

The Future of Olmstead: 2020 and Beyond – Selected Excerpts from the Transcript



[ABA Section of Civil Rights and Social Justice](#)

<https://www.youtube.com/watch?v=JWMEbfAsAGs&t=183s>

32:20

um an important need to start to think expansively about olmstead in the prison and jail

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context and so why i think we are probably aware those of us that are working among

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disability rights advocates for disabled folks and also in movements for disability justice

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that the data shows that individuals with disabilities are disproportionately represented in

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prisons and jails now there's always going to be issues with data and comparing data

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across jurisdictions is a challenge given different definitions but i'm drawing data from

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the 2012 bureau of justice statistics report that indicated that anywhere from 26

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percent of individuals in prisons have physical disabilities and over half taking from another

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bjs report anywhere between 36 and 50 percent might have psychiatric disabilities against

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self-reporting and so there's again limitations to that i say that to say i think that our

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numbers are even higher if we actually had consistent definitions of disability across

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disabilities and across jurisdictions so in a 1996 decision

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pennsylvania department of corrections versus yeski the supreme court ruled that the ada applies so

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the non-discrimination mandate reasonable accommodation mandate complies with both both olmstead and the

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integration mandate that applies to program services and activities that are provided in prisons and jails

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so i guess to build on you know thinking about olmsted and specifically the integration mandate there are a set of

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regulations found in 28 cfr section 35 152

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that specifically apply the integration mandate to jails and prisons i'm going to talk a

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little bit about those and again thinking about olmsted in the prison context again with the recognition that this is moving

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us beyond our traditional way of thinking about olmstead challenges but trying to apply it to the conditions of confinement so the

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integration mandate under section 35 152 states that public entities shall ensure that inmates or

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detainees with disabilities are housed in the most integrated setting appropriate to the needs of individuals

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unless it is appropriate to make an exception a public entity shall and i'll go through each of them

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so again we're seeing regulations that incorporate the integration mandate specifically into

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the setting of jails and prisons the first provision shall not a jail or prison shall not place inmates

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or detainees with disabilities in inappropriate security classifications because no accessible cells or beds are

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available this happens in a number of facilities where let's say these cells that are

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large enough to hold an individual that uses a wheelchair or that has

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particular mobility-related disabilities and require assistive devices that take up space that can be

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the or the the practice that is pre prevented by the integration mandate

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under this section is placing individuals into a higher classification

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cell than would other or level that would be required if they um you know didn't have a

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disability and so again just to state it plainly you cannot as a prison official

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place a person with disability in a higher level classification simply because that is where the accessible

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cells are located in prisons their different security classification levels and that's an important part of the

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experience and the harshness of incarceration if you're at a high classification level you will likely have and indeed in most

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cases have less access to privileges and and privileges are defined broadly

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to include things like education programming visitation access to commissary things

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that really matter when we think about the day-to-day experience of incarceration the second provision of the integration

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mandate as applied specifically to prisons and jails specifically prohibits

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the placement of inmates or detainees with disabilities in designated medical areas unless they are receiving

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medical care or treatment this prevents again incarc

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a more restricted condition of confinement in medical areas where the individual is not

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receiving medical care treatment and it prevents individuals from disabilities from being placed in what are called medical

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isolation units so they can be more restrictive in terms of reducing the number of hours one would

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spend outside of their cell it can result in again placement of these medical

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units can result in diminished privileges or benefits as i stated before and so it's very

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important to ensure that placements are not happening here

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into the medical units you know as another way of kind of putting people with disabilities in more

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restrictive conditions unless of course they're receiving medical care treatment and i would still contest like

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the isolated conditions of the medical care units in general the third requirement again under the

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integration mandate under section 35 152 this goes to education programming and

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what it prohibits is placing inmates or detainees with disabilities and facilities that do not offer the same programs as the facilities where they

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would have otherwise been housed so it's an attempt to ensure that placements are not depriving people

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with disabilities from access to programs educational programs classes anchor management

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programs therapeutic programs that they would have had access to again seeing that as a part of placement

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into the most integrative setting because um you know switching individuals into other facilities that deprives them of

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access to these programs that they would have had elsewhere is um you know a part of creating again

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more restrictions and violates the integration regulations

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uh the last thing goes to um visitation which is very important for incarcerated

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people of course to have access to their families and their loved ones and so the provision the last provision that's

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important to note under our regulations here prevent depriving or

