

March 2012

Applying Lessons from the Evolution of *Brown v. Board of Education* to *Olmstead*: Moving from Gradualism to Immediate, Effective, and Comprehensive Integration

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Recommended Citation

Charles R. Bliss & Talley Wells, *Applying Lessons from the Evolution of *Brown v. Board of Education* to *Olmstead*: Moving from Gradualism to Immediate, Effective, and Comprehensive Integration*, 26 GA. ST. U. L. REV. (2012).

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APPLYING LESSONS FROM THE EVOLUTION OF *BROWN V. BOARD OF EDUCATION* TO *OLMSTEAD*: MOVING FROM GRADUALISM TO IMMEDIATE, EFFECTIVE, AND COMPREHENSIVE INTEGRATION

Charles R. Bliss and C. Talley Wells*

INTRODUCTION

In 1999, the United States Supreme Court issued a landmark desegregation decision.¹ The segregation at issue in the *Olmstead v. L.C.* decision involved individuals with disabilities confined in state institutions.² The Court recognized that isolating individuals with disabilities without justification is discrimination.³ Such confinement “severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”⁴ Thus, the Court held that men and women confined in institutions had a qualified right to be integrated.⁵ Unfortunately, ten years after *Olmstead*, many men and women with disabilities throughout the country remain confined in institutions.

Olmstead has frequently been compared to *Brown v. Board of Education*.⁶ Both cases required integration of individuals who had historically suffered discrimination. After sweeping denunciations of the practice of discriminatory segregation, the Court in both cases

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1. *Olmstead v. L.C.*, 527 U.S. 581 (1999).

2. *Id.* at 587.

3. *Id.* at 600.

4. *Id.* at 601.

5. *Id.* at 607.

6. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

confronted difficulties in devising a remedy. In both cases, the end point, desegregation, was stated, but the practical form of the remedy needed to most effectively produce that result was less clear. In both cases, the remedy of desegregation involved changing huge public systems that had evolved over many decades. Both involved public investments in infrastructure, redeployment of public employees, and confronting entrenched attitudes opposing the required changes. This paper will suggest that the remedy process for desegregation of individuals in state institutions in many ways parallels the school desegregation process and that several lessons are available from that process.

We begin by describing the similar issues involved in the *Olmstead* and *Brown* cases. We then provide an overview of how the remedies in the two cases evolved. We conclude by suggesting how lessons from *Brown* can be applied to *Olmstead* remedies. Specifically, we recommend that gradualism should end. Courts enforcing *Olmstead* should move from requiring the development of plans with discretionary benchmarks and waiting lists and instead require immediate, effective and comprehensive integration of institutionalized individuals with the supports and services they need.

I. SIMILARITIES BETWEEN SCHOOL DESEGREGATION AND DESEGREGATION OF INSTITUTIONALIZED PERSONS

The similarities between desegregation of schools and desegregation of people in institutions are striking. The difficulties of these tasks reflect the existence of both financial and attitudinal problems that must be overcome.

Both desegregation processes require overcoming entrenched attitudes. In the case of school desegregation, the attitudes to be overcome included straightforward racism. There was an expressed belief that African-American children would not be able to compete with white children and thus needed to be in different schools. Prejudices also face people in institutions. Some people feel uncomfortable with or apprehensive of them. Others believe that people with disabilities can better or more safely be served in

institutions. Where people did not want African-American children in their schools, similarly people sometimes do not want people with disabilities living in their neighborhoods. While it may seem hard to equate current attitudes allowing segregation of people with disabilities to long rejected attitudes supporting racial segregation, it is important to remember that those attitudes were once widely held.

In addition to overcoming attitudinal barriers, effective desegregation requires a large shift of resources. In the school desegregation context, the resource requirements were huge. African-American children were frequently sent to substandard schools with insufficient instructional materials. Desegregation often required construction of new school buildings and investment in materials. In addition, teachers had to be shifted to different locations. Student transportation often had to be provided to effect desegregation. Furthermore, there were people and institutions with an economic interest in preserving the status quo of separate school systems.

Large amounts of resources must also be made available to integrate institutionalized persons. States have built large institutions to segregate individuals with mental health and developmental disabilities. There often is no plausible use for these buildings when the residents are shifted to community placements. The community placements must often be developed as well. Personnel must be shifted from providing institutional care to providing care in community settings. Jobs are lost and different jobs are created to serve people in more integrated settings. The change in required structure and jobs is probably greater for integration of institutionalized persons than it was for school desegregation. Because large state institutions are the source of jobs and economic activity in small communities, there is often a political lobby to retain those institutions unrelated to any concern for the residents of the institutions. However, the scale of school desegregation was so vast that the economic resources involved were certainly larger overall.

In both *Brown* and *Olmstead*, the courts faced complex, sometimes intractable, interests opposing significant change. The challenge of providing the material resources to implement the required changes, while dealing with entrenched attitudes often opposed to those

changes, made developing and monitoring the remedy following *Brown* and *Olmstead* a complicated process.

II. EVOLUTION OF THE REMEDY IN SCHOOL DESEGREGATION CASES

This part of the paper will outline the evolution of remedy components mandated in school desegregation cases.⁷ The evolution of the remedy occurred at different rates in different places, depending to some extent on the willingness of local authorities to follow the law, but common patterns emerged as the remedy developed.

A. *Brown* and *Brown II*

Brown was decided in 1954. By a vote of 9-0 the Supreme Court outlawed racial segregation in public schools.⁸ While providing an inspiring rejection of segregation, the Court was uncertain about the appropriate remedy: “because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity.”⁹ The Court therefore requested briefing on the elements of relief in the *Brown* decision.¹⁰

In 1955, the Court issued a second *Brown* decision (*Brown II*) in which it still failed to provide specific guidance for how desegregation of schools should occur.¹¹ After discussing the difficulties that desegregation would entail, the Court stated: “[T]he cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these

7. We have looked principally at Supreme Court and Fourth and Fifth Circuit cases because that is where the majority of cases occurred. There is a smattering of cases from other circuits.

8. *Brown*, 347 U.S. at 495.

9. *Id.*

10. *Id.* at 495–96.

11. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

cases.”¹² The Court provided no timetables or requirements. The lack of specificity of the remedy meant that the Court relied on the good faith of the defendants and the district courts to remedy the problem of segregation. Over the next twenty years, people throughout the country would learn that this approach was not sufficient.

B. Courts' Attempt to Circumscribe the Scope of Relief

An initial response to the *Brown* decisions was an attempt by lower courts to limit their scope and therefore circumscribe the needed remedy. The most frequently cited limitation originated in *Briggs v. Elliott*.¹³ The *Briggs* court stated:

Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action.¹⁴

This analysis conflicted with *Brown*'s requirement that states must “effectuate a transition to a [unitary] racially nondiscriminatory school system.”¹⁵ Nevertheless, the *Briggs* analysis was adopted by some of the circuit courts, particularly the Fourth Circuit,¹⁶ to support remedial plans that relied on individual voluntary choice to remedy segregation. The remedial plans focused solely on individuals rather than class-based discrimination. These plans failed to produce integration and instead resulted in continued segregation.

12. *Id.* at 301.

13. *Briggs v. Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955).

14. *Id.* at 777.

15. *Brown II*, 349 U.S. at 301.

16. *Sch. Bd. of City of Charlottesville, Va. v. Allen*, 240 F.2d 59, 62 (4th Cir. 1956); *Bradley v. Sch. Bd. of City of Richmond, Va.*, 345 F.2d 310, 317 (4th Cir. 1965); *Boson v. Rippy*, 285 F.2d 43, 47 (5th Cir. 1960).

