# WILLOWBROOK: PRECEDENT OR PROMISE? MODIFICATION OF CONSENT DECREES FOLLOWING THE SECOND CIRCUIT'S 1983 DECISION IN *NYSARC V. CAREY*

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## INTRODUCTION AND HISTORY[1]

In the mid-1800s, the first "schools" for persons with intellectual disabilities were established out of a sense of conscience-driven reform.[2] Before long, however, most such places became custodial warehouses, and often the very professionals in charge essentially gave up.[3] The Great Depression is said to have caused many additional families to place their intellectually disabled relatives in such institutions,[4] even as the states that ran them slashed staffing and budgets.[5] In 1935, the New Deal—the first great legislative social reform law of the twentieth century—made no provision whatsoever for people with mental disabilities.[6]

The early 1960s gave birth to a very significant program of institution-*building* in the State of New York, established and paid for with bonded public debt.[7] By 1965, almost 200,000 people nationwide were in public institutions for the "care" of persons with intellectual and other developmental disabilities (I/DD).[8] In 1966, Burton Blatt of Syracuse University published "Christmas in Purgatory: A Photographic Essay on Mental Retardation," which depicted the holidays as the author and his

[1] The authors would like to acknowledge that this compilation of historical information was, in part, based on information contained within the following book: DAVID J. ROTHMAN & SHEILA M. ROTHMAN, THE WILLOWBROOK WARS (1984).

[2] *The Museum of disABILITY History*, DISABILITY HIST. WK., http://disabilityhistoryweek.org/timelines/?page=2 (last visited Mar. 12, 2013) (establishing one of the first schools of its kind, the "Massachusetts School for Idiotic Children and Youth," in 1848); Tammy Reynolds et al., *Reducing the Stigma of Intellectual Disabilities*, R.I. STUDENT ASSISTANCE SERVICES, http://www.risas.org/poc/view_doc.php?type= doc&id=10357 (last visited Mar. 12, 2013).

[3] *Perspectives on the Historical Treatment of People with Disabilities: Appendix 14C*, *in* TEACHING FOR DIVERSITY AND SOCIAL JUSTICE 421, 422 (Maurianne Adams et al. eds., 2d ed. 2007), http://instructional1.calstatela.edu/dfrankl/CURR/kin385/PDF/History-of-Treatment-of-the-Disabled.pdf.

[4] *See Overview of Mental Health in New York and the Nation*, NEW YORK ST. ARCHIVES, http://www.archives.nysed.gov/a/research/res_topics_health_mh_timeline.shtml (last visited Mar. 12, 2013) (indicating that "extreme overcrowding" was common "as a result of Depression-era financial hardships").

[5] *Id.*

[6] *New Deal Programs & Timeline*, LIVING NEW DEAL, http://livingnewdeal.berkeley.edu/resources/timeline/ (last visited Mar. 12, 2013).

[7] DAVID J. ROTHMAN & SHEILA M. ROTHMAN, THE WILLOWBROOK WARS: BRINGING THE MENTALLY DISABLED INTO THE COMMUNITY 27 (2005) [hereinafter THE WILLOWBROOK WARS].

[8] DAVID BRADDOCK ET AL., THE STATE OF THE STATES IN DEVELOPMENTAL DISABILITIES 2011, at 17 (2011).

cameraman saw them in 1965.[9]

Back in 1938, the New York State legislature authorized the construction of Willowbrook as an institution to serve the "mentally retarded," but when it was completed in 1941 the United States was at war, and the facility became known as Halloran General Hospital.[10] After World War II, the Veterans Administration took over.[11] From 1947 through 1951, the wards slowly emptied of returning veterans, and in 1951 Willowbrook finally became an institution for care of persons with I/DD.[12]

Within four years, 3,600 residents were in a place with an official capacity of 2,950.[13] By 1963, 6,000 people were jammed into a facility with an official capacity of 4,275.[14] In 1964, the Chair of the Senate Mental Hygiene Committee, William Conklin, toured the facility and publicly reported deplorable conditions.[15] In 1965, there were several violent deaths at Willowbrook, a grand jury investigation, and finally an unannounced tour by Senator Robert F. Kennedy, which led to a televised condemnation of Willowbrook before Congress.[16]

And yet nothing really changed.[17] Until 1971, in the midst of yet another New York State Budget crisis, staffing at Willowbrook was reduced by 22%, leaving 912 fewer staff to care for more than 6,000 residents,[18] which was more than 65% over capacity.[19] Most likely as a result, more than 1,300 incidents of injury, fighting, or assault were reported over the course of just eight months during 1972.[20] Despite these conditions, insofar as the authors can ascertain, at no time during the eventual

