Supreme Court of the State of New York
Appellate Division, First Department

&

Historical Society
of the New York Courts

Remembering Willowbrook

Ensuring Justice, Dignity & Inclusion for Individuals with Intellectual & Developmental Disabilities

CLE Course Materials

Panelists
(In Order of Presentation)

Henry Kennedy, Moderator
Joshua Schneps
Beth Haroules
Leonard D. Simmons
Jose J. Rivera, Jr.
Marco Damiani
Victoria Schneps

October 27, 2025

6:00 pm - 7:30 pm Program

27 Madison Avenue | New York, NY

Remembering Willowbrook
Ensuring Justice, Dignity & Inclusion for Individuals with Intellectual & Developmental Disabilities

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CLE Materials

A. *Timed Agenda and Biographies of Panelists*
B. *New York State Constitution*
    1. New York State Constitution, Article I § 11.
    2. New York State Constitution, Article XVII § 1.
C. *The Willowbrook Case: Complaint, Filings, Consent Decree, and Permanent Injunction*
    1. *New York State Association for Retarded Children v. Rockefeller,* Class Action Complaint, 72 Civ. 356.
    2. *Parisi et al v. Rockefeller,* Class Action Complaint, 72 Civ. 357.
    3. *New York State Association for Retarded Children v. Rockefeller*, Temporary Restraining Order and Affidavit, 72 Civ. 356.
    4. *New York State Association for Retarded Children v. Carey,* Eastern District of New York Order (1975).
    5. *New York State Association for Retarded Children* and *Parisi v. Carey,* Consent Decree, 393 F. Supp. 715 (EDNY 1975).
    6. *New York State Association for Retarded Children v. Cuomo*, Permanent Injunction, 72 Civ. 356, 357.

Supplementary Materials

D. *Willowbrook: Then & Now*
    1. *Parisi et al v. Rockefeller,* Class Action Complaint, 72 Civ. 357, Photographic Exhibits.
    2. Robert W. Hayes, Description of the Exodus Program at Willowbrook State School, NYS Department of Mental Hygiene.
    3. David J. Rothman & Shelia M. Rothman, "Afterword to the AldineTransaction Edition: A Look Back on the Field," in *The Willowbrook Wars: Bringing the Mentally Disabled into the Community* (2005).
    4. New York Civil Liberties Union, "50 Years After a Landmark Lawsuit, How Does NY Treat People with Developmental Disabilities?" Commentary (2022).
    5. *Olmstead v. L.C.,* 527 U.S. 581 (1999).

E. *Public Law Litigation, Consent Decrees, and Constitutional Protections*

1. Michael W. McConnell, *Why Hold Elections? – Using Consent Decrees to Insulate Policies from Political Change,* 1987 University of Chicago Legal Forum Article 12 (1987).
2. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds,* 117 Harv. L. Rev. 1016 (2004).
3. Laura K. Bomyea, *Aid to the Needy in State Constitutions: State Court Treatment of Positive Rights Affirmative Duty Provisions,* Center for Judicial Process (2012).
4. Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases,* 16 U. Pa. J. Const. L. 637 (2014).
5. Alaizah Koorji, *Defending Consent Decrees in the Wake of* Horne v. Flores, Harvard Law Review Blog Essay (2024).

F. *New York State Mental Hygiene Laws*

1. New York State Senate Bill Jacket 6833. *An Act to amend the mental hygiene law in relation to affecting a reorganization of the department of mental hygiene and to repeal certain provisions thereof relating thereto.* Laws of 1977, Chapter 978.
2. New York State Consolidated Laws, Mental Hygiene Law § 47.03

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Remembering Willowbrook: Ensuring Justice, Dignity & Inclusion for Individuals with Intellectual & Developmental Disabilities

October 27, 2025

NYS Supreme Court, Appellate Division, First Department & Historical Society of the New York Courts

6:00- 6:05 pm	**Willowbrook Historical Film Clip**
6:06-6:10 pm	**Welcome and Introduction** Hon. Dianne T. Renwick, Presiding Justice Appellate Division, First Department
6:10- 7:20 pm	**Moderated panel discussion** **Henry Kennedy, *Moderator***, Willkie Farr & Gallagher LLP, Ret. Managing Attorney, **Joshua Schneps,** CEO and Co-Publisher, Schneps Media **Beth Haroules**, Director of Disability Justice Litigation, New York Civil Liberties Union **Leonard D. Simmons**, Principal Attorney, Mental Hygiene Legal Service, Appellate Division, First Judicial Department **Jose J. Rivera, Jr.,** Director of Quality Assurance |Compliance Officer, Cerebral Palsy Association of Nassau County, Inc.; Gouverneur Parents Association, Inc. Advocate **Marco Damiani**, Chief Executive Officer, AHRC New York City **Victoria Schneps,** Founder, President and Co-Publisher, Schneps Media; Founder, Life's WORC
7:20–7:30 pm	**Questions**
7:30 pm	**Farewell & Acknowledgments** by Presiding Justice Renwick

Remembering Willowbrook
Ensuring Justice, Dignity & Inclusion for Individuals with Intellectual & Developmental Disabilities

October 27, 2025
Appellate Division, First Department & Historical Society of the New York Courts

Panelists
[in alphabetical order]

Marco Damiani, *Chief Executive Officer, AHRC New York City*

Mr. Damiani believes that inclusion is not aspirational — it must be expected. As Chief Executive Officer of AHRC New York City, one of the nation's largest human services nonprofits and a Forbes Best American Company, he leads more than 5,000 employees who support over 15,000 neurodivergent children and adults across New York City.

With decades of experience in nonprofit leadership, disability rights, health equity, and integrated care, Marco has dedicated his career to advancing inclusion — ensuring that people with intellectual and developmental disabilities have equal access to healthcare, education, employment, and community life. His journey began as a Direct Support Professional, where he witnessed the challenges faced by frontline staff and the inequities endured by those they support. Later, during the closure of Willowbrook State School, he saw both the failures of institutionalization and the power of collective advocacy to drive lasting change. These experiences shaped his commitment to building sustainable, equitable systems that transform lives.

Mr. Damiani serves as President of the Executive Directors' Association of The Arc New York and as a board member of the Inter-Agency Council, NY Disability Advocates, Care Design NY, Metro Community Health Centers, and Café Joyeux US. He is also a member of the Governance Committee for Public Health Solutions' Social Care Network and the Dean's Strategic Advisory Council at the NYU College of Dentistry.

Mr. Damiani's leadership has been recognized with numerous awards, including the Kriser Medal from the NYU College of Dentistry, the Opportunities-in-Action Medal from Pace University, the Arc of the U.S. Lifetime Achievement Award, a Certificate of Special U.S. Congressional Recognition, the Unsung Hero Award from the Hudson Valley Human Rights and Holocaust Commission, and the Metro Community Health Centers Duane Schielke Health Equity Leadership Award. He has also been named an Empire BCBS Whole Healthcare Hero, a Crain's New York Notable Leader in Healthcare, and a PoliticsNY Nonprofit Power Player, with multiple citations from state and city leaders for advocacy and service.

Marco's thought leadership has been shared through publications in JAMA, Policy and Practice in Intellectual Disabilities, and Social Work in Disability and Rehabilitation. He holds an M.A. in Developmental Psychology from Columbia University, a B.S. in Psychology from Manhattan College, and pursued doctoral studies in Educational Psychology at NYU.

He credits every success to colleagues, self-advocates, and families who stand for inclusion. Together, they uphold his guiding belief: to stand for a society where disability is recognized as a valued dimension of human diversity.

Beth Haroules, *Director of Disability Justice Litigation, New York Civil Liberties Union*

Ms. Haroules joined the ACLU of New York/NYCLU as a staff attorney in 1994. Ms. Haroules is the Director of Disability Justice Litigation at the NYCLU. Prior to joining the NYCLU, she practiced in the areas of commercial litigation and international arbitration at White & Case, a New York City law firm.

Ms. Haroules handles a broad spectrum of civil rights and civil liberties issues, ranging from First Amendment issues to government surveillance issues to public health and disabilities issues. Working with NYLPI as co-counsel, Ms. Haroules is lead counsel in the Willowbrook class action litigation. She served as lead counsel, with both MHLS and with the US Department of Justice as co-counsel, in the Hirschfeld v. HHC/Kings County conditions litigation. She challenged, with NYLPI and the Bazelon Center, the constitutionality of New York's "Kendra's Law." She serves on the New York State Education Data Privacy Advisory Council and has served on several NYC Task Forces on Crisis Prevention and Mental Health Crisis Response and Behavioral Health & Criminal Justice; the Advisory Council to the Supported Decision-Making New York (SDMNY) project; and, the New York State Bar Association Task Force on Mental Health and Trauma Impacted Representation.

Ms. Haroules obtained her JD from Boston University School of Law and her AB from Harvard University.

Henry Kennedy, *Willkie Farr & Gallagher LLP, Ret. Managing Attorney,* Program Moderator

Mr. Kennedy is the parent of a woman with a developmental disability and, until his retirement, practiced law at Willkie Farr & Gallagher LLP. He has served on numerous disability-related boards and committees, including the N.Y.S. Research Foundation Mental Hygiene Board and the Institute for Basic Research Governor's Blue-Ribbon

Panel. Mr. Kennedy has frequently spoken on the history and significance of Willowbrook State School and the impact of the Consent Judgment on the development of services in New York. He co-chaired the 25th Anniversary Celebration of the Consent Judgment at the College of Staten Island in 2000 and later participated on a panel marking its 50th anniversary, sponsored by the N.Y.S. Office for People with Developmental Disabilities. He received his J.D. from Touro College Jacob D. Fuchsberg Law Center and a B.A. from the University of Dayton.

Jose J. Rivera, Jr., *Director of Quality Assurance |Compliance Officer, Cerebral Palsy Association of Nassau County, Inc.; Gouverneur Parents Association, Inc. Advocate*

Mr. Rivera brings over four decades of experience in the field of developmental disabilities. A graduate of the City College of New York, his advocacy is rooted in personal experience—his brother was a member of the Willowbrook Class. Jose's journey is featured in the documentaries *Unforgotten: Twenty-Five Years After Willowbrook* and *The Path Forward: Remembering Willowbrook*.

Beginning his career in 1971 with the Gouverneur Parents Association, he went on to serve as an auditor with the New York State Office for People with Developmental Disabilities (OPWDD) and was appointed to the Willowbrook Consumer Advisory Board in 1984. Since 2002, he has served as the first Director of Quality Assurance at the Cerebral Palsy Association of Nassau County. He also co-chairs the CP State Affiliates Quality Assurance/Corporate Compliance Committee and represents CP State on the OPWDD Regulatory Reform Committee.

Jose has been instrumental in efforts to establish the Willowbrook Center for Learning, a memorial honoring the legacy of Willowbrook. He and his wife, Andrea, are proud parents to Antonio and Elianna. His lifelong commitment continues to shape and improve services for individuals with developmental disabilities.

Joshua Schneps, *CEO and Co-Publisher, Schneps Media*

Joshua Schneps is CEO and Co-Publisher of Schneps Media, the largest local media company in New York City and New York State. Schneps Media was named as a top 10 media company in the United States by E&P Magazine in 2023.

The privately-owned media company includes a large collection of the most widely read and respected community newspapers, magazines, local websites and business & live events serving all five boroughs of New York City, Long Island, Westchester and Palm Beach County. Schneps Media's flagship media outlets include amNY, The Queens

Courier chain, Brooklyn Paper, Dan's Papers, NoticiaNY, Long Island Press, Schneps Long Island Nassau Local Newspapers, Gay City News, Brownstoner.com, Bronx Times, The Villager, Bay News, TimesLedger, New York Family and many more.

Schneps Media's events division hosts several business networking, awards, and tradeshow events throughout New York City, Long Island and Palm Beach County, including Power Women, Power List and various other B2B and B2C events. Other events include Real Estate Conferences, Health Expos and Camp Expos.

Dan's Taste are the premier food & drink events on the East End of Long Island that take place annually in the Hamptons each summer.

Mr. Schneps is also the creator and host of the podcast, Schneps Connects, which focuses on business leaders and the business community. Guests include high profile CEOs, politicians, philanthropists, media personalities, and celebrities.

Mr. Schneps also founded LIC Flea & Food Market, which was one of the top destinations in Queens, New York, as well as The World's Fare, which annually attracted over 10,000 attendees to Citi Field for a two-day international food and beer festival.

The company's founder, Publisher and President is Mr. Schneps' mother and business partner Victoria Schneps-Yunis. Inspired by the power of the press during her advocacy work on behalf of her daughter with special needs, Ms. Schneps pursued her dream of being in the news business. She started in her Bayside living room, a neighborhood newspaper with a partner and a $250 investment.

Surrounded by the news business for almost his entire life, Mr. Schneps developed an entrepreneurial spirit and passion for media at a young age. He graduated from Indiana University's Kelley School of Business as a finance major. Mr. Schneps worked for Bank of America Securities LLC as an Investment Banking Analyst in the Media & Telecom group. After gaining invaluable knowledge he joined the family business in 2001.

Mr. Schneps currently serves on several boards and resides in Brooklyn with his wife Tracey, son Hudson, and daughter Sloane.

Victoria Schneps, *Founder, President and Co-Publisher, Schneps Media; Founder, Life's WORC*

Ms. Schneps is the founder, President and Co-Publisher of Schneps Media, which began in 1985 with one newspaper, The Queens Courier. Schneps Media now provides the communities with 101 media outlets, they are the leading local media company serving New York City, Westchester, Long Island from Manhattan to Montauk and Palm Beach County. She was inspired by the power of the press during her advocacy work on behalf

of her daughter Lara, brain damaged at birth, Ms. Schneps pursued her dream of being in the news business.

She started The Queens Courier in her Bayside living room, with a partner and a $250 investment. Today, Schneps Media comprises newspapers, magazines, websites, digital media, webinars, podcasts and events. In partnership with her son Joshua Schneps, the company has expanded into more than 100 media outlets.

The 50th anniversary of the Willowbrook consent decree to which Lara Schneps, Victoria's daughter was a named plaintiff, is being remembered for the powerful change it made in the lives of people with disabilities

Life's WORC, the group she founded in 1971, has grown to serve over 1000 individuals with developmental disabilities and autism and its $80 million not-for-profit organization. It operates 50 group homes, 19-day programs, WORC Force Center for Achievement in Garden City and the creation of WORC Force. Ms. Schneps continues to volunteer as a member of the board and to celebrate the 50th anniversary of Life's WORC main office building now bears her name.

Ms. Schneps is the recipient of numerous awards for her dedicated community service, and she is proud to have been chosen to carry the Olympic Torch for the 1996 Olympics in Atlanta. She has received awards as Businessperson of the Year by The Queens Chamber of Commerce, the Flushing YMCA, Grand Marshal of the Queens Hispanic Parade, and is recognized by the Hindu and Muslim communities as well. She serves on the boards of the United Way of Long Island, Flushing Bank, LISTnet, Life's WORC, Boys and Girls Club of Metro Queens.

She is a proud graduate of James Madison High School and received her BS from New York University and her MS from Brooklyn College. Recently widowed and she is the proud mother of three surviving children, 4 stepchildren and 15 grandchildren. She is passionate about her family, friends and the community.

Leonard D. Simmons, *Principal Attorney, Mental Hygiene Legal Service, Appellate Division, First Judicial Department*

Leonard Simmons is a Principal Attorney with Mental Hygiene Legal Service, where he represents clients across a broad range of mental health contexts, with a focus on civil rights, investigations, and special litigation. As part of his practice, Leonard advocates for individuals with developmental disabilities living in community-based settings, including Willowbrook class members, to protect their rights and ensure their dignity and well-being. He also represents clients with disabilities who are inappropriately institutionalized in hospitals and other facilities, litigating systemic issues to remove

barriers to housing and services for this population. In addition, Leonard leads efforts to improve conditions within institutional settings, with a special focus on securing access to fresh air, exercise, and the outdoors for those in confinement.

Leonard is also a mindfulness instructor and received his Mindfulness Teacher Certification in 2016 through Warrior One LLC at the San Francisco Zen Center. Since then, he has offered mindfulness programming at Brooklyn Law School, St. John's School of Law, Cardozo School of Law, and to other law schools, law firms and bar associations throughout New York.

New York State Constitution, Article I

§ 11 Equal protection of laws; discrimination in civil rights prohibited (a) No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, ethnicity, national origin, age, disability, creed, religion, or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and

reproductive healthcare and autonomy, be subjected to any discrimination in their civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state, pursuant to law. (b) Nothing in this section shall invalidate or prevent the adoption of any law, regulation, program, or practice that is designed to prevent or dismantle discrimination on the basis of a characteristic listed in this section, nor shall any characteristic listed in this section be interpreted to interfere with, limit, or deny the civil rights of any person based upon any other characteristic identified in this section. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 6, 2001; amended by vote of the people November 5, 2024.)

Available at https://dos.ny.gov/system/files/documents/2025/01/constitution-january-1-2025.pdf.

New York State Constitution, Art. XVII

§1. The aid, care and support of the needy are public concerns *and shall be provided by the state and by such of its subdivisions*, and in such manner and by such means, as the legislature may from time to time determine.

Adopted by Constitutional Convention of 1938; approved by vote of the people November 8, 1938.

Available at:

https://dos.ny.gov/system/files/documents/2025/01/constitution-january-1-2025.pdf

Records Copied at the National Archives at Kansas City
Record Group 21, Records of the District Courts of the United States
U.S. District Court for the Eastern District of New York
Civil Case Files, 1938 - 1994
National Archives Identifier: 582654
New York State Association for Retarded Children, Inc. et al. v. Nelson Rockefeller, et al.
Case: 72-CV-356

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

72C 356

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC.; BENEVOLENT SOCIETY FOR RETARDED CHILDREN, WILLOWBROOK CHAPTER, OF THE NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN; LARA R. SCHNEPS, by her father Murray B. Schneps; NINA GALIN, by her mother Diana Lane McCourt; ANTHONY RIOS, by his father Jesus Rios; DAVID AMOROSO, by his mother Rosalie Amoroso; ROSE EVELYN CRUZ, by her father Francisco M. Cruz; BARRY FRIEDMAN, by his father Melvin Friedman; LOWELL SCOTT ISAACS, by his father Jerome W. Isaacs; and ANTOINETTE MAGRI, by her mother Sandra Magri,

Plaintiffs,

-against-

NELSON ROCKEFELLER; ALAN D. MILLER, M.D.; FREDRIC GRUNBERG, M.D.; ROBERT E. PATTON; CHARLES SCHLAIFER; JACK HAMMOND, M.D.; ROBERT W. HAYES; BERTRAM PEPPER, M.D.; A. ANTHONY ARCE, M.D.; JAMES M. MURPHY, M.D.; MANNY STERNLICHT; and MILTON JACOBS, M.D.,

Defendants.

CLASS ACTION

COMPLAINT

72 Civ.____

FILED
MAR 17 3 39 PM '72
CLERK
U.S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK

Plaintiffs, through their attorneys, allege upon information and belief:

Jurisdiction

1. This class suit is a civil rights action arising under the First, Fourth, Fifth, Sixth, Eighth, Thirteenth and Fourteenth Amendments to the Constitution of the United States, and under 42 U.S.C. §§1983 and 1994. Jurisdiction is authorized by 28 U.S.C. §1343. Money damages are

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inadequate, and plaintiffs therefore request declaratory and injunctive relief pursuant to 28 U.S.C. §§1651, 2201 and 2202, and 42 U.S.C. §1983.

Parties-Plaintiffs

2. Plaintiff New York State Association For Retarded Children, Inc., (referred to hereafter as the "Association") is a corporation duly incorporated under the laws of New York in 1949. State-wide, the Association has 56 Chapters and 30,000 family members, many of whom are parents or relatives of residents of Willowbrook State School for the mentally retarded or mentally defective (referred to hereafter as "Willowbrook").

3. Plaintiff Benevolent Society For Retarded Children, Willowbrook Chapter, of the New York State Association for Retarded Children, Inc., has approximately 1,500 members, most of whom are parents or relatives of residents of Willowbrook. The Association and its chapter, the Benevolent Society, sue individually and on behalf of their members.

4(a) Plaintiff Lara R. Schneps, aged four, has resided at Willowbrook, Building 14, Ward B, since July 31, 1969. She is profoundly retarded, as are most of the 45-50 children, aged 1-7, who reside in her ward. In addition, she suffers from severe motor complications and physical disabilities.

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(b) Although Lara is not toilet trained and cannot walk, talk or feed herself, she is not engaged in any program to overcome those limitations. With proper training she could overcome those limitations.

(c) There are never more than three attendants to staff Lara's ward. Usually there are only one or two. Recently, Lara's mother visited and found only one attendant to care for the children in Lara's ward. And for substantial periods of time, Lara's ward is left entirely unattended.

(d) In addition to the total absence of educational or training programs, Lara does not receive minimally adequate medical care and treatment. In approximately July of 1970, because of inadequate and improper medical care, including an eight-day delay in preparing a report on a throat culture, she fell into a coma and almost died. She required extended hospitalization in University Hospital, New York, New York.

(e) Her parents did not want to place Lara in Willowbrook, and would like to take her out, but they have been unable to find any private or community facilities to assist them in her care, and are unable to care for her at home on a permanent basis.

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5(a) Plaintiff Nina Galin, aged ten, resides at Willowbrook in Building 2, Ward 5E. She has been assigned an I.Q. of 19. She was admitted to Willowbrook at the end of April, 1971. In order to bypass a long waiting list, Nina's mother was required to sign a consent authorizing Nina to be enrolled in an experimental hepatitis program at Willowbrook.

(b) Nina receives no schooling or training of any kind, and is not engaged in any recreation program. She lives and sleeps in a room with 17 other children. The room has no toys or games. Her clothing is grossly inadequate but an attendant told her mother not to provide clothing because it would only be stolen. Her diet is inadequate and consists mainly of starches. She has constant diarrhea. She has not received adequate dental care.

(c) Since admission to Willowbrook, Nina has been given tranquilizing medication four times a day. She had never been given medication before, except for one month. Since taking the medication she has developed

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a recurrent spasm in her arm, and appears very "dopey." Her parents have complained about the medication, but it is still given.

(d) Her parents visit Nina and take her home frequently, and they almost always discover new physical problems and injuries, including fresh bruises, deep scratches, pulled out hair, and a head wound that required two stitches.

(e) Her parents did not want to place Nina in Willowbrook, and would like to take her out, but they have been unable to find any private or community facilities to assist them in her care, and are unable to care for her at home on a permanent basis.

6(a) Anthony Rios, aged eleven, resides at Willowbrook in Building 76. He has been assigned an I.Q. of 50 and has been diagnosed as mildly retarded. He was admitted to Willowbrook on February 8, 1971.

(b) Anthony was assigned to a school program on the Willowbrook premises, but when he allegedly hit a teacher, he was suspended from the school. His parents were not notified of the suspension. They found out about it, by accident, one month later. After another two weeks,

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Anthony's mother succeeded in getting him back in the school program. But during the period of suspension, Anthony, who had been toilet trained since the age of three, began to wet and soil himself. He is no longer toilet trained.

(c) Anthony's parents have tried repeatedly to locate community facilities for their child, but with no success. No one at Willowbrook has assisted them in looking for community facilities. They are unable to care for Anthony in their home on a permanent basis.

(d) Anthony resides on a ward with 35 other children, staffed by two attendants. His clothes are "raggedy." Clothes delivered by his parents "seem to disappear."

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7(a) Plaintiff David Amoroso, aged twelve, resides at Willowbrook in Building 76, Ward 2. He was admitted in August of 1970. There are 35 other children on his ward. During the day his ward is staffed by one or two attendants. At night there is frequently only one attendant.

(b) David attended public school facilities for one or two hours per day from age 7 to age 10. School officials then told David's parents that he could no longer attend public school facilities, though they were not told why, and that if they did not take David out of public school he would be "kicked out." David's parents were unable to care for him at home on a permanent basis, and tried unsuccessfully to find another school or a community facility.

(c) Subsequently, David's parents were told by a social worker in the Metropolitan Hygiene Retardation Clinic, the screening agency for the Department of Mental Hygiene, that he was too old to be admitted to Willowbrook and would not be admitted unless they consented to place him in the experimental hepatitis research program, which they reluctantly did. After the hepatitis program, David was transferred to building 6 for one month. Dr. Mike Wilkens, an employee of Willowbrook, then transferred him to building 76.

(d) Initially, though his parents insisted that he be in school, David was not permitted to enter

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a schooling program at Willowbrook. Finally, Dr. Bill Bronston, an employee of Willowbrook, got him placed in a Willowbrook school program, but after a few weeks the teacher suspended him because he had started to soil himself. Before David entered Willowbrook he was toilet trained. But now, when his parents bring him home, they find that he wets his bed. After much effort, David's mother got him back in a Willowbrook school program, but only for one hour every afternoon.

(e) On Christmas Eve in December of 1971, David's parents went to Willowbrook to pick-up David for the holiday. His face, neck and arm were brownish-colored and appeared to them to be burned. A doctor at Willowbrook said he thought it was a rash. David's parents took him to the emergency room of St. Vincent's Hospital, where a doctor told them it was a second-degree burn.

(f) The children on David's ward all sleep in one long room. There are a few chairs and a television set, but no rugs, lamps, pictures, games, books or toys.

(g) David has frequently been subjected to physical injury, including, recently, a fractured finger, and on at least two occasions has required stitches.

(h) One Sunday morning David's mother went to pick him up and discovered he had a very badly swollen nose.

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An attendant told her David had received the injury the day before while "fighting with another kid." Since x-rays were not scheduled until Monday, David's mother took him home, where she discovered he had a very high fever, so she took him back to Willowbrook. She asked to speak with a doctor, but no doctor could be found. On Monday morning she called Willowbrook and spoke to a Willowbrook doctor who told her David was fine, and was resting in bed. She asked about David's nose, but the doctor did not seem to know there was even a problem with David's nose. He told her he would call her back. Twenty minutes later he called to say that David had a temperature of 102, that his nose was badly swollen, and that he would be sent for x-rays. The x-rays showed David had a fractured nose.

8(a) Plaintiff Rose Evelyn Cruz, aged thirteen, resides at Willowbrook in building 76. She has resided at Willowbrook for approximately three years. She resided first in building 2. She now resides on a ward of approximately 100 children, which is staffed by approximately four employees.

(b) Evelyn has on several occasions been transferred from one building to another, all without prior consultation with, or approval of, her parents. On one occasion, Evelyn's father objected to a transfer, because he had noticed more progress in the previous ward,

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but no one at Willowbrook could tell him why Evelyn had been moved.

(c) Except for doctor Bill Bronston, no employee at Willowbrook has told Evelyn's parents anything about her. They have not been told Evelyn's I.Q., her diagnosis, what programs she is in or is not in, or anything at all about her habilitation plan or post-institution plan.

(d) Evelyn's parents used to bring her clothing, which "constantly disappeared." Now they simply bring new clothes each week and take back the previous week's clothes, so they will not be stolen.

(e) The floor in Evelyn's ward is uncovered and very cold. Her parents believe there is often insufficient heat on Evelyn's ward.

(f) Evelyn cannot communicate. Her parents have not been told whether she is in a speech or language development program.

(g) When they visit each week, Evelyn's parents "almost always" find that Evelyn is "severely scratched."

(h) Evelyn's parents would prefer to have her live at home or close by in the community, but they do not know and have not been told about any community facilities to assist them, and they are unable to care for her at home without assistance.

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9(a) Plaintiff Barry Friedman, aged fifteen, resides at Willowbrook. He was admitted to Willowbrook seven years ago. He resided for one year in building 29 and then was transferred to building 76. He has been assigned an I.Q. of 14 or 15, and is diagnosed as profoundly retarded.

(b) Before admission to Willowbrook, Barry spent two years at New Jersey-Vineland, a private school for retarded children. At Vineland, Barry received speech therapy and made some progress. The doctor at Vineland said further progress was possible, but Barry's father could no longer afford private care.

(c) Barry has deteriorated since admission to Willowbrook. He used to be able to say a few "words," but now he does not speak at all. He is not in any speech or language development program. His health has declined steadily. He has had pneumonia, boils, various respiratory conditions and severe athlete's foot.

(d) Often, the clothes taken to Barry by his father are reported "lost," and Barry is forced to wear inadequate and skimpy clothing.

10(a) Plaintiff Lowell Scott Isaacs, aged 7, resides at Willowbrook in Building 76, Ward 2. Lowell is deaf, does not speak, and is classified as multiply retarded. He was admitted to Willowbrook approximately one year ago, after being on the waiting list for 1 1/2 years.

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(b) Lowell was assigned to a hearing program but was recently suspended from the program and sent back to his ward for being "too active." His father was not told how long Lowell was suspended, but he knows of other children similarly punished by confinement to their wards for several days at a time.

(c) Lowell's clothing is "deplorable" but his father was told by attendants that any clothing he brought would only be stolen.

(d) Lowell's ward has no toys. The approximately 35 children on his ward are cared for, during the day shift, by two attendants.

(e) Lowell's diet is inadequate in both quantity and quality. At home he eats "ravenously." At Willowbrook, he is forced to eat only mashed meals, even though he is able to consume solid foods.

11(a) Plaintiff Antoinette Magri, aged nine, resides at Willowbrook in Building 12, Ward C. She was admitted to Willowbrook five years ago, and has been diagnosed as severely retarded.

(b) Three years ago, Antoinette lapsed into a coma and was in critical condition because of what a Willowbrook doctor characterized as a "heavy dose" of medication.

(c) Antoinette's parents are concerned about her care at Willowbrook. Antoinette is now 30 pounds

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underweight, and her parents believe her diet is in-- adequate. Her parents have discovered tooth marks on her body, numerous scratches on her face and neck, a bruised lip and a missing tooth, a broken toe, and a severe gash in the back of her head.

(d) On February 1, 1972, Antoinette's parents discovered that her legs were "terribly bent." A few days later, Antoinette's parents were told that a Willowbrook doctor found nothing wrong with her legs. After two weeks of unsuccessfully attempting to speak with that doctor, Antoinette's parents were permitted to speak with a second doctor, who said that tests were underway. Subsequently, Antoinette's parents were told by the first doctor that Antoinette has rickets, or de-calcification of the bone, but that treatment cannot begin until more tests are completed.

Parties - Defendants

12. Defendant Nelson Rockefeller is sued individually and as Governor of the State of New York. He exercises overall responsibility for the operation of all public institutions.

13. Defendant Alan D. Miller, M.D., is sued individually, as Commissioner of the New York Department of Mental Hygiene and as a member of the Board of Trustees of the Health and Mental Hygiene Facilities Improvement Corporation. As Commissioner, he is, by section 7 of the

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New York Mental Hygiene Law, "charged with the execution of the laws relating to the custody, care and treatment of the mentally ill and of mental defectives."

14. Defendant Frederic Grunberg, M.D., is sued individually and as Deputy Commissioner of the New York Department of Mental Hygiene in charge of the Division of Mental Retardation and Children's Services.

15. Defendant Robert E. Patton is sued individually and as Deputy Commissioner of the New York Department of Mental Hygiene in charge of the Division of Local Services, with responsibility for development of community facilities.

16. Defendant Charles Schlaifer is sued individually and as Chairman of the Board of Trustees of the Health and Mental Hygiene Facilities Improvement Corporation, which Corporation is responsible for the planning and construction of public mental health and mental retardation facilities.

17. Defendant Jack Hammond, M.D., is sued individually and as Director of Willowbrook, with an office at 2760 Victory Boulevard, Staten Island, New York, 10314. He exercises overall responsibility for the operation of Willowbrook and for the custody, care and treatment of its residents.

18. Defendant Robert W. Hayes is sued individually and as Associate Commissioner for Mental Retardation of the New York Department of Mental Hygiene.

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19. Defendant Bertram Pepper, M.D., is sued individually and as Associate Commissioner for Children's Services of the New York Department of Mental Hygiene.

20. Defendant A. Anthony Arce, M.D., is sued individually and as Director of the Bureau of Aftercare Services of the New York Department of Mental Hygiene with responsibility for development of after-care services for persons discharged from public institutions for the mentally ill and the mentally retarded.

21. Defendant James M. Murphy, M.D., is sued individually and as Deputy Director of Willowbrook.

22. Defendant Manny Sternlicht is sued individually and as Chief of Habilitation Service of Willowbrook.

23. Defendant Milton Jacobs, M.D., is sued individually and as Supervising Psychiatrist of Willowbrook.

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Class Action Allegations

24. This is a class action brought pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all allegedly retarded persons now resident at Willowbrook. The class consists of over 5,000 members, and is so numerous that joinder of all its members is impracticable.

25. The claims, age, sex, diagnosis, legal status, length and place of residence, degree of retardation, physical limitations, attributed intelligence, and capacity to benefit from habilitation, including suitable care, treatment, education and training of the named individual plaintiffs are typical and representative of the claims and characteristics of the other residents of Willowbrook. In addition, there are among the members of the Association and the Benevolent Society, parents or relatives of Willowbrook residents who are representative of every sub-class. Accordingly, the named plaintiffs will fairly and adequately protect the interests of the class.

26. Prosecution of separate actions by individual members of the class would create a risk of (a) inconsistent or varying adjudications with respect to individual members

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of the class which would establish incompatible standards of conduct for defendants, and (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests.

27. Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

28. The questions of law and fact common to the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for a fair and efficient adjudication of the controversy. Since there is no conflict among the interests of the members of the class, members have no interest in individually controlling the prosecution of separate actions. This Court is a desirable forum in which to concentrate the litigation of the claims of the class, since it has the power to hear all the claims and to grant appropriate relief. There are not likely to be

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any difficulties in the management of a class action, since the whereabouts of all members of the class is known, and all members can easily be informed of this action.

Statement of Claim - Introduction

29. At all times relevant herein, defendants were acting under color of the statutes, ordinances, regulations, customs and usages of the State of New York and, in particular, under color of Article 6 of the New York Mental Hygiene Law.

30. At all times relevant herein, defendants, and each of them, knew, or should have known, of the policies, practices, acts, omissions and conditions alleged herein.

31. Willowbrook is a "state school" established by section 120 of the New York Mental Hygiene Law "for the care, treatment, training and education of the mental defectives of the state." It is located on Staten Island, within the jurisdiction of this Court.

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Statement of Claim - Due Process Violations

32. Care, treatment, education and training are all included within a broader concept referred to by mental retardation professionals as "habilitation." The goal of habilitation is to assist each mentally retarded person to lead a life as close to normal as is possible.

33. At the present time there are approximately 5,209 residents at Willowbrook. All of them, including the named individual plaintiffs, are capable of benefiting from habilitation, but the defendants have denied them said habilitation.

34. All of the residents of Willowbrook have been deprived of their liberty and confined to Willowbrook under non-criminal procedures. They are confined, ostensibly, not for punishment but for the purpose of habilitation. Accordingly, under the due process clause of the Fourteenth Amendment to the United States Constitution, their confinement is justified, if at all, only if they are in fact provided habilitation services.

35. Defendants, however, have created, fostered and condoned conditions, policies and practices at

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Willowbrook that are directly contrary to professionally accepted concepts of habilitation. As a consequence, Willowbrook is not a therapeutic institution. It more closely resembles a prison, and the residents confined therein have therefore been denied due process of law.

Absence of individualized habilitation plans

36. A necessary prerequisite to an adequate habilitation program is the preparation for each resident of an individualized, comprehensive, habilitation plan, tailored to that resident's particular needs. No such plans have been provided for the Willowbrook residents.

Inhumane and psychologically destructive environment

37. A second prerequisite to an adequate habilitation program is a humane physical and psychological environment. The environment at Willowbrook is inhumane and psychologically destructive. Examples of the anti-therapeutic environment include, without limitation, the following:

a) Willowbrook is approximately 500 residents over its rated capacity, and approximately 1,800 over its suggested capacity. Residents are forced to live

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and sleep in barn-like structures, often 40, 50 or a hundred to a room, with six inches or less between beds.

b) Residents have no privacy, and no place to keep personal possessions.

c) Residents are not permitted or assisted to send and receive sealed mail.

d) Residents are denied suitable opportunities for meeting and talking with residents of the opposite sex.

e) The areas in which the residents live are sparsely furnished, and are almost totally devoid of lamps, sofas, comfortable chairs, pictures, rugs, magazines, books, toys, games and the other acoutrements of normal living.

f) Residents are not properly clothed. Many of them are left all day, or for major portions of the day, entirely naked. Many others do not have or wear shoes or shirts. Residents are not permitted to select clothes from among a variety of styles, fabrics and colors, but are forced to wear loose-fitting, institutional-type clothing, all of which severely impedes the process of habilitation.

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Frequently, residents are forced to wear dirty clothes and clothes soiled with urine and feces.

g) Many of the living areas give off an overpowering stench of sweat, urine and human excrement.

h) Residents are forced to use toilets that frequently have no seats. There are often no walls, partitions or curtains between toilets. Toilet areas are not clean and free from odor. Frequently, no toilet paper is made available.

i) Residents are not protected from frequent and continuing theft and destruction of their clothing and personal property.

j) Residents are not protected from frequent and continuing physical assault and injury.

k) Approximately two to three residents die at Willowbrook each week. Many of them -- at least three or four a month -- die aspirating their own food or vomit because there are not enough employees to care for them. The number of deaths per week has increased substantially since defendants instituted a "job freeze" in December of 1970. During calendar year 1970 there were 101 deaths at Willowbrook.

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During calendar year 1971, after the job freeze, there were 131 deaths, even though the resident population declined during 1971.

38. In addition to the foregoing, Willowbrook is critically deficient in, among others, the following respects:

a) The diet is inadequate and food preparation and dining conditions are unsanitary and excessively hurried. Many residents are forced to eat in four minutes or less.

b) Eighty percent of the school age residents are receiving no schooling whatsoever;

c) Ninety-six percent of the residents are not receiving speech therapy, and ninety-four percent are not receiving language development assistance, even though three-fourths of the residents need and could benefit from such programs.

d) Sanitary conditions are so grossly inadequate that the hepatitis antigen appears in the bloodstream of almost 100% of all residents within six months of admission.

e) Ninety-six percent of the adult residents are receiving no adult education.

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f) The resident buildings are not air-conditioned, which causes severe discomfort and irritability during the summer months, and severely impedes habilitation.

g) Experimental research programs, including the use of noxious or aversive stimuli, are conducted without the express and informed consent of the affected resident and his relatives or guardian.

Inadequate Staff

39. A third prerequisite to an adequate habilitation program is a qualified staff in adequate numbers. However:

a) A substantial percentage of the psychiatrists, physicians, psychologists and other professionals employed at Willowbrook are not licensed or certified to engage in the private practice of their profession in the State of New York. Many of them have only a rudimentary facility with the English language, which makes it extremely difficult, in some cases impossible, for them to communicate with the residents.

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Similarly, although approximately thirteen percent of the residents are of Spanish or Latin extraction, very few of the professional or non-professional employees of Willowbrook are fluent or even conversant in Spanish.

b) The number of employees authorized for Willowbrook is markedly inadequate. Furthermore, as of December, 1971, almost twenty percent of the employment positions authorized for Willowbrook were not filled. Most of the vacancies are the result of the "job freeze" instituted by defendants in December of 1970. Since that time, Willowbrook has lost approximately 650 staff members and, in addition, has not been permitted by defendants to fill approximately 300 jobs that were unfilled when the job freeze was instituted. In many categories, the number of vacancies is close to, or exceeds, the number of filled positions. As of December, 1971, for example, there were 15 physical therapist aides, and unfilled openings for 22 more; there were 5 psychologists and openings for 5 more; there were 131 nursing personnel and openings for 120 more. As of that date, Willowbrook

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had vacancies for 330 attendants, 6 social workers, 37 occupational therapists, 15 recreational therapists, 19 educators, 13 clinical personnel, and 110 support personnel. These staff shortages continue to the present time.

c) As of February 17, 1972, Willowbrook employed one licensed physical therapist, and had unfilled openings for twelve more. It had 10 psychiatrists and unfilled openings for 7 more, it had four social workers with a Masters Degree in social work and unfilled openings for 2 more. It had a total of 2,368 clinical employees and unfilled openings for 433 more.

d) To compound the shortage of staff, Willowbrook suffers from a very high absentee rate, which defendants know but have failed to monitor or correct. Accordingly, the number of staff members available to care for patients on a day to day basis is substantially lower than the number of staff workers listed on the employment records.

e) Willowbrook has a very high rate of staff turnover, approximately one-third of the staff each year, but does not have or provide an adequate

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orientation program for its new employees, or adequate in-service training for its existing employees. Many of the employees at Willowbrook, particularly at the ward level, where most of the resident-employee contact occurs, have no understanding of mental retardation, or habilitation techniques, and no concept of their functions and duties.

f) In most of Willowbrook's twenty-seven buildings there is no doctor, registered nurse or licensed practical nurse on duty during the second and third shifts, and medication administered during those shifts is therefore administered by attendants.

g) At the clinical level, there are no psychiatrists who have completed a three year residency in psychiatry. Those who have completed such a residency program are employed solely in administrative duties.

40. Because of the critical shortages of staff, the vast majority of Willowbrook residents are not engaged in any habilitation program. For most, Willowbrook is, at best, a custodial warehouse, which provides them nothing but food and shelter and a place to live until they die.

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The absence of periodic evaluations

41. A fourth prerequisite to a therapeutic habilitation program is frequent and comprehensive review of each resident's mental and physical condition, including evaluation and adjustment of his habilitation plan. Such reviews do not take place at Willowbrook. Approximately two-thirds of the residents have not had their intelligence tested or re-evaluated since 1965 or earlier.

Statment of Claim - Failure to Provide, Explore and Utilize Less Drastic Alternatives

42. Each resident at Willowbrook has a constitutional right to be treated with dignity and to be afforded the maximum personal freedom he is capable of exercising. Whenever defendants restrict a resident's right to dignity and personal freedom they may do so only for an habilitative purpose, and they are constitutionally required to utilize the least drastic alternative sufficient to achieve that purpose.

43(a) Each of the residents of Willowbrook could be more adequately habilitated in alternatives less drastic than the conditions now existing at Willowbrook.

(b) As of January, 1971, 404 residents, almost eight percent of the population, were diagnosed as mildly retarded or borderline normal-retarded. Since

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they could have been habilitated in the community, they, among others, should not have been admitted to Willowbrook and could immediately be discharged to existing public school and community facilities. But defendants have failed to take the necessary steps to locate appropriate residential facilities in the community and to effectuate their discharge.

(c) As of January, 1971, 774 residents, almost fifteen percent of the population, were diagnosed as only moderately retarded. Many of those residents could be discharged immediately to existing community facilities, and all of them could be discharged to community facilities if additional facilities were available. But defendants have failed to take the steps necessary to discharge those who could be immediately placed in community facilities, and have failed for years to plan and develop sufficient community facilities to meet the need.

(d) As of January, 1971, 1076 residents, almost 36 percent of the population, were diagnosed as severely retarded, and 2181 residents, approximately 41% of the population, were diagnosed as profoundly retarded. A few of those residents could be discharged immediately to existing community facilities, and all or almost all of them could be discharged to community facilities if additional facilities were available.

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But defendants have failed to take the steps necessary to discharge those who could be immediately placed in community facilities, and have failed for years to plan and develop sufficient community facilities to meet the need.

44. For the present, until sufficient community facilities are provided, there are less drastic alternatives within Willowbrook that would more adequately habilitate the residents. Instead of maximizing and utilizing those alternatives, however, defendants have subjected the residents of Willowbrook to unnecessary and anti-therapeutic restrictions. Many of those restrictions are so barberic as to constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Those restrictions include, without limitation:

a) Placing residents in locked, solitary isolation rooms for extended periods of time. At the present time at least 11 residents are confined almost continuously, many of them nude, in locked, solitary isolation rooms that have no sinks or toilets, no sheets or blankets, and no furnishings other than a vinyl mattress. At least five of those residents

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have been continuously confined in seclusion for more than one year, and at least three have been continuously confined in seclusion for more than five years.

b) Tying or strapping residents to their beds or chairs for substantial periods of time, or restricting their movements through the use of straitjackets and similar devices;

c) Confining residents to locked wards and buildings.

d) Denying residents grounds privileges, week-end passes, and similar freedom of movement, even when the ward physicians in charge of the residents have recommended such measures.

Statement of Claim--Involuntary Servitude

45. The Thirteenth Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution prohibit enforced labor except as punishment for crime.

46. A substantial number of Willowbrook residents, including most of those who reside

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in building 19, are ordered, directed and required to perform labor which involves the operation and maintenance of the institution, or for which the institution is under contract with an outside organization. The working residents receive no financial compensation for their labor or, at best, only token payments of a few cents per day. None of the working residents receive the state minimum or federal minimum wage. Frequently, residents are ordered to work as punishment for alleged misbehavior. Said labor is not therapeutic or beneficial to the resident and in many cases makes it impossible for the working resident to attend schooling programs or other habilitation programs for which he would otherwise be eligible.

Statement of Claim - Discriminatory Treatment of the Mentally Retarded

47. The equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits unreasonable classifications. In numerous respects, the mentally retarded and the allegedly retarded residents of Willowbrook have been unreasonably classified and discriminated against. Said classifications are arbitrary and capricious and are not necessary to achieve any compelling state interest. Examples of those discriminatory classifications follow.

48. Willowbrook residents aged 5-21 are denied the education provided to other persons of their age,

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including mentally retarded persons, in the community, and almost all residents over 21 are denied any education whatsoever.

49. The amount spent per resident in New York State residential institutions for the retarded, including the amount spent per resident for many of the residents at Willowbrook, is, in many cases, substantially lower than the amount spent per prisoner in New York State correctional facilities.

50. Defendants have allocated and budgeted per patient expenditures for allegedly mentally ill children in psychiatric hospitals that are approximately 300% greater than the per resident expenditures allocated and budgeted for allegedly mentally retarded children at Willowbrook.

51. Defendants receive from the federal government and from third-party sources a substantial amount of money as reimbursement for the costs of care and treatment allegedly rendered to Willowbrook residents. The bulk of those receipts, however, are allocated to construction, to operation of facilities for the mentally ill, and to other purposes that do not directly benefit the residents of Willowbrook.

52. Defendants have fostered and condoned standards of habilitation for residents of Willowbrook that are markedly inferior to the minimum standards defendants

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have mandated as prerequisite to the licensure of private residential facilities for the mentally retarded. For example, unlike Willowbrook, private facilities must have a comprehensive "individual written plan of care and treatment" specifying "the methods of care and treatment and providing for appropriate review and revision." Furthermore, private facilities cannot exceed their authorized bed capacity at any time, they must provide "periodic medical, dental, eye and hearing examinations," and they must have an "adequate number of appropriately qualified staff" including as staff physicians only those who are "licensed to practice medicine in the State of New York."

53. In numerous respects, including notice, opportunity for a hearing, periodic judicial review, length of confinement, and number of physicians necessary to effect confinement, the procedures for the institutionalization and retention of the allegedly mentally retarded, unreasonably deny to them substantive and procedural protections that are afforded to the allegedly mentally ill. In addition, the allegedly mentally retarded are denied the services of the Mental Health Information Service, which services are afforded to the allegedly mentally ill.

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Summary

54. Because of the foregoing, the vast majority of residents at Willowbrook have actually regressed and deteriorated since their admission. Many of them exhibit stylized and stereotyped behavior, such as constant bobbing, head-nodding, unusual body postures, etc., which is not the result of mental retardation but instead is the result of prolonged deprivation in a barren, prison-like environment.

55. Because of the foregoing, residents have been deprived of the habilitation necessary to enable them to speak, read, communicate, mix and assemble with others of their choice, and to exercise other rights protected by the First Amendment.

56. Because of the foregoing, residents have been deprived of their rights to privacy and dignity protected by the Fourth and Fourteenth Amendments.

57. Because of the foregoing, residents have been subjected to cruel and unusual punishments, in violation of the Eighth Amendment.

58. Because of the foregoing, residents have been subjected to involuntary servitude, in violation of the Thirteenth and Fourteenth Amendments.

59. Because of the foregoing, residents have been denied due process and equal protection of the laws, in violation of the Fourteenth Amendment.

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WHEREFORE, plaintiffs respectfully demand:

A. That an order issue permitting this action to proceed as a class action.

B. That a judgment issue declaring that the acts and omissions complained of herein violate the First, Fourth, Fifth, Sixth, Eighth, Thirteenth and Fourteenth Amendments to the United States Constitution, and declaring further that the constitutional rights so violated are present rights which must immediately be respected.

C. That a judgment issue declaring that Willowbrook does not now meet constitutionally minimum standards of adequate habilitation, including care, treatment, education, and training.

D. That this Court receive evidence at a hearing from which it will determine, specify and declare the constitutionally minimum standards of adequate habilitation for residents of Willowbrook.

E. That plaintiffs be granted a preliminary injunction and, upon final hearing, a permanent injunction sufficient to rectify the unconstitutional conditions, policies and practices alleged herein.

F. That said injunction direct defendants, and their successors, agents and employees, promptly to meet such standards as this Court may specify.

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G. That defendants be enjoined from appropriating or spending any money for future construction or completion of non-community based facilities until such time as this Court determines that community facilities are adequate to meet the demand.

H. That defendants be enjoined from admitting any further residents to Willowbrook until such time as this Court determines that Willowbrook meets such standards as this Court may specify.

I. That defendants be ordered to provide for the residents now in Willowbrook such appropriate additional habilitation as may be necessary to compensate for the regression and deterioration they have suffered.

J. That a receiver or master be appointed and endowed with the necessary authority to oversee and implement said orders and injunctions.

K. That plaintiffs be awarded the costs of this proceeding and such other and further relief as to this Court seems just and proper.

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Dated: New York, New York
March 17, 1972

Respectfully submitted,

BRUCE J. ENNIS
BURT NEUBORNE
c/o New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
212/924-7800

NLADA National Law Office
(Julian Tepper, Stanley Herr
and W. Anthony Fitch)
1601 Connecticut Avenue, N.W.
Washington, D.C. 20009

CHARLES HALPERN
National Council On The Rights
Of The Mentally Impaired
1600 20th Street, N.W.
Washington, D.C. 20002

Attorneys For Plaintiffs

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Attorney for
Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

the day of 19
at M.
Dated,

Yours, etc.,

Attorney for
Office and Post Office Address

To

Attorney(s) for

Index No. 720 356 Year 19

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC.; et al,

Plaintiffs,

-against-

NELSON ROCKEFELLER, et al,

Defendants.

~~SUMMONS AND CLASS ACTION~~ COMPLAINT

$15 -

Bruce J. Ennis, Esq.

Attorney for Plaintiffs

Office and Post Office Address, Telephone
New York Civil Liberties Union
84 Fifth Avenue
New York, N.Y.
212/924-7800

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

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Record Group 21, Records of the District Courts of the United States
U.S. District Court for the Eastern District of New York
Civil Case Files, 1938 - 1994
National Archives Identifier: 582654
Patricia Parisi et al. v. Nelson Rockefeller, et al.
Case: 72-CV-357

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

PATRICIA PARISI, by her mother Lena Steuernagel; ANSELMO CLARKE, by his mother Estella Clarke; NELSON AGOSTO, by his aunt and next friend Lucilia DeJesus; FRANCES BREEN, by her sister Mary Morganstern as committee of her person and property; JOHN DUFFY, by his next friend Robert L. Feldt, Esq.; EVELYN CRUZ, by her father Francisco Cruz; BONNIE ROSE, by her mother Anne Rose; MARIO NARVAEZ, by his mother Carmen Narvaez; JOHN DOE, by his mother Jane Doe; STEVEN ROSEPKA, by his father Ben Rosepka; individually and on behalf of all others similarly situated,

72C 357

: Civil Action No.

Plaintiffs,

: COMPLAINT--CLASS ACTION

-against-

NELSON A. ROCKEFELLER, individually and as Governor of the State of New York; ALLAN D. MILLER, M.D., individually and as Commissioner of the New York State Department of Mental Hygiene; FREDERIC GRUNBERG,M.D., individually and as Deputy Commissioner of the Division of Mental Retardation and Children's Services of the New York State Department of Mental Hygiene; ROBERT W. HAYNES, individually and as Associate Commissioner for Mental Retardation of the Division of Mental Retardation and Children's Services of the New York State Department of Mental Hygiene; BERTRAM PEPPER, individually and as Associate Commissioner for Children's Services of the Division of Mental Retardation and Children's Services of the New York State Department of Mental Hygiene; CHARLES SCHLAIFER, individually and as Chairman of the Trustees of the Health and Mental Hygiene Facilities Improvement Corporation of the New York State Department of Mental Hygiene; ROBERT E. PATTON, individually and as Deputy Commissioner of the Division of Local Services of the New York State Department of Mental Hygiene; A. ANTHONY ARCE, M.D., individually and as Director of the Bureau of Aftercare Services of the Division of Local Services of the New York State Department of Mental Hygiene; JACK HAMMOND, M.D., individually and as Director of Willowbrook State School; JAMES M. MURPHY, M.D., individually and as Deputy Director of Willowbrook State School; MANNY STERNLICHT, Ph.D., individually and as an associate director of Willow-

:

CLERK
U.S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK

MAR 17 3 42 PM '72

FILED

(1)

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brook State School; and MILTON JACOBS, M.D., individually and as an associate director of Willowbrook State School, :

Defendants. :

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PRELIMINARY STATEMENT

1. This is a class action brought by residents of the Willowbrook State School on Staten Island, New York to redress violations of federal constitutional rights secured by the First, Fourth, Sixth, Eighth, Thirteenth, and the Due Process and Equal Protection Clauses of the Fourteenth Amendments to the Constitution of the United States. Plaintiffs and their class seek declaratory and preliminary and permanent injunctive relief pursuant to 28 U.S.C. §§2201 and 2202, 42 U.S.C §§1983, 1985(3), 1986, and 1994, and Rules 57 and 65 of the Federal Rules of Civil Procedure.

2. By this proceeding plaintiffs and their class seek to vindicate their constitutionally-protected right to an equal opportunity to realize their developmental capacity including the right of each plaintiff and class member to receive appropriate developmental assistance adapted to his particular needs, their constitutionally-protected right to a formal determination with adequate procedural safeguards of the appropriate developmental program for each plaintiff and class member in light of his particular developmental capacity and needs, and their constitutionally-protected rights to be free from particular practices violative of the First, Fourth, Sixth, Eighth, and Thirteenth Amendments to the United States Constitution.

3. Plaintiffs and the class members arrive and remain at Willowbrook State School as a result of a realistically coercive pattern of forces and circumstances beyond their control

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and not of their own choosing, and because of the failure of the state to provide less drastic and restrictive alternatives. At Willowbrook the plaintiff and the class members are denied appropriate developmental assistance, and many are, in fact, subjected to severely injurious and cruelly inhuman treatment. The net result is that plaintiffs and the class members are virtual prisoners in a human warehouse, condemned to incarceration for the rest of their lives without the prospect of ever attaining that measure of self-care and self-sufficiency of which they are all capable.

JURISDICTION

4. Jurisdiction is conferred on this Court by 28 U.S.C. §1343 as an action to redress the deprivation under color of law of rights, privileges and immunities secured to the plaintiffs and their class by the Constitution of the United States.

PLAINTIFFS

5. PATRICIA PARISI, aged nineteen, has been a resident of Willowbrook State School since she was seven years old.

a) Patricia had her first convulsion when she was nine months old. When she had her first seizure, her mother took her to Columbia Presbyterian Hospital where Patricia was examined over a period of two years and was diagnosed as retarded. Patricia was slow in speaking and in toilet-training. She did respond to verbal commands. Her mother enrolled her in a public school's special classes from which she was discharged after a few months because she was "disruptive". By this time Patricia's conduct was having an adverse affect on the normal child in the family. Care of both children became a severe strain on the mother. Doctors

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at Presbyterian Medical Center pressured her to institutionalize Patricia. No less drastic alternatives to complete institutionalization were available in the community.

b) Patricia's mother was prohibited by staff from visiting her child during the period immediately following institutionalization. Patricia has not received developmental assistance while at Willowbrook. She spends her days on the ward just sitting there. There are usually two or three attendants present on her ward of sixty to seventy residents. At age fourteen, she began to receive occupational therapy, about an hour per session and not on a daily basis. At some point she was placed in another type of training class, but only remained there for a few days. Her mother has complained to Dr. Hammond about the lack of programming.

c) Patricia's condition has deteriorated at Willowbrook. Her hyperactivity has grown worse, and she only calms down when she is at home on visits. She is constantly sedated at Willowbrook. Her mother has been notified by the institution with regard to the special examination of Patricia for irritation of her vulva, April, 1966; possible cataract on left eye, April, 1971; possible bone fracture from falling on her face during a severe seizure, February, 1972.

d) In March, 1970, Patricia was transferred from a higher-functioning ward in Building #21 to a lower-functioning one in Building #22. This transfer was as punishment for Patricia's having ripped an attendant's uniform. Since she has been in Building #22 she has had many injuries including, but not limited to, the following--bruises about the body; cuts about the face, arms, and legs; black eyes; bites on her

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hands, shoulders, and back; large bumps on her head. She is also having many more seizures than she used to have. Patricia's mother has repeatedly called this situation to the attention of the administration and requested Patricia's transfer into Building #11 or #21 which are more suitable to her developmental capacity. One response from Director Hammond and Deputy Director Murphy, dated May 1, 1970, justified Patricia's continued detention in Building #22 on the grounds that the girl is prone to mark the walls with crayons which her mother gives to her and that her use of a deck of playing cards leads to difficulties with other children.

6. ANSELMO CLARKE, aged eighteen, has been a resident of Willowbrook State School since he was three years old.

a) As an infant, Anselmo got seizures. He was operated on at age two and one-half years to relieve pressure from the brain and with subsequent medication he stopped having seizures. Anselmo could feed himself but he did not talk, nor was he toilet trained. While Mrs. Clarke worked, her husband and two normal children helped with the care of Anselmo. Mrs. Clarke was advised by a nurse that Anselmo would receive the education, training, care, and treatment at an institution like Willowbrook which the parents could not provide at home. No less restrictive alternative services in the community were offered or known to her.

b) Anselmo was entered as a "voluntary"admission, his mother believing it to be in the child's best interests. During the initial six week period when Mrs. Clarke was prohibited from visiting her son, he lost approximately thirty

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pounds. The only training he received in all these years there has been toilet training. When his mother complained about the lack of educational programming and lack of activity, she was told that there were not enough teachers and that not much could be done for her son.

c) Anselmo is frequently bruised and injured without satisfactory explanation, e.g., when three of his teeth were knocked out at age three the reason given was that he lost his balance.

d) Anselmo's knee is presently bent like the letter "K". This condition has grown steadily worse over the past few years without orthopedic correction, except for shoes which offer no help. When Mrs. Clarke noted that her son was experiencing great pain on account of his leg, Dr. Rappaport assured her that the retarded do not feel pain as normal human beings do.

7 . NELSON AGOSTO, aged eleven, has been a resident of Willowbrook State School for less than one year.

a) Nelson was born in New York but spent his early years in Puerto Rico with his father. He returned to New York at age eight to live with his aunt, Mrs. DeJesus. At that time he could walk, speak some Spanish, but he was not toilet-trained. He spent a year in a day care program but he was still too much trouble for his aunt who was in poor health. A social worker at Mt. Sinai Hospital advised her to place Nelson in either Bellevue or Willowbrook. Mrs. DeJesus refused to send her nephew to Bellevue because of the stories she had heard about that place, so arrangements were made for Nelson's placement in Willowbrook.

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b) During the first few weeks of his residence there, Mrs. DeJesus was prohibited from visiting. When she finally could visit him she observed that he had lost a substantial amount of weight and noticed marks with the appearance of belt lashings across his legs and rear. He was so famished on that occasion that he ate four sandwiches and seven cups of juice.

c) Nelson was initially placed in a ward which contained boys who were quite wild, exhibiting aggressiveness toward him. He was finally transferred out of that ward by Dr. Wilkins who has since been discharged.

8. FRANCES BREEN, aged fifty-one, has been a resident of Willowbrook State School since she was thirty-two years old.

a) Frances lived at home with her parents and two sisters and attended Catholic school until the fifth grade when the nuns advised that she be examined because she seemed unable to learn with the normal children. Frances could write a few words but she could not read or count. After she was examined at St. Charles Hospital and it was determined that she was retarded, she was taken out of school. She never received further formal education or training.

b) When Frances' mother died when she was thirteen, Frances and her younger sister moved in with their older married sister, Mary Morganstern. After their father died when Frances was seventeen, Mary was appointed the committee of her person and property. When Mary's husband died, Mary could no longer take care of Frances because of her own poor health. The family priest recommended Willowbrook and Kings County Hospital made the necessary arrangements. Frances was sent

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to Willowbrook when she was thirty-two years old.

c) Frances was first placed in Building #32 and was assigned work in the laundry, folding and ironing sheets. When she resisted that type of labor, she was placed in Building #11 where she was supposed to take care of infants. Again resisting the assigned tasks, she was removed to Building #23 where she has lived for the last ten years. Dr. Bronston, the physician in Building #23, has advised her family that Frances clearly does not belong with the hyperactive residents there.

d) Frances has no friends at Willowbrook. The residents in her building bother her, fight with her, and rip her clothing. She used to enjoy sewing and embroidering, but can no longer engage in these activities because needles are not allowed on the ward. Frances receives no recreation at Willowbrook.

e) Soon after Frances was placed in Willowbrook, she developed a twitch which doctors advised was permanent. During her periodic visits home, however, the twitch does not appear. Whereas Frances used to be highly motivated, she has become increasingly nervous and selfish. Frances' face and body are covered with bruises and scabs, some self-inflicted. She has nearly sucked the skin off two of her fingers. When she is with her family, she exhibits none of the behavior which leads to her self-injury at Willowbrook.

f) Frances has suffered from chest pains for a few years. Her physician suspected ulcers and ordered tests in August of last year. The appropriate tests have still not been administered despite her family's frequent requests. Her

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family has been forced to consult a private doctor for the necessary diagnosis and treatment.

g) Frances has recently experienced drastic changes of weight. At one point she weighed 205 pounds and appeared bloated, rather than fat. When her sisters expressed concern about this condition and the simultaneous slowing down of her reflexes, certain medication causing the bloating was reduced. She then went down to 175 pounds. Frances presently weighs 146 pounds, having lost 14 pounds within the last three weeks.

9. JOHN DUFFY, aged eighteen, has been a resident of Willowbrook State School since he was five years old.

a) John's mother had tuberculosis while she was pregnant, and John was born with the disease. For the first year of his life, both he and his mother were hospitalized. John spent the following year in a foster home until his mother was released from the hospital. Thereafter, he lived with her, until the loss of her job necessitated his placement in foster homes again. John moved back with his mother when she married. John's stepfather had him committed to Willowbrook because the child had temper tantrums and allegedly attempted to set their house on fire. John's mother presently resides in St. Zita's Home for homeless women. Her other children were placed in foster homes. She has visited John infrequently. The present status of his commitment is involuntary.

b) John was first placed in Building #6 where he was the subject of metabolism research by Dr. Reiss. He is presently a resident of Building #19. John has learned how to play

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the trumpet. (He is lead trumpet in a band composed of other residents.) He has also learned to repair wheel chairs which he does in the shop for two hours every day. For this labor, he is compensated by a five-dollar store card every two weeks. John receives no habilitation for his speech problems. He was enrolled in a "trainable" class, but this program was not aimed toward his eventual discharge from Willowbrook and appropriate placement in the community. John has been assigned an intelligence quotient of 86.

c) John has no privacy at Willowbrook. He is forced to bury his valuable personal possessions in the woods surrounding Willowbrook for their safekeeping.

10. EVELYN CRUZ, aged twelve, has been a resident of Willowbrook State School since she was six years old.

a) At the time she was placed there, she could walk, speak and was toilet trained. A doctor at a State Hospital told her parents that Evelyn had to go to Willowbrook because she was too much trouble for the parents. They were advised of and knew of no other alternatives to their daughter's institutionalization.

b) As a resident of Building #76 of Willowbrook, Evelyn receives no education or training. She spends her days on the floor in front of a television set. No progress in her development has been noted by her parents.

c) Evelyn is always bruised and scratched when they visit her. The clothing and personal possessions they bring her have always disappeared by the next visit. Her parents have been prevented from seeing how their daughter actually lives on the ward.

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11. BONNIE ROSE, aged nineteen, has been a resident of Willowbrook State School since she was eight years old.

a) At age eighteen months, Bonnie was diagnosed as "emotionally disturbed" by doctors at Coney Island Hospital and her mother was told that Bonnie would not be normal. While Bonnie lived at home she developed slowly. She walked, fed herself, and understood commands, but she spoke very little. Her mother obtained medication from the Kings County Mental Hygiene Clinic to control the child's hyperactivity which posed special problems for the four normal children in the family. Mrs. Rose was unsuccessful in her attempts to enroll Bonnie in a private school for emotionally disturbed children because of the long waiting list. Likewise, she was told the public schools had no classes for Bonnie. She approached several other agencies in the city to place Bonnie in an educational program suited to her needs, but nothing was available.

b) Bonnie was committed to Willowbrook by the Family Court following a neighbor's complaint that the child made too much noise. Bonnie's mother vehemently opposed her child's institutionalization, preferring some form of day care in the community.

c) When Bonnie was brought to Willowbrook for the first time, a doctor responded to Mrs. Rose's obvious emotional and deeply personal tragedy by advising her to forget about Bonnie and to live for her normal children. Bonnie resides in Building #23, in a ward with approximately 50 other hyperactive girls. She receives no education or training, not even adequate custodial care. Her scarred body indicates the effects

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of ward activities.

d) In 1964, Bonnie was hospitalized with a severe gash in her head. In January, 1972, Bonnie was again hospitalized in Building #2, this time with a massive and severe infection of her left arm. Dr. Bronston, her building physician, believes that she had the infection for some time and that the boil on the arm was visible for several days before it was reported by an attendant. The infection was caused directly by ward conditions: penicillin resistant staphylococcus prevalent on the wards, inadequate staff and supervision, no outdoor activity resulting in lack of sunlight and vitamin deprivation.

12. MARIO NARVAEZ, aged eighteen, has been a resident of Willowbrook State School since he was five months old.

a) When Mario was born with his legs and arms crossed, he was immediately diagnosed as retarded. Doctors at Mt. Sinai Hospital and Social Services personnel arranged to have him placed in Willowbrook. There were eight other children in his family.

b) Mario used to be able to visit his home on occasion, but this practice has ceased because his mother could not control him around the grandchildren she cares for.

c) Mario has a speech impediment but he understands when he is spoken to. At Willowbrook he resides in Building #6. He helps attendants regularly by working in the laundry room, carrying packages, and engaging in other odd jobs.

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d) His family has frequently observed him during visits with a black eye, scratches, busted lips, and beaten up. His family has written to the N.Y. State Medical Board about his condition.

13. JOHN DOE, aged twenty-one, has been a resident of Willowbrook State School since he was eleven years old.

a) When John was one year old it was noticed that his development was not normal. He spent some time in Creedmoor and in Shield of David before entering Willowbrook. At that time he was verbal and toilet-trained.

b) The staff has labeled him "disturbed" and "hyperactive"; as a consequence, he is heavily sedated. John has not received education, training, or habilitation adapted to his needs while at Willowbrook. With one-to-one contact, John is capable of learning. A rabbi taught him the prayers that were necessary for his bar mitzvah. He understands Yiddish.

c) John is receiving medication for seizures. He is presently suffering from an abdominal hernia.

d) John's mother believes her son has been beaten frequently by attendants and fears further reprisals against her son for her participation in organizing parents and in this lawsuit. She has recently suffered from a nervous breakdown, and does not want the names of her son or herself to appear in this lawsuit.

14. STEVEN ROSEPKA, aged eighteen, has been a resident of Willowbrook State School since he was four years old.

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a) Prior to admission, Steven was examined and observed by private doctors, and by staff at Columbia Presbyterian Hospital and Flower Fifth Hospital. Though Steven talked, walked, fed himself, and was toilet trained, the strain from his special needs was too great on his mother who had to care for two other normal children. A social worker at Flower Fifth Hospital advised his parents that Steven's admission to Willowbrook was in the best interests of his mother's health. She also made all of the necessary arrangements.

b) Steven's parents visit him regularly but have been prevented, until recently, from visiting his ward in Building #6 except once a year on visiting day. On one such occasion when Steven's father asked where his son's bed was, he received three different answers from ward attendants. Every time his father has visited the ward he has observed numerous children barefoot and naked. Steven's father brings his son nice clothes on Sundays and takes the time to dress him up, but during the week Steven wears the tattered institutional clothing, if any.

c) Steven is not presently receiving any program of education or training at Willowbrook. Steven was excluded from an educational program at the institution, with the explanation given to his father that more advanced children deserved the attention and that "Stevie was a waste of time."

d) Six years ago, his father observed his back was scratched and cut up, as though it had been lashed. No satisfactory explanation from staff was given in response to Mr. Rosepka's questions about this incident.

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e) Three years ago, his father noticed a swollen black and blue eye and was told that his son had been in a fight with another boy. When the eye was still bloodied and swollen a week later, his father requested that a doctor examine it but was told that there was nothing to worry about. In response to a letter to Dr. Hammond a specialist examined the boy's eye four weeks later. Three months thereafter, Steven's eye was examined again at a hospital. When his father visited the hospital, he was told that his son had lost his left eye.

f) Throughout the years of Steven's residence at Willowbrook, Mr. Rosepka's requests for information from doctors about his son's condition or progress went unanswered. Instead, his inquiries were met with warnings that he was doing more harm than good by his complaints and his concern.

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CLASS ACTION ALLEGATIONS

15. Plaintiffs bring this action as a class action pursuant to Rule 23(a) and, in addition, Rule 23(b)(2), or, in the alternative, Rule 23(b)(1)(A) or (B), or, in the alternative, Rule 23(b)(3), of the Federal Rules of Civil Procedure.

16. Plaintiffs are members of a class containing, upon information and belief, in excess of 5209 persons, composed of all of the residents at Willowbrook State School, on Staten Island, New York. The members of the class are so numerous as to make joinder impracticable. Rule 23(a)(1).

17. There are questions of fact and law common to the class, namely, whether each of the members of the class is needful and capable of benefiting from appropriate developmental assistance, and whether the defendants have violated the constitutional right of each class member to an equal opportunity to realize his developmental capacity including appropriate developmental assistance adapted to his particular needs, and the constitutional right of each class member to a formal determination with adequate procedural safeguards of his appropriate developmental program in light of his particular developmental capacity and needs. Plaintiff's claims are typical of the claims of the class. Rule 23(a)(2) and (3).

18. The circumstances, age, manner of admission, length and place of residence, attributed intelligence, and capacity to benefit from appropriate developmental assistance of the plaintiffs are a fair sampling of the characteristics of the residents of Willowbrook. Plaintiffs' attorneys have legal resources and experience adequate to protect all members of the class. Plaintiffs know of no conflict of interest among members of the class. Accordingly, plaintiffs can fairly and

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adequately protect the interest of the class. Rule 23(a)(4).

19. The prosecution of separate actions by individual members of the class would create a risk of varying adjudications with respect to individual members of the class which might establish incompatible standards of conduct for the defendants in this action, and would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. Rule 23(b)(1)(A) and (B).

20. In denying the rights of the plaintiffs and the class members to an equal opportunity to realize their developmental capacity including the right of each to receive appropriate developmental assistance adapted to his particular developmental capacity and needs, and in denying the rights of the plaintiff and the class members to a formal determination with adequate procedural safeguards of the appropriate developmental program for each in light of his particular developmental capacity and needs, the defendants have refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and corresponding declaratory relief with respect to the class as a whole. Rule 23(b)(2).

21. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. Plaintiffs know of no interest of members

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of the class in controlling separate actions. This Court is the most desirable and convenient forum, since it has the power to hear all the claims and to grant appropriate relief. Plaintiffs know of no difficulties likely to be encountered in the management of the class action. Rule 23(b)(3).

DEFENDANTS

22. At all times relevant herein, the defendants were acting under color of the statutes, ordinances, regulations, customs, and usages of the State of New York.

23. The acts and omissions alleged herein are the result of a conspiracy among two or more of the defendants for the purpose of depriving plaintiffs and class members of the equal protection of the laws and of equal privileges and immunities under the laws, and for the purpose of preventing or hindering the constituted authorities of New York State, including professional and non-professional employees of Willowbrook, from giving and securing to plaintiff and class members the equal protection of the laws.

24. One or more of the defendants herein have done and caused to be done acts in furtherance of the object of such conspiracy, whereby plaintiffs and class members are injured in their persons and property and are deprived of having and exercising rights and privileges of a citizen of the United States.

25. At all times relevant herein, defendants, and each of them, knew of and had the power and authority to prevent or aid in preventing the wrongs conspired to be done and alleged herein, but neglected or refused to do so.

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26. At all times relevant herein, defendants, and each of them, knew, or should have known, of the policies, practices, acts, omissions, and conditions alleged herein.

STATEMENT OF CLAIMS

RIGHT OF RETARDED PERSONS TO EQUAL OPPORTUNITY TO REALIZE DEVELOPMENTAL CAPACITY

27. Today, assistance in developing the ability of each of its citizens to cope with his environment and to function independently in society is perhaps the most important responsibility of state and local governments. In the absence of the formal assistance of the state, by way of classroom academic training or otherwise, no person may reasonably be expected to maximize his human abilities and to achieve the degree of self-sufficiency of which he is capable.

28. Formal assistance toward the realization of developmental capacity is an especially fundamental interest of retarded, handicapped, or otherwise developmentally disadvantaged persons. Unlike other persons, for whom development and learning is likely to come informally in the family or by happenstance, retarded persons may never develop at all absent formal assistance adapted to their particular developmental capacities and needs. The result of the failure to provide appropriate developmental assistance to retarded persons is likely to be the loss of their basic liberty to achieve a modicum of self-care and self-sufficiency and even the loss of life itself.

29. Developmental assistance appropriate to the capacity and needs of retarded persons consists of a continuous process of aiding each person to acquire and maintain those life skills

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which enable him to cope more effectively with the demands of his own person and of his environment, and to raise the level of his physical, mental, and social efficiency. As such, developmental assistance appropriate to the capacity and needs of retarded persons embraces more than formal and traditional academic and vocational training, and includes other kinds of training and requires the provision of adequate medical and health services and the maintenance of a humane physical and psychological environment.

30. The plaintiffs and the class members are institutionalized retarded individuals--persons who have been historically stigmatized, regarded with prejudice, and subjected to discrimination. Institutionalized retarded individuals constitute a discrete, insular, and voiceless minority to whom the usual political processes are not open, and therefore must be candidates for special protection by the judiciary.

31. Taken together, the extreme vulnerability of institutionalized retarded persons, and the fundamental importance of their interest in developmental assistance adapted to their particular developmental capacities and needs, require that any distinction which denies appropriate developmental assistance to the plaintiffs and their class while providing it to other persons similarly situated must be subjected to exacting judicial scrutiny.

THE DENIAL OF APPROPRIATE DEVELOPMENTAL ASSISTANCE TO THE PLAINTIFFS AND THEIR CLASS AT WILLOWBROOK

32. Willowbrook State School, completed in 1942 and located on Staten Island, is an institution maintained by New York State's Department of Mental Hygiene for the education, training, care,

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and treatment of so-called "mental defectives" from the New York City area. Mental Hygiene Law, Section 120.

33 . The residents are housed in a sprawling complex of twenty-seven one and two-story buildings, each comprised of several wards. The ward is the basic unit for the organization of their lives.

34 . Administrative offices and most professional and other services are centrally located in other buildings.

35 . Willowbrook's resident population of 5209 persons is comprised of residents, ranging from infants to the elderly, who arrived at the institution at various stages of life. The bulk of the population is between the ages of five and twenty-one.

-- Inhumane and Unsuitable Psychological and Physical Environment

36 . The present conditions at Willowbrook are the absolute antithesis of an environment in which individuals can develop and function at their maximum level.

37 . Residents are forced to live in conditions which are shockingly oppressive, unsanitary, unhealthy, degrading, inhumane, and far below the minimally acceptable standards for human habitation.

38 . Neither areas in which residents are forced to sleep nor those in which they are forced to spend their waking hours are designed to provide an atmosphere which fosters personal relationships and social development, encourages or even permits residents to separate into small groups, allows programs of habilitation, simulates the functional arrangements of a private home or allows for the maintenance of personal hygiene and freedom from illness and disease.

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39. Generally, sixty to seventy residents live and sleep together on wards which consist of a large sleeping room, a day room, and a toilet and shower area. Dining facilities for ambulatory residents are not necessarily located in the same building with the ward.

a. Bathrooms

40. The overwhelming odor of urine, feces, and menses in the female buildings pervades the wards due to lack of adequate toilet facilities, improper supervision of residents, and insufficient staff for cleaning up. A ward typically has eight toilets, but at any one time many of them are non-functioning. No partitions between toilets allow privacy to residents. Necessary safety devices such as grab bars and arm rests for the physically handicapped are not provided. Aggressive and larger residents frequently take stalls occupied by the smaller and less aggressive ones. Unsupervised residents drink from the toilets and smear themselves with their own excrement. The failure to systematically and frequently clean toilet areas creates the appropriate setting for the spread of fecally transmitted diseases such as hepatitis, with the hepatitis antigen appearing in the bloodstream of close to 100% of the resident population.

b. Showers

41. One communal shower area is provided for each sixty to seventy residents. There is no privacy for the residents as they are lined up each evening in the nude and pushed under the shower hose one-by-one. For non-ambulatory residents there

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exist porcelain stretchers with attached hosing apparatus upon which the residents are placed and washed. There are no bathtubs in adult ambulatory buildings. A careful scrubbing and drying of each resident is impossible because of too few attendants and inadequate provision of washrags and towels. The showers themselves are rendered unsanitary in that they are not cleaned between uses by so many people. The lack of hygienic techniques during the showering procedures above described is one of the several contributing institutional causes of cellulitis, the inflammation and infection of legs which afflicts so many Willowbrook residents and which requires massive antibiotic therapy, bed rest and usually hospitalization.

c. Day Room

42. Residents spend many waking hours in a crowded day room, with the background of the droning of a television which is mounted from a raised platform. This continuous and undifferentiated stream of programming is entirely unsuited to residents' special developmental needs. The day room is sparsely furnished by rows of benches, with too few spaces on benches for the number of residents present. Thus, many are forced either to lie or sit on a cold floor or to stand up for long periods. There are no rugs, no comfortable chairs, no tables, no forms of decoration, nor individual objects for their amusement.

d. Dining Facilities

43. Residents dine in overcrowded barrack-like areas containing rows of tables and chairs, which are not arranged in any unit fashion so that a small group of residents could eat in dignified surroundings. The dining areas have a foul smell from the vomit and excrement which are part and parcel of

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the eating experience and from the lack of proper ventilation or cleaning of these facilities. The physical environment, noise, and confusion render the psychological environment inimical to normal eating. Supervision of eating is inadequate to prevent some residents from systematically and habitually stealing the food of others. Feeding time is uniformly brief, ranging from three to four minutes when a child depends upon a feeder to fifteen to twenty minutes for self-feeders who are herded into and out of the dining areas in those intervals. Because eating is in shifts the first groups who eat are prohibited from taking any extra portions to prevent inadequate portions to the last group. The consistency of food is that of undifferentiated mush; real meats, fresh vegetables, and solids are not offered. The outcome of this incredible feeding process can be seen universally among the residents in their toothlessness, tooth decay, bloodied gums, stomatitis, loss of hair, poor skin healing, hyperpigmentation, skin discoloration, nutritional anemia, fundamental protein deficiency diseases, absorption diseases, chronic skin infections, severe respiratory illness, pneumonia, and malnutrition.

e. Sleeping quarters

44. Residents sleep in the dormitory-like room of each ward in beds typically spaced six inches apart. The residents often huddle together on the floors or beds for sleeping purposes since there are rarely sufficient provisions for sheets, blankets, or pillows.

f. Storage of Personal Items

45.There is inadequate room for storage and safekeeping of any personal possessions. Many residents are forced to

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carry around their few personal possessions to avoid the inevitable theft and destruction that occurs to even the least valuable item.

g. Laundry

46. Laundry services for the entire resident population are centrally located. Frequently, clothing and linens are in transit or are lost or destroyed in the central facility, leaving insufficient amounts of clean clothing which fits the residents and of such essentials as sheets, blankets and towels. Residents are forced to spend many days in the nude as a consequence of the inefficient operation of the laundry services. There is no provision for the cleaning and return of any individual's own clothing which may have been bought especially for him by his family.

h. Acoustics

47. Acoustics in the resident buildings are such that the bare stone floors, walls, and ceilings elevate the din of residents milling about and their occasional shrieks to a level of continuous and terrible assault upon the senses. This situation constitutes a form of psychological torture and contributes to the dehumanization of residents.

i. Heating and Ventilation

48. The system of heating and ventilation is in a deteriorating state of disrepair. Many residents have suffered severe burns from malfunctioning radiators in the wards. The wards are generally oppressively hot in which case a window has to be opened creating drafts and causing colds among

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residents. Dust and the odors of sweat, urine, and feces permeate the air in the resident buildings. There is no system of air-conditioning to relieve this oppressive situation.

j. Physical Plant and Maintenance

49. Willowbrook's entire physical plant is in a constant state of disrepair and obsolescence. Maintenance of the physical plant is impossible in view of the recurrent malfunctioning of vital electrical, plumbing and structural facilities and the shortage of staff.

k. Results

50. As a direct result of their institutionalization and their subsequent subjection to so inhumane and so unsuitable a physical and psychological environment, residents' levels of functioning have declined and their physical conditions have deteriorated.

51. The establishment of a minimally humane and suitable physical and psychological environment at Willowbrook is an absolute prerequisite to the maximization of plaintiffs' developmental capacities. The present environment is an absolute obstacle to this realization.

-- Staff: Insufficient Numbers and Inadequately Trained

52. There is a dearth of staff on the wards and generally throughout the institution. Staff is insufficient in numbers to provide proper supervision and aid for the residents in their various needs and activities. The shortage of employees is a primary cause of unsanitary conditions, poor resident personal hygiene, brutal conditions, scarcity of developmental programming, minimum ward coverage, and inadequacy of equipment and supplies. The authorized number of employees is grossly

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inadequate to satisfy the developmental needs of residents.

53. The executive-ordered budget freezes of the past two years have had a devastating effect on loss of personnel, causing Willowbrook to operate with over 900 fewer staff members than the authorized 3628 staff positions (at the same time that resident population was 1800 above the ideal capacity).

54. The official statistics as of February 17, 1972 indicate a slightly ameliorated situation due to a recent executive-ordered lift of part of the freeze: 15 physical therapists, with openings for 23 more; 5 psychologists, with openings for 5 more; 101 nursing personnel, with openings for 72 more; 10 psychiatrists (only one of which is duly certified and involved in direct patient care), with openings for 7 more. In addition, there are vacancies for 4 physicians, 193 attendants, 7 social workers, 38 occupational therapists, 17 recreational therapists, 18 educators, 9 speech and hearing specialists, and various other clinical and support personnel. Volunteers are not involved directly in resident care.

55. High staff turnover and chronic absenteeism exacerbate the already critical staffing problems.

56. Direct results of the insufficient numbers of staff include, but are by no means limited to, the following examples: spastic children who need physical therapy have had none since the ward therapist left Building 12 last spring, resulting in their muscles tightening, less use of their bodies, and a decline in their ability to physically experience things; ambulatory residents receive no physical therapy despite their needs; over 1000 quadriplegic children and young adults receive no motion exercise; residents receive no regular physical examinations or tests for hearing and vision; Spanish-speaking residents who comprise 13% of the Willowbrook population have all testing administered to them in English, because no psychologist on the staff speaks Spanish.

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57. On the present staff, many members including professionals and non-professionals are insufficiently trained and prepared for meeting the range of needs of retarded persons. Inadequate in-service training programs are conducted to fill the gaps in previous training or to bring practice up to professional standards.

-- Residents' Peonage

58. Willowbrook could not function at its present sub-human level were it not for the toils and peonage of the residents.

59. Residents' labor consists of work on the wards and grounds, such as cleaning floors, cleaning feces, making beds, dressing and undressing other residents, helping in the preparation of food, running errands, maintaining grounds, transporting linens, emptying trash, and acting as servants in the homes of administration and staff.

60. There is no connection between the labor performed and an on-going program of education, training, and habilitation. Residents work at the same jobs for years though they are capable of doing much more in terms of complicated skills and productive labor.

61. The satisfactory performance of labor may actually prevent discharge and appropriate community placement of a resident whose labor is considered vital in relieving pressures on overworked staff.

62. Residents are coerced into performing this labor by the utter boredom of their lives and lack of alternative activity without such participation.

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63. The staff arbitrarily grants a variety of institutional privileges, such as limited mobility within a building and freedom from discipline, conditioned upon the cooperation of residents in the performance of the assigned work.

64. Residents are compensated, if at all, far below the minimum wage level and are coerced into spending what compensation they receive on the grounds.

65. The conditions surrounding the labor of some residents constitute cruel and unusual punishment, e.g., a resident of Building #6 was forced to begin dressing other residents at 4 a.m. each morning.

66. One particularly cruel aspect of residents' labor is that staff expect and encourage residents to mete out discipline to their peers, including severe beatings which are regularly delivered by brutalized residents against other residents who are recalcitrant or unruly.

-- The Failure of the Medical Model at Willowbrook

a. Crisis Care

67. Because the retarded have been defined by their doctors as "sick", Willowbrook is organized along the traditional medical model where physicians and psychiatrists dominate key decision-making from administration down to wards.

68. Theoretically, all staff members in a residential building are under the supervision of that building's physician, who is responsible to one of the three assistant directors, Sternlicht, Jacobs, and Murphy, who in turn report to the Director, Dr. Hammond.

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69. Within each building the physician relies on the nursing supervisor and a building supervisor, a non-professional, to administer to residents' needs and to run the building.

70. The theoretical priority given the medical and psychiatric aspects of residents' conditions over developmental and habilitative needs, however, does not assure adequate or minimal evaluation and treatment of residents.

71. Rarely does the physician and infrequently does the nurse or building supervisor have regular contact with residents on the wards.

72. Case finding on the wards is left, by default, to staff untrained in identifying persons in need of medical attention.

73. Institutional conditions of filth, epidemic and endemic disease, and the lack of a scientific treatment approach are responsible for a state of chronic illness, debilitation, malnutrition, acquired insanity, deprivation and deformity as the norm.

74. Residents' illnesses and conditions fester until they reach a crisis proportion and can no longer be ignored. Only the most dramatic incidences of gashes, soaring fever, wretched incapacity and overt illness attract attention.

75. After a condition is called to his attention, the physician may order treatment without himself observing the resident's physical condition.

76. Even if the physician responds adequately to the particular crisis, no adequate system of follow-up of resident's condition exists. The resident is likely to be again submerged in the mass of deteriorating human beings to await the next

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crisis which will distinguish him from the herd.

77. Since physicians are easily transferred from building to building, thoroughgoing knowledge of residents is deterred and continuity of care is undermined.

78. Crisis care recognizes no past and admits no future for residents.

b. Non-Implementation of Preventive Techniques

79. Prevention is a dynamic concept which is applicable daily and which is based on the principle of maintaining the well-being and functioning of the whole human being. This vital concept is intrinsic to basic medical care.

80. The strategy of prevention is alien to medical practice at Willowbrook which labors under the tradition of institutional custodial and crisis care.

