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# THE POTENTIAL AND RISKS OF RELYING ON TITLE II'S INTEGRATION MANDATE TO CLOSE SEGREGATED INSTITUTIONS

Steven Schwartz\*

## INTRODUCTION

When President George Bush signed the Americans with Disabilities Act on July 26, 1990, some believed that it would mandate the end of segregated institutions for persons with disabilities. But only nine years later, when the Supreme Court interpreted the integration mandate of the ADA, it crushed those hopes with language explicitly recognizing an appropriate role for such institutions in a publicly-funded service system.<sup>1</sup> A reactionary voice seized this statement and attempted to interpret it as a mandate to maintain all existing institutions. This parabolic evolution has left advocates from each end of the spectrum with a rather unconvincing claim that the integration mandate is relevant at all to the closure or maintenance of segregated facilities.

But a more nuanced argument may be crafted from the history, language, and pragmatic application of Title II's integration mandate. That argument depends on either an incremental approach to closure, or a skillful blend of administrative, legislative, and media advocacy to forge a determination to enforce the fundamental promise of the ADA.

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1. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 604–05 (1999).

## I. THE MISPERCEIVED PROMISE OF TITLE II'S INTEGRATION MANDATE<sup>2</sup>

Scholars claimed and advocates hoped that Title II's integration mandate would end the sordid history of segregation, and particularly its most visible vestige, institutions for persons with psychiatric, intellectual, and developmental disabilities. That claim was grounded in the legislative history and Congressional Findings of the ADA.

During the late 19th century and early 20th century, discrimination against persons with mental disabilities was the norm. Society accepted the pseudoscientific literature on the topic and, in conjunction with the new "science" of eugenics and the emergence of Social Darwinism, believed that the "feeble minded" were a "menace to society and civilization . . . responsible for many, if not all, of our social problems."<sup>3</sup> Segregation of such individuals was justified on the grounds that it was beneficial for both the community and the persons with mental disabilities themselves.<sup>4</sup> Virtually every state institutionalized persons with disabilities, especially children, claiming that they were unsuitable for companionship, a blight on mankind, and whose mingling with society was a most baneful evil.<sup>5</sup> Justice Marshall lamented that:

A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and nearly extinguish their race. Retarded children were categorically excluded from

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2. Much of this history, the import of the Findings, and the chronicle of segregation that animated the ADA is drawn from the many amici briefs filed in support of the Respondents in *Olmstead*.

3. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 461–62 (1985) (Marshall, J., concurring in part and dissenting in part) (footnotes omitted).

4. See, e.g., C.S. Yoakum, *Care of the Feeble-minded in Insane in Texas*, BULL. U. TEX. 83 (Nov. 5, 1914) (describing the institutionalization and segregation of persons with disabilities as "consistent with a deep and abiding charity [that] . . . permits all to live under those circumstances best suited to make each useful and happy").

5. Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMPLE L. REV. 393, 400–01 (1991) (footnotes omitted) (quotation marks omitted).

public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them. State laws deemed the retarded unfit for citizenship.<sup>6</sup>

A radical change occurred in the decades that followed the end of racial segregation, a form of segregation that also was justified on the theory that the practice was beneficial for everyone involved. Rather than segregate persons with disabilities, professionals argued that “normalization”—living as part of a community, not outside it—was more respectful, more dignified, and more integrated for individuals with disabilities.<sup>7</sup> Congress affirmed the shift of opinion among the professional community by passing the ADA, an attempt to officially erase the effects of the country’s history of segregation and to chart a new, more humane course:

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 . . . [T]he Nation’s proper goals regarding individuals with disabilities [should include] assuring . . . independent living . . . for such individuals.<sup>8</sup>

The legislative history of the ADA makes it unmistakably clear that Congress intended to end the segregation of persons with disabilities.<sup>9</sup> Upon introducing the bill, the House Committee on

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6. *City of Cleburne*, 473 U.S. at 462 (Marshall, J., concurring in part and dissenting in part) (citations omitted) (quotation marks omitted).

7. See, e.g., Bengt Nirje, *The Normalization Principle and Its Human Management Implications*, in PRESIDENT’S COMMITTEE ON MENTAL RETARDATION, CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 179, 186–87 (R. Kugel & W. Wolfensberger eds., 1969).

8. 42 U.S.C. § 12101(a)(2)–(8) (2006).

