Costs and the Right to Community-Based Treatment

Lucille D. Wood†

INTRODUCTION

Much has been written about the right of people with mental disabilities to receive treatment in the community. Several scholars have worked to ground a right to community-based treatment in various state and federal statutes or constitutional provisions.1 Very little attention, however, has been paid to the way in which the costs of community-based treatment have entered into courts' opinions. Helen L. v. DiDario,2 a case celebrated by disabilities rights advocates for its expansive interpretation of the right to receive treatment in the most integrated setting, has raised puzzling and pressing questions about the role of costs in the right to community-based treatment under the Americans with Disabilities Act3 ("ADA"). In Helen L., the Third Circuit Court of Appeals ordered Pennsylvania’s Department of Public Welfare to provide the plaintiff with nursing care in her own home instead of in the state’s nursing home, but the court was extremely vague about the extent to which the fact that home-based care was less expensive influenced its reasoning.4 The Eleventh Circuit Court of Appeals’s recent decision in L.C. v. Olmstead5 has planted the seeds of a circuit split on the issue of costs, which may lead

† B.A. (1995), J.D. candidate (1999), Yale University. The author wishes to thank Professor Robert Burt, the Jerome N. Frank Legal Services Organization, the staff at the Bazelon Center for Mental Health Law, and Shanna M. Cohn for their ongoing support.

1. For an exploration of several federal constitutional sources of the right to community-based treatment for people with mental disabilities, see Bruce A. Arrigo, The Logic of Identity and the Politics of Justice: Establishing a Right to Community-Based Treatment for the Institutionalized Mentally Disabled, 18 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1 (1992). For a general review of the federal constitutional, federal statutory, and state statutory bases for the right to community-based treatment and a search for that right in state constitutions, see Anthony B. Klapper, Comment, Finding a Right in State Constitutions for Community Treatment of the Mentally Ill, 142 U. PA. L. REV. 739 (1993). See also Stacy E. Seicshnaydre, Comment, Community Mental Health Treatment for the Mentally Ill—When Does Less Restrictive Treatment Become a Right?, 66 TUL. L. REV. 1971 (1992), for a history and analysis of federal constitutional and statutory bases of the right to community-based treatment.

2. 46 F.3d 325 (3d Cir. 1995).


4. See 46 F.3d at 338.

the Supreme Court to grant certiorari in a future case concerning the
costs of community-based treatment. These costs are thus likely to play
an increasingly important role in judicial opinions deciding the right to be
treated in the community and challenge advocates to articulate an ap-
proach to costs that will best promote the integration of people with dis-
abilities.

This challenge is not new. By looking at the ways in which courts have
approached the costs of integration in the past, we can gain insight into
how advocates for people with disabilities should urge courts to consider
costs in the future. Part I of this Note begins with the legislative history of
the ADA in an effort to explain how and why costs are relevant to the
integration of people with disabilities. Part II then describes three “pure
approaches” to costs that courts have employed and provides examples
of each. Part III examines the record of how courts have considered costs
in articulating the rights of the institutionalized under the Fourteenth
Amendment. Part IV traces the history of judicial treatment of costs un-
der the statutory framework of section 504 of the Rehabilitation Act of
1973 and the ADA. Part V then returns to the three pure approaches
adopted in recent caselaw and asks the question: “Where should we go
from here?” For those whose goal is to promote the integration of people
with disabilities, the question is one of strategy. The history of courts’
treatment of costs in the constitutional and statutory arenas should in-
form the answer. The advocate’s task will be to construct an approach to
costs that is likely to further the goal of integration which lies at the heart
of the ADA.

I. A Threshold Question: Why Costs?

This Note focuses on what the advocate’s approach to costs should be, because the different ways in which courts handle costs lead to very
different outcomes for people with disabilities. In this sense, costs are as-
sumed to be part of the analysis. As a practical matter, advocates and
lawyers must form their legal strategies within the framework as it ap-
ppears in the caselaw, but they must also understand the origins of the
framework to advocate effectively. Before analyzing the various judicial
approaches to the costs of community-based treatment, we must first ask
how the right to community-based treatment became inextricably linked
to costs.

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A. The Integration Mandate

To implement the statutory provisions of title II of the ADA, the Department of Justice promulgated the following regulation, dubbed the integration mandate: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 8

The integration mandate prompts important threshold questions: If a public entity's failure to administer its services in the "most integrated setting" is, by definition, discrimination, then why should there be a concern for costs at all? If community-based treatment is medically appropriate for an individual with a disability, and the state is keeping that individual in an institution, is this not discrimination, plain and simple?

Unfortunately, the answer thus far has been no, for two reasons. The first reason stems from the muddy legislative history of the ADA, which seems both to invite courts to and to preclude courts from considering costs. The second reason relates to the nature of disability-based discrimination itself.

B. The Debate Surrounding Legislative History

Since the ADA was passed, scholars, lawyers, and judges have disagreed about the extent to which the law should be read merely as an extension of section 504 of the Rehabilitation Act of 1973 ("section 504"), an earlier federal statute prohibiting disability-based discrimination, to local governments and private actors. Because the caselaw under section 504 involves considering costs through the "undue burden" test, the question of whether or not (and how far) Congress meant to depart from section 504 in enacting the ADA becomes important in understanding how costs have infiltrated courts' analyses under the ADA's integration mandate. It is beyond the scope of this Note to canvass the entire legislative history of the ADA to determine whether Congress intended the section 504 cost analysis to be incorporated into the integration mandate of the ADA. The discussion here seeks only to illustrate that the line between section 504 and the ADA is unclear.

Legislative history has been cited frequently to support the proposition that the ADA demands no more and nothing different from section 504. The House Judiciary Committee stated that title II of the ADA is to "work in the same manner as section 504," 9 and the House Committee on Education and Labor explained that title II of the ADA "simply extends

8. 28 C.F.R. § 35.130(d) (1997).
the anti-discrimination prohibition embodied in section 504 to all actions of state and local governments." In enacting the ADA, Congress incorporated the remedies, procedures, and rights pertaining to section 504 that were enacted by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act Amendments of 1978. The ADA's incorporation of section 504 standards has led many courts to incorporate the reasoning of cases decided under section 504 into cases decided under the ADA.

Advocates for people with disabilities may be at a loss for what to make of these directives and may wonder whether departures in ADA provisions from their section 504 counterparts are legally insignificant. There are two schools of thought. Jonathan Drimmer argues that "although the initial bill... demanded more stringent standards than those developed in section 504, the final Act was a compromise which presented a grant of limited rights and a weak condemnation of discrimination." On the other hand, Timothy Cook argues persuasively that, despite these directives, the ADA cannot be read as a mere re-enactment of section 504. "[G]iven the congressional findings, legislative history, and caselaw regarding the continued persistency and the stigmatic evils of segregation," Cook writes, "Congress would not have simply reenacted without clarification the identical requirements it enacted seventeen years previously to little effect." Instead, he argues that Congress meant to eliminate the confusion resulting from "a potpourri of substantially inconsistent regulations" promulgated by the various federal agencies pursuant to section 504 and to clarify the existing law. Because the legislative history can be read to support both Cook's position and the position that the ADA does not differ substantially from section 504, there is simply no clear answer to the question of how far, in general, Congress meant to deviate from section 504 in enacting the ADA.

Unfortunately, it is even less clear to what extent Congress meant to depart from section 504 with respect to the costs of integration. The

12. See, e.g., Conner v. Branstad, 839 F. Supp. 1346, 1357 (S.D. Iowa 1993) (stating that the legislative history of title II illustrates Congress' intent that the statute be interpreted consistently with section 504).
15. Id. at 416.
16. Id. at 415.
17. See id. at 415-39.
regulations promulgated under section 504 have led courts to recognize two central defenses to discrimination under section 504. The "undue burden" defense allows defendants to argue that the accommodation sought by the plaintiff is simply too expensive to bear. The "substantial modification" or "fundamental alteration" defense says that defendants are not required to make fundamental changes to a program if doing so would compromise the program's integrity.

The Department of Justice included only the fundamental alteration defense in the regulations specifying the scope of the ADA's integration mandate. In fact, as Cook notes, the undue financial burden defense was omitted in accordance with congressional instruction. Furthermore, Cook contends that Congress intentionally omitted the cost defense because it determined, as evidenced by the legislative history, that the benefits of integrating persons with disabilities far outweigh the costs. As part of a statutory compromise, the cost or "undue burden" defense remained only for those portions of the ADA rules governing architectural and communications barriers.