81. Illnesses and conditions from which residents suffer can be prevented through simple procedures at relatively negligible costs: one doctor's use of preventive techniques over a period of several months in his building resulted in the reduction among his residents of skin disease by two-thirds (by ordering the use of anti-bacterial soap) and respiratory illness by one-half (by consistent and aggressive case finding and scientific treatment following the American Pediatric Guidelines and simple public health principles).

82. In general, medical practice at Willowbrook is totally ignorant of modern concepts of mental health, child development, and public health which build on principles of prevention and which are so vital to the positive development of the full potential of the residents.

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c. The general crudeness and cruelty of medical practice on residents

83. The general level of medical practice at Willowbrook is crude and unscientific.

84. Most doctors are foreign-born and educated. Only one doctor on the entire staff has been trained at an American medical school in the last twenty years. Many doctors and professionals are not duly licensed to practice their professions in New York.

85. Particularly barbarous medical practices include, but are not limited to, the lack of analgesic support during painful operations and dental extractions and the failure to use novocaine when lacerations are sewn.

86. The utter slowness, poor judgment, and failure to act once a resident's severe condition is called to the attention of a physician defies any conceivable standard of medical practice.

87. Repeated refusals of physicians who are allegedly specialists to treat and to follow the simplest medical and surgical procedures has resulted in deaths and other irretrievable losses to residents. Leona Hall died in Building #22. After a mass was discovered in her abdomen, the evaluations and diagnoses extended over so long a period that her demise from cancer became inevitable. (See Paragraphs 6, 14 supra)

88. The shameful use of meaningless jargon on residents' medical records reflects the utter pessimism with which they are viewed. The resident receives a detailed physical examination when he arrives at Willowbrook. Regardless of how

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long the stay at Willowbrook, that initial examination is the only complete physical examination he will receive. Thereafter, one resident's record becomes indistinguishable from another: the wrenching adaptation to the institution; the inevitable crises, injuries and illnesses; regression in behavior in response to the institution, characterized by such words as "assaultive", "destructive", "bites", "withdrawn", "disturbed". The existence of the individual with potential for growth and development is totally lost in these "progress" notes.

-- Programming Philosophy

a. There to die

89. Defendants view residents' placement in Willowbrook as permanent and their potential as hopeless.

90. No goals are set for any resident, nor does a formal individualized developmental plan exist for the education and habilitation of each resident according to special needs and abilities and intended to lead to discharge or community placement within a specified period of time.

91. Defendants have instructed staff personnel, in filling out medicaid and medicare forms which require mention of plans for education and habilitation, not to advise appropriate programs for residents on the basis of ability to benefit therefrom but rather to recommend a program only if it is presently available to that resident.

92. Medicaid and medicare forms are prepared with the conclusory line already typed at the bottom of the evaluation--"The resident is permanently and totally disabled and requires indefinite residential care."

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b.Token programming

93. There are nominal education, training, and habilitation programs carried on at Willowbrook for a minority of residents.

94. These programs are carried on by several individual grossly understaffed departments (e.g. Education, Physical Therapy, Occupational Therapy, Recreational Therapy) which are each responsible to one of the assistant directors of the institution.

95. Any possible benefits from such programs are erased when these residents are returned to the wards to spend the remainder of their day in a psychologically sterile and physically unsanitary, unsafe environment.

96. The Department of Mental Hygiene statistics from January 1971 admit the lack of education and habilitation for the overwhelming number of residents. On information and belief, the following official statistics err on the side of optimism:

76.9% are not receiving occupational therapy;

93.6% are not receiving physical therapy;

96.0% are not receiving speech therapy;

94.1% are not receiving language development;

97.8% are not receiving intensive therapy;

63.2% are not receiving recreational activities;

82.7% are not receiving school classes;

96.4% are not receiving adult education;

98.3% are not receiving pre-vocational training;

97.1% are not receiving vocational training.

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c. Arbitrary and Irrational Misclassification and Exclusion

97. The standard intelligence tests used to determine the initial suitability of persons for admission to Willowbrook and their treatment there are wholly defective in providing a meaningful measure of a person's capacity to benefit from appropriate developmental assistance.

98. These tests and the procedures by which they are administered discriminate against poor, black, and non-English-speaking persons.

99. The tests are not administered or interpreted sensitively enough to distinguish among a wide range of learning disabilities.

100. Residents who have physical handicaps or impairments of vision or hearing have frequently been improperly diagnosed, and the subsequent failure to treat their purely physical disabilities compounds the misclassifications.

101. The failure to properly and periodically review these classifications of residents results in the attachment of stigmatizing and misleading labels to their life-long detriment. Fully 40% of the residents have not been re-tested in the past ten years.

102. The record of each resident's hopeless catalog of liabilities effectively excludes him from appropriate developmental programming. These traits, disabilities and liabilities, such as "messy", "aggressive", "not toilet trained", "non-ambulatory", "low-functioning", are collected and assigned with a view toward administrative ease in warehousing and regimenting residents.

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103. These labels bear no rational relationship to the individual's capacity to benefit from assistance in maximizing his full human potential and to achieve a degree of self-sufficiency and self-care. They often describe traits which have developed as a direct result of institutionalization. All residents are capable of benefiting from appropriate developmental assistance.

104. Residents have been tested, diagnosed and labelled by procedures lacking any of the safeguards which are afforded similarly handicapped children who are receiving developmental assistance by the public school system in special classes or by other special services.

d. Failure to implement less drastic alternatives

105. Defendants have attempted to classify residents by degree of retardation as follows: 8%, mildly or border - line retarded; 15%, moderately retarded; 36%, severely retarded; 41%, profoundly retarded.

106. According to these statistics, many of the residents should have never been admitted to Willowbrook and still greater numbers should be immediately discharged and placed in appropriate community-based programs.

107. Defendants have utterly failed to plan for and provide appropriate community-based facilities as less drastic alternatives to institutionalization, in accordance with the projected needs of retarded persons, in general, and Willowbrook residents, in particular.

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108. Defendants have utterly failed to explore and implement less drastic alternative approaches to the delivery of habilitation within Willowbrook, in accord with the needs of residents for whom continued institutionalization is appropriate.

--Particularly Cruel and Inhuman Practices

a. Tranquilizers

109. The massive use of tranquilizer drugs, mellaril and thorazine, against residents for the purposes of control, restraint, and punishment constitutes cruel and inhuman punishment of residents as a result of their status of being retarded.

110. The continuous subjection of residents to this practice hinders their developmental capacity and contributes to their misclassification and subsequent exclusion from habilitative programs.

111. Due to the magnitude of the use of these drugs and to the untrained staff which administers them, medical records do not accurately reflect what each resident receives or the reasons therefor. Disastrous consequences to residents flow from the improper supervision of total drug intake, e.g., tranquilizers combined with medication for other specific conditions such as seizures.

b. Other Restraints

112. Some residents have been in seclusion and in solitary confinement for periods of years, without adequate treatment, supervision, or program designed for their development. This incarceration would not be necessary if proper intervention techniques were used in a suitable environment.

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113. Camisole is ordered daily for many residents in order to prevent them from picking at their own skin, or rectums, or at other residents. Informally, other residents are tied to benches or beds for hours at a time. These practices of restraint are required to contain the present residents with minimum damage and injury. These cruel practices would not be necessary if residents were engaged in suitable learning and recreation programs or receiving meaningful human contact, for purposes of developing the self-sufficiency and self-care of which they are capable.

114. All ambulatory residents are unduly restricted by the system of locked wards. A recommendation by a physician, in consultation with his ward staff and building supervisor, that his residents were independent and capable of benefiting from limited ground privileges was recently refused by Dr. Hammond. The result of the system of locked wards is that most patients never see daylight. Their exercise is pacing in the day room, with the continuous threat that too much activity on the ward will provoke some attendant to administer tranquilizers.

115. None of the residents who are subjected to any of the above forms of restraint has been properly classified as dangerous.

116. All of the residents are capable of developing skills and self-sufficiency if placed in developmental programs suited to their needs.

c. Hepatitis Research Program

117. Some residents at Willowbrook are the subjects of an experimental hepatitis research program, the only such experiment on live human beings in this country.

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118. The participation of these residents can not properly be termed consensual. Parents whose children are on the waiting list for admissions and who must place their children in Willowbrook because of family pressures and lack of less drastic alternatives are positively encouraged and misled into enrolling their children in this dangerous experimental program , thus gaining immediate admission to Willowbrook. The parent is further misled into the belief that this research program will benefit his child, since the facilities and other programming available to these subjects are far superior to that afforded regular ward residents.

119. The justification for injecting these residents with hepatitus virus in the search for the development of a vaccine is that within six to twelve months of admission every resident will have the hepatitis antigen in his bloodstream anyway. This is cruel and vicious reasoning. The prevalence of hepatitis among residents could be eradicated or prevented under suitable environmental conditions and with proper control techniques.

--Further Abridgement of Residents' Constitutional Rights

120. Defendants have purposely and systematically isolated residents from their families and from the community--by absolutely prohibiting parental contact with the residents for a length period following admission, by excluding visitors from the wards, by responding to parents' natural concern for their children in a negative manner, by invidiously misclassifying residents for the purpose of discouraging parental and community involvement, and by failing to provide appropriate developmental assistance.

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121. Defendants have deprived residents of any modicum of privacy in the conduct of their lives (Paragraphs 40-46 , supra).

122. Defendants have prevented residents from maintaining meaningful contact and association with other residents, with members of the opposite sex, and with normal individuals.

123. Defendants have denied residents important rights and privileges of communication by the restrictive policy toward the use of the mails, telephones, and by the denial of the residents' access to attorneys.

--Deaths and Near Deaths

124. One hundred and thirty-one residents died in Willowbrook in the one-year period ending December 1971. That is between two to three utterly wasted lives and needless deaths per week due to institutionalization at Willowbrook.

125. Behind each death is an untold story of sadness, suffering, neglect and cruelty. A resident of Building #23 named Varone was killed when she was caught in a dangerous steam tunnel which opened into her building. She was missing for over 20 hours because no one would investigate the tunnel, despite a worker's declaration that she was there. Leona Hall, a resident of Building #22, died when the physicians allowed the mass in her abdomen to fester and bring about her rapid debilitation and demise from cancer.

126. Some residents might prefer death to the endless tragedy and waste of their lives at Willowbrook: Tina Aponte of Building #23 tried to hang herself from pipes which hang dangerously close to the residents and which were ironically installed there as part of a new safe fire sprinkler system.

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127. Each resident at Willowbrook is in constant jeopardy of becoming a faceless figure in next year's death count, a casualty of the state's purposeful holding action against the retarded.

THE UNCONSTITUTIONALITY OF THE DENIAL OF APPROPRIATE DEVELOPMENTAL ASSISTANCE TO PLAINTIFFS AND THEIR CLASS

128. The opportunity for appropriate developmental assistance adapted to the individual's particular needs, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

129. Other persons, both normal and handicapped, receive appropriate publicly-supported developmental assistance in a variety of ways, including by way of regular classes and special classes and services under the jurisdiction of the State Education Department and the local boards of education. Still other persons, whose parents or guardians are of sufficient financial means, receive appropriate developmental assistance in licensed private institutions.

130. Yet the plaintiffs and their class at Willowbrook suffer from a denial of appropriate developmental assistance adapted to their particular developmental needs, despite their need and capacity, shared in common with other persons, for the improvement of skills and self-sufficiency with appropriate developmental assistance. The result is the deprivation of their basic liberty to achieve a modicum of self-care and independence and even the loss of life itself.

131. The distinction that denies plaintiffs and their class appropriate developmental assistance, while providing it to other similarly-situated persons, is not necessary to

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and does not even serve any compelling or legitimate state purpose, is wholly irrational and arbitrary and capricious, and denies the plaintiffs and their class the equal protection of the laws and substantive due process.

DUE PROCESS DETERMINATION OF APPROPRIATE DEVELOPMENTAL PROGRAM

132 . The plaintiffs and their class at Willowbrook are summarily and without any, let alone a prior, formal determination comporting with Fourteenth-Amendment procedural due process principles denied important and basic liberties and constitutional rights, including (1) their constitutional right to an equal opportunity for appropriate developmental assistance, (2) their liberty to develop even a modicum of self-care, independence, and self-sufficiency, and (3) their liberty to be free from the unwanted lifetime stigma, disgrace, and humiliation of an unwarranted labelling and reputation as hopelessly untrainable and dependent human beings.

133 . The Due Process Clause of the Fourteenth Amendment guarantees to each plaintiff and class member the right to a formal and impartial determination of his appropriate developmental program in light of his particular development capacity and needs, based upon expert testimony and written findings of fact, with the right to a meaningful opportunity for the affected person to participate by way of an advocate of his choice, access to his records including behavior reports and the results of I.Q. tests, the presentation of evidence and expert witnesses, and confrontation and cross-examination of witnesses, and the right to a periodic review of the determination.

134 . Admission to and detention at a state school such as

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Willowbrook is by way of one of three procedures under the Mental Health Law: (1) on voluntary admission pursuant to Section 122, (2) on certification of one physician or one psychologist pursuant to Section 123, or (3) on court certification pursuant to Section 124.

135. There is no provision in any of the statutory admission procedures, or anywhere else in the statutory scheme (Mental Hygiene Law, Section 120 et seq.), for a formal determination, with adequate procedural safeguards, of each person's appropriate developmental program in light of his particular developmental capacity and needs, as required by the Due Process Clause of the Fourteenth Amendment.

MISCELLANEOUS PROCEDURAL DEFECTS

136. Further, the purported "voluntary" nature of Section 122 admission and detention, the purported "non-protesting" nature of Section 123 admission and detention, and the purported judicial scrutiny of "suitability" for admission under Section 124 are in reality and in practice pure pretense. The coercive pattern of circumstances which leads to admission to and detention at Willowbrook, the absence in the statutory scheme of any ascertainable standards governing decisions as to admission and detention, and the wholesale barrenness of procedural safeguards in the statutory scheme effectively give virtually unbridled discretion to defendant officials of the Department of Mental Hygiene and, particularly, of Willowbrook State School, in the admission and discharge of the plaintiffs and their class and in the failure to provide appropriate developmental assistance.

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--Section 122 Procedural Defects

137. Mental Hygiene Law Section 122 "voluntary" admissions are initiated by written application of the person to be admitted or, if that person be under 18 years of age, by his parent, legal guardian, or next-of-kin. Typically, the parent of a child admitted is realistically unable to retain the child at home because of the hyperactive behavior of the child, the presence of the other children at home, pressures of poverty, and ignorance regarding the significance and basis of the child's behavior. Further, there are available no less drastic and restrictive alternatives for the child, since special services and classes of the local school district are not available, licensed private institutions are prohibitively expensive, and the state has not provided sufficient community-based residential facilities. As a result, the parent is driven by coercive forces and circumstances beyond his control to "voluntarily" seek the child's admission to Willowbrook. The only substantive criterion for admission under Section 122 is "suitability for care and treatment", a wholly vague criterion providing no ascertainable standards for determining the appropriateness of a person's admission to a state school in light of his particular developmental capacity and needs.

138. Once admitted pursuant to Section 122, the resident is involuntarily detained in the unlimited discretion of the director of the state school for a period of 60 days. Thereafter, the director may discharge the resident in his unlimited discretion. Section 133. Discharge may also be effectuated upon 15 days written notice from the resident or, if he is under 18 years of age, from the person who made the initial

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admission application. Section 122. But the statute makes no provision that notice of this discharge right be afforded to the resident or anyone on his behalf, with the result that the right to discharge on 15 days written notice may not be exercised because of ignorance of its existence. Further, even if notice of the right is given, the resident child's parent or relative may not exercise the right because he is unavailable, uninterested in the child, ignorant of the child's best developmental interests, or realistically unable to seek discharge because of the absence of less drastic and restrictive alternatives to the state school.

139. Even if a discharge is sought on 15 days written notice, the director in his unlimited discretion can refuse to discharge the resident, whereupon discharge can be effectuated only by order of a judge of a court of record. Section 133. Only the director, and not the person seeking the resident's discharge, is afforded by Section 133 the opportunity for a hearing before the judge. There is no specification of the kind and degree of proof required, of necessary findings of law and fact, or of the standards by which the judge's decision must be guided.

-- Section 123 Procedural Defects

140. Mental Hygiene Law Section 123 admissions are initiated by application of any of a number of persons and agencies on behalf of the person to be admitted. Sections 123 and 124. The application must be accompanied by a certificate executed by an examining physician or certified psychologist showing that the person to be admitted is "mentally defective." Sections 123 and 121. In the absence of the admitted person's

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objection and in the discretion of the director the person is then admitted to the state school if he is deemed "suitable for care and treatment". Section 123.

141. The certifying doctor need not be an expert in, or even be familiar with, the educational needs and problems of retarded persons. The admission criterion of "suitability for care and treatment" is wholly vague and provides no ascertainable standards for determining the appropriateness of a person's admission to a state school in light of his particular developmental capacity and needs. Because of the same coercive pattern of circumstances and absence of less drastic alternatives leading to Section 122 admissions, as described in Paragraph 137 , supra, the applicant on behalf of the person to be admitted under Section 123 often has no choice but to seek admission to a state school. These coercive circumstances and the absence of a hearing on the question of the person's objection to state school placement render meaningless Section 123's requirement that the admission be non-protested.

142. Once admitted pursuant to Section 123, the resident is involuntarily detained in the unlimited discretion of the director for a period of sixty days. Section 123. Thereafter, the director may discharge the resident in his unlimited discretion. Section 133. Discharge may also be effectuated upon 15 days written notice from the resident or any person on his behalf. But for the same reasons detailed in Paragraph 138 , supra, regarding Section 122 discharge, the right may not be exercised because of the lack of notice or the unavailability of a person willing and realistically able to seek discharge on behalf of the resident.

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143. Even if a discharge is sought on 15 days written notice, the director in his unlimited discretion can refuse to discharge the resident, whereupon discharge can be effectuated only by order of a judge of a court of record. Sections 123 and 133. The person seeking the discharge on behalf of the resident is not guaranteed a hearing before the judge, and there is no specification of the kind and degree of proof required, of necessary findings of law or fact, or of the standards by which the judge's decision must be guided.

-- Section 124 Procedural Defects

144. Mental Hygiene Law § 124 admissions are effectuated on the petition of any of a number of persons or agencies, the certificate of two examining physicians or an examining physician and a certified psychologist, and a court order. Personal service of the notice of application on the person to be committed is not required if the examining doctors state that personal service would in their opinion be "detrimental" to the person, or, otherwise, if the judge is, in his unlimited discretion, "satisfied" that personal service would be "ineffective or detrimental". Section 124. If the person who makes the petition is the father, mother, husband, wife or other nearest relative of the person, then there is no requirement of service of the notice of application on some person other than the one who petitions for court certification. Section 124. There is no hearing before the judge on the application, unless ordered upon the judge's own motion or by a relative or near friend on behalf of the person to be committed. Accordingly,

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if the father, mother, husband, wife, or nearest relative of the person to be committed makes the petition, and, for whatever reason, does not request a hearing, and the judge does not on his own motion order it, then there is likely to be no hearing even on the question of "need for observation and treatment," let alone the question of the person's appropriate developmental program, even if some other relative or friend of the person would have requested a hearing upon notice. Section 124.

145. In the absence of a hearing, the judge simply decides to his "satisfaction" that "the alleged mentally defective person may require care and treatment". Section 124 makes no specification of the kind and degree of proof required, of necessary findings of law or fact, or of the standards by which the judge's decision must be guided. Finally, even the court order of commitment is rendered a nullity by the decision of the director, in his unlimited discretion, that the person to be committed is not appropriate for detention as measured by the wholly standardless criterion of "mentally defective." Section 124.

146. The procedural defects of the discharge procedure under Section 133 are fully detailed in Paragraph 139, supra.

WILLOWBROOK--THE REALITY

147. The purpose of Willowbrook State School belies its reality. The plaintiffs and their class arrive and remain at Willowbrook under the pressure of realistically coercive circumstances. The state fails to provide any less drastic and restrictive alternatives to institutionalization at a state school. The statutory scheme under the Mental Hygiene Law,

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Section 120 et seq., fails to provide procedural safeguards and ascertainable standards adequate to insure that an allegedly retarded person's admission to and continuous detention at Willowbrook is appropriate in light of his particular developmental capacity and needs. At Willowbrook plaintiffs and their class are denied appropriate developmental assistance adapted to their particular capacities and needs. Instead they are merely kept in custody and subjected to severely injurious and cruelly inhuman treatment and even loss of life.

148. Cumulatively, these realities effectively transform Willowbrook State School from an institution predicated upon altruistic promises of development and habilitation into a human warehouse, where its residents are condemned to virtual incarceration for the rest of their lives, without the prospect of ever attaining that measure of self-care and self-sufficiency of which they are all capable.

149. This virtual imprisonment of plaintiffs and their class and their deprivation of liberty and even life violates the very fundamentals of substantive due process and constitutes cruel and unusual punishment.

ALTERNATIVES TO THE HUMAN WAREHOUSE APPROACH

150. Experts in the field of mental retardation universally agree that all retarded persons are capable of benefiting from appropriate developmental assisance, that services for the retarded should be in the community from the time the first diagnosis is made, and that the most effective services must be continuous, close to home, and given as early as possible.

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151. California has pioneered in the rational restructuring of its mental health delivery system along the principles that the lives of the retarded can be normalized by a wide range of community residential facilities and supportive habilitative programs and that large warehousing institutions like Willowbrook must be phased out and new construction of such facilities halted.

152. The California Plan has succeeded in reducing the number of their institutionalized retarded by one-third in a short three to four years. At the same time, the costs to the State of services to the retarded have been significantly reduced.

153. Even defendant Miller's conservative estimate admits that 25% of the residents of Willowbrook could be released immediately if proper facilities were provided for them in the community. (Daily News, February 15, 1972 at 5)

154. Human warehouses are an expensive waste of lives and fiscal resources. Better care and treatment are possible at less cost under the alternate community residential and service model.

CONSTITUTIONAL CAUSES OF ACTION

AS AND FOR A FIRST CAUSE OF ACTION

155. The denial to plaintiffs and their class at Willowbrook of appropriate developmental assistance adapted to their particular developmental capacities and needs, while granting it to other children similarly situated with respect to the need for and capacity to benefit from such assistance, is not necessary to and does not serve any compelling or even legitimate state purpose and constitutes a denial to plaintiffs

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and their class of their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

AS AND FOR A SECOND CAUSE OF ACTION

156. The denial to plaintiffs and their class at Willowbrook of appropriate developmental assistance adapted to their particular developmental capacities and needs, while granting it to other children similarly situated with respect to the need for and capacity to benefit from such assistance, is wholly irrational and arbitrary and capricious and contravenes substantive due process principles of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

AS AND FOR A THIRD CAUSE OF ACTION

157. The failure to provide the plaintiffs and their class with a formal and impartial determination, with adequate procedural safeguards, of the appropriate developmental program for each person in light of his particular developmental capacity and needs denies to plaintiffs and their class, without the procedural due process guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, important and basic liberties and constitutional rights, to wit: (1) their constitutional right to an equal opportunity to realize their developmental capacity, (2) their liberty to develop even a modicum of self-care, independence, and self-sufficiency, and (3) their liberty to be free from the unwanted stigma, disgrace, and humiliation of an unwarranted labelling and reputation as hopelessly untrainable and dependent human beings.

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158. Procedural due process principles require that this formal and impartial determination be based upon expert testimony and written findings of fact, with the right to a meaningful opportunity for the affected person to participate by way of an advocate of his choice, access to his records including behavior reports and the results of I.Q. tests, the presentation of evidence and expert witnesses, and confrontation and cross-examination of witnesses, and the right to a periodic review of the determination.

AS AND FOR A FOURTH CAUSE OF ACTION

159. The requirement of labor by plaintiffs and members of their class without compensation at minimum wage level, with no view towards its place in their education or habilitation, its arbitrary relationship to the grant of resident privileges, its substitute for an adequate staff in sufficient numbers, and the particularly odious circumstances under which it must be performed violates the prohibition against peonage in 42 U.S.C. §1994 and constitutes conditions of involuntary servitude in contravention of the Thirteenth Amendment to the United States Constitution.

AS AND FOR A FIFTH CAUSE OF ACTION

160. The subjection of plaintiffs and members of their class to specific practices including, but not limited to, the extended isolation, restraint, and solitary confinement of non-dangerous residents with no therapeutic goals, massive drug therapy to contain and sedate the population, anti-scientific, crude and non-preventive medical practices, the Hepatitis

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Experimental Research Program and the meting out of arbitrary discipline by residents against other residents, constitutes cruel and unusual punishment in contravention of the Eighth Amendment to the United States Constitution.

AS AND FOR A SIXTH CAUSE OF ACTION

161. The continued denial by defendants of plaintiffs' access to telephones, mail privileges, attorneys and the systematic interference by defendants with plaintiffs' rights of association and privacy constitute an abridgement of their rights guaranteed under the First, Fourth, Sixth, and Fourteenth Amendments to the United States Constitution.

AS AND FOR A SEVENTH CAUSE OF ACTION

162. The virtual lifetime incarceration in Willowbrook and deprivation of liberty and even life of the plaintiffs and their class violates fundamental substantive due process principles of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

AS AND FOR AN EIGHTH CAUSE OF ACTION

163. The virtual lifetime incarceration in Willowbrook and deprivation of liberty and even life of the plaintiffs and their class constitutes cruel and unusual punishment in contravention of the Eighth Amendment to the United States Constitution.

NECESSITY FOR INJUNCTIVE RELIEF

164. Representatives of the plaintiffs and their class and other interested persons have repeatedly petitioned the defendants for relief from the onerous and unconstitutional conditions prevailing at Willowbrook. Further attempts to

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obtain redress by appealing to the defendants herein would be futile.

165. The denial to the plaintiffs and their class of their above-detailed constitutional rights has caused and will continue to cause them severe and irreparable harm.

166. Plaintiffs and their class have no plain, adequate, or complete remedy at law.

RELIEF REQUESTED

WHEREFORE, plaintiffs respectfully pray on behalf of themselves and all the members of the class that this Court:

1. Assume jurisdiction of this cause and determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.

2. Enter a final judgment pursuant to 28 U.S.C. §§2201 and 2202 and Rules 54, 57, and 58 of the Federal Rules of Civil Procedure declaring that the acts and omissions complained of herein violate the First, Fourth, Sixth, Eighth, Thirteenth, and the Due Process and Equal Protection Clauses of the Fourteenth Amendments to the United States Constitution.

3. Receive evidence at a hearing from which this Court will determine, specify, and declare the constitutionally-minimum standards for the appropriate developmental assistance of the plaintiffs and their class, including minimum standards for the maintenance of a humane physical and psychological environment and for the protection of the health and safety of the plaintiffs and their class.

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4. Establish a uniform procedure whereby each plaintiff and class member will receive a formal and impartial determination comporting with procedural due process requirements of his appropriate developmental program in light of his particular developmental capacity and needs.

5. Approve a plan for the development of community-based residential facilities for the appropriate developmental assistance of the mentally retarded, and for the orderly reduction of the resident population of Willowbrook and the eventual phasing out altogether of Willowbrook.

6. Enter a permanent injunction enjoining the defendants, their officers, agents, servants, employees, and successors in office to:

A. Immediately take all necessary action to immediately meet the constitutionally-minimum standards for the appropriate developmental assistance of the plaintiffs and their class.

B. Cease and hold in abeyance any addition to or new construction of non-community-based facilities until such time as this Court determines that community-based residential facilities are adequate to meet the need.

C. Notify, within a reasonable time of this Court's Order, the parents, guardians, or next-of-kin of each plaintiff and class member of the judgment of this Court herein.

7. Enter a preliminary injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure, sufficient to prevent irreparable harm to the plaintiffs and their class pending this Court's final disposition of this action.

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8. Appoint a master or receiver endowed with the necessary authority to oversee and implement the orders and injunctions of this Court.

9. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure allow plaintiffs their costs herein and also grant them and the members of their class such additional or alternative relief as may seem to this Court to be just, proper, and equitable.

Respectfully submitted,

Kalman Finkel

KALMAN FINKEL
JOHN E. KIRKLIN
The Legal Aid Society
Civil Appeals Bureau
267 West 17th Street
New York, New York 10011
(212) 691-8320

ANITA FISHER BARRETT,
Of Counsel

ROBERT L. FELDT
The Legal Aid Society
Staten Island Neighborhood Office
56 Bay Street
Staten Island, New York 10301

Attorneys for Plaintiffs

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

the day of 19
M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

Index No. Year 19 72

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

72C 3571

PATRICIA PARISI, by her mother Lena Steuernagel, et al.,
Plaintiffs,
-against-
NELSON A. ROCKEFELLER, individually and as Governor of State of New York, et al.,
Defendants.

SUMMONS AND COMPLAINT

$15 -

KALMAN FINKEL

JOHN KIRKLIN, ROBERT FELDT of Counsel
Attorney for Plaintiffs

Office and Post Office Address, Telephone

THE LEGAL AID SOCIETY
EDWARD Q. CARR, JR., *Attorney-in-Chief*
Civil Appeals Bureau
267 WEST 17th ST. NEW YORK, N. Y. 10011
691-8320

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

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SUMMC ACTION (Formerly D. C.) (2-61) (6-48))

United States District Court

FOR THE

EASTERN DISTRICT OF NEW YORK

Willowbrook et pgent

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC.; BENEVOLENT SOCIETY FOR RETARDED CHILDREN, WILLOWBROOK CHAPTER, OF THE NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN: LARA R. SCHNEPS, by her father Murray B. Schneps; NINA GALIN, by her mother Diana Lane McCourt; ANTHONY RIOS, by his father Jesus Rios; DAVID AMOROSO, by his mother Rosalie Amoroso; ROSE EVELYN CRUZ, by her father Francisco M. Cruz; BARRY FRIEDMAN, by his father Melvin Friedman; LOWELL SCOTT ISAACS, by his father Jerome W. Isaacs; and ANTOINETTE MAGRI, by her mother Sandra Magri,

Plaintiff

v.

NELSON ROCKEFELLER; ALAN D. MILLER, M.D.; FREDRIC GRUNBERG, M.D.; ROBERT E. PATTON; CHARLES SCHLAIFER; JACK HAMMOND, M.D.; ROBERT W. HAYES; BERTRAM PEPPER, M.D.; A. ANTHONY ARCE, M.D.; JAMES M. MURPHY, M.D.; MANNY STERNLICHT; and MILTON JACOBS, M.D.,

Defendant

CIVIL ACTION FILE NO. 72 C 356

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon BRUCE J. ENNIS

plaintiff's attorney , whose address is

New York Civil Liberties Union
84 Fifth Avenue
New York, N.Y. 10011

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

S/ Lewis Orgel
Clerk of Court.

Is/ Barbara Krigsman
Deputy Clerk.

Date: March 17, 1972

[Seal of Court]

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC., et al,

Plaintiffs,

-against-

NELSON ROCKEFELLER, et al,

Defendants.

TEMPORARY RESTRAINING ORDER

Upon the annexed complaint and the affidavit of BRUCE J. ENNIS, both dated March 17, 1972, it is hereby:

ORDERED, that defendants, their successors, agents, attorneys and employees, are temporarily restrained, ordered and enjoined from transferring any person now a resident at Willowbrook State School to any other institution or facility, without that person's express, written consent, or the written consent of his or her parent or legal guardian, until this Court determines that the second institution or facility meets or exceeds the constitutionally minimum standards for adequate habilitation, including care, treatment, education and training, of the mentally retarded, and it is further

ORDERED, that service of a true copy of this order and the papers upon which it was granted upon the Attorney

General of the State of New York on or before

shall be due and sufficient service

of this order and of the complaint upon all defendants.

Dated: March 17, 1972
New York, N.Y.

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC., et al, Plaintiffs, -against- NELSON ROCKEFELLER, et al, Defendants.	AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BRUCE J. ENNIS, being duly sworn, deposes and says:

1. I am one of plaintiffs' attorneys, and make this affidavit in support of their application for a temporary restraining order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure.

2. The New York Times for February 24, 1972, p. 43, reported that "state mental health officials" were considering a "plan" to reduce overcrowding at Willowbrook State School by "the gradual transfer of 1,500 mentally retarded patients to other institutions."

3. The article stated that some of the older residents of Willowbrook would be "transferred to institutions for the mentally ill, which normally do not care for the retarded but which now have excess room."

4. I have been told by Mr. Bob Feldt, an attorney who has recently handled several cases involving Willowbrook, that a substantial number of Willowbrook residents will probably

be transferred from Willowbrook within the next week or ten days.

5. The complaint herein alleges that the conditions in Willowbrook are dangerous to human life and safety, anti-therapeutic, and far below the minimum standards necessary to ensure adequate treatment. Nevertheless, it would not benefit the named individual plaintiffs, or the class of Willowbrook residents they represent, to transfer them from one inadequate institution to another, particularly if the second institution is located outside the jurisdiction and scrutiny of this Court.

6. Plaintiffs intend to call numerous expert witnesses in support of the proposition that mental illness and mental retardation are completely distinct conditions, and that the methods of care and treatment of the mentally ill are completely different from the methods of care and treatment of the mentally retarded.

7. Institutions for the mentally ill do not have the equipment, professional personnel (special educators, for example), or experience necessary to habilitate the mentally retarded.

8. Accordingly, plaintiffs request that neither they nor the class they represent, be transferred from Willowbrook, without their express, written consent, or the written consent of their parents or legal guardians, until this Court determines that the institution or institutions to which they would be transferred meet or exceed the constitutionally minimum standards for adequate habilitation, including care, treatment, education and training.

9. Relief similar to that demanded herein was recently granted by temporary restraining order on February 11, 1972 in the case of Ricci v. Greenblatt, United States District Court for the District of Massachusetts, Civil No. 72-469 F, the Hon. Francis W. Ford presiding. A copy of that order is attached hereto. That case, too, challenged the constitutional adequacy of treatment in a public institution for the mentally retarded.

10. Attached hereto is a memorandum of agreement between the parties in the case of Wyatt v. Stickney, United States District Court for the Middle District of Alabama, Civil Action No. 3195-N. By that agreement, the mental health and mental retardation officials of the State of Alabama consented to a judicial declaration and order that the standards for the habilitation, care, treatment, education and training of the mentally retarded contained in that agreement are the minimum standards necessary to ensure adequate treatment.

11. The Wyatt standards include specific staffing ratios necessary to ensure adequate treatment. Following those ratios, which Alabama has now agreed to meet, Willowbrook should have 87 Ph.D. psychologists; it has one. It should have 87 social workers with a Masters Degree in social work; it has four. It should have 52 licensed physical therapists; it has one. It should have 87 recreation therapists with a Masters Degree; it has 3. It should have 52 speech and hearing therapists; it has five.

12. Upon information and belief, the institutions to which Willowbrook residents will be transferred do not come close to meeting the Wyatt standards, and are not better equipped and staffed than Willowbrook. Accordingly, the proposed transfers should be enjoined.

BRUCE J. ENNIS

Sworn to before me this

17th day of March, 1972

STEVEN M. TULLBERG
Notary Public, State of New York
No. 31-4032260
Qualified in New York County
Commission Expires March 30, 1973

recovery. Moreover, the additional premium dollars award benefit to the insured under the omnibus clause of the policy. That is, persons occupying a vehicle owned by the insured, other than the named insured or any relative, would only be covered by the uninsured motorists protection if the additional vehicles were insured.[6]

[2] However, the policy involved in the instant case differs from that which was involved in *Westchester* in one important respect. The policy here at issue defines an insured highway vehicle as a highway vehicle described in the schedule as an insured highway vehicle to which *bodily injury liability coverage*[7] of the policy applies. Tieing this definition to Exclusion (b)[8] it becomes apparent that the insured, under the interpretation of the contract propounded by the insurer, would receive absolutely no additional coverage for his premium dollars paid for uninsured motorists coverage on vehicles two through seven. That is, the five or six dollars initially paid by the insured for uninsured motorists coverage effectively protected all insureds at all times as long as the highway vehicle had bodily injury liability coverage applicable to it since Exclusion (b) would therefore not apply. All seven vehicles were so covered.[9]

[3] The premiums received by the insurer for uninsured motorists protection in relation to vehicles two through seven are a windfall to the insurer under its interpretation of the contract. Surely, the insured reasonably expected something in return for the premiums paid for the additional uninsured motorists endorsements. The only possible interpretation of the contract that would fulfill the reasonable expectations of a layman, Continental Insurance Company v. Bussell, 498 F.2d 706 (Alaska 1972); Graham v. Rockman, 504 P.2d 1351 (Alaska 1972), is that the uninsured motorists premiums paid in connection with vehicles two through seven were meant to increase the amount of coverage, the limits of liability clause notwithstanding.[10]

Accordingly, it is ordered:

1. That plaintiff's motion for summary judgment is granted.

2. That counsel for plaintiff forthwith submit an appropriate judgment form.

6. An insured automobile was defined in that policy as (a) an automobile described in the policy for which a specific premium charge indicates that coverage is afforded.

7. It is apparent from a reading of policy AXI 159-33-90 that bodily injury liability coverage, coverage C, was not meant to include uninsured motorists insurance, coverage F, within its meaning.

8. See footnote 1, *supra*.

9. It can be argued that this is an overly technical construction of the contract. However, after all, the contract was drafted by the insurer.

10. The language of a policy need not be ambiguous in order to interpret it in accordance with the reasonable expectations of a layman. Continental Insurance Company v. Bussell, 498 P.2d 706, *supra*; Graham v. Rockman, 504 P.2d 1351, *supra*.

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC., et al., Plaintiffs,

v.

Hugh L. CAREY, Individually and as Governor of the State of New York, et al., Defendants,

United States of America, Amicus Curiae.

Nos. 72 Civ. 356, 72 Civ. 357.

United States District Court, E. D. New York.

May 5, 1975.

A motion was made for approval of a consent judgment terminating a civil rights action concerning care and treat-

ment of mentally retarded children and adults residing at a state developmental center. The District Court, Judd, J., held that inmates of state facility had a constitutional right to protection from harm and to a minimum quality of care or treatment even in respect of persons whose confinement was not involuntary, and final judgment on consent so providing would be approved.

Judgment in accordance with opinion.

Mental Health ⇐51

Inmates of a state facility had a constitutional right to protection from harm and to a minimum quality of care and treatment even in respect to persons whose confinement was not involuntary.

Bruce J. Ennis, New York Civil Liberties Union & Mental Health Law Project, New York City, Christopher A. Hansen, Mental Health Law Project, New York City, for and on behalf of all named plaintiffs in No. 72 Civ. 356 and the class.

J. Stanley Pottinger, Asst. Atty. Gen., Diane S. Dorfman, Michael S. Lottman, Jack R. Marker, Attys., Civil Rights Div., Dept. of Justice, Washington, D.C., for amicus curiae United States.

Kalman Finkel, Attorney-in-Charge The Legal Aid Society, Civil Div., New York City, Anita Fisher Barrett, John E. Kirklin, The Legal Aid Society Civil Appeals Bureau, New York City, Joan Mangones, Douglas Leonard, The Legal Aid Society Staten Island Neighborhood Office, Staten Island, N.Y., of counsel; for and on behalf of all named plaintiffs in No. 72 Civ. 357 and the class.

Louis J. Lefkowitz, Atty. Gen., New York City, for and on behalf of all defendants; by Joel Lewittes, Asst. Atty. Gen., of counsel.

MEMORANDUM

JUDD, District Judge.

A hearing has been held on the parties' motion for approval of a consent judgment terminating this civil rights action concerning the care and treatment of mentally retarded children and adults residing at Willowbrook State Developmental Center (formerly the Willowbrook State School).

During the three-year course of this litigation, the fate of the mentally impaired members of our society has passed from an arcane concern to a major issue both of constitutional rights and social policy. The proposed consent judgment resolving this litigation is partly a fruit of that process.

As pointed out in this court's Memorandum of April 23, 1975, the proposed consent judgment was formulated after prolonged hearings before this court and as the result of extensive negotiations between the parties. During these negotiations, private counsel for the plaintiffs were assisted by representatives of the Civil Rights Division of the United States Department of Justice, and the defendants were represented by the Attorney General of the State of New York, as well as by representatives of Governor Carey's office, the Budget Director, and the Department of Mental Hygiene.

This court's original determination that the action could be maintained as a class action (Memorandum and Order of July 28, 1972) included a finding that the plaintiffs would adequately represent all members of the class. The court's observations during this litigation have reinforced that view. Counsel for plaintiffs have demonstrated skill and a great capacity for work in assembling facts concerning each aspect of conditions at Willowbrook, evaluating the results of this court's preliminary injunction of April 10, 1973, and providing expert testimony as to the needs of Willowbrook residents and the methods

and programs employed in institutions elsewhere in the United States.

The proposed consent judgment includes an Appendix of "Steps, Standards and Procedures" covering 29 single-spaced pages, and dealing with 23 areas, all designed to secure the constitutional rights of Willowbrook residents to protection from harm. The proposed judgment recites that these

> are not optimal or ideal standards, nor are they just custodial standards. They are based on the recognition that retarded persons, regardless of the degree of handicapping conditions, are capable of physical, intellectual, emotional and social growth, and . . . . that a certain level of affirmative intervention and programming is necessary if that capacity for growth is to be preserved, and regression prevented.

The defendants agree that "within their lawful authority," and "subject to any legislative appproval that may be required," they shall "take all actions necessary to secure implementation of the steps, standards and procedures," as well as "all steps necessary to ensure the full and timely financing of this judgment." The proposed judgment is agreed to apply to "all residents of Willowbrook and, unless inappropriate, to all other members of the class."

Many of the Steps, Standards and Procedures are to be achieved within thirteen months after the signing of the judgment, although different times are specified for some provisions.

The proposed judgment further provides for the appointment of a Review Panel to monitor implementation of the judgment and to perform other functions, as well as a Professional Advisory Board and a Consumer Advisory Board for Willowbrook. The court reserves jurisdiction for any further action that may be necessary after the entry of the final judgment and the commencement of its implementation.

The proposed judgment details reforms with regard to physical environment, staffing, programs, and therapy of various kinds. It sets a goal of developing community facilities and sharply reducing the population of Willowbrook. Specifically, Part V of the Steps, Standards and Procedures states:

> Defendants shall take all steps necessary to develop and operate a broad range of non-institutional community facilities and programs to meet the needs of Willowbrook's residents and of the class. Within six years from the date of this judgment Willowbrook shall be reduced to an institution of 250 or fewer beds to serve the needs of residents who require institutional care and who come from the geographical area of Staten Island. The Review Panel shall annually evaluate progress toward this objective.

Objections

No one appeared at the public hearing to voice any objection to the proposed judgment.

One written objection was submitted by a citizen who is a weekly visitor to Willowbrook. Mrs. Else Grunwald objected to the proposed limitation of Willowbrook to a small institution of 250 residents from the Staten Island area. She asserted that the buildings should be utilized instead for "new experiments" with "reliable, qualified, tested, and investigated personnel for smaller groups." It is not part of the judgment that the Willowbrook buildings not used for the smaller number of residents shall be abandoned; the state has a right to find other appropriate uses for them, and presumably will do so in the six year period provided in the judgment. If the parties have determined that dispersal of most of the Willowbrook residents is better than other possible alternatives, the court believes that their agreement on the subject should be accepted.

A letter from several members of the Keener Parents Association, received in March, objected to the closing of the

Keener facilities, to which some Willowbrook residents have been transferred. Although an earlier draft of the consent judgment provided for the closing of the Keener facility, the form submitted to the court provides instead for the evaluation of the Keener Unit by the Review Panel.

Murray B. Schneps, one of the plaintiffs, called attention at the hearing to a notice about budget cutbacks in the Mental Hygiene Department, but a letter filed by Commissioner of Mental Hygiene Lawrence C. Kolb and Deputy Commissioner Robert W. Hayes assures that these proposed cutbacks will not impair the implementation of the final judgment.

None of the objections or comments provides any reason for not approving the proposed judgment on consent.

The Applicable Standard

This court's Memorandum and Order of April 10, 1973 found that there was a constitutional right to protection from harm, even in respect of persons whose confinement was not involuntary. The final judgment is couched in those terms, although it provides greater relief than did the preliminary injunction. Briefs submitted by the New York Attorney General had urged that the court change its position and dismiss the complaint.

Had this case been finally submitted for determination on the merits, the court would have faced a substantial burden in analyzing the briefs and the mass of testimonial and documentary evidence which was submitted by both sides and which bears on the right to relief and the formulation of the various categories of relief. Happily, the parties have relieved the court of this task and have brought to bear on the forging of relief their evident expertise. The court has reviewed the proposed judgment and each of the Steps, Standards and Procedures, and finds them neither impractical, improper nor beyond the scope of the complaint.

One final point should be addressed with regard to the extent and detail of the judgment hereby approved.

The consent judgment reflects the fact that protection from harm requires relief more extensive than this court originally contemplated, because harm can result not only from neglect but from conditions which cause regression or which prevent development of an individual's capabilities.

During the interval since this court's preliminary injunction, there have been significant judicial decisions in the field. In Donaldson v. O'Connor, 493 F.2d 507, 527 (5th Cir. 1974), cert. granted, 419 U.S. 894, 95 S.Ct. 171, 42 L.Ed.2d 138 (argued and awaiting decision), the Fifth Circuit in an opinion by Judge Wisdom held that

> where a nondangerous patient is involuntarily civilly committed to a state mental hospital . . . such a patient has a constitutional right to such treatment as will help him to be cured or to improve his mental condition.

In Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), the same court upheld lower court rulings that there is a "right to treatment" for civilly committed mentally retarded persons. It held that persons in institutions for the mentally handicapped were entitled to a constitutional minimum quality of care or treatment even if their confinement was justified only by the "need for care." 503 F.2d at 1313. See also Welsch v. Likins, 373 F.Supp. 487 (D.Minn.1974); Davis v. Watkins, 384 F.Supp. 1196 (N.D.Ohio 1974).

A decree with some similarity to the final decree here was entered by the District Court in Wyatt v. Stickney, 344 F.Supp. 373, 379 (M.D.Ala.1972), and was affirmed in Wyatt v. Aderholt, *supra*. The district court decision in *Wyatt* included 49 detailed regulations

under its "Minimum Constitutional Standards for Adequate Habilitation of the Mentally Retarded" (344 F.Supp. at 395), and named seven members of a Human Rights Committee for the institution. 344 F.Supp. at 407.

Somewhat different legal rubrics have been employed in these cases—"protection from harm" in this case and "right to treatment" and "need for care" in others. It appears that there is no bright line separating these standards. In the present posture of this case, there is no need for the court to re-examine the constitutional standard properly applicable to Willowbrook's residents. The relief which the parties agreed to will advance the very rights enunciated in the case law since this court's 1973 ruling.

Other Matters

During the pendency of the action there have been a number of changes, among the defendant officeholders, from the Governor to the Director of the Willowbrook Developmental Center. The new holders of the various offices described in the caption should be substituted as defendants and the original defendants should be excused from further participation in the action.

The court also notes that the plaintiffs' right to apply for attorneys' fees, and defendants' right to object to such fees, is reserved for further action by the court.

While the court hopes that it will not have to consider requests for action by the Review Panel, it is appropriate to retain jurisdiction for the purpose of implementing the consent judgment.

The court has accordingly signed the "Final Judgment on Consent." This includes the substitution of defendants indicated in the caption of the judgment for the officers named as defendants earlier in the litigation.

WISCONSIN POTOWATOMIES OF the HANNAHVILLE INDIAN COMMUNITY, Plaintiff,

v.

Bernard HOUSTON, Individually and as Director of the Michigan Department of Social Services, Defendant.

No. M-56-72 CA.

United States District Court,
W. D. Michigan, N. D.

Nov. 16, 1973.

Indian tribe brought action against director of state Department of Social Services to regain custody and right to determine custody, care and control of three orphaned children of an Indian father and a non-Indian mother, whose custody had been adjudicated in favor of maternal relatives in state probate court. The District Court, Engel, J., held that the children, who were enrolled members of the tribe, were considered Indians for purposes of determining whether Indian tribe or state probate court had jurisdiction to determine their custody; that the children were domiciled on the reservation at the time of the death of their parents; that the Indian tribe had not waived its right nor consented to jurisdiction of the state probate court; and that custody of the children ought to have been determined by tribal council rather than the laws and procedures of the state.

Order accordingly.

1. Infants ⇐78(1)

Where question presented to court for determination was whether probate court for county, acting under Michigan law and legal principles, or Indian tribe, acting according to its tribal laws and customs, had the power to determine custody of orphaned children of an Indian father and a white mother, no guardian ad litem was required on behalf of the children.

NEW YORK STATE ASSOCIATON FOR RETARDED CITIZENS and PARISI v. CAREY, No. 72-C-356/357 (E.D. N.Y., April 30, 1975), *approved* 393 F. Supp. 715 (E.D. N.Y. 1975)

Upon the joint motion of plaintiffs, defendants, and the United States, it is hereby ordered, adjudged and decreed:

1. This Court has jurisdiction of the subject matter and of the parties hereto and the complaints state claims under 42 U.S.C. §1983. On April 10, 1973 this Court entered an opinion finding that Willowbrook's residents had a constitutional right, under the Eighth and Fourteenth Amendments, to protection from harm. Subsequently, a trial was held on plaintiffs' request for permanent relief. Without admission and prior to final findings of fact and conclusions of law, the parties have now agreed to entry of a consent judgment, specifying additional steps, standards and procedures necessary to secure the constitutional right to protection from harm for Willowbrook's residents and members of the class. The Court has issued notice to the class, and finds that this judgment is supported by evidence in the record. This judgment and Appendix "A" thereto are hereby approved pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. The steps, standards and procedures contained in Appendix "A" hereto are not optimal or ideal standards, nor are they just custodial standards. They are based on the recognition that retarded persons, regardless of the degree of handicapping conditions, are capable of physical, intellectual, emotional and social growth, and upon the further recognition that a certain level of affirmative intervention and programming is necessary if that capacity for growth and development is to be preserved, and regression prevented.

2. Within their lawful authority, including the State constitution and applicable State laws, and subject to any legislative approval that may be required, defendants are hereby ordered and enjoined to take all actions necessary to secure implementation of the steps, standards and procedures contained in this judgment and in Appendix "A" hereto, which appendix is expressly made part hereof, in a prompt and orderly manner.

3. The steps, standards and procedures contained in this judgment and in Appendix "A" hereto shall be applicable to all residents of Willowbrook and, unless inappropriate, to all other members of the class. Specifically, defendants shall delegate among themselves and their subordinates responsibility for the appropriate and relevant actions necessary to implement this judgment. Defendants shall take all steps necessary to ensure the full and timely financing of this judgment, including, if necessary, submission of appropriate budget requests to the legislature.

4. This judgment and Appendix "A" hereto shall be applicable to and binding on the defendants and their successors, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of this judgment by personal service or otherwise. In addition, defendants shall include in every future contract requiring an agent or independent contractor to perform steps, standards and procedures that would otherwise be performed by defendants or their employees, a clause requiring the agent or independent contractor to meet the steps, standards and procedures specified in Appendix "A" hereto, insofar as they are relevant to said contracts.

5. This judgment shall have no binding force or effect with respect to any other action or proceeding.

6. Defendants shall post in each building where members of the class reside a notice that the Court has issued a judgment setting forth steps, standards and procedures to be applicable to those residents, and that a copy of that judgment is available for inspection by employees in the office of each such building. In addition, defendants shall make a copy of this judgment available for inspection by parents, relatives or guardians at the administration building during regular business hours.

7. (a) Within 45 days of the date of this judgment, a Review Panel shall be appointed, consisting of two persons chosen by defendants and approved by the Court, three persons chosen by plaintiffs and approved by the Court, and two recognized experts in the field of mental retardation who are not otherwise currently employed or retained by defendants. One of the two experts shall be experienced in the management and operation of public institutions for the mentally retarded, and the other in the establishment and operation of community facilities and in the care and placement of mentally retarded persons in such facilities. The two experts shall be agreed upon by the parties and approved by the Court; if the parties do not agree, each party shall submit one nomination for each disputed position and the appointments shall be made by the Court. The Court may terminate and replace any of the seven Review Panel members at any time, for good cause. Upon resignation, termination or inability of any Review Panel member to continue to serve on the Review Panel, his or her replacement shall be appointed in accordance with the procedures specified in this paragraph.

(b) The Review Panel shall promptly hire at least one, but not more than three, full-time staff members with appropriate experience in mental retardation and/or institutional administration to assist the Review Panel in performing its duties.

(c) Review Panel members and Review Panel staff shall receive appropriate compensation from defendants, on a monthly basis, and shall promptly be reimbursed by defendants for reasonable out of pocket expenses incurred in performing the duties of the Review Panel. Defendants shall at their expense provide appropriate office space, telephone service, postage, clerical staff, typewriters, and similar support equipment to enable the Review Panel to carry out its duties. The classification and status of the Review Panel and its staff (*i.e.*, as employees, consultants, or otherwise) shall promptly be determined by defendants.

(d) All Willowbrook unit chiefs, team leaders and department heads (referred to hereafter as "supervisors") shall compile and submit to the Director and to the Review Panel every 60 days written reports which show in detail the progress towards implementation within the building, unit or department of which they are supervisors of each relevant provision of this judgment, and which describe problems or obstacles to full implementation. For this purpose, the Review Panel shall consider issuance of recommended check lists and appropriate forms. Supervisors shall be allowed sufficient on duty time, and shall be provided sufficient clerical and other support, to carry out this responsibility.

(e) The Review Panel staff shall periodically compile written reports showing in detail the degree of progress with respect to implementation of this judgment and specifying recommendations for consideration by the Review Panel, and shall perform such other duties as the Review Panel directs.

(f) Members of the Review Panel and its staff shall be allowed access to all information, records (including budget records), buildings and areas, and shall be permitted to interview any member of the class or employee of defendants, at reasonable times and places, to the extent necessary to the discharge of their duties under this judgment.

(g) Any interference with the Review Panel, its staff, or with supervisors in connection with their performance of the duties described herein, by any person having notice of the

contents of this judgment, may be punishable as contempt of court and subject to other sanctions provided by law.

(h) All reports submitted to the Review Panel by the Professional or Consumer Advisory Boards, by supervisors, by Review Panel staff, or by consultants, shall be available for inspection and copying by all parties to this action.

8. (a) The Review Panel appointed pursuant to paragraph 7 above shall receive the reports described in said paragraph and any reports submitted by the Professional and Consumer Advisory Boards or by consultants pursuant to this judgment. The Review Panel and its staff shall conduct any additional inquiries they deem necessary or appropriate with respect to the matters contained in such reports or with respect to other matters which may come to the Review Panel's attention relative to the provisions of this judgment.

(b) The Review Panel, by majority vote of the entire panel, shall periodically make written recommendations to defendants of steps deemed necessary to achieve or maintain compliance with the provisions of this judgment. Such recommendations shall include, where necessary, timetables for implementation of steps or measures for which timetables are not specified elsewhere in this judgment. Copies of such recommendations shall be served upon counsel for plaintiffs and the United States, the New York City Regional Director of the Department of Mental Hygiene, and upon such other persons as the Review Panel deems appropriate.

(c) Panel members may also make informal suggestions to the defendants, in whatever form they deem appropriate, which in their opinion will facilitate compliance with this judgment.

(d) The Review Panel shall, by majority vote of the entire panel, recommended a resolution of any disagreements which arise concerning the interpretation or application of the steps, standards and procedures contained in Appendix "A" hereto. Such recommendations shall be communicated in writing to defendants, to counsel for plaintiffs and the United States, to the New York City Regional Director of the Department of Mental Hygiene, and to such other persons as the Review Panel deems appropriate.

(e) All parties to this judgment shall be bound by and shall implement the recommendations of the Review Panel issued pursuant to paragraphs 8(b) and 8(d) hereof, unless within 15 business days following receipt of such recommendations they serve on all other parties and file with the Review Panel a written objection to such recommendations. The filing of such an objection by any party shall automatically stay the effect of any such recommendation until further order of the Court.

(f) After receipt of written objections, the Review Panel, by majority vote of the entire panel, or any party, may apply to Court for an order implementing the recommendations to which objection has been taken. Such applications shall be upon prior written notice to all parties and to the Review Panel.

(g) Any party may request the Review Panel to issue a specific recommendation, and upon the Review Panel's failure or refusal to do so, that party may apply to Court for appropriate relief.

(h) Any employee, resident, parent, foster parent, next of kin or guardian may bring a situation or disagreement related to the provisions of this judgment to the attention of the Review Panel for appropriate action in accordance with the procedures outlined above.

(i) The Review Panel, by majority vote of the entire panel, shall establish such formal and informal hearing procedures, bylaws and regulations as it deems necessary in order to perform its duties.

(j) The Review Panel shall hold meetings every four months, or more often, at which any employee, resident, parent, foster parent, next of kin or guardian, or any other person deemed by the Review Panel to have a similar or appropriate interest, may appear and make recommendations, comments, or suggestions as to any matter within the jurisdiction of the panel. Such meetings shall be held alternately at Willowbrook and at the New York City Regional Office of the Department of Mental Hygiene, and shall be adequately publicized at Willowbrook and in the general community no less than 7 days prior to the date thereof. Such meetings shall be in addition to any other meetings, hearings, or conferences which the Review Panel deems necessary in order to carry out its duties under this judgment.

(k) Where appropriate, the Review Panel shall draw upon and utilize the experience and expertise of the Consumer and Professional Advisory Boards established pursuant to this judgment, and upon the advice and assistance of other recognized experts. The defendants herein shall bear the costs, within reasonable limitations, of the services provided and necessary expenses incurred by such other experts.

(l) Within six months of the date of its appointment, and each six months thereafter, the Review Panel shall report in writing to the Court and counsel for the parties concerning the progress made in carrying out the provisions of this judgment. Such reports shall include a description of steps taken to achieve compliance with the judgment, a description of all disagreements and interpretive questions resolved by the Review Panel and the recommended resolutions thereof, a statement of problems which the panel has been unable to resolve, recommendations of the panel or any member thereof for modifications of this judgment, and any other matters which the panel deems appropriate. The Review Panel may also submit special reports at any time.

9. Jurisdiction is retained by the Court until further order, for the purpose of enabling any party to apply at any time for an order pursuant to Rule 60 of the Federal Rules of Civil Procedure, or for such further orders as may be necessary or appropriate for the construction of, implementation of, or enforcement of compliance with this judgment or any of the provisions thereof. The plaintiffs reserve the right to request such attorneys' fees and costs as this Court deems appropriate, and defendants reserve the right to oppose such requests.

APPENDIX "A"
Steps, Standards, and Procedures

Definitions

For the purposes of this Appendix, and of the Consent Judgment of which it is a part:

"Plaintiffs" and "defendants" refer to the parties named as plaintiffs and defendants in the caption hereof. In addition, for this purpose only, plaintiffs shall be deemed to include the United States of America, *amicus curiae*.

"Department" refers to the New York State Department of Mental Hygiene.

"Commissioner" refers to the Commissioner of the State Department of Mental Hygiene.

"Willowbrook" refers to Willowbrook Developmental Center, on Staten Island, New York (formerly Willowbrook State School).

"Director" refers to the Director of Willowbrook Developmental Center, and shall include acting or interim directors.

"Consultant" or "consultants" refers to a person, agency, firm, or organization that is independent of the Department, or of Willowbrook, though not necessarily independent of other state agencies or departments.

"The Class" refers to all persons who were residents of Willowbrook on March 17th, 1972.

"Programming" or "program activity" refers to any activity specified in the resident's development plan that is individually designed and structured to increase the resident's physical, social, emotional or intellectual growth and development, and shall include but not be limited to structured recreation as defined in section G.6 hereof, programs to teach self-awareness, basic motor and sensory skills, self-care activities, communication and social abilities, vocational and avocational skills and other skills necessary to live as independently as possible.

A. Resident Living

1. Residents shall be provided with the least restrictive and most normal living conditions possible. This standard shall apply to dress, grooming, movement, use of free time, and contact and communication with the outside community, including access to educational, vocational and therapy services outside of the institution. Residents shall be taught skills that help them learn how to manipulate their environment and how to make choices necessary for daily living.

2. In addition, the staff shall prepare residents to move from 1) more to less structured living; 2) larger to smaller facilities; 3) larger to smaller living units; 4) group to individual residences; 5) segregated from the community to integrated with the community living and programming; 6) dependent to independent living.

3. Living groups shall not contain unrelated residents differing widely in age level (e.g., young children and adults) or level of retardation (e.g., profoundly and moderately retarded) unless designed to test out special models within a research framework. Blind residents shall not be grouped with lower functioning residents simply because of their blindness, nor shall the multiply handicapped be segregated unless particular circumstances so require.

4. The institution's rhythm of life shall be modified to conform with practices prevalent in the community. For example, older residents ordinarily shall not be expected to live according to the timetable of younger children.

5. Multiply handicapped and non-ambulatory residents shall, except where otherwise indicated by a physician's order, spend a major portion of their waking day out of bed, spend a portion of their waking day out of their bedrooms, have planned daily activity, and be rendered mobile by suitable methods and devices. Residents shall not stay in beds, cribs, wheelchairs or orthopedic carts all day long, except on the order of a physician, which must be in writing if the order is to remain in effect for more than four hours.

6. The Director and the Consumer Advisory Board shall prepare a document listing the legal and civil rights of residents, which shall be approved by the parties, circulated to staff and residents, and posted throughout Willowbrook.

7. Residents shall be provided with clean, adequate and seasonally appropriate clothing, including shoes and coats, which shall be readily accessible for residents' use. Such clothing shall be comparable in styles and quality with clothing worn by persons of similar age and sex in the community.

B. Environment

1. Defendants shall provide living facilities which afford residents privacy, dignity, comfort and sanitation. This shall include, but not be limited to:

—accessible, private and easily usable toilets and bathing facilities, including specialized equipment for the physically handicapped;
—accessible and easily usable sinks and drinking facilities;
—adequate toilet paper, soap, towels, linen and bedding;
—training for residents in the use of toilet facilities;
—individual bed and dresser or storage place;
—attractive, comfortable and spacious living and sleeping areas;
—attractive and normalizing furnishings and leisure equipment, including materials to reduce noise level;
—normal temperatures and adequate ventilation;
—separate clean and dirty linen storage areas.

2. Living areas shall be sectioned and partitioned so that no more than eight residents live or sleep in one unit. Programming and working areas shall be quiet, appropriately designed and conducive to programming. Architectural barriers which impede living and programming for handicapped residents shall be corrected or removed. Residents shall be encouraged to decorate their living areas and furniture.

3. Every building shall be kept clean, odorless, and insect-free at all times, and sufficient equipment such as brooms, mops, etc., shall be provided to housekeeping staff for this purpose. In particular, lavatory areas are to be cleaned as often as necessary every day, and bathtubs shall be cleaned after the bath of each resident.

4. Housekeeping staff and services shall be provided to all living units every day on both the day and evening shifts. Additional housekeeping staff shall be employed for this purpose.

5. Residents shall ordinarily sit or be on the floor only for therapeutic reasons (i.e., physical therapy positioning). If placed on the floor for play or other purposes, they shall be on mats, a sufficient number of which shall be provided so that residents are not crowded together.

6. Residential life shall be structured so that it is possible for residents to wear and use glasses, hearing aids, crutches, braces, rolling walkers, and similar aids in their living units, and residents who need such aids shall be provided with and assisted to use them.

7. Toys and equipment shall be readily accessible to residents during waking hours.

C. Direct Care Staff, Mid-Level Supervisors, and Clinical Staff

1. Each resident at Willowbrook shall receive appreciable and appropriate attention each day from the direct care staff in his living unit, whose primary responsibility shall be the care and development of each resident. To this end, appropriate provision shall be made to ensure that direct care staff are not required to perform routine housekeeping chores, except during the 3rd (night) shift.

2. Direct care staff shall participate in the inter-disciplinary team decision-making process and individual care, development and services programming, as described in section D, with the responsibility for individual residents set forth in that section.

3. Willowbrook shall employ and maintain sufficient therapy aides at the grade 7 and 9 levels to ensure that the following numbers shall be present and on duty:

a) During the hours of the day and evening when residents are awake:

1) One therapy aide for every four residents in buildings primarily for residents who are children, non-ambulatory or multiply handicapped, and for those residents receiving intensive psychiatric care;

2) One therapy aide for every sixteen adult residents presently residing in buildings 19 and 32;

3) One therapy aide for every resident receiving an intensive behavior modification program;

4) One therapy aide for every six residents for all residents and buildings not covered above;

b) During sleeping hours, an average of one therapy aide for every twelve residents on an institutional basis.

4. So long as defendants maintain the ratios required by paragraph 3(a) hereof within buildings, they may provide a lower staff to resident ratio for one or more living units within a building, in order to provide higher staff to resident ratio for another living unit, or units, within that building, provided that such deviation is not regular, chronic or permanent for any living unit or units, and provided further that in no living unit shall the staff to resident ratio ever be lower than 1:8, except in those living units covered by paragraph 3(a) (2) above.

5. Schedules of residents and employees shall be revised so that day ratios apply when residents are waking and preparing for breakfast.

6. The direct care staff to resident ratios specified above shall be achieved and maintained as promptly as possible and in no event later than 13 months from the date of this judgment.

7. Sufficient mid-level supervisors, *i.e.*, grade 11 and grade 13 therapy assistants, or registered or practical nurses where appropriate, shall be employed to ensure that there will be one such person present on duty per 24 residents on both

the first (day) and second (evening) shifts, and one such person present on duty for every 48 residents on the third (night) shift, such ratios to be achieved within 13 months of the date of this judgment. At least ¼ of the persons employed at grades 11 and 13 shall be employed at the grade 13 level.

8. Willowbrook shall establish and maintain an overall ratio of clinical staff to residents of 1 to 3. For this purpose, clinical staff shall include, without limitation, physicians, psychologists, dentists, nurses, teachers, physical therapists, social workers, speech and hearing therapists, recreation therapists, music therapists, unit chiefs, and team leaders, but shall not include the direct care staff (including therapy aides and mid-level supervisors as defined in paragraph 7 above), and other administrative, support and clerical staff. Each of the above clinical disciplines shall be adequately represented by appropriately qualified staff. The numbers of persons to be included within each discipline shall be at the discretion of the Director. Within 13 months of the date of this judgment, at least one-third of the total clinical staff, and at least one-third of the clinical staff within each discipline other than social work and occupational therapy, shall be employed at the professional, as opposed to the paraprofessional or trainee, level. Within 18 months of the date of this judgment, at least one-third of the clinical staff within the social work and occupational therapy disciplines shall be employed at the professional level. All persons employed at the professional level shall meet the standards for licensure, certification or registration that would be required for similar practice in the community.

9. Defendants shall begin immediately and shall continue to hire such staff as is necessary to maintain steady progress towards achievement of the ratios specified in paragraphs 3, 7 and 8 hereof.

D. Programming and Evaluation

1. Each resident shall have an individual plan of care, development and services (referred to hereafter as the "development plan"), which shall be prepared and re-evaluated at least annually by an interdisciplinary team of direct care and appropriate professional staff, as described in this judgment, after comprehensive diagnostic testing and evaluative screening, with the assistance of the resident, his or her parents, relatives or guardian. The development plan shall include all education, speech, physical therapy or other plans required by this judgment. The development plan shall be regularly reviewed by the team, at least quarterly.

2. Each development plan shall describe the nature of the resident's specific needs and capabilities, his or her program goals, with short range and long range objectives and timetables for their attainment. The development plan shall provide for six (6) scheduled hours of program activity per weekday, designed to contribute to the achievement of objectives established for each resident, and each resident shall receive six hours of such program activity per weekday. In exceptional cases, residents may receive fewer than six hours of program activity per weekday if a physician certifies in writing that such activity would be medically harmful to the resident. Such certification shall promptly be submitted to the Professional Advisory Board for approval. The development plan shall state criteria for release to less restrictive settings, including criteria and projected date for release, discharge, or transfer to a community placement, and programming necessary to achieve such release, discharge or transfer.

3. A single team member, identified in the development plan, shall be responsible for reviewing and supervising the resident's program progress, including his progress toward community placement, and for coordinating the inputs and assignments of other professionals and disciplines. For each shift a specific direct care employee shall be designated to have continuing responsibility for each resident's daily living and safety. Records shall be maintained listing such employees and the residents for whom they are responsible. Such records shall be available to the Review Panel and to parents, relatives or guardians. Professional team members shall be responsible for training, supervising and evaluating therapy aides and direct care staff who implement any part of the program.

4. Defendants, in collaboration with plaintiffs, shall promptly establish and submit to the Review Panel for consideration a mechanism for an appeal by residents, parents, guardians or relatives when they disagree with the resident's individual development plan.

5. Residents shall not be sent back to their living units from programming activity as punishment, and programming shall not be withdrawn from any individual except as part of an approved behavior modification program. Programming shall be regularly scheduled for both the day and evening shifts.

6. Parents, relatives and guardians shall be kept informed on at least a quarterly basis of the resident's educational, vocational, and living skills, progress, and medical condition, and shall be allowed access to the resident's records, subject to objection of the resident, who shall also have access to his or her records.

E. Personnel—Recruitment, Screening, Training, Qualifications, Termination.

1. Defendants shall actively recruit qualified staff, including top level management and professionals, whose licensure, certification or qualifications would be suitable for practice or employment in comparable circumstances in the community.

2. There shall be full staff orientation and training programs to increase employees' skills and interest in achieving the program goals of the residents. Within 60 days of the date of this judgment, defendants shall prepare and submit to the Review Panel for evaluation and recommendation a plan to improve Willowbrook's orientation and in-service training programs, which plan shall specify the proposed staffing, curriculum and duration of such programs.

3. Personnel policies shall be directed at the best use of individual employees' skills and at the enhancement of effective programming for residents and working conditions for employees. In order to continually improve personnel policies, systematic interviews of employees terminating employment shall be carried out, summaries of which shall be reviewed by the Willowbrook personnel department, the New York City Regional Office of the Department of Mental Hygiene, and by other appropriate persons, to determine any causes of employee dissatisfaction and instances of dehumanizing or abusive practices and other relevant information, including the determination of appropriate criteria for hiring and screening new employees.

4. All employees with direct care responsibilities shall be able to communicate in English. Sufficient bilingual staff shall be hired to serve the needs of Spanish-speaking residents.

5. Staff shall be actively involved by the administration in the development and assessment of Willowbrook policies and programming.

6. Supervisors shall be responsible under appropriate law and regulation for the regular review and assessment of the performance of their subordinates, including most particularly their success in meeting program objectives. The administration shall be responsible for pursuing every procedure and requirement provided by law, regulation or contract, in the termination or reassignment of employees whose performance is found unsatisfactory.

7. Whenever necessary to expedite recruitment or to maintain staff, whatever exceptions are permitted under the State Civil Service Law or any other law shall be utilized. In addition, defendants shall develop a plan for increasing the length of the probationary period for grade 7 mental hygiene therapy aides, and shall seek, where necessary, approval for such plan from the Civil Service Commission.

F. Education

The education philosophy shall be that all residents are presumed to be capable of benefiting from education. Except for residents over the age of 21 who are involved in six or more hours of appropriate, formal, daily programming, all residents shall be provided a full and suitable educational program, regardless of chronological age, degree of retardation or accompanying disabilities or handicaps. No resident shall be presumed to be incapable of educational development. Each resident in a formal education program shall have an individual education plan which shall specify short term and long term objectives. The education staff shall consult on at least a weekly basis with those individuals and teams responsible for the daily care and programming of each resident.

2. Educational services at Willowbrook shall, at least, be generally equivalent to the special educational services provided in New York City in terms of:

a. Staff qualifications and competencies, in-service training, and diagnostic or prescriptive teachers;

b. Program hours per student;

c. Nature, content and quality of programs;

d. Curriculum guides, equipment, resource materials and diagnostic, testing, and screening procedures.

3. There shall be provided sufficient teachers' aides, therapy aides and other assistants to achieve an average of one such aide or assistant for each teacher, to assist the education staff.

4. There shall be no more than six residents in a class for severely and profoundly retarded residents, nine in a class for moderately retarded residents, and twelve in a class for mildly retarded residents. Generally, classes for school-age children shall be conducted for six hours per day. For this purpose, classes shall include lunch periods if they are used for training purposes, physical education, and similar nonacademic programs of instruction. In exceptional cases, residents may receive fewer than six hours of educational activity per weekday if a physician certifies in writing that such activity would be medically harmful to the resident. Such certification shall promptly be submitted to the Professional Advisory Board for approval.

5. The Department and the Director shall seek out and develop educational services in the community for residents who are able to take advantage of such services.

6. Those residents with specialized needs, such as the blind, deaf and multiply handicapped, shall receive programs of special education and development specifically designed to meet those needs, and special education staff shall receive specialized training for this purpose.

7. Toilet training shall not be a prerequisite to receiving educational services.

8. All necessary classroom materials and equipment shall be on hand and re-ordered as necessary. Teachers shall have a major voice in deciding what is needed. All necessary diagnostic equipment shall be ordered immediately. Teachers shall be trained to use such equipment.

9. Education shall be provided on a year-round basis to those residents who require year-round educational services as part of their individual development plan set forth in section D.

10. Defendants shall advise the New York City schools of the number of school-age Willowbrook residents being prepared for transfer to the community, and shall supply the New York City schools with a projected timetable for the transfer of such residents to the jurisdiction of such schools.

11. Sufficient bilingual/bicultural staff and instructional and testing materials shall be provided to meet the needs of residents from Spanish-speaking backgrounds.

G. Recreation

1. There shall be a recreational program at Willowbrook which meets the recreational needs of each resident, as set forth in his or her development plan described in section D, as to design of equipment, functional level, and physical or visual handicap. There shall be enough recreational equipment to provide adequate recreation services to all residents. There shall be special emphasis on equipment for lower functioning residents. The recreation program shall conform as closely as possible to normal community recreation activities, in particular in terms of equipment, age and sex grouping, facilities and surroundings.

2. Unless there is a medical order to the contrary, a minimum of two hours per day of recreation activities shall be provided for each resident, and weather permitting, recreation activities shall take place outdoors.

3. Recreation shall be conducted in small groups, except for activities such as baseball or swimming, where larger numbers are appropriate.

4. Whenever possible, recreational activities shall take place in the community. Additional vehicles shall be provided to ensure adequate transportation for all residents, regardless of handicap.

5. There shall be at least one recreational therapist for every 60 residents, assisted by recreation therapy aides. Recreation staff shall receive in-service training and shall conduct activities during the day and evening. Additional supervised recreational and leisure activities shall be available on weekends and holidays.

6. Recreation may be considered a part of programming if it consists of organized and structured activity related to the achieving of program goals. A resident shall not be considered to be receiving recreational programming merely because he or she is outdoors.

7. Library facilities shall be developed for the use of residents, containing reading materials, coloring books, film strips and the like.

H. Food and Nutrition Services

1. Consistent with their capabilities and handicaps, residents shall be taught to feed themselves and shall be fed both hot and cold foods and beverages in a normal fashion with due regard for personal hygiene (including washing hands of residents before and after every meal), use of utensils, appropriate quantities of food, appropriate dining room surroundings, meal schedules, which correspond to normal community standards, with no less than 30–45 minutes allotted for each resident's meal. Where appropriate, residents shall be taugnt to eat in leisurely family style and to choose their own quantities and items according to individual tastes and preferences. Direct care staff shall be trained in and shall utilize proper feeding techniques.

2. A nourishing, well-balanced, nutritionally adequate diet shall be provided. Residents shall be given liquids at appropriate intervals during each meal, not just at the end of the meal. The food and nutrition needs of residents shall be met in accordance with the Recommended Dietary Allowances of the Food and Nutrition Board of the National Research Council, adjusted for age, sex, activity, disability and special therapeutic needs of individual residents. There shall be a mechanism for ensuring that residents who require special diets receive them.

3. A medical order shall be required if residents are to be fed a diet of other than solid foods, are to be fed in any setting other than a suitable dining area, or are to be fed in a prone position.

4. There shall be a sufficient number of competent personnel, including personnel with experience in mental retardation, to instruct the staff and to fulfill the objectives of the food and nutrition services, including:

—Institution Food Administrator;

—Nutritionists and/or dieticians;

—Other food service personnel;

—Clerical personnel.

Every person engaged in the preparation and serving of food in the facility shall have a food handler's permit or a pending application for such a permit.

5. Dining areas and food storage, preparation, and distri-

bution shall be in compliance with state and local sanitation requirements. There shall be sufficient dishes and utensils ... residents, which shall be thoroughly cleaned between uses.

6. Food shall be prepared by methods that preserve nutritive value, served at normal temperatures, and protected from contamination in transport and storage.

7. Denial of a nutritionally adequate diet shall not be used as punishment, or as part of a behavior modification program.

I. Dental Services

1. As part of each resident's overall health services program, the full range of necessary or appropriate dental services shall be supplied by qualified professionals, and such services shall include diagnosis, treatment, and at least annual examination and cleaning. Emergency treatment by a dentist on a 24-hour seven-day a week basis shall be available. In addition, each resident shall be provided with and taught to use toothpaste and his or her own toothbrush, or, if incapable, such brushing shall be performed for the resident by the staff each morning and evening.

2. Specialized services shall be made available to all residents in need and shall include orthodontics, false teeth, and dental plates. Painkillers normaly associated with dental work shall be administered when needed.

J. Psychological Services

1. These services shall include at least annual psychological evaluations which shall be conducted as part of each resident's development plan pursuant to section D. In addition, evaluation, consultation, development plan preparation, therapy and behavior modification shall be provided, where necessary or appropriate, by sufficient qualified psychology staff and supporting personnel.

2. All psychology staff other than M.A. or Ph.D. psychologists shall be actively and regularly supervised by M.A. or Ph.D. psychologists.

K. Physical Therapy Services

1. Individualized physical therapy services on a regular basis (including 7 days a week where needed) shall be provided to those residents who can benefit therefrom, including all cerebral palsy residents and all non-ambulatory residents, and shall include positioning, feeding programs, self-ambulation programs, intervention and activation. Each physical therapist shall keep evaluation and progress records for each resident under his or her care, in accordance with the requirements of section D.

2. Sufficient numbers of qualified staff and personnel shall promptly evaluate all non-ambulatory and physically handicapped residents to determine the number of wheelchairs (including electric), braces, orthopedic shoes, walkers, crutches, positioning equipment, bolsters, helmets, adaptive chairs, etc., that are needed. Such equipment shall be ordered and/or constructed and issued as quickly as possible. Carpenters shall be employed to make adaptive equipment, tailored to the physical needs of individual residents.

3. There shall be immediate physical therapy follow-up on residents who have undergone orthopedic surgery.

L. Speech Pathology and Audiology Services

1. The purpose of speech pathology and audiology services shall be to improve the verbal or non-verbal communication skills of all residents. For this purpose, it shall be presumed that all residents can benefit from such services. Speech pathology and audiology services shall be provided, as needed, to all residents. Speech therapy shall be integrated with the educational program described in section F, and residents shall be entitled to both educational and speech services, where appropriate.

2. To this end, there shall be available sufficient appropriately qualified staff and necessary supporting personnel to carry out speech pathology and audiology services, in accordance with goals and stated objectives in individual development plans. Staff who assume independent responsibilities for clinical services shall possess the educational and experience qualifications required for a Certificate of Clinical Competence issued by the American Speech and Hearing Association (ASHA) in the area (speech pathology or audiology) in which they provide services, or equivalent qualifications.

3. The annual evaluation described in section D shall include an audiometric test conducted by an audiologist, and an evaluation by a speech therapist to identify speech and hearing problems. Sufficient audiometers shall be provided for testing, conditioning and therapy, and all speech therapists and specialists shall be trained in their use. Testing shall be diagnostic and shall include speech and language evaluation. A speech therapist shall develop an individual plan for each resident after each evaluation, as part of the development plan requirements of Section D.

4. Speech therapists shall teach parents and relatives how to stimulate language.

5. Residents who require hearing aids are to wear the aids as the therapist recommends.

6. Speech therapists shall consult with physicians if they believe surgery is appropriate. Physicians trained in this area shall be available.

7. Speech therapists' recommendations as to ENT, dental referrals and continued programming shall be considered by the interdisciplinary team described in Section D.

8. Where appropriate, deaf residents shall be taught sign language.

M. Medical and Nursing Services

1. Willowbrook shall have a comprehensive program of health services for residents which provides quality, continuity and accessibility of care. Each resident shall have at least annually a comprehensive medical examination. A full range of preventive, acute, and specialized medical services and resources shall be available to residents as needed. In keeping with section D, medical services and diagnosis shall be closely coordinated with an individual resident's development plan.

2. Residents not requiring specialized medical or nursing care shall not be kept in the infirmary for reasons of personal safety, discipline, or any other reason.

3. Adequate provision shall be made for direct-care supervision of residents isolated with contagious diseases. Such isolation shall be permitted only upon written order of a physician after personal examination. Such order shall only be valid for 10 days, and renewals shall not be employed excessively. No resident shall remain in isolation for more than 30 days without contemporaneous written approval of the Director for each succeeding 30 day period. Isolation of a resident alone in a locked room, living unit or area shall be deemed seclusion, and therefore prohibited.

4. All residents who remain in the infirmary for more than 5 days shall receive the same amount and kind of programming they would otherwise receive, unless the written order of a physician certifies that such programming would be medically harmful to the resident.

5. A full-scale immunization program shall be established so that all residents receive all necessary immunizations within 3 months after the date of this judgment and as often thereafter as is medically usual.

6. Arrangements shall be made to increase and improve the ambulance services presently available at Willowbrook so that ambulances will always be available when requested and can respond rapidly (on the average, within fifteen minutes) to emergency calls. To the extent this requirement is met by the utilization of personnel employed at Willowbrook, they shall meet the same standards required for public or private ambulance personnel in the Willowbrook geographical area.

7. There shall be regular training sessions for direct care staff on the identification and treatment of medical problems, with particular emphasis on seizure control, aspiration, pre-

vention of bed sores, etc.

8. Physicians' schedules shall include adequate provision for coverage, including care for medical emergencies on a 24-hour, seven-day-a-week basis. In particular, an additional and adequate number of physicians, in no event less than two, shall be scheduled to be present on duty during the early morning, breakfast, and dinner periods, and during the third (night) shift.

9. Willowbrook shall maintain a contract for acute medical care with one or more accredited hospitals. In addition, service agreements with backup medical facilities shall be developed, where appropriate.

10. The comprehensive medical evaluations specified in paragraph "1" hereof shall include evaluation of the need for comprehensive eye examinations. An adequate number of optometrists and opthalmologists shall be employed or retained on a contract basis to ensure that every resident receives such eye examinations, when indicated. Glasses shall be provided when indicated and promptly replaced if broken.

11. Defendants shall employ or contract for the full-time services of at least one ENT physician, and at least one neurologist or other physician with specialized training in diagnosis, treatment and control of seizures who shall not be assigned responsibility for a building, or any other responsibility that would interfere with performance of these functions.

12. Nurses shall be considered part of the care service team. Residents shall be provided with nursing services in accordance with their needs. Such service shall include:

a. Provision of skilled nursing care as needed; and

b. Control of communicable diseases and infections through:

(1). Identification and assessment;

(2). Reporting to medical authority;

(3). Implementation of appropriate protective and preventive measures.

13. Defendants shall request appropriate authorities to conduct a public health inspection immediately throughout Willowbrook, and all recommendations required to meet applicable health codes shall be implemented immediately.

N. Restraints and Abuses

1. Mistreatment, neglect or abuse in any form of any resident shall be prohibited. The routine use of all forms of restraint shall be eliminated. Physical restraints shall be employed only when absolutely necessary to prevent a resident from seriously injuring himself or others. Restraints shall never be employed as punishment, for the convenience of staff, or as a substitute for programs. In any event, restraints may only be applied if alternative techniques have failed (such failure to be documented in the resident's records) and only if such restraints impose the least possible restriction consistent with their purposes. Willowbrook shall have a written policy defining (1) the use of restraints, (2) the professionals who may authorize such use, and (3) the mechanism for monitoring and controlling such use.

2. Only professionals designated by the Director may order the use of restraints. Such orders shall be in writing and shall not be in force for over 12 hours. A resident placed in restraint shall be checked at least every 30 minutes by staff trained in the use of restraints and a written record of such checks shall be kept.

3. Mechanical restraints shall be designed for minimum discomfort and used so as not to cause physical injury to the resident. Opportunity for motion and exercise shall be provided for a period of not less than ten minutes during each two hours in which restraint is employed.

4. The use and duration of all restraints, including mittens, tying devices, camisole and restraint shirts, shall be documented in daily reports made to the Director by those professionals ordering such use.

5. Straitjackets shall never be used, nor shall any resident be tied, spread-eagled, to a bed, or subjected to either corporal punishment, degradation, or seclusion, which is hereby defined as placing a resident alone in a locked room, living unit or area, which he or she cannot leave at will.

6. Alleged instances of mistreatment, neglect or abuse of any resident shall be reported immediately to the Director, and there shall be a written report that the allegation has been thoroughly and promptly investigated (with the findings stated therein). Such written reports shall be made available to the Consumer Advisory Board and the Professional Advisory Board, on request, and their confidentiality shall be maintained.

7. Parents, relatives or guardians shall be notified in writing whenever restraints are used.

O. Labor

1. Institution Maintenance: No resident shall be required to perform labor which involves the operation and maintenance of the institution or for which the institution is under contract with an outside organization. Privileges or release from the institution shall not be conditioned upon the performance of labor covered by this provision. Residents may voluntarily engage in such labor if the labor is compensated in accordance with applicable minimum wage laws. No resident shall regularly be involved in the care, feeding, clothing, training, or supervision of other residents.

2. Training Tasks and Labor:

(A). Residents may be required to perform vocational training tasks which do not involve the operation and maintenance of the institution, subject to a presumption that an assignment of longer than 4 months to any task is not a training task, provided the specific task or any change in assignment is:

(i). An integrated part of the resident's development plan and has been approved as a program activity by a professional responsible for supervising the resident's program; and

(ii). Supervised by a staff member.

(B). Residents may voluntarily engage in habilitative labor during non-program hours for which the institution would otherwise have to pay an employee, provided the specific labor or any change in labor is:

(i). An integrated part of the resident's development plan and has been approved as a program activity by a professional responsible for supervising the resident's program;

(ii). Supervised by a staff member; and

(iii). Compensated in accordance with applicable minimum wage laws.

3. Personal Housekeeping: Residents may be required to perform tasks of a personal housekeeping nature such as the making of one's own bed.

4. If defendants bill residents for the costs of their care, treatment and maintenance, the total amounts so billed shall not exceed 50% of the total amounts of any payments received by residents pursuant to this section, and shall not be deducted from such payments prior to receipt by the residents.

P. Behavior Modification, Research, and Hazardous or Experimental Treatment

1. Residents who require, in addition to regular programming, services for psychiatric or emotional problems shall be treated in their living units or in small residential groups within a living unit of no more than four residents. Defendants shall promptly prepare and submit to plaintiffs' counsel for approval a plan incorporating appropriate due process standards and procedures to precede transfer of any resident to a specialized psychiatric unit, or retention therein.

2. The use of aversive conditioning shall be permitted only after positive reinforcement procedures and other less drastic alternatives have been explored and approval has been obtained:

A. from the resident, if he or she is capable of giving informed consent, or

B. from the parent, relative or guardian if the resident

can not give informed consent and the parent, relative or [illegible] can give informed consent, and

c. from a three person special committee on aversive conditioning, designated by the Director, which shall include at least one designee each from the Consumer Advisory Board and Professional Advisory Board.