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prevent prisons from deprive and jails from depriving inmates or detainees with disabilities of visitation with family

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members by placing them in distant facilities where they would otherwise not be housed if they did not have disabilities and so

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i think again you know we're thinking expansively about what integration looks like

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in the prison setting and that does in fact pose some tensions um and i talk about

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this in an article that i wrote for the georgetown um law journal of pop i believe a

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poverty law um and polit policy and poverty law um kind of talking about applying

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generally the integration mandate into prisons of course you know prisons themselves are harsh

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facilities they are not built either in terms of the structural plant or in the provision of medical mental

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health services to accommodate disabilities and i know there are a number of protection and

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advocacy organizations around the country that have shed light on some of these challenges disability rights washington and most

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notably comes to mind um but in any event there is still

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um work to be done in terms of um building in a model of

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the americans with disabilities act that kind of focuses in on individualization and using that as a way to challenge

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to contest some of the ways of thinking about how prisons and jails are managed so re

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thinking about the ada is requiring individualization thinking about olmsted is requiring integration the most integrated setting

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appropriate to the needs of the person with disabilities you know challenges things like solitary

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confinement which can be used as a way to respond to disabled people that are not

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accommodated and as a result of being uh not accommodated are denied access to programs and

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services and activities or are punished you know as a direct result of the failure to accommodate

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let's say psychiatric disabilities and so there is again a benefit in trying to apply the ada

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more robustly and specifically the integration mandate more robustly to prevent isolation that

41:03

um in the case of solitary confinement can amount to torture um the the other thing i think that's

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important to think about with the uh integration mandate that you know the vast majority of prison litigation takes

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place under the eighth amendment and i think that um you know any prison rights litigator would

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talk about the limitations on bringing ada claims um you know for instance a deliberate

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indifference standard um and that you know poses in a number of cases a barrier to

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liability on the part of the prison um but also i think more expansively i mean the constitutional floor is pretty low

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um if we look at sort of providing basic human needs as this standard under the eighth amendment and

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so the ada kind of builds above that basic floor and quite low floor

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in requiring again considerations of not just security or penological

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interest above all else um but integration and accommodation and

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individualization that might be used as a way to challenge blanket security policies that um

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again might disproportionately impact disabled people thinking about

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solitary confinement as a tool for managing uh quote unquote disruptive behaviors that

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might also be a result of a failure to accommodate um so again with those tensions in mind

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i do think that it's an important area to kind of think about in our litigation

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on behalf of uh you know our clients with disabilities and thinking about how to use the integration mandate to

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challenge uh conditions like solitary confinement or to ensure access to privileges and benefits that

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might be denied um you know if the the jurisdiction the particular facility is not accommodating

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disabilities um so i guess i i wanted to talk about criminalization but i i didn't time myself so i'm not sure

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where i'm at i think i might be going slightly over but maybe i could focus on criminalization in our q a

43:02

yeah i i think that uh that's think that the second big piece of what you were going to talk about and because there's so much so i'll come to that

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okay thanks um thanks uh jimelia for for your uh presentation i i just

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will note i mean as you're describing some of the uh these cases some of the the issues that that

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prisoners with uh disabilities face you know we think a lot about institutions not just again

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physical places but of societal institutions in terms of universal design that they're not designed

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with people with disabilities in mind or at least frequently or not and um and so we talk about modifications and accommodations uh but

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we should be thinking in other kinds of institutions about you know understanding that part of the population

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will include people with disabilities mobility and otherwise and so we need to be thinking that way and it's interesting to think about

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prisons and jails in that way because you know the the universal design thing has this sort of

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positive element of providing services and and uh you know treatment and what other

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things and of course we don't think of jails and prisons in that way and yet as you point out
a

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lot of the the litigation here or at least the the regulatory focus is well within the context of
an

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institution that is designed to incarcerate uh there are still in fact very important programs
to help people

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learn skills be able to readjust to society as most people in prisons and certainly in jails will

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uh and so if you deny access to that to those programs on the same basis to be uh that you
have people without

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to promote decarceration and fight mass incarceration and i know you have some ideas
about

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that thanks bob yeah and i um

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no again in another area very much informed by some of the creative thinking that the
bazlon center has done

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and other um litigation brought under the obama administration during sort of the era of olmstead

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enforcement most recent era i think it is important to think uh and also i should know in this moment of

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thinking about defund movements that are attempting to shift resources from criminal law enforcement and to

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provisions of care and services and communities there's some overlap here so in my previous comments i talked

