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What's Good is Bad, What's Bad is Good, You'll Find Out When You Reach the Top, You're on the Bottom: Are the Americans with Disabilities Act (and Olmstead V. L.C.) Anything More than 'Idiot Wind'

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"WHAT'S GOOD IS BAD, WHAT'S BAD IS GOOD, YOU'LL FIND OUT WHEN YOU REACH THE TOP, YOU'RE ON THE BOTTOM": ARE THE AMERICANS WITH DISABILITIES ACT (AND *OLMSTEAD V. L.C.*) ANYTHING MORE THAN "IDIOT WIND?"

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Mental disability law is contaminated by "sanism," an irrational prejudice similar to such other irrational prejudices as racism and sexism. The passage of the Americans with Disabilities Act (ADA)—a statute that focused specifically on questions of stereotyping and stigma—appeared at first to offer an opportunity to deal frontally with sanist attitudes and, optimally, to restructure the way that citizens with mental disabilities were dealt with by the remainder of society. However, in its first decade, the ADA did not prove to be a panacea for such persons. The Supreme Court's 1999 decision in Olmstead v. L.C.*—ruling that the ADA entitled certain state hospital residents to treatment in an "integrated community setting," and stressing that "unjustified isolation . . . is properly regarded as discrimination based on disability"—appeared to have the potential to transform and revolutionize mental disability law. This Article questions whether* Olmstead *has done that, and whether, in fact, it has the capacity to do that. Furthermore, a review of post-*Olmstead *caselaw—a universe that is "pretty pallid"—and the meager (in volume) scholarship, conclude that, in spite of* Olmstead, *"there are still many sanist attitudes that need to be undone."*

INTRODUCTION

I began advocating on behalf of persons with mental disabilities in 1971, first on an occasional basis, then as part of my work with the New Jersey office of the Public Defender. Three years later, I began working full-time as the director of the New Jersey Division of Mental Health Advocacy in the New Jersey Department of the Public Advocate. This division was the nation's first state-wide, cabinet-level public interest advocacy office.[1] As a result of my experiences, I first wrote and spoke to national audiences about

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1. *See, e.g.*, Michael L. Perlin, MENTAL PATIENT ADVOCACY BY A PUBLIC ADVOCATE, 54 PSYCHIATRIC Q. 169 (1982); Stanley C. Van Ness & Michael L. Perlin, *Mental Health Advocacy: The New Jersey Experience, in* Mental Health Advocacy: An Emerging Force in Consumers' Rights 62 (Louis E. Kopolow et al. eds., 1977).

mental disability law in 1975,[2] and began teaching it full-time in 1984.

In 1990, I turned my scholarly attention to questions of *sanism*.[3] "Sanism" is defined as an irrational prejudice towards mentally ill persons, which is of the same quality and character as other irrational prejudices. Such other prejudices are reflected in prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry.[4] As I recently wrote:

> Sanism is as insidious as other "isms" and is, in some ways, more troubling, because it is (a) largely invisible, (b) largely socially acceptable, and (c) frequently practiced (consciously and unconsciously) by individuals who regularly take "liberal" or "progressive" positions decrying similar biases and prejudices that involve sex, race, ethnicity, or sexual orientation. It is a form of bigotry that "responsible people can express in public." Like other "isms," sanism is based largely upon stereotype, myth, superstition and deindividualization. To sustain and perpetuate it, we use prereflective "ordinary common sense" and other cognitive-simplifying devices such as heuristic reasoning in an unconscious response to events both in everyday life and in the legal process. . . .
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> The practicing bar, courts, legislatures, professional psychiatric and psychological associations, and the scholarly academy are all largely silent about sanism. A handful of practitioners, lawmakers, scholars and judges have raised lonely voices, but the topic is simply "off the agenda" for most of these groups. As a result, individuals with mental disabilities . . . are frequently marginalized to an even greater extent than are others who fit within the *Carolene Products* definition of "discrete and insular minorities."[5]

It is impossible to understand developments in mental disability law or to coherently construct any overarching mental disability law theory without recognizing the insidious and corrosive power and

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2. Michael L. Perlin, *Psychiatric Testimony in a Criminal Law Setting*, 3 BULL. AM. ACAD. PSYCHIATRY & L. 143 (1975).

3. *See generally* MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL (2000) [hereinafter PERLIN, HIDDEN PREJUDICE].

4. *See, e.g.*, Michael L. Perlin, *On "Sanism"*, 46 SMU L. REV. 373 (1992) [hereinafter Perlin, *Sanism*].

5. PERLIN, HIDDEN PREJUDICE, *supra* note 3, at 22–23 (footnotes omitted).

impact of sanism.[6] In a book and series of articles,[7] I have considered questions of involuntary civil commitment law,[8] of institutional rights,[9] of the right to refuse treatment,[10] deinstitutionalization,[11] criminal incompetencies,[12] the insanity defense,[13] Federal Sentencing Guidelines,[14] and the death penalty.[15] I believe understanding the inconsistencies, ambiguities, and internal contradictions in any of these areas of the law requires coming to terms with the power and force of sanism.

Over two decades ago, the Supreme Court stressed the "adverse social consequences" associated with commitment to a mental hospital, and declared that "[w]hether we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the

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6. *See id.*; 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) [hereinafter Perlin, *Half-Wracked*]; 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 (1998).

7. *See* PERLIN, HIDDEN PREJUDICE, *supra* note 3; Michael L. Perlin, *"There's No Success Like Failure/and Failure's No Success at All": Exposing the Pretextuality of* Kansas v. Hendricks, 92 Nw. U. L. Rev. 1247 (1998) [hereinafter Perlin, *Success*]; Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. REV. L. & SOC. CHANGE 517 (1993–94) [hereinafter Perlin, *Right to Sex*]; Michael L. Perlin, *Decoding Right to Refuse Treatment Law*, 16 INT'L J. L. & PSYCHIATRY 151 (1993); Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence*, 11 BEHAV. SCI. & L. 47 (1993).

8. *See* PERLIN, HIDDEN PREJUDICE, *supra* note 3, at 79–112.

9. *See, e.g., id.* at 113–24.

10. *See, e.g., id.* at 125–56; Michael L. Perlin & Deborah A. Dorfman, *Is It More Than "Dodging Lions and Wastin' Time"? Adequacy of Counsel, Questions of Competence, and the Judicial Process in Individual Right to Refuse Treatment Cases*, 2 PSYCHOL., PUB. POL'Y & L. 114 (1996) [hereinafter Perlin & Dorfman, *Dodging Lions*].

11. *See, e.g.*, Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 91–93 (1991) [hereinafter Perlin, *Marginalization*].

12. *See, e.g.*, Perlin, HIDDEN PREJUDICE, *supra* note 3, at 205–22; Michael L. Perlin, *"Dignity Was the First to Leave":* Godinez v. Moran, *Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants*, 14 BEHAV. SCI. & L. 61 (1996).

13. *See, e.g.*, PERLIN, HIDDEN PREJUDICE, *supra* note 3, at 323–42; MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 385–90 (1994) [hereinafter PERLIN, JURISPRUDENCE]; 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 (1997) [hereinafter Perlin, *Borderline*].

14. *See, e.g.*, Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431 (1995).

15. *See, e.g.*, 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 (1996); Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability Evidence*, 8 NOTRE DAME J. L. ETHICS & PUB. POL. 239 (1994) [hereinafter Perlin, *Sanist Lives*].

individual."[16] Underlying sanism's power is the malignancy of stigma. As John Parry and Eric Drogin wrote:

> Stigma affects the law in at least two ways: (1) the negative effect on the liberty interests of the person with a mental disability who is the subject of a legal proceeding and (2) potential bias due to sanism that judges and other courtroom participants may demonstrate towards that person.[17]

The stigma that accompanies mental illness has been characterized by one state supreme court as "carr[ying] with it a stigma similar to that associated with a criminal record,"[18] and likened by another court to the stigma that attaches to "dishonesty . . . serious felony . . . [or] manifest racism."[19] A diagnosis of mental illness carries with it legal disabilities as well as social stigmatization.[20] Surveys show that mental disabilities are the most negatively perceived of all disabilities.[21] Individuals with mental disabilities are denied jobs, refused access to apartments in public housing or entry to places in public accommodation, and turned down for participation in publicly-funded programs because they appear "strange" or "different."[22] Behavioral myths have emerged suggesting that persons with mental disabilities are deviant, worth less than "normal" individuals, are disproportionately dangerous, and are presumptively incompetent.[23]

Courts regularly issue sanist opinions.[24] In 1960, the Iowa Supreme Court held that the Fourteenth Amendment's Due Process

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16. Vitek v. Jones, 445 U.S 480, 492 (1980) (quoting Addington v. Texas, 441 U.S. 418, 425–26 (1979)).

17. JOHN PARRY & ERIC DROGIN, CRIMINAL LAW HANDBOOK ON PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE AND TESTIMONY 5 (2000) (footnotes omitted).

