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COMMENT

Olmstead v. L.C. and the Voluntary Cessation
Doctrine: Toward a More Holistic Analysis of the
“Effectively Working Plan”

Disability advocates have heralded *Olmstead v. L.C.*¹ as “the *Brown v. Board of Education* for the law of disability discrimination.”² *Olmstead* concerned a pair of women with mental illnesses institutionalized at a state psychiatric hospital. State medical employees agreed that both women could be treated in a community-based program. However, the state refused to grant their requests for placement in such a program.³ The two women filed suit, asserting a protected interest in receiving state-provided treatment services in an integrated setting rather than an institutional one.⁴ Finding in their favor, the Supreme Court held that unnecessary segregation of individuals with disabilities constitutes discrimination under Title II of the Americans with Disabilities Act.⁵

Ten years after the Court’s decision, comparisons with *Brown* have proved apt if inauspicious. In *Olmstead*, the Court reasoned that institutional placement of individuals capable of living in the community “perpetuates unwarranted assumptions” about such individuals and “severely diminishes” their quality of life.⁶ In so doing, it echoed the mantra in *Brown*: separate is

1. 527 U.S. 581 (1999).

2. Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 654 (2000).

3. *Olmstead*, 527 U.S. at 593.

4. *Id.* at 593-94.

5. *Id.* at 597-600.

6. *Id.* at 600-01. The Court found that restrictive institutional settings promote assumptions that “persons so isolated are incapable or unworthy of participating in community life” and reduce “family relations, social contacts, work options, economic independence, educational

inherently unequal.⁷ Yet a plurality of the Court tempered *Olmstead*'s integration mandate by recognizing an affirmative "fundamental alteration" defense.⁸ The plurality indicated that a state would meet this defense if it has a "comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings."⁹ This vague deference to state plans has occasioned a struggle for enforcement comparable to the struggle that followed *Brown*.¹⁰

This Comment argues that the federal courts have embarked on a path of judicial interpretation that threatens to render the "working plan" provision in *Olmstead* a "get out of jail free" card for states otherwise in violation of the decision's integration mandate. Courts have split between a pair of problematic approaches in assessing plans: a retrospective approach and a prospective approach. The retrospective approach gives undue weight to past state actions; the prospective approach relies uncritically on state promises to take future action. To ensure that states cannot successfully invoke the "working plan" provision in the absence of a genuine commitment to integration and deinstitutionalization, this Comment urges courts to analyze plans under the voluntary cessation doctrine. This approach would examine both past conduct and present assurances to assess the likelihood of future compliance.

The argument progresses as follows. Part I discusses the present split in the federal courts of appeals between the prospective and retrospective approaches

advancement, and cultural enrichment." *Id.* For additional discussion of the negative effects of institutional segregation, see, for example, Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 440-57 (1991).

7. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). This parallel is an imperfect one. Many individuals with disabilities do best in a combination of integrated and segregated settings. See Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1483 (2007) ("The mantra 'separate is inherently unequal' needs to be replaced with the slogan 'invidious segregation is inherently unequal.'"). Hence, *Olmstead* focuses on "unjustified" institutional isolation. 527 U.S. at 600.
8. States meet this defense if they can show that under the present "allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." *Id.* at 604. Lower courts have adopted this definition. See, e.g., *Williams v. Wasserman*, 164 F. Supp. 2d 591, 632 (D. Md. 2001) ("[T]he few courts that have confronted this question have followed the approach used in *Olmstead*.").
9. *Olmstead*, 527 U.S. at 605-06 (plurality opinion).
10. Where school districts tested how much speed is "deliberate speed," state institutional systems have tested how effective is "effectively working." Compare Robert B. McKay, "With All Deliberate Speed": A Study of School Desegregation, 31 N.Y.U. L. REV. 991 (1956) (analyzing the law's response to state efforts to delay school integration), with Jennifer Mathis, *Where Are We Five Years After Olmstead?*, CLEARINGHOUSE REV., Jan.-Feb. 2005, at 561 (analyzing recent litigation concerning the boundaries of the fundamental alteration defense).

to assessing state working plans. Part II explains the voluntary cessation doctrine and argues that it can be applied to state working plans. Finally, Part III applies the voluntary cessation doctrine to state working plans and demonstrates how this approach will provide the relief that *Olmstead* mandates.

I. OLMSTEAD WORKING PLANS AND THE COURTS

The plurality in *Olmstead* provided scant guidance concerning the necessary conditions for a state working plan to be “comprehensive” and “effectively working.”¹¹ In its most favorable light, this may reflect “recognition of the limited capacity of courts to shoulder the burden of significant social change on their own.”¹² In its least favorable light, however, the indeterminate language may allow states to proceed with merely symbolic changes.¹³ The federal courts have split between a retrospective approach to analyzing working plans and a prospective approach. The difference between these approaches can be gleaned from applying them to the following hypothetical.