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about you know how to ensure that incarcerated people are protected against you know

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unjustified institutionalization within the prison um and the ways of doing that to ensure

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that they can remain in the general population where they would have access some baseline set of privileges and benefits

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as as construed as sort of you know accessing commissary accessing visitation educational programming

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etc so the the most optimistic and i think um uh the future of olmstead

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that gives me sort of the most hope and thinking about um you know where can it do uh good

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to prevent incarceration is in thinking about how olmstead can be

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deployed to require jurisdictions to divert individuals from the criminal legal system to reduce

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the pathways into encounters with law enforcement to protect individuals who are at risk of

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institutionalization if again we think about the jail as an institution we think about placements there as

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avoidable in many cases and of course consistent with olmstead and the integration mandates regulations

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that substantiate it constituting disability discrimination to place people unjustifiably

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in these kind of isolative and institutionalized conditions so there's this growing critique and

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public awareness of mass criminalization and i want to center something that i think you know need not really be emphasized

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um in a group like ours but that you know in talking about the criminalization of

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disability i don't want to suggest that you know people with disabilities are more prone to criminal activity

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or individuals with psych disabilities are more prone to engaging in criminal conduct that's not the conversation

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that i want to have and it's a false one and it's used to stigmatize disability it has historically

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but in my own research when i look at quality of life offense policing so-called order of

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order maintenance policing i see disproportionately individuals with disabilities tracked

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into these systems in many cases the targeting of quality of life policing

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low-level offenses like misdemeanors even non-criminal citations and some

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municipalities target individuals that say are part of unsheltered communities and even in a moment of pandemic we

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still see cities like seattle cities like sacramento los angeles chicago continuing to engage in

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this enforcement of a quality of life offenses so arresting individuals for residing in public

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places disorderly conduct laws criminal trespass loitering public intoxication

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um the other sort of thing to note as well is there is um in recent reporting

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discussing in particular the cleveland clinic identified this uh in a report by propublica

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um that there is aggressive uh order maintenance enforcement in and around hospitals and so again

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thinking about the lack of provision of mental health in community settings means that

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individuals are getting access to care in emergency room departments or at least going into hospitals again puts people with

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disabilities in the crosshairs of police enforcement and the very sites where they're attempting to access care are also hyper-policed areas um and so

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the individual merely they're engaged in what can be termed or what is labeled

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offensive or disruptive conduct in some cases the disruption is merely their presence in a particular place so again

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this criminalization that's targeting disabled people in the sites where they're accessing care or in public

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places where there's no place for them to go as in the case of unsheltered communities so these failed

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social investments have led to criminalization so thinking about you know how to

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think about homestead and this notion of the risk of institutionalization

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you know we can think about expanding comprehensive olmstead planning to conversations that look to redirect

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you know federal state and local resources to fund community-based services that require coordination

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between law enforcement and some jurisdictions or require the diversion of resources from

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criminal legal systems and into again the provision of care and services in the community

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that you know target mental health system infrastructure in terms of the the investment as a way of again

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jurisdictions remaining in compliance with olmstead and ensuring that they are um you know not

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engaging in discrimination by which you know i'm you know in the the legal theory formulation targeting

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individuals that are at risk of institutionalization and institutionalization in this context being incarceration in jails

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and so you know thinking about uh what advocacy could look like and ensuring this coordination

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and ensuring coordination between mental health system providers and also law enforcement um thinking about

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comprehensive olmstead planning as including like diversionary program uh support so that when an individual

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let's say is at a hospital in need of care you know they're not taken to the jail is like

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the only way of responding um you know to their mental health treatment needs if that's an

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issue or if housing accessible and affordable housing is an issue that they're not taking to jail because there's no place else for them to go

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but there are supportive housing programs again to reduce the risk of institutionalization there's you know mobile you know maybe

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crisis response teams not you know law enforcement but uh helping professionals that are not

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coercive um or not you know coming with a requirement of receiving treatment but

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providing again social services mental health support as needed as requested to avoid sort of tracking um people with

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disabilities into jails and prisons and i think uh into jails and at least in this front-end conversation

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the data in these jurisdictions where these diversionary programs have been adopted are very promising it reduces the risk of

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institutionalization in terms of hospital visits in terms of involuntary commitment stays and i think that there's a way in which we can think

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broadly about um this this movement both celebrating olmstead in this anniversary

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year or year after and thinking about movements to defund