18. Nelson v. Ferguson, 399 S.E.2d 909, 913 (W. Va. 1990).

19. Green v. St. Louis Hous. Auth., 911 F.2d 65, 69 (8th Cir. 1990) (quoting Harrison v. Bowen, 815 F.2d 1505, 1518 (D.C. Cir. 1987)).

20. State v. Bean, 762 A.2d 1259, 1265 (Vt. 2000).

21. Michael L. Perlin, *"I Ain't Gonna Work on Maggie's Farm No More": Institutional Segregation, Community Treatment, the ADA, and the Promise of* Olmstead v. L.C., 17 T.M. COOLEY L. REV. 53, 63 (2000) [hereinafter Perlin, *Maggie's Farm*].

22. *Id.* at 63–64 (citing Bonnie P. Tucker, *The Americans With Disabilities Act of 1990: An Overview*, 22 N.M. L. REV. 13, 16–17 (1992)).

23. *Id.* at 64. *See, e.g.*, Perlin, *Sanism*, *supra* note 4, 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); Linda Teplin, *The Criminality of the Mentally Ill: A Dangerous Misconception*, 142 AM. J. PSYCHIATRY 593, 597–98 (1985).

24. *See generally* PERLIN, HIDDEN PREJUDICE, *supra* note 3. For examples of sanism in insanity defense decision making, see PERLIN, JURISPRUDENCE, *supra* note 13, at 387–90 (discussing, *inter alia*, State v. Zmich, 770 P.2d 776 (Ariz. 1989), People v. DeAndo, 170 Cal. Rptr. 830 (App. 1980), People v. Aliwoli, 606 N.E.2d 347 (Ill. App. Ct. 1992), and State v.

Clause did not protect the loss of liberty resulting from involuntary civil commitment.[25] In 1976, in a case involving a state law requiring mandatory retirement for certain police officers at age 50, the Supreme Court rejected plaintiff's equal protection argument:

> While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.[26]

On the other hand, some judicial opinions and some scholarly writings acknowledge the thrall in which stereotypes have imprisoned the legal system. These include stereotypes regarding mental illness and dangerousness,[27] mental illness and criminality,[28] mental illness and sin,[29] and mental illness and evil.[30] In a decision

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Dunne, 590 A.2d 1174 (N.J. 1991)); Perlin, *Sanist Lives*, *supra* note 15, at 277–78 (discussing Riggins v. Nevada, 504 U.S. 127, 146 (1992) (Thomas, J., dissenting)).

25. Prochaska v. Brinegar, 102 N.W.2d 870, 872 (Iowa 1960).

26. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976).

27. *See* Richard Gardner, *Mind over Matter?: The Historical Search for Meaningful Parity Between Mental and Physical Health Care Coverage*, 49 EMORY L.J. 675, 677 (2000) (stating that "[historically, treatment] for mental illnesses ranged from exorcism to even more bizarre and often inhumane practices, such as torture or the removal of portions of the skull to allow evil spirits to escape").

28. *See* Sarah Bredemeier, *Hollow Verdict: Not Guilty by Reason of Insanity Provokes Animus-Based Discrimination in the Social Security Act*, 31 ST. MARY'S L.J. 697, 732 (2000) (stating that "animosity toward the mentally ill reaches as far back as the earliest books of the Bible, inspiring myths, legends, and horror stories linking madness to God's punishment, sin, and evil."); *id.* at 732 n.180.

29. *See* PERLIN, JURISPRUDENCE, *supra* note 13, at 37 (stating that "ever since Prince Ptah-hotep attempted the first classification of mental illness almost five thousand years ago, conceptions of such illness have been inextricably linked to the notion of sin."); *Deuteronomy* 28:15–28 (cursing with madness those who fail to observe all of God's commandments); Perlin, *Sanism*, *supra* note 4, at 388–91 (pointing to the deep-rooted misconceptions and hatred toward the mentally ill throughout history); *see also, e.g.*, JOHN BIGGS, JR., THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE 26–27 (1955) (explaining that insanity was tied to sin, and a special class of priests were the only people capable of ridding the sinner of his demonic possession); WOLF WOLFENSBERGER ET AL., THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES 12–25 (1972) (noting that mental retardation has often been regarded as the result of sin and God's punishment).

30. *See* WALTER BROMBERG, FROM SHAMAN TO PSYCHOTHERAPIST: A HISTORY OF THE TREATMENT OF MENTAL ILLNESS 63–64 (1975) (discussing various historical perspectives of mental illness); MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 64–65 (1984) (examining the American and English tests for insanity—specifically knowing the difference between good and evil—under the theory that humans become somewhat godlike once this distinction is recognized); JUDITH S. NEAMAN, SUGGESTION OF THE DEVIL:

involving a local ordinance that sought to bar the establishment of all group homes within a town, Supreme Court Justice Thurgood Marshall wrote:

> A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race." Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them. State laws deemed the retarded "unfit for citizenship."[31]

But opinions such as this are rare.[32] One recent positive example comes from the Montana Supreme Court which stated that "[t]he use of such stereotypical labels—which, as numerous commentators point out, helps create and reinforce an inferior second-class of citizens–is emblematic of the benign prejudice individuals with mental illnesses face, and which are, we conclude, repugnant to our state constitution."[33] Unfortunately, this in no way reflects the standard judicial "take" on these issues.[34]

THE ORIGINS OF MADNESS 31, 144 (1975) (addressing the stereotype of persons with mental illness as evil).

31. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 462–63 (1985).

32. *See* PERLIN, JURISPRUDENCE, *supra* note 13, at 391–92 (discussing non-sanist opinions). Decisions such as *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978), *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), and *Rivers v. Katz*, 504 N.Y.S.2d 74 (1986), all implicitly acknowledge the virulence of sanist thinking and actions. For less well-known lower court opinions that focus on sanism issues, see PERLIN, HIDDEN PREJUDICE, *supra* note 3, at 307–08 (discussing Waters v. Thomas, 46 F.3d 1506, 1535 (11th Cir. 1995) (Clark, J., concurring & dissenting in part); United States v. Denny-Shaffer, 2 F.3d 999, 1009, 1021 n.30 (10th Cir. 1993); State v. Wilson, 700 A.2d 633, 649 (Conn. 1997) (Katz, J., concurring); and State Farm Fire & Cas. Co. v. Wicka, 474 N.W.2d 324, 327 (Minn. 1991)).

For recent scholarship, *see, e.g.*, Bredemeier, *supra* note 28, at 730; Justine A. Dunlap, *Mental Health Advance Directives: Having One's Say*, 89 KY. L.J. 327, 353 (2000–01); Eric S. Janus, Hendricks *and the Moral Terrain of Police Power Civil Commitment*, 4 PSYCHOL., PUB. POL'Y & L. 297, 321 (1998); Carolee Lezuch, *The Americans with Disabilities Act: Redefining "Major Life Activity" to Protect the Mentally Disabled*, 44 WAYNE L. REV. 1839, 1861 n.130 (1999); Grant H. Morris, *Defining Dangerousness: Risking a Dangerous Definition*, 10 J. CONTEMP. LEGAL ISSUES 61, 98 (1999); Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1244 (2000); Elisa Swanson, *"Killers Start Sad and Crazy": Mental Illness and the Betrayal of Kipland Kinkel*, 79 OR. L. REV. 1081, 1103–10 (2001); Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 41 (1999).

33. In re Mental Health of K.G.F., 29 P.3d 485 (Mont. 2001) (footnotes omitted).

34. *See* Perlin, *Sanism*, *supra* note 4, at 400–01 (footnotes omitted) stating:

In 1990, Congress passed the Americans with Disabilities Act (ADA),[35] and it *appeared* that, for the first time, there was some consensus acknowledgment of the damage inflicted by generations of mechanical adherence to mindless stereotypes.[36] In 1999, the Supreme Court decided *Olmstead v. L.C.*,[37] affirming an Eleventh Circuit decision. The Eleventh Circuit had ruled that the ADA entitled plaintiffs—residents of Georgia State Hospital—to treatment in an "integrated community setting" as opposed to an "unnecessarily segregated" state hospital. This Article considers the ADA and *Olmstead* in an effort to determine the extent to which this Act and this decision have changed or are likely to change prevailing sanist norms.

Twice in the past I have turned to Bob Dylan's brilliant masterpiece, *Idiot Wind*,[38] for lyrics to use in article titles dealing with the insanity defense.[39] The searing metaphors and savage language of that song "fit" perfectly with that topic.

In *Idiot Wind*, Dylan sings, "What's good is bad, what's bad is good, you'll find out when you reach the top, You're on the bottom."[40] This leads into the question posed in this Article. The decision in *Olmstead* appears to have "reached the top" in the context of institutional mental disability law. But did it really? Has *Olmstead*, so far, really made a difference?[41] Or, are persons institutionalized because of mental disability, still "on the bottom?"