C. Courts Protective of School Boards' Discretion

The Supreme Court made clear in *Brown II* that the method for implementing the desegregation mandate would be determined locally.¹⁷ For a period of time, the courts protected that local discretion. Even when cases came to the courts with schools completely segregated, the remedy was to order the school board to come up with a plan for desegregation:

The primary responsibility rests on the County Board of Public Instruction to make 'a prompt and reasonable start,' and then proceed to 'a good faith compliance at the earliest practicable date' with the Constitution as construed by the Supreme Court. 'During this period of transition,' the district court must retain jurisdiction to ascertain and to require good faith compliance.¹⁸

Indeed, courts reversed district court orders with specific requirements for desegregation that eliminated local discretion.¹⁹ The courts also left in place procedures that were set up for the purpose of discrimination until local schools demonstrated they actually would use them to discriminate.²⁰ Courts allowed schools to discriminatorily assign students and then required the plaintiffs to exhaust local administrative remedies to request desegregated assignments based on state pupil enrollment laws.²¹ Courts gave defendants every benefit of the doubt to demonstrate their good faith progress toward desegregation. The most positive step under this approach was that the appellate courts did generally require that the district courts retain jurisdiction over the cases so that they could promptly address future issues.

17. *Brown II*, 349 U.S. at 299.

18. *Holland v. Bd. of Pub. Instruction*, 258 F.2d 730, 733 (5th Cir. 1958).

19. *Rippy v. Borders*, 250 F.2d 690, 693-94 (5th Cir. 1957).

20. *Carson v. Warlick*, 238 F.2d 724, 728 (4th Cir. 1956).

21. *Id.*; *Covington v. Edwards*, 264 F.2d 780, 781-83 (4th Cir. 1959) (citing *Carson*, 238 F.2d at 728).

D. Courts Make Clear There Will Be No Going Back

Shortly after desegregation began, the Supreme Court at least made clear that there was to be no backsliding once relief was ordered.²² In Little Rock, Arkansas, the school board formulated a desegregation plan in response to the original *Brown* order. The district court and court of appeals approved the plan despite challenges by the plaintiffs. When the plan was implemented in Little Rock, riots necessitating the intervention of the National Guard occurred, and subsequently the entire school year was disrupted. In response, the local board proposed to curtail its plan for two-and-a-half years. The district court approved, but the court of appeals reversed the decision. The Supreme Court held that local opposition to integration, including violent and disruptive opposition, would not be a basis for delaying previously ordered and effectuated relief.²³ The Court stated, "Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights."²⁴ The Court made clear that hostility and lawless opposition were not going to defeat court-ordered desegregation.²⁵

E. Courts Allow Facially Adequate Remedies That Do Not Achieve Desegregation

Allowing local governments unguided discretion was ineffective in attaining desegregation. In the next round of remedy development, the defendants were at least required to come up with plans. Unfortunately, the courts allowed plans that might have appeared facially nondiscriminatory but produced little or no desegregation. Examples of such plans were freedom of choice plans that allowed all pupils to select the school they attended (often after assigning them to schools based on race),²⁶ plans where students were assigned

22. *Cooper v. Aaron*, 358 U.S. 1, 16 (1958).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Bradley v. Sch. Bd.*, 345 F.2d 310 (4th Cir. 1965) (freedom of choice plan with discriminatory initial assignment allowed).

geographically but could transfer if they were in the minority at their school,²⁷ and plans where the county closed all schools but set up a program which provided vouchers to private (segregated) schools.²⁸ A principal conceptual failure in these remedies is that they focused on individual rather than group-oriented relief to remedy a group problem. These plans relied on the individual choices of black and white students to attain integration. These plans were generally insufficient because of the frequent threats and intimidation toward black students seeking to integrate schools. While these plans sometimes resulted in token integration, none of these plans resulted in significant desegregation and each left separate school systems for minorities and whites.

F. Plans Not Achieving Desegregation Are Rejected

As the ten-year anniversary of *Brown* approached, there had been little progress in desegregating many of the school districts of the South. Cases in the courts repeatedly noted that they were still dealing with segregated systems:

‘To summarize, it graphically appears from the testimony of Dr. Theo R. Wright, Superintendent of Birmingham Public Schools, that he and the Birmingham Board of Education have operated a segregated school system based upon race in the past, are doing so now, and have formulated no plans to discontinue such an operation.’²⁹

In the face of this failure to achieve desegregation, the Supreme Court mandated a change in approach to remedies. The Court struck down plans that were not effectively eliminating segregation. The Court struck down a plan approved by the Sixth Circuit that assigned

27. *Kelley v. Bd. of Educ.*, 270 F.2d 209, 213 (6th Cir. 1959).

28. *Griffin v. Bd. of Supervisors*, 322 F.2d 332 (4th Cir. 1963) (abstaining from deciding whether county could close all schools and provide funding for white private schools), *rev'd by Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964).

29. *Armstrong v. Bd. of Educ.*, 323 F.2d 333, 339 (5th Cir. 1963) (quoting *Armstrong v. Bd. of Educ.*, 220 F. Supp. 217 (1963)).

students to their local school without regard to race but allowed students in the minority at the school to transfer.³⁰ A key basis for the decision was that the plan tended to perpetuate segregation rather than end it.³¹ Next the Court reversed the Fourth Circuit's abstention from deciding whether a Virginia county could shut down its public school system entirely and fund private schools through vouchers. The Court stated that the district court needed to devise a remedy to "put an end to the racial discrimination practiced against these petitioners under authority of the Virginia laws."³² The Court made clear that the district court had broad power available to it to eliminate discrimination, including the power to compel taxation.³³ In these cases the Court instructed the lower courts to focus on whether the remedy was effective in eliminating the identified wrong of segregation, not on whether the remedy might sound like it was constitutionally adequate. The Court also made clear that the time to act was upon the courts: "There has been entirely too much deliberation and not enough speed"³⁴ Despite the strong language that the time to act was now and the broad endorsement of district court power, the Court still did not mandate any particular remedy. It did, however, make clear that further remedies would be measured by their actual effectiveness and not by whether they might plausibly remedy the problem.³⁵

G. Courts Mandate Gradual Remedies Requiring Actual Desegregation

After years of frustration with desegregation efforts, courts finally began to mandate actual desegregation. The courts no longer allowed plans that might effect desegregation—they simply ordered that actual desegregation take place. This often took the form of ordering that children attend schools based on where they lived and that those

30. *Goss v. Bd. of Educ.*, 373 U.S. 683, 684 (1963).

31. *Id.* at 686.

32. *Griffin v. County Sch. Bd.*, 377 U.S. 218, 232 (1964).

33. *Id.* at 233.

34. *Id.* at 229.

35. *See id.* at 233–34.

schools be desegregated. However, the courts still allowed a gradual process of desegregation. Many of these plans required a grade per year to be integrated.³⁶ These plans were in some cases mandated by the court of appeals to district courts that refused to enter injunctions ordering desegregation.³⁷

Within a year or two after the courts began regularly mandating grade per year desegregation plans, the courts stepped up the pace of required desegregation. The Fifth Circuit required desegregation to occur both from the twelfth grade down and from the first grade up, and often at the rate of more than one grade per year at both ends.³⁸ As the court succinctly put it, “the rule has become: the later the start, the shorter the time allowed for transition.”³⁹ Once meaningful desegregation was mandated, it seemed harder for courts to justify allowing discrimination against some children to persist while discrimination against substantial numbers of other children was ended.