In the past three decades, a state has been moving individuals from institutional settings into community-based settings at a rate comparable to the national average. Continued progress toward community integration would require an increase in expenditures, however, and state leaders do not intend to make these outlays. A class of institutionalized individuals with disabilities at one of the state’s psychiatric hospitals has requested placements that would allow the individuals to participate in the community. State medical employees agree that each class member can receive adequate treatment in a community-based program. Aware of the Court’s decision in *Olmstead* and concerned about a lawsuit, the state issues a written plan to reduce the number of state institutional beds by 250 annually over the next five years. Pointing to its plan, the state places the class members on a waiting list.

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11. The plurality merely noted that such a plan would have a “waiting list that moved at a reasonable pace” that is “not controlled by the State’s endeavors to keep its institutions fully populated.” *Olmstead*, 527 U.S. at 605-06 (plurality opinion).
 12. Samuel R. Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding “We the People”: The Disability Rights Cases*, 104 COLUM. L. REV. 49, 58 (2004).
 13. See 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, 1262 (1999) (“[S]tates sometimes mask inappropriate motivations under the guise of more acceptable ones.”).

A. *The Retrospective Approach*

The retrospective approach examines whether a state has demonstrated a past commitment to deinstitutionalization. Anchored by a pair of Ninth Circuit decisions, courts adopting this approach have invariably found for state defendants.¹⁴ They have held that a general history of deinstitutionalization, even absent stated goals or guidelines, may be enough to satisfy *Olmstead's* working plan requirement.¹⁵ In *Arc of Washington State Inc. v. Braddock*, for example, the Ninth Circuit held that the State of Washington had an effectively working plan based on findings that the State's institutional population had declined by twenty percent from 1994 to 2001 and that its expenditures on community services had doubled in the same period.¹⁶

Confronted with our hypothetical case, a court applying the retrospective approach would almost certainly find that the state has a comprehensive, effectively working plan. Although the written plan might reassure the court, it would not be necessary to uphold the state's actions. Even if the hypothetical state's program has not moved on pace with the program considered in *Braddock*, lower courts have discerned working plans from equally vague histories of deinstitutionalization.¹⁷ Most notably, a federal district court in Maryland found that the state had an effectively working plan based on testimony that it was "gradually closing institutions and expanding the number and range of community-based treatment programs."¹⁸

B. *The Prospective Approach*

The prospective approach examines whether a state has expressed a reasonably specific commitment to move individuals with disabilities from institutional settings into community-based settings. Primarily in the Third Circuit,¹⁹ these courts have held that courts may "discharge" their

14. See *Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615 (9th Cir. 2005); *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005); *Bryson v. Stephen*, No. 99-CV-558-SM, 2006 WL 2805238 (D.N.H. Sept. 29, 2006); *Williams v. Wasserman*, 164 F. Supp. 2d 591 (D. Md. 2001).

15. See, e.g., *Sanchez*, 416 F.3d at 1068 (upholding California's plan given its "successful record" and unspecified programs "to continue and to increase" these efforts).

16. *Braddock*, 427 F.3d at 621.

17. See, e.g., *Bryson*, 2006 WL 2805238, at *5-7; *Wasserman*, 164 F. Supp. 2d at 633-38.

18. *Wasserman*, 164 F. Supp. 2d at 634.

19. See *Frederick L. v. Dep't of Pub. Welfare (Frederick L. II)*, 422 F.3d 151 (3d Cir. 2005); *Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d 374 (3d Cir. 2005); *Frederick L. v. Dep't of Pub. Welfare (Frederick L. I)*, 364 F.3d 487 (3d Cir. 2004); *Kathleen S. v. Dep't*

responsibilities under *Olmstead* upon confirming that a “general plan does exist.”²⁰ In *Frederick L. v. Department of Public Welfare*, the Third Circuit held that Pennsylvania’s mental health department needed to “be prepared to make a commitment to action in a manner for which it can be held accountable by the courts.”²¹ The court’s only stated requirement, however, was that the plan be “communicated in some manner.”²² It added in a later opinion that plans must be “reasonably specific and measurable.”²³

A court employing the prospective approach almost certainly would find that the state in our hypothetical case has an adequate plan. The state has not only communicated a plan; it has communicated a plan with specific and measurable goals. The Third Circuit considered a nearly identical case in which Pennsylvania initially expressed a goal of reducing state institutional beds by at least 250 annually.²⁴ At the time of suit, the state presented the court with a different version of the plan, which included the “more amorphous” and “non-specific” goal of reducing the institutional population by “up to 250 beds” annually.²⁵ This goal would have been met by a zero bed reduction and did not pass muster; the court implied, however, that a goal of 250 beds would have been acceptable.