> [J]udges reflect and project the conventional morality of the community. Like the rest of society, judges take refuge in flawed "ordinary common sense," heuristic reasoning and biased stereotypes to justify their sanist decisions. . . . [J]udicial decisions in all areas of mental disability law continue to reflect and perpetuate sanist stereotypes. The myths are cherished by trial judges, appellate judges, Supreme Court justices, and, especially, by the Chief Justice of the United States.

35. 42 U.S.C. §§ 12101 (1994). *See* Perlin, *Maggie's Farm*, *supra* note 21, at 57–58 (stating that "the ADA provides basically the same bundle of protections for persons with disabilities as the Civil Rights Acts of the 1960s did for citizens of color with clear, strong, and enforceable standards").

36. *See* Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?* 8 J.L. & HEALTH 15, 22 (1993–94) [hereinafter Perlin, *Sanist Attitudes*].

37. 527 U.S. 581 (1999).

38. BOB DYLAN, LYRICS 1962–1985 367 (1985).

39. Michael L. Perlin, *"Big Ideas, Images and Distorted Facts": The Insanity Defense, Genetics, and the "Political World,"* in GENETICS AND CRIMINALITY: THE POTENTIAL MISUSE OF SCIENTIFIC INFORMATION IN COURT 37 (Jeffrey R. Botkin et al. eds., 1999); Perlin, *Borderline*, *supra* note 13.

40. DYLAN, *supra* note 38, at 367.

41. This discussion sidesteps entirely the Eleventh Amendment issues resolved in *University of Alabama v. Garrett*, 531 U.S. 356 (2001) (holding that states have Eleventh Amendment sovereign immunity in Title I ADA cases brought by state workers).

The three Parts of this Article begin to answer these questions. Part I briefly examines the state of mental disability law before the ADA's passage and comments on the relative lack of success in cases litigated in its wake. Part II considers the *Olmstead* decision and its relative impact (or lack thereof) in the larger world of the ADA. Part III considers the possible impact of *Olmstead* on sanist attitudes displayed within the legal system. This Part suggests that *Olmstead*, for all its revolutionary potential, has still raised more questions than it has answered.

I. THE ADA

The ADA's legislative history—as it applied to persons with mental disability—focused specifically on questions of stereotyping and "reflect[ed] Congressional awareness of the pernicious danger of stereotyping behavior."[42] The legislative history relied heavily on the language in *School Board of Nassau County v. Arline*[43] that "society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that follow from the actual impairment."[44] Congress' inclusion in the definition of disability an individual who is regarded as being impaired[45] "acknowledges this teaching about the power of myths."[46]

The ADA's passage was enough to excite and inspire those working in mental disability law, but that enthusiasm was tempered by concern that the ADA might be powerless to affect sanist attitudes. As I wrote soon after the ADA was passed, "if the ADA is to make any *true* headway in restructuring the way that citizens with mental disabilities are dealt with by society . . . , it must provide a means by which to deal frontally with . . . sanist attitudes."[47] Moreover, "unless advocates turn their attention to these attitudinal questions, the ADA may—in 'real life'—turn out to be little more than the last in a long (and depressing) series of 'paper victories' for mentally ill individuals."[48]

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42. Michael L. Perlin, *"Make Promises by the Hour": Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947, 968 (1997) [hereinafter Perlin, *Make Promises*].

43. 480 U.S. 273 (1987).

44. *Id.* at 284.

45. 42 U.S.C. § 12102(2)(c) (1994) (stating the "term 'disability' means, with respect to an individual—being regarded as having such an impairment").

46. Perlin, *Make Promises*, *supra* note 42, at 968.

47. Perlin, *Sanist Attitudes*, *supra* note 36, at 22.

48. *Id.* at 22–23. *See infra* text accompanying note 109.

There was also concern that the Supreme Court would see the ADA as little more than another in a series of "mom and apple pie" statutes with little substance or enforcement power:

> Will courts say, "No, Congress really didn't mean what it said"? Will they say, "Well, Congress may have meant it, but only in an aspirational way, and there's really nothing for us here"? Or will they say, "Yes, Congress said it, Congress *meant* it, and, dammit, we're gonna enforce it"?[49]

Early court decisions were spotty. A handful of courts applied the ADA boldly to cases involving municipal budget cuts that eliminated community recreational programs solely for persons with disabilities,[50] and to state laws that required state hospital residents to contribute to the costs of assigned counsel.[51] The most important case in this small universe, *Helen L. v. DiDario*,[52] held that a state welfare department regulation requiring certain patients to receive services in the segregated setting of a nursing home, rather than in their own homes, violated the ADA.[53]

Helen L. is significant for several reasons. First, the Third Circuit read the Act's antidiscrimination language expansively,[54] citing congressional findings that "[h]istorically, society has tended to isolate and segregate individuals with disabilities . . . [and that] such forms of discrimination . . . continue to be a serious and pervasive social problem."[55] Furthermore, it found that "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."[56] The court read the ADA to intend to ensure that "qualified individuals receive services in a manner

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49. Perlin, *Make Promises*, *supra* note 42, at 955.

50. *See, e.g.*, Concerned Parents to Save Dreher Park Ctr. v. City of W. Palm Beach, 846 F. Supp. 986 (S.D. Fla. 1994).

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

52. 46 F.3d 325 (3d Cir. 1995), *cert. denied*, 516 U.S. 813 (1995). *Maggie's Farm*, *supra* note 21, at 66–67, discusses the significance of *Helen L.* *See generally* Andrew Batavia, *A Right to Personal Assistance Services: "Most Integrated Setting Appropriate" Requirements and Independent Living Model of Long Term Care*, 27 AM. J. L. & MED. 17, 32 (2001); Loretta Williams, *Long Term Care After* Olmstead v. L.C.*: Will the Potential of the ADA's Integration Mandate Be Achieved?*, 17 J. CONTEMP. HEALTH L. & POL'Y 205, 218–22 (2000); Sandra Yue, *A Return to Institutionalization Despite* Olmstead v. L.C.*? The Inadequacy of Medicaid Provider Reimbursement in Minnesota and the Failure to Deliver Home- and Community-Based Waiver Services*, 19 LAW & INEQ. 307, 316 (2001).

53. *See* 46 F.3d at 327.

54. *Id.* at 335.

55. *Id.* at 332 (quoting 42 U.S.C. § 12101(a)(2) (1994)).

56. *Id.* (citing 42 U.S.C. § 12101(a)(8)).

consistent with basic human dignity rather than a manner which shunts them aside, hides, and ignores them." The court further declared that it would "not eviscerate the ADA by conditioning its protections upon a finding of intentional or overt 'discrimination,'"[57] focusing specifically on Congress' finding that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization."[58]

Unfortunately, *Helen L.* aside, the picture, for the most part, was bleak for persons with disabilities. A study by Professor Ruth Colker revealed that in ADA employment cases, for example, employers prevailed in 93% of district court cases and in 84% of court of appeals cases.[59] The ADA has *not* yet been a panacea for all problems faced by persons with disabilities.[60]

II. *OLMSTEAD*

Then the Supreme Court decided *Olmstead v. L.C.*[61] In her majority opinion, Justice Ruth Bader Ginsburg stressed that "[u]njustified isolation . . . is properly regarded as discrimination based on disability"[62] and that "undue institutionalization qualifies as discrimination 'by reason of . . . disability.'"[63]

How important a decision is *Olmstead*? Soon after it was issued, I wrote that *Olmstead* was potentially "the most important civil mental disability law case since the Supreme Court decided *Youngberg v. Romeo*[64] in 1982 . . . . [If] taken seriously, it may change the debate

57. *Id.* at 335.

58. *Id.* at 336.

59. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.- C.L. L. REV. 99, 99–100 (1999); see also, Kathryn Moss et al., *Outcomes of Employment Discrimination Charges Filed Under the Americans with Disabilities Act*, 50 PSYCHIATRIC SERV. 1028 (1999) (stating that 15.7% of EEOC filings brought "some kind of benefit" to individual alleging ADA discrimination). *See generally* SUSAN STEFAN, UNEQUAL RIGHTS (2001); Susan Stefan, *The Americans with Disabilities Act and Mental Health Law*, 10 J. CONTEMP. LEGAL ISSUES 131 (1999); 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 (1998) [hereinafter Stefan, *Worker Stress*].

60. *See, e.g.*, Stefan, *Worker Stress*, *supra* note 59.

61. Olmstead v. L.C. Zimring, 527 U.S. 581 (1999).

62. *Id.* at 597.

63. *Id.* at 597–98. *See also* PERLIN, HIDDEN PREJUDICE, *supra* note 3, at 175–204 (discussing *Olmstead*).