The underpinning for the requirement of remedies producing actual integration was a firm rejection of the idea from *Briggs* that “the Constitution . . . does not require integration. It merely forbids [segregation].”⁴⁰ The Fifth Circuit dismissed this limiting idea and instead held that school districts “have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools.”⁴¹ The court focused on elimination of discrimination against the class of minority students rather than individual students.⁴² Thus, it mandated remedies that would actually desegregate the schools, although it still allowed gradual implementation.

36. *Bush v. Orleans Parish Sch. Bd.*, 308 F.2d 491, 502 (5th Cir. 1962) (a grade per year going to two grades per two years in the future); *see also, e.g., Davis v. Bd. of Sch. Comm'rs*, 322 F.2d 356, 359 (5th Cir. 1963) (*per curiam*).

37. *Stell v. Savannah-Chatham County Bd. of Educ.*, 318 F.2d 425, 427–28 (5th Cir. 1963).

38. *See, e.g., Price v. Denison Indep. Sch. Dist. Bd. of Educ.*, 348 F.2d 1010, 1012 (5th Cir. 1965); *Stell v. Savannah-Chatham County Bd. of Educ.*, 333 F.2d 55, 64 (5th Cir. 1964).

39. *Lockett v. Bd. of Educ.*, 342 F.2d 225, 228 (5th Cir. 1965).

40. *Briggs v. Elliot*, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

41. *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385, 389 (5th Cir. 1967).

42. *Id.* at 423 (Godbold, J., dissenting).

H. Courts Focus on Component Aspects of Remedy

Once the courts began to require actual integration, their attention was also drawn to other aspects of segregation that needed to be remedied in order to have unified school systems. The Court focused on faculty desegregation and ruled that courts must promptly deal with that component to provide a full remedy.⁴³ Lower courts recognized the critical nature of integration of faculty⁴⁴ and looked to “a sextet of indicia—student bodies, faculty, staff, transportation, extracurricular activities, and facilities.”⁴⁵ Implicit in the focus on system-wide indicators was the clear recognition that while discrimination was a violation of individual rights, it was directed at a group:

Segregation is a group phenomenon. Although the effects of discrimination are felt by each member of the group, any discriminatory practice is directed against the group as a unit and against individuals only as their connection with the group involves the antigroup sanction. . . . [As] a group-wrong . . . the mode of redress must be group-wide to be adequate.⁴⁶

I. Courts Mandate Immediate Desegregation

Fourteen years after the *Brown* decision, many schools remained almost completely segregated. At that point, the Supreme Court simply said that no more time was allowed for gradual remedies and the appropriate remedy was an order for immediate desegregation. The Court first focused on the fact that the remedy must achieve actual integration: “In the light of the command of that case, what is involved here is the question whether the Board has achieved the ‘racially nondiscriminatory school system’ *Brown II* held must be

43. *Bradley v. Sch. Bd.*, 382 U.S. 103, 105 (1965).

44. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 882–84 (5th Cir. 1966), *aff’d on reh’g en banc*, *Jefferson County Bd. of Educ. v. United States*, 380 F.2d 385 (5th Cir. 1967).

45. *Carr v. Montgomery County Bd. of Educ.*, 429 F.2d 382, 384 (5th Cir. 1970).

46. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d at 866 (quoting Comment, *The Class Action Device in Antisegregation Cases*, 20 U. CHI. L. REV. 577 (1953)).

effectuated in order to remedy the established unconstitutional deficiencies of its segregated system.”⁴⁷ The Court next made clear that the remedy must work now: “The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.”⁴⁸

The immediacy requirement became even more dramatic in the next term. The Court ordered desegregation to occur in the middle of the school year on a few weeks’ notice from the Court’s order:

The Court of Appeals’ order . . . is remanded to that court to issue its decree and order, effective immediately, declaring that each of the school districts here involved may no longer operate a dual school system based on race or color, and directing that they begin immediately to operate as unitary school systems.⁴⁹

On January 14, 1970, the Court ordered that the schools of West Feliciana Parish be desegregated by February 1, 1970.⁵⁰ The Court ultimately felt constrained to order desegregation, which it had previously recognized as a complex and difficult undertaking, to occur in a matter of weeks. Because many school systems had not effectively desegregated, this sort of order was applied to numerous schools districts across the South.⁵¹

J. Authorization of Further Remedies to Ensure Effective Desegregation

Following the orders for immediate desegregation, the courts did not stop their efforts to ensure compliance with the law. They went on to allow further remedies to ensure that desegregation was effective. For instance, courts mandated teacher transfers,⁵² mandated

47. *Green v. County Sch. Bd.*, 391 U.S. 430, 437 (1968).

48. *Id.* at 439.

49. *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969) (per curiam).

50. *Carter v. W. Feliciana Parish Sch. Bd.*, 396 U.S. 290, 291 (1970) (per curiam).

51. *E.g.*, *United States v. Bd. of Educ.*, 423 F.2d 1013 (5th Cir. 1970); *Singleton v. Jackson Mun. Separate Sch. Dist.*, 425 F.2d 1211, 1213 (5th Cir. 1970) (per curiam); *Stanley v. Darlington County Sch. Dist.*, 424 F.2d 195 (4th Cir. 1970).

52. *United States v. Choctaw County Bd. of Educ.*, 417 F.2d 838, 842 (5th Cir. 1969).

transportation be provided,⁵³ and refused to let school districts split if that furthered segregation.⁵⁴ These aggressive remedies sought to achieve desegregation by going beyond requiring all children to attend their local schools regardless of race to affirmatively requiring components of the system which supported segregation to be dismantled. The Court determined that, going forward, the pernicious effects of previous discrimination must be attacked through aggressive remedies that went beyond mere even-handedness.

K. Summary

In reaching its decision in *Brown*, the Court recognized that the importance of desegregation had to be tempered by the real and practical difficulties of making it happen. In addition to the host of difficulties that came with transforming a culture of racial prejudice and discrimination were the practical issues of changing an entire system of where children would attend school, who the teachers would be, what buildings would be used, and how children would get to school. With these realities in mind, the Supreme Court originally ordered desegregation to occur with “all deliberate speed.”⁵⁵ The pace of change after the “all deliberate speed” order, however, was often too slow. School systems developed plans that were ineffective to create actual integration or that would take too long, such as integration one grade at a time. As time went by and systems were not changing with “all deliberate speed,” or any speed, the courts moved through a succession of intermediate remedial measures, finally ordering school systems to desegregate completely and immediately.

III. THE *OLMSTEAD* REMEDY AND ITS EVOLUTION

As in *Brown*, the Court in *Olmstead* recognized the desegregation of institutionalized persons would be complicated by the need to

53. *Brewer v. Sch. Bd.*, 456 F.2d 943, 947 (4th Cir. 1972).

54. *Wright v. Council of Emporia*, 407 U.S. 451 (1972).

55. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

develop alternative placements and overcome entrenched attitudes and interests.⁵⁶ The Court recognized there must be a balancing between placement of individuals in integrated settings and the need of the states to have an orderly process.⁵⁷ In a parallel to the “all deliberate speed” requirement in *Brown*, the Supreme Court in *Olmstead* provided a similar prescription for how the integration mandate of *Olmstead* should occur. A plurality stated that states could meet their obligation by creating a comprehensive working plan for transitioning individuals with disabilities into the community along with a waiting list that would move at a “reasonable pace.”⁵⁸ The plurality came to this prescription by balancing the requirement of the Americans with Disabilities Act (ADA)⁵⁹ and its implementing regulations. These regulations require that states make reasonable modifications to existing rules, policies, and practices to carry out the integration mandate with the state’s ability under the ADA to raise a defense that such reasonable modification would fundamentally alter the state’s system of caring for and treating the larger population of individuals with similar disabilities.⁶⁰ The Court recognized it would take time to reach the required end state where people were provided care in the most integrated environment possible.⁶¹

Today—just as the courts following the *Brown* decision moved from “all deliberate speed” to ordering desegregation immediately—courts enforcing *Olmstead* should take into account the ten years that have elapsed since the *Olmstead* decision and begin to move from simply requiring plans with waiting lists to requiring immediate integration for people with disabilities. Ten years after *Olmstead*,

56. *Olmstead v. L.C.*, 527 U.S. 581, 609 (1999) (Kennedy, J., concurring).