Neither of these approaches provides adequate assurance of future compliance with *Olmstead*’s integration mandate. Past actions may be discontinued, and future promises may go unfulfilled.²⁶ That a state has acted appropriately in the past or promises to do so in the future may demonstrate that it has a comprehensive plan, but it does not suffice to demonstrate that it has an *effectively working* plan.

of Pub. Welfare, No. 97-6610, 1999 WL 1257284 (E.D. Pa. Dec. 23, 1999); *Makin ex rel. Russell v. Hawaii*, 114 F. Supp. 2d 1017 (D. Haw. 1999).

20. *Pa. Prot. & Advocacy*, 402 F.3d at 382.

21. *Frederick L. I*, 364 F.3d at 500.

22. *Id.*

23. *Frederick L. II*, 422 F.3d at 157. The court noted that “general assurances and good-faith intentions” are not sufficient. *Id.* at 158.

24. *Id.* at 157-58.

25. *Id.*

26. See Mathis, *supra* note 10, at 581 (noting that many states have demonstrated “something less than a strong commitment to *Olmstead* compliance”).

II. THE VOLUNTARY CESSATION DOCTRINE

An alternative approach to analyzing working plans under *Olmstead* would treat a state's adoption of a plan as voluntary cessation of illegal conduct. It is well established in mootness doctrine that courts will not decide cases in which "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."²⁷ Courts have made exceptions to this principle; one exception holds that a defendant's voluntary cessation of illegal conduct does not necessarily render a case moot.²⁸ As one court has declared, "A controversy still smoulders when the defendant has voluntarily, but not necessarily permanently, ceased to engage in the allegedly wrongful conduct."²⁹

Voluntary cessation of illegal behavior renders a case moot if the behavior has indeed ceased and "subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."³⁰ If the questionable behavior has ceased, a plaintiff may show that "there exists some cognizable danger of recurrent violation, something more than the mere possibility."³¹ The defendant will then face the "heavy" burden of proving that the wrong will not be repeated.³² The Court's ensuing analysis considers "the bona fides of the expressed intent to comply, the effectiveness of the discontinuance, and, in some cases, the character of past violations."³³

Under this rubric, a legally cognizable reversal of policy must be both "overt and visible" and have "every appearance of being permanent."³⁴ Courts are particularly wary of "efforts to defeat injunctive relief . . . [that] seem timed to anticipate suit"³⁵ and will not rely on a mere promise of future compliance.³⁶ In assessing the likelihood that present assurances will produce a reversal of

27. *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

28. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

29. *Hooker Chem. Co. v. U.S. EPA, Region II*, 642 F.2d 48, 52 (3d Cir. 1981).

30. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)).

31. *W.T. Grant Co.*, 345 U.S. at 633.

32. *Id.*

33. *Id.*

34. *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 334 (1952).

35. *Id.*; see also *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977) (holding that actions taken to anticipate a lawsuit do not indicate that the practice sought to be enjoined would not be repeated).

36. *W.T. Grant Co.*, 345 U.S. at 633; see also *United States v. Generix Drug Corp.*, 460 U.S. 453, 456 n.6 (1983) ("The possibility that respondent may change its mind in the future is sufficient to preclude a finding of mootness.")

policy, courts consider past behavior indicative of a genuine commitment to compliance.³⁷ For example, one court held that while the construction of a new and sanitary prison facility might eliminate temporary overcrowding and poor conditions, it did not assure future compliance with the Eighth Amendment because “filth can accumulate in new buildings” and “new buildings can be made intolerably overcrowded.”³⁸

Courts have applied this analysis in cases where neither the defendant nor the court raised the question of mootness, but the defendant sought to avoid liability by ceasing questionable conduct.³⁹ In *NAACP v. City of Evergreen*, for example, the Eleventh Circuit considered a class action that alleged racially discriminatory city hiring practices, which were discontinued in the face of litigation.⁴⁰ While the district court had reasoned that no relief could be granted absent a present violation, the court of appeals held that “in cases presenting abundant evidence of consistent past discrimination, injunctive relief is *mandatory* absent clear and convincing proof that there is no reasonable probability of further noncompliance with the law.”⁴¹

Given the application of a voluntary cessation approach outside the context of mootness doctrine, courts would not be stepping out of bounds to apply it to state working plans. The next Part contends that the approach better matches the plurality’s language in *Olmstead* than the prospective and retrospective approaches.

