acknowledgements of her 'special condition.' She was furthermore targeted for disciplinary action at this point. Verizon alleged "concerns" with Darcangelo's work performance; however, all of the reported incidents had occurred more than four years prior to her disciplinary action. Darcangelo was terminated.

The Fourth Circuit, ironically citing evidence from Darcangelo's own psychiatrist, granted summary judgment to her employer on the basis that bipolar disorder had the potential to impair Darcangelo's judgment, an "essential qualification" for her job.²⁰⁷ Darcangelo had no complaints for four years prior to disciplinary action, and it was unclear that her judgment was presently impaired. She also had generally positive performance reviews. Nonetheless, because it was possible that her judgment

²⁰⁵ See e.g. *Tomlinson v. Wiggins*, No. 12-CV-1050, 2013 U.S. Dist. LEXIS 69707 (W.D. Ark. May 16, 2013).

²⁰⁶ 189 F. App'x 217 (4th Cir. 2006)

²⁰⁷ *Darcangelo v. Verizon Md., Inc.*, No.: WDQ-02-816, 2005 U.S. Dist. LEXIS 37660 at *9 (D. Md. June 7, 2005).

might be impaired by her disorder, she was not considered an “otherwise qualified individual with a disability.”²⁰⁸

This case is significant because of its underlying logic. First, disabled employees are held to higher scrutiny with regard to their “judgment,” despite lapses in judgement being in no way unique to people with bipolar disorder. Second, since “judgment” is ostensibly an essential qualification for any job, ranging from customer service to professional sports, the logic of this court decision would exempt any person with bipolar disorder from coverage under the ADA. The idea of an “otherwise qualified” disabled person therefore has been weaponized by the courts and, as a result, exacerbated naïve integrationism.

The other concept embedded in Title I that perpetuates naïve integrationism is the principle that accommodations need not be provided if they constitute an “undue hardship” or “fundamental alteration” to the job in question. Courts have generally not required employers to provide reasonable accommodations when they would either fundamentally alter a program or cause an undue hardship to the employer—leading courts to hold that many accommodations needed by employees with psychiatric disabilities are unreasonable. *Tomlinson v. Wiggins*,²⁰⁹ cited earlier, held that an employee requesting a less harsh management style from their boss was not a reasonable accommodation. The court reasoned that employees are not entitled to stress-free work

²⁰⁸ *Id.* at *10.

²⁰⁹ No. 12-CV-1050, 2013 U.S. Dist. LEXIS 69707 (W.D. Ark. May 16, 2013).

environments, or apparently even abuse-free ones.²¹⁰ Likewise, *Whalen v. City of Syracuse*²¹¹ held that a plaintiff who asked not to contact certain colleagues who triggered their depression and anxiety was asking for an unreasonable accommodation. *Schwarzkopf v. Brunswick Corp.*²¹² held that it was unreasonable for a psychiatrically disabled employee to request that he not be yelled at by his boss or colleagues. “Getting along with people” is viewed by many courts as an “essential feature” of virtually any job, and all of these functions are viewed to fall under the auspices of getting along with other people. *Prichard v. Dominguez*²¹³ for this reason notes an “overwhelming unanimity” of court opinions suggesting that it is unreasonable to transfer employees away from triggering, hostile, or otherwise undesirable bosses under the ADA.

Courts have likewise been hesitant to require other structural changes to work environments that might alleviate stress or triggers for employees with mental health conditions. For example, *Treanor v. MCI Telecomms. Corp.*²¹⁴ held that the ADA did not require employers to create part-time positions for employees suffering from depression, as did *Lamb v. Qualex*.²¹⁵ Courts likewise do not routinely require smaller modifications to employees’ schedules or hours to accommodate their illnesses. *Dorgan v. Suffolk*

²¹⁰ Unless, of course, another law applies, such as Title VII of the Civil Rights Act, which disallows abuse based upon race or sex.

²¹¹ No. 5:11-CV-0794 (LEK/TWD), 2014 U.S. Dist. LEXIS 95835 (N.D.N.Y. July 15, 2014)

²¹² 833 F. Supp. 2d 1106 (D. Minn. 2011).

²¹³ No. 3:05cv40/RV/MD, 2006 U.S. Dist. LEXIS 46607 (N.D. Fla. June 29, 2006).

²¹⁴ 200 F.3d 570 (8th Cir. 2000)

²¹⁵ 33 F. App'x 49 (4th Cir. 2002)

Community College,²¹⁶ for example, held that employers are not required to accommodate employees by modifying their schedules. The employee in question had bipolar disorder, which made it difficult for her to attend work during designated work hours. Employers are also not required to accommodate requests to work from home, even when the position would allow for it.

These cases suggest a fundamental hostility toward restructuring the workplace in ways that support workers with psychiatric disabilities. As opposed to a social understanding of disability, which puts the onus on employers to create an accommodating environment, courts have held that the responsibility for managing mental illness in the workplace falls solely upon employees. In the first instance, there is a difference between asking for a ‘stress-free’ work environment and an environment that minimizes potential triggers that might inhibit a mentally ill employee’s job performance. The idea that ‘getting along with people’ requires a disabled employee to tolerate a hostile work environment that undermines their mental well-being, but it does not impose reciprocal obligations on the part of managers to ensure that work environments are not hostile, seems to unfairly shift the onus of ‘getting along with people’ onto disabled employees without requiring employers to live up to similar standards. It is true that ‘getting along with people’ is an important part of many jobs; however, courts have defined ‘getting along with people’ in such a way that a disabled person who cannot cope

²¹⁶ No. 12-CV-0330 (SJF)(ARL), 2014 U.S. Dist. LEXIS 107850 (E.D.N.Y. Aug. 4, 2014)

with hostile work environments without their mental health suffering is at fault, while managers who create hostile work environments are not held to the same standards.