Cook's analysis distinguishes those provisions for which Congress might have intended to allow the undue burden or cost defense from those for which it did not. The Department of Justice, however, included an appendix to section 35.150 that muddies Cook's clean analysis:

Many commenters asked that the Department clarify a public entity's obligations within the integrated program when it offers a separate program but an individual with a disability chooses not to participate in the separate program. The extent to which that individual must be provided with modifications in the integrated program will depend not only on what the individual needs but also on the limitations and defenses of this part. For example, it may constitute an undue burden for a public accommodation, which provides a full-time interpreter in its special guided tour for individuals with hearing impairments, to hire an additional interpreter for those individuals who choose to attend the integrated program.

In this appendix the undue burden defense, and with it the language of costs, creeps in the back door.

The task of interpreting the complex legislative history of the ADA

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18. "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (1997) (emphasis added). It is noteworthy that § 35.130(b)(7) comes before and does not appear to modify § 35.130(d), though no court has read § 35.130(d) without considering the fundamental alteration defense in § 35.130(b)(7).


20. Id. at 457-65.

21. See id. at 462 (citing 42 U.S.C.A. § 12134(b) (West 1998)).

best lies with Cook and his fellow scholars. For purposes of this Note, it is enough to acknowledge that the line between section 504 and the ADA is far from clear. Thus, while the ADA integration mandate itself does not appear to contemplate the costs of community-based treatment, costs may have entered simply because of the uncertain relationship between section 504 and the ADA.

C. The Continuing Relevance of Disability

A second explanation for courts’ consideration of costs is linked to the nature of disability-based discrimination. In his thorough analysis of the legislative history of the ADA, Cook draws an analogy between the segregation of people with disabilities and racial segregation.23 According to Cook, it is plain from the ADA’s legislative history that Congress regarded the logic in Brown v. Board of Education24 that “[s]eparate . . . facilities are inherently unequal”25 as relevant to the situation of people with disabilities.26 Given the legislative history of the ADA, Cook argues, classifications that segregate persons with disabilities are presumptively illegal and, like racial classifications, ought to be subject to strict scrutiny.27

Why, then, is the ADA’s integration mandate not the equivalent of the desegregation mandate in Brown? One reason stems from an important difference between racial discrimination and disability-based discrimination. When we talk about eradicating racial discrimination, our ultimate goal (in most cases) is to remove barriers. Exactly what kinds of policies are needed to remove what kinds of barriers, and for exactly how long these policies will be needed, are hotly contested.28 But for the disabilities community, removing barriers is only half of the story. Equality also means ongoing “special” treatment. At times we advocates work to rid society of its prejudices, yet we do not work to create a disability-neutral world. Instead we strive to create a world in which disability is en-

24. 347 U.S. 483 (1954); see also Cook, supra note 14, at 409-11 (discussing the impact of Brown on the definition of injury from discrimination and segregation).
25. Id. at 495.
26. For a thorough treatment of the analogies drawn between race and disability by ADA supporters and examples of the impact of Brown on those who spoke in favor of the ADA, see Cook, supra note 14, at 410, n.120.
27. See id at 433-34.
28. It is beyond the scope of this Note to deal adequately with competing visions of racial equality. For some thinkers, racial equality requires explicit recognition of racial difference and race-based policies that may or may not be aimed at creating a race-neutral world. The point here is only to note that “separate is inherently unequal” is rather unhelpful in the disabilities arena, where mere integration, even without ongoing animus, necessarily will generate inequality. There can be no level playing field; individualized treatment is precisely what is necessary for equality.
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tirely and forever relevant.

Ira Burnim's discussion of the dual goals of the ADA—"equal treatment" and "special treatment"—is illuminating here. Burnim notes that much of the work done in combating disability-based discrimination has focused on removing barriers to equal treatment. At the same time, neutral rules may operate to disadvantage and exclude people with disabilities, necessitating special treatment and creating conflicting ideals in the disabilities community. According to Burnim, the advocates' solution to this "dilemma of difference" has been to insist on equal treatment when doing so promotes independence and integration for people with disabilities, and to insist on special treatment when doing so promotes these same aims. This solution has replaced the tension between equal and special treatment with the question of how best to promote the integration and independence of people with disabilities.

This new focus, says Burnim, presents a problem because there are competing visions of how best to achieve integration and foster independence. His insight is essential to understanding the entrance of costs: As soon as competing visions are considered, talk of expense is bound to enter the discussion as one criterion of measurement. Once one abandons a clear mandate in a search for the best of several alternatives, one must have some means of comparison. Is institutional treatment more segregative than treating people in the community or in their homes? The question can be answered no longer in the language of Brown. The force of the statement "separate is inherently unequal" is replaced with the salience of the question "Which better advances the (long-term) independence and (eventual) integration of people with disabilities?" There is room for more than one answer, and room to consider which is less expensive.

Another way in which the continuing relevance of disability leads to discussions of costs and "reasonableness" involves the role of the judiciary. Robert Burt notes that traditional litigation has relied upon the notion that there will come a time when the plaintiff's claims are satisfied and her rights made secure. According to Burt, "the idea that 'rights-satisfied freedom' must be an attainable goal for a complaining litigant..."

30. See id. at 245-48.
31. See id. at 251-52.
32. See id. at 253.
33. See id. at 253.
34. See id.
has traditionally served to provide rough conceptual boundaries for the otherwise limitless trump card of ‘rights.’” The boundary has been “eroded in practice,” he says, in institutional cases in which it is difficult to imagine the parties’ disengagement, and especially in cases in which the mental impairments of the plaintiffs create a continual need for protection, rather than freedom, from the constraints of defendants.

Burt’s reasoning can be extended easily to cases involving people with mental disabilities who want to be treated in their communities. Such plaintiffs do not envision future disengagement from the defendants they sue: Their disabilities and the nature of their claims dictate that there will be some form of continuous involvement. Burt notes that this conceptual problem of “insatiable demand” is implicit in the cases involving institutional reform because, quite arguably, a “huge, if not limitless, amount of resources, would be required to assure any improvement.” His observations point toward yet another explanation for the discussions of costs in ADA integration mandate cases. To the extent that the plaintiffs’ disabilities in these cases require defendants’ continued involvement and large resources are at stake, a discussion of resources and “reasonable” limits on insatiable demand becomes inevitable. Perhaps such limits were not discussed explicitly in Brown because in 1954 viewing school desegregation within the framework of disentanglement was possible.

To summarize, costs have become part of the discussion under the integration mandate for two main reasons: a legislative history replete with unclear directives about how costs should be treated; and the nature of disability itself. Both factors force the integration mandate from the world of “separate is inherently unequal” to a “reasonable” balancing and consideration of costs.

II. THREE PURE APPROACHES

Having examined the threshold question of how costs came into the courts’ analyses under the integration mandate, we can now turn to the different approaches to costs available to courts. Courts have adopted at least three “pure approaches.” The pure no-costs approach says that integration should be pursued regardless of cost. A second pure approach, dubbed the efficiency approach, requires the pursuit of only those integrative steps that are more cost-efficient than their segregative counterparts. A third, the strict separation of powers approach holds that the court must reject any claim requiring re-allocation of a state’s funds.

36. Id. at 309.
37. Id. at 309.
38. Id. at 310.
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whether more or less efficient. Examples of the use and implications of the efficiency and separation of powers approaches are given below. The pure approaches unpack the ambiguities in Helen L. and explore the various directions in which courts may go in the wake of that decision.39

A. The Efficiency Approach

In Williams v. Wasserman,40 ("Wasserman") residents of state institutions with developmental disabilities challenged the state’s failure to implement their treating professionals' recommendations for community-based care. The defendants characterized the relief sought by plaintiffs as a redesign of the state’s mental health care system requiring hundreds of community treatment slots. The plaintiffs argued that they sought not a fundamental alteration of the state’s programs but instead sought "admission to an existing program of treatment on behalf of plaintiffs for whom such treatment is recommended."41 In denying the defendants’ motion for summary judgment, the court held that “genuine disputes of material fact remain between the parties concerning the relative cost of institutionalization as compared to community-based treatment” and that such costs needed to be determined to assess the presence or absence of an “undue financial burden.”42

The court in Wasserman employed the efficiency approach, which involves a comparison of the costs of integration with the costs of maintaining existing segregation. The approach raises interesting questions as to which costs courts ought to incorporate into the analysis. For example, one might ask whether the costs of housing the plaintiffs should be considered a cost of community-based treatment. This question is difficult to answer, since some plaintiffs will have housing available to them outside of the institution (making community-based treatment less burdensome than institutionalization on the state) and others may be otherwise homeless. More importantly, the efficiency approach seems to ignore the societal costs of segregation itself. Interpreting the ADA as requiring a strictly dollars-and-cents analysis, while its integration mandate places an obvious premium on integration, is highly questionable.