64. 457 U.S. 307 (1982) (finding a limited constitutional right to training for certain persons institutionalized by reason of mental retardation). *See* 2 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL §§ 3A-9 to 3A-9.9, at 87–108 (2d ed. 1999) [hereinafter PERLIN, DISABILITY LAW).

on [mental health issues], . . . and perhaps most importantly, on how we feel about persons with [mental] disabilities."[65]

Will *Olmstead* resuscitate and revitalize the constitutionally-grounded "least restrictive alternative" (LRA) principle in mental disability law?[66] Was it a harbinger of a sea change on the part of the Supreme Court, or an anomalous decision that simply cannot be harmonized with the rest of this area of law? Certainly, the other cases decided by the Supreme Court on the same day as *Olmstead*, frequently known as "the *Sutton* trilogy,"[67] were seen as defeats by ADA supporters. The decisions were hailed by those unsympathetic to the ADA.[68] Was *Olmstead* "different" because it dealt with questions of institutionalized mental patients, thus not touching on the employment issues at the heart of *Sutton*, *Albertson's*, and *Murphy*? Or did *Olmstead*'s difference make it somehow irrelevant? Would these cases make a difference in how the public *felt* about all these issues? There can be no dispute that the ADA has spawned an astonishing number of published cases.[69] Sheer numbers, however, say little about attitudes and ultimate impacts.

A. Olmstead's *Impact?*

Will the explosion of ADA litigation ultimately have a substantive and lasting impact on many of the most important questions of mental disability law? Will *Olmstead* actually provide the first important leverage in nearly a quarter of a century to bring about important changes in how we construct mental disability and how

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65. Perlin, *Maggie's Farm*, *supra* note 21, at 56.

66. *See* Michael L. Perlin, *"Their Promises of Paradise": Will* Olmstead v. L.C. *Resuscitate the Constitutional "Least Restrictive Alternative" Principle in Mental Disability Law?* 37 HOUS. L. REV. 99 (2000) [hereinafter Perlin, *Promises of Paradise*].

67. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Serv., 527 U.S. 516 (1999); Sutton v. United Air Lines, 527 U.S. 471 (1999).

68. *See, e.g.*, Susan Norton, *Resolved by Supreme Court*, 51 MANAGE, May 1, 2000, at 1 *available at* 2000 WL 28951549 (stating that "to the collective relief of employers everywhere, the Supreme Court [decided *Sutton* and *Murphy*]").

69. On a purely personal anecdote, I wrote the first edition of a three volume mental disability law treatise in 1989. I have just submitted the manuscripts to volumes four and five of a five-volume second edition. MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL (1989); *id.*, (2d ed. 1998–2000). Each summer and fall, I write a new pocket part and supplement. I prepare to do this work by, first, dragging from my basement to my home office a group of packing boxes that contain all the mental disability law cases (and relevant law review articles) published in the prior year. This year, there were twenty-eight boxes. And eighteen of these twenty-eight boxes—when they were finally sorted—were filled with cases involving the ADA.

we treat persons with mental disability? It is possible that *Olmstead* will give us an important, new, and revolutionary tool with which to fight sanism.[70] Of course, on the other hand, it may not. Mental disability law is strewn with examples of "paper victories,"[71] bold pronouncements from the Supreme Court that fall are ignored at the trial court level. By way of example, I am not sure what is more astonishing: the fact that, 1) thirteen years after the Supreme Court decided *Jackson v. Indiana*,[72] one-half of the states had not implemented *Jackson*,[73] or, 2) in the decade following the revelation, the matter remained status quo,[74] or, 3) according to Westlaw, other than the three professors who conducted this research, I am the only law professor who has ever written about this.[75]

Will it be this way with *Olmstead* and the ADA? Or will there be some sort of a perceptible, measurable shift in attitudes so that the promises of the ADA—"promises of paradise"[76]—become a reality?

Several years before *Olmstead*, I turned to a Dylan love ballad *Love Minus Zero/No Limit*,[77] for the lyric "make promises by the hour" in an effort to describe one of the then-unresolved dilemmas of the ADA.[78] Would the Supreme Court take the ADA seriously, or would the Court respond, as it had in the first *Pennhurst State School & Hospital*[79] decision by eviscerating the Developmental Disabilities Bill of Rights Act,[80] by delivering nothing? *Olmstead* answered that

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70. *See* Perlin, *Maggie's Farm*, *supra* note 21, at 56 (stating that "*Olmstead potentially* has the capacity to transform and revolutionize mental health law" (emphasis in original)).

71. *Id.* at 22 (quoting Michael Lottman, *Paper Victories and Hard Realities*, *in* PAPER VICTORIES AND HARD REALITIES: THE IMPLEMENTATION OF THE LEGAL AND CONSTITUTIONAL RIGHTS OF THE MENTALLY DISABLED 93 (Valerie J. Bradley & Gary J. Clarke eds., 1976)). Lottman's article was one of the first published uses of this phrase in a mental disability law context. *See, e.g.*, Perlin, *Promises of Paradise*, *supra* note 66, at 1049; Perlin & Dorfman, *Dodging Lions*, *supra* note 10, at 116; Paul Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475, 2499 (1999).

72. 406 U.S. 715 (1972) (holding that indefinite long-term commitment of persons unlikely to regain their competence to stand trial in the foreseeable future is unconstitutional). *See generally* PERLIN, DISABILITY LAW, *supra* note 64, § 2A-4.4, at 122–24 (2d ed. 1998) (explaining the *Jackson* decision).

73. Perlin, *Half-Wracked*, *supra* note 6, at 23–24 (discussing and citing research presented in Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 940 (1985)).

74. *See id.* at 24–25 (discussing and citing research presented in Grant H. Morris & J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. DAVIS L. REV. 1 (1993)).

75. *See id.* at 24.

76. *See* Perlin, *Promises of Paradise*, *supra* note 66.

77. *Id.* at 167.

78. Perlin, *Make Promises*, *supra* note 42 at 958.

79. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981)

80. *Id.* at 30 (stating that the Developmental Disabilities Bill of Rights Act was merely a federal/state grant program and that neither the right to treatment nor the least restrictive

question,[81] but, as I see now, that was only the first important question to be confronted.

The second, and perhaps arguably more important, question is this: Has *Olmstead*, so far, really made the difference that many of us hoped, predicted, and expected? What impact, if any, will *Olmstead* have on *attitudes*?[82] Will it begin to remediate decades (centuries? millennia?) of sanism? Will it augur in a new regime in which issues of stigma, exclusion, and segregation are finally taken seriously? Or, after the post-*Olmstead* dust settles, will the ADA remain little more than *Idiot Wind*, "blowing through the dust upon our shelves?"[83]

B. The ADA's Evolution

When enacting the ADA, Congress appeared to treat mental disability issues as a poor stepchild to matters dealing with physical disability.[84] There was little legislative debate, and what there was suggested a fairly wide gap between Congress' concerns in writing the legislation, and the extent of discrimination faced by persons with mental disabilities.[85]

To what extent could the ADA undo sanist attitudes?[86] Were courts willing to take seriously the remarkably strong language used by Congress in a series of fact findings that seemed to elevate ADA inquiries into questions of equal protection law?[87] Was the ADA

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alternative sections of the bill of rights were enforceable in private action). *See also* Perlin, *Make Promises*, *supra* note 42, at 953, 958–59, 981.

81. *See Olmstead*, 527 U.S. at 583 (stating that "the ADA stepped up earlier efforts in the Developmentally Disabled Assistance and Bill of Rights Act and the Rehabilitation Act of 1973 to secure opportunities for people with developmental disabilities to enjoy the benefits of community living").

82. *See generally* Perlin, *Maggie's Farm*, *supra* note 21 (asking this question about the ADA in general).

83. DYLAN, *supra* note 38, at 368.

84. Perlin, *Sanist Attitudes*, *supra* note 36, at 24–26.

85. *Id.* Most of the debate as to mental disabilities centered on the question of whether certain sexual disorders—e.g., transvestism, transsexualism, and other "gender identity disorders" would be covered. 42 U.S.C. § 12211(b)(1) (1994); *see also* Perlin, *Sanist Attitudes*, *supra* note 36, at 25 n.53.

86. *See* Perlin, *Sanist Attitudes*, *supra* note 36, at 22 (stating that "if the ADA is to make any *true* headway in restructuring the way that citizens with mental disabilities are dealt with by society (by employers, public agencies, and proprietors of places of public accommodations) it must provide a means by which to deal frontally with these sanist attitudes.")

87. Perlin, *Make Promises*, *supra* note 42, at 947–49. *But see* University of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (noting that discrimination in *employment* is reviewed under the rational basis test for Equal Protection clause purposes in ADA cases).

merely hortatory?[88] Was it an example of what Justice Harlan had described in *Rosado v. Wyman*[89] ("Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that, though falling short of legislating its goals, serve as a nudge in the preferred directions"),[90] or was the Court going to give it true substance and true life?