By nominally protecting individuals from discrimination on the basis of disability while simultaneously holding that people cannot display any symptoms of their disability in the performance of their jobs, the court system reinforces naïve integrationism. However, this is not entirely due to judicial hostility—the language of Title I itself requires that a person be “otherwise qualified,” that their accommodations be “reasonable” and that they not “fundamentally alter” the workplace in any way. In this way, Title I can claim to protect disabled workers against discrimination while simultaneously denying such protection to most disabled people. For this reason, many prominent activist groups have shifted attention away from employment discrimination cases and toward *Olmstead* litigation.²¹⁷

3. Innovative Uses of the Integration Mandate: A Way Forward

Title I of the ADA, for the reasons discussed above, does not seem to be a fruitful way to improve the integration of disabled people into competitive, integrated employment. However, activists’ attempts to end the segregation of disabled people into sheltered workshops have recently garnered attention. Notably, the United States District Court for the District of Oregon recently certified a class in *Lane v. Kitzhaber*²¹⁸ (now

²¹⁷ This is, of course, to the extent that they were involved in them to begin with. As previously mentioned, according to Stein (2014), none of the Supreme Court cases dealing with disability were actually brought by cause lawyers, or often even lawyers that had any real experience with disability law.

²¹⁸ 283 F.R.D. 587 (D. Or. 2012)

Lane v. Brown) of “all individuals in Oregon with intellectual or developmental disabilities who are in, or have been referred to, sheltered workshops” and “who are qualified for supported employment services.”²¹⁹ The complaint in this matter relied on the holding in *Olmstead* that disabled people should not be unnecessarily segregated and was joined by the United States Department of Justice’s Disability Rights Division.²²⁰

The suit was brought by eight individuals and United Cerebral Palsy of Oregon and Southwest Washington and sought injunctive relief under Title II of the ADA (the integration mandate). Specifically, Title II of the ADA prohibits public entities from discriminating against disabled persons. Unnecessary segregation, per *Olmstead*, constitutes discrimination by public entities. The regulations for Title II provide that the “most integrated setting appropriate” is “a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.”²²¹ The plaintiffs alleged that the state of Oregon violated Title II of the ADA by referring individuals in the state vocational rehabilitation system directly to sheltered workshops. Specifically, the Oregon Department of Human Services violated Title II of the ADA by

²¹⁹ *Id.* at *589.

²²⁰ See *Lane v. Brown*, DISABILITY RIGHTS OREGON (last accessed May 5, 2020), <https://droregon.org/lane-v-kitzhaber/>. See also United States’ Complaint in Intervention, *Lane v. Kitzhaber*, Case No. 3:12-cv-00138-ST (D. Or. 2012), https://www.ada.gov/olmstead/documents/lane_complaint.pdf.

²²¹ See *Lane v. Kitzhaber*, F.R.D. 587 at *590 (quoting 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.*, available at http://www.ada.gov/olmstead/q&a_olmstead.htm, citing [28 CFR Pt. 35, App. A \(2010\)](#)).

giving significantly more money to sheltered workshops than supported employment programs.²²² After closing the last institution for developmentally and intellectually disabled people in 2009, Oregon increased reliance on sheltered workshops and decreased the use of supported employment services.²²³ The District Court held that the class met the requirements for certification and had stated a valid claim upon which relief could be granted. In other words, the class fulfilled the requirements to move on in litigation. However, the matter was settled before it was litigated further.²²⁴ Nonetheless, the certification of this class was a first and has been cited in seven similar class certification decisions at the time of writing.²²⁵

The settlement agreement prioritized the creation and implementation of supported employment services for intellectually and developmentally disabled people in Oregon. As part of the agreement, Oregon agreed to reduce the number of individuals in sheltered workshops by nearly 50 per cent by June 30, 2022.²²⁶ Individuals will instead receive supported employment services based upon their “capabilities, choices, and strengths.”²²⁷ Through this settlement agreement, at least 4,900 people between the ages of 14 and 24 will receive employment services through the state, and at least half will

²²² *Id.* at *591.

²²³ *Id.*

²²⁴ See *Fact Sheet on Proposed Agreement over Oregon Supported Employment*, DISABILITY RIGHTS OREGON (Sept. 8, 2015), <https://droregon.org/wp-content/uploads/Oregon-9.8.15.pdf>.

²²⁵ According to a LexisNexis Shephard’s report.

²²⁶ See *Lane v. Brown: Frequently Asked Questions*, DISABILITY RIGHTS OREGON (Oct. 23, 2015), <https://droregon.org/lane-v-brown-frequently-asked-questions/>.

²²⁷ *Id.*

receive an individualized employment plan that will enable them to participate in competitive, integrated employment.²²⁸ The goal will be for these people to work in an integrated setting for at least 20 hours per week.²²⁹ Moreover, local educational agencies may not refer students to sheltered workshops, and activities at school will no longer be allowed to mimic sheltered workshops. Finally, the state of Oregon will give grants to existing sheltered workshop providers to expand their supported employment programs.²³⁰ This settlement agreement will be enforced by monitoring by the state, as well as Disability Rights Oregon and the United States Department of Justice.

This case demonstrates the power of the *Olmstead* integration mandate to create supported integration rather than naïve integrationism. Instead of merely closing sheltered workshops, this settlement agreement provides for services necessary for disabled people to participate in competitive, integrated employment. Moreover, because the District Court certified the class before the settlement agreement was reached, such precedent can be used as persuasive authority in other states where activists are pursuing similar litigation.

It is worth noting that the ADA does not explicitly ban sheltered workshops—indeed, it explicitly allows them to continue functioning (*See* Stefan 2010). This suggests a potential limitation of litigation as a strategy for producing *Olmstead* compliance. However, the overuse of sheltered workshops for people who could participate in

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

competitive, integrated employment undermines the integration mandate of *Olmstead*.²³¹ The ADA is therefore a double-edged sword for activists seeking to enhance employment rights for disabled people. On one hand, it can be an effective tool for deconstructing work silos and role segregation that have separated disabled people from their peers. This increases participatory parity by ensuring that disabled people can control the conditions under which they work, as well as earning at least the minimum wage (which is far from guaranteed in the status quo). However, Title I of the ADA, which explicitly focuses on employment, undermines participatory parity by failing to give adequate remedies to workers who have been discriminated against.

Because of the deficiencies of the ADA regarding employment, much of this change must happen at the systemic policy level. The work needed is not dissimilar to the alternatives to deinstitutionalization discussed in Chapter 2. States must initiate and implement supported employment programs. In the section that follows, I will set out some of the potential benefits of supported employment programs for disabled employees.