[9] *See* BURTON BLATT & FRED KAPLAN, CHRISTMAS IN PURGATORY at v–vi (1966).
[10] THE WILLOWBROOK WARS, *supra* note 7, at 23.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*; *The ADA Legacy Project*, MINNESOTA GOVERNOR'S COUNCIL ON DEVELOPMENTAL DISABILITIES, http://www.mncdd.org/index.html (follow "Parallels In Time" hyperlink; then follow "V. The Reawakening 1950–1980" hyperlink; then follow "B. 1950–1970 Improve the Institutions" hyperlink; then follow "Next Page" hyperlink three times; then follow "Video: Senator Robert Kennedy visiting institutions ('snake pits') in New York" hyperlink) (last visited Mar. 12, 2013).
[17] THE WILLOWBROOK WARS, *supra* note 7, at 27.
[18] *Id.* at 23, 33.
[19] *Civil Rights: Law and History,* FINDLAW, http://civilrights.findlaw.com/civil-rights-overview/civil-rights-law-and-history.html (last visited Mar. 12, 2013).
[20] *Id.*

litigation, which was not commenced until 1972, did the federal government move to decertify Willowbrook as an Intermediate Care Facility for the Mentally Retarded, which entitled it to be paid Medicaid reimbursement for every day of "care" to every resident.[21]

The Willowbrook litigation, commenced in 1972, was part of a wave of federal litigations brought to address shameful conditions and wholly inadequate treatment in state-run mental hygiene institutions all across the country.[22] Many would urge that the 1965 speech on the U.S. Senate floor by Senator Robert Kennedy, in which he referred to Willowbrook as a "snake pit,"[23] was one of the galvanizing events leading to litigation, albeit seven years later.[24] But even more directly, the January, 1972 Geraldo Rivera 20/20 broadcast from within the institution itself entitled "Willowbrook: The Last Great Disgrace," made it impossible for Courts, elected officials, or the general public to turn away from what was graphically and shockingly depicted.[25] This "tour" was arranged by a Willowbrook staff physician, Dr. Michael Wilkins, who had been rewarded for his activism with termination from New York State Service.[26] Many years later, Dr. Wilkins called

[21] N.Y. State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 752 (E.D.N.Y. 1973); *see* THE WILLOWBROOK WARS, *supra* note 7, at 39, 97.

[22] *See generally* N.Y. State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 958 (2d Cir. 1983) (relating to a class action brought on behalf of a group of mentally retarded persons residing at Willowbrook State School for the Mentally Retarded); Lelsz v. Kavanagh, 98 F.R.D. 11, 12 (E.D. Tex. 1982) (relating to a class action suit challenging conditions at Texas institutions); Garrity v. Gallen, 522 F. Supp. 171, 175 (D. N.H. 1981) (relating to a class action brought by residents of the only institution for the provision of services for the "mentally retarded" in the State of New Hampshire, Laconia State School & Training Center); Ky. Ass'n for Retarded Citizens v. Conn, 510 F. Supp. 1233, 1234 (W.D. Ky. 1980) (relating to a class action based on conditions at Outwood residential treatment center); Halderman v. Pennhurst State Sch. & Hosp., 446 F. Supp. 1295, 1298 (E.D. Pa. 1978) (relating to a class action brought by residents and former residents of Pennhurst Center who are mentally retarded persons); Welsch v. Likins, 373 F. Supp. 487, 489 (D. Minn. 1974) (relating to an action brought by six residents of various state-owned institutions challenging the conditions and treatment); Wyatt v. Stickney, 344 F. Supp. 387, 389 (M.D. Ala. 1972) (relating to a class action brought on behalf of residents of a state school).

[23] *See* PAUL J. CASTELLANI, FROM SNAKE PITS TO CASH COWS 117 (2005) (stating that Senator Kennedy "resurrected the term snake pit" to characterize the conditions at Willowbrook).

[24] *Id.* at 133.