The Deputy Commissioner for Mental Retardation, and the New York City Regional Director of the Department, shall be advised when a decision has been reached and approved to utilize such aversive conditioning. Aversive conditioning techniques shall be employed only under the supervision of and in the presence of a psychiatrist or psychologist licensed to practice in the State of New York who has had proper training in the use of such techniques, and who is specifically authorized by the Director to conduct such aversive conditioning.

3. Behavioral research or experimentation shall be conducted only after approval has been obtained as set forth in paragraph 2(A)–(C) above.

4. Because of the necessity to concentrate on the basic programmatic needs of Willowbrook residents and the history of experimentation at Willowbrook, no physically intrusive, chemical, or bio-medical research or experimentation shall be performed at Willowbrook or upon members of the plaintiff class. This standard, however, recognizes the possibility that such research or experimentation, under proper safeguards, may be appropriate for persons who are not members of the class, in other facilities or programs.

Q. Medication

1. No prescription medication shall be administered except upon order of a physician. Such orders shall be confirmed in writing by a physician as promptly as possible, within twenty-four hours.

2. Notation of each individual's medication shall be kept in his medical records. At least weekly the attending physician shall review the drug regimen of each resident under his care. All prescriptions shall be written with a termination date, which shall not exceed 30 days. The chief medical or pharmacological professional shall provide an annual statement of the volume and frequency of drugs administered, by type and condition of resident.

3. Residents shall have a right to be free from unnecessary or excessive medication. The resident's records shall state the effects of psychoactive medication on the resident. When dosages of psychoactive medication are changed or other psychoactive medications are prescribed, a notation shall be made in the resident's record concerning the effect of the new medication or new dosages and the behavior changes, if any, which occur.

4. Medication shall not be used as punishment, for the convenience of staff, as a substitute for program, or in quantities that interfere with the resident's program.

5. Pharmacy services at the institution shall be directed by a professionally competent and licensed pharmacist. Such pharmacist shall be a graduate of a school of pharmacy accredited by the American Council on Pharmaceutical Education. Appropriate officials of the institution, at their option, may hire such a pharmacist or pharmacists fulltime or, in lieu thereof, contract with outside pharmacists.

6. Whether employed fulltime or on a contract basis, the pharmacist shall perform duties which include but are not limited to the following:

a. Receiving the original, or direct copy, of the physician's drug treatment order;

b. Reviewing the drug regimen, and any changes, for potentially adverse reactions, allergies, interactions, contraindications, rationality, and laboratory test modification, and advising the physician of any recommended changes, with reasons and with an alternate drug regimen;

c. Maintaining for each resident an individual record of all medications (prescription and nonprescription) dispensed, including quantities and frequency of refills.

7. Only appropriately trained staff shall be allowed to administer drugs. Persons administering oral medications shall ensure that they are swallowed by the resident.

8. Written policies and procedures that govern the safe administration and handling of all drugs shall be developed by the responsible pharmacist, physician, nurse, and other professional staff.

a. The compounding, packaging, labeling, and dispensing of drugs, including samples and investigational drugs, shall be done by the pharmacist, or under his direct supervision, with proper controls and records. Each drug shall be identified up to the point of administration. Procedures shall be established for obtaining drugs when the pharmacy is closed.

b. There shall be a written policy regarding the administration of all drugs used by the residents, including those not specifically prescribed by the attending practitioner. There shall be a written policy regarding the routine of drug administration, including standardization of abbreviations indicating dose schedules. Medications shall not be used by any resident other than the one for whom they were issued.

9. Drugs shall be stored under proper conditions of sanitation, temperature, light, moisture, ventilation, segregation and security.

a. All drugs shall be kept under lock and key except when authorized personnel are in attendance.

b. The security requirements of federal and state laws shall be satisfied in storerooms, pharmacies, and living units.

c. Poisons, drugs used externally, and drugs taken internally shall be stored on separate shelves or in separate cabinets, at all locations.

d. Medications that are stored in a refrigerator containing things other than drugs shall be kept in a separate compartment with proper security.

e. A perpetual inventory shall be maintained of each narcotic drug in the pharmacy, and each unit in which such drugs are kept, and inventory records shall show the quantities of receipts and issues and the person to whom issued or administered.

f. If there is a drug storeroom separate from the pharmacy, there shall be a perpetual inventory of receipts and issues of all drugs by such storeroom.

10. Discontinued and outdated drugs, and containers with worn, illegible, or missing labels, shall be returned to the pharmacy for proper disposition.

11. Medication errors and drug reactions shall be recorded and reported immediately to the practitioner who ordered the drug.

R. Maintenance, Safety and Emergency Procedures

1. All necessary steps shall be taken to correct health and safety hazards, including the covering of radiators and steam pipes in a manner to protect residents from injury, the prompt repair of broken windows, and the removal of cockroaches and other insects and vermin.

2. All lead paint on the interior and exterior of buildings shall be removed and replaced with safe agents, or covered with panelling or other suitable materials, to the extent necessary, so that old lead paint is not accessible to residents.

3. Willowbrook shall comply with the provisions of the Life Safety Code of the National Fire Protection Association. Staff and residents shall be trained in emergency procedures, particularly for use in case of fire. Procedures to be followed in case of fire, medical, missing person, or other emergencies, shall be promulgated by the Director. Special attention shall be paid to the needs of physically handicapped residents. There shall be monthly fire drills for each shift, and periodic fire drills for the night shift.

4. Defendants shall take whatever steps are necessary to improve security and to protect residents, staff, parents and visitors.

5. All buildings commonly used by residents, other than the gymnasium, shall be air-conditioned as promptly as possible.

6. Defendants shall establish and maintain a program of adequate maintenance of buildings and equipment which shall include prompt elimination of existing maintenance backlogs.

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4. Defendants shall take whatever steps are necessary to improve security and to protect residents, staff, parents and visitors.

5. All buildings commonly used by residents, other than the gymnasium, shall be air-conditioned as promptly as possible.

6. Defendants shall establish and maintain a program of adequate maintenance of buildings and equipment which shall include prompt elimination of existing maintenance backlogs.

7. Outside windows and doors shall be provided with screens.

8. Floors in living or sleeping areas other than dining or [illegible] areas shall be provided with carpets or rugs, consistent with a pleasant, clean, quiet and safe residential environment.

S. Advisory Bodies and Volunteers

1. A seven member Consumer Advisory Board shall be established, and its responsibilities shall include evaluation of alleged dehumanizing practices, and/or violations of individual or legal rights. This Board shall participate in the development of Willowbrook's philosophy, goals and long-range plans, advise the Director on a regular basis, and at least quarterly shall submit written reports to him, to the Commissioner, and to the Review Panel.

2. Membership on the Consumer Advisory Board shall include parents or relatives of residents, community leaders, and residents or former residents. Members shall be nominated by the Review Panel and appointed by the Commissioner for terms not to exceed two years, such terms to be staggered so as to afford appropriate overlap.

3. A seven member Professional Advisory Board shall be established, and its responsibilities shall include advising on all professional programs and plans, budget requests and objectives, investigations of any alleged dehumanizing practices and/or violation of human and legal rights. This Board shall review research proposals and projects, assist the administration in staff recruitment and training, advise the Director on a regular basis, and at least quarterly shall submit written reports to him, to the Commissioner, and to the Review Panel.

4. The Professional Advisory Board shall consist of eminent professionals in relevant fields. Members shall be nominated by the Review Panel and approved by the Commissioner for terms not to exceed two years, such terms to be staggered so as to furnish appropriate overlap. No member of the Board shall be on the staff of any of the Department's facilities, nor shall he or she be functioning as a paid consultant to the Department.

5. The Professional and Consumer Advisory Boards shall have direct access to all living areas and program areas and to all records directly relating to resident care, other than personnel records. The Boards shall coordinate their efforts with those of both visitor and parent organizations, and shall cooperate with defendants in submitting requests for information and in arranging for such access.

6. Willowbrook shall expand its voluntary program substantially through active recruitment and training of volunteers.

7. Defendants shall apply for federal funding for a foster grandparent program for Willowbrook.

8. Members of the Professional and Consumer Advisory Boards shall be reimbursed by defendants for their reasonable expenses. Members of the Professional Advisory Board, and where appropriate, members of the Consumer Advisory Board, shall receive appropriate compensation.

T. Management

1. A meaningful table of organization shall be maintained, clearly defining areas of responsibility and accountability by position and name. A means for resolving disputes between units and professional departments, including disputes concerning the deployment or supervision of staff, shall be created, including methods for clarifying any misunderstandings that may arise in this regard. There shall be regular outside evaluation of management and of all major program elements covered by this judgment.

2. A current and meaningful policies and procedures manual shall be developed at once, incorporating recommendations from key institution staff as well as consultants.

3. Consultants shall be used as catalysts, evaluators, and monitors of programs and services on a structured and regular basis. Whenever consultants or outside evaluators are utilized, they shall prepare written reports and evaluations which shall be forwarded to the Director, the Review Panel, and the parties. Where appropriate, such reports may be made available on request to the Professional and Consumer Advisory Boards by the Director or the Review Panel, and their confidentiality shall be maintained.

4. The Director shall prepare an intelligible budget request complying with applicable laws, with program objectives.

U. Records

1. There shall be a system of records for each resident, developed and maintained under the supervision of a competent librarian or registrar. Each resident's records shall be readily available to all professional staff. Direct care staff involved with a particular resident shall have access to those portions of an individual's records relevant to programming. Information shall be incorporated in the resident's record in sufficient detail to enable those persons involved in the resident's program to provide effective, continuing services. All entries in the resident's record shall be legible, dated, and have the signature and identification of the individual making the entry.

2. These records shall include:

a. Identification data including the resident's legal status;

b. The resident's history, including but not limited to:

(i) relevant family data, including family visits and contacts, educational background, and employment record;

(ii) prior and institutional medical history, both physical and mental, including prior institutionalization;

c. An inventory of the resident's life skills;

d. A record of each physical examination, psychological report, and any other evaluations, including all those required by this judgment;

e. A copy of the individual's development plan, and any modifications and evaluations thereof, with an appropriate summary to guide direct care staff in implementing such plan;

f. The findings made in periodic (at least quarterly) reviews of the individual's response to his or her development plan, with directions as to modifications, prepared by a professional involved in the resident's program;

g. A copy of the post-institutionalization plan and any modifications thereof, a summary of the steps that have been taken to implement that plan, and all social service reports;

h. A medication history and status, as required by Section Q;

i. A signed order by authorized personnel for any physical restraints, as required by Section N;

j. A description of any extraordinary incident or accident in the institution involving the resident, to be entered by a staff member noting personal knowledge of the incident or accident or other source of information, including all reports of investigations of resident mistreatment, as required by Section N;

k. A monthly summary of the extent and nature of any work activities and the effect of such activity upon the resident's progress;

l. All team minutes relating to the resident;

m. All other orders and certifications specifically required by this judgment.

3. Defendants shall employ an adequate number of appropriately qualified staff, and necessary supporting personnel, to facilitate the prompt and accurate processing, typing, checking, indexing, filing and retrieval of records and record data.

V. Community Placement

1. Defendants shall take all steps necessary to develop and operate a broad range of non-institutional community facilities and programs to meet the needs of Willowbrook's residents and of the class. Within six years from the date of this judgment Willowbrook shall be reduced to an institution of 250 or fewer beds to serve the needs of residents who require institutional care and who come from the geographic area of Staten Island. The Review Panel shall annually eval-

ue a progress towards this objective.

To this end, defendants shall each year for the next five years request the legislature to appropriate sufficient additional funds for the development and operation of community facilities and programs to serve the needs of the class to insure that an increasing proportion, exclusive of increases in salaries, of the Department's budget, resources and expenditures relevant to the class, shall be devoted to the development and operation of such facilities and programs.

3. Until such time as other private or governmental agencies develop and operate community facilities and programs sufficient to meet the needs of Willowbrook's residents and of the class, defendants shall accept direct responsibility for the development and operation of such facilities and programs, including the development and operation of hostels, halfway houses, group homes, sheltered workshops, and day care training programs.

4. Within 12 months of the date of this judgment, defendants shall develop and operate, or cause to be developed and operated, at least 200 new community placements to meet the needs of Willowbrook's residents and of the class. For purposes of this section, except for placement in hostels currently under construction or development, which in no event shall exceed 15 beds, a "community placement" shall mean a non-institutional residence in the community in a hostel, halfway house, group home, foster care home, or similar residential facility of fifteen or fewer beds for mildly retarded adults, and ten or fewer beds for all others, coupled with a program element adequate to meet the resident's individual needs.

5. Promptly following the date of this judgment, defendants shall request an appropriation of not less than two million dollars ($2,000,000) in order to finance the leasing and operation of the 200 community placements required by paragraph 4 hereof. If such request is not approved by the legislature, defendants shall earmark and utilize for this purpose a sum of not less than two million dollars from sums already appropriated by the legislature for the 1975-1976 fiscal year.

6. Within six months of the date of this judgment, the Review Panel, working in close collaboration with the plaintiffs and with the defendants, who shall provide all necessary assistance and information for this purpose, shall prepare and recommend for implementation by defendants a detailed and comprehensive plan for the development and operation of additional community facilities and programs to meet the needs of Willowbrook's residents and of the class. Said plan will be referred to hereafter as the "community placement plan."

7. The community placement plan may recommend that additional community facilities and programs be developed and operated during the six months following recommendation of the plan, and shall recommend, by type and size of facility and program, the development and operation of a specified number of community facilities and programs, together with a recommended timetable for their development and operation.

8. In order to prepare the community placement plan described in paragraphs 6 and 7 hereof, the Review Panel shall be authorized, at its discretion, to retain consultants with expertise in the development and operation of community facilities and programs. Defendants shall provide a sum of not less than $50,000 to be used by the Review Panel for this purpose.

9. The primary goal of Willowbrook and of the Department shall be to ready each resident, with due regard for his or her own disabilities and with full appreciation for his or her own capabilities for development, for life in the community at large. To this end, defendants shall develop a full program of normalization and community placement with a full complement of community services.

10. The Director shall proceed immediately to identify those residents, including those with only physically handicapping conditions, who lack only the proper preparation to benefit from community placement. There shall be at least an annual review of each resident's progress for this purpose, as provided in section D.

11. Interdisciplinary teams shall be responsible for the development of specific programming for an individual's normalization, including a projected date for his or her progress to a community setting, in consultation with the individual resident and his or her parents or guardian. An individual staff member shall be designated to ensure the carrying out of each resident's program plan. Preparation for advancement to community placement, as provided in section D, shall include specific instruction, both at Willowbrook and in the community, in living skills, and shall also include participation in residential-type programs housed in smaller units on the Willowbrook grounds, by conversion of residential facilities currently used by staff, to accommodate such programs.

12. The community services office shall conduct an intensive campaign to secure appropriate community placements. Evaluation by interdisciplinary teams shall include recommendations as to the community alternative best suited for each resident.

13. No resident shall be placed in the community or transferred to another State institution unless and until the Director shall find that such placement will offer the individual better services, an opportunity for personal development, and a more suitable living environment than Willowbrook. Services offered in the community shall include, where appropriate, work placement, legal services, health services, recreational services, citizen advocacy, respite care and family planning services and education.

14. The Department will urge and facilitate the development of New York City proposals to take full advantage of some of the $2,000,000.00 authorized and appropriated by the legislature by Chapter 620 of the Laws of 1974, for the purpose specified therein.

W. Miscellaneous

1. Unless otherwise specified herein, and except for steps, standards and procedures relating to capital construction and renovation, all other steps, standards and procedures contained herein, including those relating to staffing, programming, clothing, housekeeping, recreation, education, food and maintenance, shall be achieved, and thereafter maintained, within thirteen (13) months from the date of this judgment. Capital construction and renovation shall be completed as promptly as possible. To this end, defendants shall promptly prepare and submit to the Review Panel for evaluation and recommendation a detailed plan for all capital construction and renovation required by this judgment, which plan shall include timetables for the achievement of specific objectives.

2. The moratorium on admissions to Willowbrook shall be continued indefinitely. This moratorium, however, shall not preclude "paper admissions" to Willowbrook of persons who are not actually admitted to Willowbrook, but are, instead, placed by Willowbrook in other facilities and programs, and shall not preclude short-term readmissions of members of the class or residents of Staten Island for the purpose of respite care or for specialized intensive services that cannot be provided in the community, and shall not preclude emergency admissions of residents of Staten Island to the Staten Island Unit of Willowbrook Developmental Center, upon notice to the Professional Advisory Board.

3. Defendants shall promptly prepare and submit to the Review Panel for evaluation and recommendation a plan for adequate hearing procedures, incorporating appropriate due process safeguards, to precede any (1) refusal after demand to admit or transfer any Willowbrook resident to a less restrictive setting, or (2) transfer of a Willowbrook resident to any other residential placement. Community placements and transfers to other institutions or developmental centers shall be accompanied by written notice to the Mental Health Information Service, and to parents, relatives, or legal guar-

dants shall not reduce the level of services and ning provided in other facilities and programs for tally retarded in order to meet the requirements gment.

5. The Review Panel shall evaluate and make recommendations concerning the appropriateness of the Keener Unit as a residential facility for the retarded prior to the transfer to or admission of any member of the class to Keener.

6. Nothing in this judgment shall be deemed to expand or restrict the classes of persons otherwise entitled to participate in any disciplinary proceedings authorized by law or contract. The Review Panel, however, may designate one of its members to observe one or more of such proceedings. That member shall not participate in such proceedings, except as an observer, and shall keep confidential the name ames of any employees or residents involved in such eedings.

Plaintiffs and defendants expressly waive the rights of the esidents to confidentiality of resident records under §15.13 of the Mental Hygiene Law for the limited purpose of allowing the Consumer Advisory Board or its designees to act *in loco parentis* with respect to Sections D1, D4, D6, N7, P2, V11, and W3 hereof for residents whose interests under those sections are not actively represented by a parent, relative or legal guardian or committee. If necessary, or advisable, the Consumer Advisory Board may apply to an appropriate court for authority to exercise directly, or through its designees, the function of a guardian, with respect to this judgment. In general the defendants shall support such applications but reserve the right to oppose the particular person or persons nominated to serve as such guardian.

WILLOWBROOK PERMANENT INJUNCTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, BENEVOLENT SOCIETY FOR RETARDED CHILDREN, et al.,	:	
Plaintiffs,	:	PERMANENT INJUNCTION
-against-	:	72 Civ. 356, 357
MARIO CUOMO, et al.,	:	
Defendants.	:	

WHEREAS, plaintiffs and defendants entered into a Consent Judgment which was approved by the Court on May 5, 1975, 393 F. Supp. 715 (EDNY), requiring defendants to provide a range of individualized services to the plaintiff class of persons with mental retardation ("class member") and to place them in appropriate, less restrictive, normalizing residences in the community, and

WHEREAS, this Court has actively monitored and supervised, through regularly scheduled status conferences and hearings on various motions of the parties, the provision of services and community residential placements provided to class members pursuant to the Consent Judgment and subsequent orders of the Court, and

WHEREAS, on February 25, 1987, after several years of negotiations between the parties, this Court approved a settlement agreement which, inter alia, imposed the obligation on

defendants to place and maintain plaintiff class members in community residential facilities, placed specific limits on the size of such facilities, established timelines for the completion of all such placements, and provided for the entry of a permanent injunction upon satisfaction of defendants' service and placement obligations ("1987 Stipulation"), and

WHEREAS, defendants have achieved most of their quantitative placement obligations for class members, but will not be able to complete their remaining obligations within the December 31, 1992, timeline set by the 1987 Stipulation, and

WHEREAS, plaintiffs seek to protect the rights and ensure the quality of the residential placements and treatment services of those class members who will not be placed on or before December 31, 1992, and

WHEREAS, in order to prevent the recurrence of the tragic conditions which led to the filing of this litigation in 1972 and the entry of the Consent Judgment in 1975, both plaintiffs and defendants agree that the members of the plaintiff class must continue to receive high quality services in appropriate community residential settings for the rest of their lives, after the removal of this case from the active docket of the Court, and

WHEREAS, as a result thereof, and pursuant to the provisions of paragraph 11 of the 1987 Stipulation, the parties have agreed to the terms and provisions of a permanent injunction which assures that defendants will continue to provide appropriate community residential and habilitative services to the members of

the plaintiff class, replaces the Consent Judgment and subsequent orders of the Court, removes this case from the active docket and active supervision of the Court, and, if adhered to by Defendants, will hereafter assure that the class members continue to receive the high level of habilitation services and appropriate community residential options which have been the objectives of this litigation since its inception, and which have been the obligations required of Defendants by the orders of this Court, and

NOW, THEREFORE, for these findings and reasons, plaintiffs and defendants herein, through their respective counsel, stipulate and agree to the following provisions of this permanent injunction:

1. This permanent injunction supplants and replaces the Consent Judgment and all subsequent orders of this Court in this matter, except as specifically referenced herein. All such judgments and orders are hereby vacated and dissolved, subject however to the exceptions and reservations herein set forth. The Office of the Special Master shall terminate at the close of business on March 31, 1993. Any motions to enforce the rights of the plaintiff class shall be brought before this Court pursuant to the permanent injunction. The action shall otherwise be terminated, and the case shall be removed from the active docket.

Richmond Complex.

2. Defendants may, but are not required to, operate and maintain on the grounds of Willowbrook residential facilities which, in the aggregate, do not exceed a capacity for 150 persons. For purposes of this paragraph, "Willowbrook" shall be defined as set forth in paragraph 2(a) of the 1987 Stipulation, which definition is specifically retained and incorporated herein. (See Appendix A attached hereto)

3. Defendants shall render high quality and appropriate medical and habilitative services, shelter, food and clothing to the residents of the Richmond Complex. At a minimum these services shall conform to applicable state and federal requirements and all other requirements of this permanent injunction. For purposes of this paragraph, the "Richmond Complex" shall be defined as set forth in paragraph 3(a) of the 1987 Stipulation, as that definition incorporates paragraph 2(a) of the 1987 Stipulation, which definitions are specifically retained and incorporated herein. (See Appendix B attached hereto)

4. Defendants shall continue to prepare the residents of the Richmond Complex for placement in small community residential settings of 10 beds or less, to the extent warranted by interdisciplinary team recommendations. At the time the permanent injunction is entered, defendants shall provide plaintiffs a list of the names of every class member residing at the Richmond Complex on that date. A copy of that list shall be

attached to this permanent injunction. (See Appendix C attached hereto) No later than two years after the entry of this permanent injunction, defendants shall provide plaintiffs' counsel with the current address of each individual listed on Appendix C, the residential capacity of the facility where he or she resides, the name and address of the provider of residential services for each resident of the Richmond Complex who resided there on the entry of this permanent injunction, and placement plans for those residents who still remain at the Richmond Complex at that time. For those residents whose interdisciplinary team has recommended they should continue to remain at the Richmond Complex, defendants shall also provide plaintiffs' counsel with all data and reports in its possession which support, and which do not support, such recommendations.

5. Placements.

(a). With the exception of the class members listed on Attachment 1 to this permanent injunction, defendants have satisfied their quantitative placement obligations under the 1987 Stipulation, including Attachment A to the 1987 Stipulation. (A copy of Attachment A and a list of the other Willowbrook class members placed pursuant to the Willowbrook Consent Judgment is attached hereto as Attachment 2.)

(b). All class members who have not been placed in a community or qualifying facility by December 31, 1992 shall be placed on Attachment 1 to the permanent injunction. Before being included on Attachment 1, each class member must have a complete

placement plan which has been reviewed and approved by the Special Master and plaintiffs' attorneys.

(c). OMRDD shall place all class members listed on Attachment 1 into appropriate community residential facilities as defined in paragraph 4(d) of the 1987 Stipulation, see Appendix B, no later than August 31, 1993, however this deadline may be extended upon consent of plaintiffs and defendants, where appropriate to meet the needs of an individual class member. Appendix A to the Consent Judgment and subsequent orders of the Court shall continue to be applicable to these individuals until six months after each person on Attachment 1 has been placed in an appropriate community facility or, in the case of an individual who has been returned to a developmental center or otherwise placed in a non-qualifying facility as defined in paragraph 2(c) of the 1987 Stipulation, until the individual has lived continuously in an appropriate community facility for six months.

(d). Plaintiffs' counsel and defendants have agreed upon an independent evaluator who will closely monitor the individuals listed on Attachment 1 to ensure that they receive the services required in paragraph 1(c) above and verify the continued appropriateness of their placement plans. With regard to these individuals only, the independent evaluator shall have the same powers granted to the Special Master pursuant to paragraphs 5, 6, 8, 9, 10, 13, and 16 of the Order of Referral, dated July 13, 1982, including but not limited to monitoring,

providing technical assistance, and issuing formal recommendations. Defendants shall provide adequate funds to permit the independent evaluator to perform his or her duties under this permanent injunction. (See Appendix D attached hereto, setting forth the powers and duties of the independent evaluator).

(e). Defendants shall report regularly to both plaintiffs and the independent evaluator on the progress of their efforts to place individuals listed on Attachment 1. The independent evaluator shall certify to the court and the parties no later than September 30, 1993 whether defendants' placement obligations have been met under Attachment 1 and the individuals listed on Attachment 1 are receiving services consistent with Appendix A to the Consent Judgment and subsequent orders of the Court, as provided in paragraph 5 (c) above. Because these individuals are among the most difficult to place and maintain in the community, the independent evaluator shall continue to monitor their progress in the community for six months following their placement into a community facility.

6. Maintenance of Size of Community Residences.

Defendants shall maintain class members in the community residential facility in which they live at the time of the entry of this permanent injunction, or in such community residential facilities with equal or smaller residential capacities as are appropriate for the class member, except:

(a). in the event of an emergency as described in paragraph 8 (b) of the 1987 Stipulation (See Appendix E attached hereto);

(b). where the class members' medical needs require movement pursuant to the criteria for inclusion in Attachment A to the 1987 Stipulation which are described in paragraph five of said Stipulation and certain documents developed by the Special Master and which are specifically retained and incorporated herein (See Appendix F attached hereto);

(c). where the class member's interdisciplinary team recommends a residential movement for the purpose of providing treatment and services which are more appropriate to the class member's needs and which cannot be provided in the same or a smaller facility, subject to:

(i). the consent of the class member, if the class member has capacity; or, if the class member lacks capacity, the class member's correspondent or, in the case of noncorrespondents, the Consumer Advisory Board. However, consent shall not unreasonably be withheld if the class member is endangering other residents at the facility where the class member resides or is substantially interfering with the operation of the residential program; and

(ii). the considerations set forth in paragraph 6 of the 1987 Stipulation, which is specifically retained and incorporated herein. (See Appendix G attached hereto)

(d). where a class member with capacity requests a move to another facility;

(e). upon consent of plaintiffs' counsel.

7. Consumer Advisory Board.

Defendants shall comply with the Stipulation and Order of January 3, 1992, which shall remain in effect, and is specifically retained and incorporated herein. (See Appendix H attached hereto). For purposes of this permanent injunction and the Stipulation and Order of January 3, 1992, the parties agree that the term "noncorrespondent class member" shall mean any class member who does not receive active representation, as defined in Appendix H, attached hereto. Defendants shall refer for Consumer Advisory Board representation or co-representation those class members who lack active representation, as defined in Appendix H attached hereto. With the consent of a class member with capacity or his or her correspondent, the Consumer Advisory Board may also act as co-representative or advocate for those members of the plaintiff class who are not noncorrespondent class members. The Consumer Advisory Board shall continue to have the responsibility to evaluate alleged dehumanizing practices and violations of individual or legal rights with regard to any and all members of the plaintiff class.

8. Case Management.

Defendants shall continue to provide plaintiff class members with case management services, as defined in Appendix I, at a ratio of no less than one case manager to every 20 persons. No

later than the first day of January and the first day of July of each calendar year, so long as any plaintiff class member lives, defendants shall provide to plaintiffs' counsel, or their designated representative, and the Consumer Advisory Board a report detailing the current status of defendants' compliance with their case management obligations and listing the name and caseload of every case manager providing services for a member of the plaintiff class and the name and address of any class member who is not receiving case management services in accordance with this paragraph.

9. Access to Class Members and Records; Plaintiffs' Access to Commissioner of OMRDD.

(a). For so long as any class member lives, defendants shall provide plaintiffs' counsel, the Consumer Advisory Board and Mental Hygiene Legal Service ("MHLS"), to the extent it represents a class member, with the following rights of reasonable, unrestricted access to:

(1). all class members; and

(2). all records relating to class members maintained by or in the possession of defendants, or maintained by any provider of services to the class member upon reasonable advance request to the OMRDD Defendants, including but not limited to individual developmental plans and incident reports; and

(3). all facilities where class members reside or receive habilitation, treatment or other services; and

(4). copies of all residential or program surveys and audits for facilities where class members receive services upon reasonable advance request to the OMRDD Defendants. For purposes of this paragraph, surveys and audits shall include, but not be limited to, those completed by the New York State Commission on Quality of Care, and the OMRDD Quality Assurance Division, and/or any successor to either agency.

(b). For so long as a correspondent shall represent a class member, defendants shall provide each correspondent the right of reasonable, unrestricted access to each class member the correspondent represents and all records and facilities listed in paragraph 9 (a)(2), (3) and (4) above.

(c). Plaintiffs and plaintiffs' counsel shall continue to have reasonable access to the Commissioner of the Office of Mental Retardation and Developmental Disabilities ("OMRDD") to discuss matters of concern to members of the plaintiff class through telephone calls and informal meetings at mutually convenient times and places.

10. Programming.

(a). Defendants shall provide all class members with meaningful, full day habilitative programming and services appropriate to their individual needs each day during week days and meaningful, appropriate recreation and community integration each day during evenings and weekends for the remainder of their lives. Such habilitative programming and services, recreation and community integration shall include, but not be limited to,

compliance with applicable contemporary habilitation standards and contemporary federal and state regulatory standards. Class members with capacity have a right to refuse to partake in such programming.

(b). Defendants shall ensure that each class member's developmental plan is reviewed by the class member's interdisciplinary treatment team at least annually, and quarterly if the class member, correspondent, Consumer Advisory Board or MHLS, to the extent it represents a class member, so requests. The class member if he or she has capacity, the class member's correspondent or the Consumer Advisory Board, and MHLS, to the extent it represents a class member, shall be invited to attend such reviews and kept informed of the class member's educational, vocational and living skills, progress, medical condition and other matters relevant to his or her care, treatment and development. Defendants shall maintain current, appropriate professional assessments of each class member's needs, including where applicable, but not limited to, medical, psycho-social, habilitative, psychological, speech therapy, food and nutrition, physical therapy, and occupational therapy.

(c). In addition to the above, the notice to the class described in paragraph 18 below shall include the following notice of the following right of each class member under the permanent injunction:

> "Class members presently are entitled to receive active treatment and full day programs and it is the defendants' intention to continue these programs. If any aspect of the day program that the class member was entitled to under the

Consent Judgment is proposed to be changed, including but not limited to the nature or duration of the program, you will be given notice of the proposed change and will have an opportunity to discuss the proposal and object to it if you are not satisfied. You will be entitled to administrative and judicial review of the proposal if you object. Any future change in the program to which the class member was entitled under the Willowbrook Consent Judgment shall be permitted only on a showing that it provides a greater opportunity for the class member's growth and development and is based on an individualized assessment of the class member's current needs made by the individual's treatment team, including, where applicable, the individual's medical psycho-social, habilitative and psychological needs, in the exercise of its professional judgment. Appropriate changes in the individual developmental plan may be made where a class member is unable to participate fully in programming because of a medical condition or advanced age and such assessment is based upon a full individualized assessment of the class member's current needs in the manner described above. In the case of a class member incapacitated by a medical condition, prior programming shall be restored as soon as the individual is no longer incapacitated."

11. Safety and Physical Environment.

Defendants shall assure each class member protection from harm and a safe, clean and appropriate physical environment.

12. Staffing.

Defendants shall assure that there is sufficient staff present and on duty to protect each class member from harm; provide a safe, clean and appropriate physical environment; provide meaningful, full day habilitative programming and services appropriate to the individual's needs during week days and meaningful, appropriate recreation and community integration each day during evenings and weekends for the rest of their lives; and satisfy defendants' other obligations under this permanent injunction.

13. Behavior Modification, Research, and Hazardous or Experimental Treatment.

Paragraph P, subparagraphs (2), (3) and (4) of Appendix A to the Willowbrook Consent Judgment, attached hereto as Appendix J, is specifically retained in the permanent injunction, except that in subparagraph (2)(c) plaintiffs' attorneys shall designate the individual formerly designated by the Professional Advisory Board.

14. Names and Locations of Class Members.

Defendants shall provide plaintiffs' counsel and CAB with a list of the names and locations of all class members at the time the permanent injunction is entered and at six month intervals thereafter, so long as any class member lives.

15. Due Process Notices.

Except in emergencies as defined in Appendix K, defendants shall provide notice at least 30 days prior to the transfer of any class member from any residential facility or building in which he or she resides, to:

(a) the Consumer Advisory Board, so long as any class member remains alive;

(b) to plaintiffs' counsel for at least five years from the date of entry of this permanent injunction; and

(c) MHLS, to the extent it represents a class member.

In an emergency, as defined in Appendix K, one day's notice shall suffice unless circumstances are such that it is impossible to provide notice prior to the transfer, for example

in the event of a fire or other natural disaster. In such cases notice shall be provided as soon as practicable. Notice shall be provided through due process forms, a copy of which is attached hereto as Appendix L. Unless the parties expressly agree otherwise in writing, defendants' obligation to provide: 1) a hearing before an independent factfinder and the other rights presently afforded at such a hearing, as described in Appendix L; and 2) full, written notice of such rights 30 days prior to the proposed transfer, as described in Appendix L, shall remain in effect for so long as any class member is alive, regardless of any change in the form or content of defendants' due process notices.

16. Appropriate Services.

Defendants shall continue to provide each class member with residential, habilitative and programming services that are reasonably unrestrictive and appropriate to his or her individual needs.

17. Notice of Rights.

The OMRDD defendants shall place the following information describing the rights and entitlements under the permanent injunction in the permanent record of each class member, shall retain such information on record for so long as the class member is alive, and shall enter such information in the class member's file maintained by all providers of residential and habilitative services to class members:

(a). designation of membership in the Willowbrook class;

(b). notation that class membership results in rights and services guaranteed by this permanent injunction issued by the United States District Court, Eastern District, and a summary o those rights; and

(c). the name, address and telephone number of plaintiffs' counsel, MHLS and the Consumer Advisory Board.

18. Notice of entry of Permanent Injunction.

Defendants shall provide one time notice to all correspondents and class members of their rights and entitlemen under the permanent injunction. Within three (3) months of the entry of the permanent injunction, defendants shall mail the Notice to Correspondents, which is attached hereto as Appendix I to the Consumer Advisory Board, MHLS and all class members with capacity and each and every class member's correspondent at the last known address.

19. Commissioner's Task Force.

Defendants shall create a Commissioner's Task Force which shall meet quarterly and be comprised of parents, advocates, consumers, members and staff of the Consumer Advisory Board, OMRDD, other professionals in the field and plaintiffs' counsel. The Task Force shall, inter alia, review information from the monitoring provided in paragraph 21 below and advise the Commissioner on both the dissemination to other facilities of better practices at facilities found to be exemplary and on possible plans of corrective action where deficiencies are identified. The Task Force shall also identify and address

systemic problems, review the progress in implementing the systemic plans identified in paragraph 20 below, and advise the Commissioner regarding these and other matters concerning the plaintiff class. In addition to the monitoring reports described in paragraph 21 below, the Task Force shall receive quarterly reports of case management ratios and use other sources of information including but not limited to parents, consumers, the New York State Commission on Quality of Care, and the OMRDD Division of Quality Assurance. Plaintiffs and defendants have agreed upon the members of the Task Force. The Task Force shall operate until the 350 audits described in paragraph 21(d) below have been completed and reviewed by the Task Force. Thereafter, the Task Force, plaintiffs' counsel and the Commissioner shall evaluate the continuing need for the Task Force. The Task Force shall not be discontinued without the consent of plaintiffs' counsel and defendants.

20. Systemic Issues

(a). Defendants and plaintiffs agree that the continued delivery by defendants of high quality residential and habilitation services to class members is linked to the successful management of key professional interventions or services. The professional interventions and services which the parties have identified as critical to the successful implementation of this permanent injunction are: vocational and day programming, medical services, respite care, behavior management, case management, residential and integrative services, and incident review. The

items enumerated herein are not intended to be exclusive. Rather, defendants have agreed to continue to identify other professional interventions and services which are key to their obligation to successfully comply with the provisions of this permanent injunction.

(b). Defendants, while maintaining that the professional interventions and services set forth in paragraph 20 (a) above are currently being provided, have also agreed to take the steps necessary and required to improve these services. To that end, defendants and the Special Master will develop a master plan of action for each systemic issue in the areas set forth in paragraph 20(a), above. Plaintiffs and defendants have agreed upon and submitted to the Court the master plan and a plan for specific action during fiscal year 1993-94. Defendants will submit these plans to The Commissioner's Task Force, which will review the progress and problems related to these systemic issues and make recommendations to the Commissioner. Defendants will conduct individual audits of class members to determine how well their systemic solutions are improving the quality of services provided to class members, as provided in paragraph 21 below.

(c). For purposes of monitoring the development and implementation of the plans required by this paragraph, defendants agree to provide plaintiffs' counsel, if plaintiffs shall so request, information sessions to be attended by plaintiffs' counsel, any experts retained by plaintiffs' counsel and designees of the defendants, who are responsible for

designing and implementing the plans. The purpose of the meetings shall be to inform plaintiffs' counsel of their progress in developing and implementing the plans and to provide defendants with input and suggestions from plaintiffs' counsel, and to provide plaintiffs' counsel with status reports regarding the implementation of the plan.

21. Monitoring.

In order to ensure that class members are receiving the services required by this permanent injunction, defendants shall monitor class members' residential and day programs as described below. The parties agree that the audit instruments and methodology contained in Appendix N, attached hereto, measure compliance with the permanent injunction. Defendants agree to hire three staff members from the Office of the Special Master to monitor compliance with the permanent injunction and to perform the audits and related work described in paragraph 21(b), (c), (d), and (e), below.

(a). The Special Master shall complete approximately 700 validated full audits by March 31, 1993. Defendants shall take prompt action to correct any deficiencies cited in the audits.

(b). Within 24 months following entry of the permanent injunction, or longer on consent of the plaintiffs, defendants, together with staff from the Special Master's Office, shall complete surveys of each class member who was not fully audited by the Special Master as provided in paragraph 21(a) above, using

the short form audit instrument set forth in Appendix N attached hereto. Any class member whose compliance level is below 80% shall promptly be re-audited using the full audit instrument contained in Appendix N. Defendants shall promptly correct any deficiencies cited in the audits.

(c). Surveys, as required by state and federal law, will be conducted by the OMRDD defendants or the New York State Department of Health for every facility in which a class member resides and the results will be matched against the Willowbrook key indicators contained in Appendix N, attached hereto.

(d). In 1995, or at the completion of the process described in paragraph 21(b) above, whichever is later, defendants shall conduct a random sample audit of 350 class members at 350 different sites using the full audit instrument in Appendix N attached hereto, in order to determine whether class members are receiving the services required under the permanent injunction and whether the systemic problems identified in paragraph 20 have been corrected. Defendants shall devise a plan of correction for any deficiencies revealed by the audit.

(e). Defendants, together with the staff from the Special Master's Office described in paragraph 21(g) below, shall promptly devise and implement plans of correction for those individuals who are not receiving appropriate services as disclosed by the audits and surveys described above or other sources of information supplied to OMRDD.

(f). Plaintiffs may select independent consultants to review and validate the survey findings and corrective actions described above and report quarterly their findings to OMRDD, plaintiffs and the Commissioner's Task Force. OMRDD will furnish the survey findings, and raw data if requested, to plaintiffs, the Consumer Advisory Board, and the Commissioner's Task Force.

(g). Three members of the professional staff of the Special Master's Office shall continue their work, but under the direct supervision of the OMRDD Internal Audit Unit, and shall serve as staff to the Commissioner's Task Force and shall conduct the audits of class members after March 31, 1993. Defendants shall continue to employ these individuals in such capacity until one month after the completion and validation of the audits and corrective actions described in paragraph 21(b), (d) and (e) above, or December 31, 1995, whichever occurs later. In the event any staff member of the Special Master's Office does not remain until the completion and validation of the audits and corrective actions described above, he or she shall be replaced by an individual agreed upon by plaintiffs' counsel and defendants.

22. The court retains jurisdiction to enforce the provisions of this permanent injunction and for purposes of requests for attorney's fees and costs related to the monitoring and enforcement of the permanent injunction, except that after December 31, 1995, or two months after the completion and validation of the audits and corrections described in paragraph

21 above, whichever is later, plaintiffs may not seek attorney's fees for monitoring unrelated to a motion to enforce this permanent injunction.

23. Plaintiffs and defendants agree that the primary purpose of this permanent injunction is to guarantee members of the Willowbrook class certain basic, enumerated rights, high quality community residential and treatment services, high quality case management and advocacy services and the representation of noncorrespondent class members by the Consumer Advisory Board.

Dated: New York, New York
March 11, 1993

ROBERT M. LEVY (RL1929)
New York Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 382-0557

MICHAEL S. LOTTMAN (ML9527)
1003 Richardson Drive
Raleigh, NC 27603

Attorneys for Plaintiffs

ALAN M. ADLER (AA9465)
Deputy Counsel
New York State Office of
Mental Retardation and
Developmental Disabilities
44 Holland Avenue
Albany, NY 12229
(518) 474-7700

ROBERT ABRAMS
Attorney General of the
State of New York
120 Broadway Room 24-46
New York, New York 10271
By: Ronald Turbin (RT8170)
Assistant Attorney General
(212) 416-8633

Attorneys for Defendants

SO ORDERED:

JOHN R. BARTELS
United States District Judge

WILLOWBROOK

"Willowbrook" shall refer to the grounds of the former Willowbrook Developmental Center and the Institute for Basic Research, including the Staten Island Developmental Center, the Karl D. Warner Center, the Richmond Complex, and any subsequent structures.

RICHMOND COMPLEX

Defendants may operate on the grounds of Willowbrook and the Institute for Basic Research a residential facility to be known as the Richmond Complex, which shall be an institution of 150 or fewer beds. The number of residential beds at Willowbrook shall be 150 or less and shall not exceed 150 at any time.

Appendix B

POWERS OF INDEPENDENT EVALUATOR

1. The independent evaluator shall be allowed full access to all information, records (including budget records), buildings and areas covered by the preliminary injunction and shall be permitted to interview any member of the class or any employee of defendants, at reasonable times and places, to the extent necessary to the discharge of his duties.

2. Any interference with the independent evaluator in connection with his or her performance of the duties described herein, by any person having notice of the contents of this Order, may be punishable as contempt of court and subject to other sanctions provided by law.

3. In addition to those powers described above, the independent evaluator shall have the authority to:

(a) Require the defendants or their agents or any person who provides services to class members to submit any reports necessary to assist the independent evaluator in performing his or her duties, including programs, records and evaluations of individuals, and to assist in accomplishment of the community placement provisions of the Permanent Injunction;

(b) Provide advice and assistance to the parties in implementing the Permanent Injunction;

(c) Issue such reports to the parties and the Court as he or she deems useful in performing his or her duties;

(d) Consult with all parties and interested persons and bodies concerning implementation of the Permanent Injunction;

(e) Identify specifically any terms of the Permanent Injunction with which defendants are not in compliance. He or she may recommend a resolution of any disagreements which arise concerning compliance with the terms of the Permanent Injunction. Such recommendations shall be communicated in writing to the following: defendants, counsel for defendants, counsel for plaintiffs, and such other persons as the independent evaluator deems appropriate.

4. All parties shall be bound by the recommendations of the independent evaluator issued pursuant hereto, unless within 15 business days following receipt of such recommendations they serve on all other parties and file with the independent evaluator written objection to such recommendations. The filing of such an objection by any party shall automatically stay the effect of any such recommendation until further order of the Court. Within ten

(10) days of receipt of written objections, the independent evaluator or any other party, may apply to the Court for a hearing to determine whether the recommendations to which objection has been made should be adopted. Such applications shall be upon prior written notice to all parties and to the independent evaluator.

5. In order to achieve the goal of compliance with and enforcement of the Permanent Injunction, information investigations by the independent evaluator may be conducted as informal working sessions. Informal private consultations without the presence of counsel are permitted but the fact that such meetings were held shall be made known to all counsel by the independent evaluator keeping a record of them and making the record available.

6. The independent evaluator shall have no authority to exercise any control or management over the operation of any facility operated or licensed by the State of New York, but shall have authority to monitor the location and acquisition of community placement facilities in order to meet the placement goals of the Permanent Injunction and to make a report to the parties with respect thereto.

7. Defendants and all of their agents, as well as public agencies of the State of New York, will cooperate fully with the independent evaluator in order to accomplish the purposes of this order.

EMERGENCY FOR INCREASED BED SIZE

For purposes of this paragraph, an emergency situation shall be limited to the revocation, suspension or precipitous surrender of the operating certificate of a community or qualifying facility in which class members reside.

ATTACHMENT A CRITERIA

Defendants may place in appropriate long-term care facilities those class members who require extended intensive medical care at a more service-intensive level than that which is provided in an Intermediate Care Facility for the Mentally Retarded ("ICF/MR"), as defined in the Social Security Act, §1905(c) and (d) and 42 C.F.R. §§442.400 et seq.

PARAGRAPH 6 OF THE 1987 STIPULATION

Defendants shall continue to provide class members placed in facilities pursuant to paragraphs 4 and 5, above, with the least restrictive and most normal living conditions possible, consistent with the provisions of Appendix A, §§(1) and (2) of the Consent Judgment. Any placement pursuant to this Stipulation shall be appropriate to the individual needs of the class member and consistent with the provisions of Appendix A to the Consent Judgment.

JANUARY 3, 1992 ORDER RE: CAB

Active Representation

Active representation is generally defined as participation with the interdisciplinary team in planning and evaluating the individual development plan and/or visits between the correspondent and the individual class member at least annually. Merely signing consent forms sent through the mail or receiving phone calls initiated by facility staff with no other involvement does not constitute active representation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, et al., Plaintiffs, -against- MARIO CUOMO, et al., Defendants.	72 Civ. 356, 357 STIPULATION AND ORDER (J.R.B.)

WHEREAS, the Consumer Advisory Board was established pursuant to the provisions of §§ S and W of Appendix A to the Final Judgment entered on May 5, 1975 [393 F.Supp. 715 (EDNY)], and

WHEREAS, in paragraph 11a of the stipulation and order dated February 24, 1987, the defendants agreed to assure that necessary and appropriate representation and advocacy services were provided to noncorrespondent class members after the entry of a permanent injunction in this litigation,

NOW, IT IS HEREBY STIPULATED AND AGREED, by and between the parties, that the permanent injunction referred to in paragraph 11 of the stipulation and order dated February 24, 1987, shall contain the following paragraphs:

1. The seven member Consumer Advisory Board, as nominated and appointed pursuant to the provisions of § S (2) of Appendix A to the Final Judgment entered on May 5, 1975 [393 F.Supp. 715 (EDNY)] ("Consent Judgment") and paragraph 9 of the stipulation

and order dated February 24, 1987, shall continue to provide necessary and appropriate representation and advocacy services on an individual basis to all noncorrespondent former Willowbrook class members as long as any such class member shall live. The term "necessary and appropriate representation and advocacy services" shall include, but not be limited to, those representation and advocacy services which the Consumer Advisory Board has provided on an individual basis to noncorrespondent members of the Willowbrook class prior to the entry of this injunction.

2. The Consumer Advisory Board shall have direct access to all living areas and program areas used by noncorrespondent former Willowbrook class members and to all records relating to the care of any noncorrespondent former Willowbrook class member.

3. If necessary, or advisable, the Consumer Advisory Board may apply to an appropriate court for authority to exercise directly, or through its designees, the function of a guardian, for the purpose of providing necessary representation and advocacy services for a former Willowbrook class member. In general the defendants shall support such applications but reserve the right to oppose the particular person or persons nominated to serve as such guardian.

4. Defendants shall provide sufficient funds to ensure that the Consumer Advisory Board continues to be staffed with an executive director, two secretaries and program staff at a ratio of one (1) staff member for every 75 noncorrespondent clients

upstate and one (1) staff member for every 100 noncorrespondent clients in the New York City metropolitan area.

Dated: New York, New York
December 1, 1991

ROBERT M. LEVY
New York Civil Liberties Union
Foundation
132 West 43rd Street
New York, New York 10036
(212) 382-0557

MICHAEL S. LOTTMAN
P.O. Box 81
Mansfield Depot
Hartford, CT 06251

Attorneys for Plaintiffs

ALAN ADLER
Deputy Counsel
Office of Mental Retardation
and Developmental Disabilities
44 Holland Avenue
Albany, New York 12229
(518) 474-7700

Attorney for Defendants

SO ORDERED:

U.S.D.J.

January 3, 1992

Willowbrook Case Management

I. Definition of Case Management

A case manager is a qualified mental retardation professional (QMRP) who is either a state employee, or an employee of a voluntary agency that does not provide residential or day services to the class member. A class member or the class member's correspondent may choose a functionally independent case manager employed by the same agency that provides residential or day services if such a person is available. The case manager:

1. Promotes self-advocacy, self direction and choice;

2. Advocates and arranges for services that are accessible, community-based, comprehensive, and culturally appropriate;

3. Monitors the quality of services and programs provided to the consumer through measures of consumer satisfaction; and,

4. Monitors compliance of the services and programs with Willowbrook class requirements and entitlements and with state and federal laws and regulations.

II. Case Management Functions

The case manager shall perform the following functions on behalf of class members:

1. Advocacy

   a. The case manager shall protect and uphold the rights and entitlements of the class member in the residential program, in the day or work program, and in all spheres of the class member's life. These rights and entitlements are established by federal and state laws and regulations and by class membership under the permanent injunction. The case manager shall ensure that procedural and substantive due process requirements are met with regard to the class members and the class member's representatives.

b. The case manager shall ensure active representation, either by the class member or by a correspondent or Consumer Advisory Board ("CAB") representative.

c. The case manager shall display an appropriate long-term view for the class member that assures appropriately high, but realistic, expectations for growth, movement and independence.

2. Assessment

a. Through an interdisciplinary treatment team, appropriately constituted based on the needs of the individual, the case manager shall ascertain a class member's developmental level and specific needs for services.

b. The case manager shall ensure that all assessments for the class member including, where applicable but not limited to, medical, psycho-social, habilitative, psychological, speech therapy, food and nutrition, physical therapy, and occupational therapy, have been either completed or scheduled and the case manager shall request appropriate documentation of such.

3. Program Plan Development

a. The case manager shall make every effort to ensure that all appropriate parties, including the class member, the correspondent, the Mental Hygiene Legal Services ("MHLS") and the CAB representatives to the extent it represents a class member, are invited and in attendance at interdisciplinary treatment team meetings.

b. The case manager shall ensure development of a plan of needs and services for the class member.

c. The case manager shall ensure that each class member's developmental plan is reviewed by the class member's interdisciplinary treatment team at least annually or more frequently when required by the class member's individual needs. A class member's development plan shall be reviewed by the

interdisciplinary treatment team on a semi annual or quarterly basis if the class member, the correspondent, Consumer Advisory Board, or MHLS, to the extent it represents a class member, so requests.

4. Recordkeeping

a. The case manager shall ensure that the individual's record is maintained including the individual's plan for needs and services, persons responsible, and plans for data maintenance and monitoring.

b. The case manager shall prepare monthly case notes reflecting visits and progress.

c. The case manager shall ensure written notifications to the class member and correspondent as required by OMRDD's Client Placement Procedures.

5. Coordination

a. The case manager shall serve as a focal point for services.

b. The case manager shall coordinate among the diverse providers of service required by the class member, including their day and residential programs.

6. Linking

a. The case manager shall ensure that the class member is linked to new services, as needed. In doing so, the case manager shall, as needed, make referrals for the new services, arrange services at generic agencies, accompany the class member to agencies providing services or arrange for a person familiar with the class member and his or her needs to do so, assist in completing forms and applications, and perform other related duties.

7. Support

a. The case manager shall assist the class member and/or their family with unanticipated crisis intervention.

8. Monitoring/Follow-Up

a. The case manager shall assure that the class member is receiving appropriate services in accordance with their plans of needs and goals, and periodic reassessment of the class member's progress.

b. The case manager shall ensure that the class member's correspondent or CAB and MHLS representatives are kept informed of the class member's educational, vocational and living skills, progress, medical condition and other matters relevant to his or her care, treatment and development.

c. The case manager shall ensure reporting, investigation, implementation of preventive actions, and other needed follow-up on incidents which pose a risk to the health and safety of the class member or to others in the class member's immediate environment.

9. Discharge

a. The case manager shall coordinate the termination of services which are no longer needed by the class member or for which the class member is no longer eligible.

10. Case Manager Reporting

a. Case managers shall keep a list of dates of monthly contact with the class members and dates of attendance at team meetings, which shall be available to the plaintiffs and CAB upon request.

b. The DDSO shall monitor and evaluate case management services provided by voluntary agencies in order to ensure that all class members receive services in accordance with Appendix I.

PARAGRAPH P(2),(3), and (4) FROM THE CONSENT DECREE

P. Behavior Modification, Research, and Hazardous or Experimental Treatment

2. The use of aversive conditioning shall be permitted only after positive reinforcement procedures and other less drastic alternatives have been explored and approval has been obtained:

A. from the resident, if he or she is capable of giving informed consent, or

B. from the parent, relative or guardian if the resident can not give informed consent and the parent, relative or guardian can give informed consent, and

C. from a three person special committee on aversive conditioning, designated by the Director, which shall include at least one designee each from the Consumer Advisory Board and Professional Advisory Board.

The Deputy Commissioner for Mental Retardation, and the New York City Regional Director of the Department, shall be advised when a decision has been reached and approved to utilize such aversive conditioning. Aversive conditioning techniques shall be employed only under the supervision of and in the presence of a psychiatrist or psychologist licensed to practice in the State of New York who has had proper training in the use of such techniques, and who is specifically authorized by the Director to conduct such aversive conditioning.

3. Behavioral research or experimentation shall be conducted only after approval has been obtained as set forth in paragraph 2(A)-(C) above.

4. Because of the necessity to concentrate on the basic programmatic needs of Willowbrook residents and the history of experimentation at Willowbrook, no physically intrusive, chemical, or bio-medical research or experimentation shall be performed at Willowbrook or upon members of the plaintiff class. This standard, however, recognizes the possibility that such research or experimentation, under proper safeguards, may be appropriate for persons who are not members of the class, in other facilities or programs.

EMERGENCY MOVE

The immediate and unplanned change of residence of a person due to a sudden and acute medical or psychotic episode, behavior constituting an imminent danger of serious harm to the resident or others, or any other circumstance necessitating the immediate change of residence of a person.

SAMPLE - PLACEMENT NOTIFICATION LETTER TO CORRESPONDENT
This letter is to be adapted to suit the recipient and situation,
but must contain all the information herein

Date _____

Dear ____(correspondent)_____:

We are planning to move _____ from _____ (with a certified capacity of ___) to a __(specify ICF/DD, CR, Family Care Home, DC, or any other placement__ operated by _____ and _____ located at _____ (with a certified bed capacity of ___) on or about _____.

This move has been planned because it has been determined that the proposed placement would offer him/her better services, a greater opportunity for personal development, and a more suitable living environment.

The staff of this facility/agency have considered whether the proposed placement complies with statutory, regulatory and other legal requirements and whether it is the least restrictive and most normal setting available and appropriate to _____'s needs. Since we believe this proposed move meets these conditions and is in _____'s best interest, we are requesting your agreement. Although we are including a copy of the Community Service Plan, you are invited to inspect the complete record on which the proposed placement is based.

You are also invited to visit both the residential placement site and proposed day program site. If you wish to do so, please contact me so I can make the arrangements, or you may contact the following parties directly:

Contact	(Name of Residential Placement Site Contact Address Telephone Number)	(Name of Day Program Address Telephone Number)

Please indicate on the enclosed form as to whether you agree or disagree with the proposed placement. If you do not agree, you have the right to request a hearing at which you may present your objections (see attached " Summary of Procedures for Responding to Placement Proposals").

If you, as correspondent, do not complete and return the enclosed "Proposed Placement Response" form within 30 days of receipt of this notice, the Consumer Advisory Board for the Willowbrook Class will be designated to advocate for the Class member, to review the proposed placement, and to make recommendations.

If you have any questions, including how to complete the attached "Proposed Placement Response" form, please contact me at __(Phone number)__.

Sincerely yours,

Attachments: Proposed Placement Agreement Response Form
Summary of Procedures for Objecting to Placement Proposals
Community Services Plan (IPP-70)(or equivalent)

cc: Person for whom Placement is Proposed
Mental Hygiene Legal Service (MHLS)
Consumer Advisory Board
Plaintiffs' Attorney
Receiving Facility (send to staff member named as contact)
Day Program (send to staff member named as contact)
B/DDSO

STATE OF NEW YORK
OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES

44 HOLLAND AVENUE • ALBANY • NEW YORK • 12229-0001

ELIN M. HOWE
Commissioner

THOMAS A. MAUL
Executive Deputy Commissioner

_M_E_M_O_R_A_N_D_U_M_

March 12, 1993

To: All Willowbrook class members
All Willowbrook correspondents
Consumer Advisory Board
Mental Hygiene Legal Service

From: Alan M. Adler
Deputy Counsel

Subject: Notice of entry of Permanent Injunction

On March 11, 1993, Judge Bartels approved the entry of the Willowbrook permanent injunction which replaces the Willowbrook Consent Decree and all other orders in the Willowbrook litigation. Pursuant to the terms of the permanent injunction, you are to receive notice of class member rights and entitlements under the permanent injunction. The attached notice of rights will be placed in every class members' permanent record and will also serve as your notice.

In addition to the notice placed in the class members' permanent record, we are also notifying you that class members presently are entitled to receive active treatment and full day programs and it is the defendants' intention to continue these programs. If any aspect of the day program that the class member was entitled to under the Consent Judgment is proposed to be changed, including but not limited to the nature or duration of the program, you will be given notice of the proposed change and will have an opportunity to discuss the proposal and object to it if you are not satisfied. You will be entitled to

administrative and judicial review of the proposal if you object. Any future change in the program to which the class member was entitled under the Willowbrook Consent Judgment shall be permitted only on a showing that it provides a greater opportunity for the class member's growth and development and is based on an individualized assessment of the class member's current needs made by the individual's treatment team, including, where applicable, the individual's medical psycho-social, habilitative and psychological needs, in the exercise of its professional judgment. Appropriate changes in the individual developmental plan may be made where a class member is unable to participate fully in programming because of a medical condition or advanced age and such assessment is based upon a full individualized assessment of the class member's current needs in the manner described above. In the case of a class member incapacitated by a medical condition, prior programming shall be restored as soon as the individual is no longer incapacitated.

NOTICE OF RIGHTS

_____ was a member of the Willowbrook class and as such is entitled to certain rights and services which are guaranteed by a permanent injunction. This injunction was issued by the United States District Court for the Eastern District of New York on March 11, 1993 in the case of New York State Association for Retarded Children, et al., v. Cuomo, et al., 72 Civ. 356, 357.

This notice of rights must be placed in the consumer's files maintained by all providers of residential and habilitative services.

The consumer is represented by Rob Levy, an attorney with the New York Civil Liberties Union located at 132 West 43rd Street, New York, New York 11036. The telephone number of the NYCLU is 212 382-0557. The consumer may also be entitled to be represented by the Consumer Advisory Board, an advocacy group, located at 1150 Forest Hill Rd., Staten Island, New York 10314. The CAB's phone number is 718 983-5205. In addition to this special representation by the NYCLU and the CAB, the consumer may also be entitled to representation, like all other consumers, by the local office of the Mental Hygiene Legal Service (MHLS). If any problems arise concerning the consumer's rights under the permanent injunction, the NYCLU, CAB, and MHLS should be notified.

The following is a summary of the consumer's rights under the permanent injunction:

1. If the consumer is a resident of the Richmond Complex on Staten Island, the consumer has the right to high quality and appropriate medical and habilitative services, shelter, food and clothing which at a minimum conforms to state and federal regulations. Consumers at the Richmond Complex also have the right to be prepared for placement in a small community residence of 10 beds or less. The NYCLU will be notified of placement plans for consumers residing at the Richmond Complex by February 26, 1995.

2. If the consumer is not a resident of the Richmond Complex and is awaiting placement on February 26, 1993, the consumer is entitled to be placed pursuant to the approved placement plan by August 31, 1993. The placement will be monitored by Ms. Ronnie Cohn, an independent evaluator, pursuant to the permanent injunction.

3. Consumers who reside in community residential facilities on February 26, 1993 have the right to be maintained in that facility or another facility of equal or smaller residential capacity. The consumer can only be moved to a larger facility if a) medical or treatment needs require it, or b) if the consumer requests such a move, or c) the consumer is endangering other residents at the facility or is substantially interfering with the

operation of the facility, or d) in the event of an emergency as defined in the permanent injunction.

4. If the consumer does not have an active family member or friend to act as a correspondent, the consumer is entitled to be represented by the Consumer Advisory Board.

5. The consumer is entitled to case management services from a case manager who has a case load of no more than 20 consumers.

6. The NYCLU, CAB, and MHLS to the extent they represent the consumer, have access to the consumer, his or her records, and all facilities where the consumer receives residential or habilitative services.

7. The consumer has the right to a meaningful, full day habilitative program and services appropriate to his or her individual needs week days and meaningful, appropriate recreation and community integration weekday evenings and weekends. These habilitative services and recreation shall meet applicable regulatory standards. Consumers with capacity have the right to refuse such services and recreation.

8. The consumer's developmental plan shall be reviewed at least annually by the consumer's program planning team. More frequent reviews may be requested where appropriate. The consumer, if he or she has capacity, the consumer's correspondent or CAB representative, and the MHLS to the extent it represents the consumer, shall be invited to attend such reviews. Current professional assessments of the consumer's needs shall be maintained in the consumer's files.

9. The consumer is entitled to be protected from harm and is also entitled to a safe, clean, and appropriate physical environment.

10. The consumer is entitled to have sufficient staff members present to provide protection from harm and the habilitative and recreational services required by the permanent injunction.

11. Aversive conditioning, behavioral research, or experimentation may only be conducted after approval by a three person special committee.

12. Except in emergencies, the consumer, the CAB, the NYCLU until February 26, 1998, and the MHLS to the extent it represents the consumer, shall be given 30 days notice of any proposed transfer from the consumer's present residence. In addition, the consumer has the right to a hearing before an independent factfinder. These rights are the same as are afforded to all consumers on February 26, 1993. However, these rights must be afforded to this consumer for life regardless of changes that may be made that affect other consumers not subject to the permanent

injunction.

13. The consumer is entitled to continued residential, habilitative, and programming services that are reasonably unrestrictive and appropriate to his or her individual needs.

If anyone has any questions concerning this notice or the permanent injunction, please contact the attorneys for the plaintiffs or defendants:

Rob Levy
Senior Staff Attorney
NYCLU
132 W 43 St
New York, NY 10036
212 382-0557

Alan M. Adler
Deputy Counsel
OMRDD
44 Holland Ave.
Albany, NY 12229
518 474-7700

STATE OF NEW YORK
OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES

44 HOLLAND AVENUE • ALBANY • NEW YORK • 12229-0001

ELIN M. HOWE
Commissioner

(518) 474-7700
Fax: (518) 474-7382

THOMAS A. MAUL
Executive Deputy Commissioner

March 11, 1993

Robert Levy, Esq.
New York Civil Liberties Union
132 West 43rd St.
New York, New York 10036

Re: Willowbrook Permanent Injunction

Dear Rob,

This "side letter" will serve to confirm some of our understandings concerning the permanent injunction.

With regard to paragraph 5(a)'s Attachment 2, we have accounted for the 5,343 class members as best as humanly possible. If a class member whose present address is unknown should turn up at a later date, we will provide services and a placement. Likewise, if what appears to be a valid community placement turns out to be a nonqualifying facility, we will also be responsible for finding a placement in a qualifying facility. If there are any disputes as to whether an individual is entitled to a placement, the independent evaluator will resolve the dispute. If a class member is entitled to a placement, they will also be entitled to consent judgment services while awaiting placement.

With regard to paragraph 5(d), we have agreed that Ronnie Cohn will serve as the independent evaluator. While we do not expect that Ronnie will need the services of consultants, in the extraordinary circumstance that she does, she can request them from the defendants. Defendants will make sure that Ronnie has access to whatever technical assistance is necessary for her to carry out her duties.

With regard to paragraph 8, existing case management assignments will be continued and are in compliance with the permanent injunction. New case management assignments will meet the new definition contained in Appendix I.

With regard to paragraph 15(a), the notice to the CAB is informational only and does not give them any independent right to object to the placement. CAB may object where they represent a noncorrespondent class member.

With regard to paragraph 21(f), defendants will pay for up to 60 person days of independent consultants for the plaintiffs.

The defendants will spend up to $10,000 to contract with Peg Fletcher for audit start up if Ronnie Cohn is unavailable due to her independent evaluator responsibilities.

Please sign a copy of this letter to indicate your agreement with the above.

Sincerely,

alan

Alan M. Adler
Deputy Counsel

AMA:ms

Robert Levy

Robert Levy

Civ. Action No. 72C 357

Index No. Year 19

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

PATRICIA PARISI, et al.,

Plaintiffs,

- against -

NELSON ROCKEFELLER, et al.,

Defendants.

PHOTOGRAPHIC EXHIBITS

KALMAN FINKEL

Attorney for Plaintiffs

Office and Post Office Address, Telephone

THE LEGAL AID SOCIETY

EDWARD O. CARR, JR., Attorney-in-Chief

Civil Appeals Bureau

267 WEST 17th ST. NEW YORK N. Y. 10011

691-3320

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

PATRICIA PARISI, et al.,

Plaintiffs,

- against -

NELSON ROCKEFELLER,

Defendants.

- X

Civ. Action No.
72 Civ. 357

PHOTOGRAPHIC EXHIBITS*

FILED
U.S. DISTRICT COURT
★ JUL 12 1972 ★
TIME A.M.
P.M.

* Not to be released without permission of the Court

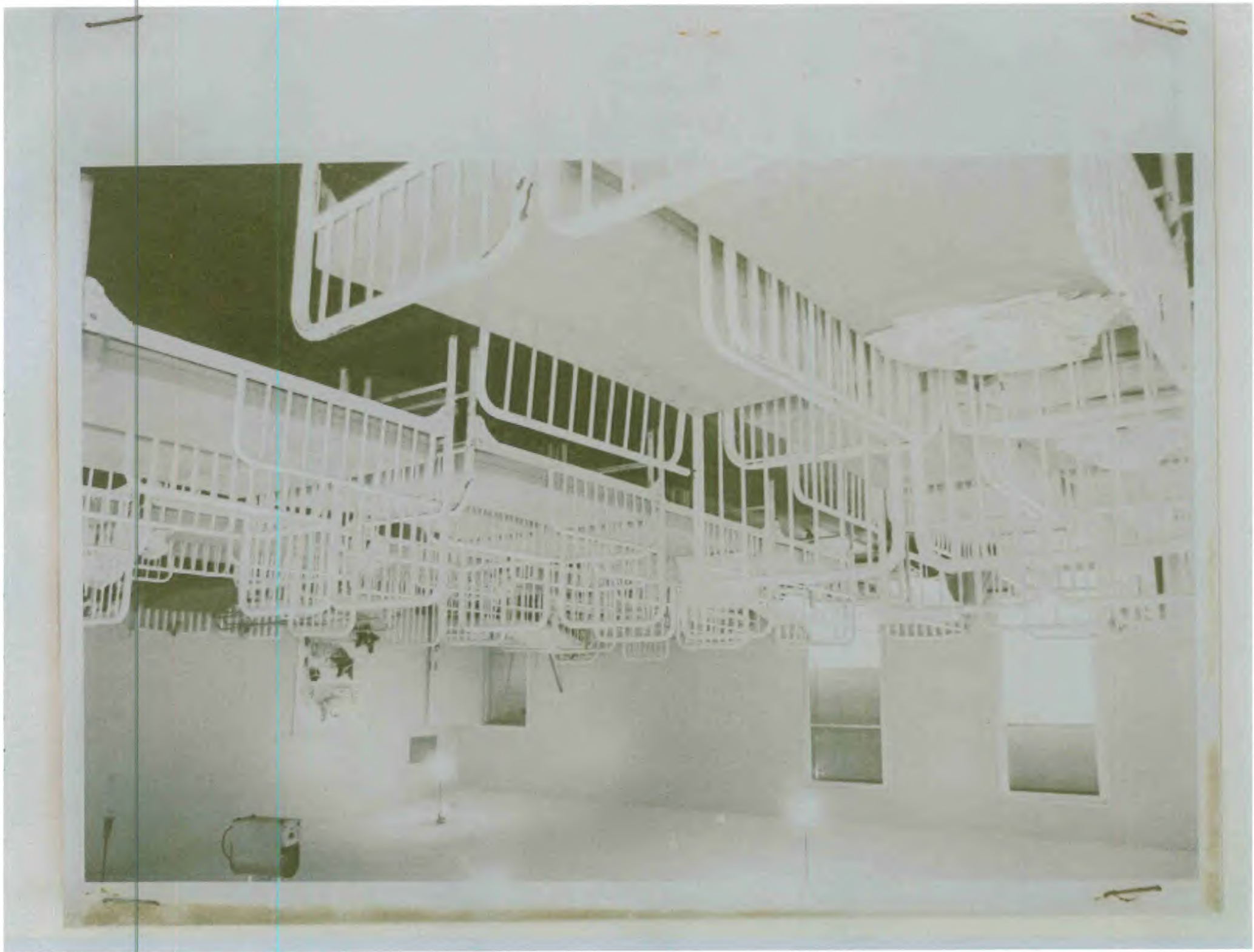


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Exhibit HH - Not to be released without

Exhibit 11 - Not to be released without



Exhibit JJ - Not to be released without



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Exhibit MM - Not to be released without



Exhibit NN - Not to be released without permission of the Court



Exhibit OO - Not to be released without permission of the Court





Exhibit QQ - Not to be released without



Exhibit RR - Not to be released without



Exhibit TT - Not to be released without permission of the Court

Form 26-D.M.H.

ALAN D. MILLER, M.D.
COMMISSIONER
WILLIAM VOORHEES, M.D.
FIRST DEPUTY COMMISSIONER
ROBERT PATTON
SECOND DEPUTY COMMISSIONER

STATE OF NEW YORK
DEPARTMENT OF MENTAL HYGIENE
DIVISION OF MENTAL RETARDATION
AND CHILDREN'S SERVICES
44 HOLLAND AVENUE
ALBANY, N. Y. 12208

ROBERT W. HAYES, M.P.H.
DEUTY COMMISSIONER
FOR MENTAL RETARDATION
AND CHILDREN'S SERVICES
SAMUEL L. ORNSTEIN, PH.D.
ASSOCIATE COMMISSIONER
FOR MENTAL RETARDATION
BENJAMIN PASAMANICK, M.D.
ASSOCIATE COMMISSIONER
FOR RESEARCH EVALUATION

October 2, 1973

Mr. Jerry Gavin
President
Benevolent Society for
Retarded Children
39 West 32nd Street
New York, New York 10001

Dear Mr. Gavin:

As agreed at the meeting with your board on the evening of September 17, I am enclosing a description of the Exodus Program. This material briefly describes what was planned from the beginning of this program including a summary of what has taken place up to the present date and what is being planned for the remainder of this fiscal year. The projections are estimates of what can be accomplished with the resources available this year but does not necessarily mean that these projections can be fully achieved by March 31, 1974. Adjustments will be made as necessary to insure that receiving program units and community placements are adequately developed to meet the needs of the residents being moved from Willowbrook.

I was glad to have the opportunity to meet with you and your board and I will continue to follow-up on the many questions that were asked. Please let me know if you have additional questions, concerns or reactions to the Exodus plans for the rest of this year. I will be getting in touch with you shortly in response to some of the other major points your board brought to my attention. Please express my thanks to all who attended the meeting.

Sincerely,

ROBERT W. HAYES
Deputy Commissioner

RWH:sab

The Exodus Program
Willowbrook State School

The Exodus program was developed in the early part of 1972 as part of a plan to improve living conditions and care of the residents at Willowbrook State School as rapidly as possible. The severe overcrowding and understaffing of the institution required both reducing the resident population and increasing the available staff at the same time in order to provide adequate care and habilitation programs. Although many improvements needed to be made in terms of daily care and habilitation programs, overcrowding by nearly 75% was recognized as a serious obstacle to improving conditions and to obtaining, organizing and retaining the additional personnel required in all categories. It was also known that many of the less handicapped residents in Willowbrook could be placed more appropriately in the community with little additional training if adequate living situations could be found or developed and needed community educational, vocational, health, recreational and other services were both available and open to former residents of the institution. Many other residents could be prepared for placement in a variety of community settings in a relatively short period of time if intensive care and training programs could be provided them. However, effective programs at Willowbrook could only be accomplished if severe overcrowding could be markedly reduced. Thus it was clear that immediate steps should be taken to accelerate the reduction of the resident population from the then existing 5200 to a level close to the rated capacity of a little under 3000. The overall goal of this effort was not planned as merely a reduction in resident population but rather an effort to make possible providing each resident with

a better living environment and an increased opportunity for personal development whether or not they were placed in the community, relocated to another State facility, or remained in Willowbrook.

This goal meant that each resident leaving Willowbrook must be placed in a better living situation more appropriate to their needs. For some this would mean direct placement in the community. For others further preparation for community placement would be necessary. Fortunately, new or recently acquired small facilities were being developed in the boroughs of Brooklyn, Manhattan and Queens. As programs were activated in these facilities, priority could be given to relocating residents of Willowbrook with the most potential for early placement in their home communities. In anticipation of building a facility in the Bronx a nucleus staff could be enlarged to find community placements for some residents from the Bronx and provide needed back-up services not otherwise available.

These plans would not provide direct relief of overcrowding for buildings with residents requiring more extensive periods of intensive care and habilitation. There was a need to add an element to the plan that would provide direct relief to overcrowding on wards caring for the more seriously handicapped and at the same time provide better care and habilitation. The availability of good space in some of the State's mental hospitals provided this opportunity to develop a better quality program in more spacious quarters with more adequate staffing. The use of such space was considered an emergency measure to be used only as long as necessary. The continued construction and opening of new, smaller and modern state facilities for the mentally retarded plus expansion of family

care, group homes, hostels and skilled nursing homes along with the availability of needed community services would further reduce the average daily residential population of the older and overcrowded state institutions. It would then be possible to phase out these units.

Four units were opened during 1972 and two (Wingdale Unit at Harlem Valley State Hospital and Glen Oaks Unit at Creedmoor State Hospital) received residents transferred from Willowbrook State School. To provide quality programs the units were limited in size (300 residents or less), for adults only and provided with sufficient staff to meet or exceed federal standards for skilled nursing care. Most of the available staffing could be concentrated in direct care categories because the on-going support services of the state hospital could be expanded as required with little additional staff. The size of the units were planned within accreditation standards for living and program areas. Each unit was placed under the administration of the nearest state facility serving the mentally retarded. Visits to these units verify that the residents are receiving markedly better care and habilitation services than was possible in the overcrowded buildings of Willowbrook State School. The attached table indicates 201 residents have been transferred to the two units by September 14, 1973 with 56 more transfers planned through the remainder of this year.

The borough facilities opened in Brooklyn, Manhattan and Queens were planned and staffed to meet the new accreditation standards for residential facilities serving the mentally retarded.

Although each facility has experienced varying degrees of organizational problems in the early stages of opening, most of these difficulties are being overcome as the staff becomes more experienced working together and have become more familiar with the residents they have received. As of September 14, 1973 444 residents have been transferred to these facilities and 60 have been placed in the community after further training. It is planned that these facilities will receive 199 additional transfers through the remainder of the fiscal year. The above figures are summarized in more detail on the attached table. An additional 125 residents can be accommodated in the Keener Unit that is planned as another unit of the new Manhattan borough program initiated last year. This unit will be staffed at the same high staffing level that is being used in all the new state facilities for the mentally retarded.

Direct community placements are being made by the new staff in the Bronx and the community services unit of Willowbrook. Up through September 14, 1973 these placements totaled 296 and 116 more are projected through the remainder of the fiscal year.

The family care program under development by the staff of the new Broome State School in Binghamton is being expanded for adult residents of Willowbrook who need a family living situation and can adapt more easily to a rural community. As of September 14, 1973 fourteen residents had been placed including those on an initial two weeks trial basis. It is projected that approximately 175 might be placed in this program. In addition to participation in the

family activities of the homes established these residents will be using four activity centers created specifically for adult residents in family care homes in this area. Efforts will also be made to assist these residents in taking advantage of vocational, social, and recreational activities that are available to citizens of the area.

In addition to the Broome family care program a new kind of center is being planned on the grounds of Kings Park State Hospital. Last year a complex of three buildings plus a separate food service building was planned as one of five mental retardation units for adults authorized by the state legislature. However, staffing authorizations and operating funds were not sufficient to establish the levels of care and programming needed in all of the units and this unit was not opened so the proper standards could be maintained in the other four units. Since some remodeling was completed and equipment purchased the use of these buildings for a new program this year was reconsidered after the possibility of using the new facility at South Beach was evaluated as not feasible or desirable. A new plan was formulated based on the idea of grouping all residents with families living in a particular geographical area.

A review of residents at Willowbrook revealed that well over two hundred belong to families living in Suffolk County. With the population growth of Suffolk County it appears unlikely that these residents can be accommodated at Suffolk State School.

It is also expected that the reduction of patient population in the three state hospitals on Long Island will continue at a

rapid rate. This means more living and program space will become available. The establishment of a Suffolk County Developmental Center at Kings Park would not only provide an immediate opportunity to move Suffolk residents at Willowbrook closer to their home communities but also would provide the basis for developing a second residential facility in Suffolk County that in the future could serve a specific part of the county and reduce the pressure on the presently overcrowded facilities at Suffolk State School.

The currently available buildings include one unit that is very suitable for non-ambulatory residents. The available space can be divided into small ward units so that living units and program areas can be planned for a wide range of residents including both children and adults. Although the center would be under the immediate direction of Mental Retardation specialists, general administration and central support services can be provided through the State Hospital Director, Dr. Nathan, a former member of the staff of Suffolk State School. He and his immediate staff are willing and able to give the development of this center top priority. Up to 200 residents could be transferred to this center. The actual number would depend on the individual needs of the residents and the diversified programs that can be adequately provided by the 200 staff positions available. These programs would be designed to prepare as many residents as possible for eventual placement in community settings according to their individual needs. As placements are made additional Suffolk County residents could be admitted on transfer from Suffolk

State School or directly from the community area that could be assigned this center in the future.

This proposed center along with the other programs described would, when completely implemented, reduce the resident population at Willowbrook to a level close to the rated capacity. The staff and physical facilities at Willowbrook would then be sufficient to allow the development of living and programming standards needed by each resident. Although further reduction in population would be desirable it would not be necessary to accomplish this further reduction at a rapid rate. The resident population at Willowbrook should eventually be not more than 2500 so that living areas can be scheduled for major remodeling, additional program space can be developed, some buildings closed, and a stable and more capable staff developed and maintained.

	TRANSFERRED BY 3/31/73	TRANSFERRED BETWEEN 3/31 & 9/14/73	PROJECTED THRU 3/31/74
Bronx	28	15	50
Broome	-	14	175
Kings County	173	62	132
Kings Park	-	-	180
Manhattan			
Keener	-	-	125
Sheridan Unit	98	20	-
Queens			
Corona Unit	74	17	17
Glen Oaks Unit	91	29	50
Howard Park Unit	-	-	50
Suffolk	60	-	-
Upstate Facilities	22	-	-
Wingdale	55	26	6
Direct Releases	145	108	66
TOTAL	746	301	851

Willowbrook Population:

3/31/72 = 5141
3/31/73 = 4294
9/13/73 = 3995
- = 3109 Projected upon the completion of this year's program

9/28/73

Afterword to the AldineTransaction Edition: A Look Back on the Field

I

Since the 1984 publication of the *Willowbrook Wars*, the changes that we traced in the care of the developmentally disabled, especially the movement from institution to community, have not only proceeded on course but in many ways, accelerated.

Willowbrook itself is history. In 1984, then Governor Mario Cuomo made closing Willowbrook a priority, and he and the Office of Mental Retardation and Developmental Disabilities (OMRDD) set a 1987 deadline for transferring all of the residents. They considered a variety of proposals for how to use the site, from relocating state agencies from the World Trade Center to constructing housing for senior citizens. But from the start, the College of Staten Island (CSI), whose facilities were scattered over the borough, had the inside track. On September 1987, the state transferred ownership of the property to the CSI. Groundbreaking ceremonies occurred two years later, and in 1994, the CSI campus opened, with fourteen renovated Willowbrook buildings serving as classrooms, laboratories, and offices.[1]

The transfer of residents from Willowbrook was not without points of conflict, several of which had to be resolved in federal court, but the process did go forward and the 1987 deadline was met. In 1984, 2,291 class members had been living in group homes or in independent housing; 721 members still resided at the facility and another 1,085 were in other institutions around the state. [2] By February 1987, the last residents had left Willowbrook and their departure became the occasion

for the class lawyers to to reach a final settlement with New York officials. The agreement provided that by 1992, all Willowbrook class members would be in group homes, not other institutions; however, it did allow for placement in group homes of more than six beds. Once these placements were complete, the case would be closed. Judge John Bartels approved the settlement and considered it "the best protection we could devise." A few parents demurred on the grounds that the state should not be permitted to place class members into quasi-institutional settings of twenty to thirty beds.[3]

The state met the terms of the 1992 agreement and on March 11, 1993, Judge Bartels, then ninety-five years old, signed a permanent injunction to supercede the 1975 Willowbrook consent decree. After eighteen years of federal court oversight, more than fifty orders and opinions, and over a hundred court hearings, Bartels ceremoniously closed an era of disability litigation. Signing the Injunction and invoking civil rights language, he declared: "The retarded have really overcome.... Social justice has prevailed."[4]

The injunction itself was an odd document but from plaintiffs' perspective, a highly desirable one. Typically, the issuance of a court injunction looks to stop an action; in this case, it served to continue an action, that is, to perpetuate the active supervision of the Willowbrook class. Entitled "A Document for Dignity," it recognized that the mentally disabled were now living in the community– what the 1972 consent decree had fought for had been achieved. The challenge that now had to be confronted was how best to insure that the class members, scattered throughout the city in small and separate settings, would be protected against harm and receive the services they needed. When the consent decree expired, the monitors from the office of Special Master and the Review Panel were gone. But the Injunction provided that the Consumer Advisory Board (CAB) would continue serving as guardians for Willowbrook class members who had no families or were unable to advocate for themselves. It also required the establishment of an OMRDD Commissioner's Task Force to be composed of consumers, parents, professionals, and the class lawyers, that would monitor the well-being of the class. Finally, it mandated OMRDD to conduct periodic audits of the class, a long form for a sample of them, a short form for the remainder.

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reported the findings from 350 long form audits.[5] The survey covered many of the salient features of caretaking, from the caliber of the housing to the quality of the day programs.[6] Overall, the findings were good but not excellent. The general level of compliance with the standards reached 88 percent. However, case management services– including assessments of clients' needs and the integration of these needs into a treatment program– were inadequate for between a quarter and a third of the group. Recreational and social activities were poor for half of them. A little over a quarter lived in homes that were "not homelike, individualized, comfortable or aesthetically pleasing." Although "community integration" was a stated goal, 92 percent were in segregated day services. The audit concluded with the need to design a systematic plan of corrective action with ongoing follow-up.[7]

The findings sparked a battle between OMRDD and the advocates for the class, which persists to this very day. The Willowbrook wars continue as the plaintiffs' lawyers, now based at the New York Civil Liberties Union, tenaciously prod OMRDD. They are demanding a better audit instrument and insisting that OMRDD is obligated not only to complete the audits but to take all appropriate measures to correct the deficiencies. OMRDD takes the position that the audit instrument is more than adequate and it is doing its best to improve the programs. Developing mechanisms to remedy deficiencies is a difficult and lengthy process, complicated by the fact that the class is aging and posing new caretaking problems to resolve. It has developed some new report forms and the latest audit results show vast improvement.[8] Plaintiffs are skeptical of the claims.

What conclusions can be reached? Although much depends on whom you ask, something of a consensus does emerge. The horrors of Willowbrook are certainly gone. The worst is over. That said, there remains ample room for improvement.

According to the long-term chair of the CAB, Rita Martin: "Although a large percentage of people are getting appropriate care and treatment, there are still a large number of people who have not received the 'high quality' of care promised by the permanent injunction. On the issue of group homes, the promises have been fulfilled. But on the issues of community integration and environmental attractiveness, quality is still lacking."

To the NYCLU, whose legal team is now headed by Beth Haroules: "The folks in the Willowbrook class are probably better off today than

they were in the past. But advocates and attorneys have to remain ever vigilant to ensure that the today's quality does not deteriorate. There is a real risk that the same atrocities can happen, and so we have to keep as many eyes on as possible. Certainly, we won't ever have the same atrocities of medical experimentation of history's past; but we still must remain vigilant, because without us, the class is basically helpless, and therefore at constant risk of abuse."

From the perspective of the statewide Commission on Quality Care, as expressed by Tom Harmon: "The class is much better-off, but nothing's perfect. I walked through Willowbrook, pre-consent judgment, and I have never seen or smelt anything as bad. But wherever you place vulnerable people in the hands of fallible people, there is always the chance for problems."

To the independent evaluator Ronnie Cohn: "Clearly the class members are better off than before. But despite the audit reports demonstrating 1,000 percent better compliance, there are still issues of getting people involved in the community. Certainly, community involvement was not something that we would have been looking to do thirty years ago. Today, protection from harm are not the primary concerns, though they are still concerns. What's important now are rights issues and participatory issues." Or as a consultant to the Task Force, Jim Thigpen, concludes: "From what I've seen visiting homes, OMRDD is not complying with the class' entitlements, specifically in healthcare and community inclusion. The class is better-off than it was in the past, but it's just not enough."[9]

II

The progress that New York made in bringing Willowbrook residents into the community has benefited other developmentally disabled persons in the state. In 1993, New York, belatedly, took advantage of the Home and Community Based Services (HCBS) Waiver established under the Medicaid program and tapped into new streams of federal funds. The result was a notable increase in community-based care. In 1991, 6,165 people lived in group home settings of 1-6 persons, 21,916 in settings of 1-15, 6,489 still resided in institutions, and 17,812 lived in smaller but still institutional Intermediate Care Facilities (ICFs). In 1995, two years after the waiver program started, the number of people in settings of 1-6 persons increased by 50 percent

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(to 9,014), the number in settings of 1-15 was up 20 percent (to 26,647); residents in institutions declined (to 4,161), and so did those in ICFs (down to 12,386). Because of this shift, New York was able to close eight of its large institutions, including Letchworth and O.D. Heck.[10]

Parents with a developmentally disabled child now enjoy many more service options than they had thirty years ago. In the days of Willowbrook, they had only two choices: institutionalize the child at the state's expense or assume themselves all the burdens of emotional and financial care. Very few day programs or rehabilitation services were available, except for a handful that the parents themselves organized and supported. Today, community-based programs are much more extensive. Parents are eligible to receive personal care assistants (PCAs) and respite care. Developmentally disabled infants receive early stimulation exercises; as children, they participate in special education classes and are entitled to support services. When they turn eighteen, they are eligible for New York's array of residential and vocational support systems, social security funding, and individualized case-management. Of course, shortfalls persist: the waiting list for group homes is long and financial support levels are not generous. But a once stark choice–Willowbrook or nothing– has become far more nuanced.