4. Policies that Support the Spirit of *Olmstead*

As established in the previous sections, employment-based litigation is not as promising as other court-based avenues for pursuing policy change. Therefore, it is important to address the policy context in which systemic change needs to happen.

²³¹ For a more thorough discussion of the pros and cons of sheltered workshops, see Chapter 1.

Overcoming naïve integrationism will not be accomplished through the courts alone. This section discusses some promising policy avenues for increasing competitive, integrated employment for disabled people.

4.1 The Role of State Vocational Rehabilitation Programs

Each state is federally required and funded to offer vocational rehabilitation services through a designated vocational rehabilitation agency—every state has one or two such agencies. In 2010, more than 1.4 million disabled individuals received services from vocational rehabilitation agencies (*See* Hyde, Honeycutt, and Stapleton 2014). Title I of the Rehabilitation Act of 1973 approves grants to states for vocational rehabilitation services, supported employment, independent living, and client assistance programs. Under Title I of the Rehabilitation Act, disabled people can receive services to help them pursue post-secondary education, employment, or other ways to live independently in the community. Services provided by vocational rehabilitation agencies differ between states but generally include services such as career counseling, medical services, training for jobs, and medical equipment that would enable people to pursue employment.²³² One study found a causal relationship between the availability of vocational rehabilitation services and applications for disability benefits. This study suggested that disabled individuals were more likely to apply for and to seek disability benefits in months that state agencies served a lower percentage of applicants or had a shorter waiting period before people received services (Hyde, Honeycutt, and Stapleton 2014). Other studies

²³² *See generally* 29 U.S.C. §§701-751.

have shown that increased vocational rehabilitation services can help people find and stay in competitive, integrated employment, because these services provide people with the supports they need to work effectively (*See e.g.* Chan et al. 2016). These findings suggest that vocational rehabilitation services can play a vital role in helping people find and maintain competitive, integrated employment.

How do vocational rehabilitation services do this? This section discusses the role of vocational rehabilitation services in allowing people to obtain and maintain employment, as well as discussing some innovative moves by state vocational rehabilitation agencies that have increased competitive, integrated employment among disabled people.

The goal of the Rehabilitation Act of 1973 as amended by the Workforce Innovation and Opportunity Act (WIOA)²³³ is “competitive, integrated employment,” defined as work that is performed on a full or part-time basis for which an individual is compensated at or above the minimum wage and is not less than the customary rate paid by the employer for similar work. This work must also be performed at a location in the community where disabled employees interact with other non-disabled employees. The work must also present appropriate opportunities for advancement. WIOA allows for “customized employment” for people with “significant disabilities” that tailor

²³³ *See* 29 USC §§ 3101-3361.

individualized support programs for those individuals. WIOA also creates opportunities for supported employment, discussed in the next subsection.²³⁴

Historically, the major problem with relying on state vocational rehabilitation services is that they are chronically underfunded. Agencies deal with this funding shortfall in different ways—some agencies serve fewer people more intensively, and others serve more people but provide less intensive services (*See* Hyde, Honeycutt, and Stapleton 2014). Generally, vocational rehabilitation programs have an “order of selection” process that prioritizes significantly disabled individuals over others (Ben-Shalom 2016). That said, WIOA amended the Rehabilitation Act to provide more funding for state vocational rehabilitation agencies and to expand the populations that such agencies can serve (*See* Ben-Shalom 2016). As a result, vocational rehabilitation agencies in light of WIOA might be a promising place to begin increasing integrated, competitive employment for workers with disabilities.

Rehabilitation programs do vary by state, but WIOA has increased many states’ capacities to serve populations that they have not historically served. For example, WIOA increased services for transition-age youth, workers who receive subminimum wages, as well as workers already in employment who are seeking to stay employed (Mann and Croake 2017). Mann and Croake (2017) found that after the passage of WIOA, half of applicants to state vocational rehabilitation services who were neither students nor paid

²³⁴ *See generally Resources and Strategies for Competitive Integrated Employment*, WINTAC (accessed May 5, 2020), <http://www.wintac.org/topic-areas/resources-and-strategies-for-competitive-integrated-employment>.

workers beforehand were employed after receiving vocational rehabilitation services, controlling for differences between state service provision. Three-quarters of people who were already employed were able to maintain their employment due to the more intensive service provision.

Vocational rehabilitation programs, especially in the wake of WIOA, have the potential to overcome some of the worst effects of naïve integrationism. Naïve integrationism would push for the closure of sheltered workshops and the end of subminimum wage positions without having a clear plan for what to do with these workers after they leave these settings. However, the amount of individualized support provided by state agencies in the wake of WIOA means that people leaving subminimum wage situations, even those who are severely disabled, qualify for intensive, personalized employment services that have already shown promise in improving employment outcomes. The next subsection will discuss one of the specific services vocational rehabilitation agencies can provide and the growing evidence base behind it.

4.2 Supported Employment

Workplace supports are important for disabled workers generally but are particularly important for psychiatrically, cognitively, intellectually, or psycho-socially disabled workers. For example, only one in five adults with schizophrenia work in competitive employment settings, and less than half are employed in any capacity (Chow 2014, 1126). Moreover, 61-85 per cent of working-age adults with psychiatric disabilities are not in the labor force, compared to 20 per cent of adults in the general population (Chow 2014, 1126). As a result, psychiatrically disabled individuals are more likely to

experience poverty (and poverty is likely to trigger psychiatric symptoms).²³⁵ Therefore, there has been a concerted effort in the disability policy literature to develop tools that allow such individuals to pursue competitive, integrated employment. One promising tool discussed and favored by the literature is supported employment.

Supported employment provides individualized supports to disabled people in competitive, integrated settings, earning competitive wages (*See* Stefan 2012). Although supported employment can take many forms, generally, supported employment services help disabled people identify, acquire, and maintain competitive, integrated employment. Generally, state vocational rehabilitation agencies work with employers directly to provide on-the-job support for disabled people, thus allowing disabled people to bypass sheltered workshops and volunteer experiences and enter the workforce directly.²³⁶ As opposed to traditional vocational rehabilitation models in which only 21 per cent of people receiving services find competitive jobs, 58 per cent of people receiving supported employment services find and maintain competitive, integrated employment in their

²³⁵ *See The CBHSQ Report*, SAMHSA (2016), https://www.samhsa.gov/data/sites/default/files/report_2720/Spotlight-2720.html.