[25] *Id.*

[26] Dr. Wilkins revealed during a 2007 interview that although he was fired for what he claimed was activism on his part, he kept a key to the facility, which

the facility a "concentration camp," and "ultimately depressing."[27]

Plaintiffs in the Willowbrook litigation[28] urged that a combination of federal statutes and constitutional provisions created a right to treatment in the least restrictive environment and, for those who remained in institutional care, meaningful developmental and medical services, adequate staffing and clinical services, good food, clean appropriate clothes, some reasonable privacy in intimate areas of care, recreation, and a host of clearly-needed improvements to the daily lives of residents.[29]

However, even in an early decision on plaintiffs' preliminary injunction motion (addressed to institutional staffing and conditions), U.S. District Judge Orrin D. Judd, who had previously been the Solicitor General of New York State, found very little likelihood of success embodied in claims for treatment in the least restrictive environment, based upon federal court precedent.[30] The 1973 staffing ratio standard set by Judge Judd was one staff to nine residents – presumed at least adequate "to protect residents from harm."[31] Measuring that standard against the actual 1971 numbers, staffing then was less than 10% of what was constitutionally required.[32]

Yet sometimes lawsuits succeed, not by citing or making law, but merely by the courage of parents, organizations, and public interest lawyers in bringing compelling facts and circumstances to the fore—a result that several commentators have referred to as "social justice."[33] In any event, it was likely the resulting

he used to let Geraldo Rivera into the facility for investigative purposes. *See* Interview by CSEA with Dr. Michael Wilkins, Staff Physician, Willowbrook St. Sch. (Aug. 19, 2007), *available at* http://library.albany.edu/speccoll/findaids/apap015/WILKINS.pdf.

[27] *Id.*

[28] These plaintiffs included the organization now known as NYSARC, Inc., by whom the authors are currently employed. *See, e.g*; N.Y. State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 956 (2d Cir. 1983); N.Y. State Ass'n for Retarded Children, Inc. v. Carey, 551 F. Supp. 1165, 1166–67 (E.D.N.Y. 1982); N.Y. State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 752 (E.D.N.Y. 1973).

[29] *Carey*, 551 F. Supp. at 1166–67; *see, e.g.*, *Rockefeller*, 357 F. Supp. at 757.

[30] *Rockefeller*, 357 F. Supp. at 764, 768, 769 (holding that plaintiffs were only entitled to a portion of the relief they sought on a motion for preliminary injunction); *see also* THE WILLOWBROOK WARS, *supra* note 7, at 68.

[31] *Rockefeller*, 357 F. Supp. at 768.

[32] *Id.* at 756.

[33] *See* ROTHMAN & ROTHMAN, *supra* note 1, at 2–3, 6 (1984) (describing the efforts to close down the Willowbrook facility and promote social justice).

outrage of the electorate and gubernatorial candidate Hugh Carey (rather than some emerging, unformed federal law on the subject) that led to the swift negotiation of the Willowbrook Consent Decree (Decree), which has been the blueprint of the system of care for people with intellectual and other developmental disabilities for nearly forty years in the State of New York (and elsewhere).[34]

But, as various aspects of the Willowbrook case went forward, all within the context of the very detailed and exacting Decree, other federal courts, and finally the United States Supreme Court, first in *Pennhurst State School & Hospital v. Halderman*, (*Pennhurst I*),[35] next in *Youngberg v. Romeo*,[36] and thereafter in *Pennhurst State School & Hospital v. Halderman*, (*Pennhurst II*),[37] squarely held that the then-existing federal statutes would support neither federal court claims of entitlement to community services nor sweeping institutional reforms.[38]

In *Pennhurst I*, the high court noted that the Developmentally Disabled Assistance and Bill of Rights Act (DD Act)[39] was at least partially an exercise of Congress' authority to legislate and to enforce rights under the Fourteenth Amendment.[40] And yet, without specifically addressing the state's Eleventh Amendment immunities, the Court held the statute would not support a remedy of "least restrictive treatment" environment.[41] Next, in *Youngberg*, the U.S. Supreme Court held that the plaintiff, a "mentally retarded" resident of an institution in Pennsylvania, was only constitutionally entitled to "conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests."[42]

The fairly narrow purposes of this piece are:

1. to examine the apparent lack of impact of the final

[34] *See* Shaila K. Dewan, *Recalling a Victory for the Disabled*, N.Y. TIMES, May 3, 2000, at B5 (stating that "[t]he decree is considered to be one of the most successful social policy changes of its type . . .").

[35] Pennhurst State Sch. & Hosp. v. Halderman (*Pennhurst I*), 451 U.S. 1 (1981).

[36] Youngberg v. Romeo, 457 U.S. 307 (1982).

[37] Pennhurst State Sch. & Hosp. v. Halderman (*Pennhurst II*), 465 U.S. 89 (1984).

