2000

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.

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Recommended Citation
Thomas M. Cooley Law Review, Vol. 17, Issue 1 (2000), pp. 53-90

"I AIN'T GONNA WORK ON MAGGIE'S FARM NO MORE:" INSTITUTIONAL SEGREGATION, COMMUNITY TREATMENT, THE ADA,[1] AND THE PROMISE OF *OLMSTEAD v. L.C.*[2]

MICHAEL L. PERLIN[3]

I. INTRODUCTION

If you are of a certain age, there is a fairly good chance that you remember, perhaps hazily, perhaps with pinpoint accuracy, the day that Bob Dylan plugged in his guitar and changed the course of rock 'n roll forever.[4] Now, it is true that I have been accused by some otherwise very good friends of being a bit too Dylan-centric, a charge to which I gleefully demur. But even if this allegation has a *soupcon* of truth, the point is an important one. Dylan's decision to abandon (or at least, radically transform) the folk music tradition and replace it with a new sort of literary, poetic, angry, passionate, lyrical rock music truly revolutionized popular culture.[5] For those of you fortunate enough to have seen him in recent years, that revolution continues.[6]

Why do I start this way (other than the obvious, which is that I really enjoy talking about him)? Well, there are two interlocking reasons. First, I believe that the United States Supreme Court's decision in June of 1999 in *Olmstead v. L.C.*[7] and the impact of the Americans With

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1. The ADA, mentioned throughout the paper, refers to the Americans With Disabilities Act, which can be found at 42 U.S.C.A. § 12101 (West 1995). This paper was presented on October 30, 1999, at Thomas M. Cooley Law School's Symposium on Mental Disability Law. Portions of this paper are adapted from MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL (2000).

2. 119 S. Ct. 2176 (1999).

3. Professor of Law, New York Law School. J.D., Columbia University School of Law; A.B., Rutgers University. The author wishes to thank Jennifer Burgess, Christine Morton, and Jenna Anderson for their invaluable research help, and Michael Feuerstein for bringing him back into the world of Bob Dylan's music.

4. *See* The DYLAN COMPANION: A COLLECTION OF ESSENTIAL WRITING ABOUT BOB DYLAN 15-16 (Elizabeth Thompson & David Gutman eds. 1990); TIM RILEY, HARD RAIN: A DYLAN COMMENTARY 116-17 (1992); WANTED MAN: IN SEARCH OF BOB DYLAN 57-66 (David Bauldie ed. 1990).

5. *See, e.g.*, RILEY, *supra* note 4, at 4-27.

6. Readers of this article are cordially invited to visit me in my New York office. My door now is festooned with the set lists of the last twelve Dylan concerts I've attended (from November 1994, at Roseland in New York City, to November 1999, at the Meadowlands Arena in East Rutherford, NJ).

7. 119 S. Ct. 2176 (1999).

Disabilities Act[8] on persons institutionalized by reason of mental disability[9] has the capacity to be as *legally* revolutionary as Dylan's decision to alter his performance style thirty-four years ago was *culturally* revolutionary (although I am, frankly, not at all certain that this will be so). Second, when Dylan did go electric, one of the first songs came from his famous *Bringing It All Back Home* album, *Maggie's Farm*.[10]

Maggie's Farm, like most of Dylan's important songs from this period, was not without its ambiguities. Critics have variously suggested that it is a metaphor for slavery and/or plantation life, for the ravages of Darwinian capitalism, for the oppression of family life, and for the suffocation of the human spirit.[11] Who knows which one, if any, is right? Bob sure has not told us.[12] We do know that *Maggie's Farm* has had a remarkable shelf life. Bob has sung it some 563 times on his current extended series of tours, most recently on July 30, 1999, at Jones Beach, NY.[13]

I tell you all this–trust me, it really is not as self-indulgent as it may

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8. 42 U.S.C.A. § 12101 (West 1995).

9. *See generally* PERLIN, *supra* note 1; MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL (1998, 1999 & 1999 Cum. Supp.).

10. Probably Dylan's most controversial early electric performance was at the Newport Folk Festival on July 25, 1965. *See* Joe Boyd, *Newport '65*, *in* WANTED MAN, *supra* note 4, at 64 ("[B]y [the musical standards of 1965, *Maggie's*] was the loudest thing that anybody had ever heard."). *See, e.g.*, RILEY, *supra* note 4, at 116-17. *Maggie's* was the first electrified song that he sang that afternoon.

This will be my last burst of self-referentiality. I may have seen Bob sing *Maggie's* at a concert at Rutgers University in April 1965 (my memory is good, but not *that* good). In recent years, I've heard him sing it three times: Roseland in New York City in 1994, the Electric Factory in Philadelphia in 1995, and Irving Place in New York City in December 1997. I expect that there will be future times as well.

11. *See, e.g.*, Andrew Muir, *Detailed Study of Maggies* [sic] *Farm*, (visited Oct. 8, 1999) <http://www.geocities.com/Athens/Forum/2667/maggiesf.html>; RILEY, *supra* note 4, at 105 ("'*Maggie's Farm*' is a list of complaints, from everyday chores and employer hassles to bureaucratic oppression." The song's opening line— "I ain't gonna work on Maggie's Farm no more"—has been used epigrammatically to illustrate academicians' adoption of Critical Legal Studies as "Urban Guerrilla Warfare" in David Fraser, *If I Had a Rocket Launcher: Critical Legal Studies as Moral Terrorism*, 41 HASTINGS L.J. 777, 789 (1990)).

12. On the unexplained ambiguity in Dylan's lyrics, *see* ROBERT SHELTON, NO DIRECTION HOME: THE LIFE AND MUSIC OF BOB DYLAN 306-39 (Da Capo ed. 1997). The song title may have come from Silas Magee's Farm in Greenwood, Mississippi, where Dylan, on July 6, 1963, played his early civil rights anthem, *Only a Pawn in Their Game*, at a civil rights rally. *See also Greenwood Mississippi Rally*, (visited Oct. 11, 1999) <http://www.punkhart.com/dylan/tapes/63-jul6.html>. *See generally* Muir, *supra* note 11.

13. *See* Bill Pagel, *Bob Dylan's 1999 Summer Tour Guide*, (visited Oct. 15, 1999) <http://www.execpc.com/~billp61/073099s.html>.

seem–because, when I read *Olmstead* and spent some time thinking about it, *Maggie's Farm* popped immediately into my mind. In her brilliant, Pulitzer Prize-winning report on life at Creedmoor Psychiatric Hospital in New York City, *Is There No Place on Earth For Me?*,[14] Susan Sheehan wrote carefully and thoughtfully about the regime of a then-recently-retired Creedmoor Superintendent who ran Creedmoor like a plantation, and treated Creedmoor staff like plantation workers (even to the grotesque length of calling African-Americans "darkies").[15] When I first read Sheehan's book,[16] the "plantation" metaphor jumped out at me, and resonated with so many of my experiences as a lawyer representing patients at New Jersey mental hospitals from the mid 1970s to the early 1980s, and with observations that I had made over the years at mental hospitals in other states across the country. The sagas of right-to-treatment cases such as *Wyatt v. Stickney,*[17] or right-to-refuse-treatment cases such as *Rennie v. Klein,*[18] bespoke a plantation mentality, often on the parts of both the keepers and the kept.[19]

So, when I first read *Olmstead*,[20] one of the images that immediately

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14. SUSAN SHEEHAN, IS THERE NO PLACE ON EARTH FOR ME? (Vintage ed. 1983).

15. *See id.* at 13.

16. I have been assigning it to my Mental Health Law students yearly since 1985, so I have probably re-read it more than any other book in my lifetime.

17. 325 F. Supp. 781 (M.D. Ala. 1971) (subsequent citations omitted).

> A few of the atrocious incidents cited in [the supplementing] case include the following: (a) a resident was scalded to death by hydrant water; (b) a resident was restrained in a straitjacket for nine years in order to prevent hand and finger sucking; (c) a resident was inappropriately confined in seclusion for a period of years; and (d) a resident died from the insertion by another resident of a running water hose into his rectum. Each of these incidents could have been avoided had adequate staff and facilities been available[.]

344 F. Supp. 387, 393-94 n.13 (M.D. Ala. 1972); *see* 2 PERLIN, *supra* note 9, § 3A-3.1 at 24-32 (2d ed. 1999).

18. 462 F. Supp. 1131 (D.N.J. 1978) (subsequent citations omitted).

> On November 17, 1977, plaintiff reported that evening shift attendants beat him with sticks while he was tied to a bed. The next day he pointed out the sticks, which were hidden at the nurses' station. The investigation that followed resulted in the suspension of one employee for three days. Plaintiff and the attendant remained together in the same ward.

Id. at 1136. *See generally* 2 PERLIN, *supra* note 9, § 3B-5.1 at 190-91 (2d ed. 1999).

19. *See generally Rennie,* 462 F. Supp. 1131 (D.N.J. 1978); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972); and *Wyatt,* 325 F. Supp. 781 (M.D. Ala. 1971).

20. I should point out that I have never been to Georgia Regional Hospital in Atlanta, the facility in which L.C. and her co-plaintiff, E.W., were housed. To the best of my knowledge, it has never been the subject of litigation over patients' conditions of confinement. *But see* Parham v. J.R., 442 U.S. 584 (1979) (discussing the constitutionality of Georgia's juvenile commitment statutes). My intuition, however, from reading a range of cases about Georgia Regional Hospital in which *other* issues (malpractice, *see, e.g.,* Davis v. State, 439 S.E.2d 40

came to my mind was Dylan singing, snarling:

I ain't gonna work on Maggie's farm no more.
No, I ain't gonna work on Maggie's farm no more.
Well, I wake in the morning,
Fold my hands and pray for rain.
I got a head full of ideas
That are drivin' me insane.
It's a shame the way she makes me scrub the floor.
I ain't gonna work on Maggie's farm no more.[21]

Maggie's Farm spoke to emancipation.[22] The ADA, as I will discuss later, speaks to emancipation; and *Olmstead,* when read (from my perspective, at least) optimistically, speaks to emancipation. It is this question of *potential* emancipation that I wish to address today. For I believe that *Olmstead* is *potentially* the most important civil mental disability law case since the Supreme Court decided *Youngberg v. Romeo*[23] in 1982. *Olmstead potentially* has the capacity to transform and revolutionize mental health law in the same profound ways that Bob Dylan transformed and revolutionized popular culture. If *Olmstead* is taken seriously, it may change the debate on institutional mental health care, on community treatment, on deinstitutionalization, on the segregation of persons with mental disabilities, on the future of the "least restrictive alternative" doctrine, and perhaps most importantly, on how we feel about persons with disabilities.

This paper will proceed in this manner. First, I will briefly discuss the ADA so as to better contextualize the *Olmstead* case.[24] Then, I will consider the sparse pre-*Olmstead* litigation that dealt with questions

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(Ga. Ct. App. 1993), *reconsideration denied* (1993), *cert. denied* (1994); Swofford v. Cooper, 360 S.E.2d 624 (Ga. Ct. App. 1987), *rev'd, cert. granted,* 368 S.E.2d 518 (Ga. 1988), *reconsideration denied* (1988); release of insanity acquittees, *see, e.g.*, Ledbetter v. Cannon, 384 S.E.2d 875 (Ga. Ct. App. 1989), *reh'g denied* (1989); and DuBose v. State, 251 S.E.2d 15 (Ga. Ct. App. 1978), *reh'g denied* (1978); racial discrimination involving employees, *see, e.g.*, Collier v. Dep't. of Human Resources, 397 S.E.2d 632 (Ga. Ct. App. 1990)) have been litigated, is that there is no reason to expect that the conditions there are significantly different than the conditions at many other American state hospitals—often dreary, dull, depressing, and dispiriting. *See generally* Rebecca Perl, *Suit Says Children Illegally Confined: Mental Hospitals Misused?*, ATLANTA CONST., Dec. 4, 1991, at A1 (discussing a class action suit brought against Georgia state hospitals, including Georgia Regional Hospital, alleging that hundreds of non-mentally ill children were being unlawfully detained).