57. *Id.* at 604.

58. *Id.* at 606.

59. 42 U.S.C. §§ 12101–12213 (2006).

60. *Olmstead*, 527 U.S. at 604.

61. Once the individuals whom all parties agree can be served in more integrated environments are placed, there may remain a group about whom states may make the fundamental alteration argument that they cannot be served in a community setting. Decisions on these sorts of cases have more to do with the appropriate end point for the *Olmstead* remedy than evolution of the remedy to reach that endpoint, and might be analogized to cases like *Milliken v. Bradley*, 418 U.S. 717 (1974) (cannot impose cross district desegregation remedy), where the Court began to draw substantive limits on the reach of remedies to effect desegregation.

states, whether or not they have actually done so, have had time to create working plans and to draw down their waiting lists. As more time passes from the *Olmstead* decision, the strength of a state's assertion that major modifications would be fundamental alterations diminishes.

A. *The ADA*

The foundation for the *Olmstead* decision is the ADA. When Congress passed the ADA, it found that individuals with disabilities had historically experienced—and continued to experience—discrimination by confinement in institutions, segregation, and exclusion due to lack of modifications to facilities and practices.⁶²

Congress passed the ADA to remedy such discrimination as well as to promote integration and inclusion. Title II of the ADA prohibits public entities from discriminating against qualified individuals with disabilities.⁶³ Two key federal regulations help enforce this antidiscrimination prohibition. The “integration regulation” requires public entities to ensure that their services and activities are “administer[ed] . . . in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”⁶⁴ The “reasonable modification regulation” requires public entities to make reasonable modifications to avoid discriminating based on a disability, unless a modification would cause a fundamental alteration to the public entity's service, program, or activity.⁶⁵

These two regulations are at the heart of the United States Supreme Court's decision in *Olmstead*. These regulations are also the key to post-*Olmstead* court decisions determining the extent and the speed by which desegregation and integration should occur.

62. 42 U.S.C. § 12101(a)(2), (3), (5) (2006).

63. 42 U.S.C. § 12132 (2006).

64. 28 C.F.R. § 35.130(d) (1998).

65. 28 C.F.R. § 35.130(b)(7) (1998).

B. *Olmstead v. L.C. Decision*

The plaintiffs in *Olmstead* were two women who had diagnoses of mental retardation and mental illness.⁶⁶ They were both confined to a Georgia mental health institution even though their doctors and treatment teams determined that they could live in the community.⁶⁷

The Supreme Court succinctly boiled the issue in their case down to whether the ADA's prohibition of discrimination by a public entity required "placement of persons with mental disabilities in community settings rather than in institutions."⁶⁸ To that question, the Court answered with a "qualified yes."⁶⁹ It created the following three-prong test to explain when such action was required: (1) when treatment professionals determine that community placement is appropriate; (2) when the individual does not oppose being served in the community; and (3) when the placement is a reasonable accommodation when balanced with the needs of others with mental disabilities.⁷⁰

1. *The First Prong: Whether a Community Setting Is Appropriate*

The first prong in *Olmstead* is based on the requirement in the integration regulation that public entities administer services in the most integrated setting "appropriate to the needs of qualified individuals with disabilities."⁷¹ The preamble to the integration regulation defines this setting as "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible."⁷² According to the Court, a state may generally rely on its treatment professionals to determine whether an individual qualifies to receive services in the community.⁷³

66. *Olmstead v. L.C.*, 527 U.S. 581, 593–94 (1999).

67. *Id.*

68. *Id.* at 587.

69. *Id.*

70. *Id.*

71. *Id.* at 602 (citing 28 CFR § 35.130(d) (1998)) (emphasis added).

72. 56 Fed. Reg. 35,716 app. A (July 26, 1991).

73. *Olmstead v. L.C.*, 527 U.S. 581, 602 (1999). The requirement that treatment professionals be from the state may not be necessary when *Olmstead* is being applied to someone who does not live in a state institution. Cf. *Radaszewski v. Maram*, 383 F.3d 599, 604, 610–11 (7th Cir. 2004) (using

It is important in the analysis under this prong that the determination be made based on the circumstances and needs of the individual and not on whether the needed services or supports actually exist at present in the community.⁷⁴ Otherwise, if treatment professionals limit determinations to what supports and services exist in the community, more individuals will be found inappropriate for services in the community and remain confined in institutions.⁷⁵ In turn, where more individuals are confined in institutions, states will likely continue to allocate scarce resources into institutions rather than into services in the community, which can make this a chicken and egg problem.⁷⁶ Such inertia defies the mandate that individuals be served in the most integrated setting.

Once one looks through the lens of what is possible, there are few, if any, needs of individuals with disabilities that can only be met in institutions.⁷⁷ While cost can be raised with limited success by a public entity for the third prong of the *Olmstead* test, cost should not be a basis under the first prong for a determination of whether an individual can benefit from a community placement with appropriate supports.

Thus, the first prong should be a low hurdle. The question is simply whether an individual can handle and benefit from living in the community.⁷⁸

uncontradicted evidence from the plaintiff's personal doctor, nurse, and expert witness in analyzing first prong); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003) (restating the *Olmstead* test without referring to the state in the first prong).

74. *Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 294, 329–30 (D. Conn. 2008).

75. See, e.g., *id.* at 329–30 (citing testimony that case managers did not make referrals for placement in the community where insufficient resources existed).

76. Cf. *id.* at 328 (discussing state commissioner's attempts to increase funding for hospital at the same time that community placements were generally not being considered).

77. See *Disability Advocates, Inc. v. Patterson*, No. 03-CV-3209, 2009 U.S. Dist. LEXIS 80975, at *126–96 (E.D.N.Y. Sept. 8, 2009) (finding virtually all individuals living in New York institution-like group homes could be appropriately served in integrated supportive housing).

78. *Radaszewski*, 383 F.3d at 612 (quoting *Olmstead*, 527 U.S. at 601–02) (“By no means is Eric an ‘unqualified’ disabled person in the sense that *Olmstead* emphasized—he is not someone who is ‘unable to handle or benefit from community settings’”).

2. *The Second Prong: Whether the Individual Opposes a Community Setting*

The second prong of *Olmstead* is another low hurdle. It raises the question of whether the individual opposes being served outside of the institution. The second prong implies that an individual should be given the option of living in the community whether or not a request to live in a community setting is actually made. According to one court, “[t]he Supreme Court’s reasoning in *Olmstead* makes it clear that a state must do more than wait until the residents of its facilities have affirmatively asked to be placed in the state’s integrated residential settings”⁷⁹ It is, therefore, incumbent on states to inform individuals, using communication methods that meet the individual’s needs, about what is or can be available in the community, so the individual can make an informed decision on whether he or she opposes receiving services in the community.

3. *The Third Prong: Reasonable Modification vs. Fundamental Alteration*

The third prong of the *Olmstead* test has been the focus of post-*Olmstead* litigation. It is also key to determining the extent and timing of any remedy. Thus, it should be the battleground for any future effort to move *Olmstead* remedies from a deliberative process with plans and waiting lists to a mandate for immediate systemic desegregation and integration.