B. The Separation of Powers Approach

Williams v. Secretary of the Executive Office of Human Services43

39. A case example of the no-costs approach appears below after the discussion of Helen L. See infra Subsection II.C.2.
41. Id. at 528.
42. Id.
"Williams" offers a very different approach to the cost question. The plaintiffs in *Williams* were homeless individuals with mental disabilities who argued that Massachusetts's Department of Mental Health ("DMH") had not provided a sufficient amount of integrated housing to satisfy the requirements of the ADA integration mandate. The Supreme Court of Massachusetts held that DMH had not violated the ADA, finding that "nothing in the ADA requires that a specific proportion of housing placements provided by a public mental health service be in 'integrated' housing." Relying on *Alexander v. Choate*, the *Williams* court made clear its perceived duty to keep the effect of the Act within "manageable bounds."

Unlike the court in *Wasserman*, the *Williams* court was unwilling to entertain efficiency arguments made by the plaintiffs. Although the plaintiffs had repeatedly pointed to Wisconsin's mental health services system as a model of a more efficient and practical structure for providing care to the mentally ill, the *Williams* court stated: "[t]hat another State, through legislation, allegedly applies its resources more effectively is an argument better made to the Legislature, not to the courts."

C. An Unclear Directive

The pure approaches are useful tools for unpacking *Helen L.*, a case which will undoubtedly affect the availability of community-based treatment for people with disabilities. As discussed below, the court's ambiguity in *Helen L.* opens the door for courts to consider costs in potentially disparate ways, and, under one radical interpretation, to push costs out of the integration mandate altogether.

In *Helen L.*, nursing home resident Idell S. joined an action against the secretary of Pennsylvania's Department of Public Welfare ("DPW") alleging that DPW violated the integration mandate of the ADA by requiring her to receive the care that she needed in the segregated setting of a nursing home rather than in her own home through the Department's attendant care program.

Idell S. was a 43-year-old mother of two who had contracted meningitis, leaving her paralyzed from the waist down. Because of her disability, Idell S. used a wheelchair and needed assistance with daily living activi-

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44. See id. at 452.
45. Id. at 452.
46. 469 U.S. 287 (1985). This case and others brought under section 504 are discussed below. See infra Part IV.
48. Id. at 455 n.7.
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ties such as bathing, laundry, shopping and cleaning. Both parties to the action stipulated that although Idell S. was not capable of fully independent living, she was not so incapacitated that she needed the custodial care of a nursing home.\(^{50}\)

DPW operated two different programs providing people with physical disabilities with assistance in daily living: nursing home care and treatment in the community through the attendant care program.\(^{51}\) After spending four years as a resident of the Philadelphia Nursing Home, Idell S. was evaluated and deemed eligible for the attendant care program,\(^{52}\) which provided "[t]hose basic and ancillary services which enable an individual [with physical disabilities] to live in his [or her] home and community rather than in an institution and to carry out functions of daily living, self-care and mobility."\(^{53}\) Because of a lack of funding, Idell S. was placed on a waiting list for the program and continued to live in the nursing home, separated from her family and community.\(^{54}\)

I. Helen L. and the Separation of Powers Approach

In ruling for Idell S., the court rejected DPW’s argument that since funding for nursing home services and the attendant care program for the fiscal year had already been appropriated by the General Assembly of Pennsylvania, shifting funds from the nursing home care appropriation to attendant care would constitute a fundamental alteration of the program.\(^{55}\) Providing attendant care services to Idell S. in her home would not be a fundamental alteration, the court reasoned, as Idell S. was neither asking that DPW alter its requirements for admission to the program nor requesting that the substance of the program be altered to accommodate her.\(^{56}\) Dismissing DPW’s assertion that under state constitutional law the secretary could not move funds from one budget line to another, the court boldly declared: "It is not now up to us to invent a funding mechanism whereby the Commonwealth can properly finance its nursing home and attendant care programs. However, the ADA applies to the General Assembly of Pennsylvania, and not just to DPW."\(^{57}\) The court concluded that although DPW was under no obligation to provide Idell S. with any care at all, "since the Commonwealth has chosen to provide services to

\(^{50}\) See id. at 328.


\(^{52}\) Helen L., 46 F.3d at 329.


\(^{54}\) See Helen L., 46 F.3d at 329.

\(^{55}\) See id. at 337-38.

\(^{56}\) See id.

\(^{57}\) Id. at 338.
Idell S. under the ADA, it must do so in a manner which comports with the requirements of that statute.\textsuperscript{58}

Thus, in Helen L. the Third Circuit Court of Appeals implicitly rejected the separation of powers reasoning in Williams and thereby found budget shifting \textit{not} to be a fundamental alteration. Instead, it reversed the judgment of the lower court, which had relied on Williams:

Even though defendant Snider concedes that it is more expensive and less salutary for plaintiffs to remain in a nursing home rather than receive attendant care services, this admission does not authorize the Court to adjust the Department's allocation of resources or provision of services. Plaintiffs assert that the fact that they would be served better by attendant care services distinguishes their case from Williams. Given the separation of powers reasoning in Williams that requires courts to avoid involving themselves in administrative agency policy decisions, I am unable to agree.\textsuperscript{59}

Notably, the district court applied the Williams separation of powers analysis even where the increased efficiency of the plaintiffs' proposal, as compared to the defendants', was undisputed. Because the Court of Appeals did not explicitly address the separation of powers issue in its opinion, it is possible, on one hand, that it departed from the Williams court's reasoning only very narrowly in the case before it, in which a small amount of money available in another line of the budget needed to be re-allocated to an eligible applicant to an existing state program. Under such an interpretation of Helen L., the court would be expected to reject two types of ADA claims: those in which the more integrative setting was more expensive, and those in which any remedy was likely to involve more extensive restructuring of the state's appropriations.

2. Helen L. and the No-Costs Approach

One could also read Helen L. to say that costs are irrelevant. The Helen L. court simply ordered DPW to admit a qualified applicant to an existing program. Shifting funds was not a fundamental alteration, and fulfilling its own obligations under state law was not an unreasonable or undue burden. Following this logic, the court did not need to enter into a cost analysis to reach its conclusion.

The court \textit{in Charles Q. v. O. Houstoun}\textsuperscript{60} put such a spin on Helen L. In Charles Q., two of the four plaintiffs were patients at a state psychiatric facility seeking community placements under the integration mandate. Defendants argued, as did the defendants in Helen L., that appropria-

\textsuperscript{58} Id. at 339.
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...tions for the fiscal year for mental health services had already been made. They maintained that shifting funds from the hospital budget would cause decreases in the quality of care and the "unavailability of funds for such basic patient needs as food, water, heat, medication and psychiatric and medical services." Accommodating plaintiffs by using existing funds from the budget for community-based programs, they argued, would cause a reduction or elimination of the services provided by these programs. Without noting which treatment—hospital or community-based—would be more expensive, the court held that defendants' arguments had been foreclosed by Helen L. because "the Third Circuit stated that a fundamental alteration in a program must change its requirements or its substance... An agency's claim that it lacks funding to serve a disabled person is not sufficient." Thus, the Charles Q. court interpreted the Helen L. holding that budget shifting was not a fundamental alteration to be wholly independent of the fact that for DPW treating Idell S. in the community through the attendant care program was more cost-efficient. Taking the no-costs approach, the Charles Q. court read the cost discussion in Helen L. as mere dicta.

3. Helen L. and the Efficiency Approach

The most curious aspect of Helen L., however, is the way in which costs creep into the court's apparent dicta:

Ironically, DPW asserts a justification of administrative convenience to resist an accommodation which would save an average of $34,500 per year, would allow Idell S. to live at home with her children, and which would not require a single substantive change in its attendant care or nursing home programs.