21. Bob Dylan, Lyrics 1962-1985 166 (1985).

22. *See id.*

23. 457 U.S. 307 (1982). *See generally* 2 PERLIN, *supra* note 9, § 3A-9, at 87-90 (2d ed. 1999).

24. *See infra* notes 31-79 and accompanying text.

affecting persons institutionalized because of mental disability.[25] Then, I will address the Eleventh Circuit's decision in *Olmstead*,[26] a case far broader, and, to my mind, more visionary than the Supreme Court's ultimate decision.[27] Next, I will look at *all* the *Olmstead* opinions (for there is much to learn from all of them).[28] Following this, I will briefly discuss the concepts of "sanism" and "pretextuality," two concepts that I am convinced beyond a reasonable doubt explain much about the incoherence of so much of mental disability law.[29] Finally, I will explain what I see as the overarching significance of *Olmstead*, and how it may truly give institutionalized persons across the nation the capacity to say, maybe even optimistically to sing, "I ain't gonna work on Maggie's Farm no more."[30]

II. THE AMERICANS WITH DISABILITIES ACT[31]

The Americans With Disabilities Act[32] has been hailed by advocates for persons with disabilities as "a breathtaking promise,"[33] "the most important civil rights act passed since 1964[,]"[34] and as the "Emancipation Proclamation for those with disabilities."[35] It is, without question, Congress's "most innovative attempt to address the pervasive problems of discrimination against physically and mentally handicapped citizens"[36] by providing, in the words of a Congressional committee, "a

25. *See infra* notes 80-101 and accompanying text.

26. L.C. v. Olmstead, 138 F.3d 893 (11th Cir. 1998), *aff'd and remanded*, 119 S. Ct. 2176 (1999).

27. *See infra* notes 157-214 and accompanying text.

28. *See infra* notes 122-56 and accompanying text.

29. *See infra* notes 215-57 and accompanying text; *see also* PERLIN, *supra* note 1.

30. *See infra* notes 258-64 and accompanying text.

31. This section of the article and the accompanying footnotes were developed from Michael L. Perlin, *The ADA and Persons With Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J.L. & HEALTH 15, 15-27 (1993-94); and Michael L. Perlin, *"Make Promises by the Hour:" Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947, 947-955 (1997) [hereinafter *Promises*].

32. 42 U.S.C.A. § 12101 (West 1995).

33. Bonnie Milstein et al., *The Americans With Disabilities Act: A Breathtaking Promise for People With Mental Disabilities*, 24 CLEARINGHOUSE REV. 1240 (1991).

34. Kent Jenkins Jr., *Spotlight Finds Hoyer*, WASHINGTON POST, May 28, 1990, at D1.

35. Kimberly Ackourney, Comment, *Insuring Americans With Disabilities: How Far Can Congress Go to Protect Traditional Practices?*, 40 EMORY L.J. 1183, 1183 (1991); *see also* Sandra Law, *The Americans With Disabilities Act of 1990: Burden on Business or Dignity for the Disabled?*, 30 DUQ. L. REV. 99, 114 (1991) (stating that the ADA is a "solid and positive step toward making this country a better nation").

36. PERLIN, *supra* note 9, § 6.44A, at 16 (1999 Cum. Supp.).

clear and comprehensive national mandate to end discrimination against persons with disabilities."[37] The ADA provides basically the same bundle of protections for persons with disabilities as the Civil Rights Acts of the 1960s[38] did for citizens of color with clear, strong, and enforceable standards.[39]

The language that Congress chose to use in its introductory fact finding is of extraordinary importance.[40] Its specific finding that individuals with disabilities are a "discrete and insular minority . . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness"[41] is not just precatory flag-and-apple-pie rhetoric.[42] This language, granted "the force of law,"[43] was carefully chosen; and it comes from the heralded footnote four of the *United States v. Carolene Products* case[44] that has served as the springboard for nearly a half century of challenges to state and municipal laws that have operated in discriminatory ways against other minorities,[45] and reflects a Congressional commitment to provide

37. H.R. REP. NO. 101-485, pt. 3, at 23 (1990).

38. *See generally* 42 U.S.C.A. §§ 1971, 1973 (West Supp. 1999).

39. Compare BONNIE P. TUCKER, *The Americans With Disabilities Act of 1990: An Overview*, 22 N.M.L.Rev. 13 (1992) (discussing enforcement provisions), with Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 Duke L.J. 1 (1996) (reading the ADA to provide more protections than do other civil rights acts).

40. *See* 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 the "shocking and eye-opening" nature of these findings).

41. 42 U.S.C.A. § 1210(a)(7) (West Supp. 1999).

42. *See* 2 PERLIN, *supra* note 9, § 7.13, at 617-23 (giving a full commentary on above issues); *see also* Perlin, *Promises*, *supra* note 31, at 955 (discussing the question of whether key sections of the ADA will be seen as little more than hortatory language). Compare Pennhurst State Sch. & Hosp.v. Halderman, 451 U.S. 1, 11 (1981) (stating that 42 U.S.C.A. § 6010 "simply does not create substantive rights" in developmentally disabled individuals with a legally enforceable cause of action), with David Ferleger & Patrice Maguire Scott, *Rights and Dignity: Congress, the Supreme Court, and People With Disabilities After Pennhurst*, 5 W. NEW ENG. L. REV. 327, 350 (criticizing the conclusion as "absurd" and "objectionable" in an article co-authored by plaintiffs' lead counsel in the Pennhurst case).

43. James B. Miller, *The Disabled, the ADA, and Strict Scrutiny*, 6 ST. THOMAS L. REV. 393, 413 (1994).

44. 304 U.S. 144, 152 n.4 (1938).

45. *See id*; *see also* Michael L. Perlin, *On "Sanism,"* 46 SMU L. REV. 373, 380-81 n.51 (1992) (discussing the impact of this footnote on the development of mental disability law); and 1 PERLIN, *supra* note 9, § 1-2.1, at 7 (2d ed. 1998). *See, e.g.*, Susan Lee, *Heller v. Doe: Involuntary Civil Commitment and the "Objective" Language of Probability*, 20 AM. J.L. & MED. 457, 477 n.90 (1994) (reflecting Congressional intent to identify disabled persons as a group "deserving heightened scrutiny"); Leonard S. Rubenstein, *Ending Discrimination*

protected class categorization for persons with disabilities.[46] This in turn forces courts to employ a "compelling state interest" or "strict scrutiny" test in considering statutory and regulatory challenges to allegedly discriminatory treatment.[47] The law's invocation of the full "sweep of congressional authority, including the power to enforce the Fourteenth Amendment"[48] 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,[49] guaranteeing, for the first time, that this core constitutional protection will finally be made available to persons

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Against Mental Health Treatment in Publicly Financed Health Care, 40 ST. LOUIS U. L.J. 315, 339 (1996) (demonstrating the ADA's invocation of the *Carolene Products* footnote justifies employing "heightened judicial scrutiny" test); and Lisa Montanaro, Comment, *The Americans With Disabilities Act: Will the Court Get the Hint? Congress' Attempt to Raise the Status of Persons With Disabilities in Equal Protection Cases*, 15 PACE L. REV. 621, 663 (1995) (stating that by adopting the ADA, Congress attempted to utilize *the Carolene Products* theory to imply that a "heightened level of scrutiny" should be used in ADA cases).

46. *See* Phyllis Coleman & Ronald A. Shellow, *Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply With the ADA and the Constitution*, 20 J. LEGIS. 147, 151 n.23 (1994) (stating that "the ADA treats disabled persons as a suspect class."); Lowndes, *supra* note 40, at 446 (stating that "Congress clearly intended to create a new protected class—the disabled."); Miller, *supra* note 43, at 412 (stating that Congress applied "suspect class" test in ADA statutory language); and Montanaro, *supra* note 45, at 664 (stating that "Congress' intent was to transform the disabled into a suspect class for purposes of constitutional and statutory interpretation").

In a trilogy of employment cases, the Supreme Court recently narrowed the category of persons who are to be treated as "disabled" under the ADA. *See also* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999); Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133 (1999); Albertsons, Inc v. Kirkingburg, 119 S. Ct. 2162 (1999) (sometimes called "the *Sutton* trilogy"). Nothing in these decisions, however, goes to the question of how the Court would construe discrimination cases involving individuals found to be "disabled" within the ADA's meaning.

47. On the relationship between this language and the heightened scrutiny requirement, *see* Crowder v. Kitagawa, 842 F. Supp. 1257, 1264 (D. Haw. 1994) (assuming application of strict scrutiny level in ADA cases); 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).

In City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985), the Supreme Court had ruled that mental retardation was neither a suspect class nor a quasi-suspect class for purposes of equal protection analysis. In supporting its conclusion, it noted that a contrary decision would have made it difficult to distinguish other groups such as persons with mental illness "who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large." *Id.* at 445.

48. 42 U.S.C.A. § 12101(b)(4) (West Supp. 1999).

49. U.S. Const. amend. XIV, § 1.

with disabilities.[50]

Individuals in in-patient psychiatric hospitals comprise a population that is classically voiceless and friendless, with few contacts in the "free world." It is a population whose disenfranchisement starkly mirrors the sort of powerlessness and marginalization spoken to by the Supreme Court in the *Carolene Products* case and, of course, spoken to by Congress in the ADA's initial findings section.[51]

By its terms, the entire ADA applies to persons with mental disabilities, including persons with mental illness.[52] Yet, very little of the final statute, the legislative history, or floor debate focused on the "grotesque" history of discrimination and mistreatment suffered by such individuals;[53] the crushing economic, social, and psychological burdens borne by such persons in their day-to-day lives; the conditions faced by such persons when institutionalized in public facilities, or when discharged from such facilities to lives of misery on our cities' streets without adequate transitional mental health, medical, or social services; or the pernicious legal effects that flow from the badge of mental disability.[54]

The legislative history is remarkably skimpy and speaks to only two relevant considerations. First, it reflects Congressional awareness of the danger of stereotyping behavior.[55] It makes this clear through its heavy reliance on the Supreme Court's language in *School Board of Nassau County v. Airline*[56] that "society's accumulated myths and fears about

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50. *See, e.g.*, Timothy M. Cook, *The Americans With Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 434 (1991) (finding "unambiguously that Congress considered disability classifications to be just as serious and just as impermissible as racial categorizations that are given 'strict' or 'heightened' scrutiny, sustainable by the courts only if they are tailored to serve a 'compelling' governmental interest.").

Cook's article is cited approvingly in, *inter alia*, Muller v. Costello, 187 F.3d 298, 308 (2d Cir. 1999); Kathleen S. v. Department of Pub. Welfare, 10 F. Supp. 2d 460 (E.D. Pa. 1998), *stay denied*, 10 F. Supp. 2d 476 (E.D. Pa. 1998); Valentine v. American Home Shield Corp., 939 F. Supp, 1276, 1388 (N.D. Iowa 1996); Muller v. Hotsy Corp., 917 F. Supp. 1389, 1402 (N.D. Iowa 1996); Heather K. by Anita K. v. City of Mallard, Iowa, 887 F. Supp. 1249, 1263 (N.D. Iowa 1995); Hutchinson v. United Parcel Serv., Inc., 883 F. Supp. 379, 387 (N.D. Iowa 1995); and Fink v. Kitzman, 881 F. Supp. 1347, 1368 (N.D. Iowa 1995).

51. *See* Rubenstein, *supra* note 45, at 338-39, 350.

52. *See generally* 42 U.S.C.A. § 12101 (West 1995).

53. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 454 (1985) (Stevens, J., joined by Burger, C.J., concurring) (Marshall, J., joined by Brennan and Blackmun, JJ., concurring in part and dissenting in part); *see generally* Cook, *supra* note 50, at 399-407.