In the pre-*Olmstead* years, things were happening in the courts and on the streets. First, mentally disabled plaintiffs fared poorly in individual employment discrimination cases.[91] Second, similarly-disabled individuals did surprisingly well, comparatively speaking, in institutionally-based litigation.[92] Third, the public debate on the ADA was limited by the grumbling op-ed critique that it is "preposterous" to argue that discrimination against persons with disabilities is equivalent to discrimination based on race,[93] or that persons with disabilities should simply be "thankful" that many facilities *are* accessible to them.[94] The language in these columns is almost identical to the language found in newspapers in the late nineteenth century, when editorial writers grumbled about how "parasites" received undeserved governmental largesse in the form of Civil War pensions.[95]

Although the ADA discourse is occasionally tempered by a heart-warming story about how the law made a true difference by empowering individuals with serious disabilities,[96] negative press

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88. Perlin, *Make Promises*, *supra* note 42, at 955–56.

89. 397 U.S. 397, 413 (1970).

90. *Id.* at 412.

91. *See* Moss, *supra* note 59, at 1028; Stefan, *Worker Stress*, *supra* note 59, at 802.

92. *See* PERLIN, DISABILITY LAW, *supra* note 64, § 5A-2.4, at 195–96 nn.226–27 (citing cases).

93. Paul Clark, *ADA and Its Discontents: Court to Rule on Lawsuits Against States*, WASH. TIMES, Oct. 11, 2000, at A19.

94. Ed Miedema, *Enforcing the ADA Can Sometimes Go Too Far*, FT. LAUDERDALE SUN-SENTINEL, Sept. 19, 2000, at 20A.

95. *See, e.g.*, Peter David Blanck, *Civil War Pensions, Civil Rights, and the ADA: Empirical Studies (1869–1907, 1990–2000)*, 62 OHIO ST. L.J. 109 (2001); Peter David Blanck & Michael Millender, *Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America*, 52 ALA. L. REV. 1 (2000).

96. *See* Laura C. Scotellaro, Note, *The Mandated Move From Institutions to Community Care:* Olmstead v. L.C., 31 LOY. U. CHI. L.J. 737, 737 (2000) (footnotes omitted):

> Larry McAfee, a twenty-nine year old civil engineer, became a quadriplegic as a result of a motorcycle accident. During the four years following his accident, he was transferred from institution to institution like a "sack of potatoes." The state in which he lived refused to pay for community-based living services for him and only paid for the cost of nursing home care even though he was not ill and did not require any institutional care. In the nursing home, he was told when to eat, when to sleep, and even when he could watch movies on television. Because of these restrictions on his life, he requested the right to be removed from his life-sustaining respirator. Immediately after

anecdotes far outweigh the positive ones. Certainly, the media-friendly Casey Martin saga has drawn more attention than all other individual ADA cases combined.[97] Fourth, the Supreme Court sent out what could charitably be called a mixed message in its 1999 decisions. The *Sutton* trilogy[98] sharply limited the ADA in employment cases, while *Olmstead* surprisingly broadened it.[99] But, after all of this, the issue of sanism remains off the radar screen of most public debate.

When I discuss the ADA with friends and with other lawyers, a universe that presents prototypically liberal "takes" on a variety of social issues (race discrimination, homophobia, misogyny, etc.), two issues emerge. First, virtually every person has a horror story about how "unreasonable" ADA demands caused clients to go out of business, prevented other clients from opening new offices, etc. These criticisms mostly concern ramps and other matters involving physical accessibility. None of these stories, on the surface at least, appear to have anything to do with mental disability law. Second, not a single person accepts—on *any* level—the argument that discrimination against persons based on disability is *like* discrimination based on race, religion, or sexual preference. Even friends who have "outed" themselves and have told of their experiences in psychiatric hospitals, or who have movingly shared the impact of major depression or bipolar illness on their own lives and/or on the lives of loved ones, refuse to take seriously my arguments that disability-based discrimination is as pernicious, as harmful and as morally corrupt as other types of discrimination.

Mr. McAfee was placed in a community-based setting, however, he changed his mind about suicide.

For negative examples, see *supra* notes 93–94.

97. *See* Martin v. PGA Tour, 204 F.3d 994 (9th Cir. 2000), *aff'd*, 532 U.S. 661 (2001) (holding that allowing golfer with disability to use a golf cart, despite the walking requirement that applied to the association's tours, was not a modification that would "fundamentally alter the nature" of those competitions and was required by Title III of the ADA).

98. *See* Perlin, *Promises of Paradise*, *supra* note 66, at 1029–30 n.214 (discussing *Sutton v. United Air Lines*, 527 U.S. 471 (1999), *Albertson's, Inc. v. Kirkinburg*, 527 U.S. 555 (1999), and *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999)); Perlin, *Maggie's Farm*, *supra* note 21, at 58 n.46 (discussing the *Sutton* trilogy).

99. *See* PERLIN, DISABILITY LAW, *supra* note 64, § 5A-2.4b at 219–20 (2d ed. 2000).

III. THE RAVAGES OF SANISM

For the past decade, I have written and continue to write relentlessly about the ravages of sanism.[100] I have also written about the way that stereotypes, prejudices, deindividualized thinking, and the use of cognitive-simplifying heuristics[101] have warped the way we think about mental disability, about persons with mental disability, about persons who provide mental health services to persons with mental disabilities.[102] It is this omnipresence of sanism—and its evil twin, pretextuality[103]—that continues to temper my enthusiasm about the ADA as a civil rights statute and *Olmstead* as an implementing (or, perhaps, *motivating*) decision.

In the immediate aftermath of *Olmstead*, I wrote the article *I Ain't Gonna Work on Maggie's Farm No More.*[104] This article argued that *Olmstead* carried with it the seeds to potentially revolutionize mental disability law just as Dylan's electric (and electrifying) performance at the 1965 Newport Folk Festival of Maggie's Farm, a song about redemption and freedom in the context of another civil rights struggle, revolutionized pop music.[105] A few months later, I wrote another piece, in an equally optimistic tone, arguing that *Olmstead* could potentially cause a restructuring of major aspects of the forensic mental health system, and *Olmstead* could further lead to a major reconceptualization of how and where we conduct incompetency-to-stand-trial and insanity evaluations.[106] A few months later, my post-*Olmstead* glow begin to dim a bit. I wrote an article

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100. *See* PERLIN, HIDDEN PREJUDICE, *supra* note 3, at 21–58; Perlin, *Sanism*, *supra* note 4; *see also*, Perlin, *Maggie's Farm*, *supra* note 21; Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407 (2000); Perlin, *Half-Wracked*, *supra* note 6; 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); Perlin, *Sanist Lives*, *supra* note 15.

101. *See* PERLIN, HIDDEN PREJUDICE, *supra* note 3, at 4–16; Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990).

102. *See* PERLIN, JURISPRUDENCE, *supra* note 13, at 440–44; Perlin, *Half-Wracked*, *supra* note 6, at 30–31.

103. PERLIN, HIDDEN PREJUDICE, *supra* note 3, at 59–75; Perlin, *Success*, *supra* note 7; Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 669–70 (1993); 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 (1991).

104. Perlin, *Maggie's Farm*, *supra* note 21.

105. *Id.* at 53–55.

106. Michael L. Perlin, *"For the Misdemeanor Outlaw": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193 (2000) [hereinafter Perlin, *Outlaw*].

(alluded to previously), *Their Promises of Paradise,*[107] which argued that *Olmstead* may *potentially* revitalize the least restrictive alternative doctrine[108] in mental disability law. But, in all instances, I made clear that none of this would be any more than ephemeral unless we directly confronted the issue of sanist attitudes, which was the topic of my first ADA article in 1993.[109]

There is a disconnect in constitutional and statutory mental disability law that most of us have perhaps missed. There have been no analogous attempts, so far, to answer the question that has bedeviled civil rights activists since the 1950s:

> How to capture "the hearts and minds" of the American public so as to best insure that statutorily and judicially articulated rights are incorporated—freely and willingly—into the day-to-day fabric and psyche of society. Unless advocates turn their attention to these attitudinal questions, the ADA [even after *Olmstead*] may in real life turn out to be little more than the last in a long (and depressing) series of "paper victories" for mentally ill individuals.[110]

A. *The Heart of* Olmstead

1. Isolation as Discrimination—In *Olmstead,* the Supreme Court focused on what it saw as Congressional judgment supporting the finding that "unjustified institutional isolation of persons with disabilities is a form of discrimination."[111] First, the Court considered that institutionalization (as opposed to community-based therapy) perpetuated "unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."[112] Second, the Court concluded that confinement, "severely diminishes

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107. Perlin, *Promises of Paradise, supra* note 66.

108. *See* Lessard v. Schmidt, 349 F. Supp. 1078, 1096 (E.D. Wis. 1972) (subsequent citations omitted). *See generally* PERLIN, DISABILITY LAW, *supra* note 64, §§ 2A-4.4a, 2A-4.4c, at 126–32, 139–42.

109. Perlin, *Maggie's Farm, supra* note 21; *see also* Perlin, *Sanist Attitudes, supra* note 36.

110. Perlin, *Sanist Attitudes, supra* note 36, at 22–23. The "hearts and minds" phrase was first used in Chief Justice Warren's opinion in *Brown v. Bd. of Educ. of Topeka,* 347 U.S. 483, 494 (1954); *cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 445 (1968).