In creating the third factor, the plurality cited the reasonable modification regulation to acknowledge that a state may resist some modifications if the modifications would fundamentally alter services. The plurality stated:

Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the

79. *Messier*, 562 F. Supp. 2d at 337.

responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.⁸⁰

As in *Brown*, the Court recognized the propriety of relief, but found that “immediate” relief might be inequitable.⁸¹ As in *Brown*, there is no question that ultimately relief must be granted and it is reasonable to assume that the equities pointing toward immediate relief increase as time goes by.

The plurality then gave an example. It said a state could satisfy the reasonable modification regulation if it demonstrated “that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State’s endeavors to keep its institutions fully populated.”⁸² This model of a working plan with reasonably moving waiting lists became a focal point of discussion in later litigation, particularly in class actions dealing with large systems of care. The question now is whether the model needs to evolve to emphasize immediacy and effectiveness after ten years of opportunity to meet the requirements by devising plans and waiting lists.

C. *The Evolution of Olmstead*

The evolution of *Olmstead* is not as apparent as the evolution of *Brown*. This is due in part to the fact that not as much time has passed, so we do not have the benefit of a historical perspective. It is also due in part to the fact there are simply fewer appellate cases interpreting *Olmstead*.

With that caveat, there are still key ways in which *Olmstead* has evolved and ways in which it needs to further evolve. *Olmstead* has been expanded to include all qualified individuals with disabilities who need institution-level services whether or not such services are

80. *Olmstead v. L.C.*, 527 U.S. 581, 604 (1999) (plurality).

81. *Id.*

82. *Id.* at 605–06.

presently being provided in an institution. Limitations have been placed on the fundamental alteration defense, including with respect to whether changes to Medicaid or costs will be seen as fundamental alterations. The working plan model as a way for a state to satisfy the fundamental alteration defense has been given a little more flesh and has been interpreted as a requirement rather than an option. At the same time, the *Olmstead* evolution continues to have one of the key drawbacks of the early *Brown* evolution in that courts still generally require the states to be the key actors in creating and timing the *Olmstead* remedy.

1. Expansion to All Qualified Individuals Needing Institution-Level Services

While the *Olmstead* decision involved women confined to a psychiatric hospital, the *Olmstead* decision has been interpreted to apply to all individuals with disabilities who need institution-level services.⁸³ It applies to individuals in nursing facilities,⁸⁴ to individuals in large congregate settings akin to institutions,⁸⁵ and to individuals with all types of disabilities, including individuals with severe disabilities.⁸⁶

Olmstead also applies to individuals who currently live in the community but who need institution-level services in order to continue to remain in the community.⁸⁷ As one court stated, the *Olmstead* protections would be meaningless if individuals “were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation.”⁸⁸ Many of these cases involve Medicaid home and community based waivers (Medicaid waivers), which are programs in which states have been

83. *Townsend v. Quasim*, 328 F.3d 511, 515, 518 (9th Cir. 2003).

84. *Id.*

85. *Disability Advocates, Inc. v. Patterson*, 598 F. Supp. 2d 289, 296, 298, 322 (E.D.N.Y. 2009).

86. *Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 294, 343 (D. Conn. 2008).

87. *See, e.g., Radaszewski v. Maram*, 383 F.3d 599, 611–14 (7th Cir. 2004); *Grooms v. Maram*, 563 F. Supp. 2d 840, 856 (N.D. Ill. 2008); *Radaszewski v. Maram*, No. 01-C-9551, 2008 U.S. Dist. LEXIS 24923, *40–41 (N.D. Ill. Mar. 26, 2008).

88. *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003).

given waivers by the federal Medicaid agency to provide institution-level services in the community rather than in institutions.⁸⁹

2. States May Be Required to Seek and Maintain Medicaid Waivers

A requirement that a state seek an amendment through the federal government of its Medicaid waiver program in order to provide a reasonable modification may not in itself constitute a fundamental alteration.⁹⁰ In an Illinois case, a man with a severe disability, who required the assistance of a ventilator, needed care at a higher cost and at a higher “level of care” than the state provided through its adult Medicaid waiver, even though he had received such care under the state’s waiver for children.⁹¹ He could only receive the medical services he needed in an institution through Medicaid.⁹² The state argued that it could not provide a higher level of care or at a higher cost cap because its approved application with the federal government for the Medicaid waiver did not allow for such care.⁹³ The court held that requiring the state to modify its waiver through an application for such a change with the federal government would not be a fundamental alteration, especially where there was no evidence that the cost of care would be higher if the services were provided in the home as opposed to in an institution.⁹⁴

The inverse is also true for Medicaid waivers. A state may be restricted from amending a Medicaid waiver in a way that would hinder integration, such as reducing the care it provides under the waiver in a way that would force individuals to receive care in an institution.⁹⁵ As in the school cases, it appears that courts enforcing

89. See, e.g., *ARC of Wash. State, Inc. v. Braddock*, 427 F.3d 615, 621 (9th Cir. 2005).

90. *Grooms*, 563 F. Supp. 2d at 856; *Radaszewski*, 2008 U.S. Dist. LEXIS at *40-41 (stating that Illinois could modify the waiver from the federal government without fundamentally altering the nature of services and programs). But see *Rodriguez v. City of New York*, 197 F.3d 611 (2d Cir. 1999).

91. *Grooms*, 563 F. Supp. 2d at 845.

92. See *Grooms v. Maram*, 563 F. Supp. 2d 840, 856-57 (N.D. Ill. 2008).

93. See *id.*

94. See *id.* at 857-59.

95. See *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003).

Olmstead will be attentive to avoid backsliding once integration has been funded.

3. *Significant Costs Are Not a Fundamental Alteration*

A state cannot succeed on a fundamental alteration defense simply by showing that the remedy sought would involve painful costs. The Tenth Circuit rejected the idea that Oklahoma could limit how many medically necessary prescriptions it provided under a Medicaid waiver solely because it was undergoing a fiscal crisis.⁹⁶ Congress was aware, it noted, that integration of individuals with disabilities would involve substantial short-term financial and administrative burdens.⁹⁷

4. *Exhaustion of Remedies Not Required*

As in the school cases, defendants have attempted to derail *Olmstead* enforcement by invoking exhaustion of remedies theories. A recent case rejected a requirement that institutionalized applicants be approved for more integrated “supportive housing” when there was no assistance with such applications.⁹⁸ The court also rejected an argument that it was necessary for the applicants’ treatment providers to find them eligible for more integrated services.⁹⁹ The court refused to let bureaucratic impediments stand in the way of effective relief. This parallels the initial acceptance and eventual rejection of this sort of exhaustion of administrative remedies stratagem in the school desegregation cases.

96. *Id.* at 1182–83.

97. *Id.* at 1183 (quoting H.R. REP. NO. 101-485, pt. 3, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473).

98. *Disability Advocates, Inc. v. Patterson*, No. 03-CV-3209, 2009 U.S. Dist. LEXIS 80975, at *216 (E.D.N.Y. Sept. 9, 2009).

99. *Id.* at *219–20.