54. *See* Michael L. Perlin, *"Where the Winds Hit Heavy on the Borderline:" Mental Disability Law Theory and Practice, "Us" and "Them,"* 31 LOY. L.A. L. REV. 775, 779 (1998).

55. *See* Perlin, *Promises*, *supra* note 31, at 968.

56. 480 U.S. 273 (1987) (describing an individual with tuberculosis as a "handicapped

disability and disease are as handicapping as are the physical limitations that flow from the actual impairment."[57] Congress stressed that its inclusion in the definition of a disability of an individual who is *regarded* as being impaired[58] acknowledges this teaching about the power of myths.[59]

Thus, employment decisions cannot be based on "paternalistic views" of what is best for a person with a disability.[60] The employment title of the ADA was thus designed, in significant part, to prevent employers from relying "on presumptions, stereotypes, misconceptions, and unfounded fears" in making employment decisions,[61] and as a means of breaking the chain of misperception that individuals with disabilities are a "permanently helpless and separate class, unable to work or otherwise contribute to society."[62]

Second, the history of the "direct threat" section, again relying on the *Airline* case, specifies that, for persons with mental disabilities, the employer must identify "the specific behavior on the part of the individual that would pose the anticipated direct threat," and that the determination must be based on such behavior, "not merely on generalizations about the disability."[63] In such a case, there must be

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individual" under the amended § 504 of the Rehabilitation Act of 1973).

57. *Id.* at 284.

58. *See* 42 U.S.C.A. § 12102(2)(C) (West 1995).

59. *See generally* H.R. REP. NO. 101-485, pt. 2 (1990).

60. *See generally id.*

61. *Id.* at 30. Discrimination against disabled persons "often results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears[,] and pernicious mythologies." *Id.* at 57.

62. Elizabeth Morin, Note, *Americans With Disabilities Act of 1990: Social Integration Through Employment*, 40 CATH. U. L. REV. 189, 189 (1990). On employers' myths in this context, *see* Peter David Blanck, *The Emerging Work Force: Empirical Study of the Americans With Disabilities Act*, 16 J. CORP. L. 693 (1991); and Peter David Blanck, *Empirical Study of the Employment Provisions of the Americans With Disabilities Act: Methods, Preliminary Findings, and Implications*, 22 N.M. L. REV. 119, 129 (1992). On the significance of "misinformed stereotypes," *see generally* W. Robert Gray, *The Essential-Function Limitation of the Civil Rights of People With Disabilities and John Rawls's Concept of Social Justice*, 22 N. M. L. REV. 295, 317 (1992).

63. H.R. REP. NO. 101-485, pt. 2, at 57 (stating that "[t]he determination that an individual with a disability will pose a safety threat to others must be made on a case-by-case basis and must not be based on . . . generalizations, misperceptions, . . . ignorance, irrational fears, [or] pernicious mythologies"); *see also* Renée Cyr, Note, *The Americans With Disabilities Act: Implications for Job Reassignment and the Treatment of Hypersusceptible Employees*, 57 BKLYN. L. REV. 1237, 1273 (1992) (stating that "[g]eneralized fear about risks from the employment environment cannot be used by an employer to disqualify a person with a disability").

"objective evidence . . . that the person has a recent history of committing overt acts or making threats which caused . . . or which directly threatened harm."[64]

While these two excerpts are praiseworthy and important, that is all there is. Nowhere else in any of the lengthy Congressional reports are the specific biases (one of which is sanism) and prejudices faced by persons with mental illness discussed. Although there is recognition that much of the discrimination faced by disabled persons flows from "unfounded, outmoded stereotypes and perceptions and deeply imbedded prejudices,"[65] the legislative history in no way illuminates the specific prejudices and biases faced by mentally disabled persons, especially those who were formerly institutionalized.[66]

Earlier, I alluded to the impact of "sanism" and "pretextuality" on developments in this area. What do I mean by these terms?[67] Simply put, "sanism" is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry.[68] It infects both our jurisprudence and our lawyering practices.[69] "Sanism"[70] is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition, and deindividualization; and it is sustained and perpetuated by our use of alleged "ordinary common sense" and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.[71]

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64. H.R. REP. NO. 101-485, pt. 3, at 45-46.

65. *Id.* at 48.

66. On the way that these negative stereotypes affect our homelessness policies, *see generally* Pedro Greer, *Medical Problems of the Homeless: Consequences of Lack of Social Policy – A Local Approach*, 45 U. MIAMI L. REV. 407 (1990-91); Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63 (1991).

67. *See generally* Michael L. Perlin, *"Half-Wracked Prejudice Leaped Forth:" Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did*, 10 J. CONTEMP. LEGAL ISSUES 3 (1999) (discussing sanism and pretextuality); PERLIN, *supra* note 1.

68. *See generally* GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1955) (discussing the classic treatment); ELISABETH YOUNG-BRUEHL, THE ANATOMY OF PREJUDICE (1996) (discussing an important new and different perspective); PERLIN, *supra* note 1, ch. 2 (discussing roots of sanism and the relationship between sanism and other "ismic" behavior, such as racism or sexism or homophobia); Perlin, *supra* note 45.

69. *See* Koe v. Califano, 573 F.2d 761, 764 (2d Cir. 1978). The phrase "sanism" was, to the best of my knowledge, coined by Dr. Morton Brinbaum.

70. *See* Perlin, *supra* note 67, at 92-93 (discussing Dr. Morton Birnbaum's insights).

71. *See generally* MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE

"Pretextuality" means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest, frequently meretricious, decision making, specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends."[72] This pretextuality is poisonous: it infects all participants in the judicial system; breeds cynicism and disrespect for the law; demeans participants; and reinforces shoddy lawyering, blase judging, and, at times, perjurious and/or corrupt testifying.

In a paper I published in 1997,[73] I questioned whether:

> If and when cases are brought seeking to apply the ADA to individuals institutionalized in psychiatric hospitals, will federal courts interpret the ADA as it was written (in the light of Congress's clear statutory intent) or will the key language to which I have already alluded be seen as little more than hortatory shibboleths? Will courts say, "No, Congress really didn't mean what it said."? Would they say, "Well, Congress may have meant it, but only in an aspirational way, and there's really nothing for us here."?[74] Or will they say, "Yes, Congress said it, Congress *meant* it, and, dammit, we're gonna enforce it!"?[75]

Olmstead begins to answer these questions.

Persons with mental disabilities have faced the brunt of discrimination for years. Surveys show that mental disabilities are the most negatively perceived of all disabilities.[76] Individuals with mental disabilities have been denied jobs, refused access to apartments in public housing or entry to places in public accommodation, and turned down for

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(1994) (discussing sanism and its origins and causes).

72. Charles Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839, 840 (1974). *See also* Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131, 133 (1991).

73. *See* Perlin, *Promises*, *supra* note 31.

74. *Compare* Niece v. Fitzner, 941 F. Supp. 1497 (E.D. Mich. 1996) (refusing to follow Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995) (declining to apply the ADA to state prison cases), *with* Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952 (1998) (finding unanimously that the ADA does apply to state prison cases). This is further discussed in Michael L. Perlin, *Hidden Agendas and Ripple Effects: Implications of Three Recent Supreme court Decisions for Forensic Psychiatrists*, 2. J. FORENSIC PSYCHOLOGY PRACTICE -- (2000) (in press).

75. Perlin, *Promises*, *supra* note 31 at 955.

76. *See* Jane West, *The Social Policy Context of the Act*, *in* THE AMERICANS WITH DISABILITIES ACT: FROM POLICY TO PRACTICE 3, 9 (Jane West ed. 1991); *see also infra* text accompanying notes 223-25 (discussing comments of Senator Helms in floor debate on the ADA).

participation in publicly-funded programs because they appear "strange" or "different."[77] A series of behavioral myths has emerged suggesting that persons with mental disabilities are deviant, worth less than "normal" individuals, disproportionately dangerous, and presumptively incompetent.[78] Yet, putting aside the two exceptions that I have discussed, nothing in the ADA speaks directly to *these* myths or to the special problems faced by persons with mental disabilities in attempting to combat them.[79]

A. Early Case Law[80]

The ADA title most important to institutionalized psychiatric patients is Title II.[81] Under Title II, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[82] The legislative history stresses that discrimination continued in "such critical areas as institutionalization."[83] Although this title has not been the subject of much consideration in institutional cases, courts have held that allegations of restraint, isolation, and segregation could constitute

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77. *See* Tucker, *supra* note 39, at 16-17 (describing particularly cruel examples); *see also* Cook, *supra* note 50, at 399-41, 424.

78. *See, e.g.*, Perlin, *supra* note 45, at 393-97 (citing, *inter alia*, SANDER GILMAN, DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE AND MADNESS (1985)); Thomas Grisso & Paul Appelbaum, *Mentally Ill and Non-Mentally Ill Patients' Abilities to Understand Informed Consent Disclosures for Medication*, 15 LAW & HUM. BEHAV. 377, 385-86 (1991); Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 693-96 (1989-90); Steven Schwartz, *Damage Actions as a Strategy for Enhancing the Quality of Care of Persons With Mental Disabilities*, 17 N.Y.U. REV. L. & SOC. CHANGE 651, 681 (1989-90); Linda Teplin, *The Criminality of the Mentally Ill: A Dangerous Misconception*, 142 AM. J. PSYCHIATRY 593, 597-98 (1985).

79. *See generally* Wayne Ramage, *The Pariah Patient: The Lack of Funding for Mental Health Care*, 45 VAND. L. REV. 951 (1992) (discussing the way that public perceptions of mental illness and the accompanying stigma perpetuate inadequate treatment of the mentally ill).

80. This section of the article and the accompanying footnotes were developed from Michael L. Perlin, *"Make Promises by the Hour:" Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947, 960-62 (1997).

81. *See* 42 U.S.C.A. § § 12131-165 (West 1995); *see also* Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999), *cert. granted, in part*, Alsbrook v. Arkansas, 120 S. Ct. 1003 (2000), *cert. dismissed*, 120 S. Ct. 1265 (2000).

82. 42 U.S.C.A. § 12132 (West 1995).

83. L.C. v. Olmstead, 138 F.3d 893, 901 (11th Cir. 1998). *See generally* H.R. REP. No. 101-485, pt. 2 (1989).

discriminatory treatment under the ADA,[84] and that the Act requires that a psychiatric patient "be placed in the most integrated setting . . . which meets the needs of [his] disability but which gives [him] the most freedom."[85]

Most of the ADA/mental disability case law has focused on questions of professional licensing and examinations and on the range of accommodations necessary in employment situations.[86] Several courts have enjoined bar committees from inquiries into applicants' history of having been treated for mental disorders, but others have declined to do so.[87] Yet, other courts have considered the application of the ADA to conditions under which professional licensing exams are to be taken.[88] On whether accommodations are reasonable in the employment context, courts are split, and it appears that most decisions have been fact-based, turning on the individual judge's perception as to whether the plaintiff could perform the job tasks satisfactorily, even with the statutorily-mandated "reasonable accommodation."[89]

There is a smattering of other mental disability cases that focus on issues somewhat closer to the ones that are at the heart of this section.

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84. *See* Roe v. Community Comm'n, 926 F. Supp. 74 (N.D. W. Va. 1996).

85. Charles Q. v. Houstoun, Civ. A., No. 1, CV-95-280 (M.D. Pa. Apr. 22, 1996), *reported in Rights in Facilities*, 20 MENT. & PHYS. DIS. L. REP. 490, 490 (1996) *see also* Halderman v. Pennhurst State Sch. & Hosp., 784 F. Supp. 215, 224 (E.D. Pa. 1992), *aff'd*, 977 F.2d 568 (3d Cir. 1992) (stating that "in enacting the Americans With Disabilities Act of 1990, Congress affirmed that § 504 prohibits unnecessary segregation").

86. *See* PERLIN, *supra* note 9, § 6.44AA at, 70 n.473.43d1 (Cum. Supp. 1999).