The court was careful to separate its finding that re-arranging Pennsylvania's appropriations was not a fundamental alteration from its discussion of costs. But one wonders if the Helen L. court would have ordered the budget shifting had the attendant care not been significantly cheaper. If it had been more expensive, would the court have been comfortable with its involvement in the appropriations made by the state legislature, or would the doctrine of the separation of powers have been part of the court's analysis? What if there had been a group of similarly situated plaintiffs in need of attendant care, adding significant administrative costs to integration and increasing the bundle of money re-appropriated by the court? How might the cost calculus, only a backdrop

61. Id. at *5.
62. See id.
63. Id. at *6.
64. Helen L. v. DiDario, 46 F.3d at 338.
in Helen L., have changed had Idell S. been homeless?

"These questions are relevant to the analysis if one adopts the efficiency approach outlined above in Wasserman. Indeed, the Wasserman court characterized the Helen L. court as having "emphasiz[ed] that the program was already in existence and was less expensive than the nursing home program."65 In L.C. v. Olmstead,66 the court put a similar efficiency spin on Helen L. In L.C., two mentally retarded persons institutionalized in a state mental hospital argued that they were entitled to community-based treatment under the integration mandate.67 In granting plaintiffs' motion for summary judgment on their ADA claim, the court relied on Helen L. and rejected the argument that continued institutionalization of the plaintiffs was justified by a lack of funding for the community-based programs.68 However, the court added that:

[T]here is no dispute that defendants already have existing programs providing community services to persons such as plaintiffs. It is also undisputed that defendants can provide services to plaintiffs in the community at considerably less cost than is required to maintain them in an institution. Thus, defendants cannot demonstrate that any fundamental alteration of their program is required in order to serve plaintiffs appropriately in the community.69

The court's reasoning implies that, had the community-based treatment been more expensive than institutionalization, defendants might have availed themselves of the fundamental alteration defense. Unlike the Charles Q. court, the L.C. court did not read the cost discussion in Helen L. as mere dicta, choosing instead to adopt an efficiency approach to costs.

The Eleventh Circuit Court of Appeals applied a modified efficiency approach in its recent review of L.C., in which it remanded the case to the district court for further findings relating to the state's fundamental alteration defense and the costs of community-based treatment.70 Specifically, the Eleventh Circuit noted that the lower court had failed to consider evidence that because of the fixed overhead costs of providing institutional care, the state would be able to save money through community-based treatment only if entire hospitals or hospital wings were closed, but not by moving only one or two patients from a hospital into the community.71 Noting that the ADA might still require the state to expend addi-

67. See id. at *1.
68. See id. at *4.
69. Id. at *4 (citation omitted).
70. 1998 WL 163707 at *1.
71. See id. at *13.
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tional funds to integrate the plaintiffs, the Eleventh Circuit asked the lower court to consider whether the fiscal burden on the state would be “so unreasonable given the demands of the State's mental health budget that it would fundamentally alter the service it provides,” whether requiring the state to transfer funds from institutionalized to community-based care would be unreasonable, and whether the difference in the cost of providing institutional or community-based care would lessen the state's financial burden. The Eleventh Circuit thus left room for the finding that forcing a transfer of funds would be unreasonable and constitute an undue burden, a holding declined by the Third Circuit in Helen L. and in Charles Q. Perhaps more importantly, the Eleventh Circuit in L.C. held explicitly that costs were relevant to the fundamental alteration defense—a holding in direct conflict with the Charles Q, no-costs interpretation of Helen L.

III. THE CONSTITUTIONAL FRAMEWORK

Charles Q., Wasserman, and L.C. offer a glimpse of how Helen L. leaves room for courts to interpret its cost language in different ways. This potential for disparate rulings challenges advocates to construct a normatively desirable approach to costs under the integration mandate and to push courts to adopt that approach. Specifically, the advocate's task is to think carefully about which approach to cost would best promote integration.

This Part describes the history of the courts' treatment of the costs of community-based treatment under the Fourteenth Amendment and highlights the similarities between constitutional analysis and the reasoning in recent ADA caselaw, as outlined in Part II. Early decisions involving the rights of institutionalized persons under the Fourteenth Amendment did not contemplate the costs of community-based treatment. Later, when finances came to the fore, courts began to issue opinions incorporating conflicting approaches to costs. The result was a hodge-podge of inconsistent rulings not unlike the recent ADA caselaw outlined in Part II. As explained below, the irrepressibility of costs in the constitutional context should cause advocates to question the wisdom of arguing that costs are irrelevant in the ADA context. Put differently, the constitutional story should make advocates wary of the Charles Q. interpretation of Helen L.

72. Id.
A. Early Decisions

Courts have nearly uniformly rejected the notion that people with mental disabilities have a constitutionally-founded right to receive treatment in the least restrictive environment. No constitutional right per se to community-based treatment exists. Instead, the notion of a constitutional right to treatment in the community has emerged slowly through the articulation of a series of vague "rights" that may point toward community-based treatment. As early as 1966, in *Rouse v. Cameron*, the D.C. Circuit stated that an institutionalized mental patient has a right to treatment "adequate in light of present knowledge." The Fifth Circuit followed suit in *Wyatt v. Aderhold*, finding a "right to such individual treatment as will help [the civilly committed] to be cured or to improve [their] mental condition."

The extent of the due process rights of the involuntarily committed was first considered by the Supreme Court in 1982, in the landmark decision, *Youngberg v. Romeo*. In *Romeo*, the Supreme Court articulated three related rights afforded the involuntarily committed: the right to reasonably safe conditions of confinement, the right to be free from unreasonable bodily restraints, and the right to such minimally adequate training as reasonably might be required by these interests. Whether patients' constitutional rights have been violated, the Court stated, must be determined by balancing their liberty interests against the interests of the state. The Court found the balance in the "professional judgment" standard:

In determining what is "reasonable"—in this and in any case presenting a claim for training by the State—we emphasize that courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should

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74. 373 F.2d 451 (D.C. Cir. 1966).

75. *Id.* at 456.

76. 503 F.2d 1305 (5th Cir. 1974).

77. *Id.* at 1312.


79. *Id.* at 315-18.
Finally, because professional judgments are to be given presumptive validity, liability "may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."81

Romeo, while recognizing the due process rights of the institutionalized to safety, freedom from restraint, and minimal training, did not say any specific method or approach to treatment was required. Thus, what constituted minimally adequate training was left in the hands of professionals, and institutions were bound to provide what was deemed minimally adequate by professionals on a case-by-case basis.

B. What About Costs?

Soon after the Romeo decision, one federal judge declared sternly, "If North Dakota chooses to operate facilities for the mentally retarded, the operation of these facilities must meet minimal constitutional standards, and the obligation to meet those standards may not yield to financial considerations." But what should courts do when the professionals articulating the "minimal constitutional standard" make judgments based on financial considerations?

In the context of treating people with mental disabilities, where there is growing professional support behind community-based treatment but a scarcity of placements, this is precisely the question. Because Romeo did not instruct professionals to make their recommendations in a vacuum, nor dictate that they conduct cost analyses, it gave no clear answer. Lower courts responded in a variety of ways. In Clark v. Cohen, the court declared that deference to professional judgment requires that the decision "be one based on medical or psychological criteria and not on exigency, administrative convenience, or other non-medical criteria."83 The court in Thomas S. v. Flaherty found that professionals were changing their decisions to conform to available treatment rather than appropriate treatment.84 And in Lelsz v. Kavanagh,85 defendants' proposed modifications of a consent decree containing community place-

80. Id. at 322.
81. Id. at 323.
84. Id. at 704.
86. Id. at 1196.
87. 629 F. Supp. 1487 (N.D. Tex.), vacated, 807 F.2d 1243 (5th Cir. 1986).
ment provisions were rejected because they expressly incorporated an availability standard into professional judgment. According to the *Lelsz* court, evidence that the professional judgment was made to conform to what was available may indicate that the judgment was "a substantial departure from accepted professional judgment, practice, or standards," and therefore prohibited by *Romeo*.

In contrast, the Fourth Circuit Court of Appeals held that because "there [was] no evidence" that the professionals "did not take costs into consideration," it could not be assumed that "the qualified professionals drafted prohibitively expensive recommendations. The presumption of validity accorded the professionals' decision about appropriate treatment has not been rebutted." A failure to consider costs, following the court's logic, might have been a substantial departure from accepted professional judgment.