[38] *Pennhurst I*, 451 U.S. at 18; *Pennhurst II*, 465 U.S. at 89.

[39] 42 U.S.C. § 6000–6083 (2006).

[40] *Pennhurst I*, 451 U.S. at 15, 31–32.

[41] *Id.* at 18.

[42] Youngberg v. Romeo, 457 U.S. 307, 309, 324 (1982).

Willowbrook decision in the Second Circuit Court of Appeals' 1983 decision to reverse or significantly alter the nationwide impetus towards community-based, integrated services, and the closure of state institutions during the 16 years between 1983 and 1999 when the United States Supreme Court found many of the same federal rights which were the bedrock of the Decree to be embodied in the Americans with Disabilities Act ("ADA"), the DD Act, and related federal statutes and regulations in the *Olmstead* case;[43] and

2. to suggest that significant constitutional and jurisdictional questions might remain open to the federal courts even after *Olmstead*.

## I. CHANGE IN STANDARD FOR MODIFICATION OF CONSENT DECREE

The Second Circuit Court of Appeals set forth a new and important standard for the modification of consent decrees in its 1983 decision, *New York State Ass'n for Retarded Children v. Carey*.[44] This decision followed several years after the initial Decree was entered on April 30, 1975, designed to both depopulate and remediate conditions at the Willowbrook State School.[45] Among its many terms, the Decree entitled the plaintiff class to "the least restrictive and most normal living conditions possible," and required the reduction of the number of residents at Willowbrook from 5,700 to 250.[46] Individuals removed from Willowbrook were also to be relocated to "community placements" limited to a certain bed size.[47] The reduction in resident population was to take place within six years of the date of the consent decree, or by April 30, 1981.[48] The Decree also established the Willowbrook Review Panel, which was designed to oversee and recommend specific remedial actions and audit

[43] Olmstead v. L.C., 527 U.S. 581, 589 (1999).

[44] N.Y. State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 970–71 (2d Cir. 1983).

[45] Brief of Amicus Curiae at i, 1, 27, N.Y. State Ass'n for Retarded Citizens v. Carey 393 F. Supp 715 (E.D.N.Y., Apr. 30, 1975) (Ex. V).

[46] *Carey*, 706 F.2d at 959; Brief of Amicus Curiae at Ex. V, *supra* note 45, at i, 1.

[47] *Carey*, 706 F.2d at 959.

[48] Consent Decree, *supra* note 45, at 27.

compliance with the terms of the Decree.[49]

In 1980, five years after the entry of the Decree, the Second Circuit Court of Appeals refused to order New York's governor to divert and expend funds to continue the operation of the Willowbrook Review Panel.[50] Claims of broad state noncompliance with the Decree were subsequently heard directly by the District Court.[51] The 1983 Second Circuit Court of Appeals decision followed a motion by plaintiffs for the issuance of an order that the defendants had failed to comply with certain provisions of the Decree.[52] The defendants cross-moved to increase the bed-capacity limitation on community placements for class members from "15/10" and "6/3" to an overall fifty bed limitation.[53] United States District Judge John R. Bartels ordered only some *very* limited modifications to the Decree, and an appeal followed.[54]

In reviewing the proof and arguments presented to the district court, the Second Circuit concluded that plaintiffs' position in opposition to increasing the bed-size limitation actually inhibited compliance with another, more basic objective of the Decree: that an overwhelming majority of the Willowbrook class be promptly removed from the facility.[55] The Court noted the practical struggles facing the then-named New York State Office for Mental Retardation and Developmental Disabilities ("OMRDD") in relation to the "tight" housing market in New York City, and how that presented real difficulties in finding placements that met the terms of the (unmodified) Decree.[56] Finally, although there was significant disagreement among the testimony offered, defendants' experts had testified that care quality would not suffer in the larger-sized facilities they proposed.[57]

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[49] *Id.* at 5, 7.

[50] N.Y. State Ass'n for Retarded Children v. Carey, 631 F.2d 162, 163, 165 (2d Cir. 1980).

[51] *Carey*, 706 F.2d at 960.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 965. Further, early in Judge Judd's 1973 decision, he quoted a defendant's expert's simple and telling opinion that Willowbrook State School was "'based on the wrong concept in the wrong place with the wrong plan,'" a place in which, federal precedent notwithstanding, people with disabilities should not remain. N.Y. State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 755 (E.D.N.Y. 1973).

[56] *Carey*, 706 F.2d at 965.

[57] *Id.* at 966.