III. VOLUNTARY CESSATION AND OLMSTEAD WORKING PLANS

A voluntary cessation approach to assessing working plans would disentangle judicial inquiries into *Olmstead*’s dual requirements that a plan be both “comprehensive” and “effectively working.”⁴² These requirements parallel

37. See, e.g., *Campbell v. McGruder*, 580 F.2d 521, 541 (D.C. Cir. 1978) (denying a mootness claim “given the history of defendants’ grudging resistance, the ineffectiveness of their previous efforts at compliance and the ‘flagrant and shocking’ character of their past violations”).

38. *Jones v. Diamond*, 636 F.2d 1364, 1375 (5th Cir. 1981).

39. These cases have ranged in concern from antitrust to searches and seizures to discrimination under Title VII. See *Lankford v. Gelston*, 364 F.2d 197, 200-03 (4th Cir. 1966) (searches and seizures); *Bd. of Regents v. Nat’l Collegiate Athletics Ass’n*, 546 F. Supp. 1276, 1327 (W.D. Okla. 1982) (antitrust); *Thompson v. Boyle*, No. 74-1101, 1980 WL 2095, at *3 (D.D.C. May 20, 1980) (employment discrimination).

40. 693 F.2d 1367 (11th Cir. 1982).

41. *Id.* at 1370.

42. 527 U.S. 581, 605 (1999) (plurality opinion).

the dual inquiries under the voluntary cessation doctrine of (1) whether the defendant has indeed ceased the conduct in question, and (2) whether that conduct can be reasonably expected to recur. States that assert a working plan defense in effect claim that they are no longer engaged in discriminatory conduct and promise that they will continue to comply with *Olmstead's* integration mandate.

Under the voluntary cessation approach, courts would first address whether a state's plan, on its face, can be considered a cessation of the discriminatory policies that have prolonged unnecessary institutionalization. This inquiry would solely assess the substantive adequacy of the proffered plan, ignoring the likelihood of its implementation.⁴³ In making this assessment, courts would draw on the substantive standards developed under the prospective and retrospective approaches outlined above. To the extent that a voluntary cessation approach would unify existing doctrine under a single framework, it would require courts to negotiate the different substantive standards employed by those approaches. However, the approach leaves open the question of what substantive standards are appropriate for plans.⁴⁴

If a court determines that a plan can be considered a cessation of past discriminatory policies, the voluntary cessation approach would then inquire into whether the state can be expected to follow its plan. Plaintiffs would have the opportunity to present evidence to demonstrate a cognizable danger of continued discrimination—namely, an unimplemented plan.⁴⁵ Upon such a showing, the state would have to demonstrate that expectations of future discriminatory practices would be unreasonable given the permanence of the plan, the state's bona fides, and the character of past behavior.⁴⁶ This inquiry would combine elements from the prospective and retrospective approaches; that is, courts would look at a state's promised behavior in light of its past

43. This analysis tracks the inquiry under the prospective approach into whether a plan exists. See *supra* notes 20-22 and accompanying text.

44. Some substantive minimum would be essential. The voluntary cessation approach can only assure that states comply with their plans; compliance with substantively inadequate plans would achieve little.

45. To raise this possibility, plaintiffs could point to past state violations or other evidence of duplicity.

46. As is typical under the voluntary cessation doctrine, this would be a fact-intensive and equitable decision. Courts would be pressed to consider how the plan was devised, the state's measures for enforcement, and the credibility of state officials, among other factors.

actions to determine whether the state is likely to implement its plan in the future.⁴⁷

To return to our hypothetical case, a court would likely find the state's plan inadequate under the voluntary cessation approach. The first part of the inquiry would find the plan substantively comprehensive under current doctrine; as discussed above, it meets the substantive requirements of both the retrospective and prospective approaches.⁴⁸ The state's plan would fail the second part of the inquiry, however. The plaintiff would be able to demonstrate a threat of recurrent violation given that the state did not develop a plan until threatened with a lawsuit.⁴⁹ The state would then have a difficult time proving that its plan is permanent and in good faith, given that state leaders expressed internally that they did not intend to expend the resources necessary for continued progress toward community integration.

CONCLUSION

Questions of good faith, clean hands, and opportunism have long occupied the realm of equity. If the present approaches to working plans are any indication, however, there are instances when legal doctrine should help ferret out these concerns. Surely, repeated lawsuits against a state that has neither fulfilled its promises nor continued acceptable past behavior would prompt even the most deferential courts to deny assertions that a plan is "effectively working." Yet to rely on protracted litigation allows states to drag their feet toward *Olmstead* compliance while people who have a legal right to live in the community must remain apart from it.

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47. Courts and advocates could build a voluntary cessation framework upon existing doctrine. Some courts have combined elements of the two approaches already. See *Sanchez v. Johnson*, 416 F.3d 1051, 1067 (9th Cir. 2005) (taking into account both past efforts and a yet unimplemented program).

48. See *supra* notes 19, 23-24 and accompanying text.

49. See *supra* note 34 and accompanying text.



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