9. See H.R. REP. NO. 101-485(III) (Judiciary Comm.), at 26 (1990) (“The Americans with Disabilities Act completes the circle begun in 1973 with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning in 1964. This year, 1990, is an historic one in the evolution of this nation’s public policy towards persons with

Education and Labor found that “[t]here is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination and for the integration of persons with disabilities into the economic and social mainstream of American life.”<sup>10</sup> The Senate report accompanying the ADA relied heavily on a 1983 report by the United States Commission on Civil Rights entitled *Accommodating the Spectrum of Individual Abilities*,<sup>11</sup> which noted that “segregation singles out handicapped people and separates them from the rest of society, frequently as a condition for receiving some service or benefit,” and that “mental health and mental retardation institutions that house residents in almost complete isolation from the non-handicapped community are perhaps archetypal examples of segregation.”<sup>12</sup> Further, Senator Harkin, floor manager of the Senate debates and prime sponsor of the legislation, remarked as he closed debate in the Senate that:

Today, Congress opens the door to all Americans with disabilities . . . . [T]oday we say no to fear . . . . [W]e say no to ignorance, and . . . we say no to prejudice. The ADA is, indeed, the 20<sup>th</sup> century Emancipation Proclamation for all persons with disabilities. Today, the U.S. Senate will say to all Americans that the days of segregation and inequality are over.<sup>13</sup>

The ADA directs the Attorney General to promulgate regulations to enforce the Act.<sup>14</sup> Section 12182(b)(1)(B), entitled “Integrated Settings,” requires that “[g]oods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the

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disabilities. The ADA is a comprehensive piece of civil rights legislation which promises a new future; a future of inclusion and integration, and the end of exclusion and segregation.”).

10. H.R. REP. NO. 101-485(II) (Educ. & Labor Comm.), at 50. (1990).

11. S. REP. NO. 116, 101st Cong., 1st Sess., at 6 (Aug. 30, 1989) (“[H]istorically, individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society.”).

12. S. COMM. ON CIVIL RIGHTS, 98TH CONG., ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 41 (Comm. Print 1983).

13. 136 CONG. REC. S9684-03, at 9688 (Jul. 13, 1990).

14. 42 U.S.C. § 12134 (2006).

needs of the individual.”<sup>15</sup> The Act defines “discrimination” as “segregating . . . in a way that adversely affects the opportunities or status of [a person] because of . . . disability.”<sup>16</sup>

The Attorney General’s Title II “integration regulation” provides that “a public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”<sup>17</sup> The Attorney General’s comments to this regulation identify integrated settings as those “that enable individuals with disabilities to interact with nondisabled persons to the fullest extent possible.”<sup>18</sup> The Department of Justice further explained its interpretation of the integration regulation as:

[Applying] to all services administered by a public entity, including those that are offered exclusively to persons with disabilities. The Attorney General therefore interprets the regulation to require a State to provide services to persons with disabilities in a community setting, rather than in an institution, when a State’s treatment professionals have determined, in the exercise of reasoned professional judgment, that community placement of the individual is appropriate. Because that interpretation accords with the text of the regulation, it is entitled to controlling weight.<sup>19</sup>

To prevent segregation, states are

required to provide care in integrated environments for as many disabled persons as is reasonably feasible, so long as such an environment is appropriate to their mental-health needs . . . . This requirement serves as one of the principal purposes of Title II of the ADA: ending the isolation and segregation of disabled

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15. *Id.* § 12182(b)(1)(B).

16. 42 U.S.C. § 12112(b)(1) (2006).

17. 28 C.F.R. § 35.130(d) (1991).

18. 28 C.F.R. pt. 35, app. A, at 478 (1991).

19. Brief for the United States as Amicus Curiae Supporting Respondents, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1991) (No. 98-536), 1999 WL 149653.

persons . . . .”<sup>20</sup> This responsibility is referred to as the ADA’s “integration mandate.”

Based upon the legislative history of the ADA, the text of the Act, and the Department of Justice’s own interpretation of the Act when promulgating the accompanying regulations, it is easy to see why persons with disabilities and their advocates perceived the integration regulation to be an integration mandate for the closing of all institutions. The Supreme Court, however, did not consider the issue to be so clear.

## II. THE *OLMSTEAD* AWAKENING

The Supreme Court interpreted and applied the integration mandate in the landmark case of *Olmstead v. L.C.* Perhaps the most quoted language of *Olmstead*, and its core message, is Justice Ginsburg’s statement that “Unjustified isolation, we hold, is properly regarded as discrimination based on disability.”<sup>21</sup> That statement, and its explication of discrimination,<sup>22</sup> affirms the fundamental import of the integration mandate—that persons who can live safely in the community have a right to do so, and that states currently institutionalizing such persons have a federal obligation to accommodate them in their community service systems. The ineluctable result of these coterminous rights and duties is that many, if not most, segregated institutions must close.

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20. *Arc of Washington State Inc. v. Braddock*, 427 F.3d 617, 618 (9th Cir. 2005).

21. *Olmstead*, 527 U.S. at 597.

22. The Court, after noting that “Congress explicitly identified unjustified ‘segregation’ of persons with disabilities as a ‘form of discrimination,’” explained the reason that such segregation is discriminatory:

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.

*Id.* at 600–01.