87. *See* Clark v. Virginia Bd. of Bar Exam'rs., 880 F. Supp. 430 (E.D. Va. 1995), and Ellen S. v. Florida Bd. of Bar Exam'rs., 859 F. Supp. 1489 (S.D. Fla. 1994) (enjoining inquiries); McCready v. Illinois Bd. of Admissions, 1995 WL 29609 (N.D. Ill. 1995), and Campbell v. Greisberger, 865 F. Supp. 115 (W.D.N.Y. 1994) (allowing inquiries). *See also supra* note 46 (discussing the *Sutton* trilogy, and noting that immediately after the Court handed down its decision, the Supreme Court vacated the Second Circuit's decision in another bar case, Bartlett v. New York State Bd. of Bar Exam'rs., 156 F.3d 321 (2d Cir. 1998), *vacated*, 119 S. Ct. 2388 (1999)).

88. *See, e.g.*, Argen v. New York State Bd. of Bar Exam'rs., 860 F. Supp. 84 (W.D.N.Y. 1994); *In re* Rubenstein, 637 A.2d 1131 (Del. 1994); and *In re* Underwood, 1993 WL 649283 (Me. 1993).

89. *See* Susie v. Apple Tree Preschool & Child Care Ctr., Inc., 866 F. Supp. 390 (N.D. Iowa 1994); Kerno v. Sandoz Pharm. Corp., 1994 WL 511289 (N.D. Ill. 1994); Voytek v. University of Cal., 1994 WL 478805 (N.D. Cal. 1994). *See generally* Susan Stefan, *"You'd Have to Be Crazy to Work Here:" Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 LOY. L.A. L. REV. 795, 805 (1998) (arguing that "judicial assumptions about the nature of psychiatric disabilities and essential employment functions have resulted in the near-total failure of the ADA to protect individuals with psychiatric disabilities from employment discrimination"); SUSAN STEFAN, PSYCHIATRIC DISABILITY AND DISCRIMINATION LAW (2000) (in press).

For instance, a federal district court in Florida found an ADA violation when a town's budget cuts eliminated community recreational programs that were solely for persons with disabilities,[90] as did a federal district court in Massachusetts considering a state law that required state hospital residents to contribute to the costs of assigned counsel.[91] On the other hand, a District of Columbia district court ruled that mentally disabled residents of a homeless shelter failed to state a claim in their allegations that restrictions on their freedom of expression were in violation of the same Act.[92]

The most important of these cases is *Helen L. v. DiDario*,[93] finding that a state welfare department regulation that forced certain patients to receive required care services in the segregated setting of a nursing home, rather than in their own homes, violated the ADA.[94] *Helen L.* is significant for several reasons. First, the Third Circuit read the Act's antidiscrimination language broadly and loudly.[95] It cited Congressional findings that "[h]istorically, society has tended to isolate and segregate individuals with disabilities . . . such forms of discrimination . . . continue to be a serious and pervasive social problem."[96] Furthermore, "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[97] Next, it read the ADA as being intended to insure that "qualified individuals receive services in a manner consistent with basic human dignity rather than a manner which shunts them aside, hides, and ignores them[,]" and declared that it would "not eviscerate the ADA by conditioning its protections upon a finding of intentional or overt 'discrimination[,]'"[98] focusing specifically on Congress's finding that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization."[99] Finally, it rejected the state's argument that it could not change the plaintiff's regimen of care because the two

90. *See* Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach, 846 F. Supp. 986 (S.D. Fla. 1994), *supplemented*, 853 F. Supp. 424 (S.D. Fla. 1994).

91. *See* T.P. v. DuBois, 843 F. Supp. 775 (D. Mass. 1993).

92. *See* Melton v. Community for Creative Non-Violence, 1993 WL 367113 (D.C. Cir. 1993).

93. 46 F.3d 325 (3d Cir. 1995), *cert. denied*, 516 U.S. 813 (1995).

94. *See id.* at 327.

95. *See id.* at 335.

96. *Id.* at 332 (quoting 42 U.S.C.A. § 12101(a)(2) (West 1995)).

97. *Id.* (quoting 42 U.S.C.A. § 12101(a)(8) (West 1995)).

98. *Id.* at 335.

99. *Id.* at 336 (quoting 42 U.S.C.A. § 12101(3) (West 1995)).

programs in question were funded on separate budgetary lines.[100] In language that has potential impact on all cases assessing the potentially discriminatory basis of the provision of public hospital service benefits, the court was clear:

> [T]he ADA applies to the General Assembly of Pennsylvania, and not just to DPW [Department of Public Welfare]. DPW can not rely upon a funding mechanism of the General Assembly to justify administering its attendant care program in a manner that discriminates and then argue that it can not comply with the ADA without fundamentally altering its program.
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> . . . .
>
> Because the Commonwealth, including all its branches, is bound by the decree, the argument of inability to comply rings hollow. Even if the executive branch defendants were physically or legally incapable of complying with the decree, those Commonwealth officials sitting in the General Assembly certainly are not incapable of insuring the Commonwealth's compliance [citation omitted]. The same applies here: since the Commonwealth has chosen to provide services to [plaintiff] under the ADA, it must do so in a manner which comports with the requirements of that statute.[101]

B. The Literature[102]

By far, the most important analytic piece discussing the ADA and its potential impact here has been Timothy Cook's "*The Americans with Disabilities Act: The Move to Integration*" article in *Temple Law Review*.[103] Cook explicitly argued that the ADA meant an end to what he termed the segregation of institutions for persons with mental disabilities.[104] He read Congressional intent through the legislative history to abolish, in Senator Weicker's words, "monoliths of isolated care in institutions and in segregated educational settings . . . . Separate is not equal. It was not for blacks; it is not for the disabled."[105] The House Judiciary Report here was equally explicit: "[i]ntegration is fundamental to the purposes of the ADA. Provision[s] of segregated accommodations and services relegate persons with disabilities to

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100. *See id.* at 338.

101. *Id.* at 338-39 (citations omitted).

102. This section of the article and the accompanying footnotes were developed from Michael L. Perlin, *"Make Promises by the Hour:" Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947, 962-64 (1997).

103. *See* Cook, *supra* note 50.

104. *See id.* at 429.

105. *Id.* at 423.

second-class citizen status."[106] Cook read the act to bar intentional *and* unintentional discrimination,[107] and quoted researchers who concluded that "institutions and other segregated settings are simply unacceptable."[108] He concluded that the Act's invocation of the Fourteenth Amendment effectively overruled the "substantial professional judgment" standard of *Youngberg v. Romeo.*[109]

Can these same arguments be made about cases involving persons institutionalized because of mental illness? Are there clear differences? Do police power considerations inherent in the involuntary civil commitment process make a difference? Does the invocation of the Fourteenth Amendment and the use of "discrete and insular minority" language truly alter the *Youngberg* standard?[110]

I wrote more than five years ago that "[t]hese are difficult questions for which there are no ready or apparent easy answers,"[111] and little has changed my mind since then. Cook's article has been cited in a number of federal court decisions in cases, mostly decided by the same judge,[112] involving a range of ADA topics, from a case brought by a child with a severe respiratory condition who sought to ban exceptions to a city's ban on open burning[113] to employment discrimination cases brought by persons suffering from asthma,[114] shoulder injury,[115] carpal tunnel

106. *Id.* at 424.

107. *See id.* at 427.

108. *Id.* at 413.

109. *Id.* at 466 (discussing Youngberg v. Romeo 457 U.S. 307 (1982)); *see* Olmstead v. L.C., 119 S. Ct. 2176, 2181 (1999) (noting that the Court specifically underscored that there was no constitutional issue presented to the Court in this case). On the professional judgment standard, see generally Susan Stefan, *Leaving Civil Rights to the Experts: From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639 (1992); 2 PERLIN, *supra* note 9, § 3A-9.4 at 95-98 (2d ed. 1999).

110. *See* Sutton v. United Air Lines, 119 S. Ct. 2139, 2152 (1999) (Ginsburg, J., concurring) (stating that "Congress's use of the [discrete and insular minority] phrase . . . is a telling indication of its intent to restrict the ADA's coverage to a confined, and historically disadvantaged, class").

111. Perlin, *ADA*, *supra* note 31, at 38.

112. In addition to the cases cited *infra* notes 113-118, *see also* Helen L. v. DiDario, 46 F.3d 325, 331 (3d Cir. 1995); Easley by Easley v. Snider, 841 F. Supp. 668, 677 (E.D. Pa. 1993), *rev'd*, 36 F.3d 297 (3d Cir. 1994).

113. *See* Heather K. v. City of Mallard, Iowa, 887 F. Supp. 1249, 1251 (N.D. Iowa 1995).

114. *See* Muller v. Costello, 187 F.3d 298, 302 (2d Cir. N.Y. 1999); Valentine v. American Home Shield Corp., 939 F. Supp. 1376, 1379 (N.D. Iowa 1996).

115. *See* Hutchinson v. United Parcel Service, Inc., 883 F. Supp. 379, 385 (N.D. Iowa 1995).

syndrome,[116] spinal injury, [117] and a challenge to fees for disability parking placards.[118] Besides *Helen L.*, one case involving the sort of "big issue" that Cook's methodology might eventually reach, *Kathleen S. v. Dept. of Public Welfare*,[119] held that a state's decision to close a state hospital violated the ADA by depriving residents of their right to receive services in the most integrated setting appropriate to their needs.[120] Nonetheless, Cook's article provides litigators with a blueprint for frontal attacks on *Youngberg*-based caselaw[121] that limits patients' civil and treatment rights. The unanswered question here, of course, is whether institutional plaintiffs' litigators will take the challenge.

C. Olmstead v. L.C.[122]

In retrospect, all of these developments, with the exception of *Helen L.* and possibly *Kathleen S.*, may appear to be little more than the prelude to *Olmstead.* In *Olmstead,* the Court qualifiedly affirmed a decision by the Eleventh Circuit that had provided the first coherent answer to the question of the right of institutionalized persons with mental disabilities to community services under the ADA.[123] There, the court of appeals had found that the ADA entitled plaintiffs, residents of Georgia State Hospital, to treatment in an "integrated setting" as opposed to an "unnecessarily segregated" state hospital.[124]

Plaintiffs L.C. and E.W. challenged their placement at Georgia State Hospital, arguing that Title II of the ADA entitled them to "the most integrated setting appropriate to [their] needs."[125] The district court granted summary judgment to plaintiffs, finding that the state's failure to place them in an "appropriate community-based treatment program"

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116. *See* Fink v. Kitzman, 881 F. Supp. 1347, 1356 (N.D. Iowa 1995).

117. *See* Muller v. Hotsy Corp., 917 F. Supp. 1389, 1399 (N.D. Iowa 1996).

118. *See* Dare v. California, 191 F.3d 1167, 1169 (9th Cir. 1999).

119. 10 F. Supp. 2d 460 (E.D. Pa. 1998).

120. *See id.* at 471, *stay denied,* 10 F. Supp.2d 476 (E.D. Pa. 1998).

121. *See* 2 PERLIN, *supra* note 9, § 3A-12.1, at 120-21 n.965 (2d ed. 1999) (citing cases). Another major potential persuasive scholarly force is Rubenstein, *supra* note 45, at 319 (urging litigators to focus on the ADA as a source of rights in combating discrimination in health benefits for persons with psychiatric disabilities).

122. 119 S. Ct. 2176 (1999).

123. *See* L.C. v. Olmstead, 138 F.3d 893 (11th Cir. 1998), *aff'd and remanded,* 119 S. Ct. 2176 (1999).

124. *L.C.*, 138 F.3d at 897.

