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# THE CONSTITUTIONAL RIGHT TO COMMUNITY SERVICES

David Ferleger\*

## INTRODUCTION

“[I]nstitutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.”<sup>1</sup>

“Pennhurst provides confinement and isolation, the antithesis of habilitation.”<sup>2</sup>

“Institutions, by their very structure a closed and segregated society founded on obsolete custodial models[,] can rarely normalize and habilitate the mentally retarded citizen to the extent of community programs created and modeled upon the normalization and developmental approach components of habilitation.”<sup>3</sup>

Twenty-one years before the Supreme Court in *Olmstead v. L.C.* (*Olmstead*)<sup>4</sup> held that unjustified institutionalization is discrimination forbidden by the Americans with Disabilities Act, a court issued the landmark decision that all institutionalization of people with mental retardation violates the United States Constitution and that states have an obligation to provide community services to the

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\* University of Pennsylvania Law School, J.D., 1972. The author has a national litigation and consulting practice in disability law. He filed, litigated, and argued the *Pennhurst* case, discussed below. He was special master for a federal court for nine years in a case involving a state developmental disabilities institution, and was a court-appointed monitor in similar litigation.

1. *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999).

2. *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1318 (E.D. Pa. 1978). For subsequent history, see *infra* note 5.

3. *Halderman*, 446 F. Supp. at 1318 (E.D. Pa. 1978).

4. *Olmstead*, 527 U.S. 581, 587 (1999).

institutionalized.<sup>5</sup> The first quotation above is from *Olmstead* in 1999 and the second two are from *Halderman v. Pennhurst State School and Hospital (Pennhurst)* in 1978.

United States District Judge Raymond J. Broderick, author of *Pennhurst*, was a conservative Republican jurist and former Lieutenant Governor of Pennsylvania. He was not a judicial activist. Those words did not come easily but after thoughtful consideration.<sup>6</sup> He was stirred in *Pennhurst* by the same considerations which shaped Congress' findings in the Americans with Disabilities Act of 1990 on segregation and discrimination against people with disabilities.<sup>7</sup>

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5. *Halderman*, 446 F. Supp. at 1318 (E.D. Pa. 1978). The subsequent history of the case includes two Supreme Court decisions and numerous other rulings. See, e.g., *Halderman v. Pennhurst State Sch. & Hosp.*, 465 U.S. 89 (1984); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Halderman v. Pennhurst State Sch. & Hosp.*, 49 F.3d 939 (3rd Cir. 1995); *Halderman v. Pennhurst State Sch. & Hosp.*, 901 F.2d 311 (3d Cir. 1990); *Halderman v. Pennhurst State Sch. & Hosp.*, 707 F.2d 702 (3d Cir. 1983); *Halderman v. Pennhurst State Sch. & Hosp.*, 673 F.2d 645 (3d Cir. 1982) (on remand); *Halderman v. Pennhurst State Sch. & Hosp.*, 673 F.2d 628 (3d Cir. 1982); *Halderman v. Pennhurst State Sch. & Hosp.*, 673 F.2d 647 (3d Cir. 1982); *Halderman v. Pennhurst State Sch. & Hosp.*, 612 F.2d 84 (3d Cir. 1979); *Halderman v. Pennhurst State Sch. & Hosp.*, 612 F.2d 84 (3d Cir. 1979) (affirmed in part and reversed in part); *Halderman v. Pennhurst State Sch. & Hosp.*, 612 F.2d 131 (3d Cir. 1979); *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977) (original trial court decision).

For first-hand analysis of the case, see generally David Ferleger & Patrice McGuire, *Rights and Dignity: Congress, the Supreme Court, and People with Disabilities After Pennhurst*, 5 W. NEW ENG. L. REV. 327 (1983); David Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L. REV. 595 (1983); David Ferleger & Penelope A. Boyd, *Anti-Institutionalization: The Promise of the Pennhurst Case*, 31 STAN. L. REV. 717 (1979); David Ferleger, *The Right to Community Care for the Retarded*, in NORMALIZATION, SOCIAL INTEGRATION AND COMMUNITY SERVICES (Robert J. Flynn & Kathleen E. Nitsch, eds., 1980).

6. Judge Broderick interrogated witness after witness on the need for institutions:

"Would you agree with the other witnesses I've heard that it is time to sound the death knell for institutions for the retarded?" Thus spoke United States District Judge Raymond J. Broderick in the sixth week of trial. These words—soon to be echoed emphatically in the court's unprecedented opinion—did not come easily. The judge had studied hard and learned well. He spent the early days of trial listening to and interrogating expert after expert to find out whether an institution was not in fact needed in the southeast corner of Pennsylvania to serve 400 people. The answer was no. For 350 people? No. One institution for the entire state? No. An institution for the most profoundly retarded with physical handicaps? Again, the answer was no. Even the superintendent of the institution told the court that there was no need to continue incarceration of the retarded at Pennhurst.

David Ferleger & Penelope A. Boyd, *Anti-Institutionalization: The Promise of the Pennhurst Case*, 31 STAN. L. REV. 717, 718 (1979).

7. In adopting the ADA, Congress recognized that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem," and that "individuals with disabilities continually encounter various forms of discrimination, including outright

*Pennhurst* foreshadowed the Supreme Court's identification in *Olmstead v. L.C.*, of the profound negative impact of institutions on those confined<sup>8</sup> and its holding that the ADA proscribes "[u]njustified isolation of individuals with disabilities."<sup>9</sup>

With a satisfied grin, whether in public or private, Judge Broderick often observed that his decision recognizing the constitutional right to community services was never reversed.<sup>10</sup> Indeed, while the 1978 decision precipitated two Supreme Court decisions on other grounds, and a myriad of rulings on related issues, the constitutional holdings were not questioned on appeal or certiorari.<sup>11</sup> The commitment to alternatives to institutions, premised on constitutional rights, espoused in *Pennhurst* was the groundwork for much other litigation, became support for various states' policies, and a rallying point for institutional residents, professionals in the field, and advocates.<sup>12</sup>

It was not until *Olmstead*, however, that the Supreme Court weighed in on the institutionalization issue and this time, unlike *Pennhurst*, there was a federal statutory ground for the decision.<sup>13</sup> The emergence of the "integration mandate" of the ADA, and the

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intentional exclusion, . . . failure to make modifications to existing facilities and practices, . . . [and] segregation." 42 U.S.C. § 12101(a)(2), (5) (2006) (emphasis added).

8. The Court stated the following:

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

*Olmstead*, 527 U.S. at 600–01 (1999).

9. *Olmstead*, 527 U.S. at 582 (1999).

10. Judge Broderick made the comment to the author and in various speeches and interviews, always with the same confidence in the original constitutional grounding of his 1978 decision.

11. See *supra* note 5.

12. See *E.g.*, MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 140–45 (1991); Samuel R. Bagenstos, *Abolish the Integration Presumption? Not Yet*, 156 U. PA. L. REV. 157 (2007).

13. See *Olmstead*, 527 U.S. 581 (1999). *Contra* *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1318 (E.D. Pa. 1978).

Supreme Court's emphatic recognition in *Olmstead* of the benefits of community services for people who are institutionalized has diminished discussion of the constitutional inquiries which are the focus of this article.

This is a moment for a "necessary and overdue"<sup>14</sup> return to constitutional principles as a means both to support the integration mandate and to surmount some of the weaknesses of a purely ADA and *Olmstead* approach.

I propose that involuntary institutionalization of people with intellectual disabilities is unconstitutional on due process and equal protection grounds.<sup>15</sup> Due process precludes needless curtailment of personal liberty. Equal protection forbids discrimination against such individuals unless necessitated by a compelling state interest, an interest absent in non-criminal institutionalization. On groundwork language in *Olmstead*, I suggest that the narrow class of involuntarily institutionalized individuals with intellectual disabilities is a suspect or quasi-suspect class under the Equal Protection Clause.

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14. The phrase is from Dr. Morton Birnbaum whose writings inspired the call for recognition of a right to treatment for people in institutions fifty years ago; he termed it a "necessary and overdue development of our present concept of due process of law." Morton Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499, 503 (1960). The right to treatment did achieve recognition. For an early decision, see *Rouse v. Cameron*, 373 F.2d 451, 455 (D.C. Cir. 1966). For the early development of the right, see *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974); Russell Jackson Drake, *Enforcing the Right to Treatment: Wyatt v. Stickney*, 10 AM. CRIM. L. REV. 587 (1972); Stanley Herr, *Civil Rights, Uncivil Asylums and the Retarded*, 43 U. CIN. L. REV. 679 (1974).

15. The caselaw is often imprecise in defining the individuals involved in the litigation discussed in this article. What had been called "Mental Retardation" is currently defined as "Intellectual Disability" by the American Association on Intellectual and Developmental Disabilities (formerly, the American Association on Mental Retardation). ROBERT L. SCHALOCK ET AL., *INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS* (11th ed. 2010). "Developmental disabilities" is a broader category than mental retardation is statutorily (not clinically) defined. See generally *Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1994*, Pub. L. No. 103-230, 108 Stat. 284 (codified as amended at 42 U.S.C.A. § 15002 (2000)).

Where contextually appropriate, I have chosen to use the term current in the field, that is, "intellectual disability," to refer to what was formerly called "mental retardation." Although still unfamiliar in the legal literature, and not yet adopted in the caselaw, intellectual disability will become the norm in short order. However, where I refer to history, reported cases, or the published literature, I sometimes use the original source's terminology. It should be kept in mind that, while the categories overlap, there is a difference between developmental disabilities and intellectual disability with regard to their clinical, social, and functional features. However, for the purposes of this article, the applicable legal principles are the same.

While much of the analysis in this article might also apply to "mental illness," the discussion is limited to the rights of people with intellectual disabilities.

Restoration of constitutional rights to the conversation cures some of the deficits in the *Olmstead* statutory construct. In addition, the judicial armamentarium available to enforce constitutional rights makes techniques available to enforce a broader and more powerful responsibility on the part of the state to eliminate unnecessary institutionalization through the expansion of quality community services.