But, possibly in an attempt to balance ideological perspectives and secure a majority of the Court, Justice Ginsburg went on to qualify her sweeping definition of discrimination with perhaps the second most quoted phrase: “Nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings.”<sup>23</sup> Citing the amici curiae briefs of the American Psychiatric Association and the Voice of the Retarded, the Court relied on the very stereotypes that it chastised and endorsed institutionalization, at least for some persons: “[T]he ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk . . . . For other individuals, no placement outside the institution may ever be appropriate.”<sup>24</sup> The unavoidable result of these qualifications is that segregated institutions need *not* close.

Justice Kennedy's concurrence was even more pointed, saying that Congress's “findings do not show that segregation and institutionalization are always discriminatory or that segregation or institutionalization are, by their nature, forms of prohibited discrimination.”<sup>25</sup> He, like Justice Breyer, adopted the historical analysis of deinstitutionalization proffered by E. Fuller Torrey.<sup>26</sup> But that clarion cry against heedlessly deinstitutionalizing vulnerable citizens was tempered by a striking “deference to the program funding decisions of state policymakers.”<sup>27</sup>

Thus, although *Olmstead* adhered closely to the anti-segregationist principles that underlie the ADA and its Congressional findings, and although the Court's opinion is unique in equating institutionalization

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23. *Id.* at 601–02. Earlier the Court used much more tempered and ambiguous language in its contorted attempt to apply the reasonable modification regulation to the integration mandate: “But we recognize, as well, the State's need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities and the State's obligation to administer services with an even hand.” *Id.* at 599.

24. *Id.* at 604–05.

25. *Id.* at 614.

26. *Id.* at 610; see Torrey E. Fuller, *ASYLUM IN THE COMMUNITY* (1996).

27. *Olmstead*, 527 U.S. at 610. Justice Kennedy also explained that “[g]rave constitutional concerns are raised when a federal court is given the authority to review the State's choices in basic matters such as establishing or declining to establish new programs. It is not reasonable to read the ADA to permit court intervention in these decisions.” *Id.* at 612–13.

with segregation, *Olmstead* is of limited utility to support the logical consequence of its principled position: that segregated facilities are unlawful and most must be closed. Indeed, it has even garnered support for the contrary proposition—that institutions must remain open—rendering it a neutral, or at least ambiguous, statement on the historical, and still widespread, reliance by states on institutions to segregate, isolate, and congregate persons with disabilities.

### III. THE DISTORTED APPLICATION OF *OLMSTEAD*

Seizing on certain statements in the plurality and concurring opinions in *Olmstead*, advocates for maintaining institutions have argued that the integration mandate, as interpreted by the Supreme Court, means that states *must* afford institutionalized residents, as well as their guardians and parents, a choice of community placement or continued residence in their current facility. Therefore, they argue that states must keep their institutions open to ensure this choice is meaningful. These arguments have been presented most powerfully and consistently by the Voice of the Retarded (VOR), whose amicus brief was cited by the Court for the proposition that the most integrated setting for some persons with intellectual disabilities is a segregated institution. Most disturbingly, they have been adopted by a district court struggling to appease family members of residents of the oldest intermediate care facility for the mentally retarded (ICF/MR) in the United States, who opposed the Massachusetts Governor's decision to close the Fernald Developmental Center.<sup>28</sup>

VOR's primary argument attempts to convert the Supreme Court's respect for individual preference into a right to remain in the facility of one's choice. Its argument is predicated on two "principles" that VOR gleans from the *Olmstead* decision: (1) all placement decisions must be based upon an individualized assessment, and (2) a transfer from an institutional setting to the community can only occur if the person elects to move.<sup>29</sup> "*Olmstead's* requirement of an

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28. *Ricci v. Okin*, 499 F. Supp. 2d 89 (D. Mass. 2007).

29. *See Ricci v. Patrick*, 544 F.3d 8, 15–18 (1st Cir. 2008).

individualized ISP [individual service plan] process which takes into account the views of the resident applies equally where the residents wish to remain in an institution, and the state wishes to transfer them out.”<sup>30</sup>

VOR's corollary argument for maintaining institutions converts the plurality's caution against an ADA mandate for closure into a *prohibition* against closing any, some, or at least the institution at issue in specific litigation.<sup>31</sup> The argument attempts to extend the Supreme Court's dicta into a federal statutory requirement to maintain segregated facilities, presumably in order to provide persons with disabilities with the most integrated setting possible. Moreover, this argument has been applied defensively in case-specific contexts where facility phase-down or closure is sought as part of the remedy to violations of Title II's integration mandate, insisting that the right to live in an institution equates with the right to remain in the current institution or the institution of choice.<sup>32</sup> It even has been applied offensively, when institution closure is the result of executive directives.<sup>33</sup>