125. *Id.* at 895. Although both plaintiffs were transferred to community settings prior to the court's decision, the court declined to find the case moot as such cases were "capable of repetition, yet evading review." *Id.* at n.2.

violated the ADA,[126] and the state appealed.[127] On appeal, the Eleventh Circuit affirmed the judgment that the state had discriminated against the plaintiffs, but also remanded "for further findings related to the State's defense that the relief sought by plaintiffs would 'fundamentally alter the nature of the service, program, or activity.'"[128]

The court began its opinion by reviewing the pertinent statutory sections[129] and the relevant regulations promulgated by the Attorney General pursuant to statutory authority.[130] Under these regulations, "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities,"[131] and placement is required "in a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible."[132] The court found that "[p]lacement in the community provides an integrated treatment setting, allowing disabled individuals to interact with non-disabled persons–an opportunity permitted only in limited circumstances within the walls of segregated state institutions such as [the state hospital]."[133] It thus concluded that the "express terms" of the regulation, "supported by the Attorney General's consistent interpretation, plainly prohibit a state from treating individuals with disabilities in a segregated environment where a more integrated setting would be appropriate . . . ."[134]

It then looked at the Congressional findings and legislative history that "make clear" Congress's aim "to eliminate the segregation of individuals with disabilities:"[135]

> In enacting the ADA, Congress determined that discrimination against individuals with disabilities persists in a wide variety of areas of social life, including "institutionalization," 42 U.S.C. § 12101(a)(3)(1995), and that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion . . . [and] segregation . . . .",42 U.S.C. § 12101(a)(5); *see also* 42 U.S.C. § 12101 (a)(2) ("[H]istorically, society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination against

126. *Id.* at 895.
127. *See id.*
128. *Id.* (quoting 28 C.F.R. § 35.130(b)(7) (1999)).
129. *See id.* at 896 (citing 42 U.S.C.A. §§ 12132, 12134 (West 1995)).
130. *See id.* at 896-98.
131. *Id.* at 897 (quoting 28 C.F.R. § 35.130(d) (1999)).
132. *Id.* (summarizing 28 C.F.R. § 35.130(d) (1999)).
133. *Id.*
134. *Id.*
135. *Id.* at 898.

individuals with disabilities continue to be a serious and pervasive social problem.").

Indeed, the legislative history makes clear that Congress considered the provision of segregated services to individuals with disabilities a form of discrimination prohibited by the ADA. *See* S.Rep. No. 101-116 at 20 (1989) (noting "compelling need to provide a clear and comprehensive national mandate . . . for the integration of persons with disabilities into the economic and social mainstream of American life"); H.R.Rep. No. 101-485, pt. 2 at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 310 (listing "segregation" as a form of "[d]iscrimination against people with disabilities")[.][136]

On this point the court concluded, "[c]ertainly, the denial of community placements to individuals with disabilities such as L.C. and E.W. is precisely the kind of segregation that Congress sought to eliminate."[137]

The court continued with its focus on the "basic goal" of the ADA:

> The ADA does not only mandate that individuals with disabilities be treated the same as persons without such disabilities. Underlying the ADA's prohibitions is the notion that individuals with disabilities must be accorded reasonable accommodations *not* offered to other persons in order to ensure that individuals with disabilities enjoy "equality of opportunity, full participation, independent living, and economic self-sufficiency . . . ."[138]
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> It described the "reasonable accommodation duty" as requiring the state to "place individuals with disabilities in the most integrated setting appropriate to their needs[,]"[139] and relied on language from both the Third Circuit's decision in *Helen L. v. DiDario*[140] and Justice Marshall's separate opinion in *City of Cleburne v. Cleburne Living Center*[141] stating that "[t]he ADA is intended to ensure that qualified individuals receive services in a manner consistent with basic human dignity rather than a manner that shunts them aside, hides, and ignores them."[142]
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> The court found that malevolent intent is not required. The state's "indifference to L.C. and E.W.'s needs, manifested by their refusal to

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136. *Id.*

137. *Id.*

138. *Id.* at 899 (quoting 42 U.S.C.A. § 12101(a)(8) (West 1995), and citing Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997) (finding that the goal of the ADA is to ensure people with disabilities can participate in society)).

139. *Id.* at 899.

140. 46 F.3d 325 (3d Cir. 1995); *see also supra* text accompanying notes 93-101.

141. 473 U.S. 432, 455-78 (1985).

142. *L.C.*, 138 F.3d at 899-900 (quoting *Helen L.*, 46 F.3d at 335, and *City of Cleburne*, 473 U.S. 432, 461-64).

place them in the community while recognizing the propriety of such a placement, is exactly the kind of conduct that the ADA was designed to prevent."[143] Here it drew on Supreme Court language from a § 504 case, *Alexander v. Choate*:[144]

> Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference–of benign neglect. Thus, Representative Vanik . . . described the treatment of the handicapped as one [of] the country's "most shameful oversights," which caused the handicapped to live among society "shunted aside, hidden, and ignored."
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> . . . . Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus.[145]

Importantly, the court rejected the state's argument that plaintiffs' claims must fail because the denial of community-based placements was based on lack of funds.[146] "[T]he plain language of the ADA's Title II regulations, as well as the ADA's legislative history, make clear that Congress wanted to permit a cost defense only in the most limited of circumstances . . ." only where those accommodations "would fundamentally alter the nature of the service, program, or activity."[147] The court cited a House Judiciary report explaining:

> The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services under Section 504 of the Rehabilitation Act, or under this title . . . . The existence of such programs can never be used as a basis to . . . refuse to provide an accommodation in a regular setting.[148]

The court stressed that its holding did not "mandate the deinstitutionalization of individuals with disabilities."[149] Instead, it clarified:

> [W]e hold that where, as here, a disabled individual's treating

143. *Id.* at 901.

144. 469 U.S. 287 (1985).

145. *L.C.*, 138 F.3d at 901 (quoting *Alexander*, 469 U.S. at 295-96).

146. *See id.* at 902.

147. *Id.* (quoting 28 C.F.R. § 35.130(b)(7) (1999)).

148. *Id.* (quoting H.R. Rep. No. 101-485, pt. 3, at 50). The *L.C.* court distinguished cases such as S.H. v. Edwards, 886 F.2d 292 (11th Cir. 1989), as those cases did not have occasion to consider the "integration regulation" that was central to the methodology in deciding ADA cases. *See id.* at 901-02.

149. *Id.* at 902.

> professionals find that a community-based placement is appropriate for that individual, the ADA imposes a duty to provide treatment in a community setting–the most integrated setting appropriate to that patient's needs. Where there is no such finding, on the other hand, nothing in the ADA requires the deinstitutionalization of that patient.[150]

The court pointed out that experts, including one of E.W.'s treating physicians, were unanimous that E.W. could be treated in a community setting, provided she were given "the level of care and supervision she needed."[151] Again, it underscored:

> We do not suggest that should a trial court find that a patient, for medical reasons, needs institutionalized care, it must nonetheless order placement in a community-based treatment program. We recognize that the determination whether a patient can be appropriately placed in a community-based treatment program is a fluid one, subject to change as the patient's medical condition improves or worsens. Over the course of litigation, there may be times that a patient can be treated in the community, and others where an institutional placement is necessary. But where, as here, the evidence is clear that all the experts agree that, at a given time, the patient could be treated in a more integrated setting, the ADA mandates that it do so at that time unless placing that individual would constitute a fundamental alteration in the state's provision of services. Nothing in the ADA, however, forbids a state from moving a patient back to an institutionalized treatment setting, as the patient's condition necessitates.[152]

The court then turned to the state's lack of funds argument. The duty to provide services is not absolute, it noted, and the state need not provide the services in question "if to do so would require a fundamental alteration in its programs."[153] However, the plaintiffs adequately demonstrated to the court that the state could "reasonably modify its provision of services by providing treatment to them in an integrated [community] setting."[154] It continued by noting that "the ADA does not

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150. *Id.*

151. *Id.* at 902-03.

152. *Id.* at 903. The court further stressed "because the State's own professionals agreed that E.W. could be placed in a less segregated setting, the State has failed to demonstrate that there is a material issue of fact for trial . . . ." *Id.*

153. *Id.* at 904. "Under Title II, '[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.'" *Id.* (quoting 28 C.F.R. § 35.130 (b)(7) (1999)).

154. *Id.*

permit the State to justify its discriminatory treatment of individuals with disabilities on the grounds that providing non-discriminatory treatment will require additional expenditures of state funds."[155]

However, because the trial court did not consider the question of whether the additional expenditures necessitated by community treatment would "fundamentally alter the services [the state] provides," the Eleventh Circuit remanded the case for the trial court to consider:

> (1) whether the additional expenditures necessary to treat L.C. and E.W. in community-based care would be unreasonable given the demands of the State's mental health budget; (2) whether it would be unreasonable to require the State to use additional available Medicaid waiver slots, as well as its authority under Georgia law to transfer funds from institutionalized care to community-based care, to minimize any financial burden on the State; and (3) whether any difference in the cost of providing institutional or community-based care will lessen the State's financial burden.[156]

On appeal, the Supreme Court, in a split opinion per Justice Ginsburg,[157] qualifiedly affirmed.[158] After setting out the provisions of the ADA that focused on the institutional segregation and isolation of persons with disabilities, and the discrimination faced by persons with disabilities (including "exclusion . . . [and] segregation"),[159] the Court reviewed the key Department of Justice regulations, including the "integration [mandate] regulation,"[160] pointing out that the case, as presented, did *not* challenge their legitimacy.[161] It then set out its holding:

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155. *Id.* at 904-05 (citing United States v. Bd. of Trustees for Univ. of Alabama, 908 F.2d 740 (11th Cir. 1990)).

156. *Id.* at 905. In an accompanying footnote, the court added: "We note that this case is not a class action, but a challenge brought on behalf of two individual plaintiffs. Our holding is not meant to resolve the more difficult questions of fundamental alteration that might be present in a class action suit seeking deinstitutionalization of a state hospital." *Id.* at n.10.

157. *See* Olmstead v. L.C., 119 S. Ct. 2176, 2176, 2179 (1999). Justices O'Connor, Breyer, Souter, and Stevens (the latter in a separate opinion) joined Justice Ginsburg in most of her opinion. Justice Stevens, who would have preferred to simply affirm the Eleventh Circuit's opinion, joined with these four justices in all of the opinion save that portion that outlined the State's obligations in such cases, *see infra* text accompanying note 180. Justice Kennedy filed a concurring opinion, joined in part by Justice Breyer, *see infra* text accompanying notes 181-193. Justice Thomas dissented for himself, the Chief Justice, and Justice Scalia, *see infra* text accompanying notes 194-198.

158. *See Olmstead*, 119 S. Ct. at 2176 (1999).

159. *Id.* at 2181 (quoting 42 U.S.C. § 12101 (a)(5)).

160. *Id.* at 2183 (referring to 28 C.F.R. pt. 35, app. A (1998)).

161. *See id.*

> We affirm the Court of Appeals' decision in substantial part. Unjustified isolation, we hold, is properly regarded as discrimination based on disability. But we recognize, as well, the States' need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the States' obligation to administer services with an even hand. Accordingly, we further hold that the Court of Appeals' remand instruction was unduly restrictive. In evaluating a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably.[162]

The Court endorsed the Department of Justice's position that "undue institutionalization qualifies as discrimination, 'by reason of . . . disability,'"[163] and then characterized the ADA as having "stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living[,]"[164] stressing how much more comprehensive the ADA was than had been "aspirational" or "hortatory" laws, such as the Developmentally Disabled Assistance and Bill of Rights Act.[165] It then focused on what it saw as Congressional judgment supporting the finding that "unjustified institutional isolation of persons with disabilities is a form of discrimination[:]"[166]

> 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. Cf. *Allen v. Wright*, 468 U.S. 737, 755, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) ("There can be no doubt that [stigmatizing injury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action."); *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.") (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d

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162. *Id.* at 2185.

163. *Id.*

164. *Id.* at 2186.

165. *See id.* (discussing 42 U.S.C. § 6010 (2), as construed in Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 (1984)). *See generally* 2 PERLIN, *supra* note 9, § 7.13, at 617-23 (2d ed. 1999).