In this article, I briefly outline the *Olmstead* decision and then discuss its limitations. I assume some familiarity with the history of institutional and community care, and the litigation which preceded *Olmstead*.<sup>16</sup>

## I. THE AMERICANS WITH DISABILITIES ACT

### A. *Olmstead*: A “Qualified Yes” to Community Services

In *Olmstead v. L.C.*, the United States Supreme Court held that Title II of the Americans with Disabilities Act of 1990 (ADA)<sup>17</sup> requires the placement of persons with mental disabilities in community settings, rather than in institutions, when: (1) the state’s

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16. See generally *Olmstead*, 527 U.S. 581 (1999). The work of Jacobus tenBroek is groundbreaking but often unacknowledged. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (1966); Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809 (1966); see also, e.g., Samantha A. DiPolito, *Olmstead v. L.C.—Deinstitutionalization and Community Integration: An Awakening of the Nations’ Conscience?*, 58 MERCER L. REV. 1381, 1382–88 (2007) (nature and effects of institutionalization, and history of community services); Jefferson D.E. Smith & Steve P. Callandrillo, *Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After Olmstead v. L.C.*, 24 HARV. J. L. & PUB. POL’Y 695, 703–05 (2001) (harms of institutionalization and benefits of community services); Mark C. Weber, *Home and Community-Based Services, Olmstead, and Positive Rights: A Preliminary Discussion*, 39 WAKE FOREST L. REV. 269, 273–77 (2004) (history and nature of institutionalization). On disability discrimination, see generally Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 418 (2000) (“subordinated status” of persons with a disability); Paula E. Berg, *Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 YALE L. & POL’Y REV. 1, 9 (1999); Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1357–58 (1993) (civil rights model of disability); Michael L. Perlin, *“Their Promises of Paradise”: Will Olmstead v. L.C. Resuscitate the Constitutional “Least Restrictive Alternative” Principle in Mental Disability Law?*, 37 HOUS. L. REV. 999, 1005–10 (2000); Peter Blanck, *“The Right to Live in the World”: Disability Yesterday, Today, and Tomorrow*, 13 TEX. J. C.L. & C.R. 367 (2008).

17. Americans with Disabilities Act, 42 U.S.C. § 12132 (1990).

treatment professionals determine that such a placement is appropriate, (2) the transfer is not opposed by the individual, and (3) the placement can be reasonably accommodated given the resources available to the state and its obligation to provide for the needs of others with mental disabilities.<sup>18</sup> A five justice majority held that a failure to provide care for individuals with mental disabilities in the most integrated setting appropriate to their needs may be viewed as discrimination, in violation of the ADA, unless the state or other public entity can demonstrate an inability to provide less restrictive care without “fundamentally alter[ing]” the nature of its programs.<sup>19</sup>

Congress passed the Americans with Disabilities Act in 1990.<sup>20</sup> Designed as a comprehensive statutory scheme, the ADA seeks to eliminate disability discrimination on three fronts: employment; public services offered by public; and public services and accommodations offered by private entities.

Prior to the ADA,<sup>21</sup> Section 504 of the Rehabilitation Act of 1973<sup>22</sup> was the major statutory ground for challenge to discrimination against people with disabilities.<sup>23</sup> Section 504 provides relief when a program or service receives federal funds and, thus, affects residents of virtually all public institutions.<sup>24</sup> Section 504 had been on the books for years but it had proven of limited utility in affecting deinstitutionalization, despite a regulatory integration requirement.<sup>25</sup>

18. *Olmstead*, 527 U.S. 581, 607 (1999).

19. *Id.* at 592; 28 C.F.R. § 35.130(b)(7) (1998).

20. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).

21. *Id.* § 12132.

22. 29 U.S.C. § 794 (1973).

23. Although Section 504 has been called “the cornerstone of the civil rights movement of the mobility-impaired,” its shortcomings and deficiencies quickly became apparent. *ADAPT v. Skinner*, 881 F.2d 1184, 1205 (3d Cir. 1989) (Mansmann, J., concurring). See, e.g., Timothy Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 394-408 (1991) (the Rehabilitation Act and its regulations have been practically a dead letter as a remedy for segregated public services). One commentator has written that the weaknesses of section 504 arise from its statutory language, “the limited extent of their coverage, inadequate enforcement mechanisms, and erratic judicial interpretations.” Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 431 (1991).

24. 29 U.S.C. § 794 (1973).

25. See 29 U.S.C. § 794; 28 C.F.R. § 41.51(d) (2001) (providing that programs and activities shall be administered “in the most integrated setting appropriate”). A number of courts held that the denial of community based habilitation services to mentally disabled individuals does not constitute a viable cause of action under section 504. *E.g.*, *Ky. Ass’n for Retarded Citizens, Inc. v. Conn.*, 674 F.2d 582,

The ADA differs from the Rehabilitation Act and other earlier statutes in that it explicitly recognizes “institutionalization” and “segregation” as forms of discrimination against disabled individuals.<sup>26</sup> Also, the ADA required adoption of implementing regulations.<sup>27</sup> There are two regulations most relevant to the *Olmstead* decision; together they comprise the “integration mandate” of the ADA. The first is the integration regulation, which states: “A public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”<sup>28</sup> The second is the reasonable modifications regulation, which provides: “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 conclusively that making the modifications would fundamentally alter the nature of the service, program, or activity.”<sup>29</sup>

Delivering the Court’s *Olmstead* decision, Justice Ginsburg framed the issue as “whether the [ADA’s] proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions.”<sup>30</sup> She expressed the Court’s answer conspicuously as “*a qualified yes*.”<sup>31</sup>

While the majority concluded that unnecessary institutionalization violated the ADA,<sup>32</sup> Justice Ginsburg spoke for a plurality of four.<sup>33</sup> Justices O’Connor, Souter and Breyer joined her opinion as to the fundamental alteration defense.<sup>34</sup> Justice Stevens would have

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585 (6th Cir. 1982); *Conner v. Branstad*, 839 F. Supp. 1346, 1346 (S.D. Iowa 1993); *Sabo v. O’Bannon*, 586 F. Supp. 1132, 1137 (E.D. Pa. 1984); *Manecke v. Sch. Bd.*, 553 F. Supp. 787, 790 n. 4 (M.D. Fla. 1982), *aff’d in part and rev’d in part*, 762 F.2d 912 (11th Cir. 1985); *Garrity v. Gallen*, 522 F. Supp. 171, 213 (D.N.H. 1981). These holdings, however, do not necessarily exclude application of Section 504 to egregious discrimination in a particular individual case.

26. 42 U.S.C. §§ 12101(a)(2), (3), (5) (2006).

27. 42 U.S.C. § 12134 (2006) (attorney general to promulgate regulations).

28. 28 C.F.R. § 35.130(d) (2001).

29. 28 C.F.R. § 35.130(b)(7) (2001).

30. *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999).

31. *Id.* (emphasis added).

32. *Id.* at 587–603.

33. *Id.* (O’Connor, Souter, and Breyer, JJ., concurring with respect to Part III-B).

34. *Id.* at 603–07.

affirmed the judgment of the court of appeals.<sup>35</sup> Justice Kennedy, concurring separately, was concerned that the decision might pressure the states into “attempting compliance on the cheap, placing marginal patients into integrated settings devoid of the services and attention necessary for their condition.”<sup>36</sup>

The Court based its decision that unnecessary institutionalization is a form of discrimination on two rationales. First, placing people with disabilities who are capable of living in the community in institutions perpetuates the stereotypes that such individuals are unworthy or incapable of participating in community life.<sup>37</sup> Second, confinement in an institution deprives the individual of participation in a broad spectrum of important activities, such as “family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”<sup>38</sup> The Court recognized that institutionalization implies discrimination: “[T]o receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.”<sup>39</sup>

*Olmstead* was heralded as a potentially “revolutionary” advance for people with disabilities.<sup>40</sup> Although other courts had previously found the same protections in the ADA,<sup>41</sup> *Olmstead*’s conclusion that Title II of the ADA forbids “[u]njustified isolation” of people with disabilities was a defining moment.<sup>42</sup>

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35. *Id.* at 607–08.

36. *Olmstead*, 527 U.S. at 610.

37. *Id.* at 600.

38. *Id.* at 601.

39. *Id.*

40. “*Olmstead* potentially has the capacity to transform and revolutionize mental health law.” Michael L. Perlin, “*I Ain’t Gonna Work on Maggie’s Farm No More*,” *Institutional Segregation, Community Treatment, the ADA, and the Promise of Olmstead v. L.C.*, 17 T.M. COOLEY L. REV. 53, 56 (2000); see also Mary C. Cerreto, *Olmstead: The Brown v. Board of Education for Disability Rights: Promises, Limits, and Issues*, 3 LOY. J. PUB. INT. L. 47 (2001).

41. *E.g.*, *Helen L. v. DiDario*, 46 F.3d 325, 333 (3d Cir. 1995) (“[T]he ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled.”).

42. *Olmstead*, 527 U.S. at 582.

### B. *Olmstead's Shortcomings*

Legal advocates and scholars are perhaps prone to overstate the impact of particular cases on the world generally, as well as on the law. That has been *Olmstead's* fortune.<sup>43</sup> While one might have expected that the *Olmstead* decision would have accelerated community placement, this has not been the case. In addition, the decision is fraught with deficiencies which thwart achievement of the right articulated by the Court, that is, to the right to be free from unjustified isolation.

#### 1. *Movement from Institutions Has Slowed*

Since the *Olmstead* decision, there has been a *slowing* of the movement of residents from both public and private institutions, according to an analysis marking the case's tenth anniversary.<sup>44</sup> Between June 30, 1990 and June 30, 1999, public institution populations decreased by about 30,300 residents or 38.2%.<sup>45</sup> Private institution residents decreased by about 13,700 persons or about 28.6%.<sup>46</sup> These numerical and rate decreases were actually *greater* for public institutions than those that followed *Olmstead*,<sup>47</sup> which was decided at the end of this ten year period.<sup>48</sup> "Between June 30, 1999 and June 30, 2008, public institution populations decreased by about 14,100 people, or 28.6%, and private institution populations decreased by about 10,400 people, or 30.5%."<sup>49</sup> "Although there was a modestly increased rate of private institution depopulation

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43. Within two years of his hailing *Olmstead*, Professor Perlin was questioning its impact. *Olmstead*, 527 U.S. at 582. Professor Perlin asks, "Has *Olmstead*, so far, really made a difference? Or, are persons institutionalized because of mental disability, still 'on the bottom?'" Michael L. Perlin, "What's Good Is Bad, What's Bad Is Good, You'll Find Out When You Reach the Top, You're on the Bottom": Are the Americans with Disabilities Act (and *Olmstead v. L.C.*) Anything More Than "Idiot Wind?", 35 U. MICH. J.L. REFORM 235, 241 (2002).

44. K. Charlie Lakin, Naomi Scott, Sheryl Larson & Patricia Salmi, *Marking the 10th Anniversary of the Olmstead: Has It Made a Difference for People with Developmental Disabilities*, 47 INTELL. & DEVELOPMENTAL DISABILITIES, Oct. 2009, at 406.

45. *Id.* at 404.