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30. *Id.* at 22–23. VOR's argument relies upon and distorts lower court decisions in *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 773–74 (7th Cir. 2007) (finding that individualized assessment required prior to transfer); *Capitol People First v. Dep't of Developmental Servs.*, 155 Cal. App. 4th 676, 700 (Cal. Ct. App. 2007) (holding that placement decision must be based upon individualized assessment); *Black v. Dep't of Mental Health*, 100 Cal. Rptr. 2d 39 (Cal. Ct. App. 2000) (“the antidiscrimination protections of the ADA are not triggered” by “a medically inappropriate transfer from institutionalization to community placement”); and *Alexander v. Rendell*, Civ. No. 05-00419 (W.D. Pa. Mar. 9, 2006) (noting that the ward's guardians would have the final say regarding whether the ward would be transferred to a community placement or another institutional setting based). However, the *Alexander* court's oft-quoted statement was based not on *Olmstead* or the ADA, but rather on its interpretation of the terms of a settlement agreement, informed by certain promises and representations made by the state during the litigation. *Id.* slip op. at 3–4. Significantly, it did not alter the district court's earlier ruling that the closing of the Western Center ICF/MR “serves both the public policy of the ADA, Rehabilitation Act . . . and proper judicial deference to the discretion of the state in determining the manner in which it allocates its resources.” *Alexander v. Rendell*, Civ. No. 05-00419, slip op. at 10 (W.D. Pa. Jan. 30, 2006).

31. See MASSACHUSETTS COALITION OF FAMILIES AND ADVOCATES FOR THE RETARDED, STOP THE SHUTDOWNS FACTSHEET # 2: *OLMSTEAD*, <http://www.cofar.org/documents/Olmsteadfactsheet.pdf> (last visited Feb. 16, 2010).

32. *Rolland v. Patrick*, 562 F. Supp. 2d 176 (D. Mass. 2008) (rejecting claim by the guardians of nursing facility residents who opposed an ADA community integration settlement agreement, claiming that they had a right to remain in the current institution).

33. *Ricci*, 499 F. Supp. 2d at 89.

For instance, when the Commonwealth of Massachusetts elected, as a matter of state policy and in response to legislative budget requirements, to close its oldest ICF/MR—the Fernald Developmental Center—parent plaintiffs sought to enjoin the closure in a longstanding class action.<sup>34</sup> They claimed that the gubernatorial mandate deprived them of both an untainted assessment process and the right to object to community placement. They alleged that these deprivations contravened their rights under the ADA, as interpreted in *Olmstead*. The district court explicitly accepted the first contention, and implicitly endorsed the second.<sup>35</sup> The court “conclude[d] that the Commonwealth’s stated global policy judgment that Fernald should be closed has damaged the Commonwealth’s ability to adequately assess the needs of the Fernald residents on an individual, as opposed to a wholesale basis.”<sup>36</sup> It explained that depriving residents and families of the choice to remain at this specific facility disenfranchises them in the treatment planning process and denies them their right to object to a proposed transfer.<sup>37</sup> It rejected arguments by the Commonwealth and the Association of Retarded Citizens of Massachusetts (the Arc) that any order precluding the closure of Fernald violated, or at least frustrated, the ADA’s integration mandate.<sup>38</sup> It determined that the closure effectively contravened the Supreme Court’s requirement that community placement not be opposed by the resident.<sup>39</sup> As a result, the district court required the Commonwealth to provide every current Fernald resident with a choice of remaining at this facility, as

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34. *Id.*

35. *Id.* at 90–91.

36. *Id.* at 91.

37. *Id.* at 90–91. Ironically, the Commonwealth offered all Fernald residents a choice of transferring to another large, public ICF/MR or moving to a community placement. Perhaps most tellingly, the families did not consider this an acceptable choice or one that satisfied their interpretation of the choice provision of the ADA and its implementing regulations. *Id.*

38. *Id.* at 92 n.16.

39. *Ricci v. Okin*, 499 F. Supp. 2d 89, 92 n.16 (D. Mass. 2007).

part of a meaningful and respectful individual service planning process.<sup>40</sup>

This decision was heralded nationally by VOR, its local affiliates, and numerous other family organizations opposed to facility closure.<sup>41</sup> It threatened to translate Title II's prohibition on segregation into a prohibition on ending segregation. The decision appeared to enshrine *Olmstead's* deference to consumer choice into a proscription on any form of unwanted transfer, effectively creating a right to remain in the institution of one's choice.