5. Frederick L. *Decisions: Plans Necessary for the Fundamental Alteration Defense*

In *Olmstead*, the Supreme Court suggested that a state might be able to satisfy the fundamental alteration defense if it had a working plan for moving individuals out of an institution with a reasonably moving waiting list.¹⁰⁰ The seminal cases fleshing out the “working plan” model were the two *Frederick L.* cases decided by the United States Court of Appeals for the Third Circuit. The cases involved *Olmstead* claims of a class of individuals who were in a large congregate psychiatric hospital in Pennsylvania and who wished to be placed in community settings.¹⁰¹

In *Frederick L. I*, the court acknowledged that Pennsylvania had made progress in the past in moving individuals out of institutions, but it rejected any assumption that past progress equated to a future commitment.¹⁰² What the state needed for the court to accept its fundamental alteration defense was a plan for community placement.¹⁰³ General policies and procedures for discharge planning did not constitute an *Olmstead* plan.¹⁰⁴ Although it found the state did not have a plan, the court rejected the plaintiffs’ request that the Department of Public Welfare be ordered to provide sixty community residential slots per year.¹⁰⁵ It specifically rejected plaintiffs’ argument that the Department should be required to favor additional community placements in its allocation of resources over other budget items by stating the judiciary is not well equipped to oversee internal budget decisions of the Department.¹⁰⁶ In the end, the court simply required the state to provide “a plan that is communicated in some manner” for moving qualified individuals with disabilities into less restrictive settings and a “commitment to action in a manner for

100. *Olmstead v. L.C.*, 527 U.S. 581, 605–06 (1999).

101. *Frederick L. v. Dep’t of Pub. Welfare (Frederick L. II)*, 422 F.3d 151, 154 (3d Cir. 2005); *Frederick L. v. Dep’t of Pub. Welfare (Frederick L. I)*, 364 F.3d 487, 489 (3d Cir. 2004).

102. *Frederick L. I*, 364 F.3d at 500–01.

103. *Id.*

104. *Id.* at 500.

105. *Id.*

106. *Frederick L. I*, 364 F.3d at 497–98 (3d Cir. 2004).

which it can be held accountable by the courts.”¹⁰⁷ This is comparable to remedies in the school desegregation context requiring school districts to come up with desegregation plans.

After remand, the Department provided submissions to the district court in its attempt to comply with the Third Circuit’s decision.¹⁰⁸ The case was again appealed to the circuit court, which rebuked the department’s post-remand submissions as a “vague assurance” that individuals would be moved out of institutions and into the community.¹⁰⁹ The court specifically held that a “comprehensive working plan” was necessary for a successful fundamental alteration defense.¹¹⁰ While it acknowledged that the judiciary is not well suited to devise a plan for community placement, it stated it would offer judicial guidance because of concern about discrimination and the rights of the individuals in the hospital.¹¹¹ To comply with *Olmstead*, it said:

A viable integration plan at a bare minimum should specify the time-frame or target date for patient discharge, the approximate number of patients to be discharged each time period, the eligibility for discharge, and a general description of the collaboration required between the local authorities and the housing, transportation, care, and education agencies to effectuate integration into the community.¹¹²

The requirement of measurable goals is another step in evolution of the *Olmstead* remedy. Measurable goals provide that there be actual progress toward community integration and provide a basis for plaintiffs to promptly return to court if suitable progress is not made.

In contrast to the *Frederick L.* cases, some courts have found in favor of states on their fundamental alteration defenses in cases

107. *Id.* at 500.

108. *Frederick L. v. Dep’t of Pub. Welfare (Frederick L. II)*, 422 F.3d 151, 158 (3d Cir. 2005).

109. *Id.* at 156.

110. *Id.* at 157 (citing *Olmstead v. L.C.*, 527 U.S. 581, 605–06 (1999)).

111. *Id.* at 160.

112. *Id.*

where the states had significantly increased their allocation of Medicaid waivers.¹¹³ In one case, Washington had increased its home- and community-based waiver slots from 1,227 in 1983 to 9,977 slots in 1998 and the budget for community-based disability programs such as the waiver program doubled from 1994 to 2001.¹¹⁴ During that time, the population of individuals categorized as “institutionalized” decreased by twenty percent.¹¹⁵ In New Hampshire, the state had increased slots in its waiver program targeted for individuals with acquired brain disorder from 15 in 1993 to 132 slots in 2006.¹¹⁶ The approximate average waiting period for a slot from the date of application was one year.¹¹⁷ In these cases, the courts did not require the states to apply for and provide the additional Medicaid waivers sought by the plaintiffs. But the courts recognized that the states were making substantial progress as measured by the number of waivers they funded for community placements. Again the accepted remedy still allowed state discretion and delays for some individuals but also recognized the state was making measurable progress.

D. Summary of Olmstead Remedy Evolution

Olmstead, like *Brown* before it, allowed a balancing of individual rights against state necessities in crafting a remedy to alter long standing institutional relationships. As with *Brown*, as time goes by, the balance should tip evermore toward vindicating individual rights. Ten years after the *Olmstead* decision, courts in some jurisdictions have clarified requirements for ADA integration remedies. These decisions have made clear that *Olmstead* applies to all placements and that the courts will look at the possibility of more complete integration even when the state has made some progress. Courts have

113. *E.g.*, *ARC of Wash. State, Inc. v. Braddock*, 427 F.3d 615, 622 (9th Cir. 2005); *Sanchez v. Johnson*, 416 F.3d 1051, 1067 (9th Cir. 2005); *Bryson v. Stephens*, No. 99-CV-58-SM, 2006 U.S. Dist. LEXIS 71775, at *25, 26 (D.N.H. Sept. 29, 2006); *see also Williams v. Wasserman*, 164 F. Supp. 2d 591 (D. Md. 2001) (finding no fundamental alteration in waiver case for similar reasons).

114. *Braddock*, 427 F.3d at 621 (citing 42 U.S.C. § 1396n(c)(1) (2000); 42 C.F.R. § 441.300 (1999)).

115. *Id.*

116. *Bryson*, 2006 U.S. Dist. LEXIS 71775, at *16.

117. *Id.* at *18.

also made clear that states must have plans with measurable goals and that courts will look at whether actual progress is made in placing people in the community.¹¹⁸

E. Olmstead Relief Ten Years After the Supreme Court Decision Should Be Immediate, Effective, and Comprehensive

As more time elapsed from the *Brown* decisions, courts progressively raised the bar of what changes were required to comply with *Brown* and when such changes were required. The lessons learned in implementing *Brown* over time are applicable to implementing integration called for by *Olmstead*. Now that ten years have passed since *Olmstead*, the courts must move beyond simply allowing plans with target dates and move toward mandating immediate, effective, and comprehensive integration of institutionalized individuals.

F. Courts Should Require Immediate Desegregation and Integration

Time is a critical factor when civil rights are at stake. In the school desegregation cases, each year that passed without integration meant a young child would be educated for an entire grade in a segregated setting. As the Fifth Circuit noted, “Ordinarily, on a declaration by a court of unconstitutional deprivation of rights, the relief granted is immediate and complete. But that is not the process encompassed in the ‘all deliberate speed’ concept of [*Brown II*].”¹¹⁹ This “moratorium” of civil rights caused great anxiety in the judiciary because it ran counter to the American “notions of ordered liberty.”¹²⁰ For a time, though, it was tolerated due to the magnitude of transforming school systems and concerns over the judiciary inserting itself into school administration.¹²¹ Ultimately, though, the

118. See *supra* notes 102–103, 107 and accompanying text.

119. *Ross v. Dyer*, 312 F.2d 191, 194 (5th Cir. 1962) (citing *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955)).

120. *Price v. Denison Indep. Sch. Dist. Bd. of Educ.*, 348 F.2d 1010, 1013 (5th Cir. 1965).