46. *Id.*

47. See generally *Olmstead*, 527 U.S. 581.

48. Lakin et al., *supra* note 44, at 404–06.

49. *Id.* at 406.

following *Olmstead*,<sup>50</sup> among public and private institutions combined, the rates of depopulation were slightly lower after [*Olmstead*] than before (36.9% and 29.4%, respectively).<sup>51</sup>

Why did this occur? Statistically, it was “because of the slowing rate within public institutions” “driven by low rates of deinstitutionalization in relatively few states.”<sup>52</sup> The states slowest in community movement are increasing the proportion of public institution residents which they house.<sup>53</sup> In 1990, the 10 slowest states had 34% of the total public institution residents.<sup>54</sup> At the time of the *Olmstead* decision, they had 43%, and by 2008, they had 52%.<sup>55</sup> Since *Olmstead*, these 10 states decreased their total public institution populations by about 15% as compared with a 42% reduction in the other states.<sup>56</sup>

While these numbers cannot demonstrate an *Olmstead* cause-and-effect, the researchers did find it “[more] evident . . . that the effects of *Olmstead* in the future, if any, will depend on the *internal or external motivation* of a relatively small number of states to operate in more consistent compliance with it.”<sup>57</sup> This raises the question of whether *Olmstead* alone is sufficient to provide a significant piece of that motivation.

## 2. *Olmstead Suffers from Internal Deficiencies*

Apart from its lack of constitutional teeth, *Olmstead*<sup>58</sup> suffers from several internal deficiencies which weaken the force of its integration mandate. These include a government-friendly fundamental alteration defense and an effectively non-accountable “working plan” option to demonstrate compliance.<sup>59</sup>

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50. See generally *Olmstead*, 527 U.S. at 587.

51. Lakin et al., *supra* note 44, at 406.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* The public institutions’ population was 84,239 in 1990, 49,105 in 1999, and 35,051 in 2008. Lakin et al., *supra* note 44, at 404.

57. *Id.* (emphasis added).

58. See generally *Olmstead*, 527 U.S. 581 (1999).

59. *Id.* at 584.

a. “*Fundamental Alteration*”

The obligation of public entities to make reasonable modifications of their policies, practices and procedures to avoid the discrimination of unjustified segregation is limited by the “fundamental alteration” defense. The entity is relieved of its obligation if “the public entity can demonstrate that making the modifications would *fundamentally alter* the nature of the service, program, or activity.”<sup>60</sup> Courts must consider whether “in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with . . . disabilities.”<sup>61</sup> Additional cost, however, alone does not constitute a fundamental alteration.<sup>62</sup> The analysis is not limited to comparing institutional to community cost; if that were the case, plaintiffs would generally always prevail.

The fundamental alteration defense may result in bizarre acceptance of discrimination to the detriment of individuals deeply in need. In *Townsend v. Quasim*,<sup>63</sup> it was contended that the state’s use of community-based nursing services to provide essential long term care to some disabled Medicaid recipients but not others violates Title II of the ADA.<sup>64</sup> The plaintiff, a man in his eighties with medical and physical disabilities, was told by the Washington State’s Department of Social and Health Services that, based on new definitions of services, he would have to move to a nursing home or lose Medicaid benefits which provided him with community care.<sup>65</sup> The Ninth Circuit agreed that the state’s action was discriminatory but declined to provide relief, remanding because providing

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60. 28 C.F.R. § 35.130(b)(7) (2001) (emphasis added).

61. *Olmstead*, 527 U.S. at 604. The section of Justice Ginsburg’s opinion describing the standards to be employed when analyzing a cost-based defense was joined by only four members of the Court. Justice Kennedy’s concurring opinion supported a state’s discretion to adopt its own systems of cost analysis. *Id.* at 615 (Kennedy, J., concurring).

62. *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1183 (10th Cir. 2003) (citing H.R. REP. NO. 101-485, at 50 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 473 (“While the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole.”)).

63. See generally *Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003).

64. *Id.* at 518.

65. *Id.* at 514.

community services “would fundamentally alter” the State’s Medicaid programs.<sup>66</sup>

A fundamental alteration might involve program integrity (modification of the fundamental nature of the program, for example) or magnitude (changes in the extent or cost of the system).<sup>67</sup> “No clear statutory limits give guidance, and in the end any limits, however vague, may have to come from courts.”<sup>68</sup> *Olmstead*’s impact is “diluted by the Court’s failure to provide meaningful parameters for the defense” of fundamental alteration.<sup>69</sup>

*b. “Effectively Working Plan”*

Justice Ginsburg’s plurality gives states “leeway” to adopt a plan, apparently in the context of a fundamental alteration defense:

To maintain a range of facilities and to administer services with an even hand, the State must have more leeway than the courts below understood the fundamental-alteration defense to allow. If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State’s endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met.<sup>70</sup>

Each piece of this operational test—a “comprehensive, effectively working plan,”<sup>71</sup> a waiting list moving “at a reasonable pace not controlled” by a State’s effort to keep institutions filled<sup>72</sup>—raises

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66. *Id.* at 520.

67. For a detailed discussion of the various flavors which might comprise “fundamental alteration,” see Jefferson D.E. Smith & Steve P. Callandrillo, *Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits after Olmstead v. L.C.*, 24 HARV. J.L. & PUB. POL’Y 695, 723–24 (2001).

68. *Id.* at 769.

69. Rosemary L. Bauman, *Disability Law-Needless Institutionalization of Individuals with Mental Disabilities as Discrimination Under the ADA-Olmstead v. L.C.*, 30 N.M. L. REV. 287, 287 (2000).

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

71. *Id.* at 584.

72. *Id.*

difficult interpretive questions. It is a challenge to put meaning into these terms. “The standards established under the majority decision for measuring when statutory violations under the ADA occur in the context of health services for persons with disabilities are, in fact, quite murky; furthermore, the powers granted to States to determine the scope of their own obligations, as well as the affirmative defenses they are accorded, are extensive.”<sup>73</sup>

Of course, any test of compliance would raise definitional and interpretive questions. Here, however, where the State’s “leeway” allows it to put its thumb on the scale, one is hard put to expect courts to require meaty and prompt implementation of *Olmstead* plans.

All changes to complex systems, when done well, necessitate careful planning. Planning will typically include analysis, development of a mission, goals and objectives, expected outcomes, tasks and timelines, deadlines, identification of persons responsible, quality assurance and accountability mechanisms, and evaluation. Consequently, a self-adjusting system will be in place, with sufficient feedback and flexibility to adapt to changing conditions. A plan for movement from institutions would be expected to encompass these elements.

Enforcement of civil rights, especially class-wide enforcement, often requires a change of complex systems. Courts, however, look to results. Judicial orders require compliance. An unimplemented plan is insufficient to satisfy the court that its involvement must come to an end.

The plurality opinion in *Olmstead* invites a “plan” which itself would satisfy the integration mandate announced in the decision.<sup>74</sup> Devoid of mention of compliance or enforcement, the *Olmstead* plan has such scant required content that it has been characterized as a

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73. Sara Rosenbaum, Joel Teitelbaum & Alexandra Stewart, *Olmstead v. L.C.: Implications for Medicaid and Other Publicly Funded Health Services*, 12 HEALTH MATRIX 93, 94 (2002). For example, the authors point out the vagueness in the “reasonable pace” piece of the puzzle; “there are no general standards for measuring what constitutes a ‘reasonable pace’ for purposes of *Olmstead*-related planning, nor is there an explanation regarding how the reasonable pace standard might vary depending on the nature of the condition or service need at issue.” *Id.* at 137.

74. See generally *Olmstead*, 527 U.S. 581.

“get out of jail free” card for states otherwise in violation of the decision’s integration mandate.”<sup>75</sup>

Some courts have held that a mere history of deinstitutionalization, even absent stated goals or guidelines, satisfies *Olmstead*, while others have accepted as satisfactory mere confirmation that a plan exists.<sup>76</sup> Even a “successful record” and a plan “to continue and increase” unspecific programs were held sufficient.<sup>77</sup>

Courts are certainly limited in ability and resources to shepherd all the details of compliance,<sup>78</sup> but they are competent to ensure compliance, even in the most complex situations.<sup>79</sup> A case in point is *United States v. State of Connecticut* in which Senior U.S. District Judge Ellen Bree Burns found the state in contempt of a consent decree intended to reform a large mental retardation institution, Southbury Training School (STS).<sup>80</sup> The court found deficiencies in such areas as medical care, psychiatric services, psychological programs, physical therapy, injuries, and protection from harm, concluding that “STS’s systemic flaws have caused many residents to suffer grave harm, and, in several instances, death.”<sup>81</sup> The court appointed a special master to review “all aspects” of STS’s care, “determine the changes needed,” “formulate specific methods to

75. John F. Muller, *Olmstead v. L.C. and the Voluntary Cessation Doctrine: Toward a More Holistic Analysis of the “Effectively Working Plan,”* 118 YALE L.J. 1013, 1014 (2009).

76. In Muller, *supra* note 75, the following “working plan” cases are discussed: *Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615 (9th Cir. 2005); *Sanchez v. Johnson*, 416 F.3d 1051, 1068 (9th Cir. 2005); *Frederick L. v. Dep’t of Pub. Welfare (Frederick L. II)*, 422 F.3d 151 (3d Cir. 2005); *Pa. Prot. & Advocacy, Inc. v. Pa. Dep’t of Pub. Welfare*, 402 F.3d 374, 377 (3d Cir. 2005); *Frederick L. v. Dep’t of Pub. Welfare (Frederick L. I)*, 364 F.3d 487 (3d Cir. 2004); *Bryson v. Stephen*, No. 99-CV-558-SM, 2006 WL 2805238, at \*4 (D.N.H. Sept. 29, 2006); *Williams v. Wasserman*, 164 F. Supp. 2d 591 (D. Md. 2001); *Kathleen S. v. Dep’t of Pub. Welfare*, No. 97-6610, 1999 WL 1257284 (E.D. Pa. Dec. 23, 1999); *Makin ex rel. Russell v. Hawaii*, 114 F. Supp. 2d 1017 (D. Haw. 1999). See Melody M. Kubo, *Implementing Olmstead v. L.C.: Defining “Effectively Working” Plans for “Reasonably Placed” Wait Lists for Medicaid Home and Community-Based Services Waiver Programs*, 23 U. HAW. L. REV. 731 (2001).

77. *Sanchez v. Johnson*, 416 F.3d 1051, 1068 (9th Cir. 2005).

78. See Samuel R. Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding “We the People”: The Disability Rights Cases*, 104 COLUM. L. REV. 49, 58 (2004).

79. See generally David Ferleger, *Special Master Rules: Federal Rule of Civil Procedure 53, The Role of Special Masters in the Judicial System*, 2004 Special Masters Conference: Transcript of Proceedings, 31 WM. MITCHELL L. REV. 1193 (2005).

80. *United States v. Connecticut*, 931 F. Supp. 974, 974 (D. Conn. 1996), *appeal dismissed*, *United States v. Connecticut*, 116 F.3d 466 (2d Cir. 1997), *cert. denied sub nom.*, 522 U.S. 1045 (1998).