#### IV. THE PROPERLY CONSTRUED PROMISE AND POTENTIAL OF THE INTEGRATION MANDATE

##### *A. The Proper Construction of the Integration Mandate in Light of Olmstead*

Properly understood, *Olmstead* neither requires that an institution be closed nor mandates that it remain open. There is nothing in *Olmstead* that suggests that a state must provide institutionalized care at the facility of the resident's choosing. Contrary to VOR's arguments, *Olmstead* grants no rights to current facility residents regarding its closure, other than the right to be transferred to a community placement if medically appropriate and if the state can reasonably accommodate the placement. Indeed, the integration mandate is a one-way street. The state is not required to provide institutional care even if none of the three *Olmstead* placement criteria<sup>42</sup> is met.<sup>43</sup> By its specific terms, the integration mandate

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40. The Commonwealth and the Massachusetts Association for Retarded Citizens (Arc) appealed. As more fully discussed below in Part V, the First Circuit Court of Appeals reversed this injunction. *Ricci v. Patrick*, 544 F.3d 8 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 1907 (2009).

41. See Massachusetts Coalition of Families and Advocates for the Retarded, [www.cofar.org/whattoget.aspx?getme=court](http://www.cofar.org/whattoget.aspx?getme=court) (last visited June 26, 2009); Avert Rolland Tragedy, [www.avertrollandtragedy.org](http://www.avertrollandtragedy.org) (last visited June 26, 2009).

42. Justice Ginsburg concluded that if the individual can "handle and benefit" from community placement, if the placement is not opposed by the person with disability, and the state can reasonably accommodate the request, the ADA requires that the state offer the individual an integrated placement. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 607 (1999).

43. *Richard C. v. Houstoun*, 196 F.R.D. 288, 292 (W.D. Pa. 1999), *aff'd sub. nom.*, *Richard C. v. Snider*, 229 F.3d 1139 (Table) (3d Cir. 2000).

requires movement from more to less restrictive settings, not the reverse.<sup>44</sup> As one court recently held:

Congress, in enacting the ADA, and the Attorney General, in issuing regulations interpreting the ADA have made the judgment that mentally retarded individuals should live in the most integrated setting that is appropriate to their needs. The court must do what it can to give effect to this statutory preference for integration, while keeping in mind that it must defer to the judgment of the defendants' medical and mental health professionals in determining whether community placement is appropriate for individual class members.<sup>45</sup>

Title II, as interpreted in *Olmstead*, certainly provides no right to interfere with a state's decision to close an antiquated, costly, and underutilized institution. As the Fifth Circuit has recognized, "The state reserves the right to unilaterally close a state school [for the mentally retarded] for administrative or financial reasons, even if it means that certain residents will have to relocate as a result."<sup>46</sup> And as the Supreme Court has stated clearly, "[F]ederal law (Title XIX) 'does not confer a right to continued residence in the home of one's choice.'"<sup>47</sup>

Rather, *Olmstead*'s relevance to institution closure flows from the consequences of the state's duty to provide treatment in the most integrated setting appropriate to the needs of the individual and its directive that states must allocate their resources in a fair and

44. See *Richard C.*, 196 F.R.D. at 291–92.

45. *Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 294, 326 (D. Conn. 2008).

46. *Baccus v. Parrish*, 45 F.3d 958, 961 (5th Cir. 1995); see also *Alexander v. Rendell*, No. 05-419J, 2006 U.S. Dist. LEXIS 3378, at \*18–19 (W.D. Pa. Jan. 30, 2006) ("The Court concludes that the Defendants' closing of the Altoona Center and its plan for transfer of its residents serves both the public policy of the ADA, Rehabilitation Act and the applicable Medicaid statutes and proper judicial deference to the discretion of the state in determining the manner in which it allocates its resources . . ."); *Lelsz v. Kavanagh*, 783 F. Supp. 286, 298 (N.D. Tex. 1991), *aff'g* 983 F.2d 1061 (5th Cir. 1993), *cert. denied*, 510 U.S. 906 (1993), *reh'g denied*, 510 U.S. 1004 (1993) ("The State has always possessed the power and frequently exercises the power—to relocate its residents for its own administrative needs. If it is so desired, the State could unilaterally close any of the state [ICF/MRs] for economic reasons or otherwise.")

47. *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980).

equitable manner to meet the needs of all eligible individuals. For most states that serve many more persons than they confine in their institutions, phasing down some of their extraordinarily expensive facilities that serve only a few hundred persons is a necessary and appropriate action to comply with the ADA.

The fact that states are not required to close institutions certainly does not mean that they have to maintain them. In order to comply with their duty under the ADA to eliminate unnecessary segregation, states are afforded considerable flexibility to manage their resources, to develop, maintain, or modify their programs, and to transfer institutionalized residents to the community at a reasonable pace, pursuant to an effectively working plan.<sup>48</sup> This flexibility must encompass the ability to transfer resources, as well as residents, and to close outdated or expensive facilities in order to serve the greatest number of needy citizens in an equitable and efficient manner. Phasing down and closing large institutions is certainly an important option that states have, and historically, has been used effectively to implement their federal statutory duty to eliminate the segregation of persons with disabilities. Indeed, the Supreme Court specifically recognized that one of the means of financing an increase in community care would be through savings achieved by closing institutions.<sup>49</sup>

This equilibrium between promoting but not requiring closure provided the foundation for the First Circuit's reversal of the district court's injunction in *Ricci*. The court first summarized the background of the appeal, noting that in 2003 the Commonwealth

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48. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 605–06 (1999).