The Second Circuit ultimately held that the District Court's refusal to modify the bed limitation favored strict compliance with the terms of the decree over "the more comprehensive goal of transferring the population of Willowbrook . . . as quickly as possible."[58] In thoroughly discussing the standard for modification of a consent decree, the Court noted that the moving party must show that continuing the injunction would be "inequitable," citing the Federal Rules of Civil Procedure.[59]

The court also cited *United States v. Swift & Co.*,[60] for the proposition that a consent decree "is to be read as directed toward events as they then were. It [is] not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be."[61] In addition, the court held that institutional reform litigation calls for judicially-imposed remedies that are "open to adaptation when unforeseen obstacles present themselves, to improvement when a better understanding of the problem emerges, and to accommodation of a wider constellation of interests than is represented in the adversarial setting of the courtroom."[62]

The court went on to note that commentators had begun to favor the grant of modifications "with a rather free hand," and that decrees may be modified where defendants have made a good faith effort to comply and, nevertheless, the objective had not been achieved.[63] Particularly in those situations, the Court held that "[a]pplications to modify a decree such as that in this case should be viewed with generosity."[64] Although the court was tempted to reverse completely and direct that defendants' modification request be granted, in "fairness" they remanded solely on the issue of whether the fifty bed limitation met the standard since laid out in *Youngberg v. Romeo*.[65]

It seems apparent in hindsight that although the state may not even have demonstrated that it met the *Youngberg* or *Pennhurst I* or *II* standards of care in the 1981 trial, the plaintiffs likewise could no longer have expected to obtain a litigated result in the Willowbrook case in any way commensurate with what it had

[58] *Id.* at 967.
[59] *Id.*
[60] United States v. Swift, 286 U.S. 106 (1932).
[61] *Id.*
[62] *Carey*, 706 F.2d at 969.
[63] *Id.* at 970–71.
[64] *Id.* at 971.
[65] *Id.*

wrought in negotiating the details of the Decree. Thus, the issues remanded were also negotiated successfully to a conclusion. And, without having promised to do so, the state also eventually closed institutional Willowbrook in 1987.[66]

## II. OTHER CASES

A general review of the more than five hundred federal court citations subsequent to *NYSARC v. Carey* reveals only a few cases dealing with similar factual situations—claims relative to poor institutional conditions for individuals with developmental disabilities.[67]

In *Gary W. v. Louisiana*, plaintiffs were a class of children who had been placed in institutions in Texas, despite the fact that they were Louisiana residents who objected to the conditions therein.[68] Shortly after the issuance of a "Principal Order," meant to address the plaintiffs' previously unmet right to adequate care and treatment, no fewer than twenty-six additional orders were issued that adjusted the terms of the original decree.[69]

Citing, in part, to *NYSARC v. Carey*, the Louisiana District Court held that consent decrees not only can, but *should* be modified "in response to changed circumstances," and that flexibility is critical in achieving the goals of reform litigation.[70] The court further stated that the party seeking modification of a decree has the burden of showing that "a significant change in circumstances" (either factual or in the law) warrants its alteration.[71]

Ultimately, the *Gary W.* court found, rather un-controversially, that the petitioners met their burden because of obvious changes in the factual situation, namely that (a) no class members remained in Texas, and (b) all members of the class had reached the age of majority and lived either independently or with adequate supports.[72]

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[66] Letter From Courtney Burke, Commissioner, Office for People with Developmental Disabilities, to Friends and Colleagues (Sept. 19, 2012) (*available at* http://manhattanddcouncil.info/remembering-willowbrook-91912).

[67] *See generally Carey*, 706 F.2d 956.

[68] Gary W. v. Louisiana, No. 74-2412, 1993 U.S. Dist. LEXIS 656, at *3 (E.D. La. Jan. 19, 1993).

[69] *Id.* at *7.

[70] *Id.* at *36–*37.

[71] *Id.* at *38.

[72] *Id.* at *38–*39.