²³⁶ *See Supported Employment: The Evidence-Based Practice*, OHIO SUPPORTED EMPLOYMENT COORDINATING CENTER OF EXCELLENCE (last accessed May 20, 2020), <https://www.centerforebp.case.edu/client-files/pdf/seoverview.pdf>.

communities.²³⁷ This is because supported employment provides coaching and support to people in real-time to complete their positions to the best of their abilities.

The driving rationale behind supported employment is that: (1) mental health consumers enjoy competitive integrated employment more than sheltered workshops, (2) competitive jobs reduce the stigma attached to mental illness, and (3) competitive, integrated employment promotes self-sufficiency and independence on the part of disabled people.²³⁸ Moreover, mental health consumers who work are more likely to report fewer symptoms and a higher quality of life than mental health consumers who do not work.²³⁹ Therefore, the provision of supports to stay in the workplace, such as employment specialists, job coaches and other resources, can help people live independently in their communities and participate on an equal basis with their non-disabled peers.²⁴⁰ These supports ought to and can be provided through state vocational

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ There is a criticism to be made that supported employment does not comport with the social model of disability and the civil rights approach to disability, because it focuses on the individual (*See* Weston 2002). I would respond that supported employment is perfectly in line with a civil rights-based approach to disability, because it promotes integration in settings where disabled people would otherwise be segregated. It promotes independence and lifts disabled people out of poverty more than e.g. receiving benefits and being subject to strict governmental surveillance.

rehabilitation programs—if funding were diverted from segregated programs to integrated programs, this would be possible to achieve.

What services does supported employment provide, and how does it achieve results for disabled workers? Generally, individualized placement and support is viewed as the most successful model of supported employment for psychiatrically disabled employees. Individualized placement and support entails supporting an individual in a rapid job search (as opposed to lengthy assessments, training, and counseling) followed by placement in a competitive employment setting. This employment is supplemented by unlimited in-work support by an employment specialist for both the employee and the employer.²⁴¹ By supporting both the employee and the employer, individualized placement and support allows both parties to come to an ideal consensus about the disabled employee's needs, capacities, and strengths, as well as allows for troubleshooting any problems that may arise during the course of the individual's employment. People are not restricted from participating in individualized placement and support based on their diagnoses, substance abuse history, symptoms, psychiatric

²⁴¹ See *What is IPS?*, IPS EMPLOYMENT CENTER (last accessed May 20, 2020), <https://ipsworks.org/index.php/what-is-ips/>.

hospitalizations, or involvement with the criminal justice system, to name a few factors.²⁴²

Supported employment, especially individualized placement and support, prevents people from being needlessly institutionalized or incarcerated by helping people stay integrated in their communities. Competitive, integrated employment also reduces mental health symptoms, as discussed previously. Some studies show that 60 per cent of people receiving individualized placement and support become employed (Salkever 2010), and people tend to maintain their employment when assessed at the 10-year mark after receiving supported employment services (Bond et al. 2008; Salyers et al. 2004). Moreover, studies have shown that individuals receiving individualized placement and support decrease their use of mental health services—one study found that disabled individuals receiving individualized placement and support decreased service use by 41 per cent in one year, with reduced inpatient hospitalizations and emergency room visits as well (Rogers et al. 1995).

Supported employment also decreases involvement with the criminal justice system. A study conducted in Washington State found that mental health consumers receiving supported employment were arrested less frequently than similarly situated people not receiving it (Fan et al. 2016). Furthermore, although finding employment is particularly difficult for people with criminal justice involvement, individuals receiving

²⁴² See *Diversion to What?*, BAZELON CENTER FOR MENTAL HEALTH LAW (2019), http://www.bazelon.org/wp-content/uploads/2019/09/Bazelon-Diversion-to-What-Essential-Services-Publication_September-2019.pdf.

individualized placement and support with a history of justice involvement fare far better in securing competitive, integrated employment than people receiving traditional vocational rehabilitation services.²⁴³

Given the role that supported employment plays in keeping people integrated in their communities and reducing incidence of psychiatric symptoms, litigating in favor of supported employment services seems to be a promising avenue for unraveling the negative effects of naïve integrationism. Supported employment programs demonstrate that most disabled people can participate in competitive, integrated employment, if they are given the support they need to do so effectively. Supported employment programs also bypass the problems with reasonable accommodations, the shortfalls of which will be discussed in the next section. In short, from both a systemic policy frame and a litigation frame, advocating for increased supported employment services seems necessary for achieving competitive, integrated employment for disabled people who want it.

4.3 The Role of Civil Rights Laws

Although supported employment is a powerful tool for reducing unemployment and poverty among disabled people, it is a necessary but insufficient tool for producing community integration in the field of employment. There is still a role for civil rights law in ensuring that disabled people have a fair opportunity to participate in the workplace,

²⁴³ See *Diversion to What?*, BAZELON CENTER FOR MENTAL HEALTH LAW (2019), http://www.bazelon.org/wp-content/uploads/2019/09/Bazelon-Diversion-to-What-Essential-Services-Publication_September-2019.pdf.

although that role has been somewhat circumscribed by courts. This is because programs like supported employment are the prerogative of individual employers, whereas every employer with more than 15 employees is bound by the ADA.

One of the pivotal provisions of the ADA is that employers are required to provide the reasonable accommodations necessary for disabled workers to perform their essential job functions. For example, one study conducted by Chow et al. (2014) discusses the employment effects of job accommodations for workers with disabilities, as well as their impact on workers drawing from social security disability benefits (SSI and SSDI). Controlling for a number of factors, individuals who received job accommodations worked nearly 8 hours more per month and worked 31 per cent longer. Moreover, each job accommodation provided by an employer decreased the risk of the employee being fired by nearly 13 per cent. This suggests that more robust enforcement of the ADA does have a role to play in allowing individuals to find work and keep competitive, integrated employment once they have it.