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

112. *Id.*; *see also* Brief of the United States as Amicus Curiae at 17, *Olmstead,* 527 U.S. 581 (No. 98-536).

the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."[113] Yet, if the public rejects the empirical data that drives these arguments, then the relationship between the ADA, mental disabilities, and centuries of prejudice and mistreatment will be missed.

This may be obscure to laypersons. Given the prevalence of mental disability,[114] however, it strikes me that some of this obscurity is the result of willful ignorance.[115] Nevertheless, it cannot be obscure to lawyers with any familiarity with the history of institutional and community rights litigation in this country. The saga of institutional mental disability law in this nation is a saga of mistreatment and of non-treatment. As long ago as 1958, the president of the American Psychiatric Association called the state run psychiatric facilities "bankrupt beyond remedy."[116] The facts of the most important institutional conditions case in history—*Wyatt v. Stickney*[117]—are truly stomach-turning.[118] As the Fifth Circuit noted in its decision, affirming the district court's order: "[One patient] died after a garden hose had been inserted into his rectum for five minutes by a working patient who was cleaning him; one died when a fellow patient hosed him with scalding water; another died when soapy water was forced into his mouth; and a fourth died from a self-administered overdose of drugs which had been inadequately secured."[119] The chairman of the legal action committee of the National Association of Retarded Children characterized the facility at issue before the court in both *Youngberg v. Romeo*[120] and *Pennhurst State School & Hospital v. Halderman* [I and II][121] as "Dachau, without

113. 527 U.S. at 601; *see also* Brief for United States as Amicus Curiae at 6–7, Olmstead v. L.C., 527 U.S. 581 (1999) (No. 98-536).

114. *See* Darrel A. Regier, *One-Month Prevalence of Mental Disorders in the United States*, 45 ARCHIVES GEN. PSYCHIATRY 977, 981 tbl. 4 (1988), *quoted in* W. David Corrick, *Health and Welfare*, 24 PAC. L.J. 885, 905–06 n.15 (1993) (stating that 19.6% of Americans eighteen years old or older suffer from some form of diagnosable mental disability during their lives).

115. *Cf.* United States v. Jewell, 532 F.2d 697, 700 n.7 (9th Cir. 1976), *cert. denied*, 426 U.S. 951 (1976) (stating that "he suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful [sic] blindness").

116. Harry Solomon, *Presidential Address: The American Psychiatric Association in Relation to American Psychiatry*, 115 AM. J. PSYCHIATRY 1, 7 (1958).

117. 344 F. Supp. 373 (D. Ala. 1972).

118. *See* 2 PERLIN, DISABILITY LAW, *supra* note 64, § 3A-3.1, at 24 (2d ed. 1999) (stating that *Wyatt* was "one of the most influential mental disability law cases ever filed").

119. Wyatt v. Aderholt, 503 F.2d 1305, 1311 n.6 (5th Cir. 1974).

120. 457 U.S. 307 (1982) (finding only a limited right to treatment for persons institutionalized because of mental retardation).

121. 451 U.S. 1 (1981) (stating that the Developmental Disabilities Bill of Rights Act (42 U.S.C. § 6010) was merely a federal/state grant program and that neither the right to treat-

ovens."[122] Attempts to establish small group homes for adults with mental retardation continue to meet with "protests, lawsuits, threats, vandalism, beatings, and fire bombings."[123] This is not a cheery tableau.

It is not at all clear how *Olmstead* will be constructed by lawyers, mental health professionals, and the general public (to the extent that a Supreme Court case that does not involve abortion, affirmative action, church-state relations, the death penalty, gay rights, or *Miranda* is *ever* "constructed" by the general public).[124] I think, however, that the Court's language about exclusion and segregation[125] has the potential to be extremely important in that context.

That portion—and perhaps the most critical part of *Olmstead*—makes two novel, interlocking points never made before by the Supreme Court. First, the Court acknowledged that the effect of discrimination against persons with mental disability is like the effect of discrimination against other persons who traditionally fall within the ambit of footnote four of *Carolene Products*:[126]

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ment nor the least restrictive alternative sections of the bill of rights were enforceable in private action); 465 U.S. 89 (1984) (holding that the Eleventh Amendment bars federal relief in a right-to-community service case due to federalism concerns).

122. LEOPOLD LIPPMAN & I. IGNANCY GOLDBERG, THE RIGHT TO EDUCATION: ANATOMY OF THE PENNSYLVANIA CASE AND ITS IMPLICATION FOR EXCEPTIONAL CHILDREN 17 (1973), *quoted in* Perlin, *Marginalization*, *supra* note 11, at 100 n.215.

123. Paul Longmore, *Elizabeth Bouvia, Assisted Suicide, and Social Prejudice*, 3 ISSUES L. & MED. 141, 150 (1987). *See generally* MICHAEL WINERIP, 9 HIGHLAND ROAD (1994) (describing the arduous task of establishing a group home in Glen Cove, New York).

124. *See, e.g.*, Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"*, 66 FORDHAM L. REV. 1699, 1724 n.146 (1998) (hypothesizing similarities between public reaction to abortion and gay rights cases); Earl Martin, *Towards an Evolving Debate on the Decency of Capital Punishment*, 66 GEO. WASH. L. REV. 84, 85 (1997) (discussing death penalty); Steven K. DiLiberto, Note, *Setting Aside Set Asides: The New Standard for Affirmative Action Programs in the Construction Industry*, 42 VILL. L. REV. 2039, 2047, nn.15–16 (1997) (discussing affirmative action and abortion).

125. *See* Olmstead v. L.C. Zimring, 527 U.S. 581, 599–600 (1999).

126. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938). For a discussion on the impact this footnote from *Carolene Products* has had on the development of mental disability law, see PERLIN, DISABILITY LAW, *supra* note 64, § 1-2.1, at 7 (2d ed. 1998), and Perlin, *Sanism*, *supra* note 4, at 381 n.51. I discuss this in the ADA context in Perlin, *Make Promises*, *supra* note 42, at 948–49. Further, *see* Perlin, *Outlaw*, *supra* note 106, at 219–20 (footnotes omitted):

> The language that Congress chose to use in its introductory fact-findings [for the ADA] is of extraordinary importance. 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" is not just precatory flag-and-apple-pie rhetoric. This language–granted "the force of law"—was carefully chosen; it comes from the heralded "footnote 4" of the *United States v. Carolene Products* case, which has served as the springboard for nearly a half century of challenges to state and municipal laws that have operated in discriminatory ways

blacks[127] and women[128] (as signified by the Court in the cases supporting the *Olmstead* language).[129]

This is a major shift on the part of the Supreme Court. This holding in *Olmstead* is extremely important, as it gives life to Congress' findings 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."[130] Also, it emphasizes the legislative history that called for the abolition of "monoliths of isolated care in institutions and segregated educational settings."[131] It explicitly concluded that "integration is fundamental to the purposes of the ADA. Provision[s] of segregated accommodations and services relegate persons with disabilities to second-class citizen status."[132] A recent article focused on the importance of the *Carolene* language:[133] "[T]he statute plainly uses the . . . [phrase 'discrete and insular minority'] as constitutional code words to designate an identifiable group of people who experience a common set of obstacles to participation in public and private life."[134]

To what extent will *Olmstead* remove some of these obstacles? That question remains unanswered.

2. The Extent of Discriminatory Behavior—Second, *Olmstead's* text recognizes that the pernicious impact of discrimination cannot separate institutional isolation from other discriminatory behavior. In its reliance upon the amicus briefs of the American Psychiatric Association and the United States, the Supreme Court integrated the issue of isolation with issues of "family relations, social contacts,

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against other minorities. The language also rejects a congressional commitment to provide "protected class" categorization for persons with disabilities. 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.

127. *See Olmstead*, 527 U.S. at 600 (stating that "there can be no doubt that [stigmatizing injury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action") (quoting Allen v. Wright, 468 U.S. 737, 755 (1984)).

128. *See id.* (stating that " '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 L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) and quoting Sprogis v. United Air Lines, 444 F.2d 1194, 1198 (7th Cir. 1971))).

129. *See* sources cited *supra* note 113.

130. 42 U.S.C. § 12101(a)(7) (1994).

131. *Americans with Disabilities Act: Hearing Before the Senate Comm. On Labor and Human Res.*, 101st Cong. 215 (1989) (statement of former Sen. Weicker).

132. H.R. REP. No. 101-485, pt. 1, at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 479.

133. Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397 (2000).