**C. Irrepressible Costs**

The tension between including and excluding cost considerations in professional judgment reached a peak in the Tenth Circuit in *Jackson v. Fort Stanton Hospital*, where people with developmental disabilities at two New Mexico institutions brought a due process challenge to their institutionalization. Finding that the professionals conformed their recommendations to financial constraints, the district court held that "[i]nstitutional confinement which results from an absence of appropriate alternatives is not based on professional judgment" and that plaintiffs were entitled to "treatment recommended by qualified professionals whose judgment is unsullied by consideration of the fact that the state does not provide funding for appropriate service in community settings."

The Tenth Circuit Court of Appeals reversed the lower court on the issue of costs, stating that "reasonable consideration must necessarily incorporate a cost analysis. A professional determination that excludes all considerations of costs and available resources could easily become impossible for a state to implement within justifiable budgetary limitations." The appellate decision in *Jackson* not only vindicated the decisions of those professionals who had recommended the institutionalization of their patients because of the unavailability of placements; by requiring rather than permitting professionals to analyze

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88. *Id.* at 1495.
90. 757 F. Supp. 1243 (D.N.M. 1990), rev'd, 964 F.2d 980 (10th Cir. 1992).
91. *Id.* at 1312.
92. *Jackson*, 964 F.2d at 992.

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costs, the court implied that a decision to place a patient in the community where there was a shortage might amount to a departure from professional judgment under *Romeo*.

Reading *Jackson*, one cannot help but wonder what would happen in a state that institutionalized people with mental disabilities but provided absolutely no treatment in the community. Would professionals be bound to recommend institutionalization infinitely, even in cases where community living was essential for "minimal" treatment under the Fourteenth Amendment? The *Jackson* court answered tentively:

> We recognize that, by imposing overly extensive cost restrictions in individual cases, the state could so limit the range of recommendations available to professionals that their judgment would be rendered inadequate to meet constitutional standards. In such a case, the court might have to enter an order that would implicate appropriations decisions.

By postulating a future situation where resources were so slim that *professionals* could no longer make decisions to meet "constitutional standards," thereby necessitating *court* intervention, the court turned *Romeo* on its head. The point made in *Romeo* was precisely that someone needed to be the designated judge of what the constitutional standard was and that "there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions." The court in *Jackson* determined that courts, under certain circumstances to be ascertained by courts, would define the constitutional minimum.

Moreover, by stating generally that community placement is only one of various possible ways in which the state may comply with its constitutional obligations, the court effectively said that a state might abandon community placement altogether, regardless of what a professional might consider to be necessary for a patient to receive adequate treatment. In essence, the court protected a threshold level of treatment, the minimum "constitutional standard," from the tides of legislative appropriation. The court, quite arbitrarily in light of the emphasis on professional opinion in *Romeo*, put community-based treatment above that threshold and outside constitutional protection.

### D. Similarities

A comparison of courts' treatment of the costs of community-based treatment under the Fourteenth Amendment with the different approaches to costs under the ADA highlighted in Part II reveals similar

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93. *Id.* at 992.
concepts and tensions. Most prominent is the idea of judicial deference. In *Williams*, the court was so unwilling to involve itself in what it perceived to be legislative decision making that it took the position that any cost-based arguments for shifting funds from institutional to community placements were better addressed to the legislature. The same reluctance to meddle in legislative business was present in the Tenth Circuit Court of Appeals' opinion in *Jackson*, where the court forecasted court orders "implicat[ing] appropriation decisions" only in the most dire of circumstances. And as was seen in the cases discussed in Part II, there is some evidence that due process claims involving large numbers of plaintiffs have been met with greater judicial reluctance to implement professional recommendations of community placement requiring significant shifting of state funds.95

More generally, the strong separation of powers theme in *Williams* may be compared to the court's deference to professionals under the *Romeo* line of cases, which is strongly rooted in both separation of powers doctrine and federalism. The professional judgment standard resulted from the *Romeo* Court's desire to minimize interference by the federal judiciary with the internal operations of state institutions.96 In announcing the professional judgment standard, the *Romeo* Court avoided constitutionalizing a specific form of treatment and unduly infringing on the states' powers. In both constitutional and statutory settings, courts have been wary of infringing on state legislative power. Curiously, in the statutory framework courts have excluded cost analyses that would alter legislative appropriations, while in the constitutional setting courts have brought costs into the definition of what is reasonable in an effort to avoid compelling states to provide community placements on a wide scale.

E. Lessons

Perhaps the most important similarity between the statutory and constitutional settings is the central paradox in the right to community-based treatment. A person with a mental disability has no substantive due

95. Consider the logic of the court in *Thomas S. v. Morrow*:
   In *Society for Goodwill* the district court's order that 400 mentally retarded patients be placed in the community by 1987 was reversed. In *Phillips* the district court's refusal to place a class of several hundred mentally retarded adults in the community was affirmed. Thus, these decisions do not apply to the facts in Thomas's case, in which a discrete recommendation for treatment was made by qualified professionals to meet the needs of an individual . . .


96. 457 U.S. at 322.
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process right to any care whatsoever unless the state chooses to offer treatment to him in a state institution, at which point the patient's rights spring from his loss of liberty. Similarly, as was seen in the four cases brought under the ADA discussed in Part II, the courts have not yet articulated a right to be treated in the community unless the state has chosen to provide some form of community placement. The true irony of Helen L. is that, under the court's reasoning, the state would not have been subject to the integration mandate of the ADA had they not chosen to create the attendant care program. The advocate must therefore proceed with caution, for the constitutional and statutory bases for treatment in the community hinge ultimately on the state's initial actions.

Along the same lines, advocates ought to be somewhat nervous about advocating a strict no-costs approach. If costs were treated as completely irrelevant to the right to community-based treatment, even for a brief period of legal history, states might opt to eliminate their community-based programs. This scaling back would not occur, obviously, if the programs were indeed cheaper than their less integrative counterparts and if states knew so in advance. But in the absence of any undue burden defense, states might be far less willing to experiment with programs likely to become subject to expansion under the integration mandate.

Indeed, the legislative response might be similar to the knee-jerk reaction of the Tenth Circuit Court of Appeals in Jackson. The Tenth Circuit responded to a ruling that purged professional judgment of any consideration of costs not by permitting costs to be relevant but by requiring costs to be part of professional judgment and by narrowing considerably the constitutional protection afforded by Romeo. In short, the middle ground was lost. It will be interesting to see what becomes of the Charles Q. ruling, which put a no-costs gloss on Helen L. The lesson may very well be that the “backlash” that occurred in the Tenth Circuit in the constitutional framework was a one-time occurrence. On the other hand, advocates may find themselves wishing they had pushed for a more conservative interpretation of Helen L.

IV. THE STATUTORY FRAMEWORK

Part III traced the history of courts' approaches to costs in articulating the constitutional rights of institutionalized people with disabilities. This Part shall trace the treatment of costs under the statutory predecessor to the ADA, section 504 of the Rehabilitation Act of 1973. The section 504 story highlights the way in which vague notions such as “institutional integrity” may mutate over time and become extremely flexible in application. Like courts’ treatment of costs under the Fourteenth Amendment, the history of courts’ treatment of costs under sec-
tion 504 and the ADA cautions against using the no-costs approach and points advocates toward adopting some degree of cost analysis.

Early cases decided under section 504 incorporated both costs and institutional integrity into the question of whether a given change or accommodation would overburden defendants. More recently, courts have considered both costs and institutional integrity in analyzing claims brought under section 504 and the ADA in which plaintiffs alleged exclusion from programs based on the severity or nature of their disabilities. There is a sense in which program "integrity" has served to disguise courts' actual political and economic concerns about forcing integration, including concerns about the costs of community-based treatment. If this is the case, advocates may want to acknowledge the irrepressible nature of costs and consider the merits of the efficiency approach. If courts' analyses cannot be purged of cost considerations, advocates may at least strive for explicit and accurate cost discussions.

A. Fundamental Alteration—Early Analyses

The Supreme Court first interpreted section 504 of the Rehabilitation Act in *Southeastern Community College v. Davis*, where the Court considered whether section 504 forbade professional schools from imposing physical qualifications for admission to their clinical training programs. The Court found that section 504 did not compel Southeastern Community College to undertake "affirmative action" so that Davis, who had a bilateral, sensori-neural hearing loss, could be included in the program. Educational institutions, the Court held, are not required to "lower or to effect substantial modifications of standards to accommodate a handicapped person."