49. *Id.* at 604 & n.15. That this is the fundamental import of the *Olmstead* ruling is confirmed by a January 14, 2000 letter from the Department of Health and Human Services to all State Medicaid Directors stating that “[t]he Court’s decision [in *Olmstead*] clearly challenges us to develop more opportunities for individuals with disabilities through more accessible systems of cost-effective community-based services.” Letter from Timothy Westmoreland and Thomas Perez to State Medicaid Directors (Jan. 14, 2000), available at <http://www.acf.hhs.gov/programs/add/otherpublications/olmstead.html>. Because resources are limited, any increase in community-based resources will necessitate a decrease in institutional resources. The Court recognized as much, noting that part of the cost of the transition from institutional to community-based care may be “increased overall expenses” due to the inability to immediately “take advantage of the savings associated with the closure of institutions.” *Id.* at 604 & n.15 (quoting Brief for United States as Amicus Curiae).

announced its intention to close the Fernald Developmental Center, as well as its five other state-operated ICFs/MR.<sup>50</sup> This executive decision was reinforced by legislative directives “to promote compliance with a Supreme Court decision, *Olmstead v. L.C. ex rel. Zimring*, . . . [which] emphasized the congressional intent in Title II of the . . . [ADA] to avoid discrimination against mentally disabled persons by promoting their placement into community settings.”<sup>51</sup> It was also supported by the challenge to equitably and efficiently allocate its resources, since the per-resident cost at Fernald was over 250% higher than community residential services and approximately 150% higher than the other ICFs/MR.<sup>52</sup>

Although the court of appeals reversed the district court’s injunction on jurisdictional grounds,<sup>53</sup> and did not reach the question of whether the injunction could or did prohibit the closure of the institution, it took the opportunity to note that an executive decision to close an institution was consistent with *Olmstead*.<sup>54</sup> It found that “the law has moved in a direction disfavoring institutionalization.”<sup>55</sup> The court noted and implicitly rejected VOR’s arguments that the individualized assessment and choice principles contained in *Olmstead* prohibited involuntary transfers that might be necessary to accomplish institutional closure.<sup>56</sup> Moreover, and perhaps most significantly, it noted that the individualized assessment and service

50. *Ricci v. Patrick*, 544 F.3d 8, 12–16 (1st Cir. 2008).

51. *Id.* at 12. The Court also noted:

Another stated purpose was to further the Commonwealth’s own established policy of reducing its institutional capacity and of providing services to patients in less restrictive settings. This policy decision was grounded in evidence of prior successful transitions of a number of mentally retarded residents from residential settings, from the past closing of other ICFs. Further, the Commonwealth was cognizant of national trends toward deinstitutionalization and the need for certainty in planning matters such as personnel placement. The legislature required DMR to reduce capacity at these ICFs, provided that equal or better services for residents could be furnished in community settings.

*Id.*

52. *Id.*

53. *Id.* at 17.

54. *Id.* at 21.

55. *Id.*

56. *Ricci*, 544 F.3d at 21 & n.11. The Court noted the dispute between VOR and the Arc concerning the meaning of *Olmstead* and national trends. Although it allegedly declined to address this dispute, it clearly endorsed and found support in *Olmstead* for preferring “community placement of institutionalized individuals.” *Id.*

planning process endorsed by the Supreme Court in *Olmstead* “does not guarantee any class member any particular residential placement, nor does it guarantee that Fernald be maintained open so long as any particular resident prefers to remain there.”<sup>57</sup> The court concluded, “the removal of one of several available residential facilities . . . cannot itself result in there being a violation of the [service planning] process.”<sup>58</sup> In overturning the lower court’s injunction, the First Circuit determined that states have broad discretion and may have sound reasons to close segregated institutions, that doing so furthered Title II’s integration mandate, and that *Olmstead* created no obstacles to, and in fact supported, facility closure.

### *B. Promoting State Policies That Favor Closure*

Like the executive and legislative directives cited by the First Circuit in *Ricci*, many states have statutes, executive orders, regulations, and policies that at least favor community integration and occasionally mandate facility phase-down. These state requirements also may be incorporated in some states’ *Olmstead* plans, but more commonly are the actions of governors, agency directors, or legislators seeking to consolidate excess bed capacity, reduce excessive per diem institutional costs, avoid compliance with demanding federal facility regulations and certifications, establish service planning processes, and promote family and community values. These state decisions influence and embolden other states.<sup>59</sup> They can be justified as necessary to comply with, and even compelled by, the ADA’s integration mandate. They are clearly designed to facilitate the goals of the ADA, to respect the Congressional findings that animate the ADA, and to allow states to

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57. *Id.* at 19.