81. *Connecticut*, 931 F. Supp. at 984.

implement the required changes,” and help “effectuate those changes.”<sup>82</sup> The special master actively oversaw a detailed remedial plan, holding hearings where necessary, and after nine years, the state achieved compliance at the institution and was purged of contempt.<sup>83</sup>

The *Olmstead* “working plan” option is problematic. It does not describe the minimum elements of such a plan and does not require timely outcomes and compliance. Most importantly, its emphasis on states’ “leeway” discourages the lower courts from mandating and enforcing full-bodied plans, and ensuring that desired outcomes are achieved before the court bows out of involvement.

### *c. Absence of Guidance on Standard of Care*

The *Olmstead* Court stated in footnote 14, “We do not in this opinion hold that the ADA imposes on the States a ‘standard of care’ for whatever medical services they render, or that the ADA requires States to ‘provide a certain level of benefits to individuals with disabilities.’”<sup>84</sup> Justice Kennedy’s concurrence is stronger. He concluded that, given states’ need to weigh their priorities, “[i]t follows that a State may not be forced to create a community-treatment program where none exists.”<sup>85</sup> He did not, however, explain how one distinguishes between “creation” and “expansion” of community programs.

The multiplicity of opinions and the weak language cited above opens the possibility that *Olmstead*’s reach may be cut short in future

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82. *Id.*

83. This article’s author was the special master. The court described the success of this judicial oversight in a parallel case involving the same institution:

In a process of evaluation lasting almost a decade, the Special Master, with the assistance of experts commissioned by him and the parties, measured improvements at STS against the standards set forth in the Court Requirements. Periodically, when the Special Master concluded that the defendants had demonstrated compliance with a particular Court Requirement, he recommended that the court release STS from oversight for that Court Requirement. Finally, in 2006, after the Special Master found STS to be in compliance with all remaining requirements of the Remedial Plan, the court released STS from judicial oversight and purged the defendants of contempt. *See* Order Purging Defendants of Contempt and Ending Active Judicial Oversight, *U.S. v. Connecticut*, (Mar. 24, 2006).

*Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 294, 299–300 (D. Conn. 2008).

84. *Olmstead v. L.C.*, 527 U.S. 581, 603 n.14 (1999) (Thomas, J., dissenting).

85. *Id.* at 613.

rulings. The language does not appear to support even the minimally adequate level of habilitation which *Youngberg v. Romeo*<sup>86</sup> held is required.

*d. Silence on the Respective Roles of the Legislature and Courts*

Constrained perhaps by internal divisions, the Court was muted in its endorsement of vigorous efforts to move to a fully community-oriented system. Institutional settings may be “terminated” but not for people “unable to handle or benefit” thereby.<sup>87</sup> Institutions may be “phased out” so long as this does not place “patients in need of close care at risk.”<sup>88</sup> These qualifications meet the concerns expressed in Justice Kennedy’s opinion.

This limited closure mandate appears calculated to appeal both to those who disfavor institutions as well as to those concerned that some residents may not be well served in the community. While no one would intentionally adopt a “phase out” effort, or place even a single person into the community, if it would predictably cause harm, analysis of risk and benefit is a complex calculus in human services. Missing from the Court’s brief “yes, but . . .” discussion is the nature of the balance in this sensitive arena between the legislative policy-setting role and the judicial role in the definition and enforcement of rights. Also missing is the question of what weight to give the constitutional liberty interests of the individual and his or her desires, or that of parents or guardians. One wishes for clearer guidance from the Court on these issues.

## II. THE CONSTITUTION

### *A. The Parameters of a Constitutional Right to Community Services*

As recently as 2000, a scholar in the field correctly characterized the constitutional dimensions of a right to community treatment as “a

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86. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

87. *Olmstead*, 527 U.S. at 602.

88. *Id.* at 583.

mostly-moribund body of law.”<sup>89</sup> With the *Olmstead* statutory holding,<sup>90</sup> constitutional analysis took a backseat to examination of the extent to which the ADA might afford relief to the institutionalized. As I explain below, a comprehensive legal theory embodying both constitutional and statutory rights is more likely to serve private and public needs than a theory including just one or the other.<sup>91</sup>

I contend that institutionalization of individuals with intellectual disabilities, without their consent, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution<sup>92</sup> where the person could “handle and benefit from” an end to confinement and the provision of habilitation and supports in a community placement.<sup>93</sup> In addition, long term confinement, without effective periodic review of the justification for that confinement, is a due process violation.

For these individuals, institutionalization, as lived out in our times, is often a lifetime proposition. Institutional populations are aging on account of very low admissions and deaths. The few admissions since adoption in the 1970s of right to education laws and expansion of community services since that time have resulted in skewing the institutional census toward higher age groups. The institutions’ age groupings “reflect the aging of the US population but in an exaggerated way. E.g., in 1977, 22% were 40 years and older;

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89. Michael L. Perlin, “*Their Promises of Paradise*”: Will *Olmstead v. L.C.* Resuscitate the Constitutional “Least Restrictive Alternative” Principle in Mental Disability Law?, 37 HOUS. L. REV. 999, 1022 (2000).

90. *Olmstead*, 527 U.S. 581, 607 (holding that states are required to provide community-based treatment for persons with mental disabilities when such placement is appropriate).

91. See *infra* Part 2.

92. U.S. CONST. amend. XIV.

93. The “handle and benefit from” standard is repeated twice in the *Olmstead* plurality opinion: “First, institutional placement of persons who can *handle and benefit from community settings* perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.” *Olmstead*, 527 U.S. at 600 (emphasis added).

“We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to *handle or benefit from community settings*.” *Id.* at 601–02 (emphasis added).

1987=33.3%; 1998=57.1%; 2006=72.1%.”<sup>94</sup> By comparison to the institutionalized 72.1%, 45% of the United States population in 2006 were 40 years and older.<sup>95</sup> Residence in an institution for people with intellectual disabilities often lasts decades and can be commitment for the life of the individual.<sup>96</sup>

The Supreme Court has long recognized that civil confinement entails a “massive curtailment of liberty.”<sup>97</sup> The only permissible justifications for committing the mentally disabled are: (1) danger to the individual, (2) danger to others, and (3) need for treatment.<sup>98</sup> The Court enunciated the following principle in *Jackson v. Indiana*, striking down a state law that permitted the state to confine indefinitely a mentally deficient deaf mute adjudged incompetent to stand trial: “At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.”<sup>99</sup>

*Jackson*’s “nature, duration and purpose” criteria have become the touchstone (often unacknowledged) for the development of procedural and substantive due process, and for equal protection safeguards of the rights of the institutionalized. It is to those rights that I now turn.

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94. E-mail from R. Charlie Lakin, Institute on Community Integration, University of Minnesota, to author (Sept. 4, 2009) (on file with author).

95. United States Census Bureau, 2006 American Community Survey, S0101, Age and Sex, [http://factfinder.census.gov/servlet/STTable?\\_bm=y&-qr\\_name=ACS\\_2006\\_EST\\_G00\\_S0101&-geo\\_id=01000US&-ds\\_name=ACS\\_2006\\_EST\\_G00\\_-&-lang=en](http://factfinder.census.gov/servlet/STTable?_bm=y&-qr_name=ACS_2006_EST_G00_S0101&-geo_id=01000US&-ds_name=ACS_2006_EST_G00_-&-lang=en) (last visited Feb. 17, 2010).

96. Failure to provide adequate habilitation may well mean commitment for the life of the individual. *Welsch v. Likins*, 373 F. Supp. 487, 497 (D. Minn. 1974), *aff’d in part, vacated, remanded in part*, 550 F.2d 1122 (8th Cir. 1977); *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1315 (E.D. Pa. 1978).

97. *Zimmerman v. Burch*, 494 U.S. 113, 131 (1990); *Vitek v. Jones*, 445 U.S. 480, 491–92 (1980) (commitment to mental hospital entails “a massive curtailment of liberty,” and requires due process protection); *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (there is a “substantial liberty interest in not being confined unnecessarily for medical treatment”); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (“[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”); *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

98. *Jackson*, 406 U.S. at 737.

99. *Id.*; see also *McNeil v. Director, Patuxent Inst.*, 407 U.S. 245, 249–50 (1972).

## B. Due Process

### 1. Procedural Due Process

A procedural due process violation occurs when one is deprived of a significant interest protected under the Constitution without appropriate procedures to protect against unfairness and error.<sup>100</sup> This interest can arise either from the Constitution itself or from state law.<sup>101</sup> Post-*Olmstead* decisions have not generally required periodic review in a formal sense. The model has been to require the institution to review and to “consider” each resident for possible placement.<sup>102</sup>

A person confined in an institution who protests that confinement is entitled to a meaningful hearing—a periodic review—on the person’s continuing need for institutionalization.<sup>103</sup> The need for commitment must be reviewed periodically by a neutral fact finder.<sup>104</sup> In concluding that a woman confined for decades at a state institution for people with mental retardation had a procedural due process right to such reviews, the Third Circuit noted, “[t]he hearing tribunal must have the authority to afford relief.”<sup>105</sup> Other courts agree.<sup>106</sup> The review must not be *pro forma* and must not be biased toward the *status quo*. It has been held that, while Due Process does not require a

100. *Addington*, 441 U.S. at 425 (1979); see generally *Vitek*, 445 U.S. at 480 (1980) (transfer of prisoner to mental hospital); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

101. *Hewitt v. Helms*, 459 U.S. 460, 466 (1983).

102. See, e.g., *Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 294, 343 (D. Conn. 2008) (“The evidence indicates that the defendants generally failed to exercise professional judgment in considering community placement for a large number of class members regardless of the degree of their disability, but the plaintiffs have not established that the defendants failed to *consider* more severely disabled class members for community placement.”).

103. The need for review is implied in *O'Connor v. Donaldson*, 422 U.S. 563, 574–75 (1975) (“Nor is it enough that Donaldson’s original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed.”).

104. *Parham v. J.R.*, 442 U.S. 584, 613 (1979) (requiring the periodic review implied in *Donaldson v. O'Connor*).

105. *Clark v. Cohen*, 794 F.2d 79, 86 (3d Cir. 1986) (citing *Parham v. J.R.*, 442 U.S. 584, 607 (1979)).