134. *Id.* at 420.

work options, economic independence, educational advancement, and cultural enrichment."[135] The Court also stressed that institutionalization requires individuals to "relinquish participation in community life [so] they could enjoy given reasonable accommodations."[136] In *Olmstead*, the Supreme Court demonstrated that it "got" one of the most important structures of the ADA. That is, questions of institutionalization and deinstitutionalization are far broader than simply inquiries into whether a patient is "behind the wall" (not for a moment to minimize the seriousness of that inquiry), and that these questions touch on virtually every important aspect of interpersonal interaction.[137]

*B. The Post-*Olmstead *Universe: Two Surprises*

This all leads to a critical series of questions: How have lower courts read *Olmstead*? Have they interpreted it expansively or narrowly? Have they fleshed out some of the ambiguities? Have they paid any particular attention to the language to which I just referred? Have they merely cited the holding as black-letter law, or has the universe of decisions reflected the potentially revolutionary impact of the case? Close examination of these questions leads to two surprises: the lack of case law and the lack of scholarly response to *Olmstead*.

1. Little Case Law—Somewhat surprisingly, there are few significant post-*Olmstead* developments in the case law.[138] Lower federal courts and state courts have cited *Olmstead* for the proposition that "the ADA in fact prohibits segregation of persons with disabilities and requires states to make reasonable efforts to place institutionalized individuals with disabilities into the community"[139] in the "most

135. Olmstead v. L.C., 527 U.S. 581, 601 (1999).

136. *Id.*

137. *See, e.g.*, Pamela Cohen, *Being "Reasonable": Defining and Implementing a Right to Community-Based Care for Older Adults with Mental Disabilities Under the Americans with Disabilities Act*, 24 INT'L J.L. & PSYCHIATRY 235 (2001).

138. *See* Perlin, *Promises of Paradise*, *supra* note 66, at 1053–54; *see also* Jennifer Mathis, *Community Integration of Individuals with Disabilities: An Update on* Olmstead *Litigation*, 25 MENTAL & PHYSICAL DISABILITY L. REP. 158, 158 (2001) (stating that "although the *Olmstead* decision was of tremendous significance to the disability rights community, only a handful of lower court decisions have interpreted its meaning").

139. Rolland v. Cellucci, 191 F.R.D. 3, 9 (D. Mass. 2000).

integrated setting to fit their needs."[140] Lower courts have also quoted the *Olmstead* language that the ADA provides "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[141] At least one circuit has read *Olmstead* extraordinarily narrowly in a case involving in-home safety monitoring for patients in need of personal-care services.[142] But there are, as of yet, no cases that seriously examine the crucial attitudinal questions that are at the core of the *Olmstead* decision. Astonishingly few decisions even cite *Olmstead.*[143]

2. Little Academic Literature—Even more surprising is the dearth of important literature in the law reviews critiquing and deconstructing *Olmstead.*[144] The case is barely mentioned in Professor Bagenstos' important recent article that urges what he characterizes as a "subordination-focused approach" as a means of resolving future ADA cases.[145] Most optimistic of the early commentators has been John Parry, editor of the MENTAL AND PHYSICAL DISABILITY LAW REPORTER. Parry concluded:

> Of all the ADA Supreme Court decisions this term, *Olmstead* is the most significant for several reasons. Fundamentally, it expands the possibilities for persons in state-run mental institutions. Until *Olmstead,* the Court was suspicious of any kind of constitutionally based right to services in the community or least restrictive setting. In the past, the foundation of deinstitutionalization was the absence of dangerousness to self

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140. Kathleen S. v. Dep't of Pub. Welfare, No. Civ A 97-6610, 1999 WL 1257284, at *5 (E.D. Pa. Dec. 23, 1999). *See also* Creasy v. Rusk, 730 N.E.2d 659, 664–65 (Ind. 2000) stating that:

> Since the 1970s, Indiana law has strongly reflected policies to deinstitutionalize people with disabilities and integrate them into the least restrictive environment. National policy changes have led the way for some of Indiana's enactments in that several federal acts either guarantee the civil rights of people with disabilities or condition state aid upon state compliance with desegregation and integrationist practices.

141. Kirbens v. Wyo. State Bd. of Med., 992 P.2d 1056, 1061 (Wyo. 1999).

142. Rodriguez v. City of N.Y., 197 F.3d 611, 618–19 (2d Cir. 1999), *cert. denied,* 531 U.S. 864 (2000).

143. A simple Westlaw search reveals that *Olmstead* was cited twenty-nine times as of October 18, 2000, and forty-five times by September 1, 2001. By contrast, consider what happened in the eighteen months after the Supreme Court decided *Kansas v. Hendricks,* 521 U.S. 346 (1997), upholding that state's sexually violent predator act. *See* Perlin, *Success, supra* note 7 (stating that there were 133 cites to *Hendricks* in the same time period). *See generally* PERLIN, DISABILITY LAW, *supra* note 64, § 2A-3.3, at 75–92 (2d ed. 1998).

144. Text *infra* accompanying notes 144–46 is generally adapted from Perlin, *Outlaw, supra* note 106, at 230–31.

145. Bagenstos, *supra* note 134, at 402.

> or others, not the appropriateness of treatment or essential services in non-institutional settings. . . . The ADA's integration of service mandate, however, presented a new opportunity for advocates to obtain appropriate community-based services from the states, but many states argued that Title II did not obligate them to provide such services. Now that obligation is beyond dispute.[146]

Remarkably, there are only a handful of student notes published about *Olmstead*.[147] One student predicted that, as a result of *Olmstead*, "disabled individuals who have spent many years segregated from society and confined to institutions will finally be placed in community-based settings and will have the opportunity to live independent and productive lives."[148] In addition, a student commentator—writing generally about the relationship between mental disability and tort liability[149]—noted how *Olmstead* brought into "sharp focus . . . the law's clear preference, in the civil rights context, for care in the least restrictive environment."[150] Another student expressed concern that "the Court was unable to arrive at a uniform resolution of the cost issue." He saw this failure "combined with the deference given to the States regarding which individuals are qualified for community-based treatment," as potentially resulting in "fewer mentally disabled individuals receiving proper treatment."[151]

On the other hand, soon after the decision, Professor Paul Appelbaum speculated whether the initial "ecstatic" response of mental disability advocates was premature and concluded:

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146. John Parry, *The Supreme Court Interprets the ADA*, 23 MENTAL & PHYSICAL DISABILITY L. REP. 454, 456 (1999) (citing Youngblood v. Romero, 457 U.S. 307 (1987)).

147. *See* Rosemary L. Bauman, Note, *Disability Law—Needless Institutionalization of Individuals with Mental Disabilities as Discrimination under the ADA*—Olmstead v. L.C., 30 N.M. L. REV. 287 (2000); Shoshana Fishman, Note, Olmstead v. Zimring*: Unnecessary Institutionalization Constitutes Discrimination Under The Americans With Disabilities Act*, 3 J. HEALTH CARE L. & POL'Y 430 (2000); Joanne Karger, Note, *"Don't Tread on The ADA":* Olmstead v. L.C. ex rel. Zimring *and The Future of Community Integration For Individuals With Mental Disabilities*, 40 B.C. L. REV. 1221 (1999); Scotellaro, *supra* note 96.

148. Scotellaro, *supra* note 96, at 782.

149. *See* PERLIN, DISABILITY LAW, *supra* note 64, § 7B-1 *et seq.* (2d ed. 2000); *see also infra* notes 150 and 151.

150. Sarah Light, Note, *Rejecting the Logic of Confinement: Care Relationships and the Mentally Disabled Under Tort Law*, 109 YALE L.J. 381, 391 (1999).

151. Neil S. Butler, Note, *"In the Most Appropriate Setting": The Rights of Mentally Disabled Individuals Under the Americans with Disabilities Act in the Wake of* Olmstead v. L.C., 49 CATH. U. L. REV. 1021, 1052 (2000) (stating that "only Congressional clarification of the broad scope of the ADA's integration mandate will resolve the Court's current cost dilemma and ensure that in future years the full range of treatment options will be available to the mentally disabled").

> [I]t is unclear to what extent the U.S. Supreme Court will support lower courts in compelling states to create community alternatives that do not now exist. No bright line has been identified to separate states that can rely on the fundamental-alteration defense from those that cannot. The reluctance of the courts to trample on executive branch prerogatives has always been the bugaboo of the least restrictive alternative doctrine. Whatever else it may accomplish, the decision in *Olmstead v. L.C.* is unlikely to precipitate the widespread creation of community-based services for persons with mental disabilities.[152]

As of the submission of this Article for publication, that is all there has been.

C. Why the Surprises?

I want to speculate a bit on both of these surprises (the lack of case law and the lack of literature). The first may be a bit easier. Ever since the Supreme Court's 1982 decision in *Youngberg v. Romeo*[153]—establishing a pallid "substantial professional judgment" test as the benchmark for assessing constitutional questions about psychiatric institutionalization[154]—the incidence of institutional law reform litigation has dropped dramatically.[155] The fact that there is

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152. Paul S. Appelbaum, *Least Restrictive Alternative Revisited:* Olmstead's *Uncertain Mandate for Community-Based Care*, 50 PSYCHIATRIC SERV. 1271, 1272 (1999). *Cf.* Note, *Leading Cases: Federal Statutes, Regulations, and Treaties*, 113 HARV. L. REV. 326, 332–33 (1999), stating:

> In *Youngberg*, the Court held that, in assessing the constitutionality of the use of restraints in mental institutions, the decision to use restraints, "if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Although the Court in *Olmstead* avoided citing *Youngberg*, its deference to professional judgment seemed to invoke the spirit of *Youngberg*. In the wake of *Olmstead* and its explicit deference to professional judgment, institutions may simply avoid complying with the ADA by creating cultures in which recommendations for patient community treatment are few and far between.