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as sort of in conversation if we think broadly about this problem of policing over policing and mass incarceration and

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avoid even being tracked into jails and accessing the criminal legal system

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through that um entry point uh so again more expansions but some possibilities

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and and you know i think uh so thank you uh jameliana and i think whenever we're talking about um diversion which of course i think

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should be the first goal it's a lot easier to stay out of a system than to try to get

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out once one is in it but then of course there's that other piece of it which is that people who are already are you know either in jail before

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adjudication or for short-term incarceration or in prison for longer term whether they're almost it could be used

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to um to push them out of that perhaps sooner well first of all to make sure that

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they're not being kept longer because one thing we do know about people with disabilities is many of them

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do serve longer time for comparable crimes to people without disabilities and sometimes that's because of difficulties

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in accommodating or adjusting to institutional settings um and and i know as jamelia knows shiro

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wakslogg and i both wrote an article about and were part of a litigation team that included

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eve hill and lawyers from skadden arps here in washington uh that where we represented uh

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unfortunately not successfully but an individual who was chart was

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civilly committed in the federal system uh and and put in a bureau of prisons federal medical center

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uh for being uh but was found incompetent to stand trial and not capable of being restored so he can't be

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tried for his uh his crimes uh it we have a we have had in place a terrific

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community-based uh plan for him uh to be in the community with highly uh structured supports

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um and and have now actually gotten the district of columbia to agree with us that that's

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where he should be but he's in bop bureau of prisons custody and we have were unsuccessful in using although

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tried to use olmstead to get him out of that and say look the services that our client needs are

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community-based services and new um government need to provide that in the most integrated setting

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we didn't lose on an interpretation of olmsted it was more a question of whether that was the but for cause of our our client being in bop so

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we haven't given up completely yet but i do think it's a um productive strategy to be thinking about

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so getting people out and particularly in in sentences and again which is most sentences

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where at some point the person has to make his way her way back into into the community setting um so

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um i think i want to turn to some of the questions in in the q a uh and i'm trying to keep up there's

at is

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the the low quality of the supportive housing services that are provided and as that um

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you know using olmstead um you know or at least data from the post olmstead litigation to challenge that um

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i want to say that like the the heinz case and bob you insure wrote about this in your paper the hinds county case

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kind of integrated into their settlement agreement like a recognition of like the quality of programs

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um and uh supportive housing program as being a part of that and that was linked to you know aspects

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of criminalization as it relates to their jail system um the county at least um i think though

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that um and i might be uh confusing this with another uh question um i just want to

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read that really quickly um but but yeah so to kind of get to i think the heart

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of um lori's question it's not just you know the amount of services it's like can we

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use this as a as a way to contest quality um i guess i'm more hopeful for like the

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political economy you know opportunities so like working with policymakers and legislators to

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redistribute funds and to have an eye towards making those uh programs quality but i do agree that thinking about using

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the data that comes out of this litigation as a way to do that is an effective path forward i don't i know there's a

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lot of conversations going on at jurisdictions about you know defunding and diverting resources um

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i i just haven't seen anything as it relates to kind of like ensuring the quality outside of this heinz litigation or

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settlement agreement to be clear but it's certainly a possibility although i can't say that there are

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specific examples that i'm aware of where uh the data from the litigation has been used in this way

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i will say that and i think the questioner points out an important um distinction i think is and it's sort

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of a classic equal protection type problem which is uh if the quality of the services that

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you're saying are being given unequally is not good then getting equal access to poor services is not going to

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get you very far right you're going to want to use whatever tools you have to enhance the

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quality of services again as we know from concepts of universal design it often is the case that enhancing it

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for people with disabilities also has the uh salutary effect of enhancing it for other people too

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and again you know think curb cuts and other things that that were perhaps spurred by you know ada and

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504 and related litigate legislation and as a result people who you know are pushing

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strollers or otherwise want to go up and down more easily from curbs are able to do that those are i think politically very good types of

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solutions because they're not seen as trade-offs um going back to the issue of how expensive these these things might be

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um you know there's some there's a question and a long question in the chat um regarding i guess a [case in denver](#) of

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somebody who um could not pro was a wheelchair user could not cross the street

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quickly enough at least within the time frame of the usual pedestrian signals uh and

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ran the risk of being cited for that and whether that could be challenged under olmstead
also going into the point about broken

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sidewalks and i guess i would just say we should distinguish i think it's important for folks to

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recognize and i'll it looks like sean might have something to say about that