58. *Id.* The Court further went on to find that “the very nature of [that] process itself contradicts the district court’s conclusion. As the Commonwealth notes, the . . . process focuses only on the services a resident is to receive; [it] does not specify where those services are to be delivered.” *Id.*

59. The *Ricci* court found it instructive that the neighboring states of Maine, New Hampshire, and Rhode Island “ha[d] moved away from institutionalization completely” and closed all of their segregated institutions for persons with mental retardation and developmental disabilities. *Ricci*, 544 F.3d at 21.

accommodate persons with disabilities, as required by the ADA. Governors, state agency directors, and legislative leaders can be persuaded, and have been, to issue directives to close antiquated institutions, consolidate facility capacity, and reallocate resources to expand community supports.

States have developed successful strategies to address obstacles to closure. Governors, particularly those from Northeastern and Midwestern States where there are a disproportionate number of segregated institutions and powerful state employee unions, have established commissions, modeled after the federal military base closing commission, with the authority to determine which facilities to shutter. Alternatively, these bodies are authorized to recommend a phase-down schedule for segregated settings, with the goal of reducing capacity in existing institutions and eventually consolidating space, workers, and residents into fewer facilities, while simultaneously allowing skeptical families to choose a transfer to one of the remaining facilities. Some states, like Rhode Island and Massachusetts, have developed state-operated community residences that are staffed with state employees, thereby allowing institutional staff to have some job security and families to feel that new programs are as secure and reliable as a former facility.

In current economic times, states may be particularly interested in consolidating, phasing-down, and closing large, segregated institutions, simply to achieve needed cost-savings. While there are no specific incentives for promoting community integration in the American Recovery and Reinvestment Act, the enhanced federal reimbursement (FFP) percentage offers additional federal revenue to support community services provided through State Plans, Early Periodic Screening Diagnosis and Treatment programs, Home and Community-Based Service Waivers, and 1115 Demonstration Projects to Medicaid-eligible individuals. These Medicaid provisions cover a broad array of supports that may be needed by persons institutionalized in ICFs/MR, psychiatric hospitals, nursing facilities, juvenile justice facilities, and other institutions that confine persons with disabilities. Thus, state decisions to close segregated institutions

can be promoted as economically necessary as well as consistent with federal law.

It seems reasonably clear that these public policy decisions will be endorsed by the federal courts, either as strategy to comply with Title II's integration mandate or at least as an expression of federalism and deference to state officials. Courts will look sympathetically at the cost considerations that justify closure, and the reallocation of institutional resources to support community services. While the lower courts will adhere to the Supreme Court's criteria for individual placement decisions, they are not likely to adopt VOR's arguments that individualized assessment and family/resident preference create obstacles to closure or are even relevant in the face of a decision to shutter an existing institution.

*C. Advocating for Incrementalism: Individualized Assessments for Community Placement That Produce Facility Phase-down, and Eventual Closure*

Even if invoking Title II as a mandate for closure is unpersuasive, relying on it to achieve incremental phase-down and eventual closure is a pragmatic and proven strategy. States must accommodate residents of institutions who can live safely in the community with available supports. Many current residents of many existing institutions can be adequately served through available state programs, at least if those programs are expanded. Enforcing the integration mandate for these individuals through *Olmstead* claims will undoubtedly result in a significant reduction in the census of many facilities, eventually raising questions about under-utilization, over-capacity, excessive cost, and equitable treatment of similarly-situated individuals. It is well established that these factors generate discussions about closure, whether as part of the *Olmstead* remedy or as a discrete policy decision by state officials.<sup>60</sup> It is also well

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60. It is just this pattern that led to Massachusetts's decision to close the Belchertown and Dever Developmental Centers which the First Circuit pointed to as a reasonable justification for its subsequent decision to close the Fernald Developmental Center. *Ricci*, 544 F.3d at 18. And it is the appeals court's decision that led to the subsequent announcement by the Massachusetts Secretary of Health and Human Services that the Commonwealth would close five additional institutions over the next several years. *See*

documented that an incremental phase-down of large, segregated institutions predictably leads to closure in at least a significant number of cases.<sup>61</sup> While Title II may not mandate closure, aggressive and persistent enforcement of the integration mandate will most certainly produce this result.<sup>62</sup>

#### *D. Closure As a Remedy to Unremedied Institutional Conditions*

Before the enactment of the ADA, class action cases frequently sought both improvement in institutional conditions to satisfy the constitutional standards for confinement, as well as community placement, pursuant to either § 504 of the Rehabilitation Act or the constitutional command to provide treatment in the least restrictive alternative. Where courts found unconstitutional conditions, they frequently ordered sweeping remedial orders.<sup>63</sup> Equally as frequently, states failed to comply with these remedial orders in a timely fashion. As a result, several courts eventually abandoned their efforts to improve conditions of confinement and ordered the institutions

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Elin Howe, Update 161, State Announces More Community Living Options for People with Developmental Disabilities (Dec. 12, 2008), [www.mass.gov](http://www.mass.gov) (search "update 161"; then follow "12/12/08 – Update #161" hyperlink).