106. *Doe ex rel. Doe v. Austin*, 848 F.2d 1386, 1395–96 (6th Cir. 1988) (“Of course, because involuntary commitment cannot continue after the basis for that commitment ceases to exist, due process requires that some periodic review take place during confinement.”), *cert. denied sub. nom.*, *Cowherd v. Doe ex rel. Doe*, 488 U.S. 967 (1988); *Conner v. Branstad*, 839 F. Supp. 1346, 1353 (S.D. Iowa 1993).

judicial fact finder for periodic review of commitment of persons with intellectual disabilities, Equal Protection requires judicial periodic review of continuing need for institutionalization if people with mental illness receive such review.<sup>107</sup>

## 2. Substantive Due Process

Until its indirect evisceration in the Supreme Court's decisions in *Youngberg v. Romeo* (on Due Process) and *Pennhurst State School and Hospital v. Halderman* (on the Developmentally Disabled Assistance and Bill of Rights Act), "the concept of the least restrictive alternative—the idea that restrictivity of confinement can and must be calibrated and evaluated—ha[s] remained one of the core staples of mental disability law."<sup>108</sup> *Youngberg* focused on institutional treatment rights, and *Pennhurst* rejected a statutory community services right.<sup>109</sup> There followed a line of cases in the mid-to-late 1980s rejecting the "least restrictive" basis for community services.<sup>110</sup>

What has survived the disfavor of the least restrictive analysis, however, is robust law on other grounds. Two conceptual strands

107. *Doe ex rel. Doe*, 848 F.2d at 1395–96.

108. Michael L. Perlin, *supra* note 89, at 1000. For a review of the 1970s and early 1980s community placement court decisions, *see id.* at 1022–25. *See* *Dixon v. Weinberger*, 405 F. Supp. 974, 980 (D.D.C. 1975) (mental hospital must plan for treatment of plaintiff patients in "suitable residential facilities under the least restrictive [alternative] conditions"); David Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L. J. 595, 598 & n.12 (1983) (judicial action has provided thousands with more humane services in community facilities); Melissa G. Warren & Robert R. Moon, *Dixon: In the Absence of Political Will, Carry a Big Stick*, 18 LAW & PSYCHOL. REV. 329, 330 (1994) (mental health de-institutionalization order); *see generally* *Brewster v. Dukakis*, 544 F. Supp. 1069 (D. Mass. 1982) (mem.), *aff'd as modified*, 786 F.2d 16 (1st Cir. 1986) (mental health deinstitutionalization order).

109. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18 (stating that nothing in the Developmental Disabilities Act suggests Congress intended to require the states to provide "appropriate treatment" in the "least restrictive environment" to citizens with developmental disabilities); *Youngberg v. Romeo*, 457 U.S. 307 (1982).

110. *See* *Lelsz v. Kavanagh*, 807 F.2d 1243, 1248–49 (5th Cir. 1987); *Soc'y for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1249 (2d Cir. 1984); *Phillips v. Thompson*, 715 F.2d 365, 368 (7th Cir.1983); *see* *Jackson v. Fort Stanton Hosp. & Training Sch.*, 964 F.2d 980, 992 (10th Cir. 1992) ("Community placement is only one of various possible ways in which the state may comply with its constitutional obligations to adequately care for and train involuntarily committed individuals."); *Hanson ex rel. Hanson v. Clarke County*, 867 F.2d 1115, 1120 (8th Cir. 1989) (denying plaintiff's contention that she had right to funding for placement in the "least restrictive environment consistent with qualified professional judgment"); *Conner v. Branstad*, 839 F. Supp. 1346, 1351 (S.D. Iowa 1993). *See generally* *Giesecking v. Schafer*, 672 F. Supp. 1249 (W.D. Mo. 1987).

form the basis for the substantive due process right to treatment for the institutionalized. Although they are intertwined, they each have been considered to provide independent support for the right. The *quid pro quo* approach considers that the massive curtailment of liberty occasioned by involuntary civil institutionalization, for which criminal justice procedural safeguards are absent, cannot be justified unless the state gives to the institutionalized person something in exchange for the loss of liberty.<sup>111</sup> That “something” is habilitation. The *parens patriae* approach is that due process is violated when the state fails to provide treatment to a person dependent on the state. There is no need for detailed analysis here of whether the right to treatment arises under the *quid pro quo* or the *parens patriae* theory.<sup>112</sup>

The *quid pro quo* position finds support in the Supreme Court’s ruling in *O’Connor v. Donaldson* that “a State cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.”<sup>113</sup> Absent treatment (or whatever the Court meant by “more”), the deprivation of liberty is unjustified. Courts have applied this rationale to confinement of people with retardation.<sup>114</sup>

Partaking of the *parens patriae* interest is the holding of *Youngberg v. Romeo*,<sup>115</sup> and its progeny, that due process requires that an institution provide its residents with a minimal level of training or “habilitation.”<sup>116</sup> In *Youngberg*, the Supreme Court

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111. See *O’Connor v. Donaldson*, 422 U.S. 563, 576 (1975).

112. See Bruce G. Mason & Frank J. Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 CREIGHTON L. REV. 124 (1976); Donald H.J. Hermann, *Barriers to Providing Effective Treatment: A Critique of Revisions in Procedural, Substantive, and Dispositional Criteria in Involuntary Civil Commitment*, 39 VAND. L. REV. 83, 85 (1986).

113. *O’Connor*, 422 U.S. at 576.

114. See *United States v. Jackson*, 553 F.2d 109, 119 (D.C. Cir. 1976); *Welsch v. Likins*, 373 F. Supp. 487, 496 (D. Minn. 1974) (relying on *Robinson v. California*, 370 U.S. 660 (1962), for holding that if plaintiffs are subject to “detention for mere illness without a curative program,” their confinement is unconstitutional).

115. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

116. A recent acknowledgement of this right is Judge Ellen Bree Burns’ detailed decision in *Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 294, 303 (D. Conn. 2008), finding that institutional

concluded, first, that “[t]he mere fact that Romeo has been committed under proper procedures does not deprive him of all substantive liberty interests under the Fourteenth Amendment.”<sup>117</sup> There are additional liberty interests and they require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint.”<sup>118</sup> The treatment interests are not “absolute.” Whether the constitutional rights have been violated must be determined by “balancing his liberty interests against the relevant state interests.”<sup>119</sup>

These constitutional requirements are satisfied when there has been a “professional judgment” in determining what services and care should be provided to residents of state-run institutions.<sup>120</sup> A violation of the professional judgment requirement may be shown in at least two ways:

- a. Where no professional judgment has been exercised (including situations where a facility administrator ignores recommendations of professionals),<sup>121</sup> and
- b. Where the judgment made by a qualified professional was “such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person

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conditions generally had been improved from its prior level of dangerousness and other deficiencies to satisfy constitutional muster.

117. *Youngberg*, 457 U.S. at 315.

118. *Id.* at 319 & n.24 (noting that, in the concurring opinion in the appellate court with which the Supreme Court agreed, the concurring judge had “used the term ‘treatment’ as synonymous with training or habilitation”). Residents also have a constitutionally protected interest in medical care, safe conditions and in freedom from bodily restraint except to the extent that restraint must be used to assure safety. *Youngberg*, 457 U.S. at 315–16.

119. *Id.* at 321.

120. *Id.*

121. *Messier*, 562 F. Supp. 2d at 300 (citing *Valentine v. Strange*, 597 F. Supp. 1316, 1318 (E.D. Va. 1984) (declining to dismiss complaint by patient who set fire to herself after hospital officials took no action to confiscate her cigarettes and lighter despite unsuccessful effort to burn herself earlier in the day), and *Cameron v. Tomes*, 783 F. Supp. 1511, 1520–21 (D. Mass. 1992) (finding due process violation where facility’s administrator ignored recommendation of professionals and ordered a patient to be transported in shackles)).

responsible actually did not base the decision on such a judgment.”<sup>122</sup>

The issue is “not whether the optimal course of treatment as determined by some experts was being followed” but whether professional judgment was exercised.<sup>123</sup> Where professional judgment establishes that provision of minimally adequate treatment requires community services, an institutionalized person’s substantive due process rights are violated.<sup>124</sup> *Youngberg* did not address institutional judgments favoring placement.<sup>125</sup>

*Youngberg* requires balancing an institutionalized person’s liberty interests against the “relevant state interests”, which the Court identified *not* as budgetary or administrative but rather as the state’s interest in ensuring the exercise of professional judgment.<sup>126</sup>

For many individuals with intellectual disabilities in public institutions, the judgment exercised by the institution’s professionals themselves is that the confinement is not necessary and that community services would be beneficial. Therefore, not surprisingly,

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122. *Id.* at 301. *Youngberg*, 457 U.S. at 323.

123. *Soc’y for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1248 (2d Cir. 1984); *P.C. v. McLaughlin*, 913 F.2d 1033, 1043 (2d Cir. 1990) (courts do not determine that “the best course of action was taken”); *Messier*, 562 F. Supp. 2d at 301; *Griffith v. Ledbetter*, 711 F. Supp. 1108, 1110 (N.D. Ga. 1989).

124. It is important to note that “[t]he decisions of the treating professionals are not conclusive,” and the opinions of experts at trial may be “relevant to whether the treating professionals’ decisions substantially departed from accepted standards.” *Williams v. Wasserman*, 164 F. Supp. 2d 591, 614 (D. Md. 2001) (citing *Thomas S. v. Flaherty*, 902 F.2d 250, 252 (4th Cir. 1990) (citation omitted)). This case is the fourth in the “Thomas S.” line of cases: *Thomas S. v. Morrow (Thomas S. I)*, 601 F. Supp. 1055 (W.D.N.C. 1984); *Thomas S. v. Morrow (Thomas S. II)*, 781 F.2d 367 (4th Cir. 1986); *Thomas S. v. Flaherty (Thomas S. III)*, 699 F. Supp. 1178 (W.D.N.C. 1988); and *Thomas S. v. Flaherty (Thomas S. IV)*, 902 F.2d 250 (4th Cir. 1990).

125. Based on what turned out to be an incorrect premise, community placement was thought to be beyond the facts of the case. The Court noted that, at oral argument, “Respondent, in light of the severe character of his retardation, concedes that no amount of training will make possible his release.” *Youngberg*, 457 U.S. at 317. However, Nicolas Romeo was released from Pennhurst and moved to a community group home. E-mail from Edmund Tiryak, Romeo’s counsel, to author (Sept. 10, 2009, 08:21:30 EST) (on file with author).

126. *Youngberg*, 457 U.S. at 321 (“We think the standard articulated by Chief Judge Seitz affords the necessary guidance and reflects the proper balance between the legitimate interests of the State and the rights of the involuntarily committed to reasonable conditions of safety and freedom from unreasonable restraints. He would have held that ‘the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.’”).

*Youngberg* has been extended to embrace a due process right to community services.<sup>127</sup>

On the other hand, some courts (mostly before *Olmstead*) have declared that residents of state institutions for people with mental retardation “have no right to community placement.”<sup>128</sup> Virtually in the same breath, however, “no-right” courts have acknowledged that state decisions which deprive individuals of liberty, which result in their institutionalization, are subject to scrutiny under *Youngberg* and due process principles; confinement must be “rational.”<sup>129</sup> We see in these decisions a profound judicial disquiet with a constitutional fabric which would uphold use of governmental power to involuntarily confine people when it is acknowledged that confinement is not justified by considerations of adequate care and treatment. In considering the *Youngberg* balance between a person’s liberty interests and the state’s interests, *Olmstead*’s recognition that the ADA forbids unjustified institutionalization must be placed in the balance.