153. 457 U.S. 307 (1982).

154. *Id.* at 323. *See* PERLIN, DISABILITY LAW, *supra* note 64, § 3A-9.4, at 95–98 (2d ed. 1999).

155. *See, e.g.*, 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, 97–110 (1995) [hereinafter Perlin et al., *Therapeutic Jurisprudence*].

but one reference to *Youngberg* in *Olmstead*[156] is curious, and perhaps reflects this cessation of interest. Perhaps it should not be so surprising that post-*Olmstead* case law has been so scanty. Also, as *Olmstead* was decided just two years ago, it is certainly possible that cases currently in the pipeline have not yet percolated up to the appellate decision level.

The second is more perplexing. When the Supreme Court decides a mental disability law case, we have come to expect a cottage industry of commentary in the law reviews, both by professors and students. By way of contrast, within the first eighteen months of the Supreme Court's decision in *Kansas v. Hendricks*,[157] there were thirty-one law review articles about *Hendricks*.[158] Ironically, there has not been similar interest in the aftermath of the *Olmstead* case.

For years, I have bemoaned the lack of scholarly interest on the part of law professors about mental disability law.[159] Perhaps the lack of *Olmstead* literature reflects this. But also, perhaps, it reflects a deeper and ironic level of sanism that says that the issues before the Court in *Olmstead* just are not "important" or "interesting." And maybe it is this level of pervasive and as-of-yet-non-dislodgeable sanism that also explains the lack of case law. Perhaps lawyers representing potential ADA plaintiffs simply do not believe that the Supreme Court really meant what it said in *Olmstead*.[160] Perhaps lower courts are not convinced that the Supreme Court meant what it said.[161] Perhaps these courts do not "buy" the critical aspects of *Olmstead* that I have discussed about how discrimination against persons with disabilities is *like* discrimination based on race or

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156. See *Olmstead*, 527 U.S. at 605, stating:

> For other individuals, no placement outside the institution may ever be appropriate. See . . . Youngberg v. Romeo, 457 U.S. 307, 327 (1982) (Blackmun, J., concurring) ("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.")

157. 521 U.S. 346, 371 (1997) (upholding Kansas' Sexually Violent Predator Act (Kan. Stat. Ann. § 59-29a01 (1994)).

158. Westlaw search (Oct. 18, 2000).

159. Perlin, *Sanism*, *supra* note 4, at 406. *See also* Perlin et al., *Therapeutic Jurisprudence*, *supra* note 155, at 116. Although *Hendricks* may be classified as a "mental disability law case," its focus on sexual predator law is the reason for the extensive attention paid to it.

160. This eerily tracks the fear I expressed several years ago that the Supreme Court, when confronted with an *Olmstead*-type case, might have said that Congress really did not mean what it said in enacting the ADA. Perlin, *Make Promises*, *supra* note 42, at 955, and accompanying text. Mercifully, I was wrong.

161. *Cf.* Perlin, *Make Promises*, *supra* note 42, at 955 (anticipating a negative reaction by the Supreme Court to an *Olmstead*-like claim).

sex.[162] Nor have they "bought" how the psychological, social, and economic costs of institutionalization are much greater and graver than just (though my use of the word "just" here makes me wince) a loss of physical freedom.[163] Perhaps all of this is simply another indication of the reality that, in the long run, sanist attitudes have really not changed that much.

CONCLUSION

In August 2000, I was asked by this journal's editors to participate in this Symposium. At the time, I still basked in the afterglow of *Olmstead.* When I agreed to participate, I expected that I would write a piece celebrating *Olmstead.* I expected to look at yet another area of mental disability law that might be transformed by *Olmstead*—as I had done for several law school symposiums.[164]

So what tempered my enthusiasm in the intervening months?[165] There have been no vivid, memorable, "negative" cases—the ADA version of John Hinckley shooting Ronald Reagan[166]—that resulted in the type of saturation publicity that would be sure to bring ADA repeal to the forefront of the next Congressional agenda. Perhaps what happened is that I sat down and studied the entire post-*Olmstead* universe, what little there is of it. What is depressing is not so much what was said, but what *wasn't* said.

It is true that very few of the post-*Olmstead* cases are overtly hostile to persons with mental disabilities. Moreover, none of them engage in the "I-can't-believe-he-*said*-that" level of stereotyping about such persons that has been reflected in other areas of mental disability law.[167] That is a good thing. On the other hand, however,

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162. *See supra* text accompanying note 62 (discussing *Olmstead,* 527 U.S. at 597).

163. *See supra* text accompanying note 63 (discussing *Olmstead,* 527 U.S. at 597–98).

164. Thomas Cooley Law School symposium (on the potentially revolutionary potential of *Olmstead*), the University of Alabama symposium (on the relationship between the post-*Olmstead* ADA and forensic incompetency/insanity evaluations and commitments) and the University of Houston symposium (on how the post-*Olmstead* ADA might resuscitate the principle of the "least restrictive alternative" in mental disability law).

165. I did not become that much older, or crankier. I am also studiously avoiding any consideration of the decision in *Garrett,* see *supra* note 41.

166. *See* PERLIN, JURISPRUDENCE, *supra* note 13, at 278–81, 333–48; *see also* Perlin, *Half-Wracked, supra* note 6, at 12. *See generally* PERLIN, DISABILITY LAW, *supra* note 64, § 1-2.3, at 24 (2d ed. 1998) (discussing the impact of the Hinckley acquittal on mental disability law).

167. *See, e.g.,* Perlin, *Sanist Lives, supra* note 15, at 257 n.98 (citing Battalino v. People, 199 P.2d 897, 901 (Colo. 1948) (finding that the defendant was not insane where there was no evidence of a "burst of passion with paleness, wild eyes and trembling"), *quoted in* Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence,* 40 CASE W. RES. L. REV. 599, 727 n.608 (1990)); Perlin, *Right to Sex, supra* note 7, at 538–39 (stating that

very few of the cases are bold. Or visionary. Or reflect the type of quantum leap that we have come to experience, not infrequently, in other areas of mental disability law, both civil and criminal.[168]

The reality is that the post-*Olmstead* universe of cases is pretty pallid and uninspired. My sad conclusion is that, a decade after the passage of the ADA and in spite of *Olmstead*, many sanist attitudes still need to be undone. While *Olmstead* was a first major step, the path is still a long and winding one.

In *Idiot Wind*, Dylan sings, "What's good is bad, what's bad is good, you'll find out when you reach the top, You're on the bottom."[169] I chose this Dylan line to begin the title of this paper very specifically and carefully, because I believe it mirrors, almost perfectly, my frustration over the way the ADA continues to be read in post-*Olmstead* times. Hopefully, what's "good" does not turn out to be "bad," and we are not "on the bottom." Unfortunately, I am just not sure. Because I am not sure, I cannot yet say with confidence that the Americans with Disabilities Act is anything more than "Idiot Wind," . . . "blowing through the flowers on your tomb."[170] I truly hope that subsequent developments answer these questions in a positive way, and that, to conclude from the same song, "in the final end [we win] the wars/After losin' every battle."[171]

"in one parental rights termination case, *In re* McDonald, 201 N.W.2d 447, 450 (Iowa 1972), expert testimony that persons with disabilities cannot show love and affection as well as persons of normal intelligence was relied upon to support termination findings").

168. *See e.g.*, Perlin & Dorfman, *Dodging Lions*, *supra* note 10, at 115 (discussing the shift in the path of the right to refuse treatment litigation after the trial decisions and "since the trial decisions in *Rennie v. Klein* and *Rogers v. Okin* first articulated a limited constitutional right to refuse, a flood of court decision[s] from state and federal courts in practically every jurisdiction in the nation have tinkered with the contours of the right"). The discussion in *Dodging Lions* traces the *Rennie* case (Rennie v. Klein, 476 F. Supp. 1294 (D.N.J. 1979), *stay denied in part, granted in part*, 481 F. Supp. 552 (D.N.J. 1979), *modified and remanded*, 653 F. 2d 836 (3d Cir. 1981) (en banc), *vacated and remanded*, 458 U.S. 1119 (1982)) and the *Rogers* case (Rogers v. Okin, 478 F. Supp. 1342 (D. Mass. 1979), *modified*, 634 F. 2d 650 (1st Cir. 1980) (en banc), *vacated sub nom* Mills v. Rogers, 457 U.S. 291 (1982)).

169. DYLAN, *supra* note 38, at 367.

170. *Id.*

171. *Id.*