The trends evident in New York are even more apparent around the country. The number of residents in all state institutions has shrunk from 150,000 in 1977 to 40,000 in 2003, while residents in small group homes rose from 20,400 to 264,240. At the same time, the percentage of residents in state institutions below the age of twenty-one has dropped from 36 percent in 1977 to 5 percent in 2002. In short, the group home is now the setting not only of choice but of reality for persons with developmental disabilities. The battle for deinstitutionalization that the litigators and the Willowbrook Review Panel fought and won in New York helped promote a new national standard.[11]

None of this should suggest that this change, however dramatic, has successfully surmounted all the complexities of caring for the mentally disabled. Some institutions have managed to hold out against the trend and continue to deliver substandard services. An investigation, for example, by the civil rights division of the Justice Department in November 2004 of institutions in the neighboring state of New Jersey found abuses reminiscent of Willowbrook in its early days: staff members at the Woodbridge Developmental Center were guilty of physically abusing some of the 500 residents; record keeping was shoddy,

staff training inadequate, rates of release to the community low, and supervision weak. One resident who had difficulty swallowing choked to death on a piece of bread.[12]

No less important, the group home system is confronting new types of problems. Turnover among caretakers is mounting, with the result that trained personnel is getting more difficult to find, and to keep. At least one reason is that wages are low and benefits limited. In state institutions, budget-minded legislators keep appropriations levels low; in private facilities, which make up the great majority of group homes, staff is rarely unionized and managers are free to set wages without the pressures of collective bargaining. Indeed, salaries in community facilities are considerably lower than in state institutions. According to a University ofMinnesota study, the average hourly wage rate in state facilities is $11.67, compared to $8.68 in non-state community services.[13]

To complicate matters further, the developmentally disabled are living longer, putting new stresses on group home management and increasing the overall demand for group homes (In the 1970s, people with mental disabilities lived on average to age fifty-nine; now they live on average to sixty-six, closer to the average for the general population.) As a result, waiting lists for placements will grow longer as new clients outlive their family caretakers and more states phase out their institutions. At the same time, developmental disabilities have to become a sub-specialty within geriatrics.[14]

However challenging these demands, let one final research finding make clear that the price of success is well worth paying. Numerous studies were conducted over the 1980s and then again over the 1990s to analyze the impact of community living on the adaptive behaviors of persons with mental disabilities (including communication, self-care, and vocational skills). A review of general research findings in the 1980s, when the community movement was still young, found "benefits very consistently accrue more to the people who leave institutions to live in small community homes." The outcomes for the 1990s were even stronger as the movement matured. Benefits were "more positive and more consistent." And all this was achieved at average expenditures that were much lower for the community compared to the institution ($30,000 per person per year as against $104,000). As Sheryl Larson and Charlie Lakin of the Research and Training Center on Community Living (University of Minnesota) aptly conclude: "The indi-

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III

This movement of mentally disabled people into the community is evidence of a broad and dramatic shift in both public policy and public attitudes. The most visible and important manifestation of the change was the enactment in 1990 of the Americans with Disabilities Act. Its impact on daily life is everywhere apparent, from the reserved parking spaces for the handicapped in shopping centers to the city buses equipped with moving platforms to facilitate access for persons in wheelchairs. To be sure, many of changes have greater relevance to persons who are physically, not mentally, disabled and the relationship among advocacy organizations representing each group is not always cordial. Nevertheless, the ADA has enhanced opportunities for all disabled persons, and nowhere is this fact more evident than in its support for deinstitutionalization.

The 1999 decision of the Supreme Court in Olmstead v. L. C. forged the crucial link between the ADA and community care. The case was brought on behalf of two mentally retarded women, J.L. and E.W., one of whom was also diagnosed with schizophrenia, and the other, with a personality disorder. They were first institutionalized at the Georgia Regional Hospital in Atlanta and although their physicians soon concluded that they could be appropriately cared for in a community setting, they were not discharged. Their guardians brought suit against the state to force a community placement, citing the anti-discrimination provisions of the ADA: "No qualified individual with a disability...shall be excluded from participation in...the benefits of services, programs, or activities...or be subjected to discrimination." They also relied on the ADA's stipulation that all public programs had to be administered in "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible."

Georgia resisted their claims and the case wound its way through the lower courts, finally making its way to the Supreme Court. Justice

Ruth Ginsburg wrote the majority opinion. It held that the ADA gave persons a right to community placement when treatment professionals believed the transfer appropriate, provided that movement to a less restricted setting "is not opposed by the affected individual," and the "placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." Dismissing Georgia's claim that institutional care did not constitute "discrimination," the court found that disabled persons had a right to be treated in a setting that was the least restrictive of their liberties. As for the state's assertion that it could not "reasonably accommodate" community placement, the decision remanded the case back to the lower court for a finding of fact whether community care could be arranged through "reasonable modifications," or necessitated a "fundamental alteration" of services. In effect, the court ruling made clear that unless a state could demonstrate that community placement could not be reasonably accommodated, mentally disabled persons did not belong in institutions.[16]

The implementation of Olmstead has been mixed, with notable successes in some states offset by resistance in others. The decision did prompt the Bush administration in June of 2001 to issue an executive order on community-based alternatives for individuals with disabilities. "The Federal Government," the order declared, "must assist States and localities to implement swiftly the Olmstead decision." To this end, it would provide technical assistance to help states design and evaluate programs, and would investigate and resolve complaints by individuals "who allege that they have been the victims of unjustified institutionalization."[17]

By 1970s standards, even the announcement of such an initiative seems astonishing, but its impact goes well beyond rhetoric. An independent February 2004 analysis found that twenty-nine states had issued Olmstead-related plans or reports, twenty-seven states had received federal grants in 2003 to help the transition from institutions to community services, and the program had dispensed a total of $158 million over the period 2001-03. Although progress has been impeded by state budget shortfalls, it is evident that cost-neutral or low cost community programs are being implemented, including efforts to insure consumer-directed care (allowing people with disabilities or their guardians to decide what type of services they want) and to dispense information to consumers about community care options.

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Although all persons with mental disabilities come under the executive initiative, the developmentally disabled have received most of the attention and resources. Most states have used these funds to expand community-based services. The Olmstead decision together with the federal initiative, the report aptly concludes, "have kept the momentum alive for serving people in the most integrated setting." Conceding that implementation has sometimes been "sluggish," it found good reason to believe that "incremental reform will continue."[18]

IV

Since the driving force in closing down Willowbrook was public interest lawyers, it is appropriate for us to leave the field with observations on how public interest law has fared over the past twenty years. In terms of recruitment and sustainability, it is assuredly flourishing. There is no shortage of law school graduates seeking the positions with these organizations, and no shortage of organizations that want to harness their talents and use the courts to accomplish socially desirable ends. The prime difficulty may be that the market for such positions is tight; many groups have limited budgets and cannot hire all the staff they could use. It may well be more difficult to land a job with an outstanding rights-oriented public interest law firm than to get a position on Wall Street.

That said, the very concept of class action litigation has changed. In the 1970s and well into the 1980s, class action lawsuits were mostly the preserve of not-for-profit, reform-minded groups who were attempting to use the courtroom as an engine for social change. By contrast, after the 1990s, commercial law firms turned to class action suits as a way of collecting tort damages for clients and, not incidentally, extraordinary fees for themselves. The process began with class action suits for asbestos and lead damages, went on to tobacco, and now is poised to take on pharmaceutical products and food. It is too soon to know whether this change will spark a backlash against all class action suits but such a possibility is not out of the question.

Despite the fact that the judicial appointment process has brought more conservative judges to the federal court, the roster of accomplishments for public interest litigation has been impressive in the field of mental disability, and, as well, in criminal justice, schools, housing, and police. As Columbia Law School Professors Charles Sabel and

William Simon recently argued, there has been "no reduction in the volume or importance" of judges holding underperforming institutions accountable. They go on to note that the intimate, and intricate consent decrees that plaintiffs won in cases like Willowbrook are giving way to less detailed court orders which allow for more policy discretion.[19] Judge Bartels did not say to New York State what one of his colleagues in the District of Columbia declared in a similar type case: "The final decision about the policies and procedures and training programs will remain with the defendants, understanding that if they fail to address serious concerns raised by plaintiffs...this may result in compliance issues down the road."[20] Rather than intervene more directly in what policies and programs should be accomplished, judges now may be more willing to spur negotiations between parties. The point granted, legal interventions to correct the substandard administration of public institutions, be they custodial or caretaker, and to expand the life chances for persons with mental disabilities, is certain to continue.

Taken together, the events described in *The Willowbrook Wars*, the extraordinary impact of dedicated lawyers, compassionate judges, diligent review panel members, responsive state officials, and a host of community organizations and leaders, from the Catholic Church to community planning board members, are a model for advancing the rights of the developmentally disabled. They may also serve to inspire change in other areas as well.

Notes

I am indebted to Chris Hansen and Robert Levy for reviewing an early draft of the afterword and to Christopher Sales for his research assistance. I am also grateful to the people quoted in it for giving of their time and sharing their insights.

1. On the transition from Willowbrook to CSI, see Staten Island Advance, Jan. 4-Jan. 5, 1984, Sep. 18, 1987; CSI website, http://www.csinews.net/MediaRelations/historyofcsi.htm.
2. On the discharge of residents from Willowbrook, see Staten Island Advance, Apr.-May 1985 series on tenth anniversary of the Willowbrook Consent Decree.
3. On the Final Settlement, see Staten Island Advance, Mar. 3, 1987.
4. On the signing of the Permanent Injunction and Judge Bartels, see New York Times, Mar. 12, 1993; Staten Island Advance, Mar. 12, 1993.
5. On the Permanent Injunction, see Willowbrook Permanent Injunction, U.S. District Court Eastern District of New York, 72 Civ. 356, 357.
6. On the auditing instruments, Willowbrook long- and short- form audits, courtesy of Ronnie Cohn (independent evaluator).

The Willowbrook Wars

Bringing the Mentally Disabled into the Community

David J. Rothman &
Sheila M. Rothman

With a new afterword by the authors

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50 Years After a Landmark Lawsuit, How Does NY Treat People With Developmental Disabilities?

We should never go back to the days of Willowbrook.

Disability Rights



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At the Willowbrook State School in Staten Island, children and adults with intellectual and developmental disabilities were beaten, experimented on,

and left to suffer in deplorable, overcrowded, understaffed, and squalid conditions.

Fifty years ago, the New York Civil Liberties Union and the Legal Aid Society led a historic civil rights lawsuit challenging the inhumane conditions at Willowbrook. The landmark legal settlement established a standard of care for people with developmental and intellectual disabilities (IDD) and was in the vanguard of the civil rights movement for people with disabilities.

The Willowbrook case helped lead to more people with IDD being able to live in their communities, to more services for people with IDD, and to the legal right of children with disabilities to a public education.

The historic lawsuit made a positive impact in the lives of thousands of former Willowbrook residents, as well as all New Yorkers with IDD. But decades later, there are a number of systemic issues that continue to put people with IDD in danger.

The settlement established an extensive monitoring and oversight structure to ensure that New York complies with the court orders in the Willowbrook case. But the fact that acts of abuse and neglect continue to happen, and the trend towards housing people with IDD in larger and larger group settings show that New York's system for caring for people with developmental disabilities must be strengthened.

We should never go back to the days of Willowbrook when people with IDD were stigmatized and shunned by society, warehoused in large understaffed institutional facilities, abused, neglected, and forgotten by those in power.



The Willowbrook case

Staten Island Advance reporter Jane Curtin and photograph Eric Aerts were the first to publicly expose what was going on in Willowbrook. Then in 1972 the atrocious conditions at the facility were brought to a wider audience in 1972 when then investigative TV reporter Geraldo Rivera went in with cameras and published footage from the facility. The footage included images of children wallowing in their own feces and urine.

In March of that same year, the NYCLU and the Legal Aid Society filed class-action lawsuits that led to a settlement in 1975. That consent judgment settlement was followed by a Permanent Injunction, ordered by the court in March, 1993.* The lawsuit was a driving force behind the deinstitutionalization of people with developmental disabilities. Willowbrook eventually closed its doors in 1987.

The Willowbrook settlement guarantees all class members, for the duration of their lives, protection from harm; a safe, clean and appropriate physical environment; high-quality community residential and treatment services in the least restrictive setting; and high-quality case management and advocacy services. Willowbrook class members are also entitled to certain protections, including the right to voice grievances, to have those grievances reviewed, investigated and addressed, and to receive appropriate care and services.

> *"The Willowbrook settlement was a positive development for a community of New Yorkers that has seen too few of them over the last 50 years."*

In some instances, however, state authorities and the organizations they contract with do not live up to the requirements of the permanent injunction. This lack of compliance can have damaging impacts on the vulnerable people who are class members in the case.

Peter S. is just one example. From 1990 until 2021, Peter lived at a residential group home operated by the Center for Disability Services, a not-for profit entity, in Watervliet, New York. When the State's monitoring oversight was reduced during the pandemic, CFDS repeatedly demonstrated that its staff was unable to effectively care for Peter or provide him the support and attention he needed.

Peter has some challenging behaviors that are the result of the stunted developmental growth he experienced at Willowbrook. He needs supervision when he eats since he rushes through his meals because he was deprived of food at Willowbrook. He must be supervised in the bathroom because he was trained at Willowbrook to drink water from the toilet if he's thirsty (which he often is as he has had poorly controlled diabetes).

Rather than adequately care for and supervise Peter, CFDS hospitalized Peter ten times between February and September of last year, finally abandoning him at the hospital and refusing to allow him to return to his group home. Despite this demonstrated violation of Peter's rights as a Willowbrook class member, state officials refused to find a different residential provider for him. The NYCLU had to take the matter up with the

federal judge who still has jurisdiction over the Willowbrook litigation so that Peter could finally be placed in a better facility.

There are sadly many of these examples in which the State defendants, and their contracted agency providers, disregard the Willowbrook permanent injunction. There are also plenty of reasons to be concerned about the broader system charged with caring for people with IDD.



Systemic problems

Obviously, large numbers of Willowbrook survivors are in a better situation today than when they were in the harrowing conditions at Willowbrook. But there are multiple systemic reasons why incidents of abuse and neglect continue to happen, especially to those not protected by the Willowbrook settlement. And there are worrying signs that institutionalization and the warehousing of people with IDD is reemerging.

The system for individuals with intellectual and developmental disabilities in New York is floundering. It is grossly underfunded and regularly on the chopping block for even more cuts. Funds are not available to develop and open new residential opportunities for people with IDD. The waiting list for residential services is getting longer, and the wait time increases every day.

Staff at the residential settings are underpaid, undertrained, and overworked. As a result these group homes are massively understaffed, with an average 25 percent vacancy rate for direct care staff, sometimes going as high as 40 percent. This leads to neglect and fewer and fewer services for people with IDD.

The State Office for People with Developmental Disabilities (OPWDD) both provides services and is responsible for coordinating services for New Yorkers with IDD. OPWDD and its voluntary providers face a dire shortage

of people who work directly with people with IDD, as well as clinical support personnel, such as registered nurses and licensed practical nurses. That shortage of personnel has led to disruptive closures of group homes and to fewer and fewer resources for people with IDD.

Even in residential settings that are able to maintain staffing levels that are not bare minimums, a large number of direct-care staff are simply not suited to work with people with intellectual and developmental disabilities. Providing hands-on care to people with intellectual and developmental disabilities can be an emotionally and physically challenging job. To the extent that staff do engage in any acts of abuse and neglect that are founded, they are oftentimes not removed from their jobs or prevented from working with vulnerable people.

State officials have refused to provide the funding necessary to adequately care for people with IDD. Instead, the state has increasingly looked for economies of scale, putting more and more people into larger institutional settings with fewer staff members to provide any enrichments.

OPWDD also allows children with behavioral needs to be abandoned into hospitals or psychiatric emergency rooms. And when people with IDD grow old, they are regularly shunted off into nursing homes that often lack the resources or know-how to adequately care for them.


Willowbrook photomontage

Building a Stronger System

What we need now is a stronger system that allows for many people with IDD to be fully integrated into our communities and to assure that all people with IDD are living in the least restrictive, non-institutional, settings that will provide them with the supports and services they need.

We need IDD group homes to be adequately funded and fully staffed so that people with IDD are given the services and enrichment they need and are not neglected or abused.

We need a system that identifies incidents, investigates their causes, and affords redress for the event – including retraining, appropriate and rigorous supervision, or outright termination of staff so that acts of abuse or neglect do not happen. This should all be done with an eye towards ensuring that the numbers of horrible events continue to decline and are continuously identified when they happen.

To get there, the state must provide much more funding both so that staff can be better paid and better prepared and so that the state has more resources to review and investigate complaints.

Staff must be held accountable both when abuse is substantiated and when incidents of harm are not reported. And the state should conduct

unannounced spot visits of residential homes and day programs so that we don't have to rely solely on individuals and their families to come forward.

Finally, we need to provide affordable supportive housing for people with IDD. Just like all New Yorkers, people with IDD have a right to housing including those who require 24/7 care.

The Willowbrook settlement was a positive development for a community of New Yorkers that has seen too few of them over the last 50 years. But New York hasn't been able to meet the requirements of the Willowbrook settlement for the people covered by the suit, much less all New Yorkers with intellectual and developmental disabilities. Funding, accountability, and rigorous oversight are the keys to a system that will truly care for and protect people with intellectual and developmental disabilities.

**New York Lawyers for the Public Interest later joined the case as co-counsel after the Permanent Injunction was entered in 1993.*

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Syllabus

OLMSTEAD, COMMISSIONER, GEORGIA DEPARTMENT OF HUMAN RESOURCES, ET AL. *v.* L. C., BY ZIMRING, GUARDIAN AD LITEM AND NEXT FRIEND, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98–536. Argued April 21, 1999—Decided June 22, 1999

In the Americans with Disabilities Act of 1990 (ADA), Congress described the isolation and segregation of individuals with disabilities as a serious and pervasive form of discrimination. 42 U. S. C. §§ 12101(a)(2), (5). Title II of the ADA, which proscribes discrimination in the provision of public services, specifies, *inter alia*, that no qualified individual with a disability shall, "by reason of such disability," be excluded from participation in, or be denied the benefits of, a public entity's services, programs, or activities. § 12132. Congress instructed the Attorney General to issue regulations implementing Title II's discrimination proscription. See § 12134(a). One such regulation, known as the "integration regulation," requires a "public entity [to] administer . . . programs . . . in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 CFR § 35.130(d). A further prescription, here called the "reasonable-modifications regulation," requires public entities to "make reasonable modifications" to avoid "discrimination on the basis of disability," but does not require measures that would "fundamentally alter" the nature of the entity's programs. § 35.130(b)(7).

Respondents L. C. and E. W. are mentally retarded women; L. C. has also been diagnosed with schizophrenia, and E. W., with a personality disorder. Both women were voluntarily admitted to Georgia Regional Hospital at Atlanta (GRH), where they were confined for treatment in a psychiatric unit. Although their treatment professionals eventually concluded that each of the women could be cared for appropriately in a community-based program, the women remained institutionalized at GRH. Seeking placement in community care, L. C. filed this suit against petitioner state officials (collectively, the State) under 42 U. S. C. § 1983 and Title II. She alleged that the State violated Title II in failing to place her in a community-based program once her treating professionals determined that such placement was appropriate. E. W. intervened, stating an identical claim. The District Court granted partial summary judgment for the women, ordering their

placement in an appropriate community-based treatment program. The court rejected the State's argument that inadequate funding, not discrimination against L. C. and E. W. "by reason of [their] disabilit[ies]," accounted for their retention at GRH. Under Title II, the court concluded, unnecessary institutional segregation constitutes discrimination *per se*, which cannot be justified by a lack of funding. The court also rejected the State's defense that requiring immediate transfers in such cases would "fundamentally alter" the State's programs. The Eleventh Circuit affirmed the District Court's judgment, but remanded for reassessment of the State's cost-based defense. The District Court had left virtually no room for such a defense. The appeals court read the statute and regulations to allow the defense, but only in tightly limited circumstances. Accordingly, the Eleventh Circuit instructed the District Court to consider, as a key factor, whether the additional cost for treatment of L. C. and E. W. in community-based care would be unreasonable given the demands of the State's mental health budget.

Held: The judgment is affirmed in part and vacated in part, and the case is remanded.

138 F. 3d 893, affirmed in part, vacated in part, and remanded.

JUSTICE GINSBURG delivered the opinion of the Court with respect to Parts I, II, and III–A, concluding that, under Title II of the ADA, States are required to place persons with mental disabilities in community settings rather than in institutions when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. Pp. 596–603.

(a) The integration and reasonable-modifications regulations issued by the Attorney General rest on two key determinations: (1) Unjustified placement or retention of persons in institutions severely limits their exposure to the outside community, and therefore constitutes a form of discrimination based on disability prohibited by Title II, and (2) qualifying their obligation to avoid unjustified isolation of individuals with disabilities, States can resist modifications that would fundamentally alter the nature of their services and programs. The Eleventh Circuit essentially upheld the Attorney General's construction of the ADA. This Court affirms the Court of Appeals decision in substantial part. Pp. 596–597.

(b) Undue institutionalization qualifies as discrimination "by reason of . . . disability." The Department of Justice has consistently advocated that it does. Because the Department is the agency directed

by Congress to issue Title II regulations, its views warrant respect. This Court need not inquire whether the degree of deference described in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844, is in order; the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *E. g., Bragdon* v. *Abbott*, 524 U. S. 624, 642. According to the State, L. C. and E. W. encountered no discrimination "by reason of" their disabilities because they were not denied community placement on account of those disabilities, nor were they subjected to "discrimination," for they identified no comparison class of similarly situated individuals given preferential treatment. In rejecting these positions, the Court recognizes that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA. 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. The ADA both requires all public entities to refrain from discrimination, see § 12132, and specifically identifies unjustified "segregation" of persons with disabilities as a "for[m] of discrimination," see §§ 12101(a)(2), 12101(a)(5). The identification of unjustified segregation as discrimination reflects two evident judgments: Institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life, cf., *e. g., Allen* v. *Wright*, 468 U. S. 737, 755; and institutional confinement severely diminishes individuals' everyday life activities. Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice. The State correctly uses the past tense to frame its argument that, despite Congress' ADA findings, the Medicaid statute "reflected" a congressional policy preference for institutional treatment over treatment in the community. Since 1981, Medicaid has in fact provided funding for state-run home and community-based care through a waiver program. This Court emphasizes that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings. Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it. In this case, however, it is not genuinely disputed that L. C. and E. W. are individuals "quali-

fied" for noninstitutional care: The State's own professionals determined that community-based treatment would be appropriate for L. C. and E. W., and neither woman opposed such treatment. Pp. 597–603.

JUSTICE GINSBURG, joined by JUSTICE O'CONNOR, JUSTICE SOUTER, and JUSTICE BREYER, concluded in Part III–B that the State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless. The reasonable-modifications regulation speaks of "reasonable modifications" to avoid discrimination, and allows States to resist modifications that entail a "fundamenta[l] alter[ation]" of the States' services and programs. If, as the Eleventh Circuit indicated, the expense entailed in placing one or two people in a community-based treatment program is properly measured for reasonableness against the State's entire mental health budget, it is unlikely that a State, relying on the fundamental-alteration defense, could ever prevail. Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities. The ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk. Nor is it the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter, a placement the State proposed, then retracted, for E. W. Some individuals, like L. C. and E. W. in prior years, may need institutional care from time to time to stabilize acute psychiatric symptoms. For others, no placement outside the institution may ever be appropriate. To maintain a range of facilities and to administer services with an even hand, the State must have more leeway than the courts below understood the fundamental-alteration defense to allow. If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met. In such circumstances, a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions. The case is remanded for further consideration of the appropriate relief, given the range of the State's facilities for the care of persons with diverse mental disabilities, and its obligation to administer services with an even hand. Pp. 603–606.

Syllabus

JUSTICE STEVENS would affirm the judgment of the Court of Appeals, but because there are not five votes for that disposition, joined the Court's judgment and Parts I, II, and III–A of its opinion. Pp. 607–608.

JUSTICE KENNEDY concluded that the case must be remanded for a determination of the questions the Court poses and for a determination whether respondents can show a violation of 42 U. S. C. § 12132's ban on discrimination based on the summary judgment materials on file or any further pleadings and materials properly allowed. On the ordinary interpretation and meaning of the term, one who alleges discrimination must show that she received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic. Thus, respondents could demonstrate discrimination by showing that Georgia (i) provides treatment to individuals suffering from medical problems of comparable seriousness, (ii) as a general matter, does so in the most integrated setting appropriate for the treatment of those problems (taking medical and other practical considerations into account), but (iii) without adequate justification, fails to do so for a group of mentally disabled persons (treating them instead in separate, locked institutional facilities). This inquiry would not be simple. Comparisons of different medical conditions and the corresponding treatment regimens might be difficult, as would be assessments of the degree of integration of various settings in which medical treatment is offered. Thus far, respondents have identified no class of similarly situated individuals, let alone shown them to have been given preferential treatment. Without additional information, the Court cannot address the issue in the way the statute demands. As a consequence, the partial summary judgment granted respondents ought not to be sustained. In addition, it was error in the earlier proceedings to restrict the relevance and force of the State's evidence regarding the comparative costs of treatment. The State is entitled to wide discretion in adopting its own systems of cost analysis, and, if it chooses, to allocate health care resources based on fixed and overhead costs for whole institutions and programs. The lower courts should determine in the first instance whether a statutory violation is sufficiently alleged and supported in respondents' summary judgment materials and, if not, whether they should be given leave to replead and to introduce evidence and argument along the lines suggested. Pp. 611–615.

GINSBURG, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–A, in which STEVENS, O'CONNOR, SOUTER, and BREYER, JJ., joined, and an opin-

ion with respect to Part III–B, in which O'CONNOR, SOUTER, and BREYER, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 607. KENNEDY, J., filed an opinion concurring in the judgment, in which BREYER, J., joined as to Part I, *post*, p. 608. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 615.

Beverly Patricia Downing, Senior Assistant Attorney General of Georgia, argued the cause for petitioners. With her on the briefs were *Thurbert E. Baker*, Attorney General, *Kathleen M. Pacious*, Deputy Attorney General, *Jefferson James Davis*, Special Assistant Attorney General, and *Jeffrey S. Sutton*.

Michael H. Gottesman argued the cause for respondents. With him on the brief were *Steven D. Caley*, *Susan C. Jamieson*, and *David A. Webster*.

Irving L. Gornstein argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Lee*, *Deputy Solicitor General Underwood*, *Jessica Dunsay Silver*, and *Gregory B. Friel*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Nevada et al. by *Frankie Sue Del Papa*, Attorney General of Nevada, and *Anne B. Cathcart*, Special Assistant Attorney General, *Mike Moore*, Attorney General of Mississippi, and *Robert E. Sanders*, Assistant Attorney General, *John Cornyn*, Attorney General of Texas, *Andy Taylor*, First Assistant Attorney General, *Linda S. Eads*, Deputy Attorney General, and *Gregory S. Coleman*, Solicitor General, and by the Attorneys General for their respective States as follows: *Ken L. Salazar* of Colorado, *Jeffrey A. Modisett* of Indiana, *Margery S. Bronster* of Hawaii, *Richard P. Ieyoub* of Louisiana, *Thomas F. Reilly* of Massachusetts, *Joseph P. Mazurek* of Montana, *Charles M. Condon* of South Carolina, *Paul G. Summers* of Tennessee, *Christine O. Gregoire* of Washington, and *Gay Woodhouse* of Wyoming; and for the National Conference of State Legislatures et al. by *Richard Ruda* and *James I. Crowley*.

Briefs of *amici curiae* urging affirmance were filed for the American Association on Mental Retardation et al. by *Alan M. Wiseman*, *Timothy K. Armstrong*, and *Ira A. Burnim;* for the American Civil Liberties Union et al. by *Laurie Webb Daniel* and *Steven R. Shapiro;* for the American

JUSTICE GINSBURG announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–A, and an opinion with respect to Part III–B, in which JUSTICE O'CONNOR, JUSTICE SOUTER, and JUSTICE BREYER join.

This case concerns the proper construction of the anti-discrimination provision contained in the public services portion (Title II) of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 337, 42 U. S. C. § 12132. Specifically, we confront the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions. The answer, we hold, is a qualified yes. Such action is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. In so ruling, we affirm the decision of the Eleventh Circuit in substantial part. We remand the case, however, for further consideration of the appropriate relief, given the range of facilities the State maintains for the care and treatment of persons with diverse mental disabilities, and its obligation to administer services with an even hand.

Psychiatric Association et al. by *Richard G. Taranto;* for 58 Former State Commissioners and Directors of Mental Health and Developmental Disabilities et al. by *Neil V. McKittrick;* for the National Council on Disability by *Robert L. Burgdorf, Jr.;* for the National Mental Health Consumers' Self-Help Clearinghouse et al. by *Loralyn McKinley;* for Dick Thornburgh et al. by *Mr. Thornburgh, pro se, James E. Day,* and *David R. Fine;* for People First of Georgia et al. by *Thomas K. Gilhool;* and for the Voice of the Retarded et al. by *William J. Burke* and *Tamie Hopp.*

Stephen F. Gold filed a brief for ADAPT et al. as *amici curiae.*

I

This case, as it comes to us, presents no constitutional question. The complaints filed by plaintiffs-respondents L. C. and E. W. did include such an issue; L. C. and E. W. alleged that defendants-petitioners, Georgia health care officials, failed to afford them minimally adequate care and freedom from undue restraint, in violation of their rights under the Due Process Clause of the Fourteenth Amendment. See Complaint ¶¶ 87–91; Intervenor's Complaint ¶¶ 30–34. But neither the District Court nor the Court of Appeals reached those Fourteenth Amendment claims. See Civ. No. 1:95–cv–1210–MHS (ND Ga., Mar. 26, 1997), pp. 5–6, 11–13, App. to Pet. for Cert. 34a–35a, 40a–41a; 138 F. 3d 893, 895, and n. 3 (CA11 1998). Instead, the courts below resolved the case solely on statutory grounds. Our review is similarly confined. Cf. *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 450 (1985) (Texas city's requirement of special use permit for operation of group home for mentally retarded, when other care and multiple-dwelling facilities were freely permitted, lacked rational basis and therefore violated Equal Protection Clause of Fourteenth Amendment). Mindful that it is a statute we are construing, we set out first the legislative and regulatory prescriptions on which the case turns.

In the opening provisions of the ADA, Congress stated findings applicable to the statute in all its parts. Most relevant to this case, Congress determined that

> "(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> "(3) discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization . . . ;
>
> . . . . .

> "(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . failure to make modifications to existing facilities and practices, . . . [and] segregation . . . ." 42 U. S. C. §§ 12101(a)(2), (3), (5).[1]

Congress then set forth prohibitions against discrimination in employment (Title I, §§ 12111–12117), public services furnished by governmental entities (Title II, §§ 12131–12165), and public accommodations provided by private entities (Title III, §§ 12181–12189). The statute as a whole is intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." § 12101(b)(1).[2]

This case concerns Title II, the public services portion of the ADA.[3] The provision of Title II centrally at issue reads:

> "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such

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[1] The ADA, enacted in 1990, is the Federal Government's most recent and extensive endeavor to address discrimination against persons with disabilities. Earlier legislative efforts included the Rehabilitation Act of 1973, 87 Stat. 355, 29 U. S. C. § 701 *et seq.* (1976 ed.), and the Developmentally Disabled Assistance and Bill of Rights Act, 89 Stat. 486, 42 U. S. C. § 6001 *et seq.* (1976 ed.), enacted in 1975. In the ADA, Congress for the first time referred expressly to "segregation" of persons with disabilities as a "for[m] of discrimination," and to discrimination that persists in the area of "institutionalization." §§ 12101(a)(2), (3), (5).

[2] The ADA defines "disability," "with respect to an individual," as

"(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

"(B) a record of such an impairment; or

"(C) being regarded as having such an impairment." § 12102(2).

There is no dispute that L. C. and E. W. are disabled within the meaning of the ADA.

[3] In addition to the provisions set out in Part A governing public services generally, see §§ 12131–12134, Title II contains in Part B a host of provisions governing public transportation services, see §§ 12141–12165.

> disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." § 201, as set forth in 42 U. S. C. § 12132.

Title II's definition section states that "public entity" includes "any State or local government," and "any department, agency, [or] special purpose district." §§ 12131(1)(A), (B). The same section defines "qualified individual with a disability" as

> "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." § 12131(2).

On redress for violations of § 12132's discrimination prohibition, Congress referred to remedies available under § 505 of the Rehabilitation Act of 1973, 92 Stat. 2982, 29 U. S. C. § 794a. See § 203, as set forth in 42 U. S. C. § 12133 ("The remedies, procedures, and rights set forth in [§ 505 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.").[4]

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[4] Section 505 of the Rehabilitation Act incorporates the remedies, rights, and procedures set forth in Title VI of the Civil Rights Act of 1964 for violations of § 504 of the Rehabilitation Act. See 29 U. S. C. § 794a(a)(2). Title VI, in turn, directs each federal department authorized to extend financial assistance to any department or agency of a State to issue rules and regulations consistent with achievement of the objectives of the statute authorizing financial assistance. See 78 Stat. 252, 42 U. S. C. § 2000d–1. Compliance with such requirements may be effected by the termination or denial of federal funds, or "by any other means authorized by law." *Ibid.* Remedies both at law and in equity are available for violations of the statute. See § 2000d–7(a)(2).

Congress instructed the Attorney General to issue regulations implementing provisions of Title II, including § 12132's discrimination proscription. See § 204, as set forth in § 12134(a) ("[T]he Attorney General shall promulgate regulations in an accessible format that implement this part.").[5] The Attorney General's regulations, Congress further directed, "shall be consistent with this chapter and with the coordination regulations . . . applicable to recipients of Federal financial assistance under [§ 504 of the Rehabilitation Act]." § 204, as set forth in 42 U. S. C. § 12134(b). One of the § 504 regulations requires recipients of federal funds to "administer programs and activities in the most integrated

[5] Congress directed the Secretary of Transportation to issue regulations implementing the portion of Title II concerning public transportation. See 42 U. S. C. §§ 12143(b), 12149, 12164. As stated in the regulations, a person alleging discrimination on the basis of disability in violation of Title II may seek to enforce its provisions by commencing a private lawsuit, or by filing a complaint with (a) a federal agency that provides funding to the public entity that is the subject of the complaint, (b) the Department of Justice for referral to an appropriate agency, or (c) one of eight federal agencies responsible for investigating complaints arising under Title II: the Department of Agriculture, the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development, the Department of the Interior, the Department of Justice, the Department of Labor, and the Department of Transportation. See 28 CFR §§ 35.170(c), 35.172(b), 35.190(b) (1998).

The ADA contains several other provisions allocating regulatory and enforcement responsibility. Congress instructed the Equal Employment Opportunity Commission (EEOC) to issue regulations implementing Title I, see 42 U. S. C. § 12116; the EEOC, the Attorney General, and persons alleging discrimination on the basis of disability in violation of Title I may enforce its provisions, see § 12117(a). Congress similarly instructed the Secretary of Transportation and the Attorney General to issue regulations implementing provisions of Title III, see §§ 12186(a)(1), (b); the Attorney General and persons alleging discrimination on the basis of disability in violation of Title III may enforce its provisions, see §§ 12188(a)(1), (b). Each federal agency responsible for ADA implementation may render technical assistance to affected individuals and institutions with respect to provisions of the ADA for which the agency has responsibility. See § 12206(c)(1).

setting appropriate to the needs of qualified handicapped persons." 28 CFR § 41.51(d) (1998).

As Congress instructed, the Attorney General issued Title II regulations, see 28 CFR pt. 35 (1998), including one modeled on the § 504 regulation just quoted; called the "integration regulation," it reads:

> "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 CFR § 35.130(d) (1998).

The preamble to the Attorney General's Title II regulations defines "the most integrated setting appropriate to the needs of qualified individuals with disabilities" to mean "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 CFR pt. 35, App. A, p. 450 (1998). Another regulation requires public entities to "make reasonable modifications" to avoid "discrimination on the basis of disability," unless those modifications would entail a "fundamenta[l] alter[ation]"; called here the "reasonable-modifications regulation," it provides:

> "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 CFR § 35.130(b)(7) (1998).

We recite these regulations with the caveat that we do not here determine their validity. While the parties differ on the proper construction and enforcement of the regulations, we do not understand petitioners to challenge the regulatory formulations themselves as outside the congressional authorization. See Brief for Petitioners 16–17, 36, 40–41;

Reply Brief 15–16 (challenging the Attorney General's interpretation of the integration regulation).

II

With the key legislative provisions in full view, we summarize the facts underlying this dispute. Respondents L. C. and E. W. are mentally retarded women; L. C. has also been diagnosed with schizophrenia, and E. W. with a personality disorder. Both women have a history of treatment in institutional settings. In May 1992, L. C. was voluntarily admitted to Georgia Regional Hospital at Atlanta (GRH), where she was confined for treatment in a psychiatric unit. By May 1993, her psychiatric condition had stabilized, and L. C.'s treatment team at GRH agreed that her needs could be met appropriately in one of the community-based programs the State supported. Despite this evaluation, L. C. remained institutionalized until February 1996, when the State placed her in a community-based treatment program.

E. W. was voluntarily admitted to GRH in February 1995; like L. C., E. W. was confined for treatment in a psychiatric unit. In March 1995, GRH sought to discharge E. W. to a homeless shelter, but abandoned that plan after her attorney filed an administrative complaint. By 1996, E. W.'s treating psychiatrist concluded that she could be treated appropriately in a community-based setting. She nonetheless remained institutionalized until a few months after the District Court issued its judgment in this case in 1997.

In May 1995, when she was still institutionalized at GRH, L. C. filed suit in the United States District Court for the Northern District of Georgia, challenging her continued confinement in a segregated environment. Her complaint invoked 42 U. S. C. § 1983 and provisions of the ADA, §§ 12131–12134, and named as defendants, now petitioners, the Commissioner of the Georgia Department of Human Resources, the Superintendent of GRH, and the Executive Director of the Fulton County Regional Board (collectively,

the State). L. C. alleged that the State's failure to place her in a community-based program, once her treating professionals determined that such placement was appropriate, violated, *inter alia*, Title II of the ADA. L. C.'s pleading requested, among other things, that the State place her in a community care residential program, and that she receive treatment with the ultimate goal of integrating her into the mainstream of society. E. W. intervened in the action, stating an identical claim.[6]

The District Court granted partial summary judgment in favor of L. C. and E. W. See App. to Pet. for Cert. 31a–42a. The court held that the State's failure to place L. C. and E. W. in an appropriate community-based treatment program violated Title II of the ADA. See *id.*, at 39a, 41a. In so ruling, the court rejected the State's argument that inadequate funding, not discrimination against L. C. and E. W. "by reason of" their disabilities, accounted for their retention at GRH. Under Title II, the court concluded, "unnecessary institutional segregation of the disabled constitutes discrimination *per se*, which cannot be justified by a lack of funding." *Id.*, at 37a.

In addition to contending that L. C. and E. W. had not shown discrimination "by reason of [their] disabilit[ies]," the State resisted court intervention on the ground that requiring immediate transfers in cases of this order would "fundamentally alter" the State's activity. The State reasserted that it was already using all available funds to provide services to other persons with disabilities. See *id.*, at 38a. Re-

[6] L. C. and E. W. are currently receiving treatment in community-based programs. Nevertheless, the case is not moot. As the District Court and Court of Appeals explained, in view of the multiple institutional placements L. C. and E. W. have experienced, the controversy they brought to court is "capable of repetition, yet evading review." No. 1:95–cv–1210–MHS (ND Ga., Mar. 26, 1997), p. 6, App. to Pet. for Cert. 35a (internal quotation marks omitted); see 138 F. 3d 893, 895, n. 2 (CA11 1998) (citing *Honig* v. *Doe*, 484 U. S. 305, 318–323 (1988), and *Vitek* v. *Jones*, 445 U. S. 480, 486–487 (1980)).

jecting the State's "fundamental alteration" defense, the court observed that existing state programs provided community-based treatment of the kind for which L. C. and E. W. qualified, and that the State could "provide services to plaintiffs in the community at considerably *less* cost than is required to maintain them in an institution." *Id.*, at 39a.

The Court of Appeals for the Eleventh Circuit affirmed the judgment of the District Court, but remanded for reassessment of the State's cost-based defense. See 138 F. 3d, at 905. As the appeals court read the statute and regulations: When "a disabled individual's treating professionals find that a community-based placement is appropriate for that individual, the ADA imposes a duty to provide treatment in a community setting—the most integrated setting appropriate to that patient's needs"; "[w]here there is no such finding [by the treating professionals], nothing in the ADA requires the deinstitutionalization of th[e] patient." *Id.*, at 902.

The Court of Appeals recognized that the State's duty to provide integrated services "is not absolute"; under the Attorney General's Title II regulation, "reasonable modifications" were required of the State, but fundamental alterations were not demanded. *Id.*, at 904. The appeals court thought it clear, however, that "Congress wanted to permit a cost defense only in the most limited of circumstances." *Id.*, at 902. In conclusion, the court stated that a cost justification would fail "[u]nless the State can prove that requiring it to [expend additional funds in order to provide L. C. and E. W. with integrated services] would be so unreasonable given the demands of the State's mental health budget that it would fundamentally alter the service [the State] provides." *Id.*, at 905. Because it appeared that the District Court had entirely ruled out a "lack of funding" justification, see App. to Pet. for Cert. 37a, the appeals court remanded, repeating that the District Court should consider, among other things, "whether the additional expenditures necessary to treat L. C. and E. W. in community-based care would be unreason-

able given the demands of the State's mental health budget." 138 F. 3d, at 905.[7]

We granted certiorari in view of the importance of the question presented to the States and affected individuals. See 525 U. S. 1054 (1998).[8]

III

Endeavoring to carry out Congress' instruction to issue regulations implementing Title II, the Attorney General, in the integration and reasonable-modifications regulations, see *supra*, at 591–592, made two key determinations. The first concerned the scope of the ADA's discrimination proscription, 42 U. S. C. § 12132; the second concerned the obligation of the States to counter discrimination. As to the first, the Attorney General concluded that unjustified placement or retention of persons in institutions, severely limiting their exposure to the outside community, constitutes a form of discrimination based on disability prohibited by Title II. See 28 CFR § 35.130(d) (1998) ("A public entity shall administer services . . . in the most integrated setting appropriate to the needs of qualified individuals with disabilities."); Brief for United States as *Amicus Curiae* in *Helen L.* v. *DiDario*, No. 94–1243 (CA3 1994), pp. 8, 15–16 (unnecessary segregation of persons with disabilities constitutes a form of discrimination prohibited by the ADA and the integration

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[7] After this Court granted certiorari, the District Court issued a decision on remand rejecting the State's fundamental-alteration defense. See 1:95–cv–1210–MHS (ND Ga., Jan. 29, 1999), p. 1. The court concluded that the annual cost to the State of providing community-based treatment to L. C. and E. W. was not unreasonable in relation to the State's overall mental health budget. See *id.*, at 5. In reaching that judgment, the District Court first declared "irrelevant" the potential impact of its decision beyond L. C. and E. W. 1:95–cv–1210-MHS (ND Ga., Oct. 20, 1998), p. 3, App. 177. The District Court's decision on remand is now pending appeal before the Eleventh Circuit.

[8] Twenty-two States and the Territory of Guam joined a brief urging that certiorari be granted. Ten of those States joined a brief in support of petitioners on the merits.

regulation). Regarding the States' obligation to avoid unjustified isolation of individuals with disabilities, the Attorney General provided that States could resist modifications that "would fundamentally alter the nature of the service, program, or activity." 28 CFR § 35.130(b)(7) (1998).

The Court of Appeals essentially upheld the Attorney General's construction of the ADA. As just recounted, see *supra*, at 595–596, the appeals court ruled that the unjustified institutionalization of persons with mental disabilities violated Title II; the court then remanded with instructions to measure the cost of caring for L. C. and E. W. in a community-based facility against the State's mental health budget.

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

A

We examine first whether, as the Eleventh Circuit held, undue institutionalization qualifies as discrimination "by reason of . . . disability." The Department of Justice has consistently advocated that it does.[9] Because the Department

[9] See Brief for United States in *Halderman* v. *Pennhurst State School and Hospital*, Nos. 78–1490, 78–1564, 78–1602 (CA3 1978), p. 45 ("[I]nstitutionalization result[ing] in separation of mentally retarded persons for no

is the agency directed by Congress to issue regulations implementing Title II, see *supra*, at 591–592, its views warrant respect. We need not inquire whether the degree of deference described in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984), is in order; "[i]t is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " *Bragdon* v. *Abbott*, 524 U. S. 624, 642 (1998) (quoting *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140 (1944)).

The State argues that L. C. and E. W. encountered no discrimination "by reason of" their disabilities because they were not denied community placement on account of those disabilities. See Brief for Petitioners 20. Nor were they subjected to "discrimination," the State contends, because "'discrimination' necessarily requires uneven treatment of similarly situated individuals," and L. C. and E. W. had identified no comparison class, *i. e.*, no similarly situated individuals given preferential treatment. *Id.*, at 21. We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA.[10]

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permissible reason . . . is 'discrimination,' and a violation of Section 504 [of the Rehabilitation Act] if it is supported by federal funds."); Brief for United States in *Halderman* v. *Pennhurst State School and Hospital*, Nos. 78–1490, 78–1564, 78–1602 (CA3 1981), p. 27 ("Pennsylvania violates Section 504 by indiscriminately subjecting handicapped persons to [an institution] without first making an individual reasoned professional judgment as to the appropriate placement for each such person among all available alternatives."); Brief for United States as *Amicus Curiae* in *Helen L.* v. *DiDario*, No. 94–1243 (CA3 1994), p. 7 ("Both the Section 504 coordination regulations and the rest of the ADA make clear that the unnecessary segregation of individuals with disabilities in the provision of public services is itself a form of discrimination within the meaning of those statutes."); *id.*, at 8–16.

[10] The dissent is driven by the notion that "this Court has never endorsed an interpretation of the term 'discrimination' that encompassed disparate treatment among members of the *same* protected class," *post*, at 616 (opinion of THOMAS, J.), that "[o]ur decisions construing various

The ADA stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living. The Developmentally Disabled Assistance and Bill of Rights Act, a 1975 measure, stated in aspirational terms that "[t]he treatment, services, and habilitation for a person with developmental disabilities . . . *should be* provided in the setting that is least restrictive of the person's personal liberty." 89 Stat. 502, 42 U. S. C. § 6010(2) (1976 ed.) (emphasis added); see also *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 24 (1981) (concluding that the § 6010 provisions "were intended to be hortatory, not mandatory"). In a related legislative endeavor, the Rehabilitation Act of 1973, Congress used mandatory language to proscribe discrimination against persons with disabilities. See 87 Stat. 394, as amended, 29 U. S. C. § 794 (1976 ed.) ("No otherwise qualified individual with a disability in the United States . . . *shall*, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal fi-

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statutory prohibitions against 'discrimination' have not wavered from this path," *post*, at 616, and that "a plaintiff cannot prove 'discrimination' by demonstrating that one member of a particular protected group has been favored over another member of that same group," *post*, at 618. The dissent is incorrect as a matter of precedent and logic. See *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U. S. 308, 312 (1996) (The Age Discrimination in Employment Act of 1967 "does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*."); cf. *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 76 (1998) ("[W]orkplace harassment can violate Title VII's prohibition against 'discriminat[ion] . . . because of . . . sex,' 42 U. S. C. § 2000e–2(a)(1), when the harasser and the harassed employee are of the same sex."); *Jefferies* v. *Harris County Community Action Assn.*, 615 F. 2d 1025, 1032 (CA5 1980) ("[D]iscrimination against black females can exist even in the absence of discrimination against black men or white women.").

nancial assistance." (Emphasis added.)) Ultimately, in the ADA, enacted in 1990, Congress not only required all public entities to refrain from discrimination, see 42 U. S. C. § 12132; additionally, in findings applicable to the entire statute, Congress explicitly identified unjustified "segregation" of persons with disabilities as a "for[m] of discrimination." See § 12101(a)(2) ("historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem"); § 12101(a)(5) ("individuals with disabilities continually encounter various forms of discrimination, including . . . segregation").[11]

Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Cf. *Allen* v. *Wright*, 468 U. S. 737, 755 (1984) ("There can be no doubt that [stigmatizing injury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action."); *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 707, n. 13 (1978) (" 'In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' " (quoting *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (CA7

[11] Unlike the ADA, § 504 of the Rehabilitation Act contains no express recognition that isolation or segregation of persons with disabilities is a form of discrimination. Section 504's discrimination proscription, a single sentence attached to vocational rehabilitation legislation, has yielded divergent court interpretations. See Brief for United States as *Amicus Curiae* 23–25.

1971)). Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment. See Brief for American Psychiatric Association et al. as *Amici Curiae* 20–22. Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice. See Brief for United States as *Amicus Curiae* 6–7, 17.

The State urges that, whatever Congress may have stated as its findings in the ADA, the Medicaid statute "reflected a congressional policy preference for treatment in the institution over treatment in the community." Brief for Petitioners 31. The State correctly used the past tense. Since 1981, Medicaid has provided funding for state-run home and community-based care through a waiver program. See 95 Stat. 812–813, as amended, 42 U. S. C. § 1396n(c); Brief for United States as *Amicus Curiae* 20–21.[12] Indeed, the United States points out that the Department of Health and Human Services (HHS) "has a policy of encouraging States to take advantage of the waiver program, and often approves more waiver slots than a State ultimately uses." *Id.*, at 25–26 (further observing that, by 1996, "HHS approved up to 2109 waiver slots for Georgia, but Georgia used only 700").

We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community

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[12] The waiver program provides Medicaid reimbursement to States for the provision of community-based services to individuals who would otherwise require institutional care, upon a showing that the average annual cost of such services is not more than the annual cost of institutional services. See § 1396n(c).

settings. Title II provides only that "qualified individual[s] with a disability" may not "be subjected to discrimination." 42 U. S. C. § 12132. "Qualified individuals," the ADA further explains, are persons with disabilities who, "with or without reasonable modifications to rules, policies, or practices, . . . mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." § 12131(2).

Consistent with these provisions, the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual "meets the essential eligibility requirements" for habilitation in a community-based program. Absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting. See 28 CFR § 35.130(d) (1998) (public entity shall administer services and programs in "the most integrated setting *appropriate* to the needs of qualified individuals with disabilities" (emphasis added)); cf. *School Bd. of Nassau Cty.* v. *Arline*, 480 U. S. 273, 288 (1987) ("[C]ourts normally should defer to the reasonable medical judgments of public health officials.").[13] Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it. See 28 CFR § 35.130(e)(1) (1998) ("Nothing in this part shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept."); 28 CFR pt. 35, App. A, p. 450 (1998) ("[P]ersons with disabilities must be provided the option of declining to accept a particular accommodation."). In this case, however, there is no genuine dispute concerning the status of L. C. and E. W. as individuals "quali-

[13] Georgia law also expresses a preference for treatment in the most integrated setting appropriate. See Ga. Code Ann. § 37–4–121 (1995) ("It is the policy of the state that the least restrictive alternative placement be secured for every client at every stage of his habilitation. It shall be the duty of the facility to assist the client in securing placement in noninstitutional community facilities and programs.").

fied" for noninstitutional care: The State's own professionals determined that community-based treatment would be appropriate for L. C. and E. W., and neither woman opposed such treatment. See *supra*, at 593.[14]

B

The State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless. The reasonable-modifications regulation speaks of "reasonable modifications" to avoid discrimination, and allows States to resist modifications that entail a "fundamenta[l] alter[ation]" of the States' services and programs. 28 CFR § 35.130(b)(7) (1998). The Court of Appeals construed this regulation to permit a cost-based defense "only in the most limited of circumstances," 138 F. 3d, at 902, and remanded to the District Court to consider, among other things, "whether the additional expenditures necessary to treat L. C. and E. W. in community-based care would be unreasonable given the demands of the State's mental health budget," *id.*, at 905.

The Court of Appeals' construction of the reasonable-modifications regulation is unacceptable for it would leave the State virtually defenseless once it is shown that the plaintiff is qualified for the service or program she seeks. If the expense entailed in placing one or two people in a community-based treatment program is properly measured for reasonableness against the State's entire mental health budget, it is unlikely that a State, relying on the fundamental-alteration defense, could ever prevail. See Tr. of Oral Arg. 27 (State's attorney argues that Court of Appeals' understanding of the

[14] We do not in this opinion hold that the ADA imposes on the States a "standard of care" for whatever medical services they render, or that the ADA requires States to "provide a certain level of benefits to individuals with disabilities." Cf. *post*, at 623, 624 (THOMAS, J., dissenting). We do hold, however, that States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide.

fundamental-alteration defense, as expressed in its order to the District Court, "will always preclude the State from a meaningful defense"); cf. Brief for Petitioners 37–38 (Court of Appeals' remand order "mistakenly asks the district court to examine [the fundamental-alteration] defense based on the cost of providing community care to just two individuals, not all Georgia citizens who desire community care"); 1:95–cv–1210–MHS (ND Ga., Oct. 20, 1998), p. 3, App. 177 (District Court, on remand, declares the impact of its decision beyond L. C. and E. W. "irrelevant"). Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.

When it granted summary judgment for plaintiffs in this case, the District Court compared the cost of caring for the plaintiffs in a community-based setting with the cost of caring for them in an institution. That simple comparison showed that community placements cost less than institutional confinements. See App. to Pet. for Cert. 39a. As the United States recognizes, however, a comparison so simple overlooks costs the State cannot avoid; most notably, a "State . . . may experience increased overall expenses by funding community placements without being able to take advantage of the savings associated with the closure of institutions." Brief for United States as *Amicus Curiae* 21.[15]

As already observed, see *supra*, at 601–602, the ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk. Cf. *post*, at

[15] Even if States eventually were able to close some institutions in response to an increase in the number of community placements, the States would still incur the cost of running partially full institutions in the interim. See Brief for United States as *Amicus Curiae* 21.

610 (KENNEDY, J., concurring in judgment). Nor is it the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter, a placement the State proposed, then retracted, for E. W. See *supra*, at 593. Some individuals, like L. C. and E. W. in prior years, may need institutional care from time to time "to stabilize acute psychiatric symptoms." App. 98 (affidavit of Dr. Richard L. Elliott); see 138 F. 3d, at 903 ("[T]here may be times [when] a patient can be treated in the community, and others whe[n] an institutional placement is necessary."); Reply Brief 19 (placement in a community-based treatment program does not mean the State will no longer need to retain hospital accommodations for the person so placed). For other individuals, no placement outside the institution may ever be appropriate. See Brief for American Psychiatric Association et al. as *Amici Curiae* 22–23 ("Some individuals, whether mentally retarded or mentally ill, are not prepared at particular times—perhaps in the short run, perhaps in the long run—for the risks and exposure of the less protective environment of community settings"; for these persons, "institutional settings are needed and must remain available."); Brief for Voice of the Retarded et al. as *Amici Curiae* 11 ("Each disabled person is entitled to treatment in the most integrated setting possible for that person—recognizing that, on a case-by-case basis, that setting may be in an institution."); *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.").

To maintain a range of facilities and to administer services with an even hand, the State must have more leeway than the courts below understood the fundamental-alteration defense to allow. If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan

for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met. See Tr. of Oral Arg. 5 (State's attorney urges that, "by asking [a] person to wait a short time until a community bed is available, Georgia does not exclude [that] person by reason of disability, neither does Georgia discriminate against her by reason of disability"); see also *id.*, at 25 ("[I]t is reasonable for the State to ask someone to wait until a community placement is available."). In such circumstances, a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions.[16]

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[16] We reject the Court of Appeals' construction of the reasonable-modifications regulation for another reason. The Attorney General's Title II regulations, Congress ordered, "shall be consistent with" the regulations in part 41 of Title 28 of the Code of Federal Regulations implementing § 504 of the Rehabilitation Act. 42 U. S. C. § 12134(b). The § 504 regulation upon which the reasonable-modifications regulation is based provides now, as it did at the time the ADA was enacted:

"A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program." 28 CFR § 41.53 (1990 and 1998 eds.).

While the part 41 regulations do not define "undue hardship," other § 504 regulations make clear that the "undue hardship" inquiry requires not simply an assessment of the cost of the accommodation in relation to the recipient's overall budget, but a "case-by-case analysis weighing factors that include: (1) [t]he overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2) [t]he type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) [t]he nature and cost of the accommodation needed." 28 CFR § 42.511(c) (1998); see 45 CFR § 84.12(c) (1998) (same).

Under the Court of Appeals' restrictive reading, the reasonable-modifications regulation would impose a standard substantially more

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For the reasons stated, we conclude that, under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. The judgment of the Eleventh Circuit is therefore affirmed in part and vacated in part, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

Unjustified disparate treatment, in this case, "unjustified institutional isolation," constitutes discrimination under the Americans with Disabilities Act of 1990. See *ante,* at 600. If a plaintiff requests relief that requires modification of a State's services or programs, the State may assert, as an affirmative defense, that the requested modification would cause a fundamental alteration of a State's services and programs. In this case, the Court of Appeals appropriately remanded for consideration of the State's affirmative defense. On remand, the District Court rejected the State's "fundamental-alteration defense." See *ante,* at 596, n. 7. If the District Court was wrong in concluding that costs unrelated to the treatment of L. C. and E. W. do not support such a defense in this case, that arguable error should be corrected either by the Court of Appeals or by this Court in review of that decision. In my opinion, therefore, we should simply affirm the judgment of the Court of Appeals.

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difficult for the State to meet than the "undue burden" standard imposed by the corresponding § 504 regulation.

But because there are not five votes for that disposition, I join the Court's judgment and Parts I, II, and III–A of its opinion. Cf. *Bragdon* v. *Abbott*, 524 U. S. 624, 655–656 (1998) (STEVENS, J., concurring); *Screws* v. *United States*, 325 U. S. 91, 134 (1945) (Rutledge, J., concurring in result).

JUSTICE KENNEDY, with whom JUSTICE BREYER joins as to Part I, concurring in the judgment.

I

Despite remarkable advances and achievements by medical science, and agreement among many professionals that even severe mental illness is often treatable, the extent of public resources to devote to this cause remains controversial. Knowledgeable professionals tell us that our society, and the governments which reflect its attitudes and preferences, have yet to grasp the potential for treating mental disorders, especially severe mental illness. As a result, necessary resources for the endeavor often are not forthcoming. During the course of a year, about 5.6 million Americans will suffer from severe mental illness. E. Torrey, Out of the Shadows 4 (1997). Some 2.2 million of these persons receive no treatment. *Id.*, at 6. Millions of other Americans suffer from mental disabilities of less serious degree, such as mild depression. These facts are part of the background against which this case arises. In addition, of course, persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility. See, *e. g.*, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 461–464 (1985) (Marshall, J., concurring in judgment in part and dissenting in part) (discussing treatment of the mentally retarded).

Despite these obstacles, the States have acknowledged that the care of the mentally disabled is their special obligation. They operate and support facilities and programs, sometimes elaborate ones, to provide care. It is a continu-

ing challenge, though, to provide the care in an effective and humane way, particularly because societal attitudes and the responses of public authorities have changed from time to time.

Beginning in the 1950's, many victims of severe mental illness were moved out of state-run hospitals, often with benign objectives. According to one estimate, when adjusted for population growth, "the actual decrease in the numbers of people with severe mental illnesses in public psychiatric hospitals between 1955 and 1994 was 92 percent." Brief for American Psychiatric Association et al. as *Amici Curiae* 21, n. 5 (citing Torrey, *supra*, at 8–9). This was not without benefit or justification. The so-called "deinstitutionalization" has permitted a substantial number of mentally disabled persons to receive needed treatment with greater freedom and dignity. It may be, moreover, that those who remain institutionalized are indeed the most severe cases. With reference to this case, as the Court points out, *ante*, at 593, 603, it is undisputed that the State's own treating professionals determined that community-based care was medically appropriate for respondents. Nevertheless, the depopulation of state mental hospitals has its dark side. According to one expert:

> "For a substantial minority . . . deinstitutionalization has been a psychiatric *Titanic*. Their lives are virtually devoid of 'dignity' or 'integrity of body, mind, and spirit.' 'Self-determination' often means merely that the person has a choice of soup kitchens. The 'least restrictive setting' frequently turns out to be a cardboard box, a jail cell, or a terror-filled existence plagued by both real and imaginary enemies." Torrey, *supra*, at 11.

It must be remembered that for the person with severe mental illness who has no treatment the most dreaded of confinements can be the imprisonment inflicted by his own mind,

which shuts reality out and subjects him to the torment of voices and images beyond our own powers to describe.

It would be unreasonable, it would be a tragic event, then, were the Americans with Disabilities Act of 1990 (ADA) to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision. The opinion of a responsible treating physician in determining the appropriate conditions for treatment ought to be given the greatest of deference. It is a common phenomenon that a patient functions well with medication, yet, because of the mental illness itself, lacks the discipline or capacity to follow the regime the medication requires. This is illustrative of the factors a responsible physician will consider in recommending the appropriate setting or facility for treatment. JUSTICE GINSBURG's opinion takes account of this background. It is careful, and quite correct, to say that it is not "the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter . . . ." *Ante*, at 605.

In light of these concerns, if the principle of liability announced by the Court is not applied with caution and circumspection, States may be pressured into attempting compliance on the cheap, placing marginal patients into integrated settings devoid of the services and attention necessary for their condition. This danger is in addition to the federalism costs inherent in referring state decisions regarding the administration of treatment programs and the allocation of resources to the reviewing authority of the federal courts. It is of central importance, then, that courts apply today's decision with great deference to the medical decisions of the responsible, treating physicians and, as the Court makes clear, with appropriate deference to the program funding decisions of state policymakers.

II

With these reservations made explicit, in my view we must remand the case for a determination of the questions the Court poses and for a determination whether respondents can show a violation of 42 U. S. C. § 12132's ban on discrimination based on the summary judgment materials on file or any further pleadings and materials properly allowed.

At the outset it should be noted there is no allegation that Georgia officials acted on the basis of animus or unfair stereotypes regarding the disabled. Underlying much discrimination law is the notion that animus can lead to false and unjustified stereotypes, and vice versa. Of course, the line between animus and stereotype is often indistinct, and it is not always necessary to distinguish between them. Section 12132 can be understood to deem as irrational, and so to prohibit, distinctions by which a class of disabled persons, or some within that class, are, by reason of their disability and without adequate justification, exposed by a state entity to more onerous treatment than a comparison group in the provision of services or the administration of existing programs, or indeed entirely excluded from state programs or facilities. Discrimination under this statute might in principle be shown in the case before us, though further proceedings should be required.

Putting aside issues of animus or unfair stereotype, I agree with JUSTICE THOMAS that on the ordinary interpretation and meaning of the term, one who alleges discrimination must show that she "received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic." *Post,* at 616 (dissenting opinion). In my view, however, discrimination so defined might be shown here. Although the Court seems to reject JUSTICE THOMAS' definition of discrimination, *ante,* at 598, it asserts that unnecessary institutional care does lead to "[d]issimilar treatment," *ante,* at 601. According to the Court, "[i]n order to receive needed medical services, persons with mental dis-

abilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice." *Ibid.*

Although this point is not discussed at length by the Court, it does serve to suggest the theory under which respondents might be subject to discrimination in violation of § 12132. If they could show that persons needing psychiatric or other medical services to treat a mental disability are subject to a more onerous condition than are persons eligible for other existing state medical services, and if removal of the condition would not be a fundamental alteration of a program or require the creation of a new one, then the beginnings of a discrimination case would be established. In terms more specific to this case, if respondents could show that Georgia (i) provides treatment to individuals suffering from medical problems of comparable seriousness, (ii) as a general matter, does so in the most integrated setting appropriate for the treatment of those problems (taking medical and other practical considerations into account), but (iii) without adequate justification, fails to do so for a group of mentally disabled persons (treating them instead in separate, locked institutional facilities), I believe it would demonstrate discrimination on the basis of mental disability.

Of course, it is a quite different matter to say that a State without a program in place is required to create one. No State has unlimited resources, and each must make hard decisions on how much to allocate to treatment of diseases and disabilities. If, for example, funds for care and treatment of the mentally ill, including the severely mentally ill, are reduced in order to support programs directed to the treatment and care of other disabilities, the decision may be unfortunate. The judgment, however, is a political one and not within the reach of the statute. Grave constitutional concerns are raised when a federal court is given the author-

ity to review the State's choices in basic matters such as establishing or declining to establish new programs. It is not reasonable to read the ADA to permit court intervention in these decisions. In addition, as the Court notes, *ante*, at 592, by regulation a public entity is required only to make "reasonable modifications in policies, practices, or procedures" when necessary to avoid discrimination and is not even required to make those if "the modifications would fundamentally alter the nature of the service, program, or activity." 28 CFR § 35.130(b)(7) (1998). It follows that a State may not be forced to create a community-treatment program where none exists. See Brief for United States as *Amicus Curiae* 19–20, and n. 3. Whether a different statutory scheme would exceed constitutional limits need not be addressed.

Discrimination, of course, tends to be an expansive concept and, as legal category, it must be applied with care and prudence. On any reasonable reading of the statute, § 12132 cannot cover all types of differential treatment of disabled and nondisabled persons, no matter how minimal or innocuous. To establish discrimination in the context of this case, and absent a showing of policies motivated by improper animus or stereotypes, it would be necessary to show that a comparable or similarly situated group received differential treatment. Regulations are an important tool in identifying the kinds of contexts, policies, and practices that raise concerns under the ADA. The congressional findings in 42 U. S. C. § 12101 also serve as a useful aid for courts to discern the sorts of discrimination with which Congress was concerned. Indeed, those findings have clear bearing on the issues raised in this case, and support the conclusion that unnecessary institutionalization may be the evidence or the result of the discrimination the ADA prohibits.

Unlike JUSTICE THOMAS, I deem it relevant and instructive that Congress in express terms identified the "isolat[ion] and segregat[ion]" of disabled persons by society as a "for[m]

of discrimination," §§ 12101(a)(2), (5), and noted that discrimination against the disabled "persists in such critical areas as . . . institutionalization," § 12101(a)(3). These findings do not show that segregation and institutionalization are always discriminatory or that segregation or institutionalization are, by their nature, forms of prohibited discrimination. Nor do they necessitate a regime in which individual treatment plans are required, as distinguished from broad and reasonable classifications for the provision of health care services. Instead, they underscore Congress' concern that discrimination has been a frequent and pervasive problem in institutional settings and policies and its concern that segregating disabled persons from others can be discriminatory. Both of those concerns are consistent with the normal definition of discrimination—differential treatment of similarly situated groups. The findings inform application of that definition in specific cases, but absent guidance to the contrary, there is no reason to think they displace it. The issue whether respondents have been discriminated against under § 12132 by institutionalized treatment cannot be decided in the abstract, divorced from the facts surrounding treatment programs in their State.

The possibility therefore remains that, on the facts of this case, respondents would be able to support a claim under § 12132 by showing that they have been subject to discrimination by Georgia officials on the basis of their disability. This inquiry would not be simple. Comparisons of different medical conditions and the corresponding treatment regimens might be difficult, as would be assessments of the degree of integration of various settings in which medical treatment is offered. For example, the evidence might show that, apart from services for the mentally disabled, medical treatment is rarely offered in a community setting but also is rarely offered in facilities comparable to state mental hospitals. Determining the relevance of that type of evidence would require considerable judgment and anal-

ysis. However, as petitioners observe, "[i]n this case, no class of similarly situated individuals was even identified, let alone shown to be given preferential treatment." Brief for Petitioners 21. Without additional information regarding the details of state-provided medical services in Georgia, we cannot address the issue in the way the statute demands. As a consequence, the judgment of the courts below, granting partial summary judgment to respondents, ought not to be sustained. In addition, as JUSTICE GINSBURG's opinion is careful to note, *ante*, at 604, it was error in the earlier proceedings to restrict the relevance and force of the State's evidence regarding the comparative costs of treatment. The State is entitled to wide discretion in adopting its own systems of cost analysis, and, if it chooses, to allocate health care resources based on fixed and overhead costs for whole institutions and programs. We must be cautious when we seek to infer specific rules limiting States' choices when Congress has used only general language in the controlling statute.

I would remand the case to the Court of Appeals or the District Court for it to determine in the first instance whether a statutory violation is sufficiently alleged and supported in respondents' summary judgment materials and, if not, whether they should be given leave to replead and to introduce evidence and argument along the lines suggested above.

For these reasons, I concur in the judgment of the Court.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

Title II of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 337, as set forth in 42 U. S. C. § 12132, provides:

> "Subject to the provisions of this subchapter, no qualified individual with a disability shall, *by reason of such disability*, be excluded from participation in or be denied the benefits of the services, programs, or activities

> of a public entity, *or be subjected to discrimination* by any such entity." (Emphasis added.)

The majority concludes that petitioners "discriminated" against respondents—as a matter of law—by continuing to treat them in an institutional setting after they became eligible for community placement. I disagree. Temporary exclusion from community placement does not amount to "discrimination" in the traditional sense of the word, nor have respondents shown that petitioners "discriminated" against them "by reason of" their disabilities.

Until today, this Court has never endorsed an interpretation of the term "discrimination" that encompassed disparate treatment among members of the *same* protected class. Discrimination, as typically understood, requires a showing that a claimant received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic. This interpretation comports with dictionary definitions of the term discrimination, which means to "distinguish," to "differentiate," or to make a "distinction in favor of or against, a person or thing based on the group, class, or category to which that person or thing belongs rather than on individual merit." Random House Dictionary 564 (2d ed. 1987); see also Webster's Third New International Dictionary 648 (1981) (defining "discrimination" as "the making or perceiving of a distinction or difference" or as "the act, practice, or an instance of discriminating categorically rather than individually").

Our decisions construing various statutory prohibitions against "discrimination" have not wavered from this path. The best place to begin is with Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, the paradigmatic antidiscrimination law.[1] Title VII makes it "an unlawful em-

[1] We have incorporated Title VII standards of discrimination when interpreting statutes prohibiting other forms of discrimination. For example, Rev. Stat. § 1977, as amended, 42 U. S. C. § 1981, has been interpreted to forbid all racial discrimination in the making of private and

ployment practice for an employer . . . to *discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a)(1) (emphasis added). We have explained that this language is designed "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429–430 (1971).[2]

Under Title VII, a finding of discrimination requires a comparison of otherwise similarly situated persons who are in different groups by reason of certain characteristics provided by statute. See, *e. g.*, *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 683 (1983) (explain-

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public contracts. See *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604, 609 (1987). This Court has applied the "framework" developed in Title VII cases to claims brought under this statute. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 186 (1989). Also, the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. § 623(a)(1), prohibits discrimination on the basis of an employee's age. This Court has noted that its "interpretation of Title VII . . . applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'" *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 121 (1985) (quoting *Lorillard* v. *Pons*, 434 U. S. 575, 584 (1978)). This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U. S. C. § 1681 *et seq.*, which prohibits discrimination under any federally funded education program or activity. See *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60, 75 (1992) (relying on *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57 (1986), a Title VII case, in determining that sexual harassment constitutes discrimination).

[2] This Court has recognized that two forms of discrimination are prohibited under Title VII: disparate treatment and disparate impact. See *Griggs*, 401 U. S., at 431 ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"). Both forms of "discrimination" require a comparison among classes of employees.

ing that Title VII discrimination occurs when an employee is treated "'in a manner which but for that person's sex would be different'") (quoting *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 711 (1978)). For this reason, we have described as "nonsensical" the comparison of the racial composition of different classes of job categories in determining whether there existed disparate impact discrimination with respect to a particular job category. *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642, 651 (1989).[3] Courts interpreting Title VII have held that a plaintiff cannot prove "discrimination" by demonstrating that one member of a particular protected group has been favored over another member of that same group. See, *e. g.*, *Bush* v. *Commonwealth Edison Co.*, 990 F. 2d 928, 931 (CA7 1993), cert. denied, 511 U. S. 1071 (1994) (explaining that under Title VII, a fired black employee "had to show that although he was not a good employee, equally bad employees were treated more leniently by [his employer] if they happened not to be black").

Our cases interpreting § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, which prohibits "discrimination" against certain individuals with disabilities, have applied this commonly understood meaning of discrimination. Section 504 provides:

> "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be sub-

[3] Following *Wards Cove*, Congress enacted the Civil Rights Act of 1991, Pub. L. 102–166, 105 Stat. 1071, as amended, which, *inter alia*, altered the burden of proof with respect to a disparate impact discrimination claim. See *id.*, § 105 (codified at 42 U. S. C. § 2000e–2(k)). This change highlights the principle that a departure from the traditional understanding of discrimination requires congressional action. Cf. *Field* v. *Mans*, 516 U. S. 59, 69–70 (1995) (Congress legislates against the background rule of the common law and traditional notions of lawful conduct).

jected to discrimination under any program or activity receiving Federal financial assistance."

In keeping with the traditional paradigm, we have always limited the application of the term "discrimination" in the Rehabilitation Act to a person who is a member of a protected group and faces discrimination "by reason of his handicap." Indeed, we previously rejected the argument that § 504 requires the type of "affirmative efforts to overcome the disabilities caused by handicaps," *Southeastern Community College* v. *Davis*, 442 U. S. 397, 410 (1979), that the majority appears to endorse today. Instead, we found that § 504 required merely "the evenhanded treatment of handicapped persons" relative to those persons who do not have disabilities. *Ibid.* Our conclusion was informed by the fact that some provisions of the Rehabilitation Act envision "affirmative action" on behalf of those individuals with disabilities, but § 504 itself "does not refer at all" to such action. *Ibid.* Therefore, "[a] comparison of these provisions demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so." *Id.*, at 411.

Similarly, in *Alexander* v. *Choate*, 469 U. S. 287, 302 (1985), we found no discrimination under § 504 with respect to a limit on inpatient hospital care that was "neutral on its face" and did not "distinguish between those whose coverage will be reduced and those whose coverage will not on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having," *id.*, at 302. We said that § 504 does "not . . . guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be constructed." *Id.*, at 304.

Likewise, in *Traynor* v. *Turnage*, 485 U. S. 535, 548 (1988), we reiterated that the purpose of § 504 is to guarantee that individuals with disabilities receive "evenhanded treatment"

relative to those persons without disabilities. In *Traynor*, the Court upheld a Veterans' Administration regulation that excluded "primary alcoholics" from a benefit that was extended to persons disabled by alcoholism related to a mental disorder. *Id.*, at 551. In so doing, the Court noted that "[t]his litigation does not involve a program or activity that is alleged to treat handicapped persons less favorably than nonhandicapped persons." *Id.*, at 548. Given the theory of the case, the Court explicitly held: "There is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." *Id.*, at 549.

This same understanding of discrimination also informs this Court's constitutional interpretation of the term. See *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 298 (1997) (noting with respect to interpreting the Commerce Clause, "[c]onceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities"); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1886) (condemning under the Fourteenth Amendment "illegal discriminations between persons in similar circumstances"); see also *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 223–224 (1995); *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493–494 (1989) (plurality opinion).

Despite this traditional understanding, the majority derives a more "comprehensive" definition of "discrimination," as that term is used in Title II of the ADA, one that includes "institutional isolation of persons with disabilities." *Ante*, at 600. It chiefly relies on certain congressional findings contained within the ADA. To be sure, those findings appear to equate institutional isolation with segregation, and thereby discrimination. See *ibid.* (quoting §§ 12101(a)(2) and 12101(a)(5), both of which explicitly identify "segregation" of persons with disabilities as a form of "discrimination"); see also *ante,* at 588–589. The congressional findings, however, are written in general, hortatory terms and pro-

vide little guidance to the interpretation of the specific language of § 12132. See *National Organization for Women, Inc.* v. *Scheidler*, 510 U. S. 249, 260 (1994) ("We also think that the quoted statement of congressional findings is a rather thin reed upon which to base a requirement"). In my view, the vague congressional findings upon which the majority relies simply do not suffice to show that Congress sought to overturn a well-established understanding of a statutory term (here, "discrimination").[4] Moreover, the majority fails to explain why terms in the findings should be given a medical content, pertaining to the place where a mentally retarded person is treated. When read in context, the findings instead suggest that terms such as "segregation" were used in a more general sense, pertaining to matters such as access to employment, facilities, and transportation. Absent a clear directive to the contrary, we must read "discrimination" in light of the common understanding of the term. We cannot expand the meaning of the term "discrimination" in order to invalidate policies we may find unfortunate. Cf. *NLRB* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325 (1951) (explaining that if Congress intended statutory terms "to have other than their ordinarily accepted meaning,

[4] If such general hortatory language is sufficient, it is puzzling that this or any other court did not reach the same conclusion long ago by reference to the general purpose language of the Rehabilitation Act itself. See 29 U. S. C. § 701 (1988 ed.) (describing the statute's purpose as "to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living, for individuals with handicaps *in order to maximize their employability, independence, and integration* into the workplace and the community" (emphasis added)). Further, this section has since been amended to proclaim in even more aspirational terms that the policy under the statute is driven by, *inter alia*, "respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities," "respect for the privacy, rights, and equal access," and "inclusion, integration, and full participation of the individuals." 29 U. S. C. §§ 701(c)(1)–(3).

it would and should have given them a special meaning by definition").[5]

Elsewhere in the ADA, Congress chose to alter the traditional definition of discrimination. Title I of the ADA, § 12112(b)(1), defines discrimination to include "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee." Notably, however, Congress did not provide that this definition of discrimination, unlike other aspects of the ADA, applies to Title II. Ordinary canons of construction require that we respect the limited applicability of this definition of "discrimination" and not import it into other parts of the law where Congress did not see fit. See, *e. g.*, *Bates* v. *United States*, 522 U. S. 23, 29–30 (1997) ("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'") (quoting *Russello* v. *United States*, 464 U. S. 16, 23 (1983)). The majority's definition of discrimination—although not specifically delineated—substantially imports the definition of Title I into Title II by necessarily assuming that it is sufficient to focus exclusively on members of one particular

[5] Given my conclusion, the Court need not review the integration regulation promulgated by the Attorney General. See 28 CFR § 35.130(d) (1998). Deference to a regulation is appropriate only "'if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable.'" *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471, 483 (1997) (quoting *Presley* v. *Etowah County Comm'n*, 502 U. S. 491, 508 (1992)). Here, Congress has expressed its intent in § 12132, and the Attorney General's regulation—insofar as it contradicts the settled meaning of the statutory term—cannot prevail against it. See *NLRB* v. *Town & Country Elec., Inc.*, 516 U. S. 85, 94 (1995) (explaining that courts interpreting a term within a statute "must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of that term" (internal quotation marks omitted)).

group. Under this view, discrimination occurs when some members of a protected group are treated differently from other members of that same group. As the preceding discussion emphasizes, absent a special definition supplied by Congress, this conclusion is a remarkable and novel proposition that finds no support in our decisions in analogous areas. For example, the majority's conclusion that petitioners "discriminated" against respondents is the equivalent to finding discrimination under Title VII where a black employee with deficient management skills is denied in-house training by his employer (allegedly because of lack of funding) because other similarly situated black employees are given the in-house training. Such a claim would fly in the face of our prior case law, which requires more than the assertion that a person belongs to a protected group and did not receive some benefit. See, *e. g.*, *Griggs*, 401 U. S., at 430–431 ("Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group").

At bottom, the type of claim approved of by the majority does not concern a prohibition against certain conduct (the traditional understanding of discrimination), but rather concerns imposition of a standard of care.[6] As such, the major-

[6] In mandating that government agencies minimize the institutional isolation of disabled individuals, the majority appears to appropriate the concept of "mainstreaming" from the Individuals with Disabilities Education Act (IDEA), 84 Stat. 175, as amended, 20 U. S. C. § 1400 *et seq.* But IDEA is not an antidiscrimination law. It is a grant program that affirmatively requires States accepting federal funds to provide disabled children with a "free appropriate public education" and to establish "procedures to assure that, to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled." §§ 1412(1), (5). Ironically, even under this broad affirmative mandate, we previously rejected a claim that IDEA required the "standard of care"

ity can offer no principle limiting this new species of "discrimination" claim apart from an affirmative defense because it looks merely to an individual in isolation, without comparing him to otherwise similarly situated persons, and determines that discrimination occurs merely because that individual does not receive the treatment he wishes to receive. By adopting such a broad view of discrimination, the majority drains the term of any meaning other than as a proxy for decisions disapproved of by this Court.

Further, I fear that the majority's approach imposes significant federalism costs, directing States how to make decisions about their delivery of public services. We previously have recognized that constitutional principles of federalism erect limits on the Federal Government's ability to direct state officers or to interfere with the functions of state governments. See, *e. g.*, *Printz* v. *United States*, 521 U. S. 898 (1997); *New York* v. *United* States, 505 U. S. 144 (1992). We have suggested that these principles specifically apply to whether States are required to provide a certain level of benefits to individuals with disabilities. As noted in *Alexander*, in rejecting a similar theory under § 504 of the Rehabilitation Act: "[N]othing . . . suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services . . . ." 469 U. S., at 307. See also *Bowen* v. *American Hospital Assn.*, 476 U. S. 610, 642 (1986) (plurality opinion) ("[N]othing in [§ 504] authorizes [the Secretary of Health and Human Services (HHS)] to commandeer state agencies . . . . [These] agencies are

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analysis adopted by the majority today. See *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176, 198 (1982) ("We think . . . that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children" (internal quotation marks omitted)).

not field offices of the HHS bureaucracy, and they may not be conscripted against their will as the foot soldiers in a federal crusade"). The majority's affirmative defense will likely come as cold comfort to the States that will now be forced to defend themselves in federal court every time resources prevent the immediate placement of a qualified individual. In keeping with our traditional deference in this area, see *Alexander*, *supra*, the appropriate course would be to respect the States' historical role as the dominant authority responsible for providing services to individuals with disabilities.

The majority may remark that it actually does properly compare members of different groups. Indeed, the majority mentions in passing the "[d]issimilar treatment" of persons with and without disabilities. *Ante*, at 601. It does so in the context of supporting its conclusion that institutional isolation is a form of discrimination. It cites two cases as standing for the unremarkable proposition that discrimination leads to deleterious stereotyping, *ante*, at 600 (citing *Allen* v. *Wright*, 468 U. S. 737, 755 (1984); *Manhart*, 435 U. S., at 707, n. 13)), and an *amicus* brief which indicates that confinement diminishes certain everyday life activities, *ante*, at 601 (citing Brief for American Psychiatric Association et al. as *Amici Curiae* 20–22). The majority then observes that persons without disabilities "can receive the services they need without" institutionalization and thereby avoid these twin deleterious effects. *Ante*, at 601. I do not quarrel with the two general propositions, but I fail to see how they assist in resolving the issue before the Court. Further, the majority neither specifies what services persons with disabilities might need nor contends that persons without disabilities need the same services as those with disabilities, leading to the inference that the dissimilar treatment the majority observes results merely from the fact that different classes of persons receive different services—not from "discrimination" as traditionally defined.

Finally, it is also clear petitioners did not "discriminate" against respondents "by reason of [their] disabili[ties]," as § 12132 requires. We have previously interpreted the phrase "by reason of" as requiring proximate causation. See, *e. g.*, *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 265–266 (1992); see also *id.*, at 266, n. 11 (citation of cases). Such an interpretation is in keeping with the vernacular understanding of the phrase. See American Heritage Dictionary 1506 (3d ed. 1992) (defining "by reason of" as "because of"). This statute should be read as requiring proximate causation as well. Respondents do not contend that their disabilities constituted the proximate cause for their exclusion. Nor could they—community placement simply is not available to those without disabilities. Continued institutional treatment of persons who, though now deemed treatable in a community placement, must wait their turn for placement does not establish that the denial of community placement occurred "by reason of" their disability. Rather, it establishes no more than the fact that petitioners have limited resources.

* * *

For the foregoing reasons, I respectfully dissent.

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Why Hold Elections? - Using Consent Decrees to Insulate Policies from Political Change

Michael W. McConnell

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Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change

Michael W. McConnell†

Lawmakers always have dreamed of making their decisions irrevocable. Ancient lawgivers pronounced a curse on future generations who might presume to alter their enactments. Modern politicians hope to set in train such powerful political forces that successors will not be able to change direction. Here in Chicago, a faction of the City Council recently attempted to guarantee against prospective electoral defeat by voting (by simple majority) to require a two-thirds vote in the future to dislodge themselves from Council leadership posts or to change key provisions in the Council rules.[1]

But statutes, however wise, can be repealed by later legislatures,[2] executive orders can be modified by successor Presidents,[3] and council rules adopted by a majority can be repealed by future

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† Assistant Professor of Law, University of Chicago Law School. The author participated as counsel in several of the cases discussed herein: *Roti v. Washington, United States v. Board of Education of the City of Chicago, Citizens for a Better Environment v. Gorsuch,* and *Mabry v. Johnson.* Many thanks are due to Paul Bator, Frank Easterbrook, Richard Epstein, Larry Kramer, Douglas Laycock, Geoffrey Miller, Richard Stewart, and David Strauss for helpful comments on an earlier draft.

[1] See Roti v. Washington, 148 Ill. App. 3d 1006, 1007-08, 500 N.E.2d 463, 464-65 (Ill. App. 1986).

[2] For a self-conscious example, see Jefferson's Bill for Establishing Religious Freedom in Virginia:

> And though we well know that this Assembly . . . have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right.

Julian P. Boyd, ed., 2 Papers of Thomas Jefferson 546-47 (1950). See generally Geoffrey Marshall, Constitutional Theory 41-57 (1971) (discussing problem of "entrenchment" under British constitutional system).

[3] Consider, for example, the controversy over suggestions that the President amend or revoke Executive Order 11246 (Sept. 24, 1965), which establishes affirmative action requirements for contractors doing business with the federal government. Cong. Q. Weekly Rep. 2106-07 (Oct. 19, 1985). No one, to my knowledge, has suggested that the President lacks this power.

majorities.[4] Even the Constitution can be amended by vote of the same percentage of states originally required to ratify it.[5] Future lawmakers have just as much power to depart from the decisions of their forebears as their forebears had to make the decisions in the first place.

Unless, we are now told, the decisions have been embodied in consent decrees.

Consent decrees are a form of settlement in which the parties agree to end the litigation in return for a promise that one (or both) of them will change their conduct for a specified period of time, sometimes indefinitely. They are entered as a judgment of the court and are enforceable in the same way as court injunctions; yet they contain no determination by the court either that the party thus bound had violated the law or that the relief thus granted was legally warranted. Of concern here are consent decrees between government lawyers and a private party, in which the private party agrees to cease litigation (as either plaintiff or defendant) on agreed terms, in exchange for a commitment by the government that executive discretion will in the future be exercised in a particular way.