The main problem with this perspective is that courts have effectively gutted the reasonable accommodation provision of the ADA. One of the first problems with the ADA's reasonable accommodations provision is that it requires employees to self-disclose their disability to trigger legal protections, including the requirement to engage in the interactive process. However, disclosing disability increases the potential for prejudiced employers to discriminate against the disabled employee. This creates what the literature has called a "disclosure dilemma" (*See, e.g.,* Allen and Carlson 2003; Peterson et al. 2011). The disclosure dilemma is particularly acute for psychiatrically

disabled employees who more frequently face stigma when asking for accommodations (Peterson et al. 2011).²⁴⁴

Title I of the ADA also exempts employers from providing reasonable accommodations if provision of such accommodations would constitute an “undue hardship” on the employer.²⁴⁵ Existing case law does not extensively discuss what constitutes an undue hardship, but an undue hardship is generally viewed to be a fundamental alteration to the essential job functions—something it would be difficult or expensive for the employer to provide.²⁴⁶

Both the disclosure dilemma and the undue hardship provision have allowed employers refuse to accommodate disabled workers with impunity; however, the most problematic feature of Title I’s reasonable accommodation provision is the way that courts have interpreted the term “reasonable accommodation.” Although the ADA requires an accommodation to be effective,²⁴⁷ the ADA does not entitle an employee to her chosen accommodation—only an accommodation that a court would deem to be

²⁴⁴ The disclosure dilemma is exacerbated by the law’s general dismissal of the claims brought by psychiatrically disabled employees. Courts are hesitant to enforce the rights of employees with psychiatric disabilities, and therefore, these employees both open themselves up to stigma and have little means of recourse if they are discriminated against.

²⁴⁵ See 42 U.S.C. §§ 12111-12117 (2020).

²⁴⁶ See *Disability Discrimination*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Accessed May 20, 2020), <https://www.eeoc.gov/disability-discrimination>.

²⁴⁷ See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC-CVG-2003-1, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (2002).

“reasonable.”²⁴⁸ Specifically, “The ADA does not obligate an employer to provide a disabled employee every accommodation on his wishlist.”²⁴⁹ Despite the employer’s duty to offer a reasonable accommodation, “an employee cannot make [the] employer provide a specific accommodation if another reasonable accommodation is instead provided.”²⁵⁰

Many accommodations requested by disabled workers, especially workers with psychiatric disabilities, are viewed to be unreasonable. As noted earlier in this Chapter, courts have not routinely required employers to provide reasonable accommodations for workers with psychiatric disabilities. For example, the District Court in *Tomlinson v. Wiggins*,²⁵¹ cited previously, held that employees requesting less harsh management styles from their bosses is not a reasonable accommodation. Psychiatrically disabled employees have also been denied transfers to other managers or teams due to hostile work environments that damage their mental health.²⁵²

Courts have also been hesitant to require structural changes to work environments which might alleviate triggers for employees with mental health disabilities. For example, as noted earlier, *Treanor v. MCI Telecomms. Corp.*²⁵³ held that the ADA did not require employers to create part-time positions for employees suffering from depression, as did *Lamb v. Qualex*.²⁵⁴ Courts likewise do not generally require employers to modify

²⁴⁸ See *Diaz v. City of Philadelphia*, 565 F. App’x 102, 106 (3d Cir. 2014).

²⁴⁹ *Id.* (quoting *Miranda v. Wis. Power & Light Co.*, 91 F.3d 1011, 1016 (7th Cir. 1996)).

²⁵⁰ *Solomon v. Sch. Dist.*, 532 F. App’x 154, 158 (3d Cir. 2013) (citations omitted).

²⁵¹ No. 12-CV-1050, 2013 U.S. Dist. LEXIS 69707 (W.D. Ark. May 16, 2013).

²⁵² See *Schwarzkopf v. Brunswick Corp*, 833 F. Supp. 2d 1106 (D. Minn. 2011).

²⁵³ 200 F.3d 570 (8th Cir. 2000)

²⁵⁴ 33 F. App’x 49 (4th Cir. 2002)

schedules or hours to accommodate peoples' illnesses.²⁵⁵ Generally, courts are hesitant to require employers to fundamentally alter the workplace in any way to accommodate psychiatric, developmental, intellectual, or psycho-social disability. This suggests that courts' treatment of the reasonable accommodations provision of the ADA has fundamentally reduced its efficacy as a tool for disabled workers to negotiate their position.

The ADAAA did not change the reasonable accommodations provision of the ADA, only the definition of disability. Therefore, it did not yield a substantial improvement for disabled workers seeking to litigate their claims. That said, the reasonable accommodations prong is not completely toothless. Employers are encouraged to engage in a good-faith, interactive process with their employees to determine what accommodations can be reasonably provided.²⁵⁶ Indeed, a failure to engage in this process can be evidence of failure-to-accommodate.²⁵⁷ Therefore, disability disclosure can trigger protections for disabled workers.

Some states have strengthened the reasonable accommodations requirement under the ADA, therefore creating more stringent requirements than federal law. For example, California modified its Fair Housing and Employment Act (FEHA) before Congress passed the ADAAA. The Prudence Kay Poppink Act (PKP Act), among other provisions,

²⁵⁵ *Dorgan v. Suffolk Community College*, No. 12-CV-0330 (SJF)(ARL), 2014 U.S. Dist. LEXIS 107850 (E.D.N.Y. Aug. 4, 2014).

²⁵⁶ *Shapiro v. Twp. of Lakewood*, 292 F.3d 356, 359 (3d Cir. 2002).

²⁵⁷ *Boandl v. Geithner*, 752 F.Supp 2d 540, 560 (E.D.Pa. 2010).

made employers liable for refusing to or inadequately engaging in the interactive process that determines whether and what reasonable accommodations an employee or job applicant will receive.

Button (2018), the only major empirical study conducted on the changes to the FEHA, concludes that these changes to the FEHA significantly increased employment outcomes for individuals with disabilities, with an effect that was still significant at least six years later. Button performed a difference-in-difference-in-differences regression analysis using data from the Current Population Survey (CPS) to establish this effect. He first compared Californians with disabilities, before and after the changes to the FEHA, to persons with disabilities in other states, then compared Californians with disabilities to Californians without disabilities over the same time period. He then proceeded to combine the control groups to estimate a difference-in-difference-in-differences. He estimates that the probability of a person with a disability being employed increased by 3.8 percentage points after the passage of the PKP Act. As he notes, “[t]his employment increase is large relevant to the employment-to-population ratio for individuals with disabilities in California before the PKP Act came into force (24.5%).”