Two factors worked together to make the modifications needed to accommodate Davis "substantial" and therefore not required by section 504. First, the Court noted that the regulation requiring that certain kinds of auxiliary aids be provided to handicapped students explicitly excludes "devices or services of a personal nature" and that "nothing less..."
than close, individual attention by a nursing instructor would be sufficient to ensure patient safety” in the clinical phase of the nursing program. In short, the Court relied on a regulation excusing schools from the costs of particularly expensive forms of aid. The following passage of the Court's opinion best captures the cost aspect of the “substantial modification” in *Davis*:

We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear . . . . Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State.

The second, and arguably more important, factor in the Court's analysis involved program integrity, specifically the “freedom of an educational institution to require reasonable physical qualifications for admission.” The *Davis* Court upheld the freedom of the school to maintain its own standards, fearing the cost that would be borne by society if the school's graduates were to “pose a danger to the public.”

Thus, the “substantial modification” has two aspects as it was first employed in *Davis*. The first aspect involves an implicit evaluation of the potential costs of accommodation to be borne by the program (in *Davis*, the cost of personal attendants). The second aspect involves the institutional integrity of the program and the extent to which the program would be required to sacrifice its self-determined goals to accommodate specific disabilities.

In *Alexander v. Choate*, the Supreme Court clarified the cost and integrity notions first employed in *Davis*. In *Alexander*, Medicaid recipients challenged the state of Tennessee's reduction of the number of inpatient hospital days that state Medicaid would pay hospitals on behalf of a Medicaid recipient each year. Plaintiffs argued that the state could limit the number of days of coverage on a per-stay basis in order to keep its Medicaid plan within its budget and avoid disproportionately harming the handicapped. Plaintiffs argued alternatively that the annual duration limitation on inpatient coverage in the state's Medicaid plan could be replaced by other Medicaid plans that could meet the state's budgetary constraints without disproportionately disadvantaging the handi-
In rejecting the plaintiffs' arguments, the Alexander Court emphasized the cost aspect of substantial modification as outlined in Davis:

[T]o require that the sort of broad-based distributive decision at issue in this case always be made in the way most favorable, or least disadvantageous, to the handicapped... would be to impose a virtually unworkable requirement on state Medicaid administrators. Before taking any across-the-board action affecting Medicaid recipients, an analysis of the effect of the proposed change on the handicapped would have to be prepared... It should be obvious that administrative costs of implementing such a regime would be well beyond the accommodations that are required under Davis.\textsuperscript{109}

The Court was also concerned with the integrity of programs, characterizing the holding in Davis as a balance struck between "the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs."\textsuperscript{110} In dealing with issues surrounding the provision of state Medicaid, the Court was concerned not only with costs, but also with the freedom of the states: "Nothing in the pre- or post- 1973 legislative discussion of § 504 suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services covered by state Medicaid."\textsuperscript{111} In Davis, institutional integrity took the form of the freedom of educational institutions to define and maintain standards and goals related to the public welfare. In Alexander, the freedom at issue was that between the state and the federal government.

\textit{Davis} and \textit{Alexander} laid the early foundation for the modern conception of fundamental alteration. Keeping in mind both costs and institutional integrity, we can turn to fundamental alteration in the context of community-based treatment to see how costs have entered into the more recent caselaw under section 504 and the ADA.

\textbf{B. A Note on Severity of Disability Claims}

Because there is no generalized right to community-based treatment for people with mental disabilities, the concept of fundamental alteration in the context of community-based treatment most frequently arises in what are often called "severity of disability" cases—cases in which individuals with severe or multiple disabilities are denied access to community treatment programs offered to other populations of people with dis-
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abilities. A few courts, viewing section 504 and the ADA as prohibiting discrimination between the “disabled” and the “non-disabled,” have been unable to conceive of the “severity” claim and have not permitted it under section 504.\(^{113}\) However, Martha Minow’s view of disability as relational rather than hierarchical\(^{114}\) places the so-called “severity of disability” claim squarely within the purview of the ADA. Applying Minow’s logic, it makes more sense to view the “severity of disability” claim as a species of discrimination based on difference rather than as one fundamentally distinct from discrimination against the “disabled” vis-a-vis the “non-disabled.” The logical extension of this approach would be to obliterate the distinction in law between the two types of claims.\(^{115}\)

This approach is preferable not only because it exposes the relativity of “difference” or “disability” but because, from the advocate’s perspective, it broadens the scope of section 504 and the ADA. Allowing these

\(^{113}\) Notwithstanding a few notable exceptions, there is considerable caselaw that says that section 504 and the ADA apply to discrimination on the basis of severity of disability or between different disabilities. See, e.g., Plummer v. Branstad, 731 F.2d 574, 578 (8th Cir. 1984) (assuming that the severity of a handicap is itself a handicap protected under section 504); Messier v. Southbury Training Sch., 7 Nat'l Disability L. Rep. (L.R.P) ¶ 390 (D. Conn. Feb. 7, 1996) (refusing to dismiss section 504 and ADA claims that the state refused to consider severely mentally retarded institutional residents for community placement); Martin v. Voinovich, 840 F. Supp. 1175, 1190-92 (S.D. Ohio 1993) (holding that discrimination on the basis of the severity or nature of a disability in providing community housing can be actionable under section 504 and the ADA); Jackson v. Fort Stanton Hosp. and Training Sch., 757 F. Supp. 1243, 1297-98 (D.N.M. 1990), rev'd in part on other grounds, 964 F.2d 980 (10th Cir. 1992) (holding that the state violated section 504 by denying access to community programs to institutionalized residents with the most severe mental disabilities); Homeward Bound v. Issom Mem'l Ctr., No. 85-C-437-E, 1987 WL 27104, at *21 (N.D. Okla. 1987) (holding that denial of community-based services on the basis of the severity of a disability violates section 504); Garrity v. Gallen, 522 F. Supp. 171, 214-15 (D.N.H. 1981) (holding that state violated section 504 by assuming that individuals with profound mental retardation could not benefit from community-based services); Goebel v. Colorado Dep't of Insts., 764 P.2d 785, 804 (Colo. 1988) (stating that discrimination in the provision of community-based mental health care based on the severity of an individual’s mental disability would violate section 504). But see Traynor v. Turnage, 485 U.S. 535, 548 (1988) (stating that the central purpose of section 504 is to assure that handicapped individuals receive evenhanded treatment in relation to nonhandicapped individuals; Cramer v. Florida, 885 F. Supp. 1545, 1551 (D.N.M. 1995) (finding “that the ADA applies only to discrimination against disabled persons compared to nondisabled persons”); People First v. Arlington Developmental Ctr., 878 F. Supp. 97, 101 (W.D. Tenn. 1992) (holding that section 504 does not apply to discrimination among similarly handicapped persons); Wolford v. Lewis, 860 F. Supp. 1123, 1134 (S.D. W. Va. 1994) (stating that evenhanded treatment requirement of section 504 requires “only that disabled individuals receive same treatment as those who are not disabled”).


\(^{115}\) At least one judge has collapsed the distinction explicitly, stating that [T]he language of § 504 evinces an intent to eliminate handicap-based discrimination and segregation... The relevant inquiry is whether the application of § 504 [sic] between persons with different or varying degrees of disability furthers the goal of eliminating disability-based discrimination.... Ultimately, the best test to determine whether plaintiffs state a claim under § 504 is to examine whether the allegations in plaintiffs' complaint touch upon the four elements [that] comprise a § 504 claim.

claims to be actionable under section 504 and the ADA would give advocates the hook that they need, and in some jurisdictions already have, to force state and local governments to open the doors of existing programs—a very important hook given that thus far advocates have been largely unable to force governments to create programs under existing law. Under such an approach, permitting more people with mental disabilities to participate in such programs would not be the expansion of programs designed and limited by the legislature, but rather the removal of invidious discrimination in the creation and administration of such programs. 116

C. Fundamental Alteration in Severity of Disability Claims

Because of its potential for expanding existing state community-based treatment programs, the severity claim has played a central role in recent ADA litigation. Having looked at the development of the dual nature of modification under the early section 504 cases, we can now turn to what constitutes a fundamental alteration in a modern severity claim involving access to community-based treatment. There is a lesson for advocates to learn here, as there was in the constitutional narrative given in Part II. As demonstrated below, advocates should be wary of pushing courts to adopt the pure no-costs approach, since the flexibility of the doctrine in this area of law may permit the costs that seep into the analyses to go unnoticed and unchallenged. The discussion that follows points to an apparent flexibility that courts have in deciding how they will decide whether a suggested accommodation is a fundamental alteration through careful manipulation of the two aspects developed in Davis and Alexander.