166. *Olmstead*, 119 S. Ct. at 2187.

> 1194,1198 (C.A.7 1971)). 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. See Brief for American Psychiatric Association et al. as *Amici Curiae* 20-22. 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. See Brief for United States as *Amicus Curiae* 6-7, 17.[167]

The majority immediately clarified some qualifications in its opinion. It emphasized that the ADA did *not* "condone[ ] termination of institutional settings for persons unable to handle or benefit from community settings,"[168] that the states "generally may rely on the reasonable assessments of its own professionals in determining whether an individual" is eligible for community-based programs,[169] and that there was no "requirement that community-based treatment be imposed on patients who do not desire it."[170] None of these issues, however, were present in the case before it: "[Georgia's] professionals determined that community-based treatment would be appropriate for [the plaintiffs]," both of whom desired such treatment.[171] The Court added one additional word of caution here:

> 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." . . . We do hold, however, that States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide.[172]

The Court then turned to the questions of remedy and enforcement.[173] It rejected the Eleventh Circuit's construction of the "reasonable-modification regulations" as "unacceptable" in that "it would leave the

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167. *Id.*
168. *Id.*
169. *Id.* at 2188.
170. *Id.*
171. *Id.*
172. *Id.* at n.14.
173. Although this section of the opinion was co-signed by only four justices (Ginsburg, Souter, Breyer and O'Connor), a reading of it in tandem with Justice Kennedy's concurrence, *see infra* text accompanying notes 181-193, makes it likely that it will be treated by lower courts as having the weight of a majority opinion.

State virtually defenseless" if the plaintiff demonstrates she is qualified for the program or placement she seeks.[174] Rather, the Court concluded:

> Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities."[175]

The ADA, it concluded, "is not reasonably read to . . . phase out institutions, placing patients in close care at risk," nor is the law's mission "to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter[.]"[176] "For other [patients], no placement outside the institution may ever be appropriate."[177] Because of these factors, Justice Ginsburg concluded that the state must have more leeway than offered by the Eleventh Circuit's remedy:

> 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 to keep its institutions fully populated, the reasonable-modifications standard would be met.[178]

She summarized in this way:

> [U]nder Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account there sources available to the State and the needs of others with mental disabilities.[179]

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174. *Olmstead*, 119 S. Ct. at 2188.

175. *Id.* at 2189.

176. *Id.* At one point, Georgia had proposed such a placement for one of the named plaintiffs, and then later retracted it. *See id.*

177. *Id.* On this point, the opinion cited, inter alia, Justice Blackmun's concurrence in Youngberg v. Romeo, 457 U.S. 307 (1982): "For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know." *Id.* at 327.

178. Olmstead, 119 S. Ct. at 2189.

179. *Id.* at 2190.

Justice Stevens concurred, stating that he would have preferred simply affirming the Eleventh Circuit's opinion, but because there were not five votes for that disposition, he joined in all of Justice Ginsburg's opinion, except for the remedy-enforcement portion.[180] Justice Kennedy concurred, urging "caution and circumspection" in the enforcement of the *Olmstead* case.[181] After stressing that "persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility[,]"[182] he traced what he saw as the history of deinstitutionalization: that, while it "has permitted a substantial number of mentally disabled persons to receive needed treatment with greater freedom and dignity[,]" it has "ha[d] its dark side" as well.[183] Here he quoted extensively from the writings of E. Fuller Torrey:

> For a substantial minority . . . deinstitutionalization has been a psychiatric Titanic. Their lives are virtually devoid of "dignity"or "integrity of body, mind, and spirit." "Self-determination" often means merely that the person has a choice of soup kitchens. The "least restrictive setting" frequently turns out to be a cardboard box, a jail cell, or a terror-filled existence plagued by both real and imaginary enemies.[184]

"It would be a tragic event," Justice Kennedy warned, if states read the ADA, as construed in *Olmstead*, in such a way as to create an incentive to states, "for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision[,]"[185] and he thus emphasized that "opinion[s] of a responsible treating physician [should] be given the greatest of deference."[186] He underscored what he saw as a "common phenomenon:"

> It is a common phenomenon that a patient functions well with medication, yet, because of the mental illness itself, lacks the discipline or capacity to follow the regime the medication requires. This is illustrative of the factors a responsible physician will consider in recommending the appropriate setting or facility for treatment.[187]

Because of these concerns, and his fear that "[s]tates may be

180. *See id.*
181. *Id.* at 2192.
182. *Id.* at 2191.
183. *Id.*
184. *Id.* (quoting E. FULLER TORREY, OUT OF THE SHADOWS 11 (John Wiley & Sons, Inc. 1997)).
185. *Id.* at 2191-92.
186. *Id.* at 2191.
187. *Id.*

pressured into attempting compliance on the cheap, placing marginal patients into integrated settings devoid of the services and attention necessary for their condition," Justice Kennedy again urged "caution and circumspection" and "great deference to the medical decisions of . . . responsible, treating physicians."[188]

He continued[189] by articulating what he saw as the necessary elements of a discrimination finding,[190] and then raised federalism concerns: "[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."[191]

Finally, he parted company from Justice Ginsburg on the weight she gave to the Congressional findings. The findings in question, he concluded, "do not show that segregation and institutionalization are always discriminatory or that, by their nature, are forms of prohibited discrimination."[192] "Instead, they underscore Congress's concern that discrimination has been a frequent and pervasive problem in institutional settings and policies and its concern that segregating disabled persons from others can be discriminatory."[193]

Justice Thomas dissented, criticizing the majority opinion for its interpreting "'discrimination' that encompassed disparate treatment among members of the *same* protected class[,]"[194] arguing that the Congressional findings on which the majority premised its conclusions were "vague" and written in "general hortatory terms,"[195] that its "approach impose[d] significant federalism costs,"[196] and warning that states "will now be forced to defend themselves in federal court every

188. *Id.* at 2192.

189. Justice Breyer joined in the prior portion of Justice Kennedy's concurrence, but not in the portion discussed *infra* text accompanying notes 190-93.

190. *See Olmstead*, 119 S. Ct. at 2192. The Court stated:

> If they could show that persons needing psychiatric or other medical services to treat a mental disability are subject to a more onerous condition than are persons eligible for other existing state medical services, and if removal of the condition would not be a fundamental alteration of a program or require the creation of a new one, then the beginnings of a discrimination case would be established.

Id.

191. *Id.* at 2193.

192. *Id.*

193. *Id.*

194. *Id.* at 2194.

195. *Id.* at 2197.

196. *Id.* at 2198.

time resources prevent the immediate placement of a qualified individual."[197] He concluded, "[c]ontinued institutional treatment of persons who, though now deemed treatable in a community placement, must wait their turn for placement, does not establish that the denial of community placement occurred 'by reason of' their disability. Rather, it establishes no more than the fact that petitioners have limited resources."[198]

Olmstead is significant for several reasons. First, it is the first time that the Supreme Court has ruled on the applicability of the ADA to community-based treatment programs.[199] Second, it breathes important life into the Congressional findings on questions of institutional segregation, discrimination, and exclusion.[200] Third, it specifically focuses on the way that "unjustified isolation . . . is properly regarded as discrimination based on disability."[201] Fourth, it comprehends how, in its own words, the ADA had "stepped up" prior Congressional efforts in this area.[202] Fifth, it underscores how institutional isolation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life,"[203] and how such isolation "severely diminishes the everyday life activities of institutionalized individuals."[204]

On the other hand, the Court's "qualifiers" are equally important. It sanctions reliance on state professionals in determining community-treatment eligibility, thus, implicitly endorsing a perpetuation of *Youngberg v. Romeo's* "substantial professional judgment" standard,[205] notwithstanding the fact that the Court had stressed that there was no constitutional issue presented in the case.[206] It emphasizes that *Olmstead* cannot be read as an opinion designed to "phase out" institutions or to move patients to inappropriate community settings.[207] Its "reasonable modification" formula, by which a state must be able to "demonstrate that it had a comprehensive, effectively working plan for placing

197. *Id.* at 2199.
198. *Id.*
199. *See id.* at 2176.
200. *See id.* at 2181.
201. *Id.* at 2185.
202. *Id.* at 2186.
203. *Id.* at 2187.
204. *Id.*
205. *See supra* text accompanying note 109.
206. *See Olmstead*, 119 S. Ct. at 2181.
207. *Id.* at 2189.

qualified persons with mental disabilities in less restrictive settings[,]"[208] provides an early partial blueprint for the resolution of similar future litigation.

Justice Kennedy's concurrence may turn out to be of critical importance for several reasons. First, he focuses squarely on the specter of inappropriate deinstitutionalization, relying on Fuller Torrey's powerful critique.[209] Second, he raises the concern that the fear of litigation may lead the state to prematurely and inappropriately release patients "with too little assistance and supervision."[210] Finally, he links institutional release with patients' subsequent failure to self-medicate in community settings, an argument that resonates in the current debate over involuntary outpatient commitment laws that premise community treatment on medication compliance.[211] It can be expected that these arguments of Justice Kennedy's will be as much a factor in the subsequent debate on community treatment questions as will Justice Ginsburg's majority opinion.

In short, *Olmstead* has the capacity to be a truly transformative ADA case, and one which may serve as the template for future developments in this area.[212] Although the *Youngberg* "substantial professional judgment" standard has been an important underpinning of mental disability law jurisprudence for nearly two decades, courts have rarely given much thought to its dimensions, its limits, and its implications for

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208. *Id.*

209. To my mind, Torrey's critique is a terribly flawed one. *See* Perlin, *supra* note 66, at 87. *See generally* Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 PSYCHOL. PUB. POL'Y & L. 80, 84-118 (1995).

210. *Olmstead*, 119 S. Ct. at 2191. On the impact of "litigaphobia" (fear of litigation) on mental disability law jurisprudence, see, e.g., Michael L. Perlin, *Tarasoff and the Dilemma of the Dangerous Patient: New Directions for the 1990s*, 16 LAW & PSYCHOL. REV. 29, 61-62 (1992).

211. *See* 1 PERLIN, *supra* note 9, § 2C-7.3, at 491-99 (2d ed. 1998).

212. *See* Perlin, *Promises*, *supra* note 31. *Olmstead* has been cited sparingly in the months since it was decided; Rodriguez v. City of New York, 197 F.3d 611, 618-19 (2d Cir. 1999) (distinguishing *Olmstead* in a case holding that state's implementation of certain programs used to determine number of personal-care service hours to which persons with disabilities are entitled did not violate the ADA); Dare v. State of California, 191 F.3d 1167, 1176 n.7 (9th Cir. 1999) (referring to *Olmstead's* characterization of "unjustified isolation" as "discrimination based on disability," and to it having spoken "approvingly" of the ADA's efforts to end that isolation in a disability parking sticker case); Alsbrook v. City of Maumelle, 184 F.3d 999, 1016 n.24 (8th Cir. 1999), *cert. granted, in part*, Alsbrook v. Arkansas, 120 S. Ct. 1003 (2000), *cert. dismissed*, 120 S. Ct. 1265 (2000) (relying on *Olmstead's* interpretation of the meaning of "reasonable modifications" in an 11th Amendment case).

institutional life.[213] *Olmstead's* implicit endorsement of the standard is likely to rekindle interest in this standard. This will clearly have an impact on all aspects of institutional mental health practice. The Court's focus on institutional segregation and the deleterious effects of institutional isolation will likely lead to greater attention being paid to the way institutions are run, and the ways institutional mental health professionals provide treatment in institutional settings. If *Olmstead* leads to more ADA litigation on behalf of institutionalized persons seeking community treatment, it is likely that, notwithstanding the cases's implicit endorsement of the *Youngberg* standard, this will also lead to far greater scrutiny of mental health professionals' institutional practices. Although *Olmstead* deals solely with civil patients, there is nothing in the opinion or the ADA or the supporting regulations that suggests that the basic principles would be inapplicable to forensic populations.[214]

III. SANISM, PRETEXTUALITY, AND THE ADA[215]

Any analysis of ADA developments must be undertaken contextually in light of the role of sanism and pretextuality. The "direct threat" language in the ADA[216] is a potential laboratory for sanist and pretextual experimentation.[217] What sort of "behavior" will allegedly pose such a threat? If an employee starts to discuss obscure political conspiracies, is that a threat? If an individual taking psychotropic medication develops side effects that creates an agitated or a "zombie-like" condition, is that a threat? If an employee appears to be fixated with,

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213. *See* 1 PERLIN, *supra* note 9, §§ 3A-12 to 12.3 (2d ed. 1998); *see also* Michael L. Perlin, *"Their Promises of Paradise:" Will Olmstead v. L.C. Resuscitate the Constitutional "Least Restrictive Alternative" Principle in Mental Disability Law?* (work in progress, on file with author).