Consent decrees have not traditionally been considered a tool of governmental policy making. Statutes, executive orders, regulations, adjudications, and policy statements have heretofore been the means by which governmental policy is given the force and effect of law.[6] Recent federal court decisions—especially *United States v. Board of Education of City of Chicago*[7] and *Citizens for*

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[4] Roti v. Washington, 148 Ill. App. 3d at 1012, 500 N.E.2d at 467, quoting State ex rel. Kiel v. Riechmann, 239 Mo. 81, 97-98, 142 S.W. 304, 309 (Mo. 1911) ("The same power which can make rules in the first instance can directly attack and unmake or repeal such rules.").

[5] U.S. Const. art. V; compare id. art. VII. One provision of the Constitution purportedly cannot be repealed: the "equal Suffrage" of each State in the Senate. U.S. Const. art. V. This is a deeply paradoxical limitation; nothing in the text indicates that this limitation cannot itself be amended by ordinary action.

[6] In perusing the leading casebooks on administrative and legislative process, I have found none in which consent decrees were mentioned either in an index or a table of contents.

[7] 554 F. Supp. 912 (N.D. Ill. 1983) (approving consent decree); 567 F. Supp. 272 (N.D. Ill. 1983), aff'd in part, vacated in part, 717 F.2d 378 (7th Cir. 1983) (holding United States in violation of decree); 567 F. Supp. 290 (N.D. Ill. 1983) (upholding constitutionality of the desegregation plan); 588 F. Supp. 132 (N.D. Ill. 1984) (on remand, holding United States in violation of decree, requiring Administration to lobby for additional funds, and quantifying the United States' obligation at $103.9 million); vacated and remanded, 744 F.2d 1300 (7th Cir. 1984).

a Better Environment v. Gorsuch[8]—have, however, created a new species of lawmaking. The courts in these cases held, in effect, that executive officials in one Administration can set policy today *and* bind their successors to comply with it tomorrow, by settling a lawsuit on those terms. This development forces us to look at consent decrees in a new light.

Professor Peter Shane has made a major contribution by offering the first comprehensive analysis of "discretion-limiting" consent decrees in the context of the Constitution's allocation of lawmaking authority.[9] While recognizing that consent decrees can go beyond constitutional bounds by interfering with constitutionally-vested executive discretion, Professor Shane's central message is that there is no cause for alarm: consent decrees, even in cases like *Chicago Board of Education* and *Citizens for a Better Environment*, fall within the flexible tradition of American administrative and constitutional law. The anxiety over consent decrees, he suggests, reflects little more than a general anxiety over increasing judicial oversight of executive functions.

I disagree. Whatever may be the state of executive-judicial relations generally, consent decrees like those emerging from these cases are a unique and unacceptable development. To the extent that consent decrees insulate today's policy decisions from review and modification by tomorrow's political processes, they violate the democratic structure of government. They should be repudiated before they become a common part of the legal landscape.

I. Legal and Constitutional Limits on Consent Decrees

A. The Distinctive Character of Consent Decrees

Why do consent decrees against the government pose a special problem for constitutional and administrative law? Most consent decrees are ordinary compromises of litigation, controversial only insofar as the legal claims underlying them may be controversial. As a means for resolving legal disputes without wasteful litigation, consent decrees are unexceptional, indeed indispensable tools, for the intelligent conduct of government litigation. To be sure, consent decrees frequently require the executive to surrender a portion of its authority to the courts; this raises the usual set of problems of reconciling aggressive judicial supervision of executive

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[8] 718 F.2d 1117 (D.C. Cir. 1983).

[9] Peter M. Shane, Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion, 1987 U. Chi. Legal F. 241.

performance with the structural principles set out in the Constitution.[10] But consent decrees are not unique in this regard. Injunctions, declaratory judgments, and legislative schemes inviting an active judicial role all raise the same set of problems. Is there any sense in which government consent decrees should excite more than the usual anxiety over the transfer of policy-making discretion from Presidents to judges?

I contend that a narrow but important class of consent decrees, if judicially enforced, would violate the structural provisions of the Constitution by denying future executive officials the policy-making authority vested in them by the Constitution and laws. These consent decrees circumvent democratic change by precluding subsequent Presidents from changing policies set, through consent decree, by a previous Administration (or, for that matter, by preventing a single President from changing his mind). Furthermore, especially at the state and local level, consent decrees can enable officials to transgress limits on their authority or sidestep political checks and balances.

For example, an opponent of affirmative action might sue the Secretary of Labor, contending that Executive Order 11246, which establishes goals and timetables for the hiring of black construction workers in federally-funded construction projects, is unconstitutional. (I presume, for purposes of this hypothetical, that there is no legal obstacle that would prevent the President from revoking the Executive Order, but also that there is no judicially-accepted principle of constitutional law that would persuade a court to strike down the Order.) Could executive branch lawyers settle the lawsuit by entering a consent decree rescinding the Executive Order and promising that it would never be reinstated? In the face of such a decree, could a future President who supports affirmative racial preferences reissue the Executive Order?

Under current law, a proposed consent decree may be entered as a judgment of the court without any independent determination by the court that it is warranted under the facts or law pertinent to the case.[11] Moreover, the current rules regarding enforcement

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[10] See U.S. Const. art. II, § 3 (assigning to the President the responsibility to "take Care that the laws be faithfully executed"); Robert F. Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661 (1978). Defenders of the new model of public law do not deny that it has been a major departure from the traditional understanding of judicial and executive roles. See Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1669-70 (1975); Shane, 1987 U. Chi. Legal F. at 284-86 (cited in note 9).

[11] Local Number 93 v. City of Cleveland, 106 S. Ct. 3063, 3077-78 (1986). See also note

and modification of consent decrees bind future government officials, unless the private party to the decree agrees to a modification or the officials are able to persuade the court that enforcement of the decree would result in a "grievous wrong."[12] That voters may have elected government officials with different views about appropriate public policy does not, presumably, constitute a wrong sufficiently "grievous" to meet this test.[13]

Surely there is something troubling about such a decree. I do not doubt that the President has the authority to revoke an executive order in response to a lawsuit. It is much harder to accept his authority to bargain away the right of his successors to adopt a different policy. Consent decrees of this sort differ fundamentally from other forms of governmental policy making: they expressly limit future political discretion.[14]

To be sure, today's policy inevitably has repercussions for tomorrow. It is harder for future policymakers to reverse course than it is to chart a policy in new areas. But the general rule for democratic bodies is that the same authority that has power to adopt a legal rule has authority to change it. By contrast, if government policy is set by consent decree, then future executive officials cannot abrogate the decree on their own authority.[15] They would have to obtain the consent of an outside party (the other party to the decree or a judge). Unlike other forms of government policy making, consent decrees, in Professor Shane's apt words, make ordina-

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[12] United States v. Swift & Co., 286 U.S. 106, 119 (1932). Professor Shane apparently endorses a more relaxed standard for modifying consent decrees that limit government discretion. Shane, 1987 U. Chi. Legal F. at 269 n.105. (cited in note 9). This seems to be the emerging consensus among courts of appeals. See Philadelphia Welfare Rights Organization v. Shapp, 602 F.2d 1114, 1120 (3d Cir. 1979) (endorsing flexible approach to modifications of affirmative injunctions governing the conduct of government programs); New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 970 (2d Cir. 1983) (same); Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1020 (7th Cir. 1984) (en banc) (same).

[13] See Citizens for a Better Environment, 718 F.2d at 1128; compare id. at 1134 (Wilkey. J., dissenting). See also Robert V. Percival, The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making, 1987 U. Chi. Legal F. 327, 341-48.

[14] This problem may be compared to that discussed by Professor Douglas Laycock in Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. Chi. Legal F. 103. In his article, Professor Laycock discusses the effect of consent decrees on third parties unrepresented in the litigation. Here, the unrepresented "third parties" are future executive officials, and ultimately the people who elect them.

[15] Unless, of course, they follow Professor Shane's wise counsel and incorporate in every "discretion-limiting" consent decree language permitting future modification. See Shane, 1987 U. Chi. Legal F. at 261, 265 (cited in note 9). I agree that his suggested "guidelines" would be more effectual than current Justice Department guidelines. See id. at 265, 279-84.

rily "revisable" discretion "nonrevisable."[16] That is, they insulate the policies embodied in the decree from future political change, and thus from the democratic process.[17]

B. The Standards for Judging the Constitutionality of Consent Decrees

Article II of the Constitution vests significant discretionary authority in the President, and through him in subordinate executive officers. By "the President" the Constitution of course means the incumbent; the powers of the office cannot be exercised by former holders of the office. The Constitution explicitly provides that Presidents shall serve four-year terms of office, for a maximum of two terms.[18] At the end of his term, the authority of a President and his Administration comes to an end. Any attempt by a President to exert legal control over the powers of his successors, unless specifically authorized, is a violation of these constitutional provisions.

The textual allocation of powers to a President of limited term is fundamental to democratic accountability. When voters elect a new President, they expect that he will have authority to change those policies that, under the Constitution and laws, are left to the discretion of the executive. The conduct of the executive branch, no less than the legislative, is intended to be politically accountable. That is why we hold elections for President. If changes in policy have already been ruled out by binding and irrevocable agreements with private parties, then there is no point in holding them.[19]

The question is not solely whether Congress has passed legislation—such as the act authorizing the Attorney General to settle

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[16] Id. at 244.

[17] I reject Professor Shane's suggestion, id. at 264, that discretion-limiting consent decrees are analogous to agency regulations binding the agency to rule-making procedures that go beyond statutory minima. See also Percival, 1987 U. Chi. Legal F. at 344-46 (cited in note 13). Future agency heads are free to revoke those regulations. By contrast, if the same procedures were embodied in a consent decree, future agency heads would be unable to change them without permission from private parties or the court.

[18] U.S. Const. art. II, § 1; id. amend. XXII, § 1.

[19] Thus, the crux of my disagreement with Professor Shane is his conception that the electoral accountability of the presidency is not an important feature of our constitutional system. See Shane, 1987 U. Chi. Legal F. at 291 (cited in note 9) ("The reason we can plausibly claim to have a politically accountable government with respect to domestic regulatory policy is not, for the most part, because we may vote for the President, but rather because we vote for Congress.").

litigation[20]—that could be construed to provide authority to enter discretion-limiting consent decrees of the sort described here.[21] Even if Congress were to pass a statute in so many words ("the Attorney General is hereby authorized to enter into consent agreements with private parties that limit the constitutional discretion of future Presidents, and the courts shall enforce such decrees"), it would be unconstitutional in many of its applications. Not even Congress has the power to diminish the constitutional authority of future Presidents.

Nor is the question solely one of "good faith" or proper use of discretion. To be sure, one of the evils to be guarded against is the collusive settlement—government lawyers settling a suit on favorable terms to the opposing party precisely because they expect that successive administrations may be less sympathetic to its cause.[22] But even in the absence of collusion, current officeholders might well view the present concessions of the opponent as more important than the future policy-making discretion of unknown successors. The constitutional issue is not whether those who bargained away executive authority decided wisely, but whether they had the authority to bargain with that currency at all.

The enforceability of a consent decree follows logically from its nature as a hybrid between a litigated judgment and a contract.[23] A consent decree cannot have any greater weight than the combined authority of the parties who consent and the court that enters the judgment.[24] There are, therefore, two alternative bases for upholding and requiring specific performance of a discretion-limiting consent decree.

1. *The Relief Contained in the Consent Decree Could Have Been Ordered by the Court if the Case Had Proceeded to Judg-*

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[20] 28 U.S.C. §§ 516, 519 (1982).

[21] See Shane, 1987 U. Chi. Legal F. at 255, 261-65 (cited in note 9).

[22] One of the cases discussed by Professor Shane, id. at 251-53, involved an agreement signed in 1979 that purported to freeze the rules governing mortgage foreclosure relief for five years. Ferrell v. Pierce, 743 F.2d 454 (7th Cir. 1984). It may not have been a coincidence that Carter Administration appointees toward the end of that administration chose a period of time lasting roughly to the end of the succeeding administration. Compare Dunn v. Carey, 808 F.2d 555, 560 (7th Cir. 1986) ("A court must be alert to the possibility that the consent decree is a ploy in some other struggle. . . . The federal litigation may have offered an opportunity to achieve other goals, and the 'consent' . . . may have been what defendants received in exchange for giving plaintiffs what they wanted.").

[23] Local Number 93, 106 S. Ct. at 3074; United States v. ITT Continental Baking Co., 420 U.S. 223, 236 n.10 (1975); Kasper v. Board of Election Commissioners, Nos. 87-1125 and 87-1126, slip op. at 10 (7th Cir. 1987). See also Note, The Consent Judgment as an Instrument of Compromise and Settlement, 72 Harv. L. Rev. 1314, 1316-17 (1959).

[24] See generally Laycock, 1987 U. Chi. Legal F. 103, 104 (cited in note 14).

ment. If a lawsuit goes to judgment, the court may have authority to issue an order requiring the executive to comply with legal requirements, and defining the nature of the executive's legal obligations. If government lawyers, in an exercise of professional discretion, decide to compromise on similar terms, this poses no more constitutional problem than would a similar litigated decree.[25] On the other hand, to the extent that a consent decree contains elements that differ from or go beyond what a court could order in a litigated judgment, it has no more force than any other agreement between a government official and a private party. It gains no authority by virtue of being filed with the court. Judicially-imposed limitations on executive authority derive from law—that is, from the Constitution, statute, or unrevoked regulation or executive order.[26] The troublesome character of consent decrees is that they purport to make legally enforceable against future officeholders a requirement or limitation that has not been imposed by law.

Of course, it is not always possible to determine, without the benefit of trial, what relief a court would be authorized to enter against the government. In some cases, it is far from a perfunctory task for a subsequent court, asked to order specific performance of a consent decree, to determine whether it is enforceable on this basis. In other cases—important cases—the conclusion is painfully obvious. I will discuss the practical problems of making this determination below.[27] Suffice it to say that if no judicial authority for the terms of a consent decree can reasonably be inferred, it cannot

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[25] This is not to say that such decrees, like litigated judgments, may not raise constitutional problems of other sorts. The law underlying the decrees may be unconstitutional—indeed, it may be unconstitutional precisely because it delegates excessive lawmaking or executive supervisory authority to the courts. See, for example, Maryland v. United States, 460 U.S. 1001, 1004-06 (1983) (Rehnquist, J., dissenting from summary affirmance) (questioning the constitutionality of statute allowing courts to override executive decisions on the basis of their own "public interest" determination). But these problems are the problems of modern public law generally, not peculiar to consent decrees. See generally Shane, 1987 U. Chi. Legal F. at 255-61 (cited in note 9).

[26] See System Federation v. Wright, 364 U.S. 642, 651 (1961) ("the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce"). This presumes an understanding of the judicial role under which remedies are deducible from violations, a proposition which is now controversial. See generally Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Owen M. Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 47 (1979). If the judicial role is seen, instead, as the development and articulation of public values (Chayes, 89 Harv. L. Rev. at 1295-96; Fiss, 93 Harv. L. Rev. at 18) the consent decree becomes problematical on a different ground: that it subjects a public function to private agreement. See Owen M. Fiss, Justice Chicago Style, 1987 U. Chi. Legal F. 1, 12-17.

[27] See text at notes 37-40.

serve as a basis for limiting the legally-vested discretion of future executive officials.

2. *The Commitment Must be Within the Authority of the Government Signatory, Unaided by the Power of the Court.* If a given provision of a consent decree is beyond the court's remedial authority, it must be based on consent. Thus, the decree can be enforceable only if the government signatory has authority to give his consent—that is, authority from some source, other than the litigation, to bind the discretion of present and future officeholders.[28]

There are specific contexts in which government officials can take actions that restrict the legal discretion of their successors. Some of these, like the President's pardon power[29] or the Congress's power to borrow money on the credit of the United States,[30] are expressly authorized by the Constitution. A President can pardon a person of a suspected crime, and no future President can prosecute him for it. One Congress can borrow money on the credit of the United States, and a later Congress is obligated to pay it back. Other putative powers of government officials to bind their successors are more problematic.[31] This is not the occasion for cataloging or justifying circumstances when the Constitution permits executive decisions that bind future legal discretion. Such instances are rare. But if an executive official can bind the discretion of his successors by unilateral action, there is no reason why he cannot do the same by way of settling a lawsuit.[32] Conversely, if the official lacks the authority to bind the discretion of his succes-

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[28] See Frank H. Easterbrook, Justice and Contract in Consent Judgments, 1987 U. Chi. Legal F. 19, 32-41.

[29] U.S. Const. art. II, § 2. This is Professor Shane's example. See Shane, 1987 U. Chi. Legal F. at 244, 256 (cited in note 9).

[30] U.S. Const. art. I, § 8; id. amend. XIV, § 4. See Perry v. United States, 294 U.S. 330, 351, 353-54 (1935).

[31] It is unsettled, for example, whether a President can invoke executive privilege for documents prepared under his Administration, as against the decision of subsequent Presidents to release them. See Nixon v. Administrator of General Services, 433 U.S. 425, 446-51 (1977); id. at 502 (Powell, J., concurring).

[32] My position is thus fully consistent with Local Number 93, 106 S. Ct. at 3077-78 (holding that consent decrees are not unlawful merely because a court would lack the power to impose the provisions as a remedy after trial). In the *Local Number 93* situation, the employer could have adopted an affirmative action plan as a matter of private voluntary action; there was, therefore, no reason it could not do so by consent decree. Id. at 3073; see Overton v. City of Austin, 748 F.2d 941, 956 n.18 (5th Cir. 1984). As long as the city officials whose discretion is limited by the decree continue to wish to abide by it, it presents none of the problems discussed in this article. Whether future city officials will be able to modify or rescind the agreement is a more difficult issue, not addressed in *Local Number 93*.

sors, it is a pure bootstrap argument to say that he can do so by forging an agreement with a private party and submitting it to a court.

Although my principal focus in this article is on federal separation of powers, these principles have wider applications. At the state and local level, consent decrees are sometimes used to evade the political power of other branches and levels of government. For example, a city council may be precluded, under state law, from making certain decisions without a popular referendum. It follows that the city council may not evade the referendum requirement by entering a consent decree promising to make those decisions.[33] The constitutional standard thus applies beyond the context of an executive official and his successors: a consent decree gains no legal force by the "consent" of officials who lack the power to make the relevant substantive decision in the absence of the decree.

C. Legal Consequences of Finding That a Decree Violates Constitutional Principles

That a consent decree may unconstitutionally interfere with policy-making discretion vested in a government official does not, in and of itself, render the decree void. Among the class of consent decrees that theoretically intrude into the constitutional discretion of the incumbent President, many will accord with current policy and thus not raise actual problems. It is only when officials later wish to exercise their constitutionally-vested discretion contrary to the terms of a decree that an actual, ripe constitutional controversy arises. The issue, therefore, is not so much the legality of a given consent decree as the availablity of specific performance if the incumbent no longer deems compliance to be in the public interest.[34]

The court asked to enforce the decree must determine whether it comports with these constitutional principles. If it does not, this does not mean that the decree was "unlawful" in any sense. No criticism is implied of the signatories or of the court that entered the decree. Rather, this simply means that the officials whose discretion is limited are entitled to modification or rescission to the extent that the decree goes beyond constitutionally enforceable limits. Other portions of the decree, if severable, should still be

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[33] See text at notes 81-86 for examples.

[34] Where the decree limits the discretion of other branches or levels of government rather than that of future officeholders, the legal consequence of a finding that the decree violates the Constitution is that the decree is void and of no legal effect.

enforced. In other words, to the extent that the decree is constitutionally unenforceable, a change in government policy, without more, must be considered a legitimate basis for modification of the decree.[35]

This does not mean that government officials are free to violate outstanding consent decrees that they may believe to be unconstitutional. Until the court has reached the conclusion that the decree is unenforceable, the consent decree stands as a binding court judgment. Nor does it mean that the private party to the decree is left without a remedy. On the contrary, that party is entitled to some other form of relief that will restore the status quo ante. In the typical public law case, nothing more is required than to permit the private party to reopen the litigation, because the party has given up nothing other than the lawsuit. If the private party assumed obligations under the decree, however, it must be freed of those obligations, just as the government is freed of its obligations. Moreover, if the private party has suffered any concrete loss, the government is required to make it whole.[36]

Rescissions of consent decrees under this standard may in practice be quite rare. Powerful, if informal, pressures disincline government officials to breach prior commitments made by their agencies, even if there is no legal compulsion. The prospect of reinstitution of the lawsuit is one such pressure. But when the official determines that the public interest in changing policy outweighs the considerations against, these principles offer a standard for modifying or vacating consent decrees that better accords with the Constitution's allocation of decision-making discretion.

D. Practical Problems of Applying These Legal Standards

Balanced against these considerations of democratic accountability is the practical usefulness of the consent decree, in appropriate cases, for the expeditious resolution of legal controversies. Protections against improper or abusive decrees should not be made so sweeping that they eliminate the incentives for voluntary settlement where it would be in the public interest. Two specific practical objections may be made to a strict enforcement of legal limits

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[35] Several distinguished lower court judges have proposed substantial loosening of the standards for modification of public law consent decrees. See note 12.

[36] The right to compensation for property loss has its source in the Just Compensation Clause of the Fifth Amendment, and the right to reinstate the lawsuit has its source in the substantive law that was the basis for the original lawsuit. The private party is relieved of its obligations under the decree under ordinary principles of contract law.

on consent decrees. First, it may sometimes be difficult, without trial, to determine the extent of relief a district court could order and, hence, the lawful scope of a consent decree. Second, the adoption of these principles will make settlement of lawsuits against government officials more difficult. I will provide reasons why these objections should be given little weight, and show that in other contexts (procurement and plea bargaining) similar limits on specific performance of government commitments have not seriously inhibited contracting with the government.

1. *The Difficulty of Determining Lawful Scope of Relief Without Trial.* The first practical difficulty is how to apply the first criterion for a lawful consent decree—whether the court would have authority to order the relief if the case proceeded to judgment—without a trial. How is it possible to tell whether the consent decree goes beyond what the court could have ordered if there has been no determination on the facts or the law of the case?

For a large number of cases—including all but one of the examples discussed in the next section[37]—this poses no problem, because the consent decree unmistakably goes beyond any conceivable court order. In *Chicago Board of Education*, for example, the United States was the plaintiff and the Board of Education was the wrongdoer; there was no basis whatsoever for any relief against the United States on behalf of the Board. The imposition of multimillion dollar liability was obviously beyond the court's power.[38]

In other cases, determining whether the decree was within the range of permissible judicial remedies had the case gone to trial will not be difficult, because the scope of the relief is a pure question of law. The court asked to enforce, vacate, or modify the decree can as easily assess the merits of the case as the court that entered the decree. This is likely to be the situation in the large majority of consent decrees against the government in regulatory programs, since the issue is rarely the factual question of what the government has done, but virtually always the legal question of what the government's responsibilities are. In the large majority of cases involving consent decrees that impinge on executive discretion, the underlying issue is one of continuing government policy or conduct. While there may be issues of fact, they are unlikely to grow stale. Hindsight and additional experience may even make it

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[37] Overton v. City of Austin, 748 F.2d 941 (5th Cir. 1984), is the exception. See text at notes 85-86. There, the district court declined to enter the decree without proof that it was warranted by law.

[38] See text at notes 60-61.

easier to resolve the issues in the case. A private party to the decree is not likely to be prejudiced by a postponement of a trial from the initial stage of the litigation to the decree enforcement stage. Moreover, if the relief requested depends heavily on the specific conduct of particular government officials, this may be reason to deny continued relief against subsequent officeholders who played no part in the initial wrongdoing.[39]

In the small number of cases in which the scope of relief depends upon factual showings that have become difficult to make when the government officials decide to challenge the decree, it may be appropriate for the subsequent court to defer more readily to the plaintiffs' initial allegations. It may also be prudent, where such problems are anticipated, for the parties to the consent decree to lay a factual predicate for the decree at the time it is made.[40]

2. *Effect on Settlements.* Some have warned that adherence to the principles limiting consent decrees could make it harder to resolve disputes through compromise and settlement.[41] I am skeptical. Defenders of discretion-limiting consent decrees assure us that this form of settlement is rare.[42] Their claim is plausible, since good faith efforts to settle litigation will ordinarily reflect compromise; it is an unusual "compromise" that goes beyond the relief the court might grant if the case were litigated to judgment. Good faith compromise of legal disputes should not be seriously inhibited by these principles.

Moreover, private parties will seldom stand to lose from entering a consent decree with the government—even if they know that a future officeholder can withdraw when he concludes that the consent decree is contrary to the public interest. The private party will obtain the relief it seeks for some period of time, perhaps forever, without the expense of trial. Future officials may not object to the substantive terms of the decree; and even if they do, they may be restrained from seeking to rescind it because of regulatory

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[39] See Rizzo v. Goode, 423 U.S. 362, 370-77 (1976).

[40] Compare Fed. Rule Crim. Proc. 11(f) (court may not approve plea bargain unless there is a factual basis for the guilty plea).

[41] See, for example, Percival, 1987 U. Chi. Legal F. at 341, 343-44 (cited in note 13).

[42] See text at note 59; Shane, 1987 U. Chi. Legal F. at 277 (cited in note 9); Percival, 1987 U. Chi. Legal F. at 338, 344. See also Brief for the Federal Respondent in Opposition to Petition for Writ of Certiorari at 14 n.18, Union Carbide Corp. v. Natural Resources Defense Council, 467 U.S. 1219 (1984) (denial of certiorari) (the *Citizens for a Better Environment* decree "is not typical of the methods usually chosen by the [EPA] to compromise litigation") (copy on file with the University of Chicago Legal Forum).

inertia, political pressure, or the desire to maintain good will with parties that have frequent contacts with the agency.[43] The worst scenario for the private party is that, at some point in the future, it will have to litigate the issues. This is not likely to be perceived as a bad deal.

The only settlements likely to be seriously inhibited are those in which present officials choose to bargain away their successors' constitutional authority rather than face the present consequences of litigation, including the possibility of losing. If these settlements are inhibited, it is all to the good.

Even if this constitutional rule did discourage some settlement agreements that are in the public interest, this would not be dispositive. In many contexts, agreements (some of which may be beneficial) are made void or voidable because of a potential for abuse. Plea bargains, for example, are a useful means of settling criminal litigation; but it does not follow that plea bargains should be enforced even if they have the potential for violating constitutional rights.[44] Similarly, I do not think that the potential encouragement of settlements in cases against the government could possibly justify actual infringement of the executive's constitutional discretion.

3. *Experience in Other Contexts.* Concerns that an inability to bind future executive discretion will inhibit the settlement process ring hollow when we examine two closely related areas: procurement contracts and plea bargains.

a. *Procurement Contracts.* Every procurement contract entered by the federal government contains a "termination for convenience" clause. This permits the contracting officer to terminate the contract at any time prior to completion, in whole or in part, if in his judgment the public convenience so demands.[45] The decision to terminate is within the executive's discretion; the government need not even supply a reason.[46] In the event of a termination, the contractor is entitled only to performance costs incurred prior to

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[43] This is apparently what happened in *Citizens for a Better Environment.* See Brief for Federal Respondent at 12-14 (cited in note 42).

[44] See Town of Newton v. Rumery, 107 S. Ct. 1187, 1192 (1987) (plea bargains containing promise by the accused not to sue officials under Section 1983 are unenforceable under some circumstances); Fed. Rule Crim. Proc. 11(f) (court may not approve plea unless it has a factual basis).

[45] See Federal Acquisition Regulations, 48 C.F.R. §§ 8.405-06 (1986); Dennis J. Riley, 2 Federal Contracts, Grants & Assistance 324-67 (1983).

[46] 18 Comp. Gen. 826, 828 (1939); 40 Op. Att'y Gen. 225, 231-32 (1942); 22 Op. Att'y Gen. 437, 441-42 (1899).

receipt of the termination notice (and to profits on those costs, if any) and to the costs of termination. The contractor is not entitled to the usual compensation for anticipated profits, nor to consequential damages.[47] As one commentator has noted, under these clauses "[t]he government's right to terminate a contract for its convenience exceeds the usual rights of a party to a private contract."[48]

Although termination clauses are now required by federal regulation, the government's power to rescind procurement contracts was first recognized by the Supreme Court in a case in which there was neither an express clause in the contract nor a statute or regulation authorizing it. The Court reasoned that "it would be of serious detriment to the public service if the power of the [contracting department] did not extend to providing for all such possible contingencies by modification or suspension of the contracts. . . ."[49] The decision might well have been bottomed, instead, on constitutional principles. By recognizing the executive's right to modify or terminate a contract, the Court ensured that the power of future Congresses to determine appropriations and of future executives to determine military and domestic needs would not be diminished by the prior contracts of predecessor executive officials. Protecting future discretion, in this context, has evidently not seriously inhibited private contractors from doing business with the federal government.

b. *Plea Bargains and Nonprosecution Agreements.* When a prosecutor strikes a plea bargain with a criminal defendant, future prosecutorial discretion is necessarily limited. In *Santobello v. New York*,[50] the Supreme Court held that when a guilty plea entered by a criminal defendant "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."[51] The reason for this is that a guilty plea constitutes the waiver of important constitutional rights. Such a waiver must be "voluntary and knowing;" if it was based on a false premise—such as a prosecutorial promise that is not executed—then the guilty plea itself is voidable.

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[47] Federal Acquisition Regulations, 48 C.F.R. § 49.202 (cited in note 45). See also Riley, 2 Federal Contracts, Grants & Assistance at 328, 341-43, 345-46 (cited in note 45). The only exceptions are for instances of government misconduct. Id. at 346.

[48] Id. at 325.

[49] United States v. Corliss Steam-Engine Co., 91 U.S. 321, 323 (1875).

[50] 404 U.S. 257 (1971).

[51] Id. at 262.

While future prosecutorial discretion is limited by the plea bargain, it does not follow that a criminal defendant can obtain specific performance of the bargain over the objections of the government.[52] Both the logic of the due process claim[53] and the precedents of the Supreme Court[54] make clear that the remedy for a prosecutor's breach is to permit the defendant to withdraw his plea. While due process demands that the defendant be made no worse off because of the abortive bargain, he need not be given the benefit of his bargain.

The nonprosecution agreement is more complicated,[55] and the law regarding enforcement of such agreements is unsettled. By statute, the prosecutor is authorized to promise only use and derivative use immunity for testimony, not full transactional immunity, and then only with court approval.[56] Informally, however, prosecutors sometimes promise full indemnity from prosecution if a potential defendant cooperates with an investigation. If these promises were specifically enforceable, they would be executive decisions that bind future executive discretion. In fact, the lower courts were split on the enforceability of these agreements in much the same way they are split on consent decrees. Some courts would enforce the agreements. Others held that due process demands no more than that accused's testimony not be held against him.[57] The analysis here supports the latter decisions. The argument is now academic, since the Supreme Court has held that statutory immunity

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[52] In many instances, the government will prefer specific performance as the remedy for an inadvertent breach, because conducting a trial is no longer possible. See Santobello, 404 U.S. at 263 (question is "whether the circumstances of this case require only that there be specific performance of the agreement"); United States v. Brown, 500 F.2d 375, 378 (4th Cir. 1974) (describing specific performance as "the lesser relief" when compared with withdrawal of the plea); United States v. Garcia, 698 F.2d 31, 37 (1st Cir. 1983) (defendant requested withdrawal of plea as remedy for government's breach of plea bargain; government requested equivalent of specific performance).

[53] If the constitutional concern is the defective waiver of constitutional rights (to jury trial, to confront one's accusers, to present witnesses, to remain silent, and to be convicted by proof beyond all reasonable doubt), then the proper remedy is to have those rights restored.

[54] Mabry v. Johnson, 467 U.S. 504, 510 n.11 (1984).

[55] The difference between a nonprosecution agreement and a plea bargain is that no guilty plea is entered in the former; the prosecutor promises not to prosecute in exchange for cooperation (usually testimony) by the criminal suspect. Professor Shane cites nonprosecution agreements as his foremost concrete example of executive promises that bind future executive discretion. Shane, 1987 U. Chi. Legal F. at 256-58 (cited in note 9).

[56] 18 U.S.C. § 6002 (1982). See also Kastigar v. United States, 406 U.S. 441, 453 (1962).

[57] See Wayne R. LaFave and Jerold H. Israel, 1 Criminal Procedure § 8.11(d), at 691-92 (1984). It is difficult to see, after *Santobello* and *Mabry*, why nonprosecution agreements should be more susceptible to specific performance than plea bargains.

is the exclusive means by which prosecutors can promise immunity.[58]

Thus, in other significant contexts, private parties find it in their interest to strike bargains with the government, even though they are not assured of specific performance if successor officials later determine that the bargain is not in the public interest. As long as they receive compensation for their actual (and not anticipatory) property losses and are restored to their pre-bargain legal rights, their position is enhanced by agreements with the government on these terms. If procurement contracts can be entered and plea bargains made without sacrificing future executive discretion, there is no reason consent decrees cannot meet the same standard.

II. Examples of Unlawful Decrees

Since these constitutional principles follow from the very logic of consent decrees, one might wonder whether any actual consent decrees could have violated them. Informed observers state that consent decrees of this sort have been rare.[59] But two recent decrees, both upheld by federal courts and defended by Professor Shane, plainly fall into the unconstitutional category, as do a surprising number of other decrees entered by state officials. Other federal consent decrees would apparently present the same problems were they enforced by their terms in the courts. And if the device is legitimated, they may cease to be so rare. Consent decrees could become the philosopher's stone of administrative law, transmuting ephemeral power into irrevocable policy. The following examples are presented to indicate the breadth and seriousness of the problem.

A. *United States v. Chicago Board of Education*

In *United States v. Chicago Board of Education*,[60] the Carter Justice Department sued the Board of Education for unlawful segregation of the public schools. The parties ended the litigatin by consent decree. The Board agreed to desegregate; the federal government agreed to use its "best efforts" to find "available" funds to facilitate the desegregation plan. This latter provision was interpreted by the district court as committing future Presidents to support legislative measures to provide significant amounts of fed-

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[58] United States v. Doe, 465 U.S. 605, 616-17 (1984).

[59] See sources cited in note 42.

[60] See note 7 for citations of complete case history.

eral financial aid to the Chicago school system. Thus, when President Reagan proposed nationwide changes in federal education policy, including a reduction in federal aid, an increase in local flexibility in using aid, and the elimination of the federal Department of Education, the district court held that the United States had violated the consent decree, in bad faith.[61]

Under the standards set out above, this decree, as interpreted, should have been held unlawful and unenforceable. First, it contained relief that no court would have had authority to order in the underlying lawsuit. Since the entire basis of the lawsuit was that the Chicago Board of Education had segregated its schools in violation of the Civil Rights Act and the Equal Protection Clause—which the United States was suing to enforce—the court had no authority to order any relief whatsoever against the United States. The United States had no legal obligation to the Board. Second, outside the context of the consent decree, officials of the Carter Administration had no authority to limit future Presidents' recommendations to Congress concerning levels of spending for education. The voters have the right, as a matter of fundamental democratic principle, to elect Presidents who might wish to change the level of spending for education. It is illegitimate for one Administration to sign an agreement with an outside party that attempts to prevent the voters' decision from having practical effect.

B. *Citizens for a Better Environment*

In *Citizens for a Better Environment v. Gorsuch*,[62] the Ford Justice Department entered a consent decree promising that future Administrators of the Environmental Protection Agency would target twenty-one named industries for investigation. This consent decree, like that in *Chicago Board of Education*, violated the principles set forth above. First, although the Administrator was the defendant in the underlying lawsuit, the parties conceded that the court would have had no authority, absent agreement by the government lawyers, to impose this form of relief. The statute vested discretion to choose the targets for investigation in the Administrator,[63] and there was not the slightest suggestion in the legislation that these twenty-one industries had to be among them.[64]

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[61] 567 F. Supp. 272 (N.D. Ill. 1983), aff'd in part, vacated in part, 717 F.2d 378 (7th Cir. 1983); 588 F. Supp. 132, vacated and remanded, 744 F.2d 1300 (7th Cir. 1984).

[62] 718 F.2d 1117 (D.C. Cir. 1983).

[63] See Shane, 1987 U. Chi. Legal F. at 246-48, 262 (cited in note 9).

[64] Robert Percival defends the decree on the ground that the Environmental Protection

Second, outside the context of a consent decree, one Administrator would have no authority to limit his successors' investigatory discretion. Presumably, an Administrator could promulgate a regulation targeting the twenty-one industries for investigation; but future Administrators would have just as much authority to revoke regulations as past Administrators had to impose them.[65] Since the court had no power to order it, and the Administrator had no power to agree to it, this consent decree should not have been given binding legal effect.

C. Other Possible Violations

While *Chicago Board of Education* and *Citizens for a Better Environment* are the clearest cases, other consent decrees or settlements entered by the federal government have potentially violated the principles set forth above.[66] In *National Audobon Society, Inc. v. Watt*,[67] for example, the Carter Justice Department entered into a stipulation and agreement that the executive branch would not move ahead with a public dam project authorized by Congress, and that it would submit legislative proposals to Congress modifying the project's scope. Five years later, under a new Administration, the executive wished to proceed with the project. The settlement seemed to violate constitutional principles, since both the promise to submit legislation and the promise to postpone construction

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Agency ("EPA") had been in violation of time limits for the promulgation of standards. Percival, 1987 U. Chi. Legal F. at 338-40 (cited in note 13). While this statutory violation presumably could be the basis for a remedy, however, it could provide no justification for this sort of remedy. In effect, Mr. Percival's group, the Environmental Defense Fund ("EDF"), bargained with EPA to allow the agency to violate the unrealistic time limits set by Congress, in exchange for giving the EDF a degree of control over the agency's substantive policy. This sort of bargain bears no resemblance to the statutory scheme, and has the alarming feature of effectively delegating governmental authority to a private interest group. Compare Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

[65] Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 463 U.S. 29, 41 (1983) (same substantive standard of judicial review applies to revocation of rules as to their initial promulgation).

[66] The decree in Ferrell v. Pierce, 743 F.2d 454 (7th Cir. 1984), is sometimes cited as going beyond constitutional limits. See Shane, 1987 U. Chi. Legal F. at 251-53 (cited in note 9). In *Ferrell*, Department of Housing and Urban Development ("HUD") officials signed a decree agreeing to certain procedures for implementation of a mortgage relief program, and limiting the discretion of their successors to modify the procedures for five years. Whether this decree was lawful depends on whether any alternative procedures HUD might have wished to adopt would satisfy the strict statutory requirements. This issue was not resolved in *Ferrell* because soon after the decree was entered Congress amended the underlying statute. The dispositive issue in *Ferrell* was Congress's intent in passing the subsequent amendments. See Ferrell, 743 F.2d at 467-71 (Coffey, J., dissenting).

[67] 678 F.2d 299 (D.C. Cir. 1982).

went beyond what a court could have ordered,[68] and purported to limit the constitutionally-vested discretion of future executives. The court of appeals avoided these "extremely interesting, . . . novel, and far-reaching" constitutional issues by construing the decree as containing an implied time limit, which had already passed.[69]

Similarly, in *Alliance to End Repression v. City of Chicago*,[70] the FBI settled a lawsuit charging First Amendment violations by a consent decree which, according to one reasonable interpretation,[71] went "further than the First Amendment" in restricting the FBI's investigatory powers.[72] Eighteen months later, the Attorney General issued new guidelines for FBI investigations, and the private parties to the decree sought to enjoin those guidelines. Observing that "naturally a court will hesitate to assume that by signing a consent decree the government knowingly bartered away important public interests merely to avoid the expense of a trial,"[73] and that the broader interpretation of the decree "maybe even violat[ed] the President's constitutional obligation to 'take Care that the Laws be faithfully executed,' "[74] the court of appeals construed the decree narrowly to preserve the FBI's investigatory discretion within only the substantive limits imposed by the Constitution.

In *Women's Equity Action League v. Bell*,[75] federal officials charged with the responsibility of enforcing various civil rights laws challenged the constitutionality of an earlier consent decree which, they contended, "violate[d] fundamental principles of separation of powers" by "usurp[ing]" the discretion of the executive branch in a number of ways. The decree, among other things, committed the government to a particular strategy for civil rights enforcement, which was not specified by statute, and subjected budget decisions to supervision by plaintiffs' lawyers and the court.[76] While expressing no opinion on "the legality of the consent

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[68] In the meantime, the executive branch had completed all necessary environmental analyses, and no further legal obstacles to construction (other than the stipulation) existed. Id. at 303.

[69] Id. at 305 n.12, 310-11.

[70] 742 F.2d 1007 (7th Cir. 1984) (en banc).

[71] The court of appeals expressly noted that the words of the decree "will bear" this interpretation. Id. at 1011.

[72] Id. at 1016.

[73] Id. at 1013.

[74] Id. at 1014.

[75] 743 F.2d 42, 43 (D.C. Cir. 1984) (per curiam).

[76] An account of the separation of powers issues in the case is found in Jeremy Rabkin, Captive of the Court: A Federal Agency in Receivership, Regulation 16 (May/June 1984).

decree," the court of appeals remanded the case to the district court to determine whether there existed a justiciable case or controversy.[77]

In an interesting case at the local level, *White v. Roughton*,[78] township officials settled a constitutional challenge to the procedures used in administering a local welfare program by entering a decree that promised, on its face, that the township would maintain its substantive welfare standards "from this day forward."[79] Four years later, the township board of trustees repealed the welfare program. The plaintiffs sought to hold the township and its officials in contempt of the decree. Under the principles outlined above, this aspect of the decree was unenforceable, since the court would have had no authority in a procedural due process case to order indefinite continuance of a substantive program, and because government officials apparently have no authority under state law to make such a promise. Without reaching the constitutional issue, the court dismissed the action. Stating that "we doubt the township was so inept a bargainer that it gave the plaintiffs not only all the procedures they wanted but also substantive entitlements to which they had no possible claim," the court construed the decree as governing only procedures.[80]

In each of these cases, officials had entered consent decrees that appear to be unconstitutional under the analysis presented here. In each, the court of appeals avoided the constitutional question, either by construing the decree narrowly or by resorting to justiciability doctrines. While this approach may well be the most prudent for the courts, the cases do not inspire confidence that government officials—unassisted by later reviewing courts—will refrain from bargaining away the constitutional discretion of their successors when short-term considerations seem to demand it.

D. A Variation on the Theme: Consent Decrees that Sidestep Political Constraints

Consent decrees do not only purport to bind the future; sometimes they unbind the present from political restraints from coordinate branches of government or the people. In *Dunn v. Carey*,[81]

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[77] Women's Equity, 743 F.2d at 44.

[78] 689 F.2d 118 (7th Cir. 1982).

[79] Id. at 119. The court of appeals conceded that the language of the decree was "unambiguous." Id. at 120.

[80] Id. at 121.

[81] 808 F.2d 555 (7th Cir. 1986).

for example, state law limited the power of local officials to construct new public buildings. A group of plaintiffs—detainees at a county jail—sued county officials for providing allegedly inadequate jail facilities. The officials signed a consent decree, by which they agreed to construct a new jail, police and city hall complex, to be financed through new taxes. While not "imply[ing] that this particular decree was a conscious evasion or that the litigation became collusive," the court of appeals speculated that the county officials had been "frustrated by their inability to win political approval for the construction of a new city hall."[82] Since the district court obviously did not have authority to order construction of a new city hall or police headquarters and since the county officials lacked authority to authorize these buildings, the consent decree was unconstitutional and unenforceable under the standards presented here.

Another troublesome example is compromise by the executive of constitutional challenges to legislative enactments. This can have the effect of thwarting legislative will, usurping judicial responsibility, and binding future executive discretion, all in one consent decree. As one court has noted, for a government lawyer to agree to a consent judgment holding a state law unconstitutional confuses "the three branches of government." "An attorney general," the court stated, "can have no authority to be the binding determiner that legislation is unconstitutional."[83] While an attorney for the government may be able to exercise prosecutorial discretion and not enforce a statute he believes to be unconstitutional, he cannot impose this judgment on his successors. And while an attorney for the government may express his view to the court that a statute is unconstitutional and decline to defend it, the court remains responsible for reaching its own judgment on the legal issue.[84]

The consent decree device has even been used to alter the form of government without popular consent. In *Overton v. City of Austin*,[85] a Voting Rights Act suit, the city council signed a decree agreeing to change from an at-large to a single-member district election system. Under state law, however, such changes in the city

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[82] Id. at 560.

[83] National Revenue Corp. v. Violet, 807 F.2d 285, 288 (1st Cir. 1986).

[84] Id. See also INS v. Chadha, 462 U.S. 919, 939-40 (1983); Strauss v. United States, 516 F.2d 980, 982 (7th Cir. 1975); United States v. State of Texas, 680 F.2d 356, 370 (5th Cir. 1982).

[85] 748 F.2d 941 (5th Cir. 1984).

charter required a vote of the people. The district court accordingly refused to enter the decree as a judgment of the court in the absence of proof that the prior at-large system was in violation of the Act. The court of appeals affirmed, stating,

> The court here is not being asked merely to put its sanctions behind a substantive result that the parties would be empowered to achieve themselves, as in the case of the usual consent decree; rather, it is being asked to effectuate a substantive result which the parties wholly lack the jurisdictional power to bring about by themselves. . . . Absent a properly grounded judicial determination that the present charter provisions are illegal, the consent of the parties provides an insufficient basis on which to judicially ordain a different system of council election and composition.[86]

These examples demonstrate that the enforcement of consent decrees must be subjected to constitutional discipline. Consent decrees that block ordinary avenues of political change or that sidestep political constraints are neither so few nor so trivial as to justify reliance on the good judgment and self-restraint of government lawyers. Real issues of democratic accountability are at stake.

III. Defenses Offered for Discretion-Limiting Consent Decrees

Even defenders of discretion-limiting consent decrees are forced to concede that some executive powers are so central to the constitutional scheme that they must not be bargained away in the settlement of a lawsuit. It would be absurd, for example, to think that one President could make a legally binding promise that subsequent Presidents would veto particular legislation. Thus, Professor Shane acknowledges that "any purported promise, say, not to veto any environmental protection bill voted by Congress during the next five years could not have legal force."[87] He reaches the same conclusion with regard to the President's power to grant pardons.[88] Consent decrees making promises concerning the future exercise of the veto or pardon powers, he states, would be unenforceable because they would amount to a "disruption" of a "critical . . .

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[86] Id. at 956-57 (footnote omitted).

[87] Shane, 1987 U. Chi. Legal F. at 255 (cited in note 9).

[88] Id. at 256.

aspect of the framers' design."[89]

Applying this logic to all the powers of the executive would, however, lead to the conclusion I have urged here—and to invalidation of the very consent decrees Professor Shane has set out to defend. Defenders of these decrees find it necessary, therefore, to establish a hierarchy of executive powers, with some of them "critical to the framers' design" and others less so. Non-"critical" executive powers could be circumscribed by consent decree even though "critical" executive powers, like the veto and pardon powers, could not.

Professor Shane thus distinguishes between two categories of discretion-limiting consent decrees: those that limit future "constitutionally-vested" presidential discretion and those that limit merely "statutorily-vested" discretion. The former category is generally unenforceable in the absence of an "overriding public interest," at least if it has the potential to disrupt the executive branch's performance of its assigned constitutional duties. The latter category is generally enforceable, unless it is in "contravention of statute" or it cannot "reasonably be regarded as within Congress's authorization" (apparently generously understood).[90]

It is easy to understand the reluctance to make a stark choice: discretion-limiting consent decrees, as defined above, are enforceable, or they are not.[91] But the precarious middle ground position nevertheless undermines a central tenet of democracy: the people, and their elected officials, must be allowed to change their minds. Even in the more-protected area of "constitutional" discretion, the application of the standard is weak; in the area of "statutory" discretion there is no real protection at all.

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[89] Id. at 258.

[90] Id. at 265.

[91] Professor Shane's position on consent decrees is of a piece with his overall preference for ad hoc "balancing" over rule-governed adjudication in separation of powers cases. See id. at 256-59, 268-70, 278 n.136, 286-87. He ascribes this jurisprudential approach to recent Supreme Court decisions, which take a functional, rather than a categorical view of the separation of powers. Id. at 278. This does not, however, paint an accurate picture of modern Supreme Court separation of powers cases. Except where Richard Nixon was a party (and of course such cases are subject to a different constitutional standard altogether), separation of powers cases have taken a decided turn toward what its critics decry as "formalism" and I prefer to view as a natural reading of the text and structure of the Constitution. See Bowsher v. Synar, 106 S. Ct. 3181 (1986); INS v. Chadha, 462 U.S. 919 (1983); Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Buckley v. Valeo, 424 U.S. 1 (1976).

A. "Constitutionally Vested" Discretion

Not all consent decrees that invade "constitutionally vested" executive discretion are unlawful, according to Professor Shane's schema. His example of constitutionally-vested discretion that can be bargained away is the President's power to recommend legislation to Congress—the power implicated in *Chicago Board of Education*. He finds "persuasive" the argument that President Carter's lawyers could make a judicially enforceable promise that President Reagan would not recommend cuts in future budgets for elementary and secondary education. "[T]he interference with executive responsibilities is limited," Professor Shane says, and, after all, the consent decree avoided "the extraordinary effort and expense of a trial."[92]

The problem with this approach is that it provides no coherent basis for determining which presidential powers may be bargained away and which cannot. Under what theory could the President's power to veto be inviolable, while his power to recommend legislation is not? The Constitution expressly vests the power to recommend legislation to Congress in the President, as a matter of his personal discretion: the President "shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient."[93] It cannot be denied that the *Chicago* consent decree, as interpreted, interfered with this constitutional responsibility. President Reagan considered his education "Measures" "necessary and expedient"; yet the consent decree forbade him to recommend them to Congress.

The President's power to promote a legislative program is not an insignificant power. It lies at the heart of the President's function as chief executive; it is one of the principal reasons why voters select one candidate over another. As Hamilton wrote to Washington, it is "of the utmost importance" that the President "should trace out in his own mind such a plan as he thinks it would be eligible to pursue and should endeavor by proper and constitutional means to give the deliberations of Congress a direction towards that plan."[94] To allow a President's predecessors to limit his political discretion in this way does every bit as much violence to the "framers' design" as a promise to pardon perpetrators of particular offenses—probably more.

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[92] Shane, 1987 U. Chi. Legal F. at 260 (cited in note 9).

[93] U.S. Const. art. II, § 3, cl. 1.

[94] Harold C. Syrett, ed., 16 The Papers of Alexander Hamilton 277 (letter to George Washington, Apr. 14, 1794).

There is no calculus for determining which of the President's constitutional powers are more important than the others. But even if there were, this would not explain how those "less important" powers could be stripped away short of constitutional amendment. Neither the acts of presidential predecessors nor laws passed by Congress are of greater dignity than the Constitution itself. The defenders of consent decrees limiting constitutional discretion have yet to explain what higher authority permits consent decrees to take from the President discretion vested in him by the Constitution.

B. "Statutorily Vested" Discretion

Under Professor Shane's schema, discretion vested in the President by statute receives even less protection. Indeed, it can be overridden by any consent decree "reasonably in the interests of the United States."[95] Professor Shane cites *Citizens for a Better Environment* as an example of a consent decree that legitimately impinges on the President's "statutorily vested" discretion. Professor Shane sees no reason not to enforce, in 1983, a promise made in 1976 by President Ford's lawyers that future Administrators would deploy their investigative resources in a particular way. This was a fairly minimal intrusion into the ordinary discretion of the EPA, Professor Shane assures us,[96] even though, as he explains,[97] the selection of targets for investigation is an ordinary part of law enforcement discretion and there was not the slightest suggestion that the underlying statute curtailed it.[98]

This approach provides essentially no protection for "statutorily vested" discretion. It will virtually always be possible, except when the terms of the decree violate independent legal requirements, to find some basis for arguing that the decree reflects a "reasonable" enforcement strategy and is in the public interest. Whether executive discretion is to receive protection thus depends entirely on whether the discretion is classified as "constitutionally vested" or "statutorily vested."

Most troubling about this approach, therefore, is its failure to recognize that the President's discretion to supervise the enforce-

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[95] Shane, 1987 U. Chi. Legal F. at 265 (cited in note 9).

[96] Id. at 262.

[97] Id. at 246-48.

[98] Compare Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227-28 (1980) (courts may not limit choices within the range of executive discretion); Federal Comm'n v. Broadcasting Co., 309 U.S. 134 (1940) (same).

ment of statutes passed by Congress is constitutionally *as well as* statutorily based. Professor Shane states that "the executive's entire decision-making authority" in cases of domestic social and economic regulation "comes from Congress."[99] It does not. Congress determines the content of the law, and determines which subordinate officials shall enforce it; but the Constitution vests responsibility for overseeing their performance in the President alone. Article II, Section 3 provides that the President "shall take Care that the Laws be faithfully executed."[100] This he cannot do if his predecessors have made judicially enforceable promises that he will not change their enforcement strategies without the agreement of a private interest group. The "take Care" responsibility is a vital aspect of the "framers' design." It may not be bartered away by former officials, transferred to courts, or delegated to private parties.

In one important respect, interference with the "take Care" responsibility is a more complicated matter than is interference with other constitutional powers of the President. The precise scope of the President's "take Care" power in any given circumstance is determined by the "laws" he is entrusted with executing. The content of those laws, in turn, is set by Congress. Thus, if Congress passes legislation changing the law, the nature and scope of the "take Care" authority is modified. This makes it difficult, in the abstract, to rule out the possibility that Congress could delegate legislative-type authority to an executive in such a way as to enable a predecessor's decisions to affect the scope of his successor's "take Care" authority.[101] None of the cases, and nothing in Professor Shane's article, suggests any actual instance that raises this problem. Outside this hypothetical possibility, consent decrees that invade the President's "take Care" responsibility should be

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[99] Shane, 1987 U. Chi. Legal F. at 261 (cited in note 9).

[100] This is not the occasion to explore whether Congress could vest this discretion in an "independent" agency. I agree with my colleagues Geoffrey Miller and David Currie that it could not. See Geoffrey P. Miller, Independent Agencies, 1986 Sup. Ct. Rev. 41; David P. Currie, The Distribution of Powers After *Bowsher*, 1986 Sup. Ct. Rev. 19, 34-36. But whether or not this position is correct, the Constitution does not contemplate that executive discretion be vested in the dead hand of past government lawyers, subject to modifications approved by particular private interest groups.

[101] For example, Congress might enact a new regulatory statute under which the executive issues regulations with the force and effect of law. Arguably it might be constitutional, at least with sufficient justification, for Congress to provide that once the initial regulations were promulgated they would remain in force for the next ten years. If so, then the successor President's discretion to interpret the new statute could be limited by the preceding administration's regulations.

treated under the same standard as all others.

V. An Analogy to Impairment of Contracts

Professor Shane's attempts to distinguish among various forms of consent decrees that interfere with executive discretion is reminiscent of a long period of constitutional jurisprudence under the Contracts Clause of Article I, Section 10, which forbids the states from passing any laws "impairing the obligation of contracts." Well over 200 times the Supreme Court has wrestled with how to enforce state contracts without interfering with the State's sovereign prerogative to change its policies. Of all the lines of constitutional doctrine, this provides the closest parallel to the consent decree problem.

The variations on the theme are infinite, but the essentials of the scenario are the same. A State contracts with a private party. If the private party will do something beneficial to the State (build a bridge, open a factory), then the State will make certain concessions (exemption from tax, guarantee against regulation). Years later, the State no longer wishes to comply with its side of the bargain. It wishes to impose the tax, or enforce the regulation. Absent the contract, the State would have the sovereign authority to change its tax laws and its regulatory programs. Which will prevail: the private party's contract right, or the State's sovereign power?

As an original matter, one might be tempted to say that the Contracts Clause has no bearing on the matter. There are strong indications in the history that the Clause was intended to apply only to private contracts, not to contracts entered by the government.[102] Notwithstanding this history, the Contracts Clause has

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[102] The original proposal, by Rufus King, was in the language of the Northwest Ordinance: "no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, bona fide and without fraud previously formed." 32 Journal of the Continental Congress 340 (1936) (Northwest Ordinance); Max Farrand, ed., 2 The Records of the Federal Convention of 1787 at 439-440 (1911) (King proposal). Debate in the Convention centered entirely on whether this proposal "would be going too far." Id. (Gov. Morris). There is no reason to infer that the later deletion of the word "private" was intended to bring government contracts within its ambit. A leading South Carolina delegate to the Convention explained to his state convention that the Clause would prevent states from "interfering in private contracts." Jonathan Elliot, ed., 4 Debates in the Several State Conventions on the Adoption of the Federal Constitution 334 (1888) (Charles Pinckney) ("Debates"). The only unequivocal statements that the Clause applied to public contracts were made by opponents of the Constitution who used this expansive interpretation of the Clause as an argument against ratification. 4 Debates at 190 (James Galloway); 3 Debates at 474 (Patrick Henry). One of them, Patrick Henry, appeared to be answering an unrecorded assertion to the contrary by James Madison, and both were immediately contradicted by participants in the Convention. 4 De-

long been held to encompass contracts between state governments and private parties.[103] Not surprisingly, many of the cases involving government contracts turn out to display the same clash, already seen with regard to consent decrees, between today's power to enter agreements and tomorrow's power to change policy. While this is not the occasion for an extended account of how the Supreme Court has dealt with the Contracts Clause,[104] a brief summary may serve as a useful corrective to the current ad hoc approach to the constitutional law of government consent decrees.

In 1810, when the Court first addressed the question, it took the position that a contract is inviolable, whatever may be the consequences for the sovereign power of the state.[105] This position may be compared to the view today that consent decrees are binding, no matter how severe may be their interference with executive discretion.[106]

During the ensuing decades, the Court tempered this approach, without abandoning its doctrinal position, by employing the rule that a State's contract must be strictly construed in favor of the State.[107] It thus avoided most egregious impositions on governmental authority by holding that the State could not have intended to bargain its sovereign authority away. This position is comparable to the Seventh Circuit's decision in *Alliance to End Repression*.[108] There, confronted with a consent decree that appeared to bargain away the FBI's investigatory discretion, the court held that that could not have been the government's intention when it signed the decree.

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bates at 191 (W.R. Davie); 3 Debates at 478 (Gov. Randolph).

Elsewhere, I have shown how this reading of the Contracts Clause comports with the structure of protection of economic rights in the Constitution. See Michael W. McConnell, Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure, 76 Calif. L. Rev ___ (1988). See also Benjamin Fletcher Wright, The Contract Clause of the Constitution 3-16 (1938); Edward S. Corwin, John Marshall and the Constitution 167-68 (1919). But see Richard A. Epstein, Toward a Revitalization of the Contract Clause, 51 U. Chi. L. Rev. 703, 718-21 (1984).

[103] Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). See also United States Trust Co. v. New Jersey, 431 U.S. 1 (1976).

[104] The classic accounts are Wright, The Contract Clause of the Constitution (cited in note 102) and Robert L. Hale, The Supreme Court and the Contract Clause, 57 Harv. L. Rev. 512 (1944). For a recent, if optimistic, explication of the Clause, see Epstein, Toward a Revitalization of the Contracts Clause, 51 U. Chi. L. Rev. 703 (cited in note 102).

[105] See Fletcher v. Peck, 10 U.S. 87 (1810).

[106] This appears to be close to the position taken in Percival, 1987 U. Chi. Legal F. 327 (cited in note 13).

[107] See Charles River Bridge v. Warren Bridge et al., 36 U.S. 420 (1837); Fanning v. Gregoire et al., 57 U.S. 524 (1853); Water Co. v. Knoxville, 200 U.S. 22 (1906).

[108] See text at note 70.

Beginning in 1848, and increasingly often as the 19th Century proceeded, the Court began to make exceptions to its obligation of contract doctrine. First, the Court held that a State could not sign a contract bargaining away its sovereign power of eminent domain.[109] Later, other powers of the states were deemed to be so vital that they could not be alienated by contract: they included the protection of public health;[110] the promotion of safety;[111] the preservation of public morals;[112] and regulation of the use of the streets,[113] and rivers.[114] This position I find quite close to that put forward by Professor Shane. It allows some contracts that invade governmental discretion to be enforced, and disallows others, relying on an apparently ad hoc, common-sense understanding of which governmental powers are important, and which are not.

The history of the impairment of contracts clause in this period is not encouraging for the ad hoc approach. There turns out to be no satisfactory basis for determining which state powers are fundamental, and which are not, or for determining how much interference with sovereign power can be tolerated.[115] By the end of this period, prior contracts were no longer held to be a serious constraint on the power of a state government to change its mind about the exercise of its sovereign powers. As the Supreme Court stated in *Chicago & Alton R. R. v. Tranbarger*,[116]

> It is established by repeated decisions of this court that [the impairment of contracts clause does not] have the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away.

The only exception has been the rare case when a State has in effect taken property by its refusal to comply with the bargain.[117]

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[109] The West River Bridge Company v. Dix et al., 47 U.S. 507 (1848).

[110] Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884).

[111] Pierce Oil Corp. v. City of Hope, 248 U.S. 498 (1919).

[112] Douglas v. Kentucky, 168 U.S. 488 (1897).

[113] Atlantic Coast Line v. Goldsboro, 232 U.S. 548 (1914).

[114] Hudson Water Co. v. McCarter, 209 U.S. 349 (1908).

[115] Compare Baltimore v. Baltimore Trust Company, 166 U.S. 673 (1897), with Grand Trunk West'n Ry. v. South Bend, 227 U.S. 544 (1913). For an equivalent modern problem, see Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (attempts to distinguish "traditional state functions" from others are "unworkable").

[116] 238 U.S. 67, 76-77 (1915).

[117] See United States Trust Co. v. New Jersey, 431 U.S. 1 (1976). In these cases it would be preferable to restore the contracting parties to the position they would have been

We can spare ourselves a repetition of this analytical confusion by recognizing what the Court in 1810 did not see: allowing agreements with private parties to block democratic change is inconsistent with the structure of our political system; and attempting to draw lines based on what may appear to us to be "minimal," "limited," or "substantial" interference with the democratic process is hopelessly ad hoc and subjective. Consent decrees are, for relevant purposes, like contracts. The same logic that drove the obligation of contracts cases will inevitably drive the consent decree cases as well.

CONCLUSION

The democratic structure of government requires that policies set through an exercise of discretion must be subject to political change by the same means. Recent cases have created the possibility, however, that policies adopted by the executive branch can be insulated from change at the hands of future executive officers by incorporating them in the terms of a consent decree with a private party. It is necessary, therefore, to distinguish between consent decrees as a legitimate tool of compromise and settlement, and consent decrees as an instrument for precluding democratic change. I have proposed a simple rule. To be enforceable, a consent decree must either (1) be justifiable as a judicial remedy in the case; or (2) be within the authority of the government signatory, wholly apart from the decree. Adherence to this standard will not inhibit good faith settlements of litigation against the government, but will preserve the constitutional discretion of the elected President.

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in absent the contract, probably with monetary compensation measured in much the way compensation for terminations for convenience of procurement contracts is measured. See text at notes 45-49.

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Destabilization Rights: How Public Law Litigation Succeeds

Charles F. Sabel
Columbia Law School, csabel@law.columbia.edu

William H. Simon
Columbia Law School, wsimon@law.columbia.edu

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DESTABILIZATION RIGHTS: HOW PUBLIC LAW LITIGATION SUCCEEDS

*Charles F. Sabel and William H. Simon**

"Public law litigation" — civil rights advocacy seeking to restructure public agencies — has changed course over the last three decades. It has moved away from remedial intervention modeled on command-and-control bureaucracy toward a kind of intervention that can be called "experimentalist." Instead of top-down, fixed-rule regimes, the experimentalist approach emphasizes ongoing stakeholder negotiation, continuously revised performance measures, and transparency. Experimentalism is evident in all the principal areas of public law intervention — schools, mental health institutions, prisons, police, and public housing. This development has been substantially unanticipated and unnoticed by both advocates and critics of public law litigation. In this Article, we describe the emergence of the experimentalist model and argue that it moots many common criticisms of public law litigation. We further suggest that it implies answers to some prominent doctrinal issues, including the limits on judicial discretion in enforcing public law rights and the constraints entailed by separation-of-powers norms. Our interpretation understands public law cases as core instances of "destabilization rights" — rights to disentrench an institution that has systematically failed to meet its obligations and remained immune to traditional forces of political correction. It suggests reasons why judicial recognition and enforcement of such rights might be both effective in inducing better compliance with legal obligations and consistent with our structure of government.

I. INTRODUCTION

Scorned when not forgotten, yet transformed by its travails, public law litigation is becoming — again — an influential and promising instrument of democratic accountability.

In 1976 Abram Chayes argued that efforts to apply rule-of-law principles to the institutions of the modern welfare state had produced a new kind of litigation.[1] The "traditional" lawsuit involved two private parties and focused on allegations of a discrete past wrong implying a particular remedy, most often a one-time money payment from the defendant to the plaintiff. Chayes showed that an important category of civil rights litigation departed radically from this model. These

* Maurice T. Moore Professor of Law and Arthur Levitt Professor of Law, respectively, Columbia University. We are grateful for various kinds of help to the Hewlett Foundation; to participants in workshops at Columbia, Pennsylvania, Stanford, and Yale; and to Jim Liebman, Mike Dorf, Brad Karkkainen, Archon Fung, Dara O'Rourke, Margo Schlanger, Michael Rebell, Gillian Metzger, Judith Resnik, Mark Tushnet, Susan Sturm, John Boston, Jonathan Chasin, and the practitioners cited in the notes who spoke to us about their work. Our largest debt is to Laura Faer for insightful discussion and prodigious research assistance.

[1] *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284, 1288–89 (1976).

"public law" cases involved amorphous, sprawling party structures; allegations broadly implicating the operations of large public institutions such as school systems, prisons, mental health facilities, police departments, and public housing authorities; and remedies requiring long-term restructuring and monitoring of these institutions.

Chayes argued that the new litigation enriched the institutional repertory of our democracy. In his view, the independence, flexibility, and accessibility of the courts equipped them for the task of holding chronically underperforming institutions accountable to governing legal standards. Public law courts were less susceptible to capture by selfish interests and better able to induce fruitful discussion among the relevant parties than the administrative agencies that might otherwise have oversight responsibility.

Although Chayes's analytic description of public law litigation became canonical, his defense of it remained controversial. Early critics doubted that courts had the necessary information to supervise institutional restructuring effectively. Even if the courts were sufficiently informed, these critics argued, their power seemed too narrow and too shallow for the new task: Too narrow because the problems of public agencies were linked to myriad other institutions and social practices, while a court's power extended only to the parties before it. Too shallow because the operations of the agencies depended on the street-level conduct of subordinates far below the court's view, while a court's direct remedial authority operated mainly against senior officials (and even then, only with severe limitations).[2]

From the outset, the legitimacy of public law litigation was as suspect as its efficacy. For Chayes, such litigation would legitimate itself by solving public problems that other institutions of the administrative state could not. But many critics argued that even effective judicial intervention of this kind was often illegitimate. They emphasized, as Chayes had conceded, that these cases did not fit easily into traditional notions of the judicial role or the separation of powers. They doubted that conventional legal sources of authority and modes of analysis could be made to speak in any direct or determinate fashion to the task of devising remedies that restructured entire organizations. They argued that the courts could not undertake the restructuring of administrative agencies without trenching on the authority of the executive and legislative branches, and that federal courts could not superintend

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[2] *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 11 (1991); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 46 (1979); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265.

the restructuring of state and local agencies without compromising principles of federalism and local autonomy.[3]

The United States Supreme Court and other appellate tribunals also expressed disapproval in a range of decisions designed to rein in trial court discretion in public law actions.[4] Legislatures passed statutes — most notably, the federal Prison Litigation Reform Act of 1996 (PLRA)[5] — constraining the courts in these cases. Trial court judges who undertook structural relief in some high-profile cases threw up their hands in apparent exhaustion or despair, dissolving injunctions purportedly because all practicable vindication of the plaintiffs' rights had been achieved, even though little progress was detectable.[6]

Even the liberal defense of Chayes's model took on an anxious tone.[7] Proponents struggled uncomfortably with the jurisprudential phenomenon of rights that did not come with ready-made remedies. They worried about how to limit judicial discretion and preserve the prestige of the courts. There was also increasing worry about the accountability of the advocates to their generally poor and ill-educated clients — the putative right holders. [8]

Yet despite decades of criticism and restrictive doctrines, the lower courts continue to play a crucial role in a still-growing movement of institutional reform in the core areas of public law practice Chayes identified: schools, prisons, mental health, police, and housing. And while they have opposed some judicial interventions, legislatures have acquiesced in and even encouraged others.[9] There is no indication of a

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[3] *See, e.g.*, Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 950–51 (1978); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 664 (1978); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996).

[4] *See* cases cited *infra* note 11; *see also infra* pp. 1082–87.

[5] Pub. L. No. 104-34, 110 Stat. 1321 (codified as amended at 11 U.S.C. § 523(a) (2000); at 18 U.S.C. §§ 3624(a), 3626 (2000); and in scattered sections of 28 and 42 U.S.C.).

[6] *See, e.g.*, Morgan v. Nucci, 831 F.2d 313, 326 (1st Cir. 1987) (dissolving the Boston school desegregation decree); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 115 (1998) (reporting that in the course of the Santa Clara County Jail case, "several judges [were] . . . worn out by the litigation and withdr[ew] from the case").

[7] *See, e.g.*, William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 636 (1982); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 589, 674–79 (1983).

[8] *See* ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 139–82 (2003).

[9] Examples include the Civil Rights of Institutionalized Persons Act of 1980, Pub. L. No. 96-247, 94 Stat. 349 (codified as amended at 42 U.S.C. §§ 1997–1997j (2000)), which authorizes the Attorney General to bring suits to remedy "flagrant and egregious" conditions in prisons and mental health facilities; the 1990 amendments to federal housing legislation that authorize the Department of Housing and Urban Development to seek judicial receiverships against persistently "troubled" housing authorities, *see* 42 U.S.C. § 1437d(j) (2000); state legislation in Texas and elsewhere responding to judicial findings of unconstitutional school conditions, *see infra* pp. 1026–27;

reduction in the volume or importance of Chayesian judicial activity. The particular forms of this activity, however, have evolved. The remedies of recent years are different in important respects from those that Chayes and his critics focused on.

The evolution of structural remedies in recent decades can be usefully stylized as a shift away from *command-and-control* injunctive regulation toward *experimentalist* intervention. Command-and-control regulation is the stereotypical activity of bureaucracies. It takes the form of comprehensive regimes of fixed and specific rules set by a central authority. These rules prescribe the inputs and operating procedures of the institutions they regulate.

By contrast, experimentalist regulation combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability. In the most distinctive cases, the governing norms are general standards that express the *goals* the parties are expected to achieve — that is, outputs rather than inputs. Typically, the regime leaves the parties with a substantial range of discretion as to how to achieve these goals. At the same time, it specifies both standards and procedures for the measurement of the institution's performance. Performance is measured both in relation to parties' initial commitments and in relation to the performance of comparable institutions.

This process of disciplined comparison is designed to facilitate learning by directing attention to the practices of the most successful peer institutions. Both declarations of goals and performance norms are treated as provisional and subject to continuous revision with stakeholder participation. In effect, the remedy institutionalizes a process of ongoing learning and reconstruction. Experimentalist regulation is characteristic of the "networked" and "multilevel" governance proliferating in the United States and the European Union — decisionmaking processes that are neither hierarchical nor closed and that permit persons of different ranks, units, and even organizations to collaborate as circumstances demand.[10]

In cases that take the experimentalist approach, the courts are both more and less involved in reconstituting public institutions than they

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and state legislation in New Jersey and elsewhere responding to judicial findings of unconstitutional local land-use regulation, *see infra* pp. 1050–52.

[10] *See generally* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1 (2002).

In her study of private employment discrimination cases, Susan Sturm finds a shift in remedial practice from a top-down approach in "first generation" cases to an experimentalist one in "second generation" cases that parallels the course we find in public law litigation. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465–75 (2001).

were when Chayes wrote. They are more involved because experimentalist remedies contemplate a permanent process of ramifying, participatory self-revision rather than a one-time readjustment to fixed criteria. But the courts are less involved because the norms that define compliance at any one moment are the work not of the judiciary, but of the actors who live by them. At least in prospect, the demands on the managerial capacities of the court, and the risk to its political legitimacy, are smaller in this continuous collaborative process than in top-down reform under court direction.

To some extent, the experimentalist tendency has been responsive to constraints imposed by the Supreme Court.[11] Although key decisions of the Rehnquist Court sometimes seem unreflectively hostile to public law litigation, they are plausible in their demand that lower courts demonstrate stronger connections between the principles on which their determinations of liability are based and the specific means they impose as remedies. Yet beyond this general demand, the Court's guidance has been ambiguous and incoherent.[12] The experimentalist practice of the lower courts has gone far beyond anything suggested or anticipated in appellate doctrine.

In this Article, we offer an interpretation of the evolving approach to public law intervention as a species of what we call "destabilization rights."[13] Destabilization rights are claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability. The term focuses attention on a crucial common element of the claims in the various areas of public law litigation and on a dimension of the remedy that is critical to explaining the prospect of successful intervention. The effect of the court's initial intervention is to destabilize the parties' pre-litigation expectations through political, cognitive, and psychological effects that widen the possibilities of experimentalist collaboration. The regimes of standards and monitoring that commonly emerge from remedial negotiation allow this destabilization, and the learning it generates, to continue within narrower channels.

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[11] *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 362 (1996) (reversing a prison order as "inordinately — indeed, wildly — intrusive"); Bell v. Wolfish, 441 U.S. 520, 562 (1979) (disapproving orders that "enmeshed [lower courts] in the minutiae of prison operations"); Bounds v. Smith, 430 U.S. 817, 832 (1977) (stating that there are multiple acceptable means of correcting a violation and of encouraging "local experimentation"); *cf.* Ruiz v. Estelle, 679 F.2d 1115, 1148 (5th Cir. 1982) ("Directing state officials to achieve specific results should suffice; how they will achieve those results must be left to them unless and until it can be demonstrated judicial intervention is necessary.").

[12] *See infra* section IV.A.

[13] The term and the idea come from ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 530 (1987).

In Part II we survey the major areas of public law litigation to illustrate the trend away from command-and-control approaches toward experimentalist ones. In Part III we elaborate the idea of destabilization rights and argue, against Chayes, that it points to an important continuity between public law litigation and traditional common law adjudication. Part IV shows how the destabilization rights idea relates to a series of issues that have preoccupied appellate doctrine, including the relation between right and remedy, the separation of powers, respondeat superior, and the problem of interest representation. In each case, we argue that the move to experimentalism suggests a resolution.

Ultimately, our claims for the promise of the new approach remain as inconclusive as Chayes's. We end with the same cautious optimism he expressed in 1976, based, like his, on casual observation. We do, however, offer some ideas as to why the new approach might respond to the concerns that have dominated legal scholarship since he wrote. If our convictions are more firmly rooted than Chayes's, it is only because, in its recent development, public law has passed one critical test of a truly vital idea: it has managed to generate responses to questions that its proponents want to avoid and that its critics think unanswerable.[14]

II. THE PROTEAN PERSISTENCE OF PUBLIC LAW LITIGATION

Here we survey the five principal areas of structural litigation over public services — education, mental health, prisons, police, and housing. In each we find indication of a growing and promising shift from command-and-control to experimentalist intervention.

The command-and-control orientation has three characteristics: First, an effort to anticipate and express all the key directives needed to induce compliance in a single, comprehensive, and hard-to-change decree. Second, assessment of compliance in terms of the defendant's conformity to detailed prescriptions of conduct in the decree. These prescriptions tend to be process norms that dictate conduct as a means

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[14] In his last work on international public law, Chayes described a trend in that field toward arrangements of the sort we call experimentalist. *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 25–26 (1995). The book argues that sovereignty in the international realm has come to mean less the power to command from above and more the power to engage others in discussion of what needs to be done. It describes numerous international regimes of collaborative standard-setting, monitoring, and continuous revision based in part on comparisons with the experiences of others. Our project can thus be seen as revising Chayes's early efforts to understand linked changes in the judiciary and the administrative state in light of his later intuition about a more encompassing transformation of the character of democratic sovereignty. *See* Harold Hongju Koh, Book Review, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2638–39 (1997) (discussing the relation of Chayes's work on public law litigation to his work on international law).

to the attainment of goals, rather than performance norms that directly mandate and measure goal achievement. And third, a strong directive role for the court or a special master in the formulation of the remedial norms.

There has been a fairly clear and deliberate move away from the first two characteristics. History with respect to the third — judicial direction — is more ambiguous. Courts have encouraged negotiated remedies from the beginning. But judges and special masters appear to have been more directive in the past.[15]

The change has not been strictly linear. Doubts about command-and-control appeared early, and some contemporary remedies continue to have a command-and-control quality. But the general direction and nature of the trend seems clear.

A. Schools[16]

There have been three successive waves of public law litigation concerning schools.[17] The first consisted of federal desegregation suits. The second involved challenges in the state courts to the equity of school finance systems. The third continues efforts in the state courts but shifts the normative focus from "equity" to "adequacy." The shift from top-down, rule-based remedies to decentralized, standards-based intervention is an important theme of this evolution.

The best-known body of public law litigation is the Herculean effort of the federal courts to desegregate the nation's public schools. These efforts met with some early success in a few states, but massive resistance stalled them in the South until Congress passed the Civil Rights Act of 1964. Thereafter, especially between 1968 and 1972, the federal courts oversaw the successful dismantling of segregation in schools attended by millions of children through lawsuits brought by private plaintiffs and by the federal government. Most of these schools were in countywide districts in the rural South.[18]

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[15] *See, e.g.*, Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1365–76 (1991). Surveying cases from the 1970s and early 1980s, Sturm identifies and illustrates five judicial approaches to remedial formulation, four of which involve strong direction by the judge or a special master. Sturm's discussion of the fifth approach, "consensual deliberation," presciently anticipates the developments we report here. *See also* Curtis J. Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707, 708 (1978) (reporting the experience of a highly directive special master).

[16] This section draws on James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003).

[17] *See* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1153 (1995).

[18] *See* ROSENBERG, *supra* note 2, at 94–105; Liebman & Sabel, *supra* note 16, at 195–201. After two decades of stability, some of these gains have eroded in recent years. *See generally* Sean

Outside the rural South, however, desegregation was impeded by the combination of local school control and residential mobility. To establish liability, plaintiffs had to prove that school segregation resulted from official conduct rather than from residential self-segregation by individual choice. Issues of intention and causation were complex, the standards were vague and inconsistent, and the range of potentially relevant evidence was enormous. A policy patently intended to cause segregation and effective in doing so would readily establish liability. In the more common case, however, where officials did not express racist intentions, policies were facially neutral, and their consequences were ambiguous, the going was harder. Even when liability was established, doctrine generally confined the courts' remedial powers to official conduct within the district. Where the district was residentially segregated, or where whites would respond to remedial efforts by fleeing, options were severely restricted. Since the late 1970s, a sense of fatigue and futility has hung over large-scale desegregation efforts.[19]

A second line of school cases has focused on fiscal equity. Although the United States Supreme Court rejected the claim that the federal Equal Protection Clause limits inequality in state school finance,[20] many state courts have struck down school finance systems under state constitutional provisions. In total, the courts of about half the states have held school finance systems unconstitutional.[21] Although equalization of funding is a less daunting remedial task than desegregation in a residentially segregated region, implementation of school finance equity remedies has also met with difficulties and disappointments. Some states, most notably California, seem to have moved toward equality by leveling down — increasing relative contributions to poorer districts but limiting overall support for the school system.[22] In

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F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990–2000*, 81 N.C. L. REV. 1563 (2003).

[19] *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 83–90 (1995) (intemperately reversing as beyond the district court's remedial powers its mandate of elaborate and expensive efforts to integrate Kansas City schools by inducing voluntary transfers of white suburban students); Morgan v. Nucci, 831 F.2d 313, 315–17, 321 (1st Cir. 1987) (upholding the district court's renunciation of efforts to achieve racial balance in the Boston schools on the ground that segregation was rooted in "intractable demographic obstacles").

[20] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55 (1973).

[21] *See* Advocacy Ctr. for Children's Educational Success with Standards, Status of School Funding Litigations in the 50 States (June 27, 2003) (reporting "Plaintiff Victory" in school funding cases in twenty-five states), *available at* http://www.accessednetwork.org/litigation/TableofLitigationStatusfor50states.pdf.

[22] *See, e.g.*, William A. Fischel, *Did* Serrano *Cause Proposition 13?*, 42 NAT'L TAX J. 465, 466 (1989) (describing leveling-down in California).

other states, increased funding has not made a discernible difference in the performance of poorer districts.[23]

In both the desegregation and fiscal equity cases, the courts have felt compelled to address issues of educational quality. The premise of *Brown v. Board of Education* was that segregation was bad — not only in itself, but also because it made for bad education.[24] Desegregation, conversely, was expected to produce better education. Where desegregation appeared unattainable, direct educational improvement seemed an appropriate alternative remedy. Moreover, to the extent desegregation required inducements to whites to remain voluntarily in urban public schools, direct quality improvements could supply them. Thus, the logical link between desegregation and quality ran in both directions.

Remedial practice evolved along with these substantive developments. The implementation of desegregation pushed the courts toward extensive oversight of school administration. Concern for pupil assignment followed directly from the concern with integration. Given the strong connection between race and residence, and the tradition of local school attendance, the courts could not ignore siting decisions for new schools. The courts also had to make efforts to ensure that minority children were not mistreated or tacitly disadvantaged in new schools by, for example, excessive discipline or failure to discipline others who harassed them. Moreover, since minority students would likely be more at ease in a school with minority teachers, personnel policies became relevant. Once the courts saw improving educational quality as a remedial goal, almost every aspect of education policy was potentially relevant. When defendants were recalcitrant, the courts tended to increase both the scope and the detail of their orders. Thus, consent decrees often took the form of highly detailed regulatory codes embracing vast provinces of administration.[25]

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[23] *See* Eric A. Hanushek, *Conclusions and Controversies About the Effectiveness of School Resources*, FED. RES. BANK N.Y. ECON. POL'Y REV., Mar. 1998, at 15–16; *cf.* Abbott v. Burke, 575 A.2d 359, 374–75 (N.J. 1990) (mandating increased funding while acknowledging that "no amount of money may be able to erase the impact of the socioeconomic factors that define and cause these pupils' disadvantages").

[24] *See* 347 U.S. 483, 493 (1954).

[25] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22–31 (1971) (upholding a decree addressing racial quotas, the presence of one-race schools, attendance zoning, and student transportation); United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 232–37 (1969) (upholding an order prescribing certain ratios of minority students to nonminority students); Singleton v. Jackson Mun. Sch. Dist., 419 F.2d 1211, 1217–19 (5th Cir. 1970) (per curiam) (upholding a decree addressing staff desegregation, student transfers, transportation, new school construction, and inter-school-system attendance); Morgan v. Kerrigan, 401 F. Supp. 216, 265–70 (D. Mass. 1975) (requiring the development of committees and the issuance of detailed reports and proposing a detailed timetable); Carr v. Montgomery County Bd. of Educ., 289 F. Supp. 647, 654–56 (M.D. Ala. 1968) (ordering a desegregation plan addressing faculty and staff, new school con-

The concern with quality is most prominent in the third wave of cases. These are state cases of recent years, based not (or not only) on equality norms, but on provisions of a sort found in most state constitutions requiring "an adequate public education,"[26] "a thorough and efficient system of free schools,"[27] or "an educational program of high quality."[28] In these cases, the state's failure to meet norms of minimal quality and efficacy is the focus of the plaintiff's claim.[29]

Where courts have found liability in these cases, legislatures have responded with both funding and structural support, though frequently not to the satisfaction of the courts or the parties. These judicial efforts have sometimes converged with extensive civic activity around educational reform. In Kentucky and Texas, for example, lawsuits drew on the activities of politically appointed commissions of business, professional, and civic leaders.[30] Civic participation in the remedial phase of school reform litigation is not new, but it seemed to assume greater prominence in both practice and theory in the 1990s. Picking up a theme from our colleague Susan Sturm, counsel in the New York school finance case argued in 1996 that the widespread involvement of parents, teachers, business, and civic groups in the formulation and implementation of remedies was critical to the success of these suits. They proposed a "dialogic" model of reform in which remedies emerge from deliberation among the widest feasible range of stakeholders.[31]

The remedial regimes in the more ambitious of these new public law cases do not involve the comprehensive sets of regulatory instructions of the sort found in many urban desegregation cases. The new regimes do not contemplate judicial micromanagement or administrative centralization. Helen Hershkoff described one of these decrees, from an Alabama case, as "establishing a structure for institutional re-

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struction, and transportation); *see also* Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 457 (1977) ("The court order should be quantitative and precise, including timetables for the achievement of specific tasks.").

Looking back at the school desegregation precedents in a public housing case, the Massachusetts Supreme Judicial Court wrote:

> [A]s injunctions meet with indifference or violation on the part of the defendant officials, there is justification for the more detailed directions further confining . . . discretion. . . . The rule of thumb may be that the more indurated the violations of law and the remedial injunction, the more imperative and controlling the later superseding injunction.

Perez v. Boston Hous. Auth., 400 N.E.2d 1231, 1249 (Mass. 1980) (Kaplan, J.) (citations omitted).

[26] GA. CONST. art VIII, § 1, para. 1.

[27] W. VA. CONST. art XII, § 1.

[28] VA. CONST. art. VIII, § 1.

[29] *See* Heise, *supra* note 17, at 1153; Liebman & Sabel, *supra* note 16, at 202–07.

[30] *See* Liebman & Sabel, *supra* note 16, at 233–34, 243–44, 251–55.

[31] *See* Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL'Y REV. 99, 114–36 (1996).

form, and [yet] not fixing the precise content of [the] reform."[32] Instead of directing specific action, the decrees elaborate goals and methods of monitoring achievement.

These more ambitious regimes have been influenced by the "new accountability" movement in educational reform. That movement results from the interaction of both centralizing and decentralizing developments. The centralizing theme emphasizes the importance of comparative performance measurement and material incentives. The decentralizing theme prescribes devolution of authority for classroom instruction away from national and state administrators toward districts, principals, and teachers (and sometimes parents). The combination of standards-based monitoring and local discretion is designed to reconcile systematic accountability with local authority.[33]

The Texas regime is one of the more fully developed along these lines. In 1989 the Texas Supreme Court declared the state's school system out of compliance with various provisions of the state's constitution, including the requirement that the state provide for an "efficient [school] system" and the "general diffusion of knowledge." It subsequently rejected two legislative packages enacted specifically to fix the problems. Then in 1995 the court provisionally accepted a new statutory scheme increasing funding and creating the Texas Public School System Accountability scheme.[34] The statute put the state's Board of Education in charge of the system. The Board is charged with designing "assessment instruments" to test student knowledge in basic subjects and skills and with administering them at specified points in students' careers. Schools are obliged to plan and target resources specifically to improve the performance of their lowest-scoring students, regardless of their race.

Under the Texas scheme, schools and school districts are assessed annually on the basis of both test scores and other indicators, such as dropout and graduation rates, attendance rates, SAT scores, and completion of advanced courses. Relative performance is measured against a group of peer schools with comparable characteristics in

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[32] Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1190 (1999) (describing *Harper v. Hunt*, No. CV-91-0117-R (Ala. Cir. Ct. Montgomery County, Apr. 1, 1993)). *Harper v. Hunt* was consolidated with *Alabama Coalition for Equity, Inc. v. Hunt* and reprinted in *Opinion of the Justices No. 338*, 624 So. 2d 107, 110 (Ala. 1993).