121. *Ross*, 312 F.2d at 195; *Price*, 348 F.2d at 1013–14.

courts turned back toward immediate and complete relief in order to ensure the fundamental liberties at issue.¹²²

Similar to *Brown*, each year that passes in which a state is allowed to segregate an individual in an institution is a year in which the individual suffers the discrimination prohibited by the ADA.¹²³ It is a year without privacy, without freedom of movement, and without an easy ability to interact with the larger world. It is a year of human potential degraded and lost. While similar concerns exist over the magnitude of change necessary to ensure integration and the role of the judiciary in administering systems for providing services to individuals with disabilities, ultimately these concerns must give way to the fundamental liberty interests of the individuals suffering discrimination and lack of integration.

The post-*Brown* cases can be a significant guide for courts to use in moving toward requiring immediate desegregation and integration under *Olmstead*. Near the tenth anniversary of the first *Brown* decision, the Fifth Circuit became intolerant of delay and found that the later school systems started to comply with *Brown*, the less time they should be given to carry it out.¹²⁴

A growing intolerance for the status quo fits well with the evolution of the ADA, *Olmstead*, and *Frederick L. II*. In 1990, the ADA prohibited public entities from discriminating against individuals with disabilities and stated that discrimination included segregation in institutions.¹²⁵ In 1999, the Supreme Court stated in *Olmstead* that states could comply with the ADA by creating working plans with reasonably moving waiting lists to provide services in the community rather than in institutions.¹²⁶ In 2005, the Third Circuit made clear that *Olmstead* and the ADA required at a minimum a comprehensive working plan with target dates for discharges, eligibility criteria, and a general description of the collaboration that

122. See, e.g., *Green v. County Sch. Bd.*, 391 U.S. 430, 437–39 (1968); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969).

123. 42 U.S.C. § 12101(a)(2), (3), (5), and § 12132 (2006).

124. See, e.g., *Lockett v. Bd. of Educ.*, 342 F.2d 225, 228 (5th Cir. 1965); *Stell v. Savannah-Chatham County Bd. of Educ.*, 333 F.2d 55, 65 (5th Cir. 1964).

125. 42 U.S.C. § 12132 (2006).

126. See *supra* note 82 and accompanying text.

would take place with community providers.¹²⁷ Now, nearly twenty years after the ADA and ten years after *Olmstead*, there should be little to no tolerance for the segregation of individuals who want and are able to live in the community with appropriate supports.

There is no question that there are substantial political and economic difficulties with a state transitioning from an institution-based system of services to a community-based system. Employees face the loss of jobs and communities face the loss of significant economic resources when an institution is closed or scaled back. Services in the community, including medical, housing, supports, and transportation, must be created or expanded and funded. State and local systems of administering and providing services must be changed. Individuals and families must be educated about the services in the community available to them. Such changes can take time to be done well.

But states have had since 1999 to make these changes. Just as school boards were told in 1965 that they should have foreseen the nettlesome problems that would arise from delaying school integration after they were required to do so in 1954,¹²⁸ states should have foreseen the problems that would arise if they did not begin integrating individuals who were segregated in institutions. The Supreme Court declared in *Olmstead* that “unjustified isolation” was “properly regarded as discrimination.”¹²⁹ Fundamental American ideals demand that discrimination not be allowed to persist indefinitely.

Turning now to how this timing fits within the third prong of *Olmstead*, the Supreme Court explained that a state could raise a fundamental alteration defense if it would be inequitable for an individual to be given relief immediately based upon the allocation of resources and the state’s obligation to serve a diverse population of individuals with disabilities.¹³⁰ In the decade since *Olmstead*, states have had substantial time to reallocate resources to provide

127. *Frederick L. v. Dep’t of Pub. Welfare (Frederick L. II)*, 422 F.3d 151, 160 (3d Cir. 2005).

128. *Singleton v. Jackson Mun. Separate Sch. Dist.*, 348 F.2d 729, 729–30 (5th Cir. 1965).

129. *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999).

130. *Id.* at 604.

community services instead of segregated institutional care. Thus, in examining relief requested under *Olmstead*, the question should no longer be whether the *immediate* relief requested is inequitable but, instead, whether the relief, *which the state has had at least ten years to develop*, is inequitable. In other words, granting relief to individuals asserting their established right to integration was never intended to be subjected to unreasonable delay. After ten years, any delay beyond the details of transition is unreasonable. Considered in this light, the fundamental alteration component of the third prong often should be a nonissue in determining whether immediate relief should be required. A primary lesson of *Brown* is that intransigent defendants will continue to deny individual rights until the courts step in and mandate effective relief.

G. Olmstead Relief Should Be Effective

The “viable integration plan” requirement in *Frederick L. II*, which is modeled after the *Olmstead* example of a working plan with reasonably paced waiting lists, has positive elements in that it requires a state to create a plan with benchmarks for discharges with eligibility standards.¹³¹ However, it has an enormous drawback in that it gives the state too much discretion. In other words, it gives the party that has expended resources to fight an *Olmstead* lawsuit, that has denied noncompliance, and that has been dragging its feet the responsibility to create a compliance plan and the responsibility to carry out compliance.

This was a problem also faced by courts after the *Brown* decision. The Fifth Circuit noted that there would be a need to “avoid the temptation to recalcitrant or reluctant school systems to seek judicial approval of a token plan”¹³² At the same time, though, it noted that a school board’s good faith desire to do what the law requires could have a significant impact on the fashioning of relief, but not on the speed of the plan.¹³³ As time went by, the discretion allowed

131. *Frederick L. II*, 422 F.3d at 160.

132. *Price v. Denison Indep. Sch. Dist. Bd. of Educ.*, 348 F.2d 1010, 1013 (5th Cir. 1965).

133. *Id.* at 1014.

school districts to delay or circumscribe integration was increasingly limited and finally eliminated altogether.

Similarly, courts must take steps to ensure that *Olmstead* relief be planned and implemented in an effective manner. It is not simply enough to discharge individuals from institutions and close institutions. Individuals who require services at an institution-level of care will require quality services and supports in the community in order to be able to live full lives in the community and in order to avoid having to return to the institution.

There are a number of lessons from the post-*Brown* cases that courts can use in ensuring effective *Olmstead* relief. In crafting relief, courts should require states to work with experts and national agencies with knowledge in the field.¹³⁴ States with entrenched systems of providing services to individuals in institutions may lack expertise in providing quality comprehensive community services. Other states and agencies have this expertise and should be called upon to share their knowledge of best practices.

Courts should require results rather than simply relying on plans. School systems tried to satisfy *Brown* by creating “freedom of choice” plans, but these plans were ultimately found not to meet constitutional standards if they did not result in integration of students and faculty.¹³⁵

Courts should keep cases open and maintain jurisdiction to ensure that quality desegregation and integration take place.¹³⁶ Regular reports of progress should be given to the court to show that progress is being made.¹³⁷ While courts should expect their orders to be followed and contempt actions are available when court orders are not followed, the systemic changes necessary to transform institution-based services to community-based services will often require court oversight to ensure prompt and full compliance.

134. *Cf.* *United States v. Choctaw County Bd. of Educ.*, 417 F.2d 838, 842–43 (5th Cir. 1969) (requiring district court to collaborate with the experts of the federal Office of Health, Education, and Welfare in the preparation of a plan).

135. *Id.* at 840–41 (quoting *Adams v. Matthews*, 403 F.2d 181, 188 (5th Cir. 1968)).

136. *See, e.g., Stell v. Savannah-Chatham County Bd. of Educ.*, 333 F.2d 55, 66 (5th Cir. 1964); *Choctaw County*, 417 F.2d at 842–43.

137. *See, e.g., Choctaw County*, 417 F.2d at 842.