Another case citing to *NYSARC v. Carey*, that is relative to the standard for modifying a consent decree under similar facts comes out of the Middle District of Alabama.[73] The litigation in *Wyatt v. King* was protracted, having commenced in 1971, and centered on residents of Alabama institutions for the mentally ill and developmentally disabled.[74] A consent decree was entered into in 1986, and was promptly followed by several separate requests by the defendants for various modifications, including the one at issue in the 1993 decision.[75] In this particular case, defendants sought to vacate a standard in the consent decree that required them to provide "transitional treatment and care" for individuals released from involuntary confinement.[76]

After citing to the standard presented in the Federal Rules of Civil Procedure 60, the court noted that there had been a recent lessening of the formerly rigid standard in cases of institutional reform litigation, including in the Second Circuit's decision in *NYSARC v. Carey*.[77] The *Wyatt* Court also thoroughly discussed the then-recent U.S. Supreme Court decision of *Rufo v. Inmates of Suffolk County Jail*, a case which confirmed the prior standard requiring a petitioner requesting a modification of a consent decree to do so based on a "clear showing of grievous wrong evoked by new and unforeseen conditions," and found that this standard was not immutable.[78] *Rufo* held that "a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance."[79]

In accord with *Rufo* and the generally more flexible approach to modifying institutional reform decrees, the *Wyatt* court held that the defendants ultimately failed to show a change in circumstance or law that would allow a corresponding modification to their existing decree.[80] Surprisingly, of the eighty-nine citations to the 1983 Second Circuit *NYSARC v. Carey* decision that were related to modification of consent decrees, only

[73] Wyatt v. King, 811 F. Supp. 1533, 1535 (M.D. Ala. 1993).
[74] *Id.* at 1535.
[75] *Id.* at 1539.
[76] *Id.* at 1535.
[77] *Id.* at 1538.
[78] Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 377 (1992) (citing United States v. Swift, 286 U.S. 106, 119 (1932)).
[79] *Wyatt* 811 F. Supp. at 1535–36; *Rufo,* 502 U.S. at 393.
[80] *Wyatt* 811 F. Supp. at 1546.

the two discussed above deal with mental hygiene institutions.[81]

## *III. OLMSTEAD V. L.C.*

It was not until 1999 that the U.S. Supreme Court finally held, in *Olmstead v. L.C.*,[82] that persons with "mental disabilities" were *entitled* to community placement in lieu of institutionalization under certain circumstances.[83] The Olmstead plaintiffs were institutionalized individuals seeking placement in community-based programs. They brought a suit against the State of Georgia[84] challenging their institutional placements,[85]

Ultimately, the plurality opinion, authored by Justice Ginsburg, held that the Americans with Disabilities Act of 1990 required that individuals be placed in community settings when (i) treatment professionals have deemed it appropriate, (ii) transfer from an institution to a less-restrictive setting is not opposed by the individual, and (iii) "the placement can be reasonably accommodated," taking the resources of the State and the needs of others with disabilities into account.[86] The decision made it clear that no assessment of rights under the Fourteenth Amendment had been performed by any of the courts that had reviewed the case, and the matter was instead resolved purely on statute and regulation (which the majority opinion recited ". . . with the caveat that we do not here determine their validity," nor were any Fourteenth Amendment claims before the high court).[87]

In defense of claims to make modifications to institutional

[81] Gary W. v. Louisiana, No. 74-2412, 1993 U.S. Dist. LEXIS 656, at *30, *36 (E.D. La. Jan. 19, 1993).

[82] Olmstead v. L.C., 527 U.S. 581 (1999).

[83] *Id.*

[84] *Id.* at 593–94. Apparently, the State of Georgia did not assert a defense under the 11th Amendment to seek immunity from the lawsuit, a defense that would likely have been successful in disposing of the litigation in the first instance. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (holding that a non-consenting State was generally immune from pendent state law claims, even where the U.S. has participated or intervened). However, the Supreme Court later declared in Tennessee v. Lane, 541 U.S. 509 (2003) that abrogation of state immunity under Title II of the ADA was a valid exercise of Congressional power because, in part, it exhibited "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).

[85] *Olmstead*, 527 U.S. at 593.

[86] *Id.* at 587, 607.

[87] *Id.* at 588, 592.

placements, a state is entitled to posit that the modification would fundamentally alter its services and programs.[88] The Supreme Court expanded the view of the fundamental-alteration defense to include permission for a state to show that providing "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."[89]

The Court further acknowledged[90] that the states must have certain "leeway" in order "[t]o maintain a range of facilities and to administer services with an even hand," and noted that a state could meet the reasonable-modification standard if it showed "that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated . . . ."[91]

Although both state[92] and federal governments have enthusiastically embraced the "Olmstead Plan" approach to ADA compliance, it should be noted that only three other Justices concurred in that portion of Justice Ginsburg's opinion.[93]

Following *Olmstead*, in 2002 New York State enacted Article 25 of the Executive Law to establish the Most Integrated Setting Coordinating Council based on legislative findings that

> [i]n order to ensure that the state of New York is in compliance with the requirements of the Olmstead decision, the legislature hereby finds that it is incumbent upon New York state to develop and implement a plan to reasonably accommodate the desire of people of all ages with disabilities to avoid institutionalization and be appropriately placed in the most integrated setting possible.[94]

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[88] *Id.* at 603.