[33] The background of the "new accountability" movement is described in Liebman & Sabel, *supra* note 16, at 214–31.

[34] *See* Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 725–30 (Tex. 1995); *see also* TEX. EDUC. CODE ANN. ch. 39 (Vernon 1996 & Supp. 2004) (setting forth the standards and duties under the Public School System Accountability program). Both the Texas scheme and the Kentucky one, which has many comparable features, are described in Liebman & Sabel, *supra* note 16, at 231–66.

terms of such indicators as "past academic performance, socioeconomic status, ethnicity, and limited English proficiency." Outstanding performers are identified and rewarded. Laggards must, with the help of outside technical assistance, develop detailed improvement plans. In the case of continued poor performance, such schools are put into state receivership or reconstituted.[35]

The Texas process is substantially transparent, with school and district ratings and related information available on the Internet. Parents receive "report cards" on their children's schools through the mail. The state supreme court cases provoked substantial mobilization by business and civic groups. At least in some areas, it appears that the reforms have prompted extensive local parental involvement in school affairs.[36]

The new accountability approach is widely regarded as the most promising recent development in public school reform. Some jurisdictions have adopted related initiatives without judicial compulsion.[37] Although it is too soon to claim that the judicial efforts along this line have been successes, there are several jurisdictions where the courts remain key participants in the most ambitious reform efforts.

Finally, we note that trends parallel to those seen in these general education initiatives are evident in the subfield of special education for students with disabilities. The federal Individuals with Disabilities Education Act[38] and various state statutes create duties to refrain from discrimination against disabled students, to make affirmative accommodations for them, and to respond to requests for services on their behalf in accordance with prescribed procedures. Here, too, early structural reform litigation seems to have taken on a command-and-control orientation involving elaborate rule-bound administrative regimes focused on such matters as the timeliness of processing student evaluations, the number and qualifications of personnel, and student placement practices. Practitioners subsequently became dissatisfied with what some characterized as the "input-oriented" approach in both

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[35] TEX. EDUC. CODE ANN. §§ 39.023–.028, 39.051–.054, 39.071–.076, 39.093–.095, 39.131 (Vernon 1996 & Supp. 2004).

[36] *See* Liebman & Sabel, *supra* note 16, at 233–34, 243–46. Not all forms of public participation or "engagement" have this decentralized character. Sometimes such efforts are designed simply to produce information about parent preferences or school practices for use by centralized organizational structures or to generate grassroots support for programs that already have been worked out by those in control of the litigation. The use of focus groups modeled on electoral campaign practices seems more like top-down mobilization than the development of permanent local participatory capacity contemplated by the more ambitious reforms.

[37] The No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.), which was inspired by the Texas approach, mandates or encourages adoption of some of its features nationwide. *See* Liebman & Sabel, *supra* note 16, at 283–300.

[38] 20 U.S.C. §§ 1400–1487 (2000).

judicial and administrative oversight.[39] In the spirit of the new accountability approach in general education, the 1997 amendments to the federal special education statute required states to set achievement goals and to measure progress with standardized tests.[40]

The emerging "output-oriented" perspective is evident in *Vaughn G. v. Mayor and City Council of Baltimore*. In 2000, when the case was nearly two decades old, the parties agreed that the complexity of the decree hampered both enforcement and renegotiation efforts. Noncompliance was pervasive, and both plaintiffs and defendants were mired in arguments over small details that distracted them from their central goals. They thus agreed to replace their detailed "Long Range Compliance Plan" with a "Consent Order Approving Ultimate Measurable Outcomes." The six-page order prescribes sixteen outcomes and specifies procedures for measuring progress toward attaining them. Some of the outcomes involve data collection and monitoring systems for performance measurement; others involve procedural norms, and here, compliance rates are specified (for example, the order requires ninety-five percent compliance with application processing deadlines).

The other outcomes *Vaughn G.* prescribes concern educational goals. For example, the defendants committed to increase school completion rates for disabled students from fifty percent to fifty-seven percent within three years, to increase the participation of disabled students in vocational programs to the same rate as that of nondisabled students, and to provide at least eighty percent of disabled students with required services in the schools they would attend if they were not disabled. These norms were derived from statewide data on special education performance, with negotiated adjustments. The defendants' performance under the new approach has been mixed, but it seems to have improved, and the plaintiffs find that their own monitoring efforts are more focused.[41]

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[39] *See* Thomas Hehir & Sue Gamm, *Special Education: From Legalism to Collaboration*, *in* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 205, 234 (Jay P. Heubert ed., 1999).

[40] *See* 20 U.S.C. § 1412(a)(16)–(17) (2000).

[41] *See* Consent Order Approving Ultimate Measurable Outcomes, *Vaughn G.*, No. 84-1911 (D. Md. filed May 4, 2000) (on file with the Harvard Law School Library); Telephone Interview with Donna Wulkan, Plaintiff's Counsel, *Vaughn G.* (March 17, 2003); Telephone Interview with Thomas Hehir, Court-Appointed Expert, *Vaughn G.* (May 20, 2003). Hehir, a Harvard education scholar who strongly influenced the shift of remedial orientation in *Vaughn G.*, is helping to develop a similar approach in a pending Los Angeles special education case, *Smith v. Los Angeles Unified School District*, CV 93-7044-LEW (GHKx) (C.D. Cal.). Regarding an earlier effort in this vein, see Michael A. Rebell, Allen v. McDonough*: Special Education Reform in Boston*, *in* JUSTICE AND THE SCHOOL SYSTEMS: THE ROLE OF COURTS IN EDUCATION LITIGATION 70, 74–87 (Barbara Flicker ed., 1990).

B. Mental Health

Mental health is probably the least controversial category of institutional reform litigation. To be sure, the characteristic judicial experience in this realm has involved the same delay, frustration, and recalcitrance that have plagued efforts in other areas. But at least moderate success is widely conceded in several cases involving developmentally disabled clients. Coincidentally or not, the evolution with which we are concerned — from command-and-control intervention to decentralized and indirect intervention — is especially marked and self-conscious in these cases.

The contours of mental health institutional litigation were shaped by two converging developments. The first was the emergence of a legal doctrine recognizing the rights of people involuntarily confined on grounds of mental disability to treatment and decent conditions. Beginning in the 1960s, the courts articulated such rights as a matter of constitutional law. These rights were elaborated further in state and federal legislation. Congress specifically authorized the Department of Justice to bring suits against mental health institutions in the Civil Rights for Institutionalized Persons Act of 1980, and the Department has done so, with less zeal than activists would like but considerably more than it has shown in the case of prisons. Procedural barriers of the sort created by courts and legislatures for prison litigation have generally not arisen in the mental health field.[42]

The second development was the deinstitutionalization movement. The intellectual origins of this movement are in the treating professions. Reformers argued that most mentally disabled people held in large, public institutions would fare better as outpatients or as residents of small community facilities. Institutionalization limited the range of their personal associations and activities in ways that were stifling and oppressive, and hence impeded rehabilitation. More integration into normal social life would have therapeutic advantages. Small, community-based facilities might be more accessible to formal and informal monitoring by relatives and advocacy groups than large, isolated ones.[43]

The professional critique of institutionalization meshed with the libertarian impulse of the legal doctrine on confinement. Liberal lawyers argued for a right to the "least restrictive" efficacious intervention. This meant that institutionalization was impermissible when community placement was adequate or better. Although the Supreme Court

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[42] *See generally* 2 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL 3–152 (2d ed. 1999); 3 PERLIN, *supra*, at 145–281 (2d ed. 2000).

[43] *See generally* DEINSTITUTIONALIZATION: PROMISE AND PROBLEMS (Richard Lamb & Linda Weinberger eds., 2003).

never fully accepted this principle as constitutional law, statutory and regulatory support for it did emerge.[44]

Strong fiscal incentives also supported deinstitutionalization. The 1970s were a time of fiscal pressure, and even the shabbiest mental health institutions were expensive. The prospect of savings from closing them was appealing to state and local governments.[45]

The move to community facilities had a natural affinity with decentralized, indirect administrative structures. Although public agencies sometimes created and managed their own community facilities, more often they looked to nongovernmental social service agencies or for-profit providers to do so. Even administrators wedded to command-and-control models within government did not think them applicable to public subcontracting of services. As Ronald Wisor put it:

> [The move to community facilities] dramatically transforms the government's function from provider to guarantor of care. In this new role, the state's primary responsibility is to establish detailed quality control standards as the basis for the provider contracts, and then to monitor performance closely to ensure that those standards are followed.[46]

Thus, the mental health cases focused on two kinds of reforms: First, as long as the large public institutions remained open, the courts sought to bring them into compliance with minimum standards of safety, sanitation, humane conduct, and effective medical treatment. Second, courts sought to gradually replace these institutions with community care facilities. The change in remedial orientation from old to new public law can be seen both within the efforts to change the older institutions and in the shift to the community care model.

The command-and-control orientation is evident in the decrees in two of the most famous mental health cases — *Wyatt v. Stickney*,[47] which addressed Alabama's institutions for the psychiatrically and developmentally disabled, and *New York State Ass'n for Retarded Children v. Carey*,[48] which involved the Willowbrook institution for the developmentally disabled in New York City. Each decree declared many rights and duties in general terms, such as a patient's right to "privacy" and a duty to provide "adequate" medical care. Each also incorporated, by reference, the presumably changing standards promulgated by organizations with relevant expertise. For example, the

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[44] *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 14, § 36.4(c)(2) (2003) (requiring a placement plan for discharged mental patients to attempt to "capitalize on strengths to enable the least restrictive community placement possible"); *id.* § 586.1(b) ("Community residences are . . . operated to implement the principle of the 'least restrictive alternative.'").

[45] *See* 3 PERLIN, *supra* note 42, at 65–74.

[46] Ronald L. Wisor, Jr., *Community Care, Competition and Coercion: A Legal Perspective on Privatized Mental Health Care*, 19 AM. J.L. & MED. 145, 154–55 (1993).

[47] 344 F. Supp. 373 (M.D. Ala. 1972).

[48] 393 F. Supp. 715 (E.D.N.Y. 1975).

Alabama decree required a diet meeting nutritional standards prescribed by the National Academy of Science.

As to a broad range of matters, however, the decrees dictated directly and specifically. The *Wyatt* decree, for example, mandated at least one toilet for every eight patients, no more than six patients in a bedroom, at least eighty square feet of floor space per patient in each bedroom, at least ten square feet of space per person in the dining room, air temperature between eighty-three and sixty-eight degrees Fahrenheit, hot water at 110 degrees, and minimum staff-patient ratios for thirty-five job categories.[49]

Five years after the entry of this decree, the defendants petitioned for modification, claiming that the court-ordered procedures were excessively rigid. Various recordkeeping and monitoring procedures, they asserted, were "ritualistic and meaningless." Moreover, many of the treatment standards proved senseless. For example, the requirement of six hours of training per day for each resident was inappropriate for some profoundly retarded residents (who came to constitute the majority of inmates as less disabled residents were transferred to community placements). These patients had shown no capacity to benefit from such extensive training, and it sometimes became an unpleasant and demeaning experience for them. The court denied the motion, however, holding that the provisions in question, including the six-hour training requirement, were essential to the "constitutional right" of each resident to effective treatment.[50]

In the *Willowbrook* case, the defendants fought successfully against many specific requirements[51] but accepted some restrictions that were important to the plaintiffs. One of the latter provisions proved especially contentious. The consent decree required that mildly retarded members of the plaintiff class be transferred to community placements with no more than fifteen beds and that members with more severe disabilities be transferred to placements with no more than ten beds. A few years later, the defendants asked the court to modify the decree to permit patient transfers to facilities with as many as fifty beds. They argued that small community facilities had proven harder to develop than anticipated and that the therapeutic benefits of the larger settings were comparable. Like its counterpart in Alabama, the federal district court in New York denied the request, but its decision was reversed on appeal by the Second Circuit. The circuit court cited a re-

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[49] *See Wyatt*, 344 F. Supp. at 379–86; *id.* at 395–407.

[50] The defendant's motion and the court's ruling are reprinted in 1 PAUL R. FRIEDMAN, LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 813–60 (1979). *See id.* at 816–17, 822–33, 853–55.

[51] *See* DAVID J. ROTHMAN & SHEILA M. ROTHMAN, THE WILLOWBROOK WARS 114–19 (1984).

cent Supreme Court opinion suggesting that treatment consistent with "professional judgment" was sufficient for constitutional purposes, and rejecting a claim of a right to the least restrictive alternative.[52] However, the court relied equally on the principle of deference to administrative officials on matters within the scope of their discretion.[53]

In some respects, the *Wyatt* defendants probably had the better argument. The *Wyatt* court's refusal to modify its order in light of experience seems to have reflected its strong distrust of the defendants more than any view of the merits. Conversely, the Second Circuit's insistence on deference a decade later seemed based mainly on anxiety that courts were being drawn into institutional micromanagement and resolution of public policy issues over which they had no distinctive expertise.

Recent public law cases in mental health forego this type of specification in favor of more indirect modes of control. The decrees emphasize broad goals and leave the defendants substantial latitude to determine how to achieve them; mandate precise measurement and reporting with respect to achievement; and institutionalize ongoing mechanisms of reassessment, discipline, and participation.

The recent decree in a long-pending challenge to conditions at the District of Columbia institution for the mentally disabled is illustrative of this trend. The "Compliance Plan" negotiated by the parties and approved by the court specifically eschewed "detailed prescriptions of . . . policies and procedures and staff training." Instead, it adopted

> [a]n alternative approach . . . , where the parties and experts that they recommend, have a meaningful opportunity to provide input into proposed policies and training initiatives prior to their adoption and . . . the defendants give careful consideration to such input. In each section of the Plan where a need for new or revised policies and procedures is identified, the Plan requires that the process of policy-making will involve close collaboration with the plaintiffs and the plaintiff-intervenor [the U.S. Department of Justice], and experts whom they recommend, prior to the adoption of these policies and procedures. However, the final decision about the policies and procedures and training programs will remain with the defendants, understanding that if they fail to address serious concerns raised by the plaintiffs and the plaintiff-intervenor, this may result in compliance issues down the road. In the final analysis, it is compliance with the specific outcome criteria that is required . . . and the tasks identified are a means to this end.[54]

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[52] N.Y. State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 964–65 (2d Cir. 1983) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982)); *see also infra* pp. 1087–88.

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

[54] 2001 Plan for Compliance and Conclusion of *Evans v. Williams* at 6–7 (Civil Action No. 76 293 SSH) (D.D.C. filed Jan. 23, 2001) (footnotes omitted) (on file with the Harvard Law School Library) [hereinafter D.C. Plan], *adopted in* Evans v. Williams, 139 F. Supp. 2d 79, 85 (D.D.C.

The plan consists of a series of generally stated "goals" (for example, "Appropriate Individualized Habilitation and Treatment in the Community in the Least Separate, Most Integrated, and Least Restrictive Setting"). Each goal is followed by a series of specific "tasks" (for example, preparing individual service plans at least annually for each patient) and "outcome criteria" (for example, that the patient receive the services identified in the individual service plan). The plan then specifies the "method of assessing compliance" for each set of outcome criteria. Compliance with the service provision goal is to be assessed by review of a computerized database of individual service plan information, documents regarding complaints, direct observation of a random sample of ten percent of the patients in the programs, and interviews with case managers and advocates.

These plans, as elaborated, do not consistently live up to their rhetorical commitment to focus on "outcomes." An outcome is something desirable in itself, such as psychic well-being, physical health, or living skills. Often, however, the plans do not seek to measure these desiderata in the way that the new school regimes try to measure learning. The "outcomes" the mental health plans measure are really procedures. The D.C. plan, for example, measures whether services have been appropriately prescribed and provided in accordance with that prescription, not whether the services have actually improved the life of the recipient. It is a matter of controversy whether this hesitation reflects the difficulties of devising true outcome measures in this field, or the failure of practitioners to appreciate the full potential of the approach they have embraced in principle.[55] In any event, even in its compromised form, the intent and effect of such plans is to reduce reliance on specific ex ante rules.

The D.C. plan institutionalizes short-run participation of the plaintiff class through periodic meetings with the defendant officials conducted by a special master, or "Independent Court Monitor." It also creates a permanent institution designed to facilitate accountability to patients and their families. This institution is a freestanding nonprofit corporation, the Quality Trust for Individuals with Disabilities. The District committed to endow the Quality Trust with $11 million at the outset and to provide it with between $1.5 to $2 million a year for ten

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2001). A comparable example is the Remedial Plan adopted in *United States v. Connecticut*, No. N-86-252 (D. Conn. order of Apr. 21, 1998) (on file with the Harvard Law School Library).

[55] No doubt measurement of psychic well-being is difficult and contested. However, the D.C. plan ignores some easily measured outcomes in favor of less direct measures. For example, compliance with the goal of preventing accidental and intentional physical harm is measured only in terms of adherence to policies for reporting, investigating, and following up on incidents of injury. The "outcome criteria" do not include the number and seriousness of instances of harm, which is surely the most pertinent "outcome." D.C. Plan, *supra* note 54, at 31–32.

years. The board of the trust was appointed by the mayor from a list jointly developed by the parties, and subsequent vacancies are to be filled by a vote of the remaining incumbents. The trust has a broad mandate to monitor the District's programs for the developmentally disabled and to advocate on behalf of patients. This includes the power to take the District to court. Most important, the trust has broad access to information on the performance of the District's programs for the developmentally disabled.

Such judicial interventions seem to have made a difference for the better. Horrific conditions in many custodial institutions have been ameliorated, and many patients have been transferred to community facilities that offer improved conditions and are subject to promising monitoring regimes.[56] To be sure, no case has come close to fulfilling the hopes of those who brought it, and the public mental health system remains plagued by disastrous failings. Many of those formerly incarcerated in large institutions have been released into the community without adequate shelter or care. Some have simply been abandoned, others left at the mercy of poorly monitored or underpaid subcontractors. It would be unfair, however, to blame these failings on institutional reform litigation.

C. Prisons

Challenges to the Arkansas prison system in 1969 and the Texas system in 1972 inaugurated a period of massive judicial intervention in

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[56] *See* Halderman v. Pennhurst State Sch. & Hosp., 995 F. Supp. 534, 548 (E.D. Pa. 1998) (finding substantial improvement for class members from changes ordered in the Pennsylvania litigation); L. RALPH JONES & RICHARD R. PARLOUR, *WYATT V. STICKNEY*: RETROSPECT AND PROSPECT, at xi–xii (1981) (noting positive changes after *Wyatt*); ROTHMAN & ROTHMAN, *supra* note 51, at 177–219 (describing successful efforts to develop community placements and a subcontractor monitoring system under the *Willowbrook* decree); Wisor, *supra* note 46, at 152–53 (favorably appraising the system of community placements and subcontractor monitoring established under a consent decree in Massachusetts litigation, though also noting that litigation's power to bring about such change is "quite limited").

A recent *New York Times* investigation of New York community care facilities for psychiatrically disabled individuals (as opposed to developmentally disabled plaintiffs, as in *Willowbrook*) found appalling conditions. *See* Clifford J. Levy, *For Mentally Ill, Death and Misery*, N.Y. TIMES, Apr. 28, 2002, at A1; Clifford J. Levy, *Voiceless, Defenseless and a Source of Cash*, N.Y. TIMES, Apr. 30, 2002, at A1. The findings illustrate the importance of vigorous monitoring in any system providing services to vulnerable persons. The *Willowbrook* class members appear to have fared much better. The consent decree provides for two protections not available to nonclass members: First, a Consumer Advocacy Board, whose membership is appointed by the state from lists of candidates submitted by the plaintiffs and which has a full-time staff of thirty, advocates on behalf of residents. Second, the Medicaid service coordinators with responsibility for class members have caseloads of only twenty, half the usual number. Telephone Interview with Beth Haroules, Staff Attorney, New York Civil Liberties Union, and Counsel to the *Willowbrook* Class Cince 1994 (Oct. 2002); E-Mail from David J. Rothman, Professor of History, Columbia University, and Consultant to the *Willowbrook* Class, to William H. Simon (July 2002).

the nation's prisons and jails. Prison conditions in forty-one states were held unconstitutional, as were conditions in hundreds of jails throughout the country. In ten states, Malcolm Feeley and Edward Rubin report, judicial intervention was "directed at virtually every aspect of every institution in the state." They continue:

> [F]ederal courts ended up promulgating a comprehensive code for prison management, covering such diverse matters as residence facilities, sanitation, food, clothing, medical care, discipline, staff hiring, libraries, work, and education. The decisions themselves, and often the resulting body of law, specify many requirements in what can be described, depending on one's perspective, as painstaking or excruciating detail; the wattage of the light bulbs in the cells, the frequency of showers, and the caloric content of meals are all part of the code that the federal courts have promulgated.[57]

The implementation phase of many of these cases has lasted for decades.

On the whole, these cases seem to have spurred significant improvement. Especially in the harshest systems in the South, intervention has led to the elimination of the routine or authorized use of torture; to the abandonment of convict-leasing, inmate "trusties," and other managerial structures with high potential for abuse; to personnel, training, and supervisory changes that professionalized management; and to modest improvement, at least, in the physical amenity of confinement. Although many of the institutions are still foul and dangerous places, they are better than they used to be in many ways.[58]

Reform was assisted in some respects but hampered in others by the fact that it occurred amidst a policy-induced explosion of the prison population. On the one hand, the upheaval created by rushed expansion opened the system to change. It meant an influx of new personnel and created pressure, independent of the plaintiffs' demands, for more effective managerial structures. On the other hand, expansion and upheaval also increased fiscal pressures. The reformers had to find resources to fund improvements for current prisoners at a time when the system was expanding to accommodate additional ones.

Writing in 1990, Susan Sturm found some indications of a shift away from command-and-control and toward experimentalist regulation (or what she called the "catalyst approach").[59] She pointed to cases in Hawaii and Pennsylvania in which courts, instead of imposing comprehensive sets of specific rules, ordered the parties and their ex-

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[57] FEELEY & RUBIN, *supra* note 6, at 40–41.

[58] *Id.* at 73, 93–95.

[59] Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 856–59 (1990).

perts to formulate general performance standards and then to set up monitoring bodies with substantial accountability to the plaintiffs.[60]

At about this time, a movement to privatize prison services got underway. This movement involved subcontracting practices analogous to those in the mental health field, though their scale was more modest. Such efforts most commonly concerned low-security, service-intensive facilities, such as halfway houses or pre-release centers, or medical services in secure institutions. Subcontracting sometimes led to standard-setting and monitoring practices like those in mental health institutions. It freed some ambitious administrators from the rigidities associated with civil service rules, union practices, and a workforce immured in convention. According to J. Michael Keating, Jr., some administrators viewed subcontracting as "an opportunity not only to identify and clarify goals, but also to create incentive structures designed to promote the attainment of these goals."[61] (Of course, if unsupervised by public authorities, privatization also opens the way to abuse.) Such efforts increased support for emerging national accreditation processes, especially those of the American Correctional Association and the National Commission on Correctional Health Care of the American Medical Association.[62]

A further development was the formation in several states, through legislative or administrative initiative, of administrative bodies to monitor prisons. Typically, such bodies operate both by responding to grievances and through proactive auditing. Injunctive remedies in

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[60] *See id.* at 859 (discussing *Jackson v. Hendrick*, 321 A.2d 603 (Pa. 1974); and *Spear v. Ariyosha*, No. 84-1104 (D. Haw. June 12, 1985)).

[61] J. Michael Keating, Jr., *Public over Private: Monitoring the Performance of Privately Operated Prisons and Jails*, *in* PRIVATE PRISONS AND THE PUBLIC INTEREST 130, 134 (Douglas C. McDonald ed., 1990).

[62] An important part of the American Correctional Association (ACA) accreditation process is a set of about one hundred "Outcome Measures," including "[n]umber of worker compensation claims filed for injuries that resulted from the physical environment" (divided by the number of staff positions); "[n]umber of instances in which force was used" (divided by the offender population); and "[n]umber of offenders released in the past 12 months who continue substance abuse treatment for six months after release" (divided by the number of offenders released in the past 12 months). The adjustments in parentheses are designed to make the numbers comparable across institutions. *See* Am. Corr. Ass'n, ACRS Outcome Measure Worksheet, *available at* http://www.aca.org/images/form_acrsoutcome.pdf (last visited Jan. 11, 2004).

Prisoner advocates disparage ACA accreditation, emphasizing that the process includes only corrections personnel and that audits are not public. They also fault the ACA for lax compliance monitoring. *See, e.g.*, Elizabeth Alexander, *What's Wrong With the ACA?*, 15 NAT'L PRISON L. PROJECT J. 1 (2001); Telephone Interview with David Fathi, Staff Attorney, ACLU Prison Project (July 18, 2002). However, consent decrees sometimes incorporate ACA standards into more elaborate customized monitoring regimes. *See* William J. Rich, *Prison Conditions and Criminal Sentencing in Kansas: A Public Policy Dialogue*, 11 KAN. J.L. & PUB. POL'Y 693, 702–04 (2002); Telephone Interview with Mellie Nelson, Deputy Chief, Special Litigation Section of the Civil Rights Division of the U.S. Department of Justice (Sept. 23, 2002).

lawsuits sometimes also provide for the creation of these monitoring bodies.[63]

These efforts were never as ambitious as the comparable initiatives in education and mental health. There is, of course, much stronger public resistance to participation in policymaking and administration by prisoners and their advocates than by mental health patients and their advocates, and a fortiori, by parents of schoolchildren. And the natural resistance of administrators to public disclosure of performance data has been less subject to challenge in the prison sphere.

A powerful backlash against judicial intervention developed in the late 1980s. Since then, Supreme Court cases and congressional enactments have prescribed deference to administrative expertise and have insisted that judicial intervention be narrowly circumscribed. For example, one Supreme Court case reversing lower court prison injunctions vehemently condemned the level of detail (as well as the scope) of an injunction regarding prison libraries:

> It specified in minute detail the times that libraries were to be kept open, the number of hours of library use to which each inmate was entitled (10 per week), the minimal educational requirements for prison librarians (a library science degree, law degree, or paralegal degree), the content of a videotaped legal-research course for inmates . . . , and similar matters.[64]

All the Justices agreed that this went too far.

In 1996, Congress stepped in and enacted the Prison Litigation Reform Act, which imposed an array of procedural restraints on such litigation in the federal courts.[65] As in the mental health field, appel-

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[63] For administrative bodies, see, for example, CAL. PENAL CODE §§ 6125–6129 (Deering 2003) (creating an Inspector General for prisons); FLA. STAT. ANN. § 20.315(6) (West 2003) (creating the Florida Corrections Commission); 37 TEX. ADMIN. CODE § 251 (West 2003) (specifying the practices and procedures of the Commission on Jail Standards).

For litigation remedies providing for monitoring procedures, see the consent decrees in *United States v. Michigan*, No. 97-CVB-71514-BDT (E.D. Mich. Aug. 17, 1999), and *United States v. Arizona*, No. 97-476-PHX-ROS (D. Ariz. Mar. 11, 1999) (providing for grievance procedures for complaints of sexual misconduct and creating an administrative office to monitor the process and recommend systemic responses to recurring problems), *both available at* http://www.usdoj.gov/crt/split/findsettle.htm#Settlements. *See also* Settlement Agreement, United States v. Nassau County Sheriff's Dep't (E.D.N.Y. Apr. 22, 2002) [hereinafter Nassau County Settlement Agreement] (providing for the creation of a "quality assurance and improvement" system for medical and mental health care), http://www.usdoj.gov/crt/split/documents/Nassa_sher_agreem.htm.

[64] Lewis v. Casey, 518 U.S. 343, 347 (1996). Justice Thomas describes the decree in more detail over three pages of his concurrence. *See id.* at 390–92 (Thomas, J., concurring).

[65] Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended at 11 U.S.C. § 523(a) (2000); at 18 U.S.C. §§ 3624(b), 3626 (2000); and in scattered sections of 28 and 42 U.S.C.). The statute requires, among other things, that injunctions against prison administrators be "the least intrusive means necessary to correct the violation"; that after two years courts vacate injunctions on the defendant's motion unless the plaintiffs prove continuing violations; that prisoners exhaust administrative remedies; that prisoners be sanctioned for "frivolous" petitions; that damage actions be dismissed unless physical injury is alleged; and that court-awarded attorneys' fees be subject to

late courts became increasingly intolerant of lower court orders that imposed detailed restrictions, such as minimum space requirements, or restrictions only indirectly related to the legal violations, such as training or staffing requirements.[66]

Despite a growing number of legal and political constraints, however, the volume of prison litigation remains substantial, and although structural orders tend to be narrower than in the past, they are still common.[67] Among these structural orders, at least some seem to have moved toward more experimentalist modes of intervention.

Consider *Sheppard v. Phoenix*,[68] a challenge to use-of-force practices in maximum security units of the New York City jails. In 1998, the parties entered a settlement obligating the Department of Corrections to develop and implement new policies under the guidance of two designated experts with extensive prison reform experience and within broad parameters set out in a 104-paragraph "stipulation." In its report on the implementation process, the court noted that "the Stipulation . . . was implemented to achieve its goals, not to restrict it to its exact terms."[69]

Although the Department adopted extensive written policies, the court's report emphasized the process of ongoing revision, training, and monitoring, not the specifics of the policies. Monitoring efforts included an improved inmate grievance system, handheld videotaping of anticipated uses of force, cameras mounted in secluded places where incidents were likely to occur, detailed reporting and investigation procedures for each incident, and oversight by the Department's Inspector General, an officer independent of the staff line of authority. As prob-

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limits not applicable to most civil rights actions. *See generally* John Boston, *The Prison Litigation Reform Act*, *in* 1 16TH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION 687, 693 (PLI Litig. & Admin. Practice Series, Course Handbook Series No. H-640, 2000) (summarizing PLRA doctrine); David M. Adlerstein, Note, *In Need of Correction: The "Iron Triangle" of the Prison Litigation Reform Act*, 101 COLUM. L. REV. 1681, 1685–87 (2001) (discussing PLRA's exhaustion requirement). Comparable state legislation has inhibited state court litigation in some jurisdictions. *See* Christopher E. Smith, *The Governance of Corrections: Implications of the Changing Interface of Courts and Corrections*, *in* 2 CRIMINAL JUSTICE 2000: BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 113, 141 (Charles M. Friel ed., 2000).

66 *See, e.g.*, Ruiz v. Estelle, 679 F.2d 1115, 1144, 1148 (5th Cir. 1982) (reversing decree provisions requiring no more than one inmate per cell and reorganizing the prison's management structure).

67 In 1984, 24.3 percent of state prison facilities were subject to court orders; in 2000, 22.7 percent were. The figures for jails were 15.1 percent in 1984 and 13.4 percent in 2000. The change in the scope of orders is more marked. One-third of prison orders in 1984 reported twelve to thirteen regulated matters, and one-third reported one to three. By 1995, however, only 20 percent reported twelve or more regulated matters, and nearly two-thirds reported one to three. Margo Schlanger, Inmate Litigation After the Deluge: Part II, Court Order Cases 9, 19 (July 26, 2002) (unpublished manuscript, on file with the Harvard Law School Library).

68 210 F. Supp. 2d 450 (S.D.N.Y. 2002).

69 *Id.* at 452.

lems were disclosed, policies were revised. For example, incident reports showed that a large number of violent altercations between inmates and guards arose from inmate refusals to close food slots. These refusals, often accompanied by shouting, were considered disruptive and frequently prompted the guards to enter the cells to force compliance. Inquiry disclosed that these inmates were often protesting failures to address legitimate demands for services. The Department responded by providing training for guards on the appropriate reaction to service requests and by assigning social services counselors to the unit. Inmates who repeatedly refused to close their boxes were placed in specially designed cells that minimized inmate-guard contact.[70]

The court based its dismissal of the stipulation on measured performance improvement. Measures included the number of injuries, the number of use-of-force incidents, the processing times for investigations and disciplinary charges against guards, and guard sick days and worker's compensation claims (which the court treated as a proxy for both physical welfare and morale).[71] The court talked only about the internal trend. It made no comparative assessment and did not explain why the current scores should be deemed adequate. Nonetheless, it is clear that the court defined compliance by performance in relation to basic goals, not by conformity to rules.

While agreeing that the jails had made important progress, plaintiffs' counsel in *Sheppard* have pointed to areas where compliance has lagged. The specificity of their criticisms demonstrates, however, that the monitoring system already in place is sufficiently informative to guide further reforms. Plaintiffs' counsel can, for example, document a tendency for use-of-force incidents to rise when new staff arrive, leading them to recommend changes in the training and supervision of recruits. They can also attribute specific reporting failures to specific personnel and monitor the sanctions applied for violations of the decree.[72]

Plata v. Davis, one in a series of recent challenges to prison medical care, points to a similar degree of progress.[73] In a widely noted settlement, the California Department of Corrections agreed to structural relief centered on a quality assurance system with significant accountability to outside professionals and the plaintiff class. The stipulated relief in *Plata* contains virtually no substantive commands. Rather,

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[70] *Id.* at 455.

[71] *See id.* at 456–60.

[72] *See* Plaintiffs' Report to the Court on the Stipulation of the Settlement, Sheppard v. Phoenix, 210 F. Supp. 2d 450 (S.D.N.Y. 2002) (No. 91 Civ. 4148 (RPP)).

[73] Stipulation for Injunctive Relief, Plata v. Davis, No. C-01-1351 TEH (N.D. Cal. Jan. 29, 2002) [hereinafter *Plata* Stipulation], *available at* http://www.prisonlaw.com/platastip.pdf. For another case in this vein, see Nassau County Settlement Agreement, *supra* note 63.

the defendants have agreed to promulgate written policies and to monitor adherence to them in specified ways.

First, the plan provides for a panel of experts, to be agreed upon by the parties, and for the development by the parties and the experts together of an "Audit Instrument" to score compliance with the policies. The plan also specifies the minimum number of cases to be audited, their manner of selection, a procedure for resolving disputes among the auditors, and the minimum score required for compliance. The plaintiffs are entitled to seek unspecified further relief in the event of noncompliance.

The Audit Instrument has about 125 compliance elements. Many are procedural, and these tend to take a rule-like form typical of old public law: Were patients seen within specified time frames? Was the complaint and medical history adequately documented? Was treatment provided as ordered? Others specify thresholds that require appropriate treatment but leave it to professional judgment to decide what constitutes appropriate treatment in each individual case. For example, blood pressure above 140/90 requires intervention with a normal patient; blood pressure above 130/80 requires intervention with a diabetic patient. The experts expect to integrate the audit process with a "quality improvement" system of performance measures under development for prisons generally. The system will specify indicators for the classification of patients with various diagnoses by condition ("good," "fair," and "poor" control) in terms that will facilitate comparisons across prisons.[74]

The *Plata* plan emphasizes flexibility. The defendants are free to revise policies as long as they give notice to the plaintiffs (who are free to challenge them in court). Treatment provided to individual inmates will be deemed compliant if it is consistent with the department's policies or if "[t]he practitioner documents in the medical notes that he/she is deviating from adopted policies and procedures and that such deviation is consistent with the community standard."[75]

The agreement provides plaintiffs' counsel with extensive access to information, including broad categories of documents, contact with prisoners, oral interviews with staff, and periodic tours of the defendants' facilities. It also provides for mediation of disputes between the parties.

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[74] Telephone Interview with Dr. Ronald Shansky, Consultant to the California Department of Corrections (Oct. 15, 2002). An overview of the "quality improvement" approach reflected in the settlement appears in Gordon Schiff & Ronald Shansky, *Challenges of Improving Quality in the Correctional Setting*, *in* CLINICAL PRACTICE OF CORRECTIONAL MEDICINE 12, 12–25 (Michael Puisis ed., 1998).

[75] *Plata* Stipulation, *supra* note 73, at 11.

As presently structured, the relief in prison cases is less ambitious than comparable interventions in mental health cases. So far, it has not provided for monitoring institutions with stakeholder accountability, such as the Quality Trust in the District of Columbia,[76] that will survive termination of the decree. Nor has it provided for general public access to performance data in the manner of the Texas education reforms. Nevertheless, even at this early stage, its general thrust seems to be in the spirit of the experimentalist approach, and this aspect is likely to grow in time.

The extent to which experimentalist development is constrained by the Prison Litigation Reform Act of 1996 remains unclear. The Act is intended to restrict intervention generally, but some of its provisions could be interpreted to encourage movement in an experimentalist direction. Consider two of the most discussed provisions: the requirement that prisoners exhaust administrative remedies before filing suit[77] and the requirement that injunctive orders terminate after two years unless the court makes a new finding that relief is still required to remedy current violations.[78] At least on its face, each provision seems compatible with an ambitious regime of experimentalist intervention.

The exhaustion provision acknowledges that the administrator has the presumptive responsibility for making the relevant determination. From an experimentalist perspective, exhaustion contributes to the goal of developing ongoing, autonomous capacity for learning and self-reform on the part of the prison. Some such principle would be essential to any experimentalist approach.

But an effective approach would have to provide safeguards against the misuse of exhaustion to thwart serious review by, for example, establishing administrative routines that impose abusive delays or technical requirements on inmates. It would also have to provide for outside review of the prison's grievance procedures, both to resolve individual disputes and to generate information useful for addressing systemic problems.

We have a model for such an exhaustion requirement in the Civil Rights of Institutionalized Persons Act of 1980, which authorized the Justice Department to initiate suits to vindicate the rights of prison inmates and mental health patients. The exhaustion requirement in this statute was specifically limited to "such plain, speedy, and effective administrative remedies as are available" and only to procedures that have been certified by the federal Attorney General as "in substantial compliance with minimum acceptable standards."[79] In effect,

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[76] *See supra* pp. 1033–34.

[77] 42 U.S.C. § 1997e(a) (2000).

[78] 18 U.S.C. § 3626(b)(1)(A)(i), (b)(3) (2000).

[79] 42 U.S.C. § 1997e(a)(1)–(2) (Supp. IV 1980) (repealed 1996).

the statute used the exhaustion defense as an inducement to prisons to submit to a federal accreditation regime. Apparently, however, the inducement was insufficient. Among the Attorney General's certification conditions was a requirement that inmates participate in the process of developing and implementing the procedures. Few prisons sought certification, in substantial part because of their objection to the participation requirement.[80]

Although the exhaustion provision of the PLRA does not explicitly require that internal procedures be adequate or certified, it would have been plausible for the courts to imply an adequacy condition. For the most part, however, they have declined to do so[81] — in deference, we suspect, less to any coherent interpretation of the statute than to the visceral hostility to prisoners associated with its passage.

The second key provision of the PLRA — that injunctions terminate after two years unless there is proof of current violations — was intended by its drafters and has been perceived by practitioners as a major impediment to structural relief. It takes more than two years of implementation to make major improvements in a prison with serious violations. Moreover, the process of discovery and trial associated with the initial establishment of violations is costly and time-consuming. If this process must be repeated every two years, the costs will be prohibitive.

But it is not clear that the termination provision will have such an effect. To the extent that remedies take an experimentalist cast, there should be no need for costly efforts to reestablish violations, for experimentalist remedies create transparency. Once liability is found, the process of proof merges with that of implementation: a major focus of implementation is the continuous measurement of compliance. The parties should agree in the remedial negotiation on criteria and processes of measurement and on minimal performance thresholds. Measured performance below the agreed-upon threshold should suffice to establish a violation.[82]

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[80] *See* Adlerstein, *supra* note 65, at 1686 & n.27.

[81] *See* Booth v. Churner, 532 U.S. 731, 740–41 (2001) (holding that a prisoner seeking only money damages must exhaust nonmonetary administrative remedies); Boston, *supra* note 65, at 724–25 nn.74–76 (citing cases holding that the inadequacy of an administrative remedy does not excuse failure to exhaust the remedy). Note that the consequence of failure to exhaust under the PLRA is not, as under the Civil Rights for Institutionalized Persons Act, a stay of the court action pending the administrative proceeding, but rather a dismissal, even if an administrative remedy is no longer available because the period for filing has passed. *Id.* at 726.

[82] Some ambiguity about the space for experimentalist remediation arises from the requirements of the PLRA and federal equitable principles that the relief be the "least intrusive means necessary" or "extend no further than necessary to correct" the violation. 18 U.S.C. § 3626(a). This precept could be interpreted to constrain experimentalist remedies, but it is also susceptible to an interpretation that would encourage experimentalism. On one interpretation, the least intrusive injunction would attempt to spell out minimal compliance conditions in detail. In the

In some respects, then, doctrine on prison reform reflects the shift from command-and-control to experimentalist approaches. On the other hand, the doctrine is far less sympathetic to judicial intervention of any kind than is comparable doctrine in the other areas we are considering.

D. Police Abuse

Acceptance of institutional reform litigation in policing has been slower than in the other areas. There are both political and doctrinal explanations for this phenomenon. The political explanation is that popular fear of crime — and associated sentimentality about the police — make judicial intervention seem costlier and riskier here.

The doctrinal explanation arises from the judicial perception that police are less closely supervised and are in less continuous contact with citizens than public servants in the other areas. This perception had led to two procedural obstacles distinctive to the police context. The first is a reluctance to infer systemic practices from discrete instances of misconduct. Chayes, for example, criticized the Supreme Court's 1976 decision in *Rizzo v. Goode*.[83] The lower court, having found nineteen specific incidents of unconstitutional police brutality, issued an injunction requiring the police department to establish a procedure for handling citizen complaints. The Supreme Court reversed, holding that nineteen proven episodes of street-level misconduct did not establish the necessary authorization or condonation to find the department or its senior officials liable.[84]

Another problem has been courts' insistence in many cases that a plaintiff has standing only if she can show, not just that she has been the victim of abuse, but that there is a high probability that she will be abused again in the future.[85]

Recently, however, two competing developments have widened the possibilities for judicial intervention, and the initiatives encouraged by both are, in their early stages, taking an experimentalist direction. The first development occurred in 1994, when, in response to the Rodney King case and the ensuing riots, Congress enacted a statute specifically prohibiting any "pattern or practice of conduct by law enforcement of-

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competing view, an injunction — such as that in *Plata* — that mandated extensive restructuring of background processes in order to leave agents more flexibility in dealing with individual cases would be less intrusive.

In cases outside the prison context, as long as the parties agree on relief, there is no need for the court to reach such issues. However, the issues are pressing under the PLRA, because the relief restrictions there apply to settlements as well as coercive decrees. 18 U.S.C. § 3626(c)(1).

[83] Chayes, *supra* note 1, at 1305–07; *see also* Rizzo v. Goode, 423 U.S. 362 (1976).

[84] *See Rizzo*, 423 U.S. at 367–69, 375–81.

[85] *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 101–10 (1983).

ficers" that deprived people of federal rights. The statute authorizes the Attorney General to seek injunctive relief "to eliminate the pattern or practice."[86]

The Department of Justice has investigated several police forces and has brought five lawsuits that have resulted in consent decrees providing for extensive structural reforms. The reforms are considerably more elaborate than the decree reversed in *Rizzo*. The recent decrees vary in detail, depending in part on the preexisting organization of the department in question, but they tend to have general elements in common.

Typically, the defendant is obliged to promulgate or revise explicit policies with respect to specified matters, such as the use of force. Minimum substantive requirements are sometimes specified, but the defendant retains broad discretion. Data collection efforts are prescribed, often in minute detail. The department must instruct officers to document such matters as use-of-force incidents, arrests, traffic or pedestrian stops, searches and seizures, and discretionary charges (such as loitering or disturbing the peace). Officers must record the reason for their intervention, the race and other characteristics of the citizens involved, and what happened. Sometimes the decree requires videotaping. The departments sometimes agree to provide officers with handheld computers or videorecorders. Officer-reported data must be recorded and stored in a way that permits aggregation with other data, such as citizen complaints (and compliments), disciplinary proceedings, lawsuits, internal investigations, and audits. Other data on officer performance, such as sick days, missed court appearances, and accidents may be added. Training for officers in the policies and the data collection procedures is prescribed. The Department of Justice may participate in designing the training or may have a right to sign off on it.[87]

The decrees also prescribe overlapping compliance procedures. Line supervisors must monitor certain data and follow up on indications of policy violations. In addition, the department must install or refine a specialized internal compliance unit outside the chain of command, such as an inspector general or an internal affairs bureau. Finally, the court appoints a monitor (ideally someone jointly recommended by the parties) with broad access to information. The monitor oversees compliance as an agent of the court.

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[86] 42 U.S.C. § 14,141(b) (2000).

[87] *See, e.g.*, ROBERT C. DAVIS ET AL., TURNING NECESSITY INTO VIRTUE: PITTSBURGH'S EXPERIENCE WITH A FEDERAL CONSENT DECREE 25–33 (Vera Inst. of Justice 2002), http://www.vera.org/publications/publications_5.asp?publication_id=180; Consent Decree, United States v. City of Los Angeles, Civil No. 00-11769 GAF (C.D. Cal. June 15, 2001) [hereinafter Los Angeles Consent Decree], http://www.usdoj.gov/crt/split/documents/laconsent.htm.

The decrees contemplate that the data will be used as an "Early Warning System," providing indicators of systemic problems.[88] Use-of-force incidents are routinely investigated. So, too, are complaints by citizens and other officers, whom the decree may oblige to report wrongdoing by colleagues. In addition, the department is required to perform various analyses of its data. For example, it must track the frequency of use-of-force incidents, complaints, and discipline for individual officers. It analyzes use of force and other kinds of police-citizen interaction in relation to geographic area, race, shift, and squad. Benchmarks or thresholds are developed based on statistical comparisons. A quarterly index of more than a standard deviation above the mean of a prescribed comparison group (a squad or shift or set of squads or shifts) might trigger a mandatory inquiry.

Line supervisors are obliged to follow up indications of noncompliance with nondisciplinary "interventions" that may include direct observation of the officer, counseling, or counseling combined with additional training. Although the decrees emphasize nonpunitive responses, they also mandate discipline when necessary. Disciplinary procedures must meet certain prerequisites. The threshold of proof for a finding of misconduct cannot be higher than a preponderance of the evidence, and there can be no presumption that police witnesses are more credible than citizen ones. Charges and dispositions are to be periodically reported to senior officials and monitors.

The decrees also mandate procedures for "audits" by line managers or internal compliance officials. Audits are designed both to determine whether officer and supervisor conduct indicated in the records is consistent with stated policy and to test the integrity of the reporting processes. For the latter purpose, auditors examine samples of documents for completeness and surface credibility (the routine use of "canned" language is a negative signal). Smaller samples may be investigated more actively by interviewing participants, and "sting audits" with undercover monitors posing as citizens may be prescribed.[89]

Usually some of the data must be reported publicly. Audit reports with overall observations on compliance and correlations of police interventions with race and locality are commonly disclosed, while information about specific incidents and officers typically is not.[90]

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[88] *See* Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 821–41 (1999).

[89] *See, e.g.*, Los Angeles Consent Decree, *supra* note 87, at paras. 124–40.

[90] *See, e.g.*, *id.* at paras. 156, 174. A study of experience under the Pittsburgh consent decree, though unable directly to assess effects on street-level conduct, found major effects on management practices and an improvement in public perceptions of the police. Supervisors monitor performance indicators and make interventions based on them daily. DAVIS ET AL., *supra* note 87, at 10–33.

The other development favoring police abuse litigation is the growing public awareness of and protest against racial profiling.[91] One of the Justice Department lawsuits under the 1994 federal statute — against New Jersey — focused on such claims.[92] Allegations of racial profiling have also been the subject of private suits, and so far they have not been blocked by the strict procedural doctrines of the earlier police cases. Persistent unexplained statistical disparities in the racial incidence of police actions can warrant an inference of institutional condonation. Moreover, with activities such as traffic stops, the likelihood that a law-abiding minority person will suffer a repeated injury is often demonstrably high enough to satisfy standing requirements.[93] There has been parallel legislative activity: at least thirteen states and many local governments have enacted legislation prohibiting racial profiling and requiring specific compliance procedures.[94]

The progression from the *Rizzo* plaintiffs' concern with general abuse to the current focus on racial targeting might seem the reverse of the movement of the school cases from desegregation to "adequacy." But relief in the current profiling cases seems more likely to resemble relief in the school adequacy cases than the command-and-control injunctions of the desegregation cases. The approach agreed to in an early private lawsuit against Montgomery County, Maryland, which has emerged from the Justice Department's suit against New Jersey and which has been widely mandated by state and local enactments, focuses on monitoring rather than dictating ex ante the specifics of policing. The regimes commit the police not to use racial criteria (except when they are seeking a previously identified suspect). The department must promulgate written criteria for stops and searches and then document them in a way designed to permit assessment of whether the conduct is consistent with its policy. The rules provide for analysis and (sometimes public) reporting of the racial incidence of such stops and searches. At least internally, the department should be able to compare racial incidence by officer, squad, or region. The New Jersey decree mandates the development of "benchmarks" — indicators based on the racial correlations of the criteria used as triggers for stops, such as vehicle type, driving behavior, and dress. The benchmarks are derived through analysis by social scientists of photographic records of

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[91] *See generally* Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41 (2001); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002).

[92] Consent Decree, United States v. New Jersey, Civ. No. 99-5970 (MLL) (D.N.J. Dec. 30, 1999) [hereinafter New Jersey Consent Decree], www.state.nj.us/lps/jointapp.htm.

[93] *See* Gross & Barnes, *supra* note 91, at 727–29; Brandon Garrett, Note, *Standing While Black: Distinguishing* Lyons *in Racial Profiling Cases*, 100 COLUM. L. REV. 1815, 1834–39 (2000).

[94] Gross & Barnes, *supra* note 91, at 729.

traffic flow. When police stop or search minorities at rates above the benchmarks, an inference of racial profiling may arise, and intervention is called for.[95]

An important contested issue concerns the role of citizen groups in these regimes. "Community policing," in which police devise local crime control strategies in collaboration with neighborhood groups, is now widely promoted. In various forms it has had promising trials in several cities, including Philadelphia, Boston, and Chicago. The Justice Department consent decrees, however, require police consultation with community groups only in vague terms. Most importantly, they do not require that the monitoring data they generate be made available to such groups. Critics assert that such groups have important information bearing on the interpretation of the data that is unlikely to be available to professional monitors. These groups also arguably have the strongest incentives to promote enforcement. Citizen groups in Los Angeles and New Jersey have brought suits seeking expansion of the relief in the consent decrees to afford broader access and participation.[96]

E. Housing

In housing, there has been a shift away from large-scale desegregation efforts toward regimes focused directly on housing quality that parallels the course of school litigation from desegregation toward "adequacy." Concomitantly, judicial efforts to address municipal discrimination against low-income housing development have evolved in an experimentalist direction.

In 1969, in *Gautreaux v. Chicago Housing Authority*, a federal district court found that the Authority, through siting and tenant assignment decisions, had unconstitutionally segregated the city's vast public housing system. The court entered a broad decree, since revised many times, to remedy the violations. The core of the decree was a mandate that for every new unit the Authority built in a predominantly minority neighborhood, it had to build three units (later reduced to one) in a nonminority neighborhood.[97]

More than thirty years later, plaintiffs and a receiver are still struggling to implement the decree. Only about seven percent of the units constructed under the receiver are in white neighborhoods. Political resistance in nonminority neighborhoods and the shift in federal hous-

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[95] *See* New Jersey Consent Decree, *supra* note 92, at 554–56; Garrett, *supra* note 91, at 76–80; Gross & Barnes, *supra* note 91, at 717–28;.

[96] *See* Garrett, *supra* note 91, at 98–115; Livingston, *supra* note 88, at 841–56.

[97] *See* Gautreaux v. Chi. Hous. Auth., 304 F. Supp. 736, 737–39 (N.D. Ill. 1969); Gautreaux v. Landrieu, 498 F. Supp. 1072, 1073 (N.D. Ill. 1980); Gautreaux v. Chi. Hous. Auth., 4 F. Supp. 2d 757, 758 (N.D. Ill. 1998).

ing support away from new public housing construction have stalled further progress. As with schools, integration has become more difficult as whites have migrated out of the city. In addition, major problems in public housing quality persist.[98]

Some civic and tenant groups have charged that the *Gautreaux* focus on integration has impeded rehabilitation of housing projects and revitalization of minority neighborhoods. They further argue that the integration effort has made housing development too expensive. In two recent lawsuits, members of the *Gautreaux* class seeking to rehabilitate housing in minority neighborhoods have aligned themselves against the *Gautreaux* receiver and plaintiffs' counsel.[99]

There has been some success. Some units have been built in neighborhoods from which public housing was once excluded. A service-intensive program that tries to help holders of "Section 8" housing-assistance certificates find apartments in the suburbs appears to be working. On the whole, however, the experience has been disappointing.[100]

The landmark example of the shift of litigation focus to housing quality is *Perez v. Boston Housing Authority*,[101] in which the Massachusetts Supreme Judicial Court affirmed an order placing the Housing Authority in receivership. The principal substantive basis of the order was the state sanitary code requiring all landlords, public and private, to maintain housing in minimally safe and habitable conditions.[102] The plaintiffs presented voluminous evidence showing that the Authority's projects were far from compliant. They also presented evidence of corrupt and incompetent management, showing, for example, that the board and managers lacked skills and knowledge necessary to perform their duties, paid little attention to key aspects of their

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[98] *See* Joseph Seliga, Gautreaux *a Generation Later: Remedying the Second Ghetto or Creating the Third?*, 94 NW. U. L. REV. 1049, 1062 (2000).

[99] *See* Gautreaux v. Chi. Hous. Auth., 1999 U.S. Dist. LEXIS 17439 (N.D. Ill. Nov. 3, 1999); Cabrini-Green Local Advisory Council v. Chi. Hous. Auth., 1997 U.S. Dist. LEXIS 625 (N.D. Ill. Jan. 22, 1997).

[100] *See generally* Seliga, *supra* note 98; William P. Wilen & Wendy L. Stasell, Gautreaux *and Chicago's Public Housing Crisis*, 34 CLEARINGHOUSE REV. 117 (2000).

Another notable large-scale desegregation case that took an enormous toll in terms of material expense and acrimony but generated disappointing results is *United States v. Yonkers Board of Education*, 624 F. Supp. 1276, 1545 (S.D.N.Y. 1985). For the depressing story in full, see Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 324–64 (2002).

[101] 400 N.E.2d 1231 (Mass. 1980).

[102] Another basis for structural relief recognized since *Perez* is "constructive demolition," a doctrine holding that extreme failure to maintain or repair can constitute violation of a statute requiring federally subsidized authorities to demolish only in accordance with a process involving HUD approval. 42 U.S.C. § 1437p (2000); *see also* Concerned Tenants Ass'n of Father Panik Vill. v. Pierce, 685 F. Supp. 316, 321 (D. Conn. 1988) (recognizing an implied cause of action for "*de facto* demolitions" under the statute).

jobs, allowed available resources to go unused, and ignored opportunities to apply for new resources.

The federal government has sought to establish a system for assessing public housing performance that supports public actions for structural relief. Pursuant to congressional mandate, the U.S. Department of Housing and Urban Development (HUD) operates the Public Housing Assessment System, which scores local agency performance according to a range of indicators in four general areas: (1) physical condition (compliance with building and sanitation standards); (2) financial condition (for example, the number of months the authority can operate on its Expendable Funds Balance without additional resources; the average number of days tenant receivables are outstanding; the expense per unit of utilities, maintenance, and security; and the amount of unobligated capital funds); (3) management operations (for example, vacancy rates, number and age of outstanding work orders, and unit turnaround time); and (4) resident service and satisfaction (based on responses from a resident survey on issues such as maintenance and repair, safety, management communication, recreation, and other services). Each indicator is measured and then summed to produce scores comparable across sites for each of the four areas and a total score on a hundred-point scale. Authorities that receive scores of at least sixty percent of the available points for physical condition, finance, and management and a total score above ninety are considered "high performers" and are subject to relaxed reporting and monitoring requirements. An authority with passing scores in each area and a total score between sixty and ninety is considered a "standard performer." These authorities are expected to formulate improvement plans and to demonstrate progress under them. A failing score on physical condition, finance, or management or a total score below sixty leads to designation as "troubled" and subjects the authority to intensive monitoring.[103]

In an effort to make scores comparable across sites, HUD prescribes measurement procedures in minute detail. However, the system contemplates periodic revision in consultation with "owners, residents, and affected communities."[104] The tendency is toward a system

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[103] *See* Public Housing Assessment System, 24 C.F.R. pt. 902 (2003); U.S. Dep't of Hous. & Urban Dev., Public Housing Assessment System: Information About PHAS, 64 Fed. Reg. 26,160 (May 13, 1999).

[104] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOUS. & URBAN DEV., AUDIT REPORT NO. 2001-DP-0004, at 15–17 (Sept. 28, 2001), *available at* http://www.hud.gov/oig/ig1d0004.pdf (reporting criticisms by HUD's Inspector General and the Government Accounting Office that the initial weights HUD assigned to physical condition indicators did not reflect stakeholder priorities, and prescribing more effective consultation).

of specific rules, but one that is continuously revised in light of its purposes through a participatory process.

In 1990, Congress directed HUD to petition a court to place in receivership housing authorities whose performances failed to improve after being rated "troubled" under the assessment system.[105] Reports suggest that receivers have found their work difficult but have made substantial improvements.[106] In principle, the receiver's goal is not just to manage the property through a crisis, but to restructure its processes in a way that makes effective operation possible without judicial intervention. As with reform of schools and mental health facilities, a major theme of many receiverships is decentralization. In housing, decentralization includes tenant participation, which has been a prominent theme in federal public housing policy since the 1980s. HUD mandates resident advisory councils and encourages tenant management of the projects it subsidizes.[107] Some receivers have had notable success in strengthening these processes.[108]

A final, convergent instance of judicial initiative involves private housing development. It arose from the New Jersey Supreme Court's 1975 *Mount Laurel* decision.[109] The court held that a local zoning ordinance that largely precluded low- and moderate-income housing violated a state constitutional provision granting various general rights including the right "of acquiring, possessing, and protecting property." It interpreted this provision to require a local government to structure its zoning code so as to "make realistically possible an appropriate variety and choice of housing," including its "fair share of the present and prospective regional need" for low- and moderate-income housing.[110] This holding is a housing analogue to the recognition by state supreme courts of the right to an adequate education.

Mount Laurel differs procedurally from the other cases considered here. The New Jersey court was not dealing with one or a few institutions in a single case with a single structural decree. It was attempting to deal with practices of local governments across the state, and it acted in a series of cases, each involving a single locality. Yet its goals

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105 *See* 42 U.S.C. § 1437d(j) (2000).

106 *See* MARK H. MOORE, CREATING PUBLIC VALUE: STRATEGIC MANAGEMENT IN GOVERNMENT 193–200, 240–55 (1995) (Boston); Lynn E. Cunningham, *Washington D.C.'s Successful Public Housing Receivership*, 9 J. AFFORDABLE HOUSING & COMMUNITY DEV. 74 (1999); Carolyn Hoecker Luedtke, *Innovation or Illegitimacy: Remedial Receivership in* Tinsley v. Kemp *Public Housing Litigation*, 65 MO. L. REV. 655 (2000) (Kansas City).

107 *See generally* U.S. DEP'T OF HOUS. & URBAN DEV., COMMUNITY BUILDING IN PUBLIC HOUSING: TIES THAT BIND PEOPLE AND THEIR COMMUNITIES (1997).

108 *See* MOORE, *supra* note 106, at 250–53; Luedtke, *supra* note 106, at 672.

109 S. Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975), *cert. denied*, 423 U.S. 808 (1975).

110 *Id.* at 724.

were structural and its practices managerial in ways strongly analogous to those in the other new public law cases.

The first *Mount Laurel* opinion simply announced the new doctrine in general terms and struck down the particular ordinance in question, leaving development of the doctrine to future cases. The case encouraged the civil rights groups that had brought it and mobilized developers. Many municipalities resisted strongly. A movement to amend the state constitution to eliminate the doctrine formed but never succeeded.

In 1983 the court issued an opinion reaffirming its commitment to the doctrine and further guiding its implementation. *Mount Laurel II* did not prescribe comprehensive or specific directives for the determination of a locality's "fair share." Instead, it incorporated the methodology of a "Development Guide" promulgated by a state agency. The court prescribed that judges would be guided by the agency's revisions of the methodology. It provided an illustrative list of ways in which a municipality might satisfy its duties, including density bonuses and inclusionary zoning. It also prescribed a "builder's remedy," by which a builder who prevailed on a *Mount Laurel* challenge to a zoning ordinance would be permitted to build unless the municipality could show that the project violated some valid regulation. This obviated the possibility that, when a locality lost a *Mount Laurel* challenge, all development would cease until it came up with a valid zoning code. This remedy also gave developers strong incentives to challenge noncompliant codes. Finally, the court established a procedure by which it would appoint lower court judges to hear *Mount Laurel* zoning appeals. It would designate three judges to hear all the appeals statewide, one judge for each of three regions.[111]

This arrangement made possible a complex series of negotiations among municipalities and across cases that produced considerable agreement on the assignment of responsibility. When the Urban League sued twenty-three municipalities, one of the *Mount Laurel* judges ordered the planning experts of all the parties to meet to negotiate a formula for allocating "fair shares" of new affordable housing. The effort produced a consensus that became the basis for subsequent allocation decisions throughout the state.[112]

In 1985, the legislature responded to the *Mount Laurel* decisions with the New Jersey Fair Housing Act, establishing an administrative agency, the Council on Affordable Housing, to assume the primary role in monitoring compliance with *Mount Laurel* obligations. The statute

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[111] *See* S. Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390, 422–513 (N.J. 1983).

[112] *See* CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 57 (1996).

also charged the Council with providing research and technical support and facilitating negotiations among local governments. Although the statute and the Council's activities have retreated from some aspects of *Mount Laurel*, much of the framework established by the courts has been preserved.[113]

Although opinion is divided, *Mount Laurel* can plausibly be viewed as a "marginal success."[114] The efforts it prompted do not appear to have led to integration of the suburbs, but they have increased the supply of low- and moderate-income housing in New Jersey.[115] Moreover, the court prompted the legislature to create an administrative process that seems significantly more responsive to the interests articulated by the plaintiffs, both by creating pressures for local accommodation of low-income housing and by making the zoning process more transparent. A few other state courts have followed *Mount Laurel*'s lead in finding state constitutional restraints on exclusionary zoning, though generally in a weaker form, and several state legislatures have instituted statutory schemes resembling the New Jersey Fair Housing Act, with and without judicial prompting.[116]

E. Conclusion

In all of these areas, though to varying degrees, there has been a tendency for remedial practice to move away from command-and-control toward experimentalist methods.

It is possible that this tendency has partly been a function of changes in substantive issues. For example, in prison litigation, many cases in the 1970s and 1980s focused on crowding. Today's cases more commonly focus on inmate medical care. It is much easier to formulate specific directives for crowding than for medical care.

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[113] *See* N.J. STAT. ANN. § 52:27D-302(c) (West 2001). *See generally* HAAR, *supra* note 112, at 89–116.

[114] Henry Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 72 (2001). Haar views it as more than marginally successful. *See generally* HAAR, *supra* note 112. But there are negative assessments. *See* Schuck, *supra* note 100, at 315–19. The authors of DAVID KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (1995), view the judicial regime created by *Mount Laurel II* as highly promising and the results of the administrative regime that replaced it as meager. *See id.* at 112–64.

[115] Based on Commission on Affordable Housing data, Span estimates that from 1987 to 2001 the *Mount Laurel*–inspired statutory regime added 40,000 units of affordable housing and perhaps a larger number of market-rate middle-income units that otherwise would not have been built. Span, *supra* note 114, at 65–68.

[116] *See id.* at 37–84. Span views Oregon, where a judicial decision was also followed by a legislative response, as the most successful case: "[T]he Oregon experience shows that if a court can manage to provoke a state legislature into creating a state agency with jurisdiction over land-use and housing policy, such an agency can go further than its original mandate if given significant interest group, as well as judicial, support." *Id.* at 72–73.

To some extent, however, the move reflects a general sense of the inadequacy of command-and-control approaches. Courts found they lacked both the information and the depth and range of control to properly formulate and enforce command-and-control injunctions. Moreover, command-and-control interventions exacerbated resistance on the part of defendants — or at least, top-down measures had little capacity to neutralize such resistance.

Any assessment of the comparative efficacy of the two approaches would have to be tentative and qualified. In general, where clearly bad practices (and the available bad substitutes for them) can be specifically described and are not too numerous, a negative injunction in specific mandatory terms will often seem promising. Thus, the courts desegregated many countywide school districts in the rural South with more or less command-and-control-style decrees. The early prison cases made substantial improvements with traditional top-down prohibitions of practices such as convict-leasing and torture.

Even where the conditions for command-and-control intervention are not satisfied, experimentalist approaches will not always be promising. Jennifer Hochschild argues that the most successful Northern school desegregation cases, such as that of Wilmington, Delaware, were those in which the courts mandated practices specifically and quickly. She contends that in cases such as Boston's, the emphasis on stakeholder participation impeded progress.[117]

Nevertheless, the new approaches are promising in many contexts. In the following Part, we suggest some reasons why they might succeed where the older ones have failed.

III. PUBLIC LAW LITIGATION AS DESTABILIZATION RIGHTS ENFORCEMENT

A. Right and Remedy

The feature of Chayesian public law litigation that has most troubled legal analysis is the relation of right and remedy. Determination of right, or liability, looks familiar. Normatively, it seems like a judgment about entitlement of a sort courts customarily make. Methodol-

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[117] *See* JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION 92–145 (1984). It may be, however, that the success stories Hochschild emphasizes depended on stakeholder participation mobilized after the formulation of the remedy as part of its implementation. And the most important explanation for the failure of cases like Boston's may be that remedies there were confined to a single urban district, rather than, as in Wilmington, operating across several. *See* JEFFREY A. RAFFEL, THE POLITICS OF SCHOOL DESEGREGATION: THE METROPOLITAN REMEDY IN DELAWARE 120–53, 208–17 (1980).

ogically, it seems to arise from the application of conventional legal analysis to traditional sources.

But as Chayes emphasized, the remedial implications of a public law determination of right are more ambiguous than those of the paradigmatic private law determination. A judgment of tort or contract liability usually implies a limited range of specific interventions.[118] A public law liability determination speaks with some clarity only about the broadest goals of intervention. It has only vague implications for the specific forms intervention should take. Moreover, remedial design requires a different type of decisionmaking from rights determination. It does not directly involve the elaboration of normative principles or the interpretation of texts. Remedial design involves more technical, strategic, and contextual forms of thought.

Drawn from a practice that was more transitional than he anticipated, Chayes's formulation of the public law relation between right and remedy was inconclusive. It invited two contrary, symmetrically unsatisfactory interpretations. Daryl Levinson calls the first of these "rights essentialism."[119] This view sees liability determination as the core judicial function and remedial formulation as derivative and secondary. The declaration of substantive rights draws its legitimacy directly from the role of the courts in elaborating and protecting entitlements. Prescribing remedies is an ancillary activity necessary to give practical effect to the liability judgment but less grounded in legal principle.

The evolution of public law traced in Part II suggests important objections to this view. To portray the core of judging as the declaration of rights independent of the effort to actualize them in particular circumstances ignores the practical dimension of adjudication. It also misrepresents the psychology of judicial decisionmaking to suggest that the anticipated difficulties of implementing rights do not strongly influence their declaration. Furthermore, if Holmes's "bad man," who cares only about tangible sanctions and rewards,[120] captures any dimension of social life, then the remedy will determine the impact of the case on future conduct.[121]

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[118] *See* Chayes, *supra* note 1, at 1282–83. Nonetheless, the difference can be exaggerated. Some of the classics of modern legal scholarship have been devoted to showing that the remedial implications of private law rights are not as definite as people sometimes think. *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages I*, 46 YALE L.J. 52 (1936).

[119] Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

[120] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

[121] *See generally* Levinson, *supra* note 119.

The contrary view insists, with Holmes's "bad man," that only the remedy is important. But this crude positivism is even less satisfactory than the exaltation of rights. It ignores that the remedy arises from a reflective effort to give meaning to the right. Both rights essentialism and crude positivism understate the interdependence of rights declaration and remedial formulation. The remedy is an elaboration of the rights in question: it is not a technical effort to execute an already defined norm, as rights essentialism implies; nor is it an exercise of instrumental discretion, as crude positivism suggests.

Moreover, neither perspective captures the two most important distinctions between the two phases of decisionmaking in the new public law. First, the move to the remedial phase in experimentalist cases will often involve a shift in process, personnel, and methodology. The judge's role changes from that of directly determining the merits to facilitating a process of deliberation and negotiation among the stakeholders. The judge's determination in the liability phase can take into account the anticipated results of this process only to a small extent, because the same limitations of the judge's knowledge that force him to initiate the process also constrain his ability to anticipate its results.[122]

Second, the incentive or deterrent effect on potential future defendants does not depend on the specifics of the remedy in any particular case. Unlike the social engineer trying to regulate the Holmesian "bad man," the experimentalist lawmaker does not try to calibrate remedies precisely to induce the desired pattern of conduct, because she does not know with any specificity what the desired pattern of conduct is. The message that the new public law sends to prospective defendants is not that they will suffer any specific set of consequences in the event of default, but that they will suffer loss of independence and increased uncertainty. Uncertainty does not represent a failure of articulation but the deliberate crux of the message.

A critical aspect of both the declaratory and the remedial dimension of the new public law litigation is captured in Roberto Mangabeira Unger's notion of "destabilization rights." This idea is part of the detailed institutional program of "empowered democracy" that concludes Unger's 1987 work, *False Necessity*: "Destabilization rights protect the citizen's interest in breaking open the large-scale organizations or the extended areas of social practice that remain closed to the destabilizing effects of ordinary conflict and thereby sustain insulated hierarchies of power and advantage."[123]

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[122] When the defendant concedes liability in negotiation, the shift from liability to remedy is less marked. There may be little change in process or personnel, but there is likely to be a change in perspective and methodology.

[123] UNGER, *supra* note 13, at 530.

Destabilization induces the institution to reform itself in a process in which it must respond to previously excluded stakeholders. Although Unger describes the idea only briefly, he gives Chayesian public law litigation as an illustration. We think the practice in public law cases in the years since Unger's book appeared might be considered both a vindication and an elaboration of his idea.

Destabilization usefully describes both the remedy and the process by which the meaning of the background substantive right is articulated in these cases. In the new public law, the judge does not exercise discretion in each case to choose among an infinite array of potential responses to the particular problem. Rather, having found a violation of some broad norm — the right to an adequate education, the right to access to justice — she imposes the single remedy that the liability phase has shown to be appropriate: institutional destabilization. This remedy has a common structure across fields. Moreover, judicially and publicly accountable standard-setting in the experimentalist liability phase bridges the gulf between the initial affirmation of the substantive right and the eventual remedy.

In the remainder of this Part, we elaborate on the understanding of the new public law as destabilization rights. We start by noting precedent for destabilization rights in traditional private law. Here we suggest that Chayes's distinction between "traditional" and "public" law obscures an important feature of the former that foreshadows the experimentalist version of the latter. We then describe public law rights and remedies as forms of deliberate, reflective destabilization. Experimentalist intervention is a public institutional analogue of the ongoing destabilization induced by common law norms in the private market. Such intervention subverts entrenchment by subjecting institutions both to ongoing scrutiny by their stakeholders and to the feedback of disciplined performance comparisons with peer institutions.

The inauguration of these experimentalist regimes is preceded by remedial negotiations. These negotiations are induced and fueled by an intense destabilization that results from the initial intervention of the court. The parties define the remedies, but it seems unlikely that they could do so without this intervention. The court's principal contribution is to indicate publicly that the status quo is illegitimate and cannot continue. We show that this very general intervention can have a series of effects that may make it possible for the adversaries to collaborate productively to design a specific remedial regime.

B. The Destabilization Theme in Private Law Litigation

Chayes's article built on a contrast between the "traditional model" of private litigation and actions against public officials for structural injunctive relief. He characterized traditional litigation as "bipolar" (affecting only two parties), retrospective (concerned with past facts),

involving claims of right that implied definite remedies proportional to the harm alleged, "self-contained" (in the sense that judgment terminated the court's involvement), and "party-controlled" (implying a passive judicial role).[124]

But even when it operates primarily as a mechanism of dispute resolution, the common law has precedential effects that ramify beyond individual cases and shape the backdrop of general rules that regulate social interaction. In areas such as tort and bankruptcy, moreover, the common law is intended to operate as much as a system of social regulation as one of dispute resolution. By ignoring the way the systemic and self-consciously regulatory aspects of traditional adjudication entailed polycentricity and destabilization, Chayes exaggerated the novelty of public law litigation.

To be sure, the continuity with traditional litigation was far less salient in the command-and-control practices that prevailed when he wrote. But this continuity has become more visible in the experimentalist practice of recent years. The tendency of the common law to destabilize congealed social practices anticipates a central theme of experimentalist public law.

1. Precedent and Polycentricity. — Common law adjudication produces both a resolution of the dispute between the parties and a norm — the precedent — that is supposed to guide future cases and, by implication, social conduct. Chayes acknowledged the doctrine of precedent but associated it principally with appellate courts. He portrayed trial courts as concerned with factfinding and noted that this function was characteristically remitted to the "black box" of jury determination.[125] Because juries do not explain their verdicts, their decisions are ambiguous and have little formal precedential effect.

But juries decide cases under instructions from judges about the law; judges can make rulings that keep cases from juries or overrule their decisions, and they also make many decisions that influence the issues and evidence that go to the jury. All these decisions are formally subject to stare decisis. A trial court decision is binding on subordinate tribunals, if any exist, and on the court itself in future cases; further, it is persuasive authority for courts in other jurisdictions. Most trial court decisions are not officially published, but they are often published online and reported in the press and through informal channels. As a practical matter, we know that many trial court rulings and jury verdicts do influence conduct, as indications of the likely behavior of courts in future cases.[126] And, of course, appellate cases start

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[124] Chayes, *supra* note 1, at 1282–83.

[125] *See id.* at 1285–88.

[126] *See generally, e.g.*, Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47 (1992).

out as lower court cases, and their outcomes are often strongly influenced by conduct in the lower court both in making legal rulings and in the framing of the record.

In their precedential dimension, then, trial court decisions in traditional common law cases share characteristics Chayes attributed to public law litigation. They have effects that extend beyond the immediate parties. Institutional litigants show their awareness of this when they coordinate trial strategies with each other or monitor cases in which they are not directly involved. Judges, in making common law decisions, often try to take account of their precedential effects. These future effects are not necessarily proportional to or predictable from the particular harm alleged by the plaintiff before the court. To the extent that the case creates precedent, the lawsuit is not "self-contained"; the court will revisit the precedent in future cases. In applying and elaborating precedent, the court looks to its own past decisions and those of other courts, not just to the record created by the parties before it.

Finally, the precedential aspect of common law decisions blurs the distinction between simple or self-contained and complex or ramifying problems that is so prominent in the literature on public law litigation.[127] Chayes associated private law litigation with self-contained disputes and public law litigation with what Lon Fuller called "polycentric" problems.[128] Fuller's metaphor for the polycentric problem was the spider's web: tugging at one point on a single strand produces movement that ripples throughout the entire web. Adjudication, he suggested, was most appropriate for localized, self-contained problems. When the effects of resolving a particular dispute ramify broadly, he suggested, adjudication was not well-suited. A key example mentioned by Fuller and taken up by later commentators is the allocation of resources under a fixed budget.[129] A decision to increase funding for a particular activity requires that resources be directed away from others (and perhaps also toward others, to the extent that the new commitment requires complementary expenditures — for example, more spending on police may require more spending on courts and prisons). Public law litigation proponents point to problems courts routinely handle that seem polycentric, such as probate[130] and divorce.

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[127] *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 135–36 (Thomas, J., concurring) (1995); Fletcher, *supra* note 7, at 645–50.

[128] *See* Chayes, *supra* note 1, at 1304 (citing Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395–98 (1978)). Fuller's article circulated in manuscript for many years before it was published, and Chayes cited this version. *See id.* at 1304 n.94.

[129] *See* Fuller, *supra* note 128, at 394–96.

[130] *See* Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 479–86, 488–93 (1980).

Moreover, every judicial order implies an allocation of public funds sufficient to enforce it; the enforcement costs of even routine private litigation are often substantial, and enforcement often depends on the discretionary initiative of public officials, such as sheriffs charged with finding and executing on a defendant's assets.

If we focus on the precedential aspects of common law adjudication, we see a further striking respect in which the most traditional private law adjudication is polycentric. Whatever the direct mandatory effects of a common law decision, its precedential effects often ramify in myriad and partly unforeseeable ways.[131] A negligence case, for example, will often set a standard that raises the costs of a practice or product — costs that may or may not be passed on to customers. Satisfying the standard may increase or decrease the demand by the producer for other goods or services. The modification of the producer's conduct or product may either increase or decrease its attractiveness to consumers relative to other goods. The modification may induce technological developments providing benefits that spill over to other products, or alternatively, the decision may encourage technological stagnation. Yet the court typically must decide on the basis of only a small fraction of the relevant information. That such doctrines can have very large but uncertain effects is a pervasive premise of contemporary legal thought.[132] This premise is prominent, for example, in the contemporary debate over tort liability. Although they do not agree on what the effects of tort liability are, most of the commentators assume they are large, and even those who regard the effects as unfortunate view them as objections to particular doctrines[133] rather than as reasons why courts are not qualified to adjudicate those kinds of cases.

2. The Destabilization Aspect of Common Law Regulation. — Joseph Schumpeter coined the phrase "creative destruction" to emphasize that the market processes that generate economic development depend on frequent and often abrupt institutional subversion and redeploy-

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[131] *See* Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 39–44 (1979) (suggesting that all judicial norm declaration is polycentric).

Although he associated traditional common law adjudication with unicentric problems, Fuller acknowledged that precedent gave it a polycentric dimension. *See* Fuller, *supra* note 128, at 398. He did not elaborate on this insight, however, except to speculate in passing that the fact that precedential norms were developed flexibly and gradually might make them adaptable to polycentric problems. Most public law critics who built on the polycentricity idea ignored this qualification.

[132] Two prominent histories attribute large social effects to the nineteenth-century common law. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977); J. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956).

[133] *See, e.g.*, PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 3–18 (1988).

ment.[134] Common law norms play an important role in this process. Consider two especially important examples from tort law — the duty of care to strangers and the immunity for competitive injury.

The duty of care holds industries responsible, usually through damages, for the consequences of socially unreasonable practices. Reasonableness is measured in both efficiency and fairness terms. While industry custom is often used as a proxy for both efficiency and fairness, it is not a trump; even longstanding and universal practices are sometimes found unreasonable.[135] When a common law court enforces prevailing industry standards, it puts pressure on weaker, less adept firms. Some will improve their practices; some will go out of business. When a court raises standards for the industry, it puts pressure on all firms. The reasonableness norm is continuously revisable; it is elaborated in the context of current social circumstances. So firms can rarely sit back, confident that today's practices will be sufficient. They are likely to experience some pressure to improve.

The competitive injury norm is the opposite of a liability norm — it presumptively shields those who compete successfully through price or product quality from claims by unsuccessful producers injured by their activities.[136] This norm subjects economic actors to pervasive vulnerability and potentially devastating loss and thus promotes improved performance. As with the duty of care, the immunity for competitive injury creates pressures for continuous adjustment, and it often causes disruption and loss.

Common law norms like the duty of care and the immunity for competitive injury regulate indirectly and partially. Sometimes, however, common law courts engage in more direct and comprehensive restructuring of business institutions. Two areas are especially important — antitrust and insolvency.

Antitrust is a set of tools designed to destabilize enterprises that have reduced their vulnerability to competitive pressures. In effect, the doctrine forces enterprises to remain open to these pressures. Sometimes damages and the prohibition of specific practices are deemed sufficient for enforcement. At other times, when an enterprise or group has acquired monopoly or oligopoly power, courts are obliged to undertake direct and comprehensive restructuring. Over the years, major portions of the oil, tobacco, cement, and movie industries,

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[134] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81–86 (3d ed. 1950).

[135] *See, e.g.*, The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

[136] The norm became firmly established only in the nineteenth century. Prior to that time, established enterprises in many lines of business could sometimes recover from successful competitors for "loss of custom." *See* HORWITZ, *supra* note 132, at 114–16.

among others, have been restructured by court decree under antitrust laws.[137]

Insolvency is another area in which courts undertake direct and comprehensive reorganization. Chayes noted in passing that "[f]rom 1870 to 1933, federal judges, acting through equitable receivers, reorganized over 1,000 railroads," but he considered this activity outside the core work of common law courts.[138] Much of this reorganization work is concentrated in the federal bankruptcy courts. Nevertheless, state courts of general jurisdiction have substantial power to restructure organizations in situations where there is insolvency or a risk of insolvency. Insolvency law has aspects of both restabilization and destabilization. One of its principal purposes is to protect enterprises against the *excessively* destabilizing pressures that can result when creditors assert their claims individually without coordination. The resulting scramble risks both a disorderly distribution and the destruction of potentially viable enterprises. Insolvency law mitigates the destructive destabilizing effects of the common law of contract. In another dimension, however, insolvency law destabilizes: it disentrenches the position that the owners or managers of the debtor might otherwise have. Once the race to judgment is halted by public intervention or agreement among the creditors, the debtor has some advantages. It has the best information about the condition and prospects of the business, and it can coordinate its strategy without the difficulties that a diverse creditor coalition faces. Other aspects of the insolvency process are thus designed to level the field by forcing the debtor to disclose information, assisting creditor coordination, and at the extreme, mandating displacement of the debtor or its management.[139]

On a more general level, the destabilization theme is reflected in two pervasive characteristics of common law norms. First, a common law precedent, in its paradigmatic form as a damage judgment, regulates indirectly. It indicates that those in the position of the defendant will have to pay damages for comparable future injuries, but it does not specifically dictate conduct. In many cases, it leaves the defendant free to choose between compensating future victims and reducing harm, as well as free to decide how to reduce future harm. Second, a common law norm is open-textured and open-ended. It is open-textured in the sense that it states a principle rather than a rigid or specific rule, and the principle is embedded in a set of facts. Its future

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[137] *See generally* Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 CORNELL J.L. & PUB. POL'Y 239 (1999).

[138] Chayes, *supra* note 1, at 1303 n.92.

[139] *See* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 7–19, 193–208 (1986).

applicability has to be determined through informal, analogical reasoning. A common law norm is open-ended in the sense that it is always open to revision, modification, and elaboration. Whether this process is portrayed as a quest to delineate a timeless but amorphous principle or as a process of continuous regulatory adjustment, common law norms have a provisional quality.

Chayes ignored these destabilizing, regulatory aspects of common law for two related reasons. First, as we noted, he saw the common law largely as a dispute-resolution mechanism that resolved cases one by one without disturbing the settled practices of the market. Second, he associated effective regulation in the age of the administrative state with the command-and-control model of a comprehensive set of fixed and rigid rules. Public law adjudication in his conception was primarily an innovation in the process of rulemaking, not in the kind of rules made. Thus, he was doubly indisposed to detect the regulatory current of "traditional" law.

But the evolution of public law itself demonstrates the limitations of this perspective. The trend in structural remedies, we have seen, is away from command-and-control toward initiatives that build on and even systematize the very qualities of indirection and provisionality characteristic of common law norms.

C. Destabilization Rights

A public law destabilization right is a right to disentrench or unsettle a public institution when, first, it is failing to satisfy minimum standards of adequate performance and, second, it is substantially immune from conventional political mechanisms of correction. In the typical pattern of the new public law suit, a finding or concession of liability triggers a process of supervised negotiation and deliberation among the parties and other stakeholders. The characteristic result of this process is a regime of rolling or provisional rules that are periodically revised in light of transparent evaluations of their implementation.

1. The Prima Facie Case. — The prima facie case for public law destabilization has two elements: failure to meet standards and political blockage. The first element is explicit and is the focus of evidence and argument in the liability phase. The second is less discussed but remains an important background premise.

The determination regarding compliance with minimum standards is the least controversial aspect of institutional reform adjudication. Often the plaintiff's claim that the institution fails to meet minimum

standards is uncontested.[140] Often, operating managers are sympathetic to, and even supportive of, the claims because they themselves have been struggling to bring the institutions into compliance. Even senior public officials, including governors and mayors, are sometimes willing to concede the point, especially when they can blame prior administrations. Thus, the Dukakis administration, explicitly declining to defend the "indefensible," conceded that Massachusetts's mental health facilities failed to meet minimum standards, and the Williams administration in the District of Columbia conceded that the District's facilities for mentally retarded persons were unacceptable. Arkansas's prison administrator encouraged a federal court challenge to the institutions he ran and cooperated with the plaintiffs and the court. In the Texas prison litigation, a lawyer for the Texas corrections department informed the state attorney general that conditions in its facilities were in some respects worse than the plaintiffs alleged. In the Kansas City desegregation case, the school district initially joined the parents as a plaintiff against the state and was only later realigned by the court as a defendant. In Pittsburgh, a new police chief embraced monitoring procedures sought by the Department of Justice in the course of distancing himself from the mixed reputation of the prior administration.[141]

To the extent liability is disputed, the court's role is virtually identical to its role in traditional tort litigation. In effect, the court looks to industry standards to define minimum performance. Standards are proved through expert testimony about customary practice by experienced practitioners or academics and through judicial notice of norms promulgated by accrediting or standard-setting organizations within the relevant field. In education, the courts look to student performance on standardized tests, to teacher qualifications in relation to standards of accrediting organizations, and to school facilities under standards promulgated by accrediting organizations. In prison cases, standards promulgated by the American Correctional Association and the Federal Bureau of Prisons have played a critical role. National standards regarding police conduct emerged only recently, but the

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[140] The frequency of agreement between the parties on both liability and remedy is emphasized in SANDLER & SCHOENBROD, *supra* note 8, at 122; Rebell, *supra* note 41, at 90; and Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2012–13 (1999).

[141] *See* Ricci v. Okin, 537 F. Supp. 817, 820–21 (D. Mass. 1982) (noting the Dukakis administration's acknowledgement of "indefensible" conditions); Evans v. Williams, 139 F. Supp. 2d 79, 96–97 (D.D.C. 2001) (noting that officials had stipulated that "[t]he District government has fundamentally failed its obligation to disabled persons" but had insisted that the failure had occurred under prior administrations); FEELEY & RUBIN, *supra* note 6, at 59–63 (Arkansas); *id.* at 88–89 (Texas); Missouri v. Jenkins, 495 U.S. 33, 37 (1990) (Kansas City); DAVIS ET AL., *supra* note 87, at 7 (Pittsburgh).

Commission on Accreditation for Law Enforcement Agencies now plays a significant role. Courts in public housing litigation look to HUD's performance assessment system, as well as to the Uniform Housing Code promulgated by the International Conference of Building Officials. Sometimes these standards have been incorporated explicitly into the laws on which plaintiffs' claims are based, as with housing code standards in some public housing cases. More often, courts have to determine the standards' relevance to general constitutional or statutory norms. Although disputes over specifics are common, the principle of using such standards in interpreting the general norms has been largely uncontroversial.

The second element of the prima facie case — immunity to political correction — is distinctive to the public law arena.[142] The traditional common law process operates in an environment of market competition. When private actors immunize themselves from competition, antitrust law may intervene. By contrast, government institutions tend to be monopolistic. Their principal accountability mechanisms tend to be electoral and political. Public law norms play a role analogous to antitrust law in disrupting institutions that have become steeled to political pressures.[143]

The political element of the prima facie case is generally not explicit, but it seems an important premise of most cases. Three patterns recur. The first involves majoritarian political control unresponsive to the interests of a vulnerable, stigmatized minority.[144] The minority can be a racial group, as in some versions of the education, housing, and police cases. Or it can be a group that has been socially stigmatized on the basis of conduct or disposition, as with prisoners and mental health patients.