214. *See* Michael L. Perlin, "For the Misdemeanor Outlaw:" The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities (unpublished manuscript, on file with the *Alabama Law Review*).

215. This section of the article and the accompanying footnotes were developed from Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J.L. & HEALTH 15, 29-43 (1993-94); Michael L. Perlin, *"Half-Wracked Prejudice Leaped Forth:" Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did*, 10 J. CONTEMP. LEGAL ISSUES 3, 4-5; Michael L. Perlin, *"Make Promises by the Hour:" Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947, 976-82 (1997).

216. *See supra* text accompanying notes 63-64.

217. *See* EEOC v. Kinney Shoe Corp., 917 F. Supp. 419, 431-32 (W.D. Va. 1996) (stating that firing an employee due to timing of his epileptic seizures was not "unlawful discrimination" under ADA).

say, frogs or turtles, and talks to customers about their importance to the world, is that a threat? To what extent can we expect that employers will tolerate[218] "aberrant" behavior on the part of workers? Let one local news station pick up a story that a group of schoolchildren stopped going to a downtown luncheonette because an employee was "acting odd," and that anecdote will become the centerpiece of the next debate on amending the ADA.

If the plain language of the ADA conflicts with what trial judges think is "best" for mentally disabled persons, will judges enter pretextual decisions (and encourage pretextual testimony)? Michael Saks reported a trial judge's explanation as to why he ordered civil commitment of individuals notwithstanding his overt acknowledgment that the state failed to meet its burden of proof; and the judge did so because he felt compelled "to do what [he thought was] right."[219] Should we expect judges to be *less* pretextual in ADA decisionmaking?[220]

Interestingly, in at least one section, the ADA drafters seem to acknowledge the dangers of pretexts. While the Act explicitly does not restrict the ability of insurance companies to limit mental-illness-disability benefits,[221] it specifies that this non-restriction section may not be used as a "subterfuge" to evade the purposes of either the employment or public accommodations titles.[222] This expectation of pretextual

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218. I use this word consciously. It is impossible to assess the ADA's ultimate impact without some consideration of the value of "tolerance." *See, e.g.*, Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered*, 28 OSGOODE HALL L.J. 409 (1990); Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305 (1990).

219. Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence*, 11 BEHAV. SCI. & L. 47, 54 n.47 (1993) (discussing Michael Saks, *Expert Witnesses, Nonexpert Witnesses, and Nonwitness Experts*, 14 LAW & HUM. BEHAV. 291, 293 (1990)).

220. *See* Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165 (5th Cir. 1996), *reh'g. denied* (1996) (discussing disabilities that are not "open, obvious, and apparent"); *see also* Julie Odegard, *The Americans with Disabilities Act: Creating "Family Values" for Physically Disabled Parents*, 11 LAW & INEQ. J. 533 (1993) (discussing discrimination against parents with physical disabilities by both state support policies and the court system).

221. *See* 42 U.S.C.A. § 12201(c)(1) (West 1995); *see also* Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997), *cert. denied*, 522 U.S. 1084 (1998) (stating that the ADA's prohibition against disability discrimination in public accommodations did not prohibit an employer from providing a long-term disability plan which contained longer benefits for employees who become disabled due to physical illness than for those who become disabled due to mental illness).

222. *See* 42 U.S.C.A. § 12201(c). *See generally* Christopher Jones, *Legislative "Subterfuge?:" Failing to Insure Persons with Mental Illness Under the Mental Health Parity Act and the Americans with Disabilities Act*, 50 VAND. L. REV. 753 (1997) (discussing the lack of protection for the mentally ill under the Mental Health Parity Act (MHPA) and the ADA

behavior on the part of an industry subject to regulation under this act is both realistic and troubling; for it reflects the extent to which pretexts can color the way we treat persons with mental disabilities.

The potential superimposition of "morality" was raised explicitly in the floor debate on the ADA by Senator Jesse Helms. His revealing comment, asking about the consequences if an employer's "moral standards" prevent him from hiring a manic-depressive,[223] reflects the reality that sanist behavior may be seen as *moral* behavior.[224] Will this lead to a spate of literature suggesting that the ADA be subverted in the same way that psychiatrists have written articles suggesting that strict involuntary civil commitment laws be subverted?[225]

I believe that one of the many reasons why society reacts in different ways toward persons with mental disabilities than it does when it discriminates against other minorities is that the distinguishing

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from private insurance limitations for mental health care); and Ramage, *supra* note 79, at 969-70.

223. *See* Perlin, *ADA*, *supra* note 31, at 27-28.

224. *See* Deborah K. Dallmann, *The Lay View of What "Disability" Means Must Give Way to What Congress Says It Means: Infertility as a "Disability" Under The Americans With Disabilities Act*, 38 WM. & MARY L. REV. 371 (1996) (discussing factual backdrop of Pacourek v. Inland Steel Co., 858 F. Supp. 1393 (N.D. Ill. 1994)):

> Ms. Pacourek alleged that in 1992, an Inland manager, Thomas Wides, "verbally abused [her] concerning her pregnancy related condition by expressing doubt as to her ability to become pregnant and her ability to combine pregnancy and her career." She claimed that she was "treated like she had an infectious disease" and that one top-level manager told her, "I don't give a damn about the law. I only care about Inland Steel. If God had wanted you to have children, . . . he would have given them to you."
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> *Id.* at 394-95 (footnotes omitted).

225. *See* 1 Perlin, *supra* note 9, § 2A-7.1, at 186-88 (2d ed. 1998) (citing and discussing, *inter alia*, Paul Chodoff, *The Case for Involuntary Hospitalization of the Mentally Ill*, 133 AM. J. PSYCHIATRY 496, 501 (1976); Paul Chodoff, *Involuntary Hospitalization of the Mentally Ill as a Moral Issue*, 141 AM. J. PSYCHIATRY 384, 388 (1984); William McCormick, *Involuntary Commitment in Ontario: Some Barriers to the Provision of Proper Care*, 124 CAN. MED. ASS'N J. 715, 717 (1981)).

On efforts to limit the ADA's protections to the "truly disabled," compare Overton v. Tar Heel Farm Credit, 942 F. Supp. 1066, 1068 (E.D. N.C. 1996) (relying on the language of Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986), a pre-ADA case), with Robert Hammel, *Some Reflections on New York City's Disability Law*, 23 FORDHAM URB. L.J. 1195, 1216 (1996) (local human rights law should be limited to protect only the "seriously disabled"). Hammel is responded to carefully, thoughtfully, and persuasively in Janet Eriv, *Persistent Misconceptions: A Response to Robert Hammel*, 23 FORDHAM URB. L.J. 1219 (1996). The Supreme Court has recently narrowed the universe of individuals who come within ADA protections. *See generally supra* note 46 (discussing Sutton v. United Air Lines, Inc. 119 S. Ct. 2139 (1999); Murphy v. United Parcel Service, Inc., 119 S. Ct. 2133 (1999); Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999)).

characteristics of the latter groups are frequently immutable.[226] With rare exceptions, few people change gender or change race. When individuals change religion, it is generally a voluntary act undertaken with some knowledge of the dimensions and consequences of the decision. On the other hand, each one of us can become mentally ill (and none of us chooses it volitionally). This phenomenon may help explain the level of virulence we often show toward persons with mental disabilities.[227]

The ADA floor debate on this question of what I will call the non-immutability of mental illness was illuminating. Senator Armstrong made this point graphically in his arguments on behalf of a narrowed law:

> A person is or is not a man or a woman. A person is or is not a Catholic, a Jew, a Mormon, whatever . . . . That is something we can readily determine. A person either is or is not Irish, Italian and so on.
>
> This bill proceeds from an entirely different point of view. . . .[228]

On the other hand, Senator Domenici, a co-sponsor and ardent supporter, used the same information in an entirely different context. Said Domenici:

> It is very simple to say that it is only a matter of sex discrimination and perhaps race, and perhaps religion, as some have suggested. Those are easy ones.
>
> But they just scratch the surface in terms of the suffering that goes on in the lives of people who are assumed disabled because of some of the niches that they are put in, especially when it comes to serious mental illness . . . .[229]

Our discomfort and lack of clarity as to who exactly *is* disabled and who is not is, at base, sanist. Just as we wish to be able to categorize

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226. *Compare* United States v. Cohen, 733 F.2d 128, 134-35 (D.C. Cir. 1985) (Scalia, J.) (rejecting immutability argument in equal protection challenge to constitutionality of post-insanity acquittal commitment statute), *with* James Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook, and Winter*, 40 U. MIAMI L. REV. 1171, 1198-99 (1986).

227. For a general discussion on the way that public fears about the purported link between mental illness and dangerousness "drive the formal laws and policies governing mental disability jurisprudence," see John Monahan, *Mental Disorder and Violent Behavior: Perceptions and Evidence*, 47 AM. PSYCHOL. 511, 511 (1992); *see also* Allan H. Macurdy, *The Americans With Disabilities Act: Time For Celebration, or Time for Caution?*, 1 PUB. INT'L. L. J. 21, 32-34 (1991) (discussing the ways that stereotypes pervade our views of persons with disabilities).

228. 135 CONG. REC. 19871 (daily ed. Sept. 7, 1989) (statement of Senator Armstrong), *available in* WESTLAW, at 64.

229. *Id.* at 19878 (remarks of Senator Domenici).

individuals in the criminal law as sane or insane, competent or incompetent,[230] we wish for a "real world" without tinges and shades of gray, especially on the question of who is "mentally disabled" for purposes of an act such as the ADA.

The ADA, if enforced, forces us to abandon sanist stereotypes in this area of the law.[231] It makes us reject presumptions of incompetence, broadly-drawn, non-individualized pictures of mentally disabled persons, and policy rationales that are premised on prejudice and bias. The ADA, if enforced, gives institutional plaintiffs a litigational vehicle to bring some coherence to the state/federal morass in right-to-refuse-treatment law and to seek to force courts to confront issues about personal autonomy and sexuality that judges have been all too happy to avoid for years.

Olmstead provides some powerful anti-sanist ammunition. Its focuses on the ravages of isolation (and its linkage of that isolation to the perpetuation of stereotypes, stigma and the diminution of everyday life) is the Supreme Court's strongest language yet in a majority opinion that implicitly acknowledges the corrosive impact of sanist behavior. On the other hand, there may be reason for concern in *Olmstead's* willingness

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230. For illustrative cases, compare Koehler v. State, 830 S.W.2d 665 (Tex. App. 1992), *reh'g denied* (1992) (being determined incompetent to manage one's own affairs not a prima facie showing of incompetency to stand trial), with Godinez v. Moran, 509 U.S. 389 (1993) (Blackmun, J., dissenting):

> But the majority cannot isolate the term "competent" and apply it in a vacuum, divorced from its specific context. A person who is "competent" to play basketball is not thereby "competent" to play the violin. The majority's monolithic approach to competency is true to neither life nor the law. Competency for one purpose does not necessarily translate to competency for another purpose.

Id. at 413.