The success of the PKP Act suggests that there is a role for stronger civil rights laws in the equation—something disability policy experts who focus on employment often ignore. That said, as discussed throughout this Chapter, Title I of the ADA is fundamentally limited in its scope and application for disabled workers. Because state

laws can provide stronger protections than federal laws, however, it is possible to remedy some of the inadequacies of the ADA with state-level anti-discrimination laws.²⁵⁸

5. Conclusion

This Chapter makes several claims about disability and employment; however, the fundamental purpose of this Chapter is to demonstrate that litigation efforts under Title I of the ADA represent a flawed strategy for pursuing disability justice. Instead, meaningful changes to the employment status of disabled people need to come from systemic policy changes accompanied by litigation under the *Olmstead* mandate—these changes range from providing supported employment services to adequately funding state Vocational Rehabilitation services so that they can support more people.

Title I of the ADA, even as amended, remains a “windfall for employers,” as Colker (1999) claimed. Disability advocacy groups, acknowledging the shortcomings of Title I, have turned their attention to innovative litigation under Title II of the ADA (the *Olmstead* mandate), as well as systemic policy advocacy. This strategy seeks to end the practice of filtering workers into sheltered workshops. Instead, litigation and policy efforts are aimed at inducing states to give funds to programs like supported employment and vocational rehabilitation services that promote competitive, integrated employment

²⁵⁸ This might even be preferable, as state laws carry with them enhanced remedies that federal law frequently lacks.

for disabled workers. As this chapter has argued, such strategies have been far more effective than litigation under Title I to date.

This strategy is largely untested, however. It remains to be seen whether this is a litigation strategy that resulted in an isolated win in Oregon or whether it can be implemented nationwide. Nonetheless, it represents an innovative way to overcome naïve integrationism by pushing for the services and supports disabled workers need to thrive in the workplace.

In the final Chapter, I will discuss how disability services can work together throughout a disabled person's lifetime to ensure integration in housing, health, education, and employment. I will also discuss the effects of COVID-19 on the provision of disability services in the status quo, as well as options going forward.

Chapter 5: Future Directions for Disability Law

1. Introduction

Previous chapters have laid a foundation for understanding the potential, as well as the problems, with existing disability law when considering integrating people into their communities. I argue that participatory parity requires an integration presumption and that most disabled people can and do benefit from properly designed community settings. However, readers may be left with many questions at this point: what would this type of integration look like in practice? How ought we proceed? Why should we favor integration over, for example, a form of segregation that provides robust supports? What will be the effects of the current political and public health climates on disability rights litigation and policy going forward? This Chapter seeks to answer some of these questions by examining the role integration can play in facilitating social inclusion at various points in disabled people's lives. I then conclude by discussing some of the upcoming legal and political challenges and opportunities posed by a deeply conservative federal courts system and the COVID-19 global pandemic.

2. Why is segregation ableist?

As argued in Chapter 1 and further articulated in Chapter 2, presumptive segregation works to preserve the apparatus of ableism. As noted at that time, ableism has many meanings, but this project regards ableism as an apparatus whereby disabled people

are placed at a disadvantage relative to able-minded, able-bodied, or neurotypical people.

As Taussig (2020) eloquently describes it:

Ableism is the process of favoring, fetishizing, and building the world around a mostly imagined, idealized body while discriminating against those bodies perceived to move, see, hear, process, operate, look, or need differently from that vision (10).

Ableism encompasses both overt acts of prejudice or exclusion and also social expectations and prejudices that render certain spaces inaccessible. The apparatus of ableism points to a society that is not “built” for disabled people—one that presumes they do not exist, a world from which disabled people are excluded. Taussig continues:

Ableism thunders in the background of every conversation, every story, every building. It’s the atmosphere we breathe, a body of principles, rules we live by. We learn its tenets like we learn about good and evil: with subtle and consistent reinforcement (2020, 10-11).

Ableism conditions us to think certain mind-bodies are *better* than others—that disability is somehow a *deficit*, that disabled lives are fundamentally *different* from and *worse* than

abled lives.²⁵⁹ The social model of disability, popularized by disability scholars, serves to complicate the narrative of ableism.

What if disability is not a deficit? What if society is built in such a way that it excludes certain mind-bodies? What if the onus for rectifying the structural injustices associated with disability should be placed on society rather than disabled individuals? Although the social model of disability is contested and undoubtedly more complicated than this, there is a fundamental truth to it. Our world is not built for disabled mind-bodies. But what if it were? The ableist narrative that people are “better off” in segregated spaces that are in some way chosen for them by default or others is the narrative that this project seeks to destabilize.

As Davy (2015) notes, it is not just built environments that are inaccessible—our very ideas, values, and philosophies can perpetuate ableist myths as well. Davy uses the example of autonomy. We tend to think of autonomous agents as atomistic, isolated, rational choosers—but who is excluded when we conceive of autonomy in this way? My argument is that this premise applies when we think about social spaces as well. We tend to think of integration as somehow synonymous with independence rather than dependence, that certain needs cannot be met in integrated settings. But what if they can?

²⁵⁹ Even though, as Taussig (2020) notes, we are in a constant state of slipping back and forth between ability and disability—the neat categorization of people as disabled or abled is not as neat as people would like it to be.

What if, like autonomy, the idea that disabled people are “better off” when they are isolated from non-disabled peers is another ableist myth?

I take the view that this myth is both ableist and actually keeps disabled people from being able to make genuine, reasoned choices about their lives, contrary to its professed commitments. Segregation historically perpetuated the social exclusion of disabled people and therefore functioned as a tool of ableism. Disabled people were shut off from society in institutions or asylums—places where they were subjected to extreme neglect and abuse and denied the chance to live independent lives in their communities. Disabled people were not legally entitled to a formal education until the 1960s. When they were legally entitled to an education, schools were not held accountable for the ways in which they educated disabled children. As a result, children like Amy Rowley who performed “at grade level” were left behind. Even now, disabled children are frequently siloed into separate schools, where they are not afforded the same opportunities to participate in extracurricular activities. As they age, they are likely to be presumptively placed in sheltered workshops or institutions by well-meaning relatives. They are more likely to be placed in nursing homes preemptively, to be forgotten by society, to be excluded from work. These forms of exclusion deny disabled people the chance to make meaningful choices about their lives.