Some cases seem to fit a second pattern — the "logic of collective action" — in which a concentrated group with large stakes exploits or disregards a more numerous but more diffuse group with collectively larger but individually smaller stakes.[145] Chayes emphasized this pattern. He saw institutional reform as comparable to then-recent admin-

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[142] Because we reject the idea that courts are uniquely, or even — by themselves — adequately, qualified to elaborate public law rights, we disagree with Owen Fiss's claim that the courts' traditional law-declaring function is a sufficient basis for public law litigation in the absence of political failure. *See* Fiss, *supra* note 131, at 6–13.

As we indicate above, in most cases finding egregious performance failure, some form of political failure is also evident. But there are exceptions in which the political process seems adequate to address performance failures and the court should stay its hand. *See, e.g.*, Marisol A. *ex rel.* Forbes v. Giuliani, 185 F.R.D. 152, 164 (S.D.N.Y. 1982) (discussed *infra* note 222).

[143] John Hart Ely's phrase "[c]learing the [c]hannels of [p]olitical [c]hange" seems pertinent here, though he applies it to the narrower function of policing the electoral process. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105–34 (1980).

[144] *See generally id.*

[145] *See generally* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION (1965).

istrative law developments influenced by the notion that regulatory agencies were susceptible to "capture" by the industries they regulated, at the expense of more dispersed groups of consumers (in the case of price regulation) or local residents (in the case of environmental regulation).[146] The courts responded to such concerns by increasing the access of resident, consumer, or citizen group representatives to the administrative process and heightening agency accountability to such groups.[147] In public law litigation, the most common concerns about "capture" centered on public employees. At the upper tiers, public housing or prison officials might exploit their control of public institutions to do favors for friends and supporters or even to turn a profit. At the lower tiers, patrol-level police officers or mental health custodians might take personal satisfaction from abusing their power over citizens or inmates, or they might simply shirk.

And in all the areas, one can also see a third pattern overlapping one or both of the other two — the prisoner's dilemma, in which groups are caught in a low-level equilibrium that is susceptible to generally beneficial improvement, but only through a kind of coordination that existing institutions are inadequate to induce.[148] The minority oppression and "capture" views do not explain the great discretion that defendants often retain in the remedial phase. How can it be, Colin Diver asks, that the defendant, after being found to have systematically and pervasively violated the rights of the plaintiffs, is permitted to take the leading role in designing and implementing the remedy for its own wrongs?[149] Of course, the defendant is not always allowed such a role. Some restrictions on and adjustments to its authority invariably follow a finding of liability, and at the limit — when the court opts for receivership — the defendant may be displaced or restructured. But Diver's question is surely pertinent in the many cases in which the court leaves the defendant to play a dominant role.

Part of the answer lies in the fact noted earlier that defendants, or important constituents within the defendant institutions, are often sympathetic to the plaintiffs' claims. Even more often, defendants welcome the new resources that the decree induces nonparty governmental and private sources to volunteer. In many cases, the federal government has withheld funds because of the same derelictions of which the plaintiffs complain. The remedy makes these resources

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146 *See* Chayes, *supra* note 1, at 1310.

147 *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1723–57 (1975).

148 *See generally* RUSSELL HARDIN, COLLECTIVE ACTION (1982).

149 *See* Diver, *supra* note 2, at 82–83.

available. Universities and civic organizations also sometimes make major resource commitments to educational reform decrees.[150]

In principle, the defendants could negotiate such arrangements on their own without lawsuits. It is possible that they are not inclined to do so, but it is also possible that they face major coordination obstacles to doing so. Local executive agencies may be limited in their ability to provide the kind of credible assurances that would make the federal government and nongovernmental organizations feel comfortable extending new resources to them.

There is some analogy here to the role of the bankruptcy court or the equitable receiver in business insolvency. Part of the role of the court is to resolve coordination problems among the various stakeholders in the enterprise. Left to act as individuals, the stakeholders would behave in collectively destructive ways. Those in control of the organization would squander its assets rapidly in the expectation of being displaced. Anticipating this, each outside stakeholder would scramble to grab what she could before everything was gone. The resulting distribution would be arbitrary and would destroy any going-concern value of the enterprise. The court's intervention facilitates stakeholder coordination. The court organizes a process in which the stakeholders scale back their claims to permit fair distribution and, if the enterprise has ongoing value, its continuation. When the enterprise is viable, this process makes it possible to attract new investment. The process also allows for replacement or supervision of management by or on behalf of the stakeholders.[151]

This second element of the prima facie case — political blockage — sometimes becomes salient in later phases of a case in which the court assesses the adequacy of an administrative or legislative response to an initial declaration of liability. For example, both the New Jersey Supreme Court in *Mount Laurel* and the Texas Supreme Court in *Edgewood* eventually sustained legislative settlements of the issues in these cases.[152] No doubt there was substantial political pressure for the courts to do so (though the Texas court had rejected two prior leg-

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[150] *See* Morgan v. Kerrigan, 401 F. Supp. 216, 246–48 (D. Mass. 1975) (describing state and federal financial support for programs pairing universities and schools as part of a Boston desegregation decree); MOORE, *supra* note 106, at 243–44 (noting a grant of federal modernization funds to the Boston Housing Authority); RAFFEL, *supra* note 117, at 120–53 (describing community organizations' support for implementation of a school desegregation order in Wilmington, Delaware); *Pioneering Panel Hastens Pace of Child Welfare Reform*, CASEY CONNECTS (Annie E. Casey Found., Baltimore, Md.), Spring 2000, at 1, *available at* http://www.aecf.org/publications/data/connects_spring_00.pdf (describing foundation support for child welfare reform implementation).

[151] *Cf.* DAVID G. EPSTEIN ET AL., BANKRUPTCY 737–41, 745–48 (1993).

[152] *See* Hills Dev. Co. v. Township of Bernards, 510 A.2d 621, 654–55 (N.J. 1986); Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 750 (Tex. 1995).

islative efforts). But it also seems likely that the courts were influenced by the fact that the statutes emerged from processes involving broad mobilization by diverse constituencies, including representatives of the plaintiff class.

2. Remedy: The Experimentalist Tendency. — Sometimes decrees in public law cases take an in terrorem or punitive form — threatening or, far less often, imposing sanctions in order to induce compliance with other orders.[153] These background sanctions function as a kind of "penalty default" — a result that no one is likely to prefer, intended to induce the parties to negotiate a better one.[154] In extreme cases, judicial intervention may temporarily preempt the authority of incumbent managers of defendant institutions, as with a receivership. But the most characteristic public law decree makes substantive provision for the management of the institution. Although these decrees can take the form of relatively simple negative injunctions of limited scope, they are often more comprehensive.

We have seen a tendency for comprehensive relief to move away from detailed command-and-control prescriptions toward an experimentalist approach. This tendency is usefully captured in a model with three general features. None of the cases we have examined fully expresses all these features, but some come close, and the model systematically connects the distinctive and promising aspects of all of them.

The basic features of this experimentalist tendency are these:

First, *stakeholder negotiation.* The parties come together to negotiate a remedial plan.[155] Other interested stakeholders can join under

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[153] *See, e.g.*, Evans v. Williams, 35 F. Supp. 2d 88, 94 (D.D.C. 1999) (levying a $5 million contempt sanction against D.C. officials), *rev'd*, 206 F.3d 1292 (D.C. Cir. 1999), *consent order approved by* 139 F. Supp. 2d 79 (D.D.C. 2001); Ramos v. Lamm, 485 F. Supp. 122, 169–70 (D. Colo. 1979) (ordering a Colorado prison closed); Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 498–99 (Tex. 1991) (approving an order barring state funding of education unless a constitutionally adequate plan of school financing was developed); ROBERT COVER ET AL., PROCEDURE 378 (3d ed. 2003) (noting that a trial judge in a Texas prison case ordered an $800,000 per day contempt sanction but later rescinded it after finding progress); FEELEY & RUBIN, *supra* note 6, at 124–25 (reporting a state court's repeated, but never executed, threats of contempt against the Santa Clara County Board of Supervisors in a jail case).

[154] Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 97 (1989). Ayres and Gertner emphasize the function of "penalty defaults" in contract law to induce the more informed party to disclose information. In our context, the key function is to force to the table a party who otherwise might not be willing to negotiate at all.

[155] For an extensive analysis of such negotiations, including illustrations of the role of parties in formulating remedies, see Sturm, *supra* note 15, at 1365–76. At least since *Lewis v. Casey*, 518 U.S. 343 (1996), the trial court must give a defendant institution the "first opportunity" to propose a remedial plan. *See id.* at 362 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973)) (internal quotation marks omitted). But since the court is likely to treat respectfully the objections to such a plan from plaintiffs who have prevailed on the merits, the defendant still has strong incentives

liberal intervention standards. Groups that claim significant interests will be admitted to the negotiations even if they are not formal parties. Groups whose participation is thought important to the success of reform may be actively courted if they do not come on their own.

The negotiations may be superintended by a special master or mediator appointed by the court. These parajudicial officials, perhaps along with expert advisers recruited by the court or the parties, will help the parties to talk to each other in an organized way and to set an agenda and ground rules for discussion. They will also assist in gathering information.

The negotiations are deliberative. The stakeholders meet face to face, and they defend their positions with reasons. They are expected to listen to each other in good faith and to remain open to learning. To the extent that a party's proposals rest on factual premises, the party must make available relevant information within her control.

The goal of the negotiation is consensus. The stakeholders should be open to the possibility that, within the constraints imposed by the determination of liability, they can agree on a remedial regime. The master or facilitator strives for consensus. Ultimately, of course, consensus may not materialize. The master may have to return to the court with multiple proposals, or with a proposal supported by the master herself and some subset of the stakeholders. But the consensus standard plays a valuable role even when no consensus is reached. It prevents premature closure and reinforces the threshold commitment of openness and mutual respect.[156]

In practice, the extent to which deliberation occurs in remedial formulation varies. Hostile defendants may resist dealing with the plaintiffs, even if such resistance increases the risk that the court will reject their own proposals. Special masters sometimes prefer to meet with stakeholders *seriatim* and then try to craft an acceptable plan on their own, rather than encouraging direct negotiations.[157] Nevertheless, direct negotiations, with or without masters, are common. In *Plata*, the California prison medical case, the parties agreed not to seek

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to negotiate with the plaintiffs. *See id.* at 410 (Stevens, J., dissenting) (noting the "process of court-supervised negotiation that should generally precede systemic relief").

[156] For case studies of stakeholder deliberation in public policy contexts, see THE CONSENSUS BUILDING HANDBOOK (Lawrence Susskind et al. eds., 1999). Note especially the account of negotiation among state and local government entities over the allocation of responsibility for affordable housing — the same general issue implicated in the *Mount Laurel* litigation. *See* Lawrence Susskind & Susan L. Podziba, *Affordable Housing Mediation*, *in* THE CONSENSUS BUILDING HANDBOOK, *supra*, at 773–99.

[157] Berger recounts his experience with this practice and illustrates its disadvantage. After the master developed a plan intended to incorporate all the concerns expressed in separate meetings with the stakeholders, nearly every stakeholder group attacked it, and the court felt compelled to reject it. *See* Berger, *supra* note 15, at 730–33.

a special master or other intermediary because they wanted to deal with each other without any intermediation.[158]

Second, the intervention takes the form of a *rolling-rule regime*.[159] The rules that emerge from the remedial negotiation are provisional. They incorporate a process of reassessment and revision with continuing stakeholder participation.

The stakeholders recognize that they cannot effectively elaborate a regime of fixed and specified rules. Even with the judicially supported factfinding process, they have limited information. They cannot fully express their intentions; they will inevitably leave gaps and ambiguities; and they cannot anticipate all future contingencies.[160]

We have seen that one response to this problem is to focus on outcome norms that leave broad discretion to those subject to them. Such norms can be expressed in a variety of ways, ranging from the relatively specific and formal to the relatively general and informal. Since the problems of incomplete knowledge and articulation also apply to outcomes, informal norms that defer elaboration to the course of implementation have some appeal. But such an approach has important disadvantages. First, it relieves the stakeholders of the responsibility to clarify their understandings as much as possible. In addition, it defers the task of specification to situations in which the people governed by the norms will have more saliently divergent interests. At the time of the initial negotiation, some stakeholders will have a general sense of their self-interest in the norms. But for many, and perhaps most, stakeholders, there will be a good deal of uncertainty about how the norms will mesh with self-interest. As implementation proceeds, particular actors will develop interests in particular interpretations of general norms. For example, public employees whose performance is being evaluated will develop a stake in interpretations most consistent with their performance.

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158 *See Plata* Stipulation, *supra* note 73; Telephone Interview with Don Specter, Staff Attorney, Prison Law Office (July 16, 2002). The Prison Litigation Reform Act of 1996 constrains the typical use of masters as intermediaries by requiring that all their activities be on the record. It is not clear whether the limitation applies only to appointees with the factfinding powers of traditional masters or more broadly to more informal roles, such as court-appointed mediators or monitors. *See* Boston, *supra* note 65, at 722.

159 CHARLES SABEL ET AL., BEYOND BACKYARD ENVIRONMENTALISM 7 (2000).

160 Looking back on a New York special education case, plaintiff's counsel wrote:

> What the lawyers for both sides did not fully appreciate at the outset, however, was that Dr. Gross's reorganization plan did not constitute a proven educational system that could be fully implemented over time if sufficient resources were provided. Rather, it was an imaginative proposal for beginning a structural reform process whose direction and substance would be subject to ongoing reformulation.

Michael A. Rebell, Jose P. v. Ambach: *Special Education Reform in New York City*, *in* JUSTICE AND THE SCHOOL SYSTEMS, *supra* note 41, at 35.

The model we are considering is inclined to deal with the problems of limited information, articulation, and foresight less through informality than through provisionality. At the outset, stakeholders try to derive performance measures that are as specific as possible. These measures will leave the parties substantial discretion, but they will specify precise targets. Moreover, some processes, most often including documentation and reporting, will be specified in detail. Such specification facilitates assessment of compliance. But it is expected that the application of the norms will also be an occasion for their reassessment and revision. Stakeholders continue to be involved in the processes of monitoring and assessment. To the extent that any of them come to believe that the norms no longer capture the appropriate expectations, the norms can be revisited and revised through the assessment process. If educational test scores are high because teachers have inappropriately narrowed the curriculum to "teach to the test," the test should be revised or the weighting of the scores changed. If housing managers are neglecting long-term maintenance in order to respond more quickly to tenant complaints, a new performance measure focused on long-term tasks might be introduced. Participants seeking to excuse failures of compliance by criticizing the standards must both give reasons for their criticisms and propose revised standards to which they will be held accountable in the future.

Of course, at each iteration, participants will seek to renegotiate the standards in ways that benefit their private interests. The same checks on opportunism that operate in the initial negotiation — the awareness of common interests, the psychological pressures toward honesty in the process of deliberative persuasion, and the prospect of a penalty default in the absence of agreement — work at these later stages. Moreover, in the later stages, defendants may face an additional pressure: to the extent they are attacking agreed-upon standards that they have failed to meet, they have a higher burden of persuasion.

Reformers in Texas, for example, report significant progress in dealing with the phenomenon of "teaching to the test." The first assessment test adopted under the Public School Accountability System emphasized rote learning in a way that encouraged teachers to focus on instruction that had little use outside the test. Students learning to distinguish area from perimeter might be taught that area is "about multiplication" and perimeter is "about addition." Even this relatively crude regime produced important surprises. Some teachers who had lost all hope in their pupils' aptitudes were shocked to discover that they could be taught to take the test. But when complaints about "teaching to the test" arose, collaboration between teachers and administrators produced a new testing regime that focused less on algorithmic pedagogy and more on conceptual learning. Students preparing for the test now learn that area is about coverage and is measured by multiplying the lengths of the sides and that perimeter is about

framing and is measured by addition of the lengths of the sides. "Teaching to the test" is coming to mean teaching the power of abstraction.[161]

In many cases, the decree is often limited to general descriptions of the parties' goals, prescriptions for measuring their progress toward them, and commitments to make information available. But the complete regime also often includes a variety of other norms that set out, perhaps in great detail, practices or operating procedures. These practice norms will likely be set out in "plans," which may or may not be filed in court, but which generally are not expected to be reviewed and approved by the judge. The plans are intended to be easily revisable.[162] Sometimes the defendants can revise them unilaterally with notice to the plaintiffs and the court. Other times the plaintiffs must consent to revisions, and the court may intervene in the event of a dispute, but such intervention is expected to be rare. The decree may order the defendant to comply with the plans in force, but the norms in the plans are generally not directly or immediately enforceable through contempt. In principle, a further specific judicial directive could be a predicate for contempt. In practice, courts usually intervene only in cases of systemic noncompliance.

Thus, whatever the technical legal status of the plans, their function is not so much to coerce obedience as to induce internal deliberation and external transparency. Forcing the defendant practitioners to agree on a clear description of their practices puts pressure on them to reflect on and explain what they are doing. Moreover, the practice norms enable outsiders to determine what the practitioners are up to. They complement the performance norms by describing the inputs that generate the outputs indicated by those norms.[163]

The third element of the model is *transparency*. At a minimum, this element restates the requirement that the policies and operating norms of the rolling-rule regimes must be explicit and public. More ambitiously, transparency means that there must be agreed-upon measures and procedures for assessing compliance, and that these procedures and their results must be made public.

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[161] Interview with W. David Hill, Deputy Director, Charles A. Dana Center, University of Texas at Austin, in Austin, Tex. (Aug. 15, 2002).

[162] Rule 23(e) of the Federal Rules of Civil Procedure requires that the court approve a class action settlement, and under *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), a party seeking to modify a consent decree over the objection of the other party must demonstrate "a significant change in facts or law." *Id.* at 393. Although the doctrine is not explicit, it seems unlikely that either requirement applies to practice norms that are not directly incorporated into the decree.

[163] For a discussion of the distinction between performance and practice norms, see Am. Corr. Ass'n, *supra* note 62, at xxii–xxviii.

Transparency is both an accountability norm and a learning device. It is intended in part to facilitate practices of disciplined comparison. In deciding what level of performance can reasonably be expected, the court and the parties can look to the performances of comparable units. Once the frontrunners have been identified, the laggards should be able to learn from the frontrunners' practices. Successful performers should be rewarded with greater autonomy and perhaps formal honors or tangible rewards. The laggards should receive sanctions, remedial assistance, or both.

The intuitions here are obvious, but transparency requires processes that are not widely found and that are often achieved only with great difficulty. The obstacles are both political and technical. Organizations of all kinds often resist transparency. The poor performers may resist it because it makes them vulnerable; the good performers sometimes resist it because it deprives them of a competitive advantage. In practice, decrees typically require that information be made available to the parties and other involved stakeholders, but not to the public. The Texas education regime, partly nationalized by the No Child Left Behind Act,[164] is an important exception: it mandates that school and district performance data be publicly available.

Moreover, disciplined comparisons require that performance data be formulated in a manner that permits comparative assessment. A common set of metrics must be devised, and participants must be induced to report data in these terms. In the public sector, this process is most developed in the educational field. HUD's Public Housing Assessment System represents another sophisticated development along these lines.[165] In other areas, such as police conduct and prisons, even fairly sophisticated monitoring systems have not yet developed the kind of reporting and metrics that permit such comparisons.

A more difficult issue is figuring out what interventions courts should make once performances have been ranked. While tangible rewards for high performance are possible, as in some statutory education schemes, the principal reward for good performance in the judicial context will be the autonomy that comes from relaxed judicial scrutiny and termination of the decree. Disciplined comparisons may also generate intangible rewards in the form of respect and prestige for high-performing institutions.

As for poor performance, the trick is to balance remedial support, loss of control, and outright punishment. Administrators are quick to claim that inadequate performance is the result of insufficient resources. To some extent, disciplined comparisons of performance rela-

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164 *See* 20 U.S.C.A. § 9622(c)(1)(A) (West Supp. 2003).

165 *See supra* pp. 1049–50.

tive to resource levels can check such claims. Where such claims are substantiated, targeted resources may be the answer, as they are in some of the statutory "new accountability" education regimes. Where bad performance is unexcused, then the choices are increased outside intervention or punitive sanctions. If increased intervention takes the form of specific dictation of conduct, it will incur the disadvantages of command-and-control regulation and may allow the defendant administrator to shift responsibility for problems to the court or the plaintiffs. Outright replacement of the failing administrators, as in the receivership remedy that Congress has approved for poor housing authority performance, does not result in these problems, but such a remedy is only available in extreme situations. Punitive sanctions are difficult to calibrate, and there are many doctrinal and political obstacles to applying them.[166] Moreover, they deter the cooperation and information-sharing among stakeholders upon which the rolling-rule regime depends.

Experimentalism does not provide determinate guidance on the question of sanctions. It pins its hopes largely on the effects of transparency. By exposing poor performance as clearly as possible, it opens the system to general scrutiny and exposes it more readily to nonjudicial intervention.

D. Destabilization Effects

The practical questions that parallel the jurisprudential question of the relation of right and remedy are: What happens in the litigation that makes agreement among adversaries possible? And why should the resulting agreement be generally beneficial? In some cases, agreement on remedy follows a hard-fought battle on liability. Even when liability is conceded, plaintiffs and defendants are often at loggerheads. Yet with surprising frequency the fighting is followed by substantial agreement on a remedial framework that contemplates ongoing cooperation.[167] What is going on?

The idea of destabilization rights suggests an important part of the answer. The liability determination imposed or ratified by the court and subject to the experimentalist discipline of the remedial phase can

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166 *See* Evans v. Williams, 206 F.3d 1292, 1295–97 (D.C. Cir. 2000) (discussing doctrinal barriers to imposing punitive fines).

167 *See, e.g.*, HAAR, *supra* note 112, at 57 (reporting that after years of hard-fought litigation, the parties agreed on an implementation methodology for *Mount Laurel*); Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1367 (1975) (noting that although defendants in the Alabama mental health case initially resisted judicial intervention, after a finding of liability, they and the plaintiffs were able to agree on "over 90 percent of the required standards").

have a series of disentrenching effects.[168] These effects work at the individual, institutional, and inter-institutional or social levels. At the individual level, these effects appear rooted in much-discussed cognitive and psychological features of human sociability that are at odds with traditional conceptions of human actors as either calculating private utility maximizers or dispassionate Kantian moralists.

There are six principal effects:

1. The Veil Effect. — The struggle for selfish advantage is impeded at the outset of remedial negotiations by the fact that the parties find themselves partially veiled in ignorance. They cannot count on their prior positions, and it may be hard for them to anticipate what their positions will be like in the alternative future regimes under consideration.

The more daring the reforms under consideration, and the more the parties are committed to continuous self-revision, the harder it will be for any particular player to anticipate what a particular reform will mean for her with respect to such matters as compensation, resources, authority, job satisfaction, and workload. The ability to pursue selfish interests is constrained by the inherent uncertainty of how selfish goals will be served in as yet untried arrangements, and by the difficulty of entrenching any particular arrangement in a regime of continuous self-assessment and revision.

Consider the position of a school principal in a case challenging the system of which her institution is a part. She may believe that her institution is exceptionally capable of excelling on particular performance measures, or she may believe that it is exceptionally likely to fare poorly. In such a case, where the likely outcomes are known, self-interest may push her to favor particular remedies. (We will call this a "stakeholder effect" in a moment.) But it seems likely that at least as often, she will be uncertain about how her institution will fare. She may not know how her performance would compare with peer institutions. In addition, she may not know whether the consequences of poor performance, which initially are likely to include remedial assistance, are on balance good or bad for her.

Or consider the representative of a prison guard union responding to a proposal in a remedial negotiation to improve safety by screening

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168 In some cases that are settled without judicial findings of liability, notably in the area of police misconduct, the defendants do not explicitly concede wrongdoing, and the settlement agreement may even disclaim such a concession. *See, e.g.*, Los Angeles Consent Decree, *supra* note 87, at para. 3. Such disclaimers, however, are largely for the purpose of obviating evidentiary admissions that might fuel later damage actions. In order to enter the remedial negotiations and conclude a remedial agreement, the defendant has to acknowledge at least a substantial probability that the plaintiff might prevail on her claim. Such a concession should often be sufficient to induce the psychological effects we describe.

and segregating prisoners with certain psychiatric diagnoses. The proposal undoubtedly implicates the selfish interests of her constituents. A new class of specialized roles will be created; mental health professionals will play a larger role in the institution. Yet how such contingencies map onto the selfish interests of the guards is harder to say. Perhaps the newcomers will diminish the authority and autonomy of the guards; perhaps they will make the guards' jobs easier or less stressful. On the other hand, the impact of the reform on the interest in safety that the guards share with the other stakeholders seems easier to assess and predict. In such situations, stakeholders may have no better prediction of their own interests than their intuitions of the general interest.

By blurring the distinction between particular and general interests, the liability judgment approximates in actuality the conditions that political theorists such as John Rawls have considered hypothetically as aids to democratic decisionmaking. Rawls urges us to assess proposed public decisions by asking if they would be adopted if we were unaware of how they would affect our selfish interests.[169] There is a crucial difference, however, between Rawls's "original position" and the situation created by the liability judgment. In entering the "original position," participants in a political discussion are exiting the world. The impartiality of their exchange depends on abstracting from all the features of their actual activities and selves. There is considerable debate about whether it is possible to obtain such a neutral "view from nowhere," and if so, whether arrangements figured from this remove are specific enough to be translated into reality.[170]

The veil of ignorance arising from the finding or concession of liability does not require that the participants remove themselves from the world, but rather that they open themselves to it in a new way. The mutual learning that prudence suggests may cause them to change their view of the possibilities — even as they put their identities at risk by reorienting their goals, their ideas of potential collaborations, and their understanding of fruitful problem-solving strategies.

2. The Status Quo Effect. — The liability determination reverses the normal presumption in favor of the status quo. Without knowing what the new regime will be, the parties presume that it will be different from the way things have been. The condemnation of the status quo has a distinct cognitive effect: it releases the mental grip of conventional structures on the capacity to consider alternatives.

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169 JOHN RAWLS, A THEORY OF JUSTICE 195–201 (1971).

170 *See, e.g.*, AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 37–39 (1996).

Recent empirical psychology emphasizes that there are powerful cognitive tendencies toward entrenchment of the status quo. The "availability heuristic" suggests that contingencies that can be more readily visualized are likely to be given more consideration or greater weight than equally relevant but less easily imagined alternatives. The "endowment effect" suggests that people tend to demand more to give up something they already have than they would offer to acquire the same thing from someone else. Study of attitudes toward risk has indicated that people are more averse to dangers they perceive as losses rather than as failures to gain, even though these perceptions are quite manipulable. (A price differential for cash or credit will be regarded differently depending on whether it is called a credit surcharge or a cash discount.)[171]

The liability determination mitigates these effects. It counters the relative availability of the status quo by stigmatizing it. It signals that various positions entailed by the status quo are not entitlements of those who argue for them. The pronouncement that current arrangements will not continue should cause the perception of relative risks to change. The former regime no longer represents a potential loss but is simply one of many possible arrangements, and indeed a relatively unpromising one. The willingness to consider alternatives should thus broaden.

3. The Deliberation Effect. — The parties' increased openness to alternatives goes hand in hand with increased pressure to support positions by giving reasons grounded in public values. Unable to appeal to institutional inertia, the parties have greater incentives to devise arguments that persuade by the validity of their reasons. It is a core premise of a venerable, recently revived tradition of politics that justifying one's position by giving reasons and responding to reasoned arguments for competing views can alter a person's understanding of her factual circumstances and her interests, disclosing previously unseen opportunities.[172]

For example, in a recent settlement of a "racial profiling" case, the California Highway Patrol agreed to stop its practice of asking motorists to "consent" to a search in cases where there was no probable cause. The plaintiffs objected that the incidence of such requests was racially biased and that the consents that were invariably given were not voluntary. The highway patrol agreed to abandon the practice when it learned during the negotiations that the practice was producing virtually no evidence or arrests. Until the highway patrol was sub-

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[171] *See* Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 194–96, 197–99 (1991).

[172] *See, e.g.*, GUTMANN & THOMPSON, *supra* note 170, at 37–39.

jected to pressure to justify its position, it had not systematically evaluated the practice. Once it did, it had to concede its indefensibility.[173]

4. The Publicity Effect. — The vindication of the plaintiff's claim will focus public attention on the problems. Public scrutiny of all the stakeholders, and especially of the defendants, may increase. This increased scrutiny will generate diffuse but sometimes powerful pressures for responsible behavior. Public officials trying to reform their institutions may find that they can capitalize on publicity to mobilize support for their efforts. Officials who might have preferred simply to duck the issues will now feel pressure to take a position. The result could be irresponsible demagoguery; but given the pressure for public reason-giving exerted by the deliberation effect, the outcome in the setting of the new public law is perhaps more likely to be constructive engagement. In the early prison cases, for example, publicity about horrific conditions — sometimes welcomed by officials, sometimes not — appears to have played an important role in facilitating remedial progress.[174]

5. The Stakeholder Effects. — There are three stakeholder effects: the balance of power between plaintiff and defendant shifts; internal pressures are generated within the plaintiff class and the defendant institution; and new stakeholders are motivated or empowered to participate.

First, the liability determination empowers the plaintiffs vis-à-vis the defendants. It provides official legitimation of their claims. The plaintiffs now have the power, simply by objecting to the defendant's proposed remedy, to expose the defendant to further risk and uncertainty. Consequently, the defendant has stronger reason to deal with the plaintiffs.

Second, the remedial situation may transform both plaintiffs and defendants. The plaintiffs' lawyers or the organizations for which they work may now be eligible for attorneys' fees. Additionally, the court may induce the defendant or some other institution to provide resources for the negotiation, or private contributions may be induced by

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[173] *See* Terms and Conditions of Settlement Agreement, Rodriguez v. Cal. Highway Patrol, No. C 99-20895-JF/HRL (N.D. Cal. Feb. 27, 2003), *available at* http://www.aclunc.org/police/030227-rodriguez.pdf; E-mail from Michelle Alexander, Plaintiffs' Counsel, *Rodriguez*, to William H. Simon (Mar. 2, 2003) (on file with the Harvard Law School Library).

[174] For consideration of the influence of litigation-related publicity on prison reform, see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1678–80 (2003). In a paper assessing negotiated resolutions of water-quality issues, David J. Hayes identifies the degree of general public interest in the negotiations as an important variable favoring success. David J. Hayes, Federal-State Decision-Making on Water: Applying Lessons Learned 15–16 (2002) (unpublished manuscript, on file with the Harvard Law School Library).

the plaintiffs' success.[175] Accordingly, plaintiffs will be strengthened both by the prestige that accompanies success and by new resources.

There may be internal effects on the defendant as well. As an institution, the defendant is typically composed of diverse constituencies. The liability finding or concession may upset accommodations among them. Constituencies with views and interests overlapping those of the plaintiffs will see the determination as an opportunity to enhance their influence. The craft pride of some rank-and-file workers and the professionalism of some managers will lead them to resent the shoddy or corrupt practices attacked by the plaintiffs and to favor higher standards. Some senior managers may see in the remedial process the prospect of more resources or greater prestige.

Colin Diver speculates that there is a tendency for power to shift within the defendant institution from senior executive officials with general supervisory responsibilities to "operating managers" and, at a lower level, from nonprofessional staff, such as guards and orderlies, to professional staff, such as lawyers and doctors.[176] The operating managers have the kind of detailed knowledge necessary to plan compliance, and the professionals are most likely to understand and be committed to the standards the court has applied. The tendency, on this view, is to decentralize to the level of the institution but to centralize within the institution.

This view may have been generally true of the old public law cases. It arguably describes, for example, the trajectory of early reform in Southern prisons. However, it mischaracterizes change under the new public law because it presupposes the command-and-control style of intervention that is being superseded in practice. Experimentalist regimes often involve dramatic *de*centralization within institutions, as lower-tier workers get increased discretion to cope with contingencies with which they are most familiar. For example, teachers in the "new accountability" scheme have more flexibility in classroom planning

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[175] Ross Sandler and David Schoenbrod argue that stakeholder participation is dominated by lawyers with little effective accountability to their putative clients. *See* SANDLER & SCHOENBROD, *supra* note 8, at 124–29. We find this argument implausible. It is specifically contradicted by many case histories recording substantial and meaningful stakeholder participation. *See, e.g.*, MOORE, *supra* note 106, at 240–55 (Boston Housing Authority); ROTHMAN & ROTHMAN, *supra* note 51, at 114–18 (Willowbrook); Liebman & Sabel, *supra* note 16, at 67–108 (Kentucky and Texas education cases). It is true that stakeholders in these cases are commonly underorganized and vulnerable and that there are many failures of professional loyalty and accountability. However, Sandler and Schoenbrod's implication that structural litigation *reduces* the effective participation of plaintiff class members is counterintuitive. If we assume that stakeholders are so poorly organized and vulnerable that they cannot hold accountable the lawyers purporting to represent them, there is no reason to expect that they would do better in the general electoral or administrative processes. Moreover, the remedial mechanisms designed to enforce defendant accountability can also strengthen the accountability of plaintiff representatives. *See infra* pp. 1093–94.

[176] *See* Diver, *supra* note 2, at 70–73.

than before. One of the first moves of public housing receivers is to increase the responsibility for maintenance of individual project managers relative to the central office.

At the same time, the relatively objective and transparent accountability mechanisms of experimentalism can also facilitate more effective monitoring from above the institution. This monitoring reduces reliance on unspoken, insider knowledge by forcing participants to produce important information in a form that can be used by outsiders not directly involved in the process. The principal goal is to facilitate accountability to diverse stakeholders, but the practice is compatible with some forms of recentralization.

Performance scoring in "new accountability" education reform is designed to have both centralizing and decentralizing effects. State agencies are supposed to use the data to allocate resources among districts and to pressure low-performing districts; the provision of data on individual schools is designed to encourage and assist parental participation in efforts to improve children's schools. Both effects have been observed in some areas of Texas.[177]

The stakeholder effect on the defendant cannot be assessed solely in terms of the distribution of knowledge and competences at the time negotiations begin. Implementation often involves significant training of existing personnel, recruitment of new personnel, and sometimes, departure of incumbents. Thus, while the internal effect on the defendant is potentially dramatic, we cannot generalize strongly about its direction. Many trajectories are possible, depending on the type of remedial regime the parties favor.

Finally, the third stakeholder effect is that new stakeholders are likely to appear. The court's judgment may lead a variety of actors to see their interests as threatened, or to see opportunities that induce them to seek to participate. *Wyatt v. Stickney*, the seminal mental health case, began as a protest by mental health workers, who invoked the interests of residents to protest planned staff cutbacks.[178] The prospect of the "builder's remedy" in *Mount Laurel* mobilized real estate developers to side with the plaintiffs on various issues.[179] We

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[177] *See* Liebman & Sabel, *supra* note 16, at 241–47.

[178] *See* Wyatt v. Stickney, 344 F. Supp. 373, 373 (M.D. Ala. 1972); Note, *supra* note 167, at 1347. We don't suggest that these new stakeholders will always be helpful to reform efforts. Police and prison guard unions, for example, often actively resist reforms. *See* Pamela A. MacLean, *The Strong Arm of the Law*, CAL. LAW., Nov. 2002, at 24 (reporting on how the California prison guard union uses extensive political power to impede efforts to hold guards accountable for abusive conduct). Also, public employee unions sometimes promote featherbedding. *See* SANDLER & SCHOENBROD, *supra* note 8, at 78–81 (suggesting that a social workers' union persuaded the judge in a special education case to force a school board to include social workers on assessment teams unnecessarily).

[179] *See* HAAR, *supra* note 112, at 44–45.

have noted that some of the education cases have mobilized business groups and universities to participate in planning and implementing remedies. In Texas, for example, the *Edgewood* regime prompted the creation of two statewide nonprofit organizations — Just for Kids and the Educational Innovation Network — devoted to helping local groups use performance data to improve their schools.[180]

In the *Willowbrook* case, the shift from institutional to community placement was accompanied by the emergence of nonprofit groups that wanted to run the new facilities and of real estate interests that wanted to profit from their development. Both groups gave important support to the plaintiffs' efforts, leading close observers of these events to conclude that "the process of opening group homes, like that of contracting with the voluntary agencies, created a constituency for deinstitutionalization."[181]

6. The Web Effect. — Just as the court's liability determination destabilizes relations and practices within the defendant institution, so does it ramify to other institutions and practices. These ramifications, and their monitored feedback on the institutions in the case, are the web effect. The web effect makes it possible to address sequentially — in a sequence determined in the course of problem-solving itself — reforms too complex to be addressed whole. This effect is polycentricity viewed as an aid, not an obstacle, to problem solving.

Of course, the notion of "positive polycentricity" was an oxymoron to post-Chayes commentators on public law remedies. As we saw, they assumed that if courts cannot control all the effects of intervention, the collateral effects will undermine their efforts. Better to leave the problem to an institution that can intervene comprehensively or, in a world where all institutions have limited information and limited control, to do nothing. These commentators thus assumed away the possibility that gives rise to the web effect and that helps explain the promise of new public law generally: that under favorable conditions the partial interventions that limited information does allow can be informative enough to allow subsequent corrective measures, giving rise to new rounds of interventions and corrections.

Albert Hirschman anticipated this possibility in his "unbalanced growth" criticism of both comprehensive central planning and laissez-faire in economic development. Hirschman pointed out that economic development in market societies occurs through "chain[s] of disequilib-

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[180] *See* Liebman & Sabel, *supra* note 16, at 243–46; *see also* RAFFEL, *supra* note 117, at 120–53 (discussing community organizations' support for the implementation of the Wilmington school desegregation decree).

[181] ROTHMAN & ROTHMAN, *supra* note 51, at 195. *See generally id.* at 150–99.

ria."[182] A discrete disturbance causes pressures that ramify throughout other areas. In particular, pressures spill back and forth between public and private realms. Private activity generates demand and pressure for complementary public goods (in, say, roads or education), and vice versa. Using the same metaphor as Fuller but reaching the opposite conclusion, Hirschman suggested that the "cobweb" structures of market disruptions and adjustments are not imperfections to be minimized or superseded by more coordinated processes. The process of iterative disequilibration and readjustment is, in fact, a learning process that cannot be readily short-circuited. It potentially generates valuable human capital and creates incentives in a distinctively efficient way:

> In other words, our aim must be to *keep alive* rather than to eliminate the disequilibria . . . . If the economy is to be kept moving ahead, the task of development policy is to maintain tensions, disproportions, and disequilibria. That nightmare of equilibrium economics, the endlessly spinning cobweb, is the *kind* of mechanism we must assiduously look for as an invaluable help in the development process.[183]

One indication of the web effect in new public law litigation is the tendency for the focus of concern to shift in the course of litigation. Thus, in education and housing, concerns about discrimination often quickly lead to concerns about quality of service. In prisons, concerns about conditions lead to concerns about length of confinement. In all areas, issues of personnel, training, and recruitment typically surface. So do resource questions. These connections were not invisible before

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[182] Hirschman maintains that "nonmarket forces are not necessarily less 'automatic' than market forces." ALBERT O. HIRSCHMAN, THE STRATEGY OF ECONOMIC DEVELOPMENT 64 (1958). He elaborates:

> [For example, w]hen supply difficulties arise in the course of uneven progress in sectors — such as education and public utilities — where private enterprise is not operating, strong pressures are felt by public authorities to "do something"; and since the desire for political survival is at least as strong a motive force as the desire to realize a profit, we may ordinarily expect some corrective action to be taken.

Id.

[183] *Id.* at 66. The strategy of "import substitution" — subsidies and trade protection for local businesses producing for local demand, which policymakers derived from Hirschman's idea — overlooked the possibility that self-interested groups would exploit the turmoil of disequilibrium to slip into and entrench themselves within the state machinery of developing countries. When this happened, Hirschman's prescriptions for government economic policy lost favor. *See, e.g.*, Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 302 (1974). But the subsequent emergence in business practice of continuous improvement disciplines using induced disequilibria vindicated Hirschman's basic intuition that such disequilibria might provide important learning opportunities. *See, e.g.*, Paul Adler, *Time and Motion Regained*, HARV. BUS. REV., Jan.–Feb. 1993, at 97. These disciplines combined the kind of destabilization mechanisms Hirschman favored with monitoring and transparency procedures that checked opportunism. *See* Charles F. Sabel, *Learning by Monitoring: The Institutions of Economic Development*, *in* HANDBOOK OF ECONOMIC SOCIOLOGY 137, 137–65 (Neil J. Smelser & Richard Swedberg eds., 1994).

the liability determination; they just come to seem more prominent and urgent.

The web effect is also evident in the institutional complementarities induced by public law. Just as investment in, say, office building construction may prompt investment in steel and concrete by increasing the prospective returns to the latter, in the institutional reform context, one intervention within an institution can lead to further interventions. Critics of institutional reform litigation continually point out that courts lack the ability to compel the appropriation of funds for the improvements they mandate. Yet in each of the areas discussed in this Article, legislatures, agencies, or nongovernmental organizations volunteered resources once the courts acted.[184] For these supporters, the court's intervention appeared to raise the prospective return on investments in the institution.

IV. THE EXPERIMENTALIST APPROACH AND DOCTRINAL ISSUES

If our descriptive account in Part II is right, then much academic and appellate doctrinal discussion of public law litigation is not responsive to the most promising elements of recent practice. We now address how the experimentalist approach relates to four key areas of doctrinal controversy: the scope of the equitable discretion of the trial court, the separation of powers, the problem of attribution of agent misconduct to government institutions, and the problem of interest representation. In each case, the newer model has promising suggestions for the resolution of persistent concerns.

A. Remedial Discretion

The Rehnquist Court has been unsympathetic to public law litigation. In a series of decisions, the Court has purported to derive constraints on remedial discretion from the nature of the rights in question. It would be a mistake to dismiss the Court's hostility as merely ideological. For one thing, in some of its key attacks on public law, the Court took issue with remedial regimes that were manifestly ineffective. Moreover, these decisions identified important conditions for the effectiveness of structural remedies. Nevertheless, the Court's rationales for its decisions have been individually implausible and mutually incoherent.

Three cases illustrate the problems. First, *Missouri v. Jenkins*[185] proposed that trial courts limit their remedial discretion through a

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[184] *See supra* pp. 1065–66 & n.150.

[185] 515 U.S. 70 (1995) (*Jenkins IV*).

complex exercise of factual determination. Second, *Lewis v. Casey*[186] proposed that, to the extent remedial issues were indeterminate, the lower court should defer to the defendant. On reflection, the *Jenkins* approach proves impossible to execute, and the *Lewis* approach self-defeating. The shared premise of these cases is that remedial indeterminacy must be resolved either through the court's own decision or through deference to the agency. In fact, the experimentalist approach shows that this is a false dichotomy that excludes the most promising alternative. We find a partial acknowledgment of greater complexity in an earlier case — *Youngberg v. Romeo*,[187] which even as it tries to preempt judicial intervention points the way to its experimentalist variants.

Upon finding unlawful segregation in the Kansas City, Missouri School District by the district and the state, the *Jenkins* trial court issued a series of orders with the declared goal of "elimination of all vestiges of state imposed segregation," particularly the low "student achievement."[188] Given the small fraction of nonminority students in the district, pupil reassignment would make little progress toward racial balance. So the decrees focused on measures designed to improve the quality of education enough to attract students away from the suburbs through voluntary interdistrict transfer. In the absence of any precise idea of what actually makes schools effective and therefore attractive, this program of "desegrative attractiveness" became a program of establishing "suburban comparability": making the Kansas City schools as much like their best suburban counterparts as the initially vast reserves of goodwill and funding (the latter enhanced by new contributions from the state) would allow.[189]

Under the decree, class sizes were reduced to the levels required for certification in the highest category of the state Board of Education's ranking system. The salaries of virtually all of the 5000 staff members were increased. The school district made an early childhood development program, full-day kindergarten, expanded summer school, and before- and after-school tutoring available to all students. Some fifty-five schools were renovated, eighteen closed, and seventeen new ones constructed. In ordering the renovations, the district court rejected the state's "'patch and repair' approach" because it "would not achieve suburban comparability or the visual attractiveness sought by the Court as it would result in floor coverings with unsightly sections of mismatched carpeting and tile, and individual walls possessing differ-

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[186] 518 U.S. 343 (1996).

[187] 457 U.S. 307 (1982).

[188] *Jenkins IV*, 515 U.S. at 74 (quoting *Jenkins v. Missouri*, 69 F. Supp. 19, 23, 24 (W.D. Mo. 1985)) (internal quotation marks omitted).

[189] *Id.* at 78, 98.

ent shades of paint."[190] The plan called for air conditioning and fifteen personal computers in every high school classroom. Other facilities included:

> a 2,000-square-foot planetarium; greenhouses and vivariums; a 25-acre farm with an air-conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast capable radio and television studios with an editing and animation lab; a temperature controlled art gallery; movie editing and screening rooms; a 3,500-square-foot dust-free diesel mechanics room; 1,875-square-foot elementary school animal rooms for use in a zoo project; [and] swimming pools . . . .[191]

The district court's plan was plausibly described as "the most ambitious and expensive remedial program in the history of school desegregation."[192]

Set against the district court's goal of eliminating the "vestiges of segregation," however, the benefits of the first rounds of this program, as reflected in performance on standardized tests, were meager. The district court noted a "trend of improvement" in academic achievement but found the district "still at or below national norms on many grade levels." It provided no guidance on how to accelerate reform. Instead, the court observed almost wistfully that it had "allowed the District planners to dream" and "provided the mechanism for th[ose] dreams to be realized."[193]

When the state appealed, the Supreme Court held this remedial scheme improper on the ground that it was not adequately connected to the proven violations of the plaintiffs' rights. Writing for the majority, Chief Justice Rehnquist emphasized the untethered character of the district court's order:

> The District Court's pursuit of "desegregative attractiveness" cannot be reconciled with our cases placing limitations on a district court's remedial authority. It is certainly theoretically possible that the greater the expenditure per pupil within the KCMSD, the more likely it is that some unknowable number of nonminority students not presently attending schools in the KCMSD will choose to enroll in those schools. Under this reasoning, however, every increased expenditure, whether it be for teachers, noninstructional employees, books, or buildings, will make the KCMSD in some way more attractive, and thereby perhaps induce nonminority stu-

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190 *Id.* at 78.

191 *Id.* at 79 (quoting *Missouri v. Jenkins* (*Jenkins II*), 495 U.S. 33, 77 (1990) (Kennedy, J., concurring)).

192 *Id.* at 78 (quoting *Jenkins ex rel. Agyei v. Missouri*, 19 F.3d 393, 397 (8th Cir. 1994) (Bean, J., dissenting from denial of rehearing en banc)).

193 *Id.* at 79–80 (quoting the appendix to the petition for certiorari) (internal quotation marks omitted).

> dents to enroll in its schools. But this rationale is not susceptible to any objective limitation.[194]

The "objective limitation" the Court had in mind was the doctrine announced in prior cases that remedial practice should be limited to undoing the "incremental segregative effect" of particular official acts in violation of the Constitution — that is, "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[195] From this point of view, the district court's excesses resulted from its initial failure to "identif[y] the incremental effect that segregation has had on minority student achievement or the specific goals of the quality education programs."[196]

The Supreme Court's objection to the aimless and undisciplined character of the lower court's efforts is understandable, but the "incremental effect" doctrine has little promise of improving things. The effort to isolate such effects poses insuperable factfinding burdens because of the "polycentricity" that critics of public law litigation have emphasized. Public law problems invariably result from the complex interaction of conduct by myriad actors. It is highly unlikely that courts could ever command the evidence or methodology necessary to isolate the effects of particular unlawful decisions.

Moreover, even if a court could isolate the present effects of specific past unlawful acts, it is not clear how this finding would constrain its remedial authority. If the court must limit its orders to the same matters as those involved in the past unlawful conduct — for example, pupil assignment — then it may find that its only permissible options are unlikely to mitigate the harm. Pupil reassignments, for example, have little remedial potential where minority students predominate the entire system. Ineffectuality, of course, was a critical objection to the *Jenkins* decree. Alternatively, the incremental effect doctrine might mean that the trial judge has authority to order remedial measures of any kind as long as they are demonstrably likely to produce improvements proportional to the proven harm of past illegality. But this does not seem like much of a limit. There are innumerable potential ways of producing any given measure of improvement.

Finally, the narrow, specific decrees urged by the *Jenkins* majority can be both inefficiently rigid and unnecessarily intrusive on executive authority. Although Ross Sandler and David Schoenbrod endorse the *Jenkins* approach, one of their prime illustrations of inappropriate judicial intervention is a provision imposing strict deadlines for processing pupil assessments in the New York City special education pro-

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[194] *Id.* at 98 (citing *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)).

[195] *Id.* at 87 (quoting *Milliken v. Bradley*, 418 U.S. 717, 746 (1974)) (internal quotation mark omitted).

[196] *Id.* at 101 (citing *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 417 (1977)).

gram. They plausibly object that these requirements induced school personnel to sacrifice quality and to divert resources from other important programs in order to meet the deadlines. But the deadlines were among the provisions of the decree derived directly, *Jenkins*-style, from the (in this case) statutory right.[197]

A second approach to remedial discretion is illustrated by *Lewis v. Casey*. In an earlier case — *Bounds v. Smith*[198] — the Court affirmed an order, based on the constitutional right of access to the courts, requiring a state prison system to maintain law libraries. In *Lewis*, inmates challenged the Arizona prison libraries as inadequate under *Bounds*. After finding for the plaintiffs, the district court appointed a special master to determine "how best to accomplish the goal of constitutionally adequate inmate access to the courts" and adopted, substantially unchanged, his twenty-five-page proposal as a permanent injunction.[199] This "microscopically detailed order" included provisions dictating the hours of operation for the libraries, the amount of time prisoners must be permitted to use them, the minimum credentials of library staff, the forms to be used for requesting books, permissible noise levels in the libraries, the curriculum of the introductory course on legal research for prisoners, and the books and other materials to be made available.[200]

The Supreme Court struck down the order. Writing for the majority, Justice Scalia criticized the lower court for acting as if the constitutional right in question were "the right to a law library." In fact, the right recognized in the court's prior cases was a "right *of access to the courts*."[201] The remedy was thus objectionable in two respects. First, it was not supported by an adequate showing of violation of right. The plaintiffs needed to show not simply that the library was inadequate, but also that they had claims that they had been unable to present to the courts. Second, even if the plaintiffs had shown an impairment of access, it would be error to mandate this particular response when a variety of other ones — different types of libraries or different combinations of written materials and professional assistance — might be equally effective. The lower court should have given the defendant more opportunity to design a responsive remedy before it imposed one over its objection.

Arguably, the trial court in *Lewis* had followed the mandate of *Jenkins* to define the constitutional harm as narrowly and precisely as

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197 SANDLER & SCHOENBROD, *supra* note 8, at 68–72, 92–93, 197–204.

198 430 U.S. 817 (1977).

199 Lewis v. Casey, 518 U.S. 343, 347 (1996) (quoting the appendix to the petition for certiorari) (internal quotation marks omitted).

200 *Id.* at 390 (Thomas, J., concurring).

201 *Lewis*, 518 U.S. at 350.

possible. The Supreme Court, by insisting that the right in question was considerably more general than the trial court assumed, made the remedial possibilities broader and more indeterminate. The *Lewis* opinion proposed to resolve this indeterminacy by deferring to the agency. However, such deference is a crude solution to the problem of indeterminacy exacerbated by the Court's expansive approach to defining rights. In any given case, there is likely to be a dispute about how much deference is appropriate given the defendant's proven misconduct. Justice Stevens's dissent in *Lewis* argued that the agency had had opportunities to develop remedial plans in both this and a prior case involving similar claims, and that its record of noncooperation justified the district court's decision to preempt it.[202] Moreover, there has to be some limit to deference, and *Lewis* says little about what it should be.

A possible response can be found in our third case, *Youngberg v. Romeo* — a challenge to the conditions of confinement at Pennhurst, a now notorious institution for the mentally retarded in Pennsylvania.[203] The plaintiff asserted that, as an involuntarily committed resident, he had constitutional rights to reasonable safety, freedom from unnecessary restraint, and minimally adequate habilitation, all of which were violated by Pennhurst's shoddy practices. After affirming that civilly committed inmates had constitutional rights of the sort the plaintiff alleged, the Court considered how those rights should be delimited. It rejected the lower court's holding that measures infringing an inmate's liberty or safety interests required a "'compelling' or 'substantial' necessity." It concluded that this standard would pose "an undue burden on the administration of institutions such as Pennhurst" and would require judges to "second-guess" institutional judgments they were unqualified to assess. Yet instead of requiring the general administrative deference proposed by *Lewis*, the *Youngberg* Court spoke of "deference to the judgment exercised by a qualified professional":

> [L]iability 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.[204]

This precept is a more limited form of deference than the *Lewis* standard. We have noted that professional service providers in defen-

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[202] *Id.* at 411–14 (Stevens, J., dissenting).

[203] 457 U.S. 307 (1982). *Youngberg* was an individual damage action rather than an institutional reform case, but the issue it raised about the constitutional standard of care was the core issue in institutional reform cases, and the holding was thus influential in subsequent institutional cases. *See, e.g.*, Soc'y for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1248–49 (2d Cir. 1984).

[204] *Youngberg*, 457 U.S. at 322–23.

dant institutions often agree with a substantial range of the plaintiffs' claims, and that top administrators sometimes concede that their own decisions do not comply with applicable standards and hence are not "professional decisions" in the Court's sense. Although the *Youngberg* standard was prescribed for mental health cases, it expresses the practical reality in many cases in other areas: professional staff acquire increased influence over compliance regardless of the express provisions of the decree.[205]

Nevertheless, the Court's approach is subject to two objections. First, in accepting as "presumptively valid" any official decision not so egregious as to be disqualified as unprofessional, the Court is not substituting administrative expertise for amateurish judicial speculation. Rather, it gives preference to the opinion of an administratively appointed expert over the opinion of a judicially appointed expert. When courts impose remedies in public law cases, they do not devise them ex nihilo but rather formulate them from the advice of experts they have appointed. The library system in *Lewis*, for example, was not designed by the court, but by "a law professor from Flushing, New York."[206] Even granting the Court's criticisms of some of these remedies, there is no reason to regard the expertise of an authority chosen by a judge to review the decisions of other experts as systematically inferior to the judgment of one of the experts under review.

Perplexity only increases when — here the second objection — the official to whose judgment the Court would defer inhabits an institution that the larger body of professional opinion condemns. This is of course precisely the circumstance at Pennhurst. Looking back at its ruling in another case against Pennhurst, the district court observed that "no one took issue with the many professionals in the field of mental retardation who testified that 'normalization' [i.e., deinstitutionalization] has been universally accepted as the only successful method of habilitating a retarded person."[207] There are no doubt better and worse ways of managing an institution that fails to meet its legal and other obligations to those it serves. A court, however, is unlikely to discern the better choices simply by deferring to the views of the officials of the condemned institution.

The Pennhurst litigation, as it evolved after the Supreme Court's decision, reflected a further, more general shift in the character of professional opinion. *Youngberg* assumed the traditional picture in which an individual practitioner, drawing on a particular, specialized discipline, confronts and resolves problems in a substantially tacit and soli-

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205 *See* Diver, *supra* note 2, at 70–73. But note the qualification in *supra* pp. 1078–79.

206 *Lewis*, 518 U.S. at 363.

207 Halderman v. Pennhurst State Sch. & Hosp., 784 F. Supp. 215, 220 (E.D. Pa. 1992).

tary way. In the decades during which the Pennhurst litigation proceeded, this conception changed. Increasingly, professional decisionmaking came to be seen as the serviceable but provisional product of an ongoing, mutually critical discussion among experts with backgrounds in different disciplines. The more pronounced this tendency, the less sense it made to speak of deference to the views of a particular professional: individual professionals did not "have" views, collaborative groups of experts did.

The Pennhurst Final Settlement Agreement showed succinctly how this change could transform the meaning of "professional" underlying *Youngberg*: the Agreement specified that the services provided by the Commonwealth and other government entities to the class members were to be determined "by a professional judgment, expressed through the interdisciplinary team process."[208] This usage was hardly singular. By the mid-1980s, "interdisciplinary team" appeared often in cases involving the rights of the mentally retarded as a term of art requiring little or no further definition.[209]

The key characteristics of this revised conception of professional decisionmaking are collaborative dialogue, provisionality, and transparency[210] — the very characteristics of what we call the experimentalist approach. To the extent this view of professionalism converges with experimentalism, it suggests a way out of the problem of judicial discretion. The court need not choose between deriving remedies from ambiguous substantive norms on the one hand and deferring to manifestly unreliable executive officials on the other. Instead, it can try to create a process in which the stakeholders collaboratively derive standards, procedures for revising them, and mechanisms of accountability for those subject to them. The court can then facilitate implementation of these standards and procedures. In doing so, there is a sense in which the court might be said to be deferring to professional judgment, though of a different sort from that assumed in *Youngberg*. Before the court can defer to this new kind of judgment, however, it will have to oversee the creation of the processes that make it possible.

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[208] *Id.* at 218.

[209] *See, e.g.*, Sermak v. Manuel, No. 98-3345, 1999 WL 801571, at *4–5 (6th Cir. Oct. 1, 1999); S.H. v. Edwards, 860 F.2d 1045, 1049 (11th Cir. 1988); Ky. Ass'n for Retarded Children v. Conn, 718 F.2d 182, 186 (6th Cir. 1983).

[210] *See, e.g.*, INST. OF MED., CROSSING THE QUALITY CHASM: A NEW HEALTH SYSTEM FOR THE 21ST CENTURY 111–63 (2001). For an example from one of our contexts, see Schiff & Shansky, *supra* note 74, at 21–25, which asserts that "multidisciplinary teams are the real guts" of an effort to improve prison medical care and gives examples of situations in which medical problems required doctors to collaborate with administrators, guards, dieticians, and maintenance personnel.

B. Separation of Powers

The trend toward experimentalism in public law cases should mitigate separation-of-powers concerns about structural remedies. Indeed, it suggests a role for the courts, which might be called accountability-reinforcing, that fits well with familiar notions of the separation of powers.

Neither the federal Constitution nor state constitutions specifically delineate the spheres of the branches of government, and they do not appear to intend any rigid segregation of activities among them.[211] Separation of powers is an implied constraint, and it has to be given meaning in terms of traditional governmental practice or some principled understanding of democracy.

The objection to structural injunctions from tradition has been precisely the discontinuity between the "traditional model" and public law litigation that Chayes emphasized.[212] The objections from democratic principle point to two roles assigned to the separation of powers in American constitutional thought. The first is the fragmentation of powers as a barrier to tyranny; the second is the allocation of responsibility as a mechanism of ensuring accountability to the electorate.[213] Structural injunctions are accused of subverting these principles by excessively concentrating power in the court at the expense of the electoral branches.[214]

In fact, we have noted that there is substantial traditional precedent for public law litigation. Chayes exaggerated the discontinuity between traditional private law adjudication and actions for structural relief.[215] Moreover, there is clear precedent for structural cases in the

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[211] *See, e.g.*, THE FEDERALIST Nos. 45–46, at 308–23 (James Madison) (Jacob E. Cooke ed., 1961).

[212] *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 349 (1996) (Scalia, J.) ("It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.").

[213] Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1740–42 (1996).

[214] *See Lewis*, 518 U.S. at 385 (Thomas, J., concurring) ("Broad remedial decrees strip state administrators of their authority to set long-term goals for the institutions they manage and of the flexibility necessary to make reasonable judgments on short notice under difficult circumstances. . . . [They] override the 'State's discretionary authority over its own program and budgets and forc[e] state officials to reallocate state resources and funds to the [district court's] plan at the expense of . . . other government programs . . . .'" (second and third alterations in original) (quoting *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) (Thomas, J., concurring))).

When a federal court adjudicates a claim against a state executive defendant, separation-of-powers concerns are mediated by federalism. Notwithstanding occasional suggestions to the contrary, however, the federal courts tend to view separation-of-powers issues in public law cases against state institutions as analogous to those that arise in cases against federal executive defendants. *See* Robert F. Nagel, *supra* note 3, at 665–67.

[215] *See supra* section III.B.

traditional public law practice of enjoining administrative officials to perform mandatory legal duties — a core feature of the "rule of law" in the Anglo-American tradition.[216] To be sure, such injunctions were narrower and less frequent in the past, but so was the executive activity they were designed to check. Some expansion of remedies seems necessary to give meaning to the rule-of-law principle in an era of vastly changed and expanded government activities. Moreover, it is uncontroversial that there are important constitutional limits on a legislature's authority to constrain (or even to fail to provide for) the enforcement of substantive rights — even the rights the legislature itself has created.[217]

To portray the judicial activity in structural reform as encroaching on executive and legislative discretion ignores the complexity of the relations among the branches in many of these cases. Sometimes, as in housing and mental health cases, the legislature has authorized structural relief. Only in the prison area do we find a prominent, categorical expression of legislative hostility — the Prison Litigation Reform Act of 1996 — and even here the statute could have been interpreted plausibly to impose more modest limits than those the courts have inferred.[218]

Moreover, the remedial regimes that emerge from public law cases sometimes involve elaborate and creative legislation. Legislatures in Texas and Kentucky enacted innovative educational reforms in response to the school "adequacy" cases there, and legislatures in New Jersey and Oregon developed statewide programs to supervise local decisions affecting affordable housing. After courts in Maryland and New Jersey vindicated complaints about racial profiling, many state and local governments enacted legislation mandating monitoring regimes in the same spirit as the early judicial remedies. In all these instances, the legislatures would probably not have acted as they did without the courts' provocation, but the schemes that emerged were substantially their own creations.[219]

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[216] *See* EDITH HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW: CERTIORARI AND MANDAMUS IN THE SEVENTEENTH CENTURY (1963). On judicial control of administrative action as a core rule-of-law principle, see A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 388–90 (10th ed. 1959).

[217] *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542–43 (2001); Goldberg v. Kelly, 397 U.S. 254, 260–62 (1970).

[218] *See supra* p. 1042. Even after the restrictions of the PLRA, *see supra* pp. 1041–42, the Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. §§ 1997–1997j (2000), continues to authorize Department of Justice suits for structural relief against state prisons.

[219] *See, e.g.*, *supra* pp. 1026–27 & statute cited n.35; p. 1046; pp. 1051–52 & 1052 n.116.

Turning to the executive branch, we have seen that internal dissensus is a pervasive theme.[220] More often than not, agency heads or operations officers welcome the suit or at least concede many of the plaintiffs' allegations. Perhaps under separation-of-powers principles, it is the position of the jurisdiction's chief magistrate — the governor, in the case of a state defendant — not that of junior officers, that matters the most. However, even conceding this point, it is remarkable how rarely the practices that the plaintiffs attack seem to have been the result of an exercise of authority by anyone. The situation is more often the consequence of a failure or refusal to make policy. The most characteristic component of current structural decrees is a demand that the defendant simply promulgate *some* policy, often with minimal or uncontroversial constraints as to what it shall be.

Consider in this regard the background of a recent state institutional case.[221] Plaintiffs' counsel determined that the practices of a state agency in one of the areas we surveyed in Part II were woefully out of compliance with the applicable legal duties. They approached the senior officers of the agency with their allegations. The officers largely conceded the violations and expressed a willingness to negotiate a resolution that could be embodied in a statute or a consent decree. The parties tentatively agreed on the broad outlines of a resolution. When the officers approached the governor's office, however, they were told that the governor was unwilling to take the political heat for approving measures that would require additional expenditures for the benefit of a politically unpopular group. Efforts to persuade the governor that refusal to settle would involve the state in expensive litigation that it would eventually lose failed to weaken his resolve. When the institution's officials included a substantial item in their budget for defense of the litigation, however, one of the leaders of the legislature noticed it and balked. The legislator then successfully pressured the governor to agree to a settlement. The plaintiffs, the legislature, and the governor preferred that the settlement be embodied in a judicial decree rather than in a statute, so the plaintiffs filed the case with the state's assurance that it would settle promptly, which it did.

The story is more elaborate than most, but the basic theme of avoidance rather than exercise of responsibility by legislative and

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220 Since state executive power is formally more fragmented than federal executive power, division among state officials often makes it difficult to discern what judicial deference to the executive branch would mean. For example, in the Santa Clara, California, jails case, the sheriff — an elected official who was named as a defendant along with the Board of Supervisors — crossed the courtroom to sit at the plaintiff's counsel table. The sheriff and the Board were feuding. The sheriff attributed the jails' problems to inadequate funding; the Board, to the sheriff's mismanagement. *See* FEELEY & RUBIN, *supra* note 6, at 116.

221 As recounted to us in confidence by two of the participants.

elected executive officials is common. The most plausible separation-of-powers objection to the role of the court in this case is not that it usurped executive responsibilities, but that it allowed the use of its office to give political cover to a governor who should have taken responsibility for the decision on his own. Yet without the possibility of judicial challenge, a situation that no one could defend in good faith would have persisted.[222]

To the extent that old-style command-and-control regimes comprehensively preempted executive authority, both fragmentation and accountability concerns may have been implicated. But because the experimentalist approach leaves the agency more discretion than the command-and-control approach does, these concerns seem much less pressing.[223]

Moreover, the experimentalist approach seems in important respects to vindicate separation-of-powers concerns. This appears particularly clear with respect to accountability. Experimentalist intervention directly serves electoral accountability by requiring executive officials to make explicit policies and to subject themselves to mechanisms of measurement and monitoring that make their performance more readily assessable. This scheme potentially makes the executive more accountable to the legislature and to the electorate, as well as to the court.[224]

These transparency mechanisms should also enhance the accountability of plaintiffs' counsel, other stakeholder representatives, and the court itself. The new regime makes clear the goals to which the repre-

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[222] Sandler and Schoenbrod make the "political cover" version of the diminished accountability claim. *See* SANDLER & SCHOENBROD, *supra* note 8, at 117–38, 153–61. Their concern is important, but their proposals to restrict judicial intervention cannot enhance accountability when the executive is disposed to passivity and feels no pressure to act.

No doubt there are examples of underperforming agencies that have independently initiated promising reform projects in ways that have opened themselves up to stakeholders. Sandler and Schoenbrod's account of the reorganization of New York's Administration for Children's Services suggests that it may be an example. But in the case brought against that agency, the court proved able to recognize the quality of the agency's efforts and responded appropriately, declining to enter the type of intrusive orders to which Sandler and Schoenbrod object. *See id.* at 193–97; *see also* Marisol A. *ex rel.* Forbes v. Giuliani, 185 F.R.D. 152, 164 (S.D.N.Y. 1999) (noting that even if the plaintiffs established liability at trial, "the Court may not have been in a position to provide for more relief than simply encouraging continued effort and improvement by [the defendant]"). Our conception of destabilization rights anticipates such situations by requiring as conditions of ambitious structural relief both performance failure and political entrenchment.

[223] *See* Nagel, *supra* note 3, at 708–10 (discussing how "detail in decree" intensifies separation-of-powers concerns).

[224] To be sure, the legislature could prescribe regimes of monitoring, participation, and accountability on its own. When the court mandates such regimes, it is thus asserting power in relation to the legislature. But the separation of powers permits and even requires judicial mandates that constrain legislative practice when the constraints are of the sort that induce the legislature to perform its own function properly. Think of reapportionment, void for vagueness, or the delegation doctrine.

sentatives have committed their constituents and makes progress measurable in terms of criteria to which the representatives have agreed. Where progress is not being made, constituents will sometimes be in a position to put pressure on or to replace their representatives. Similarly, lack of progress will reflect on the court. Although the direct mechanisms of judicial accountability are limited, judges are likely to be reluctant to continue spending the exceptional effort and suffering the public criticism these cases often provoke when they do not feel that tangible progress is being made.

Experimentalist intervention serves both fragmentation and accountability in another, less traditional way. It opens up the underperforming institution to the influence of and participation by dissatisfied citizens through stakeholder negotiation. The stakeholder process is by definition a fragmentation of power and, when it works, it enhances accountability to those with the greatest interest in the institutions. As a form of direct rather than representative democracy and as an informal process without fixed criteria of standing or operation, the stakeholder process departs from the traditional premises of American constitutionalism. But it is potentially a valuable elaboration, one that serves the broader values of fragmentation and accountability in circumstances in which, by themselves, traditional political processes would be unable to do so effectively.

Public law litigation rejects the notion that accountability can be assumed from the fact that an agency is nested in a larger administrative structure formally headed by an elected official. Such an assumption would turn separation-of-powers doctrine into empty formalism. The electorate as a whole has limited information about and interest in the operations of particular public institutions, and issues about these institutions are bundled with myriad other ones when they are presented at the polls. The senior officers of all three branches have limited information and interests and a vast range of responsibilities as well. The stakeholder process permits a more informal and ad hoc kind of power-sharing and accountability to those who are most strongly concerned.[225]

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[225] Thus, the experimentalist style of public law remedy partakes of the same spirit as a variety of recent reforms that draw on direct citizen participation in areas including policing, environmental protection, and local economic development. *See generally* JEFFREY M. BERRY, THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS (1999); DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (Archon Fung & Erik Olin Wright eds., 2003); WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY (2001).

C. The Problem of Attribution

The next doctrinal issue might be called the problem of attribution. The plaintiff seeks structural relief against the government or senior officials. Sometimes, as with de jure segregation, she will be able to prove systematic misconduct by the senior officials. Often, however, her proof consists of a series of discrete episodes of misconduct by lower-level agents. The question then arises of when these episodes will be deemed to demonstrate systemic misconduct, or to put it differently, when they will be attributed to the government or senior officials against whom relief is sought.

The issue is theoretically present in all of the contexts surveyed above, but it arises most prominently in police abuse cases. Federal relief under 42 U.S.C. § 1983 against local government or senior state officials on the basis of misconduct by subordinates requires a showing that misconduct was a matter of explicit "policy" or a tacitly condoned "pattern or practice."[226] In addition, both the traditional "irreparable injury" requirement for equitable relief and standing requirements depend on a showing that the conduct is likely to be repeated on a significant scale in the absence of structural relief.[227]

Since the misconduct in question is rarely explicitly authorized, plaintiffs try to show an ongoing "pattern or practice." Typically, proof takes the form of evidence of a number of episodes of misconduct, and of knowledge and unresponsiveness on the part of the superiors. At some level, evidence of repeated discrete instances compels an inference of condonation.

Acts of subordinate misconduct do not establish supervisor liability by themselves, however, except insofar as they permit an inference about state of mind. The core case is intentional participation or encouragement. More recent cases, however, rarely fit this scenario. The courts have not narrowed the liability of senior officials to cases in which they have been active wrongdoers. Yet neither have the courts been comfortable with the idea that officials' failure to stop the conduct is enough. They require a showing of a state of mind between intention and indifference. Thus, we get standards such as "deliberate indifference."[228]

The elaborate body of doctrine that wrestles with these issues has two salient deficiencies. First, it treats what are basically institutional

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[226] *E.g.*, Porter v. Nussle, 523 U.S. 516, 530 (2002). Sovereign immunity principles survive sufficiently to preclude general respondeat superior liability for officials performing public functions of the sort considered here. The principal rationale is that public tasks require significant discretion, and officers are entitled to substantial deference by virtue of their position in the executive branch. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 676–83 (1978).

[227] *See, e.g.*, Rizzo v. Goode, 423 U.S. 362, 371–73 (1976).

[228] *E.g.*, City of Canton v. Harris, 489 U.S. 378, 388 (1989).

issues in psychological terms and, indeed, incoherent psychological terms. "Deliberate indifference" is an oxymoron. It misapprehends the most pertinent psychological and institutional realities. In the typical case these days, the senior officials neither desire nor actively promote the misconduct. If they could have eliminated it costlessly, they would have done so. Their problem is that eliminating the conduct would involve substantial costs of many kinds — economic, political, emotional — and for reasons that may be both selfish and public-regarding, they have made tradeoffs that permit the misconduct to continue. The important question is whether these tradeoffs are acceptable, or whether they give certain values less weight than the applicable law requires. Preoccupation with states of mind simply diverts energy and attention from the pertinent considerations.

Second, the focus on the officials' mental states risks creating strong disincentives for the kind of internal monitoring that is critical to addressing many of the problems involved in these lawsuits. If liability depends on intent, then officials might reasonably conclude that ignorance is the best defense.[229] We do not usually think of people as intending consequences of which they are unaware. Of course, courts will at some point assume that officials "must have known" about conduct that was widespread and salient, and they will sometimes conclude that deliberate avoidance of knowledge is tantamount to knowledge. However, courts do not reach such conclusions easily; they often require a fairly elaborate showing by the plaintiffs. The official who concedes knowledge of ongoing misconduct will often be in a worse position than the one who can plausibly deny it. Officials are rarely in a better position for having sought out knowledge.

The experimentalist perspective suggests two improvements on the current standards of institutional liability. First, it directs assessment of the defendant institution's performance failures away from the motivations of the individuals who occupy its senior offices. It suggests that these failures are more likely to be the product of a series of political compromises in which the values to which the plaintiffs appeal have been slighted or, relatedly, the result of a kind of low-level political equilibrium in which everyone fares less well than he might, but in which no single actor has both the incentive and the power to make changes without prodding.

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[229] At the trial of a case challenging prison medical conditions, the head of the California Department of Corrections testified that he had resisted developing a procedure to screen inmates for mental illnesses "because he knew that once mentally ill individuals were identified he would be responsible for treating them." Craig Haney & Donald Specter, *Treatment Rights in Uncertain Times*, *in* TREATING ADULT AND JUVENILE OFFENDERS WITH SPECIAL NEEDS 51, 70 (José B. Ashford et al. eds., 2001).

Second, it argues for a reversal of the penalty for monitoring implicit in the mental-state approach. If the most promising remedial approach to public rights enforcement failure involves monitoring, participation, and disciplined comparisons, then defendants who have initiated these practices should get credit for doing so. Good-faith initiation should weigh against the finding of political entrenchment that, on our view, is a prerequisite for liability. These practices tend both to create compliance pressures on lower-tier workers and to open the larger system up to political pressures toward compliance. They thus give credibility to the defense that nonjudicial political processes are sufficient to induce reform. Conversely, the failure of defendant institutions to adopt state-of-the-art compliance procedures ought to count against them in liability determinations.

The experimentalist approach in public law parallels recent trends in private organizational liability. In the corporate area, for example, the same tendency to reject executive liability for failure to supervise compliance with legal duties and to treat ignorance of even routine subordinate misconduct as exculpatory was long prominent. This tendency has changed significantly in recent decades. As a matter of practice, it has become the norm for corporations to have compliance programs in a variety of sensitive areas, such as environmental and securities law. The 1991 Federal Sentencing Guidelines for corporate defendants broke ground by making good-faith compliance monitoring efforts an important mitigating factor in sentencing in federal criminal prosecutions of corporations.[230] The courts have begun to suggest that the duty of care of corporate executives includes an affirmative obligation to monitor.[231] A shift in focus in public law litigation away from a focus on mental states and toward institutional efficacy would be in line with such private law developments.

D. The Problem of Interest Representation

Chayes's article concluded with a discussion of the "problem of interest representation."[232] Public law litigation requires representation of affected people. Most participation must be through representatives. So the court must identify the affected people, assess the representativeness of those who purport to speak for them, and sometimes assign weights to the competing interests asserted in the process.

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230 U.S. SENTENCING COMM'N, GUIDELINES MANUAL ch. 8 (1994).

231 Chancellor Allen discussed these developments in *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959, 969–70 (Del. Ch. 1996). Another analogous private context is sexual harassment employment discrimination, in which such notions as "hostile work environment" have shifted the inquiry from the motivations of individual managers to institutional structures and have led to an implied duty to monitor. *See* Sturm, *supra* note 10, at 480–90.

232 Chayes, *supra* note 1, at 1310–14.

Chayes argued that courts are not ill-equipped to identify affected interests and routinely do so under federal joinder and class action rules. He approved of the tendency of joinder doctrine and remedial practice toward inclusiveness. He noted various techniques for inducing the representation of groups that did not appear on their own initiative. These techniques included broad notice of the suit and its processes, refusal to proceed until the original parties procure the representation of specified interests, recruitment efforts by special masters, and invitations to amici curiae. With respect to the problem of weighing of interests, Chayes said without elaboration, "[a] part of the answer may be found in the suggestion that the decision, or at least the remedy, involves a species of negotiation among the parties."[233]

Our perspective suggests some elaborations on this response. To begin, the experimentalist tendency treats participation not just as an aspect of the initial remedial formulation, but as a core feature of the remedy itself. The substantive remedial terms are provisional. They are expected to be renegotiated in the light of experience. Thus, a critical element of the decree is the establishment of participatory processes for such renegotiation. The task of identifying affected interests and inducing their participation does not need to be fully accomplished at the outset. New constituencies will appear in the course of implementation, and because the rules are revisable, these constituencies will have an opportunity to challenge them.

Further, Chayes's suggestion that the difficulty of weighing interests can be remedied in part through "a species of negotiation among the parties" is more powerful in the experimentalist perspective. Chayes's discussion of negotiation was ambiguous. On one reading, he conceived of it as a kind of pluralist bargaining in which groups compromise their particularistic interests in a resolution that reflects their relative power. Under this reading, the problem of weighing interests raises a dilemma. Either the negotiated resolution would simply reflect the preexisting balance of power among the affected groups, in which case it would be tainted by the inequities that the lawsuit was brought to redress. Or alternatively, it would reflect a reallocation of power through the court's declaration of entitlements in its liability determination. In this case, however, the court would have to be able to specify the parties' entitlements, and that would require something like the specific weighing of interests that Chayes conceded would be difficult.

On another reading, Chayes discusses the remedial negotiation in terms of the deliberative consensus of democratic experimentalism. In contrast to bargaining, deliberation is centrally committed to reason-

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[233] *Id.* at 1312.

giving and openness to persuasion. It insists that the parties remain open to the possibility that they may not fully understand their self-interest and that they be at least hopeful of finding solutions that vindicate common values. It aspires to be a process of learning and solidarity-building rather than simply dispute settlement.

Destabilization rights and experimentalist remediation complement the consensus approach, but they are not helpful and may even be harmful to pluralist bargaining. Pluralist bargaining proceeds through implicit threats by the parties about the costs each can impose on the other by failing to agree. The more the parties agree on what these costs are, the more likely they will find it in their self-interest to come to some agreement. The more divergence in the parties' estimations about the costs of failing to agree, the more likely pluralist bargaining will fail.[234] Moreover, each party in the pluralist process assesses the benefits of settlement primarily in terms of her selfish interests, and the opposing party calculates her strategy in terms of the behavior she anticipates given her understanding of her adversary's self-interest. To the extent that the parties are uncertain about their own interests, both the parties' decisions about what outcomes to accept and their predictions about what their adversaries will accept become more difficult. This makes pluralist negotiation more strenuous. Destabilization rights are designed to increase uncertainty about both the parties' interests and the costs of refusing to agree. Thus, they may amplify the impediments already inherent in pluralist bargaining. On the other hand, this uncertainty potentially enhances deliberative bargaining in the ways discussed above. It can open the parties to the broader cognitive and moral orientations that produce creative solutions.

If we follow the destabilization perspective in understanding remedial negotiation as deliberative, we can give some substance to Chayes's suggestion that such negotiation responds to the problem of weighing interests. From the pluralist perspective, weighing private interests is important because the solution is viewed as an effort to maximize the satisfaction of diverse interests. By contrast, deliberation is an attempt to approximate a common interest. Even to the extent they know their current interests and powers, deliberative practitioners assume that these understandings may change in the course of deliberation; they cannot assume that there is any strong relation between the power position of a particular participant and her capacity to contribute to the discovery of generally valuable solutions.

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[234] *Cf.* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 975–80 (1979) (arguing, on pluralist assumptions, that divergence in expectations about the litigated outcome tends to reduce the likelihood of settlement).

This claim, however, should not be exaggerated. Under the best circumstances, deliberators will have definite commitments to particularistic interests and will be influenced by some sense of their fallback positions in the event of nonagreement. Those with the better fallback positions will have more power in the negotiation. Parties will benefit from greater capacities and resources in the negotiation process itself and from cultural and psychological advantages. In this sense, the dynamics of unequal bargaining power affect deliberative as well as pluralist negotiations. Moreover, even a negotiation that produces an ostensibly consensual result may appear to an outside observer or to one or more of the participants to be coerced. The intuition behind destabilization rights suggests only that there are resources of goodwill and creativity that can be tapped by a combination of uncertainty and opportunity. "Interests" in the pluralist sense will continue to play a role, but the role will be a more provisional one. But to the extent that the destabilization effects induce deliberative negotiation, the burden on the court to define and weigh interests should be less than under pluralist bargaining.

V. CONCLUSION

Recent discussion has tended to underrate the potential of public law litigation because it has tended to misperceive its forms. Much criticism has been directed at a model of judge-centered, hierarchical, and rule-bound intervention that has ceased to correspond to trial court practice. In fact, trial judges and litigants have crafted more decentralized and indirect forms of intervention that rely on stakeholder negotiation, rolling-rule regimes, and transparency. No definite assessment of the efficacy of this "experimentalist" approach is possible yet, but the approach seems to avoid the defects emphasized by the critics in the older one, and early returns on some efforts give reason for optimism.

The experimentalist approach is also responsive to concerns about the legitimacy of judicial intervention in public law cases. Experimentalist intervention is both more consistent with judicial practice in common law cases and more compatible with electoral mechanisms of democratic accountability than most accounts of public law litigation recognize. Experimentalist remedies expose public institutions to pressures of disciplined comparison that resemble the market pressures enforced by common law norms. At the same time, the transparency they induce facilitates related forms of democratic intervention, including electoral ones.

The features of experimentalist intervention that respond to concerns about both efficacy and legitimacy are captured by the idea of destabilization rights. In stigmatizing the status quo, the court's intervention opens the defendant institution up to participation of previ-

ously marginalized stakeholders and clears the way for the redefinition of relations among more established ones. Counterintuitively, destabilization through new public law creates opportunities for collaborative learning and democratic accountability that the more certain world of pluralist bargaining under the aegis of courts or legislatures often precludes.

Aid to the Needy in State Constitutions:
State Court Treatment of Positive Rights Affirmative Duty Provisions

Laura K. Bomyea
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Prof. Bonventre

Judge Posner famously said "[t]he men who wrote the Bill of Rights were not concerned that [the] government might do too little for the people but that it might do too much to them."[1] As such, our federal Constitution is concerned primarily with preventing the government from infringing on such rights of individuals as the right to speak and worship freely, to enjoy fundamental rights, and to be free from unequal apportionment of freedoms based on suspect classification schemes, to name just a few. By portraying the U.S. Constitution as "a charter of negative rather than positive liberties," the philosophy expressed by Posner has essentially positioned the Supreme Court as the arbiter of when the government has done too much—a position that has arguably been used to strike down state actions which do "too much" to protect individual rights.[2]

But many Americans still enjoy a panoply of affirmative rights—to education, to a clean environment, to public assistance programs for the needy—which (ideally) protect them from their government doing too little on their behalf. These "positive" rights are bestowed not by the U.S. Constitution, but by state constitutions, through provisions that urge or, in some cases, mandate state legislatures to act in a way that protects and furthers certain public policy goals. In theory, such affirmative constitutional rights should also obligate state high courts to act as

[1] Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 868 (2008) (citing Posner's opinion in Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983)).
[2] While far outside the scope of this paper, cases such as Michigan v. Long, 463 U.S. 1032 (1983) and its progeny show an increased interest on the part of the U.S. Supreme Court in ensuring the federal constitution is not expanded to offer greater protection by the states of individual rights. Thus, since Michigan v. Long, the U.S. Supreme Court will exercise authority to review state high court decisions that are not based on clear, articulated, adequate and independent state grounds.

arbiters of when the government has done too little. Unfortunately, in many cases, this has not occurred.

At least twenty-three state constitutions include provisions for the protection of the needy.[3] Some provisions simply empower state legislatures to develop programs, facilities, and services to assist the poor,[4] while others give state governments a broad grant of authority to take action to care for the needy.[5] Four state constitutions—those of Alabama, Kansas, New York, and Oklahoma—create affirmative duties on the part of their respective legislatures to provide for the needy.[6] However, these states vary widely in how often constitutional protections for the needy are litigated, and how receptive state high courts are to claims that the government has done too little to protect the poor. And these states' judiciaries vary widely in terms of how active a role they feel they should play in enforcing the promises of these constitutional protections.

This paper will explore the dramatic contrast between the New York Court of Appeals recognition of state constitutional protections for the needy and state high court treatment of protections for the needy in two of the other affirmative duty states: Alabama and Kansas. This paper will also track the evolution of state high court treatment of welfare protections in Montana—where an affirmative duty to protect the poor has been eroded through constitutional amendments, leaving only a broad, generic grant of authority for discretionary legislative action—as well as the emergence, in Montana, of alternative approaches to the vindication of positive rights in the face of dwindling constitutional protections.

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[3] William C. Rava, *State Constitutional Protections for the Poor*, 71 TEMP. L. REV. 543, 551–78 (1998). According to the author's study, these states include: Alabama, Alaska, Arizona, California, Colorado, Hawaii, Idaho, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Texas, Washington, West Virginia, and Wyoming. *Id.* at 577.
[4] *Id.* at 553.
[5] *Id.*
[6] *Id.* at 553–56.