[89] *Id.* at 604.

[90] In his concurrence, Justice Stevens noted that he would have affirmed the decision of the Court of Appeals to remand to the District Court on the matter of the fundamental-alteration defense. However, he joined the majority judgment for failure of sufficient votes in favor of that disposition. *Id.* at 607–8.

[91] *Id.* at 605–06.

[92] On November 30, 2012, New York State Governor Andrew Cuomo signed Executive Order No. 84, entitled "Establishing the Olmstead Plan Development and Implementation Cabinet." The aforementioned cabinet will be developed "to provide guidance and advice to the Governor" and provide recommendations on the implementation of the Olmstead Plan. N.Y. Exec. Order No. 84 (Nov. 30, 2012).

[93] *Olmstead*, 527 U.S. at 585–86.

[94] N.Y. EXEC. LAW § 700 (McKinney 2002).

Putting aside the resulting state and federal rush to adopt the Olmstead Planning mandate, there might be room to wonder whether a new "Olmstead" lawsuit, in which a state asserted its Eleventh Amendment rights, could succeed in light of, for example, *Pennhurst I, Tennessee v. Lane*[95] and the facts and findings Congress and the Department of Justice had before them in 1990. Specifically, *Lane* would require that Congress have had before it a clear, pervasive, and recent history of the states having violated the substantive protections of the Fourteenth Amendment applicable to residents of state institutions, and that the remedy of community placement of willing and suitable institutionalized people was "congruent and proportional" to the substantive violations to be remedied.[96] It could certainly be argued that as early as 1963 there were ample I/DD state institutional horrors coming to light.[97]

However, with respect to the evidence before Congress prior to the enactment of the ADA, a review of the 1988 National Counsel on Disability Report to Congress[98] actually showed that progress had been made in increasing housing and community-based independent living services, although several of the Counsel's earlier recommendations had not been implemented.[99] Additionally, the legislative history fails to reflect that Congress was focused at that time on over-institutionalization, or addressing the "evils" of institutionalized care.[100]

Although the *Lane* plaintiffs prevailed in asserting right of access to the Courts pursuant to the ADA (Title II thereof, relating to public services provided by governmental entities), and all parties conceded that Congress had expressly intended to

[95] Tennessee v. Lane, 541 U.S. 509 (2004).

[96] *Id.* at 511.

[97] President John F. Kennedy, Jr.'s "Panel on Mental Retardation" produced a report in January 1963 entitled "Report of the Task Force on Law," which was charged with preparing a "National Plan to Combat Mental Retardation." Specifically, the Report concluded that "[t]o *the* maximum feasible extent, the status of the mentally retarded patient should be reviewed by the institutional authorities and his ability to return to society reassessed by them on a periodic basis." THE PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 30 (1962).

[98] *National Disability Policy: A Progress Report – January 1988*, NAT'L COUNCIL ON DISABILITY, http://www.ncd.gov/publications/1988/copy_of_Jan1988 (last visited Mar. 22, 2013).

[99] *Id.*

[100] *See The Path to Equality*, ARCHIVEADA, http://www.law.georgetown.edu/archiveada/ (last visited Jan. 21, 2012) (compiling the legislative history of the Americans with Disabilities Act).

abrogate States' Eleventh Amendment immunity to suit, the central inquiry at the U.S. Supreme Court level was whether Congress had before it the factual underpinnings required to permit a federal court to grant specific relief on the authority of Section 5 of the Fourteenth Amendment.[101]

Of course, essentially the same Supreme Court, in 2001, found that the Eleventh Amendment would bar a federal litigant from asserting ADA rights to money damages for discrimination in employment opportunities in federal court upon essentially the same analytical framework.[102] It is at least noteworthy that in both *Lane* and *Garrett*, the discrimination alleged was between able-bodied persons and persons with disabilities, whereas the *Olmstead* plurality seems to have originated a more subtle category of "discrimination" premised upon different treatment of persons with comparable disabilities.[103]

It is also arguable that the Supreme Court long ago addressed the issue of substantive Fourteenth Amendment rights of residents of I/DD institutions, at least obliquely, in deciding *Pennhurst I*, and that by 1990 the states had generally demonstrated great willingness to empty institutional facilities in favor of community-based services to people with I/DD,[104] in response to federal financial and policy incentives rather than mandates. The federal ICF/DD Medicaid funding/service model continues to have a minimum size, but no maximum, and eligibility for currently available Home and Community-Based Services Waiver[105] continues to predicate eligibility on need for ICF/DD care. The only point asserted here is that different Supreme Court panels reach different results in similar cases,[106] and the Eleventh Amendment immunities of the States wax,

[101] Tennessee v. Lane, 541 U.S. 509, 509 (2004).