Courts may have to require states to take dramatic and drastic steps to ensure desegregation and integration. For instance, in the school cases, courts mandated teacher transfers,¹³⁸ mandated transportation be provided,¹³⁹ refused to let school districts split if that furthered segregation,¹⁴⁰ and required desegregation to take effect in two weeks in early 1970.¹⁴¹ These requirements caused hardship for children and families, cut into school budgets, and disquieted communities. Yet, these remedies were essential to root out the vestiges of discrimination and segregation.

Many believe that nursing facilities and mental health institutions are necessary to serve individuals with significant physical and intellectual disabilities or mental health disorders. Yet, the reality is most individuals can be served in the community if the services needed are available for them. Just as *Brown* completely changed the paradigm of where students would be educated, *Olmstead* can change where individuals receive supports and services. This may require substantial short-term allocations of resources and discomfort, but it will result in realization of the ADA's vision for the inclusion in society of individuals with disabilities.

H. Olmstead Relief Should Be Comprehensive

The key recognition in ensuring comprehensive relief is that while rights are individual, remedies for group-based discrimination must be oriented toward the group.¹⁴² The state must facilitate integration; otherwise, segregation will inevitably persist. The early freedom of choice remedies following *Brown* were ineffective because they placed the burden on individuals to come forward and initiate desegregation, often in the face of threats and intimidation. While many brave and energetic parents and students did so, other parents and students were deterred by inertia, the difficulty of pursuing relief individually, and threats of retaliation. Most individuals who are

138. *Id.*

139. *Brewer v. Sch. Bd.*, 456 F.2d 943, 947 (4th Cir. 1972).

140. *Wright v. Council of Emporia*, 407 U.S. 451, 452–53 (1972).

141. *Carter v. W. Feliciana Parish Sch. Bd.*, 396 U.S. 290, 291 (1970).

142. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 846 (5th Cir. 1966).

discriminated against will not come to court to protect their rights or even take affirmative steps to grasp their rights.

Under *Olmstead*, to be effective, desegregation must be initiated by the state, not by each individual with a disability. People with disabilities in state institutions can be very vulnerable. Sometimes life-sustaining care is provided by the state, and it may be an intimidating prospect to demand that the state provide non-institutional care. People with disabilities must be considered for and offered community supports and services as a matter of course. The burden cannot be placed on them to demand community placements, or desegregation will never be fully achieved. This does not mean that individuals with disabilities cannot choose where they live, only that choosing to live in the community with supports and services should not be more burdensome than choosing to live in an institution.

Courts enforcing the *Brown* decision began requiring that all vestiges of the dual school system be rooted out. Integration had to be comprehensive and complete. In order to reach this goal, courts developed the following six particulars that were necessary for comprehensive integration under *Brown*: “composition of student bod[y], faculty, staff, transportation, extracurricular activities, and facilities.”¹⁴³ Racial identification in these areas had to be eliminated in order to end the dual school system. The end result was to be that the whole system would be converted into “a unitary, nonracial school system.”¹⁴⁴

Similarly, if the vision of the ADA and *Olmstead* is to be realized, then integration must be complete to the greatest degree appropriate to the needs of individuals. This is the requirement of the integration regulation, and it is what is required to root out the discrimination prohibited by Title II of the ADA. As the Courts ultimately recognized in enforcing *Brown*, specific remedies concerning components of an effective integrated system should be addressed. The particulars necessary for comprehensive integration include: (1)

143. *Ellis v. Bd. of Pub. Instruction*, 423 F.2d 203, 204 (5th Cir. 1970) (citing *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 435 (1968)).

144. *Id.*

assessments of all institutionalized individuals; (2) accessible education on community service options; (3) sufficient quality integrated community services and supports; (4) adequate transition services; and (5) quality controls to ensure appropriate, quality, and sufficient community services.

First, to have comprehensive integration, every qualified individual with a disability in an institution or nursing facility must be assessed to determine whether such individual can live in a less restrictive setting. While this may appear to be a large undertaking, every nursing facility currently has specific assessments it is required to do under federal regulation.¹⁴⁵ Similarly, assessments are a routine part of treatment in mental health institutions. As the school desegregation cases note, the responsibility for integration must be on the state, and not on each individual. As discussed above, assessments must be based on what community services are possible in the community rather than simply based on what community services actually exist. Community services are essentially modifications, which, if reasonable, must be fashioned with the individual's needs taken into account.

Second, individuals and, where appropriate or necessary, families or guardians must be provided with sufficient information about what community services exist. This requirement is similar to what is already required by Medicaid. Medicaid requires every individual be told about alternatives to institutional services when community services are available.¹⁴⁶ Individuals must be informed using a method that is most accessible to the individual depending on the individual's disability. Where families or guardians are involved, the individual's choice should be respected to the greatest degree possible.

Third, there must be a sufficient array of quality integrated community services and supports available to meet the needs of individuals who are in institutions or who are at risk of institutionalization if such individuals can live in the community with

145. See, e.g., Relationship of PASARR to Other Medicaid Processes, 42 C.F.R. § 483.108 (2009).

146. 42 U.S.C. § 1396n(c)(2)(C), (d)(2)(C) (2006).

necessary services. Such services will often include scattered housing with flexible supports, vocational support, health care, medication, personal supports, and transportation.¹⁴⁷ While the costs for these services will be substantial, the Medicaid waiver programs have shown that such services will often cost less to provide in the community than in institutions and nursing facilities. It is also essential that the supports and services be provided in the most integrated setting appropriate to the needs of the individual.¹⁴⁸

Fourth, there must be adequate services sufficient to give individuals, particularly individuals who have been in institutions for years, the transitions they need to be successful in the community. Such services will include coordination between service providers in the institutions and service providers in the community, opportunities for trial visits, a well thought-out person-centered transition plan, and funding necessary to make a smooth transition.

Fifth, there must be oversight and quality controls to ensure that individuals in the community are receiving the services they need, that vulnerable individuals are not suffering abuse or neglect, and that individuals are getting the services they need to live successful lives in the community in the most integrated settings appropriate to their needs. Court enforcement is facilitated if the court requires that defendants keep information and provide it to plaintiffs and the court, as was often in school desegregation cases.¹⁴⁹

These systems requirements cannot effectively be requested by each individual. They can only be provided by appropriate group-oriented relief. Without this sort of comprehensive relief, each institutionalized individual will struggle to obtain an appropriate placement.

147. *Disability Advocates, Inc. v. Patterson*, No. 03-CV-3209, 2009 U.S. Dist. LEXIS 80975, at *103-07 (E.D.N.Y. Sept. 8, 2009) (citing 28 C.F.R. § 35.130(d)).

148. *Id.* at *20-21.

149. *E.g., United States v. Hinds County Sch. Bd.*, 433 F.2d 611, 618 (5th Cir. 1970).

CONCLUSION

Both *Brown* and *Olmstead* are civil rights decisions. The premise of *Olmstead* is that citizens with disabilities, who are able to live in the community with supports, have the right to be integrated in the community. As one court observed, it is a “gross injustice” to confine individuals with disabilities in an institution when being in an institution is not necessary.¹⁵⁰ Just as courts enforcing *Brown* lamented the lost human opportunities from delayed implementation of *Brown*, so we must acknowledge the human potential irretrievably lost by ten years of often slow progress toward more integrated placement of persons with disabilities. These losses cannot be reclaimed, but courts must ensure that future losses are minimized by requiring prompt remedial action. The ultimate lesson from enforcement of *Brown* is that remedy components must evolve as time goes by to ensure that justice is ultimately attained. Now that ten years have passed since the *Olmstead* decision, courts should require immediate, comprehensive and effective integration for all institutionalized individuals who can live in the community with supports.

150. *Frederick L. v. Dep’t of Pub. Welfare (Frederick L. I)*, 364 F.3d 487, 500 (3d Cir. 2004).