Of course, my arguments are contingent—as I noted in Chapter 1, they must be. Justice does not exist in a vacuum—it is not some transcendent ideal or form to which we aspire. It is a means to minimize oppression in a highly imperfect world, a world with a particular history and set of contingencies. In this world, integration is almost certainly

preferable to segregation, given the ways in which segregated environments are designed and the interests that maintain them.

But even if we were to take the approach that justice should not be contingent, presumptive integration through governmental policy is the only way to allow disabled people to make meaningful decisions about their lives. Presumptive integration means that governments and non-disabled people must think critically about the ways in which our world is designed—and provide services in-place to people previously excluded from this world. Overcoming the presumption that certain people cannot participate in our world by creating supports that allow them to is a key component of affording these people a choice going forward. When disabled people are able to participate in integrated settings, they are less likely to be impoverished, more likely to develop meaningful skills, better able to participate in our democracy, and able to have meaningful interactions with non-disabled peers. A policy presuming integration is the only way to ensure participatory parity. Until ableist conditions that prevent people from participating as equals are redressed, we cannot say that disabled people have a meaningful choice about whether to choose an integrated or segregated setting.

3. What Integrated Service Provision Looks Like

Integration is an imperative of justice, as Anderson would phrase it. Integration allows disabled people to participate in society as equals and deconstructs the injustices created by enforced state segregation.

It is my contention that governments have a choice—they can offer disability-specific services in primarily integrated settings or primarily segregated settings.

Regardless of the environment in which these services are provided, disabled people are going to have the same support needs—therefore, it is not immediately apparent that providing disability-specific services in integrated environments must be more costly. Therefore, the question becomes: in which setting are disabled people “better off”?

I argue that when the government is sanctioning and providing disability-specific services, they ought to be provided in the most integrated setting possible. This does not require disabled people to integrate—for example, plenty of cultural and ethnic minorities voluntarily separate themselves yet could integrate if they choose.²⁶⁰ Indeed, the opposite is true—when the government provides segregated services as a presumption, disabled people lack the choice to pursue their lives in integrated settings because they lack the support necessary to do so. Integration means independence for disabled people. It means the end of role segregation. It means disabled people can control their lives and their livelihoods. In what follows, I more closely examine what this level of control means and what is at stake throughout the lives of disabled people.

3.1 Education

Preparing disabled people for independent, community-based lives starts during childhood and adolescence, and the role of the government in providing community services and supports through education starts during this time as well. Integration in education means providing services that would traditionally be provided in segregated

²⁶⁰ Indeed, as previously noted, many culturally Deaf communities prefer separatism and in many circumstances strive to have Deaf children.

settings in the most integrated setting possible. While it is true that disabled students have different support needs and might in some cases need separate instruction, there is no reason that instruction cannot be provided in a school that is integrated. For example, disabled children might need additional skills-based work, such as classes on basic life skills; however, that does not mean that a disabled child cannot or does not benefit from having recess and opportunities to interact with non-disabled peers.

A non-naïve form of integration would acknowledge that disabled children frequently need intensive supports and may even need separate classrooms for certain subjects. However, in many cases, working with a paraprofessional in an integrated classroom might suffice to fulfill a particular child's support needs. A non-naïve form of integration would acknowledge that the baseline for students differs between people, just as it does for non-disabled children. Thus, children like Amy Rowley would be entitled to the full range of supports guaranteed by the Americans with Disabilities Act via the *Olmstead* mandate and *Fry* decision. A supportive integration would acknowledge that some children, such as Neill Roncker, might have specific support needs such that they need to learn in separate classrooms. However, the goal of education would be to both maximize students' independence and their opportunities to interact with the world around them.

Neill Roncker was denied this possibility altogether. His parents were given a false choice between better educational outcomes and giving Neill an education alongside his peers. However, this is not a decision they had to face—government funding structures meant that a better education for Neill could be provided only in a completely

segregated setting. There was nothing magical about that setting, but rather the levels of support provided in that setting. Parents of disabled students and disabled students themselves should not have to choose between the social offerings of an integrated setting and the support opportunities afforded by separate settings.

Nor do they have to under existing law—existing law provides for an integration presumption. This presumption is strengthened by decisions like *Andrew F.* and *Fry* that reinforce the idea that disabled children can achieve “ambitious” goals and are entitled to the supports provided by the ADA in educational settings. Existing law is in this way moving beyond naïve integration through the tireless work of disability advocates and creative cause lawyering.

2.2 Employment

Likewise, disabled people do not have to be segregated in employment settings. In fact, most available policy research points to the idea that disabled people perform better in competitive, integrated employment. Sheltered workshops and subminimum wage jobs require the same level of support as integrated settings but atrophy disabled people’s abilities and social skills rather than developing them. Thus, competitive, integrated employment not only improves wages but also serves as a means of creating independence for disabled workers.

Supported employment programs and state vocational rehabilitation systems, as discussed in Chapter 4, provide vital opportunities to transcend naïve integration through concrete policy. Per the *Olmstead* mandate, states are legally obligated to prefer integrated service provision when it exists. Thus, creative lawyering and the development

of policy alternatives can help move America past naïve integrationism by (1) showing that disabled people can be employed in community settings, and (2) dismantling exploitative structures that keep disabled people from being served in their communities.

2.3 Independent Living

The most fundamental component of ensuring that disabled people are able to live fulfilling lives in their communities is ensuring that they live in integrated, independent settings insofar as possible. Both education and employment are prerequisites to achieving this goal.

As established in Chapter 2, disabled people can and do live fulfilling lives in their communities—to say otherwise perpetuates ableist role stereotypes. Even people with significant support needs can be served (and are often better served) in community settings. For example, peer support settings and non-inpatient settings significantly reduce the need for psychiatric interventions. Likewise, maintaining scattered-site, supported housing programs allows people's needs to be met while at the same time ensuring that they are free from coercive institutional environments.