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127. See generally *Clark v. Cohen*, 794 F.2d 79 (3d Cir. 1986); *Homeward Bound, Inc., v. Hissom Memorial Ctr.*, No. 85-C-437-E, 1987 WL 27104, at \*19 (N.D. Okla. July 24, 1987) (“Freedom from bodily restraint includes the right to be free from confinement in an institution where such confinement is shown on a factual basis to be unnecessary.”).

128. *Messier*, 562 F. Supp. 2d at 319; *Soc’y for Good Will*, 737 F.2d at 1249; *Phillips v. Thompson*, 715 F.2d 365, 368 (7th Cir. 1983); *Garrity v. Gallen*, 522 F. Supp. 171, 237–39 (D.N.H. 1981). Pre-*Youngberg*, there were cases which did not appreciate the significance of the liberty deprivation. E.g., *Ass’n for Retarded Citizens of N.D. v. Olson*, 561 F. Supp. 473, 488 (D.N.D. 1982) (questioning whether institutionalization “compromises a fundamental liberty interest” and suggesting that “the state may have a compelling interest in just safekeeping—rather than habilitating—mentally retarded persons”).

129. “Community placement decisions are, however, subject to scrutiny under *Youngberg*. Like any other decision to place restraints on a patient’s freedom, the decision to keep a resident in an institution instead of placing the resident in a community setting must be ‘a rational decision based on professional judgment.’” *Messier*, 562 F. Supp. 2d at 319 (quoting *Soc’y for Good Will*, 737 F.2d at 1249) (citations omitted). As one court put it, if “a patient were being held against his will contrary to all the medical evidence and expert medical opinion, there would clearly be a constitutional violation.” *Hughes v. Cuomo*, 862 F. Supp. 34, 37 (W.D.N.Y. 1994).

Some courts flatly disagreed pre-*Olmstead* that there is any due process right to community services. *S.H. v. Edwards*, 860 F.2d 1045, 1051–52 (11th Cir. 1988) (Constitution does not bestow any “right” to receive state-provided mental health treatment in a community setting rather than in an institutional one); *Soc’y for Good Will*, 737 F.2d at 1247 (“[M]ere residence in an institution or school for the mentally retarded, without more, does not violate due process.”).

### C. Equal Protection

#### 1. Introduction

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals should be treated similarly. When state law or practice do not employ suspect classifications or impinge on fundamental rights, they are upheld when they are rationally related to a legitimate public purpose.<sup>130</sup>

When the government acts on the basis of a suspect classification or affecting a fundamental interest, the traditional rational basis standard is abandoned in favor of what has been called “strict scrutiny.” Strict scrutiny admits of little or no presumption of validity of the challenged state action.

An intermediate level of scrutiny is afforded classifications involving “quasi-suspect” classes such as gender and illegitimacy.<sup>131</sup> To withstand constitutional challenge, a classification disfavoring a quasi-suspect class must “serve important governmental objectives and must be substantially related to achievement of those objectives.”<sup>132</sup>

I advance two arguments here. First, I propose that forcible and unnecessary institutionalization of people with intellectual disabilities is irrational and therefore unconstitutional under the traditional equal protection framework. Second, I conclude that a class definition for equal protection purposes narrower than all “the disabled” is subject to at least the intermediate degree of scrutiny. Rather than define the protected group as “the disabled” generically, one would focus on those among the disabled who are maximally deprived of liberty and who are a close fit to the “special condition” class described in footnote 4 of *United States v. Carolene Products*,<sup>133</sup> and its “strict

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130. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). See generally *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Hodel v. Indiana*, 452 U.S. 314 (1981); *Schweiker v. Wilson*, 450 U.S. 221 (1981); *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979).

131. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (acknowledgement of middle tier scrutiny).

132. *Id.*

133. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (“Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special

scrutiny” progeny. This approach would bring to bear the protections of the suspect or quasi-suspect class analysis on the discrimination inherent in institutionalization.

## 2. *Needless Institutionalization Is Irrational*

Freedom from segregation has long been recognized as an interest protected by the Equal Protection Clause.<sup>134</sup> Where a state forcibly excludes, separates and segregates people with mental retardation from the rest of society, and where equivalent or superior care (and quality of life) is available in a non-segregated setting, a serious question arises whether such action is rationally related to a legitimate state interest.

Classifications impinging on fundamental rights have been invalidated as irrational.<sup>135</sup> One of the rare instances in which the Supreme Court held that discrimination (not on the basis of gender or race) was irrational involved community living for individuals with retardation. Finding that a city’s zoning exclusion of a community home was irrational, the Court found a violation of equal protection.<sup>136</sup> Similarly, it is not rational, or logical or humane, to compel institutional segregation where it is not necessary for the individual. One can demonstrate that, for each person in the institution, there is a “twin” living successfully in the community with equivalent disabilities. The institution for these individuals is definitively “separate but not equal.”<sup>137</sup>

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condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” (citations omitted)).

134. See generally *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

135. See e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (access by married and unmarried to contraception).

136. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 432 (1985).

137. See *Homeward Bound, Inc., v. Hissom Memorial Ctr.*, No. 85-C-437-E, 1987 WL 27104, at \*19 (N.D. Okla. July 24, 1987) (finding institutionalization of people with retardation to be an irrational discrimination in violation of the Equal Protection Clause). *Giesecking v. Schafer* recognized that a state may not treat a class of residents with developmental disabilities irrationally under the Equal Protection Clause, finding it a question of fact which could not be decided on summary judgment. *Giesecking v. Schafer*, 672 F. Supp. 1249, 1264 (W.D. Mo. 1987).

### 3. *Institutionalized Individuals with Intellectual Disabilities Constitute a Quasi-suspect Class*

The Supreme Court has not yet considered whether people with intellectual disabilities who are institutionalized constitute a suspect or quasi-suspect class under the Equal Protection Clause. Twice, the Court has dodged the issue; both occasions occurred after passage of the ADA.<sup>138</sup> Perhaps the Court recognizes that post-ADA there is more to be said on the issue.

The majority opinion in *Olmstead* evidences a leaning toward the position I espouse here. Referencing the “unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life,”<sup>139</sup> the Court cited two cases, one on racial classification and one on gender discrimination: *Allen v. Wright* and *Los Angeles Dept. of Water and Power v. Manhart*.<sup>140</sup> Neither was an equal protection case; however, the comparison of the irrational stereotyping and stigmatization of institutionalized people with disabilities to treatment of race and gender discrimination is telling.

A number of commentators have argued with force that the ADA itself, with its Congressional findings echoing the well-known criteria in footnote four of *United States v. Carolene Products*,<sup>141</sup> compels

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138. The Supreme Court declined to address an argument for heightened scrutiny of claims by people with mental retardation regarding commitment, finding that the issue had not been raised below. *Heller v. Doe*, 509 U.S. 312, 321 (1993) (challenge by class of individuals with mental retardation to constitutionality of Kentucky’s involuntary commitment procedures and holding that procedures met rational basis test under Equal Protection Clause). In opening her opinion in *Olmstead*, Justice Ginsburg stated, “This case, as it comes to us, presents no constitutional question,” and, citing *Cleburne*, noted that “the courts below resolved the case solely on statutory grounds.” *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999).

139. *Olmstead*, 527 U.S. at 600.

140. *Allen v. Wright*, 468 U.S. 737, 755 (1984) (race); *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 708 n.13 (1978).

141. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954). The ADA’s findings, at 42 U.S.C. § 12101(a)(7) originally read—quoting *Carolene* virtually verbatim—, “individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society . . . .” This paragraph was removed by sections 3(2) and (3) of the Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 112 Stat. 3553, 110th Cong., 2d Sess. (Sept. 25, 2008). This change does not alter the 1990 Congress’ characterization of the status of people with disabilities.

courts to employ a “strict scrutiny” or “compelling state interest” test. Such an argument would be reasonable.<sup>142</sup> It is certainly within easy reach to find that, because “the mentally retarded still suffer from some discrimination that is not related to actual disabilities,” state action “must be reviewed under a level of scrutiny higher than the rational basis test.”<sup>143</sup> For example, Michael Perlin in the immediate aftermath of *Olmstead*, urged that an ADA violation is *per se* a Fourteenth Amendment violation:

The law’s invocation of the full “sweep of congressional authority, including the power to enforce the Fourteenth Amendment” simply means that any violation of the ADA must be read in the same light as a violation of the Equal Protection Clause of the Constitution, guaranteeing, for the first time, that this core constitutional protection will finally be made available to persons with disabilities.<sup>144</sup>

This view won wide support in the literature<sup>145</sup> before the Supreme Court’s 2001 decision to the contrary in the *Garrett* case, discussed below.

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142. The suspect class criteria are a) whether the class has a history of purposeful unequal treatment, b) whether the class has such political powerlessness as to require extraordinary protection from the majoritarian political process, and c) whether the class is generally denied legal benefits on the basis of stereotyped characteristics not truly indicative of their abilities. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam). Each of these criteria has support in both history and case law.

143. See *Ass’n for Retarded Citizens of N.D. v. Olson*, 561 F. Supp. 473, 490 (D.N.D. 1982) (requiring the “state to show that disparities in educational opportunity which exist between the mentally retarded and other citizens substantially furthers important state interests”).

144. Perlin, *supra* note 40, at 59–60.

145. See Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a “Suspect Class” Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 905 (1975); James B. Miller, *The Disabled, the ADA, and Strict Scrutiny*, 6 ST. THOMAS L. REV. 393, 413 (1994); Leonard S. Rubenstein, *Ending Discrimination Against Mental Health Treatment in Publicly Financed Health Care*, 40 ST. LOUIS U. L.J. 315, 339 (1996) (analyzing the ADA’s invocation of the *Carolene Products* footnote); William Christian, Note, *Normalization as a Goal: The Americans with Disabilities Act and Individuals with Mental Retardation*, 73 TEX. L. REV. 409, 424 (1994) (stating that laws treating persons with disabilities differently should be subject to heightened scrutiny); Amy Lowndes, Note, *The Americans with Disabilities Act of 1990: A Congressional Mandate for Heightened Judicial Protection of Disabled Persons*, 44 FLA. L. REV. 417, 446 (1992) (discussing Congress’ ADA findings); Lisa Montanaro, Comment, *The Americans with Disabilities Act: Will the Court Get the Hint? Congress’ Attempt to Raise the Status of Persons with*

There is no precedential obstacle to a conclusion that involuntarily institutionalized individuals with intellectual disabilities (a class narrower than simply “the disabled”) are a quasi-suspect class under the Equal Protection Clause, and that their confinement must be subject to heightened scrutiny. Where that confinement is unnecessary, and the person could benefit from community services, institutionalization – to use the test for analysis of quasi-suspect classifications – does not “serve important governmental objectives and [is not] substantially related to achievement of those objectives.”<sup>146</sup>

In *Board of Trustees of University of Alabama v. Garrett*,<sup>147</sup> a damages case by disabled state employees, the Court held that the Eleventh Amendment sovereign immunity protects the state from damages liability under Title 1 of the ADA. Relying on *Cleburne v. Cleburne Living Center, Inc.*,<sup>148</sup> the Court concluded that “the disabled” are not a quasi-suspect class under the Fourteenth Amendment.<sup>149</sup> The petitioners in *Garrett* were a woman with breast cancer and a man with asthma. *Cleburne*’s rejection of a quasi-suspect class approach for “the large and amorphous class of the mentally retarded” was appealing to the Supreme Court in *Garrett*. The concern was that labeling the disabled a quasi-suspect class might support similar labeling of such generic groups as “the aging, the disabled, the mentally ill, and the infirm.”<sup>150</sup>

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*Disabilities in Equal Protection Cases*, 15 PACE L. REV. 621, 663 (1995) (in the ADA, Congress attempted to utilize *Carolene Products* findings to imply that a “heightened level of scrutiny” should be utilized under the ADA); see also *Crowder v. Kitagawa*, 842 F. Supp. 1257, 1264 (D. Haw. 1994) (assuming application of strict scrutiny level in ADA cases).

146. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

147. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

148. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (invalidating a zoning regulation which precluded a community home for individuals with retardation).

149. *Garrett*, 531 U.S. at 367.

150. *Id.* at 366 (quoting *Cleburne*, 473 U.S. at 446). One commentator makes a cogent argument that there is a tension between the Supreme Court’s decision in *Garrett* (declining to find “the disabled” a quasi-suspect class) and *Cleburne/Olmstead*. Sean Pevsner, *Reasonable Accommodations as Constitutional Obligations*, 7 TEX. F. ON C.L. & C.R. 317, 317 (2002) (suggesting that *Olmstead* and *Cleburne* in essence, if not in *haec verba*, balance individual rights and state interests in a manner consistent with the quasi-suspect classification approach).

*Cleburne*, however, did not simply reject the zoning rule at issue as if it were an irrational commercial regulation. The scrutiny was more intense than that under the traditional rational basis test. As Judge Posner in dissent observed in a case involving zoning regulation and churches, “But one has only to read a little further in the *Cleburne* opinion to realize that the Court was not treating the zoning discrimination at issue there as it would have treated a discrimination in the taxation of railroads or the zoning of bowling alleys.”<sup>151</sup> Judge Posner wisely urges a deeper reading of the case:

We should follow what the Supreme Court does and not just what it says it is doing. The Court rejects a “sliding scale” approach to equal protection in words but occasionally accepts it in deeds. *Cleburne* instantiates though it does not articulate the proposition that discrimination against sensitive uses is to be given more careful, realistic, skeptical scrutiny by the courts than discrimination against purely commercial activities.<sup>152</sup>

Indeed, a separate opinion in *Cleburne* joined by three of the Justices points out that the majority in fact employs, at the least, a “second order rational basis review,” not the traditional deferential test:

The Court holds the ordinance invalid on rational-basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet *Cleburne*’s ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation. In my view, it is important to articulate, as the Court does not, the facts and principles that justify subjecting this zoning ordinance to the searching review—the heightened scrutiny—that actually leads to its invalidation.... [T]he Court does not label its handiwork heightened scrutiny,

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151. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 770 (7th Cir. 2003) (zoning restrictions on churches).

152. *Id.* (citing *Romer v. Evans*, 517 U.S. 620, 634–35, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); cf. *Lawrence v. Texas*, *supra*, 123 S.Ct. at 2482).

and perhaps the method employed must hereafter be called 'second order' rational-basis review rather than 'heightened scrutiny.' But however labeled, the rational-basis test invoked today is most assuredly not the rational-basis test of *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959), and their progeny.<sup>153</sup>

A proper and *Cleburne-Garrett* consistent rule would define as a quasi-suspect (if not suspect) class those who are institutionalized. These are individuals deprived of liberty, excluded from the community, and recognized as deserving of special protection both under general due process principles and the ADA's integration mandate.<sup>154</sup> This cabined definition answers *Cleburne's* slippery slope concern that those in the general populace like the aging and infirm might be swept into a tight equal protection standard.

*Cleburne's* disquiet with designating the amorphous class of "the disabled" a quasi-suspect or suspect class is warranted. "Although it is often expressed in medical or functional terms, "disability" is a social construct and therefore is assigned different meanings in different contexts."<sup>155</sup> For example, the 2000 United States Census uses a variety of definitions of disability, including sensory disability, physical disability, mental disability, self-care disability, "going-outside-the-home disability," and employment disability.<sup>156</sup> The ADA, the Fair Housing Act, the Rehabilitation Act, and laws distributing public benefits also have *sui generis* definitions of disability.<sup>157</sup>

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153. *Cleburne*, 473 U.S. at 458.

154. See sources cited *supra* notes 150–52.

155. Henry Korman, *Clash of the Integrationists: The Mismatch of Civil Rights Imperatives in Supportive Housing for People with Disabilities*, 26 ST. LOUIS U. PUB. L. REV. 3, 7 (2007).

156. QI WANG, U.S. CENSUS BUREAU, CENSUS 2000 SPECIAL REPORTS, DISABILITY AND AMERICAN FAMILIES: 2000, at 2 (2005), available at [www.census.gov/prod/2005pubs/censr-23.pdf](http://www.census.gov/prod/2005pubs/censr-23.pdf).

157. Korman, *supra* note 155, at 8–9 (enumerating various disability definitions). The Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 112 Stat. 3553, 110th Cong., 2d Sess. (Sept. 25, 2008), is mainly a re-definition of disabilities, as well as a refutation of certain Supreme Court decisions which narrowed the class of people covered by the ADA.

*San Antonio Independent School District v. Rodriguez*,<sup>158</sup> the school financing case, finding no fundamental right to education and no suspect class, does not negate a right to treatment in the community. The Supreme Court made it quite clear in *Rodriguez* that, had there been an absolute deprivation of education, or had the class been defined in more explicit terms, the result could have been different. My argument is that institutionalization is close enough to an absolute deprivation, especially where it is shown that there is no necessity for the confinement. The limitations of the class definition proposed here render the discrimination fit for intense Fourteenth Amendment scrutiny.

#### *4. Institutionalization Must Be Justified by a Compelling State Interest*

Discriminatory institutionalization is prohibited by the Equal Protection Clause's separate strand which subjects to searching judicial review state systems which systematically deprive individuals of fundamental rights. The Supreme Court has held that "any classification which serves to penalize the exercise of [a fundamental] right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."<sup>159</sup> There is no doubt that there is a constitutional right to be free from unjustified institutionalization.<sup>160</sup>

In *Tennessee v. Lane*, holding that Title II of the ADA is a valid exercise under the Fourteenth Amendment as applied to cases implicating the fundamental right of access to the courts, the Supreme Court observed that Title II of the ADA was enacted "against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights" and found that Title II addresses

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158. *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (minor alien children have right to education); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (education is not a fundamental right).

159. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (emphasis added); see *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (subjecting to strict scrutiny a law providing for compulsory sterilization of habitual criminals).

160. See sources cited *supra* notes 102–09.

the deprivation of certain “basic constitutional guarantees, infringements of which are subject to more searching judicial review.”<sup>161</sup> Among the examples cited are cases involving institutional deprivation of liberty.<sup>162</sup> The *Lane* reasoning applies with equal force to institutionalization. It is not subject to question, therefore, that needless institutionalization of people with intellectual disabilities, as proscribed by *Olmstead* on statutory grounds, is an exercise of state power which constitutionally must be justified by a compelling state interest.

#### *D. Subsidiary Questions*

There are two subsidiary questions which are distinct from the thesis of this article but which are often enmeshed with community services litigation under the ADA and the Constitution. These questions are alive at the periphery of the central issues discussed above. They have substance. It is important to acknowledge them.

##### *1. Does the Right to Community Services Protect People Not (Yet) Institutionalized?*

This article highlights the constitutional rights of people in institutions. There are many other individuals who, living at home or elsewhere, are on the cusp of institutionalization. They may require services if institutionalization is to be avoided. Post-*Olmstead*, these individuals are protected by the statute and, I suggest, by the Constitution.

Courts have held that the integration mandate applies equally to individuals already institutionalized and “at risk” of institutionalization.<sup>163</sup> One court reached this conclusion on account of the *absence* of language in the statute and regulations “suggest[ing] that a plaintiff must currently be institutionalized to

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161. *Tennessee v. Lane*, 541 U.S. 509, 510, 522–23 (2004).

162. *Lane*, 541 U.S. at 523–24.

163. *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003); *M.A.C. v. Betit*, 284 F. Supp. 2d 1298, 1309 (D. Utah 2003).

bring a claim under the ADA or Rehabilitation Act.”<sup>164</sup> The Tenth Circuit reasoned that the integration mandate “would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation.”<sup>165</sup> *Olmstead*’s proscription of “unjustified isolation” is consistent with this approach.

There is authority that neither due process nor equal protection principles protect individuals living at home from government budget cuts resulting in reduction of their services.<sup>166</sup> However, with an analysis informed by *Olmstead*, and a finely-tuned emphasis on the factual “at risk” question, the result of similar litigation has appropriately been different.<sup>167</sup>

The rationale is straightforward and persuasive: restriction of the claim to those already institutionalized would force community plaintiffs to “choose between staying in the community without any services or entering an institution in order to receive services.”<sup>168</sup> One need not be at the institution’s door to be at risk. The fragility of one’s situation in the community is sufficient.

## 2. *Does the Right to Community Services Protect People Who Are “Voluntarily” Institutionalized?*

There is support in the case law for the notion that voluntariness in the context of institutionalization of people with intellectual disabilities is an illusory concept, and that therefore there is no basis

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164. *M.A.C.*, 284 F. Supp. 2d at 1309.

165. *Fisher*, 335 F.3d at 1181. The court also noted that there is nothing in *Olmstead* which requires “pre-suit” institutionalization before bringing suit to enforce the ADA’s integration requirement. *Id.*

166. *E.g.*, *Phila. Police & Fire Ass’n for Handicapped Children, Inc. v. City of Philadelphia*, 874 F.2d 156, 163 (3d Cir. 1989).

167. *Fisher*, 335 F.3d at 1184 (three individuals with medical-physical handicaps at risk of nursing home institutionalization on account of state decision to limit medically-necessary prescription medications to five per month; “plaintiffs’ precarious health and finances” triggers “substantial risk” of harm of institutionalization); *M.A.C.*, 284 F. Supp. 2d at 1309 (waiting list under Medicaid Waiver); *Martin v. Taft*, 222 F. Supp. 2d 940, 948 (S.D. Ohio 2002) (people with developmental disabilities eligible to be moved from large private ICF/MR facilities to non-institutional, integrated community-based housing).