[102] Under Title I of the ADA, discrimination in employment, however, as noted, the analyses seem to address remedies rather than statutory sections. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 356 (2001).

[103] *See* Olmstead v. L.C., 527 U.S. 581, 587 (1999) (reasoning that different states have different capabilities and resources which can be used to care for developmentally disabled individuals).

[104] *See* Conclusion *infra*.

[105] Federal law allows States to apply for a waiver to provide long-term care services in home and community, rather than institutional, settings. 42 U.S.C. § 1396(a) (Supp. V 2012).

[106] Of the five Justices comprising the fragmented plurality supporting the result in *Olmstead*, only Justices Ginsburg and Breyer remain, as of this writing. *The Current Supreme Court*, SUP. CT. HIST. SOC'Y, http://www.supremecourthistory.org/history-of-the-court/the-current-court/ (last visited Jan. 24, 2013).

wane, and evolve.[107]

## CONCLUSION

The 2011 report entitled "The State of the States in Developmental Disabilities 2011," authored by the University of Colorado, readily demonstrates that residential placements in state institutions were at their height around 1967, when approximately 195,000 individuals with disabilities were placed there, as compared with about 10,000 individuals in settings with six or fewer people.[108] Institutional placements have declined at about the same pace since 1967, such that in 2009 there were only around 34,000 disabled individuals in state institutions, as compared with the 443,000 who were residing in placements with six or fewer residents.[109]

As the Court noted in the Willowbrook decisions, and as these statistics confirm, deinstitutionalization was already underway by the late 1960s, and it continued consistently through at least 2009.[110] Conversely, smaller placements were on the rise long before *Olmstead*, jumping from only about 33,000 individuals in 1982 to around 160,000 in 1994, five years before *Olmstead* was even decided.[111]

It is clear from these figures, and from the timing of the various litigations discussed in this article, that states had already begun to move disabled individuals out of state institutions and into smaller placements before the "last great

[107] In *Pennhurst II*, the Justices argued at length about interpretations of the Eleventh Amendment. Justice Brennan, in a separate dissent, would have held that the Eleventh Amendment bars federal suits "against States *only by citizens of other States*." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 125 (1984) (Brennan J., *dissenting*) (quoting Yeomans v. Kentucky, 423 U.S. 983 (1975) (Brennan, J., *dissenting*)) (emphasis added). As such, he would have held that Eleventh Amendment protections were not available in this case by citizens of its own state. *Id.* at 125–26. Further, Justice Stevens' dissent (joined by Justices Brennan, Marshall, and Blackmun) forcefully argued, citing a litany of Supreme Court cases, which the holding in *Pennhurst II* was firmly against established precedent which held that state officials whose conduct is in violation of state law may not be afforded Eleventh Amendment protection. *Id.* at 130–33 (Stevens, J., *dissenting*). The majority, on the other hand, in reviewing precedential cases, found that they "did not directly confront the question" at issue in *Pennhurst II*. *Id.* at 119.

[108] BRADDOCK ET AL., *supra* note 8, at 17.

[109] *Id.*

[110] *Id.*

[111] *Id.*

disgrace" of Willowbrook, and other institutions was uncovered, and before the Supreme Court mandated community placement in certain cases in *Olmstead*. Additionally, as earlier noted in this piece, of the 519 citations to *NYSARC v. Carey*, fewer than ninety dealt with the issue of modification of consent decrees in the context of mental hygiene institutionalization cases.[112]

Perhaps the loosening of the initially strict standards in the Consent Decree by the Second Circuit in that 1983 decision did not have the negative impact on outcomes in related litigation that advocates initially feared, or perhaps social justice, consistently articulated, and reinforced by statute and regulations, has proven itself impervious to court-made law—"rights" premised upon simple morality and compassion, rather than constitution and statute—and perhaps not rights that should be tucked into the res judicata folder any time soon.

[112] *See* Wyatt v. King, 811 F. Supp. 1533, 1535 (M.D. Ala. 1993).