In Jackson v. Fort Stanton Hospital 117 the court discussed the cost aspect but scarcely touched on the institutional integrity aspect of fundamental alteration as developed in both Davis and Alexander. The court in Jackson found that residents of a New Mexico hospital were denied ac-

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116. See 45 C.F.R. § 84.4(b)(1). In promulgating this regulation, the Department of Health, Education and Welfare (now the Department of Health and Human Services) stated that
A recipient [of federal funding], in providing any aid, benefit or service, may not . . . . Provide different or separate aid, benefits or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others.

Id. (emphasis added); see also 28 C.F.R. § 35.130. This regulation, promulgated pursuant to title II of the ADA, mirrors the above regulation (prohibiting differential treatment of people with disabilities except insofar as such difference in treatment is necessary to make the aid, benefits, or services provided to people with disabilities as effective as those provided to others).

117. 757 F. Supp. 1243 (D.N.M. 1990), rev'd on other grounds, 964 F.2d 980 (10th Cir. 1992).
cess to community programs because of their severe mental handicaps in violation of section 504 of the Rehabilitation Act. Deciding that modifying the existing program to meet plaintiffs’ needs was not a fundamental alteration, the court stated:

The experience of Nebraska and Colorado in serving persons with severe handicaps shows that modification of the existing community service system in New Mexico would not require an excessive financial burden and that the accommodations would enable severely handicapped residents . . . to realize the benefits of community settings.

By contrast, the Third Circuit’s opinion in Easley v. Snider focuses predominantly on program integrity, nearly excluding costs from the discussion. In Easley, plaintiffs with mental disabilities brought an ADA action against the Secretary of Pennsylvania’s Department of Public Welfare (“DPW”) challenging the requirement that participants in DPW’s attendant care program be “mentally alert.” The Third Circuit Court of Appeals held that mental alertness was a necessary prerequisite to participation in the attendant care program. The mental alertness requirement was therefore valid under the ADA regulation prohibiting eligibility criteria excluding individuals with disabilities, unless such criteria are necessary. The criterion was necessary, the court reasoned, because the “essential nature” of the attendant program was to foster independence through individual control.

Allowing surrogates to satisfy the mental alertness requirement, the court held, would change the focus of the program away from fostering independence, alter the essential nature of the program and create an undue and perhaps impossible burden on the state. In reaching its conclusions, the Easley court relied primarily on the institutional integrity

118. Id. at 1298-99.
119. Id. at 1299; see also Homeward Bound v. Hisom Men’l Ctr., No. 85-C-437-E, 1987 WL 27104 (N.D. Okla.) (holding that the state had discriminated against plaintiffs based on the severity of their disabilities by failing to consider them for community placements). The Homeward Bound court considered the experience of five other states along with the Pennhurst Longitudinal Study. The study showed that residents of Pennsylvania’s Pennhurst Institution were better off when moved into the community, and that the cost of the community programs was less than the cost of the institutional programs. See id. at *16-17.
120. 36 F.3d 297 (3d Cir. 1994).
121. Id. at 298-99.
122. See id. at 304.
123. This ADA regulation provides that:
A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.
28 C.F.R. § 35.130(b)(8)(1997).
124. Easley, 36 F.3d at 304.
125. See id. at 305.
A dimension of fundamental alteration as used in *Davis*:

The State strives for a level of independence that allows an individual to become an active, contributing member of society, a level of independence obviously greater than one which does nothing more than keep and sustain persons out of institutions. Mental alertness of the physically disabled who participate in the program is an essential dimension without which the objectives of the program cannot be realized.126

Although the court briefly touched on the matter of financial burden, it did not analyze costs in any detail:

The proposed alteration would create a program that the State never envisioned when it enacted the Care Act. The modification would create an undue and perhaps impossible burden on the State, possibly jeopardizing the whole program, by forcing it to provide attendant care services to all physically disabled individuals, whether or not mentally alert.127

The court’s emphasis on program integrity is reminiscent more of the reasoning in *Davis* and *Alexander* than the reasoning in *Jackson*, where the cost aspect of fundamental alteration was given primary focus.

Yet what exactly is the value of integrity in the context of *Easley*? Recall that in *Davis*, the integrity of Southeastern’s program was, in the eyes of the court, tied to the public welfare. And in *Alexander*, the state’s historical power vis-a-vis the federal government was at issue. In *Easley*, the court’s eagerness to preserve the state’s freedom to enact legislative goals through statute seems to stem from the separation of powers doctrine, yet this eagerness is puzzling in light of the court’s willingness to interfere with the state’s appropriations just months later in *Helen L*. Even more puzzling is the court’s omission of costs in *Easley*, as the cost discussion in the *Helen L.* opinion compared the costs of institutionalization with the cost of the very same attendant care program at issue in *Easley*. Why did the court not consider the same figures while adding, perhaps, the cost of a surrogate necessary for a non-mentally alert plaintiff to participate?

One obvious answer to this question might be that the panel in *Easley* was genuinely concerned with the separation of powers doctrine in a way that the panel in *Helen L.* was not. After all, Idell S. had been admitted to the attendant care program; therefore, no programmatic change was necessary.128 Perhaps the *Easley* court felt that the legislative intent in drafting the attendant care program was as demanding of judicial protection as the institutional integrity at stake in *Davis* and *Alexander*, and therefore was unwilling to require modifications regardless of expense.

A second explanation is that the court perceived unforeseen costs

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126. *Id.* at 303 (emphasis added).
127. *Id.* at 305.
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(other than the costs of surrogates) that made the cost equation much more complex than the one made explicit in *Helen L*. For example, the court may have perceived that one of the costs of allowing the non-mentally alert population into the program would have been the cost of housing them, especially if there was a belief that people with mental disabilities would disproportionately become homeless in comparison to the overall population of people with disabilities released from institutions through the program.

While only hypothetical, the latter answer is disturbing because it suggests that costs may enter courts’ calculations without being made explicit, without being rebutted by plaintiffs’ counsel, and perhaps without being accurate. The courts may misperceive the burden on the state as long as it remains unquantified and overshadowed by notions such as “program integrity.” If costs are entering opinions but are masked by lengthy analyses of program integrity, or, to put it differently, if the degree of alteration of the “essential nature” or “substance” is truly a proxy for an underlying but unspoken cost, then the advocate faces a curious dilemma. Should she risk pushing for cost considerations to be made explicit without knowing if the cost calculus will cut in future plaintiffs’ favor?

V. WHERE CAN WE GO FROM HERE?

We have come full circle, back to the Third Circuit and the challenge posed by *Helen L*. Part IV stressed the flexibility that courts have in choosing whether to emphasize the financial aspect or the program integrity aspect of fundamental alteration. Advocates, too, make choices about what they choose to emphasize in litigation in response to what courts seem to be doing, and can learn from the way in which the costs of community-based treatment have entered into legal analyses under the Fourteenth Amendment, section 504, and the ADA.

This Part concludes the discussion of costs in the context of community-based treatment by returning to the pure cost approaches outlined in Part II to make suggestions about what the advocate’s approach to costs should be. The discussion is meant to spark a conversation among advocates about ways in which to think about the costs of community-based treatment, both in selecting cases and in litigating them. The outline below is only a beginning.
A. Three Approaches Revisited

1. Separation of Powers

We can begin with the obvious. The separation of powers approach employed by the court in *Williams* is often adopted by courts wary of re-allocating large amounts of money traditionally allocated by the legislature. It allows courts to avoid looking at the costs and benefits of integrative steps altogether.

The advocate’s approach should minimize the likelihood that plaintiffs’ claims for community-based treatment are dismissed under the separation of powers approach. Large numbers of plaintiffs—class actions in particular—are likely to increase the amount of the state’s money at stake and lead a judge to rely on the doctrine of separation of powers. Helen L. highlights the value of the incremental approach. Along similar lines, generalized claims for community-based treatment are more likely to invoke the separation of powers approach than claims involving an individual’s entry into an already established program.