168. *M.A.C.*, 284 F. Supp. 2d at 1309.

for treating them differently from those involuntarily civilly committed. Residents of state mental retardation facilities have generally not consented to their institutionalization. As one court explained:

First, the plaintiffs who are residents of the Grafton state school have not, in most cases, voluntarily consented to their confinement in any meaningful sense of the word “voluntary.” North Dakota Century Code, Chapter 25-04, allows for the admission of mentally deficient persons upon the application of a parent or guardian without the consent of the person involved. The statute in no way makes the consent of the person concerned a condition of admittance. Further, in the case of plaintiffs who are severely retarded, informed consent is not even possible. And even in the case of the plaintiffs who are capable of giving informed consent to admission, it may be questioned whether such consent is voluntary in light of pressures from family and the high cost and unavailability of alternative care.<sup>169</sup>

Cases which superficially take the opposite position, that voluntary submission to state custody does not trigger constitutional protections,<sup>170</sup> concur: “Indeed, even commitments formally labeled

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169. *Ass’n for Retarded Citizens of N.D. v. Olson*, 561 F. Supp. 473, 484 (D.N.D. 1982). *Accord Kentucky Ass’n for Retarded Citizens v. Conn*, 510 F. Supp. 1233, 1248 (W.D. Ky. 1980); *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1311 (E.D. Pa. 1977) (“[T]he notion of voluntariness in connection with admission as well as in connection with the right to leave Pennhurst is an illusory concept. Few if any residents now have, nor did they have at the time of admission, any adequate alternative to their institutionalization.”); *see, e.g., Clark v. Cohen*, 794 F.2d 79, 93 n.7 (3d Cir. 1986) (Becker, J., concurring); *United States v. Pennsylvania*, 832 F. Supp. 122, 124 (E.D. Pa. 1993) (“[W]here the initial institutionalization of an individual is made pursuant to a ‘voluntary’ decision, such institutionalization in its course may become one which necessarily curtails an individual’s liberty. . . .”); *New York Ass’n for Retarded Children, Inc., v. Rockefeller*, 357 F. Supp. 752, 762 (E.D.N.Y. 1973); *see Phyllis Podolsky Dietz, Note, The Constitutional Right to Treatment in Light of Youngberg v. Romeo*, 72 GEO. L.J. 1785, 1791 (1984).

170. *Torisky v. Schweiker*, 446 F.3d 438, 446 (3d Cir. 2006) (“Thus, a custodial relationship created merely by an individual’s voluntary submission to state custody is not a ‘deprivation of liberty’ sufficient to trigger the protections of *Youngberg*.”).

as ‘voluntary’ may arguably amount to *de facto* deprivations of liberty from their inception.”<sup>171</sup>

A reasonable framework is that adopted under the ADA in a recent decision.<sup>172</sup> “The ADA’s preference for integrated settings is not consistent with a procedure in which remaining at STS is the default option for residents. The defendants cannot establish compliance with the integration mandate by showing that class members never requested community placement.”<sup>173</sup>

Neither the lack of a request for placement, nor nominal voluntary status, should be determinative of whether a person in an institution is eligible to be provided community services.

### *E. The Benefits of Recognition of the Constitutional Right to Community Services*

Recognition of the constitutional right to community services described in this article would provide an “*Olmstead* Plus” footing for analysis of the rights of the institutionalized. There would be a reduction in reliance on other statutes.<sup>174</sup> The force inherent in enforcement of civil rights under the Constitution would augment the attention to detail found in the ADA statute and regulations. Certain defenses would evaporate or be diminished.

States often assert some variation of 11th Amendment sovereign immunity in response to claims for expansion of community services

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171. *Torisky*, 446 F.3d at 446 (citing case law and Sarah C. Kellogg, Note, *The Due Process Right to a Safe and Humane Environment for Patients in State Custody: The Voluntary/Involuntary Distinction*, 23 AM. J.L. & MED. 339, 341–43 (1997)).

172. See generally *Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 294, 337 (D. Conn. 2008).

173. *Id.*

174. With an *Olmstead*-strengthened ADA augmented by constitutional rights to community services, reference to Section 504 of the Rehabilitation Act, long on shaky ground, would be unnecessary in this regard. A number of courts have held that the denial of community-based habilitation services to mentally disabled individuals does not constitute a viable cause of action under section 504. *E.g.*, *Sabo v. O'Bannon*, 586 F. Supp. 1132, 1137 (E.D. Pa. 1984); see *Ky. Ass'n for Retarded Citizens, Inc. v. Conn.*, 674 F.2d 582, 585 (6th Cir. 1982), *cert. denied*, 459 U.S. 1041 (1982) (holding that section 504 does not include a legislative mandate for deinstitutionalization); see also *Manecke v. Sch. Bd.*, 553 F. Supp. 787, 790 n.4 (M.D. Fla. 1982), *aff'd in part, rev'd in part*, 762 F.2d 912 (11th Cir. 1985); *Garrity v. Gallen*, 522 F. Supp. 171, 213 (D.N.H. 1981). See generally *Conner v. Branstad*, 839 F. Supp. 1346 (S.D. Iowa 1993). These holdings, however, do not necessarily exclude application of section 504 to egregious discrimination in a particular individual case.

under the ADA. Regardless of their validity,<sup>175</sup> a constitutional basis for community services eviscerates the sovereign immunity defense. For legislation enacted under Congress' spending power, the remedy for violation is generally not a private right of action, but an action by the federal government to terminate the funds provided to the state.<sup>176</sup>

Internal deficiencies in *Olmstead* would be mitigated.<sup>177</sup> The fundamental alteration defense would have less traction in the face of assertion of constitutional rights.<sup>178</sup> An "effectively working plan" would need to satisfy standards for protection of fundamental constitutional rights, not simply statutory rights. The absence of guidance on standard of care in *Olmstead* is a gap which may now be filled by *Youngberg*-based integration case law supplemented by *Olmstead*'s "handle and benefit from" community services. On another deficiency, the lack of guidance on the future of institutional care, one may look to recent case law which establishes that each resident must at least be considered for placement.

### CONCLUSION

Challenges to institutionalization are high profile for understandable reasons including, for example, curtailment of liberty, high cost of services, deprivation of rights, a history of mistreatment and lack of care, and intensity of public and judicial scrutiny.

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175. The Supreme Court suggested in dicta that ADA claims which seek prospective injunctive relief are not barred by the Eleventh Amendment. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001).

176. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981); *M.A.C. v. Betit*, 284 F. Supp. 2d 1298, 1302 (D. Utah 2003) (class action by individuals living in the community on waiting list for Medicaid Waiver community services; rejecting challenge to cap on number of persons served).

177. See Steven Schwartz, *The Potential and Risks of Relying on Title II's Integration Mandate to Close Segregated Institutions*, 26 GA. ST. U. L. REV. (forthcoming 2010) (critique and interpretation of *Olmstead*).

178. See generally *Olmstead v. J.C.*, 527 U.S. 581 (1999). Establishment of the suggested rights might risk an inappropriate importing of the *Olmstead* limitations into constitutional analysis. The fundamental alteration defense available under *Olmstead* has already affected (or infected) due process analysis. In *Williams v. Wasserman*, 164 F. Supp. 2d 591, 627 (D. Md. 2001), the court found the fundamental alteration limitation on the ADA's integration mandate to be acceptable under due process standards as a basis to "confine patients to mental institutions who do not belong there" if the "state acts reasonably to implement community placement, without arbitrary or undue delay in light of legitimate budget constraints and the competing demands of other disabled citizens."

In *Olmstead*, the Supreme Court accepted the Nation's conclusion that community services are superior to institutional services. Institutional administrators generally agree that, with appropriate support, their residents could be well served in the community. This was the case for *Pennhurst* (decided in 1978) and for *Southbury Training School* (decided 30 years later in 2008).<sup>179</sup> In many ways, this diminishing group is a "Moses generation." Only a small proportion of people with intellectual disabilities live in institutions and the number has dropped significantly.<sup>180</sup> Most of the residents entered the institution before the explosion of community services over the last several decades, and many have not, or will not, experience personally the fruition of that community service development.

This is a time to circle back to those constitutional principles on which the rights of people with disabilities were recognized decades ago. These principles both support the ADA's integration mandate and mitigate the weaknesses of a purely ADA approach.

The involuntary institutionalization of people with intellectual disabilities is unconstitutional on due process and equal protection grounds where it is unjustified in the sense recognized in *Olmstead*, that is, when they can "handle and benefit from" community services based on professional assessment. Periodic review of each person's need for institutionalization is required.

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179. Compare *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1312 (E.D. Pa. 1978) ("All the parties in this litigation are in agreement that given appropriate community facilities, all the residents at Pennhurst, even the most profoundly retarded with multiple handicaps, should be living in the community."), with *Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 294, 326 (D. Conn. 2008):

The defendants do not seem to dispute that many or all class members could be placed in the community under the right circumstances. The defendants' witnesses, including officials at STS, rejected a so-called "readiness model" and testified that anyone currently placed at STS could live in the community if provided with the appropriate "supports and services."

180. Between 1990 and 2008, the number of individuals in public mental retardation institutions has fallen 66% from 84,239 to 35,051. See Lakin *supra* at note 44. Fifteen years ago, there were an estimated 4,132,878 people in the United States with mental retardation or developmental disabilities. RESEARCH AND TRAINING CENTER ON COMMUNITY LIVING, INSTITUTE ON COMMUNITY INTEGRATION, UNIVERSITY OF MINNESOTA, PREVALENCE OF MENTAL RETARDATION AND/OR DEVELOPMENTAL DISABILITIES: ANALYSIS OF THE 1994/1995 NHIS-D (2000), available at <http://rtc.umn.edu/docs/dddb2-1.pdf>. At roughly the same time (1999), there were 49,105 people in public institutions. See Lakin et al., *supra* note 44, at 406.

Restoration of the constitutional dimension to the conversation encourages reasoned discussion of both the opportunities and the deficits in the *Olmstead* statutory approach. Recognition of the constitutional right to community services is an opening to move further toward an end to unjustified institutionalization.

Both the Constitution and the Americans with Disabilities Act advance the integration of people with disabilities in our society. The constitutional scholar Jacobus tenBroek urged “integrationalism.” He “called for the full and equal participation in society of persons with disabilities.”<sup>181</sup> “Without that right, that policy, that world, it is not living.”<sup>182</sup>

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181. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 843 (1966) (defining the policy of integrationism as “a policy entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so . . .”).

182. *Id.* at 918, *quoted in* Peter Blanck, *The Right to Live in the World: Disability Yesterday, Today, and Tomorrow*, 13 TEX. J. C.L. & C.R. 367, 401 (2008).