One might ask whether institutions are necessary for some disabled people—that kinder institutions are possible, that living in communities with other disabled people can be better for people with high support needs. One such example is Eva Feder Kittay's daughter Sesha, who lives in a group home. This group home is far from the institutions described by Dybwad—it is an environment in which she is arguably thriving.

First, it is important to acknowledge that the circumstances under which disabled people could not live by themselves are exceedingly rare, as evidenced by the number of

people with even severe cognitive disabilities currently living and thriving in community-based settings.²⁶¹ However, even when someone needs more intensive support, it is wrong to presumptively segregate them. It is far more likely that disabled people will be arbitrarily stripped of their autonomy based on other people's expectations of them. Nonetheless, I acknowledge that some people will need constant and much more support than most disabled people. In these cases, I think it is important to think about how to maximize independence and integration to prevent creating the self-fulfilling prophesy referenced previously. It is not clear, for example, that more community-based, supported housing with a live-in caretaker is an unfeasible option for someone like Sesha. Indeed, many former Pennhurst residents with similar disabilities lived and thrived in supported housing programs in Philadelphia (Downey and Conroy 2020).

Moreover, I think that questions like this reveal a lack of imagination. Even Kittay's own language about her daughter emphasizes the burden imposed on carers—“[w]hen unaccompanied by support, efforts on the part of the disability community to allow disabled children and adults to remain in their community mean that the care falls squarely and exclusively on the shoulders of (usually female) family members” (2013, 69). Instead of focusing on how and why the world is not built for Sesha, Kittay presumes that Sesha's needs are in some sense exceptional, that they could not be met by the world in which we live. That might be true—the world in which we live is frankly not designed to accommodate people with Sesha's support needs. However, my point here is that the

²⁶¹ See, e.g., the Pennhurst Longitudinal Study.

way our world is designed is itself contingent, that through imagination, we can envisage a future that moves past ableist narratives about whether people “can” or “cannot” live in certain settings. Asking whether Sesha can live in her community is in this sense the wrong question to ask—the right question is why the community is not designed to facilitate Sesha’s support needs? In this way, even the “hard cases” posed by those skeptical of community integration do not undermine the ideal of integration as a critical component of disability justice. Integration is not any less important to justice for Sesha—but we may have a long way to go before the community is ready to integrate Sesha to the extent that she deserves.

4. Future Directions for Disability Law

I would be remiss if in a chapter discussing the future directions of disability law, I did not address the increasingly complicated world in which we live. Amy Coney Barrett and Brett Kavanaugh have recently been confirmed to the Supreme Court, reinforcing a wave of conservatism in American judicial politics. Moreover, we are living through a global pandemic that has killed over 530,000 Americans at the time of writing. Both of these phenomena are likely to affect the course of disability law in unpredictable directions.

For instance, to say that Amy Coney Barrett is not an advocate for disability rights might be an understatement. At least 50 disability advocacy groups opposed her

nomination.²⁶² Disability advocates expressed concerns about her record on the bench, including her position on the Affordable Care Act, which ensures that disabled Americans cannot be discriminated against in health insurance provision. Moreover, Barrett's record on disability education has been mixed—she suggested in one case that disabled students may be excluded from integrated schools during open enrollment because of their support needs. Nonetheless, from personal experience, advocacy groups tend to see disability rights as one of the safest areas for litigation in an increasingly conservative federal court system. Disability is an issue that is simultaneously highly political and depoliticized by most Republicans.

Another issue complicating the future of disability law is the COVID-19 pandemic. The potential implications of the pandemic could occupy an entire project itself. However, for the purposes of this section, I will merely lay out some of the ways in which it might change the disability rights landscape. On one hand, the rise of distance education ushered in by COVID-19 is an accommodation that has been requested by disabled students for years; however, there are fears that the IDEA's educational requirements will be undermined as teachers are ill-equipped to transition to distance learning.²⁶³ Likewise, the transition to remote work poses both opportunities and challenges for disabled people—some disabled people require the structure of offices to

²⁶² See Michelle Diamant, *Disability Groups Oppose Supreme Court Nominee*, DISABILITY SCOOP (Oct. 9, 2020).

²⁶³ See, e.g., Kara Arundel, *IEPs altered to reflect distance learning service changes, but at cost to schools*, EDUCATION DIVE (Oct. 6, 2020).

flourish at work, while some people may find online workplaces more accessible. Finally, disabled people might be at risk of being further excluded as more services go online. It is well-established that many disabled people lack access to the internet or other technology needs.²⁶⁴ Moreover, many websites are not accessible to all disabled people. Therefore, the drive to move more services online therefore might disadvantage disabled people going forward.

5. Conclusion

This project has established the following thesis—American disability law and policy is driven by naïve integrationism. Disabled people are presumptively integrated by law, but they are not provided with the necessary supports that they need to then thrive in integrated settings. In fact, many of these services and supports have been cut since the ADA was passed in 1990. However, this is not cause for dismay—imaginative cause lawyering and sensible policy are bringing courts and municipalities beyond naïve integrationism. The process is slow and piecemeal; however, this project has laid out a set of policy proposals and litigation strategies that disability advocates are using and can use going forward.

Our choice is not a false dichotomy between naïve integration and supported segregation—rather through a policy of presumptive integration coupled with supports, we can more effectively realize the idea of integration and therefore advance the cause of

²⁶⁴ See Monica Anderson and Andrew Perrin, *Disabled Americans are less likely to use technology*, PEW (Apr. 7, 2017), <https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/>.

disability justice. Supported integration operates as an alternative to naïve integration and supported segregation. Policies that have been discussed throughout this project, such as supported housing, community-based mental health services, supported employment, and the increased use of paraprofessionals in education can all fundamentally reshape how services are provided, thus allowing for the same types of supportive services provided in segregated settings to be provided in the community. These services, as I have argued, are necessary to ensure that people living in the community have a free and equal opportunity to participate in society on an equal basis as others—as I have argued, with presumptively segregated settings comes a lack of choice regarding when and how to receive supportive services. Through smart litigation coupled with systemic policy change, we can make piecemeal changes to the ways in which disability services are provided, ones that advance the cause of disability justice.

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