61. DAVID BRADDOCK, *THE STATE OF THE STATES* 50–53, tbl.14 (2008).

62. There is a direct correlation between those states, counties, and regions that are institution free, at least for persons with developmental disabilities and occasionally for persons with psychiatric disabilities, and those that were the object of federal class action cases seeking community placement as the primary remedy. See *Johnson v. Florida*, 348 F.3d 1334 (11th Cir. 2003) (central Florida); *Brewster v. Dukakis*, 3 F.3d 488 (1st Cir. 1993) (western Massachusetts); *Jackson v. Fort Stanton Hosp. & Training Sch.*, 757 F. Supp. 1231 (D.N.M. 1990) (New Mexico); *Wuori v. Concannon*, 551 F. Supp. 185 (D. Me. 1982) (Maine); *Garrity v. Gallen*, 522 F. Supp. 171 (D.N.H. 1981) (New Hampshire); *Michigan Ass'n for Retarded Citizens v. Smith*, 475 F. Supp. 990 (E.D. Mich. 1979) (Michigan), *aff'g judgment*, 657 F.2d 102 (6th Cir. 1981); *Evans v. Washington*, 459 F. Supp. 483 (D.D.C. 1978) (District of Columbia); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974) (Minnesota), *supplementing opinion*, 68 F.R.D. 589 (D. Minn. 1975), *aff'g judgment*, 525 F.2d 987 (8th Cir. 1975). Rhode Island, Indiana, Pennsylvania, and Florida were the subject of cases that resulted in unreported consent decrees having the same effect. For a compendium of recent cases, see HUMAN SERVICES RESEARCH INSTITUTE, STATUS REPORT: LITIGATION CONCERNING HOME AND COMMUNITY SERVICES FOR PERSONS WITH DISABILITIES (2007), available at <http://www.hsri.org/docs/litigation052307.pdf>.

63. *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Jackson v. Fort Stanton*, 757 F. Supp. 1231 (D.N.M. 1990); *Haldeman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part and rev'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'g judgment*, 451 U.S. 1 (1981), *remanded to 673 F.2d 647* (3d Cir. 1982), *rev'g judgment*, 465 U.S. 89 (1984); *N.Y. State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973).

closed.<sup>64</sup> Alternatively, state officials simply gave up trying to remedy these violations, resulting in the gradual placement of all remaining residents and the eventual closure of the institution.<sup>65</sup> While more recent cases have themselves abandoned institutional improvement strategies in favor of “pure” ADA claims, it is clear that aggressive and persistent enforcement of rigorous institutional requirements can itself be a catalyst for closure. For instance, insisting that states fully comply with the active treatment requirements for nursing facility residents with disabilities can result in a dramatic increase in community placements and the phase-down or closure of even private facilities.<sup>66</sup>

### CONCLUSION

Although facially neutral on the issue of closure, Title II's integration mandate still holds considerable promise for closing segregated facilities, mostly through pragmatic incrementalism rather than judicial mandates. But this incrementalism is not self-generating and certainly not self-sustaining. To the contrary, a host of outcries, resistance, and obstacles—including reliance on the Supreme Court's language in *Olmstead*—will arise to oppose the closing of institutions that have been a familiar part of the service system landscape for over a century. Civil rights advocates must passionately insist on the full realization of the promise of the ADA. They must creatively generate arguments, grounded in equity, efficiency, and legal rights, that result in institutional phase-down, consolidation, and closure. Advocates must also patiently pursue, through *Olmstead* claims, the full enforcement of those rights, so that they can bear witness to the incremental end of segregation.<sup>67</sup>

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64. *Halderman*, 446 F. Supp. 1295.

65. *Jackson*, 757 F. Supp. 1243; *Rockefeller*, 375 F. Supp. 752.

66. *Rolland v. Patrick*, 562 F. Supp. 2d 176 (D. Mass. 2008).

67. A powerful and moving requiem, titled *Habeas Corpus*, was held on November 18, 2000 at the former Northampton State Hospital, which once confined over 2,500 persons with psychiatric disabilities and eventually closed in 1992, as a result of the aggressive enforcement of the Consent Decree in *Brewster*. The requiem, staged by Anna Schuleit, poured J.S. Bach's *Magnificat* through the open windows of the now-deserted hospital. The music followed a morning of compelling memories

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spoken by former residents and memorialized a European village tradition that requires that windows be opened to let the suffering out. For more information, see Anna Schuleit, *Habeas Corpus* (2000), <http://www.1856.org/anna/habeas.html>.