> On the multiple meanings of competency, see generally Michael L. Perlin, *"The Borderline Which Separated You From Me:" The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1378-97 (1997); Bruce J. Winick, *Competency to Consent to Voluntary Hospitalization: A Therapeutic Jurisprudence Analysis of Zinermon v. Burch*, *in* ESSAYS IN THERAPEUTIC JURISPRUDENCE 83, 102-05 (David B. Wexler & Bruce J. Winick eds. 1991).

231. *See, e.g.*, PETER BLANCK, THE AMERICANS WITH DISABILITIES ACT AND THE EMERGING WORKFORCE: EMPLOYMENT OF PEOPLE WITH MENTAL RETARDATION 59-60 (1998); Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 391-92 (1997); Peter David Blanck, *Civil Rights, Learning Disability, and Academic Standards*, 2 J. GENDER, RACE & JUST. 33, 53-54 (1998); Peter David Blanck, *Students with Learning Disabilities, Reasonable Accommodations, and the Rights of Colleges and Universities to Establish and Enforce Academic Standards: Guckenberger v. Boston University*, 21 MENTAL & PHYSICAL DISABILITY L. REP. 679, 684 (1997) (linking sanism to ADA inquiries).

to be deferent to institutional professionals.[232] The history of institutional treatment of persons with mental disabilities is, to be charitable, a checkered one.[233] By no means is it at all clear that the "shock the conscience" scenarios uncovered in cases ranging from *Wyatt v. Stickney*[234] to *Halderman v. Pennhurst State School and Hospital*[235] are all mere historical artifacts.[236] The potential for pretexts here is real and is worthy of careful scrutiny in the next inevitable generation of *Olmstead*-like cases.

At least three other concerns flow from the other *Olmstead* opinions. As I have already suggested, Justice Kennedy's endorsement of Torrey's florid description of deinstitutionalization as a "Titanic-like" disaster[237] may (perhaps unwittingly) serve to frame the continuing debate as to the success and failures of differing approaches to deinstitutionalization. The pages of journals such as *American Psychologist* or *Psychiatric Services* are regularly filled with reports of successful deinstitutionalization programs that have "worked,"[238] and Torrey's vivid heuristics should not serve to preempt the terms of this important debate.[239]

Next, Justice Kennedy's connection between deinstitutionalization and refusals to take medication is perplexing on two independent levels. Concurring in 1992 in *Riggins v. Nevada*,[240] Justice Kennedy wrote eloquently about the dangers of drug side effects, dangers that so worried him that he concluded he would not allow the use of antipsychotic medications to make a defendant competent to stand trial absent an "extraordinary showing," a showing he doubted was possible to make

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232. *See* Olmstead v. L.C., 119 S. Ct. 2176 (1999). It is not at all clear how it is to be determined if the judgment is reflective of "reasonable assessments of [the State's] own professionals . . . ." *Id.* at 2188.

233. *See, e.g.*, 2 PERLIN, *supra* note 9, § 3A (2d ed. 1999).

234. 325 F. Supp. 781 (M.D. Ala. 1971). *See generally* 2 PERLIN, *supra* note 9, §§ 3A-3.1 (2d ed. 1999).

235. 446 F. Supp. 1295 (E.D. Pa. 1977). *See generally* 2 PERLIN, *supra* note 9, §§ 7.10-7.12 (2d ed. 1999).

236. *See generally* 2 PERLIN, *supra* note 9, § 3A-3.1, at 24 n.152 (2d ed. 1999) (stating that the defendants were still not in compliance with certain aspects of *Wyatt* orders after 25 years). *E.g.*, Wyatt v. Rogers, 985 F. Supp. 1356 (M.D. Ala. 1997); Wyatt v. Rogers, 1998 WL 862920 (M.D. Ala. 1998).

237. *See Olmstead*, 119 S. Ct. at 2191.

238. *See, e.g.*, PERLIN, *supra* note 9, § 7.02, at 108 n.26 (1999 Cum. Supp.).

239. *See* Michael L. Perlin, *"The Executioner's Face Is Always Well-Hidden:" The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 231 (1996).

240. 504 U.S. 127 (1992).

"given our present understanding of the properties of these drugs."[241] None of these concerns is present in his *Olmstead* opinion. This is even more surprising, given the attention paid by the Court to antipsychotic drug side effects in *Sutton v. United Air Lines*.[242] In *Sutton* (an opinion joined by Justice Kennedy), the Court discussed, in dicta, the fact that "antipsychotic drugs can cause a variety of adverse effects, including neuroleptic malignant syndrome and painful seizures[.]"[243] Again, there is no reference to this in Justice Kennedy's *Olmstead* concurrence.

Finally, both Justice Kennedy and Justice Thomas speculate as to the possibility of state-motivated improper release due to a fear of litigation. This assumes a major fact not in evidence: that competent, qualified counsel is widely available to represent institutionalized persons in such litigation.[244] This fear, certainly related to the critique that has scapegoated patients' rights lawyers as the villain in the deinstitutionalization movement,[245] is a potentially pernicious one, and must be carefully rebutted by responsible advocates who provide legal services to persons with mental disabilities.

Olmstead was limited to the question of community-based treatment.[246] Its powerful language about institutional segregation,[247] and about the permanent and irreversible effects of stereotyping,[248] however, goes far beyond the modest holding of the case. In acknowledging the ways that institutional placement can "perpetuate unwarranted

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241. *Id.* at 139; *see also* 2 PERLIN, *supra* note 9, § 3B-8.3, at 323-29 (2d ed. 1999).

242. 119 S. Ct. 2139 (1999).

243. *Id.* at 2147.

244. *See* Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39 (1992).

245. *See* Michael L. Perlin, *Out of Bedlam: The Truth About Deinstitutionalization*, 8 N.Y. L. SCH. J. HUM. RTS. 557 (1990-91) (book review).

> [N]urtured by radical psychiatrists (such as Thomas Szasz and R.D. Laing), spurred on by politically-activist organizations pushing egalitarian social agendas (such as the ACLU), a cadre of brilliant but diabolical patients' rights lawyers dazzled sympathetic and out-of-touch judges with their legal *legerdemain* - abetted by wooly-headed social theories, inapposite constitutional arguments, some oh-my-god worst-case anecdotes about institutional conditions, and a smattering of "heartwarming successful [deinstitutionalization] cases"- as a result of which courts entered orders "emptying out the mental institutions" so that patients could "die with their rights on." When cynical bureaucrats read the judicial handwriting on the hospital walls, they *then* joined the stampede, and the hospitals were thus emptied. Ergo deinstitutionalization. Ergo homelessness. Endgame.

Id. at 559-60.

246. *See* Olmstead v. L.C., 119 S. Ct. 2176 (1999).

247. *See id.* at 2185.

248. *See id.* at 2187.

assumptions"[249] about persons with mental disabilities and the way that such confinement can "diminish . . . the *everyday* life activities of [such] individuals,"[250] the *Olmstead* court acknowledges the hidden prejudice that contaminates all mental disability law.[251] The majority, for the first time in United States Supreme Court history,[252] raises and implicitly confronts the issue of sanism. By acknowledging that the state needs to maintain a "range of facilities,"[253] it rejects rigid, all-or-nothing, dyadic views of institutional/non-institutional life and of mental health/mental illness.[254] By its decision, it explicitly warns us of the danger of stereotyping and implicitly of "slotting"[255] (use of the typification heuristic by which treating doctors slot "patients into certain categories and prescribes a similar regimen for all").[256] By considering the corrosive effect of perpetuated assumptions, it reminds us, in the words of Judge David Bazelon, to be vigilant about "overgeneraliz[ing] about citizens whom it is easy to overgeneralize about."[257]

IV. CONCLUSION

Olmstead, to be sure, is not a "deinstitutionalization decision" and cannot and should not be interpreted as supporting the proposition that all inpatient institutions must be closed down.[258] Cases such as *Kathleen S. v. Department of Public Welfare*,[259] holding that a state's decision to close a state hospital violated the ADA by depriving residents of their

249. *Id.*

250. *Id.* (emphasis added).

251. *See generally* PERLIN, *supra* note 1; Perlin, *supra* note 67 (explaining such topics as sanism and pretextuality and the role they play in mental disability law).

252. *See supra* note 53 (discussing City of Cleburne v. Cleburne Living Center, 473 U.S. 432 and explaining the various stances taken by the Justices).

253. *Olmstead*, 119 S. Ct. at 2191.

254. *See* Perlin, *supra* note 230, at 1397.

255. *See* Michael L. Perlin, *Power Imbalances in Therapeutic and Forensic Relationships*, 9 BEHAV. SCI. & L. 111, 125 n.112 (1991).

256. Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 662 (1993).

257. David Bazelon, *Institutionalization, Deinstitutionalization, and the Adversary Process*, 75 COLUM. L. REV. 897, 909 (1975).

258. State hospital populations are far less now than they were ten, twenty, or thirty years ago. *See* Linda S. Dakin, *Homelessness: The Role of the Legal Profession in Finding Solutions Through Litigation*, 21 FAM. L.Q. 93, 104 (1987) (discussing a 70 percent decline in New York from 1965 to 1982). Researchers have pointed out that, in some jurisdictions, when involuntary civil commitment laws are loosened, the number of newly admitted patients increases significantly.

259. 10 F. Supp.2d 460 (E.D. Pa. 1998), *stay denied*, 10 F. Supp.2d 476 (E.D. Pa. 1998).

right to receive services in the most integrated setting appropriate to their needs,[260] will likely build on *Olmstead* and construe some of the decision's more ambiguous language. One of the most intriguing, and still unasked, questions is the extent to which *Olmstead* will eventually be read as a therapeutic or antitherapeutic decision. This therapeutic jurisprudence inquiry[261] is beyond the scope of this paper, but cries out for future analysis. I am convinced, however, that therapeutic jurisprudence investigations are incomplete if they do not "factor in" the impacts of sanism and pretextuality.[262] Again, the Court's focus on segregation and isolation forces us to consciously add these considerations to our analysis. But what *Olmstead* does tell us though, with finality, is that the *Maggie's Farm* mentality of the past is gone forever.

The analogy to *Maggie's Farm*, of course, is not a perfect one. No one would characterize *Olmstead*, as the critic Tim Riley characterized *Maggie's Farm*, as "the counterculture's war cry."[263] But the music critic Andrew Muir's vision of *Maggie's Farm*, as "representing any restricting, corrupt society or system," and a critique of the "personal prisons we all create by denying the freedom of the individual,"[264] may be closer to the mark. In *Olmstead*, for the first time the Supreme Court spoke of isolation and segregation and stereotypes and stigma. For *this* Court at *this* point in time, those references were fairly revolutionary. Only time will tell us the extent of *Olmstead*'s true legacy.

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260. There were three classes in the *Kathleen S.* case: residents who would be placed in the community following closure, those who were suitable for community treatment but for whom inadequate facilities existed, and those not appropriate for community placement.

261. *See, e.g.*, BRUCE WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW (1997); ESSAYS IN THERAPEUTIC JURISPRUDENCE (David Wexler & Bruce Winick eds. 1991); LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David Wexler & Bruce Winick eds. 1996); THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David Wexler ed. 1990); ESSAYS, *supra* note 230; David B. Wexler, *Applying the Law Therapeutically*, 5 APP'L. & PREVEN. PSYCHOL. 179 (1996); David B. Wexler, *Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27 (1992); David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL., PUB. POL'Y & L. 220 (1995); *Bibliography of Therapeutic Jurisprudence*, 10 N.Y.L. SCH. J. HUM. RTS. 915 (1993); 1 PERLIN, *supra* note 9, § 2D-3, at 534-41(2d ed. 1998).

262. *See, e.g.*, Michael L. Perlin, *Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 369 (1994); Michael L. Perlin, A Law of Healing (unpublished manuscript, on file with the *University of Cincinnati Law Review*).

263. RILEY, *supra* note 4, at 104.

264. Muir, *supra* note 11.