2. The No-Costs Approach

The no-costs approach adopted in *Charles Q.* may appear attractive at first glance. Many advocates would prefer not to think of accommodation and integration in cost-benefit terms. However, this Note has pointed to several warnings. First, the legislative history of the ADA and the continuing relevance of disability may preclude this approach. Second, Part III reviewed a telling history of the treatment of costs under the Fourteenth Amendment, in which a lower court in the Tenth Circuit tried to purge the *Romeo* professional judgment standard of all cost considerations. Costs came back with vengeance on appeal. Indeed, it is arguable that the lower court’s strong anti-cost statement ultimately forced costs and the availability of treatment to play a larger role in the analysis than they would have had some degree of cost-discussion been adopted below. The lesson might be that costs are likely to enter in some way, at some time. Perhaps advocates will be better off acknowledging the reality of cost constraints in an effort to control and shape the role they play in future legal analyses. A movement away from the strict no-costs approach, if it is likely to be rejected by a majority of courts, may be to plaintiffs’ ultimate advantage.

129. Note, however, that the Eleventh Circuit’s holding in *L.C.*, see supra notes 70-72 and accompanying text, could affect the wisdom of proceeding with individual plaintiffs if defendants argue, and courts recognize, that the savings incurred by treating people in the community are realized only when an entire hospital or hospital wing is closed.
Costs and Community-Based Treatment

A third warning against the no-costs approach comes from the review of section 504 and ADA caselaw from Davis to the present. Part IV revealed how seemingly cost-neutral concepts may serve to disguise courts' economic concerns. The danger posed by unspoken costs is aptly illustrated by Easley, in which the language of costs was replaced by an emphasis on program design to the plaintiffs' disadvantage. The danger inherent in the no-costs approach is that costs may nonetheless continue to be a central part of courts' analyses without being explicitly, or even accurately, addressed.

3. Efficiency

This brings us to the third approach, in which costs enter into courts' decisions explicitly. This approach is often pushed by advocates, who frequently cite studies indicating that community-based placement is considerably cheaper than institutionalization. In fact, one of the most plausible explanations for the presence of cost comparisons in cases brought under the integration mandate is the simple fact that advocates present every fact favorable to their clients. Advocates have been eager to trumpet the savings gained by treating people in the community because it has been to their advantage in a case-by-case basis.130

Yet this pure approach, too, should give us pause. At least one author has voiced uncertainty about the widely-held belief that community-based treatment is (and will continue to be) less expensive than institutionalization.131 In the Pennhurst case, for example, an expert testified that personnel costs were the largest expenditure item for both community and institutional residences and that the personnel costs were higher for institutions because of the higher salaries there.132 This fact reflected the difference in seniority between the institutional and community staffs, and may not hold true in the future. Community treatment may also prove to be the more costly alternative if demand for such services rise.133 Additionally, as the Eleventh Circuit highlighted in L.C., the relative costs of institutionalization and community-based care may depend in part on the state's ability to close entire hospitals or hospital wings.134 L.C. illustrates the fact that defendants will not necessarily continue to

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130. See Plaintiffs' Memorandum of Law in Support of Summary Judgement at 29, Helen L. v. DiDario, No. CIV.A. 92-6054, 1994 WL 22714 (E.D. Pa. Jan. 27, 1994); Plaintiff's Cross-Motion for Partial Summary Judgement at 21, Williams v. Wasserman, 937 F. Supp. 524 (D. Md. 1996). Given the facts in these cases, it is not surprising that costs came to be part of plaintiffs' arguments and, ultimately, of the courts' analyses.
132. See id. at 330.
133. See id.
stipulate that community-based treatment is less expensive than institutionalization. Economics may be used to either side’s advantage as the cost inquiry grows more complex.

Finally, if advocates rely too heavily on cost-based arguments for community-based treatment, they may run into trouble as defendants gain experience and hire their own experts to devise very different cost equations. For how can the definition of the “cost” of community-based treatment be confined? Does it include the price of housing when people are living in their own homes? Does it include the administrative costs of determining who is ready for community-based treatment and when? What about the costs of the crimes that are committed in the community by people with mental illness? And what of the costs to property values of those community residents whose homes are neighboring group homes, as documented by “Not in My Backyard” (“NIMBY”) groups? The flexibility and breadth of “costs” may present future liabilities. If the movement toward community-based treatment ever suffers a strong political backlash or loses a large part of its current popularity among psychiatrists, psychologists, lawyers, and legislatures, the costs equation easily may be rewritten to include “costs” based on the very fears and stereotypical views of people with mental disabilities advocates hope to extinguish.

VI. CONCLUSION

Clearly we, as advocates, are in a bind. We cannot allow the language of costs to replace the ideal of integration by arguing that integrative moves are less expensive than the government imagines, especially if they may not continue to be. Yet if we push costs aside, we risk losing a middle ground—a risk borne out in the constitutional arena—or having costs play a role without our participation or rebuttal, as they may be currently in the statutory arena.

Given these dangers, advocates must try to do two very different things at once. First, they must acknowledge costs as part of the picture and push courts to be honest about what financial considerations are behind their decisions. Recall that we are not faced with the question of whether costs to the government are relevant to the analysis. A careful look at the role of costs in both the constitutional and statutory arenas has revealed that costs do and will continue to play a role. Considering costs will involve making assumptions about various needs of people with disabilities and some degree of speculation. Advocates should be actively involved in cost discussions to ensure that those assumptions are accurate and that any speculation errs on the side of supporting more integration rather than less.
Second, and more importantly, they must ensure that costs do not trump the ideal of integration. Congress has placed an enormous societal premium on integration and has created a mandate that we must seek to enforce. Even as we participate in cost discussions, we must be active in limiting the role that costs play. Advocates must remind courts—through briefs and through argument—that the ADA was meant to achieve integration. Many courts have lost sight altogether of the premium placed on integration and have focused exclusively on costs. Pragmatic concerns compel us to participate in cost debates which we did not initiate, but which we cannot afford to ignore. Therefore, each time costs come to the fore we should invoke the arguments made on the floor of Congress when the ADA was passed to renew courts’ commitment to, and recreate the spirit of, integration. Advocates are the only people who have the incentives to make these arguments resonate in courts’ opinions; we must do so even when we are likely to succeed in the cost debate. Advocates must be educators.

As thoughtful educators and tenacious litigators, advocates will have to balance the reality of costs with the ideal of integration. While we must work to capitalize on cost arguments, we cannot allow costs to trump, or even to cast a shadow on, integration. In every case advocates will have to decide how much, and when, to engage in cost discussions. This Note has emphasized how the caselaw ought to be the advocate’s guide. Because the role of costs shifts over time, advocates should think carefully about how courts in specific jurisdictions have treated and are treating costs in order to create and maintain a judicial climate in which people with disabilities can make progress.

Put slightly differently, a long-term view of the integrationist movement, informed by its history, should replace the case-by-case view in which cost arguments are spun without an eye to consequence. More concretely, in a jurisdiction where costs have been eradicated from the analysis, as in Charles Q, advocates should think twice about bringing a case involving a particularly expensive integrative move. In fact, advocates might first consider bringing cases in which cost tests would not be fatal; restoring a modicum of cost-speech might create a less precarious balance and fortify and protect the recent strides made in the Third Circuit. And where unspoken costs are lurking in the absence of explicit cost-based arguments, counsel and judges should be encouraged to be explicit about costs.

On the other hand, in a jurisdiction where costs have virtually eclipsed the ideal of integration, advocates should be particularly wary of emphasizing costs, even where it will be to a particular client’s advantage in a particular case. Where we see too heavy reliance on cost tests, we
should work especially hard to steer courts away from costs and toward a focus on integration as a legislatively mandated ideal. Although such a balancing approach may prove to be difficult in practice, a sharper strategy may come into view as more courts issue additional interpretations of Helen L. New precedent, particularly precedent that builds on the split between the Third and Eleventh Circuits, may provide us with a clearer directive.

In sum, this Note has offered a skeleton of a solution to a very complex and somewhat agonizing problem. It is sincerely hoped that this Note will foster an exchange among advocates about what the integrationist approach to costs should be. The most important point may be that the premium that section 504, the ADA, and we as a liberal society place on integration must not be forgotten; too great an emphasis on costs may make us lose sight of the importance of the ideal of integration, and of the spirit of these laws. At the same time, it would be unwise to deny that the language of costs has become inextricably intertwined with this ideal, this spirit.

The best that we may be able to do at this point is to continue to watch and to think critically about how we use and are affected by cost arguments. The approach offered in this Note navigates a very fine line between the pure no-costs approach and a pure efficiency analysis. It does so by demanding that costs or forecasted burdens be explicit while insisting that the premium that Congress has placed on integration, so central to the analysis, may never be adequately quantified.