New York's constitution states that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions" and allows that the manner of providing that aid is left up to the legislature.[7] A quick legal database search reveals 207 cases that have cited this provision,[8] the most recent being in the fall of 2011.[9] The New York Court of Appeals has considered a case based at least in part on its constitutional welfare provision, Article 17, section 1, as recently as 2009.[10]

By contrast, similar provisions in the Alabama,[11] Kansas,[12] and Oklahoma[13] constitutions have been cited in thirteen, nineteen, and twelve cases, respectively,[14] including recent citations from out-of-state jurisdictions in 1995[15] and 2002.[16] The last time an Alabama court appears to have considered its constitutional protection for the poor was in 1999, in a case before the Alabama Court of Civil Appeals.[17] The Alabama Supreme Court does not appear to have taken up the issue since 1993.[18] The Kansas Supreme Court last considered a case involving that state's welfare provision in 1993,[19] while in Oklahoma, the constitutional welfare provision has not been considered since it was raised before the Oklahoma Supreme Court in 1981, and even then, it was only a tangential issue.[20] The infrequent appearance of these provisions in case law

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[7] N.Y. CONST. art. 17, § 1.
[8] *See* Westlaw Citing References for N.Y. CONST. art. 17, § 1.
[9] Keyspan Generation LLC v. Nassau County, 2011 WL 5152993 (N.Y. Sup. Ct. Nassau Cnty. 2011).
[10] Khrapunskiy v. Doar, 909 N.E.2d 70 (N.Y. 2009).
[11] ALA. CONST. art. IV, § 88.
[12] KAN. CONST. art. VII, § 4.
[13] OKLA. CONST. art. XVII, § 3.
[14] *See* Westlaw Citing References for ALA. CONST. art. IV, § 88; KAN. CONST. art. VII, § 4; OKLA. CONST. art. XVII, § 3.
[15] Moore v. Ganim, 660 A.2d 742 (Conn. 1995) (citing Alabama, Kansas, New York and Montana's constitutional provisions for support of the needy). *Id* at 585.
[16] State ex rel K.M. v West Virginia Dep't of Health and Human Resources, 575 S.E.2d 393 (W. Va. 2002).
[17] In re D.M., 738 So.2d 898 (Ala. Civ. App. 1999).
[18] Ex parte Dep't of Human Resources, 620 So.2d 619 (Ala. 1993).
[19] Bullock v. Whiteman, 865 P.2d 197 (Kan. 1993).
[20] State ex rel Dep't of Human Services v. Malibie, 630 P.2d 310 (Okla. 1981) (discussing Article 17, section 3 obligations in the state constitution in relation to a discussion about how to fairly divide revenues between the state and counties to pay for programs established to aid the needy). Despite having a very strongly worded provision for the protection of the needy, which provides that "[t]he several counties of the State shall provide, as may be

is particularly interesting given that the issue of positive rights in state constitutions—as well as specific citations to these four states' constitutional provisions for the protection of the needy—appear in literally hundreds of scholarly articles,[21] dozens of which have appeared in the last decade, and many of which posit state constitutional protections for the poor as a potentially rich source of affirmative rights to health care,[22] subsistence,[23] housing,[24] and other needs.[25] The stark differences in numbers alone suggest that New York courts are much more receptive to claims under the state's constitutional welfare provision, and perhaps that litigants in the other three states tend not to bother bringing claims under those states respective constitutional provisions. As we will see below, seminal cases in each of the other three states have made it very difficult to prevail in a claim that the state has failed to meet its obligation to protect the needy. If we extend Posner's argument to state courts—which, unlike the federal courts, can act as protectors of positive liberties—this suggests that the Alabama, Kansas, and Oklahoma high courts may not be doing enough to uphold the promises of their state constitutions as they pertain

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prescribed by law, for those inhabitants who, by reason of age, infirmity, or misfortune, may have claims upon the sympathy and aid of the county," the few instances where this section has been litigated in the state do not include any instances in which the state high court affirmed that this section creates an affirmative duty. OKLA. CONST. art. XVII, § 3. Because it does not appear that the Oklahoma provision has been litigated in any interesting or meaningful way related to the discussion at hand, it will not be included in the remainder of this paper.

[21] *See* Westlaw Citing References: Secondary Sources for ALA. CONST. art. IV, § 88; KAN. CONST. art. VII, § 4; N.Y. CONST. art. 17, § 1; OKLA. CONST. art. XVII, § 3. *See also*, Pascal, *supra* note 1; Rava, *supra* note 3; Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459 (2010).

[22] *See, e.g.*, Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325 (2010); Cynthia Soohoo & Jordan Goldberg, *The Full Realization of Our Rights: The Right to Health in State Constitutions*, 60 CASE W. RES. L. REV. 997 (2010); Alan Jenkins & Sabrineh Ardalan, *Positive Health: The Human Right to Health Care Under the New York State Constitution*, 35 FORDHAM URB. L.J. 479 (2008).

[23] *See, e.g.*, Robert Doughten, *Filling Everyone's Bowl: A Call to Affirm a Positive Right to Minimum Welfare Guarantees and Shelter in State Constitutions to Satisfy International Standards of Human Decency*, 39 GONZ. L. REV. 421 (2003–04); James M. Scott, *Positive Rights—Right to Subsistence under the Connecticut Constitution*, 27 RUTGERS L.J. 970 (1996).

[24] *See, e.g.*, Doughten, *supra* note 23; Norma Rotunno, Note, *State Constitutional Social Welfare Provisions and the Right to Housing*, 1 HOFSTRA L. & POL'Y SYMP. 111 (1996).

[25] *See, e.g.*, Sarah Ramsey & Daan Braveman, *Let Them Starve: Government's Obligation to Children in Poverty*, 68 TEMP. L. REV. 1607, 1622–35 (1995) (discussing the role of state constitutional welfare provisions in protecting needy children); Risa E. Kaufman, *State ERAs in the New Era: Securing Poor Women's Equality by Eliminating Reproductive-Based Discrimination*, 24 HARV. WOMEN'S L.J. 191 (2001).

to protecting the needy. As many scholars have warned, such failure on the part of state courts to enforce the positive rights contained in their constitutions may effectively render state positive rights protections hollow.[26]

In the seminal 1977 *Tucker v. Toia* case, New York's highest court announced that the state was duty bound by Article 17, section 1 of the New York Constitution to provide at least a minimum level of aid to the poor.[27] The *Tucker* Court invalidated a state statute denying individuals under the age of twenty-one, not living with a parent or relative, access to welfare benefits.[28] The court held that "[i]n New York State, the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution."[29] This mandate was located in Article 17, which "was intended as an expression of the existence of a positive duty upon the State to aid the needy."[30] Further, the court held that this duty exists even where the state has an interest in attempting to avoid "unnecessary welfare expenditures," arguing that such a valid state purpose "cannot be achieved by methods which ignore the realities of the needy's plight and the State's affirmative obligation to aid all its needy."[31] This affirmative obligation must be met even during difficult fiscal times, and even where the state claims it has insufficient funds to comply with regulations enacted in furtherance of the state's duty to aid the poor.[32] In addition, the state may not shirk this affirmative duty "in either its letter or its spirit."[33]

Despite New York courts' strong language in characterizing the state's constitutionally-derived duty to aid the poor, decisions since *Tucker* have increasingly emphasized the broad

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[26] *See, e.g.*, Pascal, *supra* note 1, at 863–64.
[27] Tucker v. Toia, 371 N.E.2d 449 (N.Y. 1977).
[28] *Id.*
[29] *Id.* at 451.
[30] *Id.*
[31] *Id.* at 452.
[32] Doe v. Dinkins, 192 A.D.2d 270 (N.Y. App. Div. 1st Dep't 1993).
[33] *Tucker*, 371 N.E.2d, at 452. *See also* Wilkins v. Perales, 487 N.Y.S.2d 961, 964 (N.Y. Sup. Ct. N.Y. Cnty. 1985).

discretion due the legislature in determining who qualifies as needy and how benefits will be allocated.[34] Limitations on the *Tucker* holding began within weeks of the decision in *Bernstein v. Toia*,[35] where the Court of Appeals held that the constitutional welfare provision was not "a mandate that public assistance must be granted on an individual basis in every instance . . . [or that] in carrying out the constitutional duty to provide aid, care and support of the needy, the State must always meet in full measure all the legitimate needs of each recipient."[36] In *Bernstein*, which involved a statutory cap on housing allowances, the Court held that the state's duty to aid the needy prevented the legislature from flat out refusing to aid those it had determined to be needy, as was the case in *Tucker*, but it did not establish a mandatory level or method of aid, details that were left to the discretion of the legislature. Therefore, the Court held that so long as "the over-all consequence of the method of distribution of aid to the needy . . . is reasonably expected to be in furtherance of the optimum utilization of public assistance funds, there has been no violation of the constitutional command."[37] In this case, and ever since, the New York Court has generally refused to appoint itself as a supervisor of how welfare benefits are calculated and distributed by the legislature, but generally steps in where questions are raised regarding who is eligible for state welfare benefits.[38] This distinction has been based on the language of the constitutional provision, which imposes a duty to aid the poor "in such manner and by such means, as the legislature may from time to time determine."[39] The New York courts

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[34] *See, e.g.*, Aliessa ex rel. Fayad v. Novello, 754 N.E.2d 1085 (N.Y. 2001).
[35] Bernstein v. Toia, 373 N.E.2d 238 (N.Y. 1977).
[36] *Id.* at 244.
[37] *Id.*
[38] *See, e.g.*, Novello, 754 N.E.2d at 1085; Ram v. Blum, 425 N.Y.S.2d 735 (N.Y. Sup. Ct. N.Y. Cnty. 1980); Mark G. v. Sabol, 247 A.D.2d 15 (N.Y. App. Div. 1st Dep't 1998) Aliessa v. Novello, 274 A.D.2d 347 (N.Y. App. Div. 1st Dep't 2000); Graves v. Doar, 87 A.D.3d 740 (N.Y. App. Div. 2d Dep't 2011).
[39] N.Y. CONST. art. 17, § 1.

read this language as putting "the manner and means" of discharging the duty to aid the poor "within broadest legislative discretion."[40]

While New York courts give significant discretion to the legislature to determine how aid to the needy is managed, the state's constitutional provision is still hailed as one of the most protective models of state positive rights.[41] Other states, such as Alabama and Kansas, grant similar discretionary powers to their legislatures to uphold constitutional protections for the poor, however those states do not share the same rights-protective reputation as New York courts have enjoyed on this issue. The key in at least two of these cases seems to be language within the constitutional provisions in both Kansas and Alabama's constitutions, which imposes on the legislative body the duty to care for the needy only "as may be prescribed by law."[42] This language has been read in both states to grant the legislature broad discretion to determine who qualifies as needy and what that designation qualifies them to receive.

Kansas' constitutional provision, Article 7, section 4, states that counties "shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity or other misfortune, may have claims upon the aid of society."[43] In *Bullock v. Whiteman*,[44] the Kansas Supreme Court's most recent (1993) decision on Article 7, section 4, the court affirmed that this provision state constitution imposed a "mandatory" duty on the state to provide for the needy, but stated that "the real issue is the depth, and breadth, of that duty."[45] Drawing on the New York *Bernstein* and *Tucker* cases for support, the Kansas Supreme Court concluded that

> [o]bviously [the state constitution] does not require state support to anyone who simply claims to be needy. By its terms, the constitutional provision is limited to such provision

[40] Ram v. Blum, 425 N.Y.S.2d 735, 737 (N.Y. Sup. Ct. N.Y. Cnty. 1980).
[41] Doughten, *supra* note 23, at 442–46.
[42] KAN. CONST. art. VII, § 4; OKLA. CONST. art. XVII, § 3.
[43] KAN. CONST. art. VII, § 4.
[44] Bullock v. Whiteman, 865 P.2d 197 (Kan. 1993).
[45] *Id.* at 202.

> of the poor 'as may be prescribed by law.' Thus, in *Gleason v. Sedgwick County*, a blind, destitute, disabled plaintiff, without family able to support him, was not entitled to a pension 'sufficient for his maintenance.' The court emphasized that plaintiff was receiving a pension of ten dollars per month, that the applicable statute authorized but did not require pensions up to fifty dollars per month, and that the Board of County Commissioners had deemed an increased pension to be unwise.[46]

Such discretion on part of the Board of County Commissioners was determined not to violate the state constitution in *Gleason*,[47] therefore the *Bullock* court decided that, so long as state restrictions on aid to the needy passed the New York *Bernstein* test for whether the state action was "reasonably expected to be in furtherance of the optimum utilization of public assistance funds,"[48] it would constitute permissible legislative action "as may be prescribed by law," and would not violate the Kansas Constitution.[49]

The plaintiffs in the *Bullock* case attempted to argue that, as in New York's *Tucker* case, the statute in question had put an effective bar on the receipt of public assistance for a certain group of people—those who did not qualify as having a "permanent" disability because they had been disabled for less than six months—in violation of the constitution's affirmative duty to aid the needy.[50] The Kansas court rejected this argument, pointing out that the *Tucker* case had also been cited in a more recent New York decision to support the proposition that it was within the discretion of the legislature to define which persons qualified as "needy."[51] In so doing, the Kansas court declined to take action to enforce that state's constitutional welfare provision in the types of situations New York's courts have traditionally done so—instances where the legislature is making blanket decisions on eligibility for welfare benefits by narrowing the scope of who is protected by the affirmative duty. This tendency to show deference to the legislature in all cases,

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[46] *Id.* (citations omitted)
[47] Gleason v. Sedgwick Cnty., 141 P. 584 (Kan. 1914).
[48] *Bullock*, 865 P.2d, at 203.
[49] *Bullock*, 865 P.2d at 197.
[50] *Id.* at 204.
[51] *Id.* (citing Lovelace v. Gross, 537 N.Y.S.2d 783, 784–85 (N.Y. Sup. Ct. Queens Cnty. 1989)).

even where other states like New York might invalidate legislative actions, may explain why Kansas' Article 7, section 4 provision has not been litigated since.[52] The *Bullock* court seemed to leave the door open to potential future claims by stating that "[t]he result reached herein does not mean that there is no point at which reduction in benefits and increases in eligibility requirements would ever be violative of Article 7, section 4 of the Kansas Constitution."[53] Yet, at this time, it appears no such claim has been brought in Kansas courts at any level.[54]

Similar deference has been given the state legislature in Alabama since *Atkins v. Curtis*, a 1953 case in which the constitutional welfare provision played a central role.[55] Alabama's constitution appears to contain the strongest mandatory language of all four affirmative duty states in obligating governmental action on behalf of the poor—in Alabama's case, action by the counties, which are to be compelled by the states. The constitutional provision reads "[i]t shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor."[56] Yet the Alabama Supreme Court in the seminal *Atkins* case and in unequivocally clear language, acknowledged that this language appears to create a mandatory duty on the part of the state, but in the same breath proclaimed that "of course, there is no way to force the legislature to perform that duty, although it has always undertaken to do so."[57] The dearth of litigation aimed at getting Alabama courts to enforce this duty since the *Atkins* decision seems to indicate the message was clearly received: the Alabama Supreme Court does not plan to take action to enforce this particular affirmative right should the

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[52] Other explanations, such as a failure on the part of attorneys and courts to recognize the existence of potential state constitutional claims, may also explain why this seemingly strong protection for the poor is rarely used in states like Kansas. Such explanations, however, fall outside the scope of the present discussion.
[53] *Bullock*, 865 P.2d at 206.
[54] *See* Westlaw Citing References for KAN. CONST. art. VII, § 4 (showing no Kansas cases citing the constitutional provision since the Bullock case).
[55] Atkins v. Curtis, 66 So.2d 455 (Ala. 1953).
[56] ALA. CONST. art. IV, § 88.
[57] *Atkins*, 66 So.2d at 458.

legislature fail to meet its constitutional obligation. The *Atkins* court further noted that "when the Constitution makes it the duty of the legislature to require counties to support their poor, it does not deprive the legislature of the power to declare who constitutes the poor, and what circumstances are controlling in that respect, provided their act in doing so is a fair exercise of their authority."[58] Because the act at issue in *Atkins* defined who qualified as poor by excluding those who had living relatives earning over a certain amount, the court said it was within the discretion of the legislature to "declare who constitute[s] the poor," and thus did not violate Alabama's constitutional provision.[59] It is worth noting that this legislative act was almost identical in nature to the New York act overturned in *Tucker* as contravening a substantially similar constitutional provision. This comparison demonstrates that the Alabama courts have historically declined to enforce an affirmative duty to protect the poor in the types of circumstances New York courts have traditionally intervened.

Scholars have suggested that reticence on the part of state high courts to decide whether the legislature has failed to meet its constitutional obligation to the poor stems most often from separation of powers concerns.[60] "Whereas the enforcement of negative rights only demands that a court invalidate legislation or prevent governmental action, positive rights enforcement requires a court to obligate the legislature to act, thus entering into the arena traditionally reserved for the political branches."[61] One scholar suggested that the high level of deference afforded the legislature in states like New York, Kansas, and Alabama effectively blurs those courts' interpretations of supposed positive rights provisions with their traditional equal

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[58] Atkins, 66 So.2d at 458.
[59] *Id.*
[60] Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1132, 1145–52 (1999).
[61] Pascal, *supra* note 1, at 864.

protection analysis.[62] Instead of assessing whether the legislature has met an affirmative duty, these courts are more concerned with whether the government has withheld protections from certain classes of people—the traditional negative rights approach to individual rights adjudication.[63] "By limiting judicial review to situations where benefits have been withheld from a class of person, the New York and Alabama courts are essentially performing the same equal protection analysis as courts in states without affirmative constitutional rights; the affirmative constitutional obligation serves no independent constitutional value."[64]

Which begs a few questions: if affirmative rights are to have any value, is it enough for only one branch of state government to assume responsibility for enforcing these provisions? Can courts meet their responsibility to uphold state constitutions by giving as much deference to legislatures to fully handle affirmative rights provisions as Alabama, Kansas, and even New York courts do? In the positive rights context, is the political question doctrine compatible with full enforcement of affirmative rights protections? If the answer to these questions is no—and many scholars argue it is—then what role should state courts play in ensuring the promises of state constitutions are actually realized by state citizens?

It is possible that the manner in which New York courts have approached the state's constitutional affirmative duty to the poor is actually the best available approach. After all, state legislators are democratically elected, and the democratic process may be a better mechanism for holding elected officials accountable and assessing whether an affirmative duty to the poor has been met. This would certainly relieve the discomfort many jurists have with wading into highly politicized issues. However, some scholars have argued that state judges are better positioned to venture into the public policy arena because, unlike many of their federal counterparts, they are

[62] *Id.* at 872–73.
[63] *Id.*
[64] *Id.*

often subject to the democratic process and are generally unconstrained by the same federalism concerns as federal courts.[65] In either approach, the challenge facing state courts is considerable—as one scholar puts it:

> When interpreting affirmative rights provisions, state courts find themselves navigating between Scylla and Charybdis. On one side, constitutional violations are left unredressed, resulting in devastating harm to individuals and communities as well as the constitution; on the other side, aggressive enforcement of affirmative rights may result in usurpation of the authority of political branches, improper limitations on the electorate's governing capacity, a reduction in administrative flexibility, and a diminishment in the judiciary's prestige.[66]

Perhaps there is a better, or at least short-term, solution: recasting positive rights protections for the poor in terms courts are more comfortable handling—the traditional, negative rights equal protection analysis.

At least one state has attempted to approach constitutional protection of the poor differently, in spite of amendments that have actually shifted that state's constitutional welfare provision away from the mandatory toward a more discretionary model. Montana has been cited as a good model for innovation in using its constitution to protect the poor by heightening the scrutiny employed by state courts when considering many welfare rights claims under equal protection. In order to give greater protections to the poor in the face of the constraints imposed by constitutional amendments, the Montana Supreme Court has applied a heightened level of scrutiny—similar to the federal intermediate scrutiny, though poverty has never been treated as a suspect classification at the federal level—to equal protection claims which involve welfare benefits for the poor.[67] This may have been the only way for courts to use the state constitution

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[65] Sylvia Ewald, Note, *State Court Adjudication of Environmental Rights: Lessons from the Adjudication of the Right to Education and Right to Welfare*, 36 COLUM. J. ENVTL. L. 413, 443 (2011) (noting that "[s]tate constitutions often permit courts to issue advisory opinions and to decide moot cases that nonetheless resolve important issues, and frequently provide for much broader standing").
[66] Usman, *supra* note 21, at 1512–13.
[67] *See* Doughten, *supra* note 23, at 445 (referencing *Butte I*, discussed below).

to protect the poor, even though Montana does have a constitutional provision regarding the protection of the poor.

Back in 1898, Montana's constitution used to contain the same strong, mandatory language about protecting the poor as that found in New York and Alabama's constitutions. The 1898 constitution provided that "[t]he several counties of the state *shall provide as may be prescribed by law* for those inhabitants, who, by reason of age, infirmity or misfortune, may have claims upon the sympathy and aid of society."[68] However, two constitutional amendments—in 1972 and 1988—shifted the state away from that strong language. By 1972, the same provision stated that "[t]he legislature *shall provide* such economic assistance and social and rehabilitative services *as may be necessary* for those inhabitants who, by reasons of age, infirmities, or misfortune may have need for the aid of society."[69] A 1988 ballot initiative further eroded that state's former affirmative constitutional duty to protect the needy, transforming a highly rights-protective provision into a broad, generic grant of authority for discretionary legislative action. The 1988 ballot amendment, which was one of several amendments proposed at the time, was a proposal to allow the "legislature to determine the eligibility, duration and level of economic assistance."[70] When the amendment passed, it effectively shifted full responsibility for review and enforcement of the constitutional provision protecting the needy entirely to the legislature, leaving little room for judicial involvement. The ballot proposal was challenged as unfairly vague, but was upheld.[71] The current provision reads "[t]he legislature *may provide* such

[68] Harper v. Greely, 763 P.2d 650, 651 (Mont. 1988) (emphasis added). *See also* Butte Cnty. Union v. Lewis, 712 P.2d 1309, 1310 (Mont. 1986) (*hereinafter* "*Butte I*").
[69] *Harper*, 763 P.2d at 651 (emphasis added).
[70] Amendments to the 1972 Montana Constitution, http://sos.mt.gov/elections/forms/history/constitutionalmeasureslist2008.pdf (last visited Aug. 1, 2012).
[71] State ex rel Montanans for the Preservation of Citizens' Rights v. Waltermire, 757 P.2d 746 (Mont. 1988).

economic assistance and social and rehabilitative services for those who, by reason of age, infirmities, or misfortune *are determined by the legislature to be in need*."[72]

In the 1986 *Butte Community Union* case, the Montana Supreme Court invalidated a state regulation that denied welfare benefits to "able-bodied individuals under thirty-five who have no minor dependent children."[73] The court held that, while there was no fundamental right to welfare under the 1972 version of the Montana Constitution, there was still a constitutionally-created welfare protection.[74] Since this protection had been referenced in Montana's constitutional convention as "sufficiently important to warrant reference in the Constitution," infringement of the protection should be reviewed with a heightened level of scrutiny.[75] Under this heightened level of scrutiny, the government was required to show that the classification scheme it had created was reasonable and that the state's interest in "classifying welfare recipients on the basis of age [was] more important than the people's interest in obtaining welfare benefits."[76] The Montana court determined that the classification scheme was arbitrary and that the state's interests in saving money on welfare programs did not prevail in the balancing test.[77]

The 1988 constitutional amendments essentially wrested any lingering opportunity for review under the constitutional welfare provision away from the Montana judiciary. The Montana Supreme Court reheard the *Butte* case after the 1988 amendments were proposed through house resolution, and immediately backed away from its characterization of the right to welfare as a non-fundamental, but constitutional right under the Montana Constitution.[78] The court held:

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[72] MONT. CONST. art. XII, § 3(3) (emphasis added).
[73] *Butte I* at 1310.
[74] *Butte I* at 1311.
[75] *Id.*
[76] *Butte I* at 1314.
[77] *Id.*
[78] Butte Cnty. Union v. Lewis, 745 P.2d 1128 (Mont. 1987) (*hereinafter* "*Butte II*").

> The State may legitimately limit its expenditures for public assistance, public education or any other program even-handedly applied. It may not limit its expenditures by the expedient of eliminating classes of eligible individuals from public assistance without regard to their constitutionally grounded right to society's aid when needed, through misfortune, for the basic necessities of life. We do not hereby declare that inhabitants have a constitutional right to public assistance. We do declare that the legislature, in performing its duty under Art. XII, § 3(3), must not act arbitrarily between classes of entitled persons.[79]

The court has declined to extend this holding in some situations, such as the workers compensation context,[80] since the 1988 constitutional amendment. The *Zempel* court recognizes the notion that the 1988 ballot initiative took away much of its basis for requiring a higher level of scrutiny in welfare cases, but simply declines to apply that heightened level of scrutiny *in the context of worker's compensation*.[81] It is unclear whether the Montana Supreme Court would continue to apply heightened scrutiny in other welfare-related contexts; no cases clearly on that issue, citing the constitutional provisions or the Butte cases, appear to have been litigated since.

If positive rights provisions in state constitutions are to have any meaning, state courts should take a more active role in enforcing them, and in determining where the government has done too little to provide citizens with the resources its forbears promised in the pages of its constitution. State courts are, after all, duty bound to enforce the entirety of their own constitutions, not just those provisions that are mirrored in the federal model and for which an adjudicative path has already been blazed. Even states such as New York, where positive rights protections for the needy are the subject of frequently successful claims, seem reluctant to take a strong position in enforcing their own constitutions, and reticent to charge that their legislatures have done too little to protect their citizens. If it is true that state courts are not under the same

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[79] *Butte II* at 1133.
[80] *See* Zempel v. Uninsured Employers' Fund, 938 P.2d 658 (Mont. 1997).
[81] *Zempel*, 938 P.2d at 662.

constraints as federal ones, in terms of being able to consider political questions, issue advisory opinions, and so on, then perhaps this reluctance is unnecessary.

Or perhaps a more familiar alternative would be preferable. If state courts truly find themselves unable to enforce positive rights provisions, perhaps these provisions should be recast in the traditional negative rights model, via equal protection. State courts are already comfortable with the equal protection model, and Montana's example has proven that the state equal protection analysis need not be constrained only to classification schemes for which the federal courts have allowed heightened scrutiny. A state like New York or Alabama would have no trouble finding a governmental obligation to protect the poor in the text of its constitution. Just as infringement of federally-recognized fundamental rights automatically triggers a heightened level of scrutiny, so too should infringement of rights the state has recognized as important, if not fundamental. Surely the inclusion of a specific protection in the text of one's constitution, such as aid to those in our society who find themselves in the greatest need, is a clear indication of what societal values and protections the state considers important. Is there room, then, for our state courts to enforce these values and guarantee these protections?

CONSENT OF THE GOVERNED OR CONSENT OF THE GOVERNMENT? THE PROBLEMS WITH CONSENT DECREES IN GOVERNMENT-DEFENDANT CASES

Michael T. Morley[*]

ABSTRACT

Consent decrees raise serious Article III concerns. When litigants agree on their rights and jointly seek the same relief from a court, they are no longer adverse and a justiciable controversy no longer exists between them. In the absence of an actual controversy between opposing parties, it is both inappropriate and unnecessary for a court to issue a substantive order declaring or modifying the litigants' rights. Whether Article III's adverseness requirement is seen as jurisdictional or prudential, federal courts should decline to issue consent decrees and instead require litigants that wish to voluntarily resolve a case to execute a settlement agreement, which, as a private contract, does not implicate the same justiciability problems.

Consent decrees raise unique separation-of-powers issues in lawsuits against government entities concerning the validity, proper interpretation, or enforcement of statutes or regulations. Government agencies and officials may accede to such decrees to entrench their policy preferences against future change, impose legal restrictions and obligations on their successors, and constrain those successors' discretion—all without a court determining that such relief is legally necessary. Such concerns would not arise if government defendants resolved such cases through settlement agreements, because the reserved powers doctrine and general prohibition on specific enforcement of government contracts prevent government entities from using settlement agreements to improperly limit their (and their successors') discretion and authority.

If courts are not willing to refuse to categorically decline to issue consent decrees on Article III grounds then, at a minimum, they should require litigants in government-defendant cases to demonstrate that the plaintiff has stated valid claims and that the requested relief is required to remedy the legal violations at issue. Courts must ensure that government defendants do not use consent decrees to circumvent the traditional legislative and regulatory processes and establish binding requirements for which there is not actually any constitutional or legal basis.

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* Climenko Fellow and Lecturer-in-Law, Harvard Law School. J.D., Yale Law School; B.A., Princeton University, Woodrow Wilson School of Public and International Affairs. The author wishes to thank Seth Davis, Anthony DiSarro, Richard Fallon, Jacob Gersen, Jack Goldsmith, Ryan Greenwood, Sharon Jacobs, Michael McConnell, Daniel Meltzer, Robert Pushaw, Peter Shane, Seth Stoughton, Susannah Barton Tobin, and the participants at Albany Law School's Sharing Scholarship, Building Teachers workshop and the and Society Association's 2013 annual meeting.

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INTRODUCTION

In 1996, Secretary of the Interior Bruce Babbitt ordered the Bureau of Land Management ("BLM") to prepare an inventory of 5.7 million acres of federal land in Utah to determine whether any of it was "wilderness."[1] The State of Utah and other plaintiffs sued to enjoin the inventory, but the United States Court of Appeals for the Tenth Circuit held that they lacked standing to bring their challenge because the inventory would not cause them any injury-in-fact.[2]

A few years later, shortly before the end of Secretary Babbitt's tenure, BLM issued a handbook that extended the rules and protections governing wilderness areas to other BLM-designated regions that were similar to wilderness, but did not meet certain technical statutory requirements for being categorized as such.[3] The State of Utah challenged both BLM's designation of these quasi-wilderness areas and its decision to treat them like wilderness.[4] Several environmental groups moved to intervene in the case to defend BLM's actions.[5]

The day after the environmental groups filed their intervention motion, the State of Utah and BLM—now under a new presidential administration—submitted a proposed consent decree declaring that BLM lacked statutory authority to continue conducting wilderness inventories, prohibiting BLM from designating new wilderness or quasi-wilderness areas, rescinding the handbook, and stipulating that the rules and protections governing wilderness could not apply to quasi-wilderness areas.[6] The district court entered the proposed order.[7]

By entering into the consent decree, the new Administration attempted to lock in its narrow interpretation of the federal laws governing wilderness areas[8] and allow the plaintiffs to obtain broader relief than the court itself could have ordered. For example, BLM agreed in the consent decree that it lacked the authority to perform new wilderness inventories,[9] despite the facts that it recently had con-

1 Utah v. Babbitt, 137 F.3d 1193, 1199 (10th Cir. 1998). For a detailed treatment of this incident, see Sarah Krakoff, *Settling the Wilderness*, 75 U. COLO. L. REV. 1159, 1166–68 (2004).

2 *Babbitt*, 137 F.3d at 1214–15.

3 Utah v. U.S. Dep't of Interior, 535 F.3d 1184, 1189 (10th Cir. 2008).

4 *Id.* at 1189–90.

5 *Id.* at 1190.

6 *Id.*

7 *Id.* at 1191.

8 *See* Federal Land Policy and Management Act, 43 U.S.C. §§ 1711–12, 1782 (2006).

9 *Dep't of Interior*, 535 F.3d at 1190.

ducted such an inventory and that the Tenth Circuit had held that the plaintiffs lacked standing to challenge it.[10]

One commentator argued,

> [I]t seem[s] as if the [Bush] Administration was pursuing a "Trojan Horse" approach to changing public land policy: first inviting litigation from industry; then, once a case was filed, avoiding a court decision on the merits through settlement agreements that gave the industry everything it could have hoped for through litigation, while undermining environmental controls in the process.[11]

That critique is unduly narrow. Local, state, and federal agencies and officials of both political parties, as defendants in litigation, have entered into consent decrees—often with ideologically aligned interest groups—in a wide variety of contexts. Such decrees allow agencies and officials to achieve and entrench policy outcomes that would have been difficult or impossible through the legislative or regulatory process.[12]

Most academic analysis of consent decrees focuses on so-called "structural" or "institutional" decrees, which mandate "broad policy changes, substantial administrative reorganizations, or large increases in institutional expenditures . . . for, among other things, desegregating school systems, improving prison conditions, decentralizing public mental health institutions, . . . [and] expanding special education

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10 Utah v. Babbitt, 137 F.3d 1193, 1214–15 (10th Cir. 1998). The district court in *Department of Interior* ultimately allowed the environmental groups to intervene, and they succeeded in having the consent decree vacated. 535 F.3d at 1191. Such third-party intervenors, however, are not always available. Furthermore, many state and federal courts do not allow private intervenors to join pending cases to defend legal enactments when a governmental defendant fails to do so, particularly when they lack Article III standing. *See infra* Section IV.B. Even when such groups are permitted to join a case, they often cannot prevent the court from approving a consent decree. *See* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 502 (1986) ("[A]n intervenor . . . does not have the power to block the decree merely by withholding its consent.").

11 Michael C. Blumm, *The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 ENVTL. L. REP. 10397, 10397 (2004); *see also* Krakoff, *supra* note 1, at 1160–61 (arguing that the Bush Administration's strategy of "settling environmental disputes" through consent decrees and other means "raises questions of constitutional significance"). The Environmental Protection Agency ("EPA") under the Reagan Administration also was accused of entering into "sweetheart" consent decrees with industry. Justin Vickers, Note, *Res Judicata Claim Preclusion of Properly Filed Citizen Suits*, 104 NW. U. L. REV. 1623, 1627 (2010).

12 Ideological opponents of an administration also sometimes use the threat of prolonged, burdensome, and publicity-generating litigation to compel governmental defendants to enter into consent decrees that provide greater relief than those groups could have obtained in court. *See, e.g.*, Eric A. Rosand, *Consent Decrees in Welfare Litigation: The Obstacles to Compliance*, 28 COLUM. J. L. & SOC. PROBS. 83, 83–84, 101 (1994) (stating that consent decrees allow plaintiffs in cases concerning welfare programs to obtain relief "that probably could not have been ordered by a court").

programs."[13] A voluminous body of literature[14] and case law[15] address the numerous problems that can arise from federal courts overseeing (and sometimes micromanaging) public institutions, potentially for decades, under institutional consent decrees.

Far less attention has been given to the numerous issues implicated by non-institutional consent decrees—decrees that arise from cases challenging a particular legal provision, policy, administrative determination, or discrete executive action.[16] For example, a decree

13 Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1020–21 (1986).

14 *See, e.g.*, Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 46 (1979) (arguing that institutional reform litigation requires the judge to assume the role of "political powerbroker"); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 637 (1982) ("[S]ince trial court remedial discretion in institutional suits is inevitably political in nature, it must be regarded as presumptively illegitimate."); Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 788–89 (1978) ("A court cannot weigh the competing demands for government resources to determine how much can be raised for the institutions . . . ."); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1294–95, 1305 (arguing that government "defendants are sometimes happy to be sued and happier still to lose" when a consent decree is "a shortcut around political constraints"); Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 897 (2011) (arguing that, in "institutional-reform litigation," a consent decree "may not embody [a] negotiated compromise over a genuine dispute but instead lock in the results of collaboration between the government and a particular interest group"); *see also* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1297 (1976) (explaining that equitable relief in public law cases often resembles a legislative act); *see generally* ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003).

15 *See, e.g.*, Horne v. Flores, 557 U.S. 433, 448 (2009) (noting that "institutional reform injunctions often raise sensitive federalism concerns" and can have "the effect of dictating state or local budget priorities"); Lewis v. Casey, 518 U.S. 343, 385 (1996) (Thomas, J., concurring) ("Article III cannot be understood to authorize the Federal Judiciary to take control of core state institutions like prisons, schools, and hospitals, and assume responsibility for making the difficult policy judgments that state officials are both constitutionally entitled and uniquely qualified to make.").

16 *See, e.g.*, Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 276–77 (1987) (identifying certain types of consent decrees to which governmental litigants should not be permitted to consent); David W. Swift, *A State's Power to Enter Into a Consent Decree that Violates State Law Provisions: What "Findings" of a Federal Violation are Sufficient to Justify a Consent Decree that Trumps State Law?*, 10 TEX. J. ON C.L. & C.R. 37, 41 (2004) (arguing that federal courts generally may approve consent decrees sought by state officials or agencies, but may approve decrees permitting or requiring violations of state law only if "such a remedy is necessary to rectify a violation of federal law"). Many of the seminal works on this issue appeared in a 1987 symposium in the *University of Chicago Legal Forum*. *See* Judge Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 31, 33 (arguing that a government litigant should not be permitted to enter into a consent decree requiring it to take actions that it would lack the authority to perform in the absence of the decree); Michael W. McConnell, *Why Hold Elec-*

may bar a governmental defendant from enforcing a particular statute, regulation, or ordinance, either generally or under certain circumstances, on purportedly constitutional grounds.[17] Or it may stipulate that certain regulations or other administrative issuances are illegal because they violate the agency's organic statute or some other substantive law, or the process through which they were enacted did not fully comply with the Administrative Procedure Act or other deliberative requirements.[18] Still other decrees require the signatory to promulgate or modify regulations or other issuances, typically by a certain date;[19] seek particular legislation;[20] enforce certain statutes or

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tions? Using Consent Decrees to Insulate Policies from Political Change, 1987 U. CHI. LEGAL F. 295, 302 (arguing that government defendants may submit to a consent decree if the court could have imposed a comparable order following adversarial litigation); Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327, 351 (stating that the Justice Department's restrictions on consent decrees in cases against the government "discourages settlements" by unreasonably restricting the range of commitments the government may offer in settlement of litigation"); Peter Shane, *Federal Policy Making By Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241, 272 (arguing that agencies should have broad discretion to enter into consent decrees that limit their statutorily conferred discretion); *see also* Alan Effron, Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 COLUM. L. REV. 1796, 1803–04 (1988) (concluding that the same federalism-related factors "that weigh against the granting of equitable relief in the form of an injunction" against a state entitie "should also militate against a federal court's entering or enforcing the identical measures in the form of a consent decree").

17 *See, e.g.*, Baldwin v. Cortes, 378 F. App'x 135, 137 (3d Cir. 2010) (reaffirming the validity of a consent decree overriding a statutory deadline by which minor political parties to file ballot access petitions); Adens for Green v. Schweiker, 773 F.2d 545, 547–48 (3d Cir. 1985) (discussing a consent decree invalidating an intestacy law concerning illegitimate children); ACORN v. New Orleans, 606 F. Supp. 16, 18 n.1 (E.D. La. 1984) (discussing a consent decree invalidating "a permit scheme for charitable solicitation").

18 *See, e.g.*, Turtle Island Restoration Network v. U.S. Dep't of Commerce, 834 F. Supp. 2d 1004, 1010 (D. Haw. 2011) (approving a consent decree vacating regulations concerning loggerhead and leatherback sea turtles because they were based on an allegedly insufficient biological opinion); Home Builders Ass'ns of N. Cal. v. Noron, 293 F. Supp. 2d 1, 2 (D.D.C. 2002) (approving a consent decree vacating critical habitat designation for the California red-legged frog).

19 *See, e.g.*, Conservation Law Found. of New England, Inc. v. Franklin, 989 F.2d 54, 58, 61 (1st Cir. 1993) (affirming a consent decree that required the Secretary of Commerce to create and implement a groundfish rebuilding plan if the regional fishery management council failed to do so); Berger v. Heckler, 771 F.2d 1556, 1579–80 (2d Cir. 1985) (enforcing a consent decree requiring the Secretary of Health and Human Services to "promulgate regulations which are in accordance with the decree"); Ferrell v. Pierce, 743 F.2d 454, 465–66 (7th Cir. 1984) (affirming a consent decree requiring the U.S. Department of Housing and Urban Development ("HUD") to adopt a particular mortgage foreclosure relief program); Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1121 (D.C. Cir. 1983) (affirming the validity of a consent decree requiring the EPA to "promulgate guidelines and limitations governing the discharge by 21 industries of 65 specified pollutants"); Wildearth Guardians v. Jackson, No. 11-cv-00001-CMA-MEH, 2011 U.S. Dist. LEXIS 109800, at *4, *13 (D. Colo. Sept. 27, 2011) (approving a consent decree establish-

regulations—either in general, or with regard to particular targets;[21] or take other specified discrete acts.[22] As government agencies increasingly hire "cause lawyers" from both sides of the political spectrum who seek to promote ideological or social goals, consent decrees may be used even more frequently to effectively nullify disfavored laws and regulations, entrench preferred policies, and incur enforcement-related obligations that future administrations will be hard-pressed to undo or avoid.[23]

The Department of Justice's ("DOJ") Office of Legal Counsel ("OLC"), in a still-binding 1999 opinion that has been mentioned in only a handful of articles[24] and has never been subjected to academic scrutiny, vigorously defended the practice of government defendants executing consent decrees.[25] It concluded that "[i]n general . . . the Attorney General is free to enter into settlements that would limit the future exercise of executive branch discretion when that discretion

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ing a schedule by which the EPA must either approve improvement plans governing regional haze that had been submitted by various states, or issue its own federal improvement plan).

20 *See, e.g.*, Sierra Club v. Hankinson, 351 F.3d 1358, 1363 (11th Cir. 2003) (discussing a consent decree "requiring the state Department of Transportation to seek legislation instituting an inspection program" for vehicle emissions); Se. Pa. Transp. Auth. v. Pa. Pub. Util. Comm'n, 210 F. Supp. 2d 689, 707 (E.D. Pa. 2002) ("The parties entered into a Consent Decree under which the Commonwealth defendants were obligated to seek legislation establishing and implementing" a vehicle emissions program.).

21 *See, e.g.*, Bragg v. Robertson, 83 F. Supp. 2d 713, 718 (S.D. W. Va. 2000) (approving consent decree requiring the director of the state environmental protection division to "enforce state surface mining laws").

22 *See, e.g.*, Chisom v. Jindal, No. 86-4075, 2012 U.S. Dist. LEXIS 130153, at *12–13 (E.D. La. Sept. 1, 2012) (interpreting a consent judgment requiring the State to create new districts for the election of state supreme court justices); Indus. Commc'ns & Elecs., Inc. v. Town of Alton, 710 F. Supp. 2d 189, 193–96 (D.N.H. 2010) (discussing a consent decree requiring defendant municipality to issue a zoning variance); Sansom Comm. v. Lynn, 735 F.2d 1535, 1539 (3d Cir. 1984) (rejecting a challenge to a consent decree requiring federal agencies to facilitate the rehabilitation of certain townhouses "with maximal participation by interested members of the public").

23 *See* Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649, 654 (2012) ("By drawing on state power, cause lawyers in government positions may make the state a more favorable context in which to pursue movement goals . . . .").

24 *See* Krakoff, *supra* note 1, at 1187 n.177; Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327, 347 n.98; Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1035 n.77 (2001); *see also* Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 374 n.228 (2008).

25 Memorandum from Acting Assistant Attorney General Randolph D. Moss to Associate Attorney General Raymond C. Fisher (June 15, 1999), *available at* http://www.justice.gov/olc/consent_decrees2.htm (last accessed Feb. 20, 2013) [hereinafter "OLC Consent Decree Opinion"].

has been conferred pursuant to statute."[26] Thus, although DOJ has special approval mechanisms for consent decrees in many types of government-defendant cases,[27] it generally does not view them as problematic.

This Article contends that consent decrees raise serious Article III concerns due to the lack of adverseness between or among the parties seeking them. When parties have reached accord as to the proper disposition of a lawsuit, there is no longer a live controversy for a court to resolve. Rather than entering a consent decree, the court should require the parties to memorialize their understanding in a settlement agreement—*i.e.*, a private contract—and dismiss the case without entering a substantive order that specifies or alters the parties' legal rights and obligations.

Although the legal consequences of settlement agreements and consent decrees differ, those distinctions often have limited practical impact on litigants. In government-defendant cases,[28] however, the distinction can be crucial. Contracts that purport to limit government agencies' or officials' statutory discretion often are unenforceable under the reserved powers doctrine, and potentially even the sovereign acts doctrine, and seldom are subject to specific enforcement.[29] Because consent decrees are court orders, however, government agencies and officials can use them to bind their (and their successors') discretion in ways that otherwise would be unenforceable. Likewise, because courts are not required to consider the merits of most proposed consent decrees before approving them,[30] government defendants may use them to create and entrench requirements and restrictions that lack a valid constitutional or statutory basis.

Some commentators argue that consent decrees in government-defendant cases violate Article II. This Article demonstrates that, in addition to the underlying lack of adverseness that applies to all consent decrees, the unique concerns that arise with consent decrees in

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26 *Id.*

27 Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys 3, 4 (Mar. 13, 1986), *reprinted in* U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POL'Y, GUIDELINES ON CONSTITUTIONAL LITIGATION 150, 152–53 (Feb. 19, 1988) (codified at 28 C.F.R. § 0.160(c)(3)–(5)).

28 The term "government," as used in this Article, includes federal, state, and municipal governments, unless context dictates otherwise. References to suits against government officials mean suits naming them in their official capacity. The term "government defendant" embraces counterclaim and third-party defendants, as well.

29 *See infra* Section IV.A.

30 Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986).

government-defendant cases are purely statutory, rather than constitutional. It further argues that, whether on justiciability or statutory grounds, courts should refuse to enter consent decrees in government-defendant cases. Recognizing that courts may be reluctant to adopt such an extreme reform, this Article also offers an alternate approach for considering proposed consent decrees in such cases[31]—drawing on diverse fields such as civil procedure,[32] criminal procedure,[33] and antitrust[34]—to ensure that they are not used to improperly evade the traditional legislative or regulatory processes.

As suggested earlier, this Article's main focus is non-institutional consent decrees—consent decrees aimed primarily at the validity, interpretation, or enforcement of particular legal provisions,[35] decisions, or actions of governmental entities. The distinction between such orders and institutional consent decrees is somewhat subjective, however, and much of this Article's analysis likely applies to institutional decrees, as well.[36]

Part I begins by explaining the law governing consent decrees and demonstrates that such decrees raise greater concerns than other procedural vehicles through which parties may seek judicial relief without contesting certain issues. Part II challenges federal courts' authority under Article III to enter such decrees at all, due to the absence of adverseness between the parties seeking such orders. Part III demonstrates that consent decrees raise special concerns in government-defendant cases, allowing government agencies and officials to make commitments to which they lack legal authority to agree. In contrast to some earlier commentators, this Part argues that the problem generally lies in a lack of statutory authorization, rather than infringing on the President's Article II prerogatives.[37]

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31 *See infra* Part IV.

32 *See* FED. R. CIV. P. 23(e), 24.

33 *See* Anders v. California, 386 U.S. 738 (1967); Prison Litigation Reform Act, 18 U.S.C. § 3626(c) (2006).

34 *See* Tunney Act, 15 U.S.C. § 16 (2006).

35 This Article uses the phrase "legal provision" broadly to refer to a statute, regulation, ordinance, or policy at the federal, state, or local level.

36 This Article does not address the related, but conceptually distinct, problems associated with monetary settlements in government-defendant cases. *See* Peterson, *supra* note 24, at 332 ("[T]he settlement authority of the Department of Justice creates continuing loopholes in Congress's appropriations authority.").

37 Specifically, this Part argues that Article II prohibits only consent decrees that purport to restrict a power that the Constitution specifically and directly confers upon the President without legislative intermediation, such as the pardon power. Article II does not similarly bar the vast majority of decrees, which impose limits, requirements, or conditions on statutorily conferred discretion.

Part IV proposes a variety of remedies for these challenges.[38] It begins by arguing that, under Article III, courts should not entertain requests for consent decrees due to lack of adverseness, but rather require litigants to execute settlement agreements. This would be particularly beneficial in government-defendant cases, because a range of doctrines limits the enforceability of contracts through which governmental entities improperly attempt to contract away their statutory powers or discretion.[39]

In the event courts are not willing to completely discontinue the use of consent decrees, they should require a litigant seeking such a decree in a government-defendant case to demonstrate that the plaintiff has stated valid claims, and that the requested relief is necessary to remedy the legal violations at issue. Courts also should loosen the requirements for intervention in such cases. Through adversarial presentation of the issues, an intervenor can help ensure that a proposed decree satisfies these suggested new standards and, if necessary, take an appeal. Such precautions would help ensure that government defendants do not use consent decrees to exceed the scope of their statutorily delegated authority. Part V briefly concludes.

I. CONSENT DECREES IN CONTEXT

This Part lays the foundation for the rest of the Article by explaining the law governing consent decrees. Section A discusses the lax standards courts apply when considering proposed consent decrees, with a particular focus on the various approaches courts take when a proposed decree would prohibit a government litigant from enforcing a statute on purported constitutional grounds. This Section also explains the stringent requirements the Supreme Court has established for modifying consent decrees. Section B places consent decrees in their broader context, contrasting them with other procedural vehicles parties may use to attempt to obtain substantive court

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38 Because many of these proposals are equally applicable to state courts, the concepts mentioned in this discussion should be understood as including their state-level analogues, as well.

39 As discussed later, a future administration is free to abide by a settlement agreement if it agrees with its predecessor's interpretation of the law. *See infra* Section IV.A. If, however, the future administration concludes that the restrictions imposed by the settlement agreement are not legally or constitutionally appropriate, then the agency may resume the challenged actions, and either the same plaintiffs or new ones may continue the underlying litigation or file a new case. If a court, following adversarial litigation, concludes that the government defendant's actions or policies are improper, it may issue appropriate injunctive and other relief to prevent recurrences.

orders without having the court pass on the merits of a case, or certain issues within a case.

A. *The Law of Consent Decrees*

When government defendants settle lawsuits against them, they often do so through consent decrees. A consent decree is a court order that terminates a lawsuit (or certain claims in a lawsuit) and imposes obligations on one or both litigants.[40] It is enforceable through summary contempt proceedings before the court that issued it,[41] rather than in a separate breach-of-contract suit like a settlement agreement.[42] A court may approve a consent decree among the litigants that agree to it, even if other parties to the lawsuit, including intervenors, object.[43]

The Supreme Court has emphasized that a consent decree draws its force from "the agreement of the parties, rather than the force of the law upon which the complaint was originally based."[44] In deciding whether to approve a consent decree, a court does not determine whether "the plaintiff established his factual claims and legal theories."[45] Thus, a court may enter a consent decree against a government defendant without finding that a statutory or constitutional violation has occurred,[46] "inquir[ing] into the precise legal rights of the parties," or "reach[ing] and resolv[ing] the merits of the claims or

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40 The Supreme Court's characterization of consent decrees has varied. Early cases emphatically reject the characterization of consent decrees as contracts. United States v. Swift & Co., 286 U.S. 106, 115 (1932). The Court later softened this position, stating that, because of their "dual character, consent decrees are treated as contracts for some purposes but not for others." United States v. ITT Cont'l Baking Co., 420 U.S. 223, 236–37 n.10 (1975); Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986) (holding that consent decrees are "hybrid[s]" that can be characterized as both contracts and judgments); *see generally* Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 891 (1988) (arguing that a consent decree cannot be treated either as a traditional contract or court order). Judge Frank H. Easterbrook argues that a consent decree should be thought of as a contract, except for three main differences: "the speed of enforcement, the court of enforcement, and the remedy for breach. It is a contract all the same. Its force comes from the parties' agreement, not from the law that was the basis of the suit." Easterbrook, *supra* note 16, at 20.

41 *Local No. 93*, 478 U.S. at 518.

42 *See infra* Section IV.A.

43 *Local No. 93*, 478 U.S. at 529 (holding that an intervenor "does not have power to block the decree merely by withholding its consent"); *accord* Lawyer v. Dep't of Justice, 521 U.S. 567, 578–79 (1997).

44 *Local No. 93*, 478 U.S. at 522; *accord* Easterbrook, *supra* note 16, at 20.

45 United States v. Armour & Co., 402 U.S. 673, 682 (1971).

46 Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 389 (1992); *Armour & Co.*, 402 U.S. at 682–83.

controversy."[47] A court also may order broader relief than the plaintiffs originally sought in the complaint, or than they could have obtained following an adversarial trial.[48]

In *Local No. 93, International Ass'n of Firefighters v. City of Cleveland*, the Supreme Court established four requirements for a consent decree to be approved.[49] First, the court must have subject-matter jurisdiction of the underlying dispute.[50] Second, the decree must "come within the general scope of the case made by the pleadings."[51] Third, the decree "must further the objectives of the law upon which the complaint was based."[52] Finally, the decree cannot affirmatively require "unlawful" action,[53] although in constitutional challenges, courts sometimes will approve consent decrees that require or allow conduct that otherwise would be proscribed by the allegedly unconstitutional legal provision. A few circuits have held that it is an abuse of discretion for a district court to reject a consent decree that satisfies *Local No. 93*'s requirements.[54]

As a practical matter, these standards do not substantially limit the range of consent decrees to which government defendants may agree. Agencies and officials may consent to wide-ranging relief in cases in which they ultimately could have prevailed on either the facts or the law, or where the court may have awarded much narrower relief. A consent decree also may require government defendants to perform acts that are not otherwise legally mandated, thereby constraining the constitutionally and statutorily conferred discretion of executive officials and, perhaps more importantly, their successors.[55]

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47 Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983); *see also Lawyer*, 521 U.S. at 579 n.6.

48 *Rufo*, 502 U.S. at 389 ("[P]etitioners could settle the dispute . . . by undertaking to do more than the Constitution itself requires . . . [and] also more than what a court would have ordered absent the settlement.").

49 *Local No. 93*, 478 U.S. at 525.

50 *Id.*

51 *Id.* (quotation marks and brackets omitted).

52 *Id.*

53 *Id.* at 525–26.

54 *See, e.g.*, Durrett v. Housing Auth. of Providence, 896 F.2d 600, 604 (1st Cir. 1990) (reversing the district court for refusing to enter a consent decree that "would give plaintiffs far more comprehensive relief than they could have achieved with a victory after trial," because it satisfied *Local No. 93*'s requirements).

55 *See, e.g.*, Sansom Comm. v. Lynn, 735 F.2d 1535, 1539 (3d Cir. 1984) (recognizing the validity of a consent decree containing terms which "far exceeded the relief available" under the federal statutes at issue in the underlying case); *cf.* Nobels v. Sec. Fin. Corp. of Ga., 431 F. App'x 835, 843 (11th Cir. 2011) (affirming a consent decree between private litigants that "grant[ed] a form of relief that a court could not have granted had it entered a judgment on the merits").

In effect, government defendants may use consent decrees to not only create new legal rights and obligations, but also do so outside the normal legislative and regulatory processes, and in a way that entrenches their decisions, largely immunizing them from reversal by later administrations.

Many federal courts—though not the Supreme Court—have established one narrow check on this power, holding that a government defendant may not enter into a consent decree that ignores or invalidates a statute unless the court first concludes that the statute actually is unconstitutional or (for state laws) violates federal law.[56] Courts applying this principle also reject consent decrees that grant relief that the government defendant does not otherwise have the independent legal authority to offer.[57] In *Perkins v. City of Chicago Heights*, for example, plaintiffs sued the City of Chicago Heights and the Chicago Heights Election Commission, alleging that the nonpartisan, at-large electoral system for city council violated § 2 of the Voting Rights Act.[58] After the district court rejected the plaintiffs' motion for summary judgment, the defendants and most of the plaintiffs entered into a consent decree which switched the city from a "[m]anagerial" form of government to a modified "[s]trong [m]ayor" system.[59] The district court approved the decree because it found that the plaintiffs' claims had "a significant basis in evidence and law."[60]

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56 Keith v. Volpe, 118 F.3d 1386, 1393 (9th Cir. 1997) (vacating a consent decree enjoining the enforcement of a state billboard law because "the district court could not supersede California's law unless it conflicts with any federal law"); *see also* PG Publ. Co. v. Aichele, 705 F.3d 91, 116 (3d Cir. 2013) (affirming the district court's refusal to approve a consent decree barring enforcement of a state law restricting access to polling places because "the parties cannot circumvent valid state laws by way of a consent decree"); Nat'l Rev. Corp. v. Violet, 807 F.2d 285, 288 (1st Cir. 1986) (holding that the judgment was void because the Attorney General had no authority to stipulate "that an act of the legislature is unconstitutional").

57 St. Charles Tower, Inc. v. Kurtz, 643 F.3d 264, 270 (8th Cir. 2011) (holding that a government entity may agree to a consent decree that is inconsistent with state law only if that "remedy is necessary to rectify a violation of federal law") (emphasis omitted); League of Residential Neighborhood Advocates v. City of Los Angeles, 498 F.3d 1052, 1055 (9th Cir. 2007) ("A federal consent decree or settlement agreement cannot be a means for state officials to evade state law."); Kasper v. Bd. of Election Comm'rs., 814 F.2d 332, 342 (7th Cir. 1987) ("An alteration of the statutory scheme may not be based on consent alone; it depends on an exercise of federal power, which in turn depends on a violation of federal law."); Martin v. Greenville, 369 N.E.2d 543, 546 (Ill. App. 1977) ("A municipality may not, under the guise of compromise, impair a public duty owed by it, and neither municipal officials nor the trial court may usurp the legislative process.").

58 47 F.3d 212, 214 (7th Cir. 1995).

59 *Id.* at 215.

60 *Id.* at 217.

The non-consenting plaintiffs appealed the consent decree, and the Seventh Circuit vacated it.[61] The court held that a consent decree may override state law only if "such a remedy is necessary to rectify a violation of federal law."[62] Because the Illinois Constitution stipulated that a municipality's form of government may be changed only through a referendum, the defendants lacked authority to agree to such a change unless the existing system was illegal or unconstitutional.[63] The district court's "generalized statements" about the plaintiffs' claims did not "constitute sufficient findings of a violation of federal law" to warrant overriding state law and "direct[ing] changes normally requiring voter approval."[64]

The Seventh Circuit's approach, requiring an actual adjudication of illegality or unconstitutionality before allowing a consent decree to override state law, is the strictest. The D.C. Circuit, in contrast, has held that a consent decree may override a statute if *either* the district court determines that the plaintiffs established the existence of a federal violation, *or* the government defendants admit such a violation.[65] Some courts have gone even further, holding that government defendants may enter into consent decrees or other settlements declaring legal provisions to be invalid so long as the plaintiffs' claims are "substantial."[66]

One district court, for example, held,

> [T]he Attorney General may settle a case which arises from a good faith federal challenge to a state law without admitting that the law violates federal law. As long as there is sufficient evidence to show that the challenge to the state law is reasonable, it is consistent with the Attorney General's duties to allow him or her to determine that it is in the inter-

61 *Id.* at 218.

62 *Id.* at 216.

63 *Id.* at 216–17 (citing ILL. CONST. art. VII, § 6(f)).

64 *Id.* at 217.

65 Cleveland Cnty. Ass'n for Gov't By the People v. Cleveland Cnty. Bd. of Comm'rs, 142 F.3d 468, 477 (D.C. Cir. 1998) (holding that state law cannot "stand in the way" of a consent decree if the decree is remedying "an admitted or adjudged violation" of federal law).

66 DEG, LLC v. Township of Fairfield, 966 A.2d 1036, 1045 (N.J. 2009); *see also* Feeling v. Kelly, 152 F.R.D. 670, 672–73 (D.D.C. 1994) (reaffirming the propriety of a consent decree construing a federal statute governing Aid to Families with Dependent Children ("AFDC") without assessing the validity of the plaintiffs' allegations, based on considerations of "judicial economy, convenience, as well as fairness to the litigants"); Summit Twp. Taxpayers Ass'n v. Summit Twp. Bd. of Supervisors, 411 A.2d 1263, 1266 (Pa. Commw. 1980) (upholding a court-approved settlement of a zoning case that effectively resulted in a variance, even though the statutory procedures for granting a variance were not satisfied).

> ests of the state to save the expense of litigation by settling the controversy.[67]

Although its opinion is somewhat unclear, it appears that OLC's position on consent decrees is closest to this last approach. OLC begins by acknowledging that "Congress may place limits on the scope of the Attorney General's settlement power through the general laws that govern the conduct of the agencies on behalf of which the Attorney General purports to settle."[68] It nevertheless goes on to conclude that the "'Attorney General—in the exercise of his settlement responsibilities—is not bound by each and every statutory limitation and procedural requirement that Congress may have specifically imposed upon some other agency head in the administration of [the] agency's programs.'"[69] It further opines that a federal law which prohibits an executive official, such as the Secretary of the Treasury, from settling certain types of claims does not apply to the Attorney General when representing that official in litigation.[70] Thus, OLC believes that, at least in many circumstances, the Attorney General may enter into a consent decree on behalf of a government defendant requiring conduct that the defendant otherwise could not legally perform.

Despite the diversity of approaches to consent decrees that invalidate or circumvent statutes, courts generally do not take precautions against consent decrees in which agencies agree to interpret, apply, or enforce statutes or other legal provisions in particular ways; promulgate particular regulations; or take other such actions.[71]

Because a consent decree is a court order, the court has discretion to modify it based on "a significant change either in factual conditions or in law," even if one or more of the signatories objects.[72] The

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67 Midtown Hosp. v. Miller, 36 F. Supp. 2d 1360, 1369 (N.D. Ga. 1997).

68 OLC Consent Decree Opinion, *supra* note 25.

69 *Id.* (quoting Settlement Authority of the United States in Oil Shale Cases, 4B Op. O.L.C. 756, 758 (1980)).

70 *Id.* (citing Compromise of Claims Under Sections 3469 and 3229 of the Revised Statutes, 38 Op. Att'y Gen. 94 (1933)).

71 *See, e.g.*, Berger v. Heckler, 771 F.2d 1556, 1579 (2d Cir. 1985) (holding that, because the Secretary of Health and Human Services agreed to a consent decree which required "the promulgation of regulations, she cannot now object to th[ose] terms"); Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1120–21 (D.C. Cir. 1983) (affirming a consent decree requiring the EPA "to promulgate guidelines and limitations governing the discharge by 21 industries of 65 specified pollutants" and "mandat[ing] the use of certain scientific methodologies and decision-making criteria").

72 Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 384 (1992); *cf.* United States v. Swift & Co., 286 U.S. 106, 119 (1932) (holding that a district court may modify an antitrust consent decree only upon a "clear showing of grievous wrong evoked by new and unforeseen conditions"). In the wake of *Rufo*, commentators have split on how broadly *Rufo* should

Supreme Court has held, however, that a party may not seek to modify a consent decree simply because subsequent rulings have clarified the law upon which the plaintiffs' claims were based, or demonstrate those claims to be weaker than originally thought.[73] It explained that granting courts broad discretion to modify consent decrees based on subsequent legal developments "would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements."[74]

Even when subsequent developments make modification appropriate, the court must ensure that the change is "tailored to resolve the problems created by the change in circumstances," rather than "rewrit[ing] [the] consent decree so that it conforms to the constitutional floor."[75] When modifying a decree, a court may not review whether certain provisions "'could have been opposed with success if the defendants had offered opposition.'"[76] Thus, government defendants may not readily change consent decrees as new administrations, which may interpret the law differently, take office.

B. Other Means of Avoiding Adversarial Adjudication

Consent decrees are only one procedural vehicle through which litigants, including government defendants, may seek judicial rulings that affirm or alter their respective legal rights and obligations without having the court fully consider the merits of the underlying is-

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be interpreted, and whether its more liberal modification standard should be applied beyond the context of institutional consent decrees, particularly to antitrust decrees. *See, e.g.*, John D. Anderson, Note, *Modifications of Antitrust Consent Decrees: Over a Double Barrel*, 84 MICH. L. REV. 134, 153–54 (1985) (arguing that courts should apply a sliding scale to requested modifications of antitrust consent decrees, depending on which party is seeking the modification and whether it is opposed); Jed Goldfarb, Note, *Keeping* Rufo *in Its Cell: The Modification of Antitrust Consent Decrees After* Rufo v. Inmates of Suffolk County Jail, 72 N.Y.U. L. REV. 625, 629 (1997) (arguing that applying the flexible *Rufo* standard to antitrust consent decrees would "reduce settlement incentives for antitrust enforcement agencies"); David S. Konczal, Note, *Ruing* Rufo: *Ramifications of a Lenient Standard for Modifying Antitrust Consent Decrees*, 65 GEO. WASH. L. REV. 130, 134 (1996) (arguing that the standard for modifying antitrust consent decrees should be stricter than *Rufo* but offer more "flexibility" than *Swift*).

73 *Rufo*, 502 U.S. at 389–90; *see, e.g.*, Feeling v. Kelly, 152 F.R.D. 670, 672–73 (D.D.C. 1994) (declining to vacate a consent decree, despite a subsequent Supreme Court case that arguably weakened some of the plaintiffs' claims, due to "paramount issues of judicial economy, convenience, as well as fairness to the litigants").

74 *Rufo*, 502 U.S. at 389.

75 *Id.* at 391.

76 *Id.* at 391–92 (quoting *Swift*, 286 U.S. at 116–17).

sues.[77] Litigants also may use defaults, failure to oppose dispositive motions, stipulations of law, waivers and forfeitures, and confessions of error to attempt to obtain a substantive judgment while avoiding adversarial adjudication of a case, or particular issues within a case.[78] This Section demonstrates that, for a variety of doctrinal and practical reasons, consent decrees are more problematic than such other procedural vehicles, giving governmental defendants greater leeway to effectively change the law, entrench their policy preferences, and restrict their successors' discretion based on potentially faulty legal premises that courts do not review in-depth.

Most basically, a defendant implicitly may accede to a plaintiff's claims by failing to file a responsive pleading to a complaint. A court typically will treat such a failure as a default[79] and deem the complaint's well-pleaded factual allegations admitted.[80] Even in such cases, however, the court is required to assess the validity of the complaint's allegations of law[81] and determine whether the plaintiff has stated valid causes of action.[82] Likewise, if the plaintiff seeks an injunction, then the court must exercise its equitable discretion and decide for itself whether the requested relief is appropriate.[83]

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77 For a more detailed discussion of the various ways in which litigants can attempt to obtain substantive court rulings while avoiding adversarial adjudication of cases, or particular issues within cases, see Michael T. Morley, *Avoiding Adversarial Adjudication and the Limits of Article III*, 41 FLA. ST. U. L. REV. ___ (forthcoming 2014).

78 Settlement agreements are not included in this list because, as discussed at greater length later, *see infra* Section IV.A, they are private contracts. Generally, a court's only responsibility when parties enter into a settlement agreement is to dismiss the case, which the Supreme Court has recognized is a purely administrative housekeeping matter. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 21–22 (1994).

79 FED. R. CIV. P. 55(a).

80 *Id.* R. 8(b)(6); *see also* City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 137 (2d Cir. 2011) ("It is an 'ancient common law axiom' that a defendant who defaults thereby admits all 'well-pleaded' factual allegations contained in the complaint." (citation omitted)); *cf.* Angelo Iafrate Constr., LLC v. Potashnick Constr., Inc., 370 F.3d 715, 722 (8th Cir. 2004) ("A default judgment entered by the court binds the party facing the default as having admitted all of the well pleaded allegations in the plaintiff's complaint.").

81 Nishimatsu Constr. Co. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975) ("[A] defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law." (emphasis omitted)).

82 Finkel v. Romanowicz, 577 F.3d 79, 84 (2d Cir. 2009) (holding that, even if a defendant is in default, a court is "required to determine whether the [plaintiff's] allegations establish [the defendant's] liability as a matter of law"); DirecTV, Inc. v. Hoa Huynh, 503 F.3d 847, 855 (9th Cir. 2007) (affirming the district court's "refus[al] to grant default judgment" because the "complaints failed to state violations" of federal law).

83 13 MOORE'S FEDERAL PRACTICE § 65.03 (3d ed. 1997) ("[A] plaintiff is not entitled to a permanent injunction simply because a default judgment has been entered; the court must engage in an 'inquiry' to determine whether the plaintiff has demonstrated that injunctive relief is appropriate."); *see also* Thomson v. Wooster, 114 U.S. 104, 113 (1885)

When a federal agency or official defaults, the burdens on the plaintiff are even higher. Federal Rule of Civil Procedure 55(d) provides, "A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court."[84] Although "the quantum and quality of evidence that might satisfy a court can be less than that normally required,"[85] the plaintiff still must make an evidentiary showing, in addition to establishing the legal validity of its claims and sufficiency of its allegations. Courts apply Rule 55(d) vigorously; a court will not enter a default judgment against the Government unless it believes that the plaintiff is entitled to relief on the merits.[86]

Alternatively, a defendant may attempt to implicitly agree to a plaintiff's claims by failing to oppose a motion for summary judgment. Typically, when a litigant does not oppose a motion, the court deems the matter conceded.[87] Summary judgment, however, "cannot be granted by default even if there is a complete failure to respond to the motion."[88] Rather, the court must confirm that the moving party's legal arguments are valid and that the record contains no disputes of material fact.[89] Thus, courts apply stricter standards when awarding relief as a result of a default or failure to oppose a dispositive motion than when considering a proposed consent decree.

("[A] decree pro confesso is not a decree as of course according to the prayer of the bill . . . [but] is made (or should be made) by the court, according to what is proper to be decreed upon the statements of the bill assumed to be true.").

84 FED. R. CIV. P. 55(d).

85 Alameda v. Sec'y of Health, Educ. & Welfare, 622 F.2d 1044, 1048 (1st Cir. 1980).

86 *See, e.g.*, Harvey v. United States, 685 F.3d 939, 946 (10th Cir. 2012) (holding that, because the plaintiff "did not provide satisfactory expert evidence to establish his claims, he is not entitled to default judgment"); Camacho-Rodriguez v. Potter, 136 F. App'x 378, 379 (1st Cir. 2005) (per curiam) (affirming judgment for the United States Postmaster General, despite his default, because the plaintiffs failed to establish an Americans with Disabilities Act violation); Marziliano v. Heckler, 728 F.2d 151, 158 (2d Cir. 1984) (affirming the entry of default against the Secretary of Health and Human Services after confirming that "there was an adequate factual basis for [the plaintiff's] claim").

87 *See, e.g.*, Hershey v. United States, No. 89-15262, 1991 U.S. App. LEXIS 10366, at *6 (9th Cir. May 16, 1991) ("[F]ailure to file an opposition [i]s required to be treated as . . . consent to the granting of the motion.").

88 FED. R. CIV. P. 56 Adv. Comm. Note (2010 Amend.); *see, e.g.,* United States v. One Piece of Real Prop. Located at 5800 SW 74th Ave., 363 F.3d 1099, 1101–02 (11th Cir. 2004) ("[T]he district court cannot base the entry of summary judgment on the mere fact that the motion was unopposed but, rather, must consider the merits of the motion.").

89 *See* FED. R. CIV. P. 56(e)(3) (providing that, if a party "fails to properly address another party's assertion of fact" in response to a summary judgment motion, the court may "grant summary judgment *if* the motion and supporting materials . . . show that the movant is entitled to it" (emphasis added)).

Litigants also may use stipulations of law to attempt to resolve issues in a case without having the court pass on their merits. The Supreme Court has declined to address whether courts have a "duty" to consider the merits of stipulations of law before accepting them, and has instead held only that courts have discretion to do so.[90] It is unclear how courts are to apply this standard.

Typically, a court "abuses its discretion when it makes an error of law."[91] If this meant that accepting an erroneous stipulation of law constituted an abuse of discretion, then a court would have to review and assess the validity of all such stipulations, and there would be little, if any, room for any actual exercise of discretion. Because the Supreme Court expressly declined to require courts to review stipulations of law, however,[92] it is unclear whether or when a court must identify and reject invalid stipulations.

Although stipulations of law warrant further academic consideration,[93] they are less concerning than consent decrees for two reasons. First, as a practical matter, government litigants are far more likely to attempt to resolve major or dispositive legal issues through consent decrees (or settlement agreements) rather than stipulations, in order to avoid potentially unpredictable or undesirable remedial consequences. A government litigant has a strong incentive to offer major stipulations only in the context of an overall resolution of a case, to be able to influence the nature and scope of the resulting relief.

Second, whereas courts are extremely limited in the degree of scrutiny they may apply to proposed consent decrees,[94] they (at a minimum) have complete discretion to delve into the merits of a proposed stipulation of law.[95] Thus, current doctrine gives courts greater flexibility to refuse erroneous stipulations of law than consent decrees based on incorrect legal premises.

Rather than offering an express stipulation of law, litigants may attempt to preclude comprehension and accurate judicial consideration of the underlying issues in a case by forfeiting or waiving issues or arguments. A forfeiture occurs when a party "fail[s] to make time-

90 U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., 508 U.S. 439, 448 (1993).

91 Koon v. United States, 518 U.S. 81, 100 (1996).

92 *Indep. Ins. Agents*, 508 U.S. at 448 ("We need not decide whether the Court of Appeals had, as it concluded, a 'duty' to address" the validity of litigants' stipulations of law).

93 *See, e.g.*, Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1218–24 (2011) (explaining how competing conceptions of the judiciary's main function have different implications for how courts should consider stipulations of law); Morley, *supra* note 77.

94 Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) (establishing a liberal four-prong test for approving consent decrees); *see supra* Part I.

95 *Indep. Ins. Agents*, 508 U.S. at 448.

ly assertion of [a] right" before the court,[96] while a waiver occurs when a litigant "intentional[ly] relinquish[es] or abandon[s]" a claim, argument, or right.[97]

A waiver or forfeiture is akin to an implicit or unintentional stipulation of law. As with stipulations of law, courts are not required to reach the merits of waived or forfeited arguments or issues, but have discretion to do so. Sometimes, this authority is described as completely discretionary,[98] while other cases hold that courts may adjudicate such issues only when "necessary to avoid a manifest injustice."[99] A government defendant seeking to concede a plaintiff's claims without judicial consideration of them is likely to rely on a consent decree, rather than just waiving or forfeiting a potentially meritorious argument, because a consent decree allows greater control over the ultimate outcome of the case and the relief the court awards.

Finally, litigants may use a confession of error to attempt to induce a court to base a ruling on their undisputed conception of the law. A confession of error acknowledges that an appellate court should reverse or vacate a lower court's opinion due to a defect or error and typically remand for further proceedings.[100] In *Lawrence v. Chater*,[101] the Court explained that it does not "determin[e] the[] merits" of a confession of error, but rather considers only whether the confession is "plausible."[102] Under this extremely liberal standard, when the Solicitor General confesses error, the Court almost invariably "GVRs" the case: grants certiorari, vacates the lower court ruling,

96 Yakus v. United States, 321 U.S. 414, 444 (2009).

97 United States v. Olano, 507 U.S. 725, 733 (1993).

98 Singleton v. Wulff, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."); Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 249 (3d Cir. 2013) ("[I]t is within our discretion to consider an issue that the parties did not raise below.").

99 *In re* Nortel Networks Corp. Sec. Litig., 539 F.3d 129, 133 (2d Cir. 2008).

100 Solicitor General Drew S. Days, III, *The Solicitor General and the American Legal Ideal*, 49 SMU L. REV. 73, 78 (1995) ("Solicitors General have 'confessed error' in cases where the government has won in the lower courts but the Solicitor General concluded that a 'fundamental error' had led to that result.").

101 516 U.S. 163, 170–71 (1996).

102 *Id.*; *see also* Nunez v. United States, 554 U.S. 911, 912 (2008) (Scalia, J., dissenting) (discussing the Court's "dubious yet well-entrenched habit of entering a GVR order *without an independent examination of the merits* when the Government, as respondent, confesses error in the judgment below" (alteration in original)); Mariscal v. United States, 449 U.S. 405, 407 (1981) (Rehnquist, J., dissenting) ("But I harbor serious doubt that our adversary system of justice is well served by this Court's practice of routinely vacating judgments which the Solicitor General questions without any independent examination of the merits on our own.").

and remands for reconsideration in light of the Government's new position.[103]

The Court's current approach of almost reflexively approving them exacerbates the potential problems.[104] Because confessions of error are made at the appellate level, after a government litigant already has obtained a favorable judgment below, however, they tend to be quite rare. Moreover, as with stipulations of law, government litigants have a strong incentive to try to settle a case outright through a consent decree or settlement agreement, rather than conceding an important or dispositive issue without trying to contain the resulting fallout.

Thus, for both doctrinal and practical reasons, consent decrees are a particularly problematic method through which government defendants may obtain substantive court orders without merits-based rulings on the underlying legal issues,[105] thereby potentially circumventing the traditional legislative and regulatory processes. Nevertheless, to the extent that concerns about consent decrees also apply to other procedural vehicles such as stipulations of law; waivers and forfeitures; and confessions of error, some of the reforms suggested in Part IV may be extended to them, as well.

II. CONSENT DECREES, ADVERSENESS, AND JUSTICIABILITY

An unavoidable, yet typically overlooked, threshold issue regarding consent decrees is whether a court has Article III jurisdiction to enter them.[106] When litigants reach an understanding and are ready

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103 *See Nunez*, 554 U.S. at 912 (Scalia, J., dissenting); *Mariscal*, 449 U.S. at 407 (Rehnquist, J., dissenting).

104 As explained at greater length in Morley, *supra* note 77, the Court has not always held such a permissive attitude toward confessions of error. From 1942 through the 1970s, the Court "examine[d] independently the errors confessed" rather than leaving the development of the law "to the stipulation of the parties." Young v. United States, 315 U.S. 257, 258–59 (1942).

105 One additional unofficial alternative is that the Executive could purport to defend a case, but deliberately do a poor job. *See* Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 119–20 (2000); *see also* Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1207–08 (2012) (recognizing that, when "the purported proponent of [a] statute does not actually believe that it is constitutional," it may be "unwilling to make the strongest arguments in support of its constitutionality", it undermines that system and the benefits it is supposed to promote."). Professor Daniel J. Meltzer downplays this risk based on "the traditions of the career lawyers in the Department [of Justice]." Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1225 (2011).

106 One issue beyond the scope of this Article is the extent to which this analysis differs with regard to Article I courts.

to terminate a case on mutually agreeable terms, it is questionable whether a live "case or controversy" continues to exist or that the parties' posture remains sufficiently adversarial for the dispute to be deemed justiciable. Litigants who submit a proposed consent decree to a court are signaling that they no longer want or need the court to adjudicate any disputed questions of facts or law and that they are in accord regarding their respective legal rights and obligations. This is most apparent in the extreme case, where a plaintiff files a complaint and a proposed consent decree simultaneously.[107]

Article III's case-or-controversy requirement[108] allows federal courts to exercise jurisdiction over only "actual" disputes "arising between adverse litigants."[109] In theory, federal courts "refus[e] to entertain cases" which do not involve "a collision of actively asserted and differing claims"[110] or "the honest and actual antagonistic assertion of rights."[111] The Court has explained, "[T]he adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity."[112]

A case which begins as a justiciable dispute later may become nonjusticiable if the parties are no longer adversarial or antagonistic toward each other[113] or their dispute is otherwise mooted.[114]

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107 This objection applies to all consent decrees, not just those in government-defendant cases, but it has particular salience to the latter. Private litigants usually can memorialize the terms of a consent decree in a settlement agreement instead, and even may agree to have the court in which the underlying case was filed adjudicate any alleged violations of the agreement. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381–82 (1994). The main difference between a settlement agreement and a consent decree in such cases is the availability of the contempt remedy. Government defendants, in contrast, often cannot achieve the same substantive outcomes in a settlement agreement as they could in a consent decree. Thus, the practical ramifications of allowing courts to enter consent decrees in government-defendant cases are far greater than in other types of disputes. *See infra* Part III.

108 U.S. Const. art. III, § 2, cl. 1 (specifying that the federal "judicial power shall extend" to various types of "cases" and "controversies"); Raines v. Byrd, 521 U.S. 811, 818 (1997).

109 Muskrat v. United States, 219 U.S. 346, 361 (1911).

110 Poe v. Ullman, 367 U.S. 497, 505 (1961).

111 United States v. Johnson, 319 U.S. 302, 305 (1943); *accord* Chi. & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 344–45 (1892).

112 *Poe*, 367 U.S. at 503. In the extreme case, Article III's adverseness requirement bars federal courts from entertaining lawsuits where the real party in interest is the same on both sides. S. Spring Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300, 301 (1892); Wood-Paper Co. v. Heft, 75 U.S. 333, 336 (1869). It likewise bars jurisdiction where the parties falsely stipulate to, or avoid litigating the existence of, key facts in order to generate a test case so that a legal or constitutional issue may be resolved. Bartemeyer v. Iowa, 85 U.S. 129, 135 (1873).

113 *See, e.g.*, *S. Spring Gold Mining Co.*, 145 U.S. at 301 (holding that the case had become nonjusticiable because, while it was pending, the same people came to control the corpora-

The majority opinion in *United States v. Windsor*, in which the Court invalidated § 3 of the Defense of Marriage Act ("DOMA"),[115] largely treated Article III's adverseness requirement as a prudential, rather than jurisdictional, limitation.[116] The plaintiff in *Windsor* sued to obtain a tax refund that the Internal Revenue Service ("IRS") had denied her because § 3 prevented the Court from recognizing her same-sex marriage.[117] Although the Obama Administration required federal agencies to enforce § 3's definition of marriage as a union between one man and one woman,[118] it prohibited DOJ from defending the provision's constitutionality in court.[119]

The Supreme Court commented that the DOJ's failure to contest the plaintiff's constitutional arguments raised "prudential" concerns because the litigants' agreement on the main issue in the case could lead to a "friendly, non-adversary proceeding."[120] The Court held that those concerns were overcome, however, because the U.S. House of Representative's Bipartisan Legal Advisory Group had intervened to defend § 3's constitutionality.[121] It also expressed concern that declining to hear the case would lead to a substantial amount of unnecessary litigation in the lower courts.[122] Justice Antonin Scalia, joined by Chief Justice John Roberts and Justice Clarence Thomas, vigorously dissented, arguing that Article III's adverseness requirement was jurisdictional.[123]

Notwithstanding *Windsor*, it is likely that Article III's adverseness requirement remains at least partly jurisdictional. The majority opinion held that a justiciable case existed, despite the Government's

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tions on both sides); *Wood-Paper Co.*, 75 U.S. at 336 (holding that the case had become non-justiciable because, while it was pending, the plaintiffs purchased the patents at issue and therefore "own[ed] both sides of the subject-matter of [the] litigation").

114 *See, e.g.*, Singer Mfg. Co. v. Wright, 141 U.S. 696, 700 (1891) ("The taxes being paid, the further prosecution of this suit to enjoin their collection would present only a moot question, upon which we have neither the right nor the inclination to express an opinion."); San Mateo Cnty. v. S. Pac. R.R. Co., 116 U.S. 138, 141 (1885) (deeming the case moot because "the debt for which the suit was brought has been unconditionally paid and satisfied").

115 Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (1996)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

116 *Windsor*, 133 S. Ct. at 2683–89.

117 *Id.* at 2683.

118 1 U.S.C. § 7.

119 *Windsor*, 133 S. Ct. at 2683–84.

120 *Id.* at 2687 (internal quotation omitted).

121 *Id.* at 2687–88.

122 *Id.*

123 *Id.* at 2701 (Scalia, J., dissenting) ("Article III requires not just a plaintiff (or appellant) who has standing to complain but an opposing party who denies the validity of the complaint." (emphasis omitted)); *see also id.* at 2711–12 (Alito, J., dissenting).

agreement with the plaintiff's constitutional arguments, because the IRS refused to "give . . . effect" to those arguments through its continued refusal to provide the tax refund that the plaintiff claimed.[124] Thus, even though the majority opinion frames the jurisdictional issue in terms of standing, it seems to suggest that the parties must be at least minimally adverse to each other—even if only with regard to the plaintiff's ultimate relief—for a federal court to be able to exercise jurisdiction over a matter.[125]

It also is noteworthy that *Windsor* did not purport to overrule any of the precedents discussed in this Part that more squarely frame Article III's adverseness requirement as a jurisdictional issue,[126] suggesting the continued validity of those holdings. Finally, the majority opinion itself stressed the "unusual and urgent" nature of the case.[127] Especially given the politically charged nature of the dispute, the fundamental rights at stake, and the tremendous public pressure and attention it generated, the case might not offer the best view of the Court's attitude toward the adverseness issue. Even if adverseness ultimately is viewed as a prudential limitation rather than an absolute jurisdictional requirement, however, it remains rooted in Article III, and federal courts generally must decline to entertain cases where the parties are not adverse to each other.[128]

Consent decrees raise—or, perhaps more accurately, *should* raise—justiciability concerns because a justiciable case cannot exist where both sides come to "desire the same result."[129] Section A delves into the serious challenges that consent decrees present under Article III's adverseness requirement. Section B explains why the functional considerations underlying that requirement do not support the issuance of consent decrees, either. Section C shows that the Supreme Court's attempts to reconcile consent decrees with Article III are unpersuasive. Section D distinguishes other judicial practices in which the participants also lack adverseness that commonly are said to provide a basis for allowing courts to enter consent decrees. Final-

124 *Id.* at 2685.

125 *Id.*

126 *See supra* notes 108–13; *infra* note 159.

127 *Id.* at 2688.

128 *Id.* at 2687 ("Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))).

129 Moore v. Charlotte-Mecklenburg Bd. of Educ. 402 U.S. 47, 48 (1971) (per curiam) (dismissing an appeal because both parties were seeking the same declaratory judgment).

ly, Section E briefly examines other arguments commentators have offered to defend the use of consent decrees by Article III courts.

A. *Consent Decrees and Article III Precedent*

Although the Supreme Court consistently has held that Article III permits federal courts to issue consent decrees,[130] several of its precedents suggest that they raise serious justiciability concerns. In *Lord v. Veazie*, for example, the Court dismissed the appeal because there was "no real dispute" between the litigants and their interests "were not adverse."[131] It explained, "It is the office of courts of justice to decide the rights of persons and of property, *when the persons interested cannot adjust them by agreement between themselves*—and to do this upon the full hearing of both parties."[132] It concluded that a ruling entered in the absence of adverseness between the parties "in the eye of the law is no judgment of the court. It is a nullity . . . ."[133] When litigants have reached the point where they are able to seek a consent decree, by definition, they can determine their rights "by agreement between themselves,"[134] and one of the key conditions of justiciability identified in *Lord* is lacking.

Likewise, in *Moore v. Charlotte-Mecklenburg Board of Education*, the Court reiterated that a case is not justiciable when both sides seek the same relief.[135] The district court there had held that a provision of North Carolina's anti-busing law was unconstitutional and enjoined its enforcement. On appeal to the U.S. Supreme Court, both parties argued that the lower court had erred and that the statute was constitutional. The Court observed, "We are thus confronted with the anomaly that both litigants desire precisely the same result, namely a holding that the anti-busing statute is constitutional. There is, therefore, no case or controversy within the meaning of Article III of the Constitution."[136] These holdings raise serious questions about the permissibility of entering a judgment when both sides argue in favor of it.

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130 *See infra* Section II.C.

131 49 U.S. 251, 254 (1850).

132 *Id.* at 255 (emphasis added).

133 *Id.* at 256.

134 *Id.* at 255.

135 402 U.S. 47, 47 (1971).

136 *Id.* at 47–48; *see also* Chi. & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 346 (1892) (holding that a court should not "declare legislative acts unconstitutional upon agreed and general statements" from the parties).

The Court also alluded to justiciability concerns regarding consent decrees in *Vermont v. New York*, an original jurisdiction case arising from an interstate water dispute.[137] After litigating for over two months about a polluted sludge bed in Lake Champlain and Ticonderoga Creek, the State litigants agreed to resolve the case by entering into a consent decree.[138] The proposed decree stated that "no findings" would be made, and it "shall not constitute an adjudication on any issue of fact or law, or evidence, or [an] admission by any party with respect to any such issue."[139] It called for immediate action to remediate the pollution, as well as the appointment of a special "South Lake Master" to adjudicate any future disputes that arose concerning it.[140]

The Court decided "not to approve the Proposed Decree."[141] It observed, "In the instant case no findings of fact have been made; nor has any ruling been resolved concerning either equitable apportionment of the water involved or the questions relative to whether New York . . . [is] responsible for the creation of a public nuisance as alleged by Vermont."[142] The Court further held, "Article III speaks of the 'judicial power' of this Court, which embraces application of principles of law or equity to facts, distilled by hearings or by stipulations. Nothing in the Proposed Decree . . . speaks in terms of 'judicial power.'"[143] The Court went on to suggest that it would be more appropriate for the parties to settle the dispute through either an interstate compact or a traditional settlement agreement.[144]

Three Justices came closest to questioning the validity of consent decrees in *Maryland v. United States*, in which several States intervened in an antitrust enforcement action to challenge a consent decree between AT&T and DOJ.[145] The States argued that the decree improperly preempted their laws regulating the telephone industry.[146] The Court summarily affirmed the decree, but then-Justice William Rehnquist, dissenting along with Chief Justice Warren Berger and

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137 417 U.S. 270 (1974).

138 *Id.* at 270–71.

139 *Id.* at 271.

140 *Id.*

141 *Id.* at 274.

142 *Id.* at 276. The Court also expressed concern that, in reviewing the recommendations of the Special Master and "supervising the execution of the Consent Decree," it "would be acting more in an arbitral rather than a judicial manner." *Id.* at 277.

143 *Id.* at 277.

144 *Id.* at 277–78.

145 460 U.S. 1001, 1002 (1983) (Rehnquist, J., dissenting).

146 *Id.* at 1102 (Rehnquist, J., dissenting).

Justice Byron White, wrote, "I am troubled by the notion that a district court, by entering what is in essence a private agreement between parties to a lawsuit, invokes the Supremacy Clause powers of the Federal Government to pre-empt state regulatory laws."[147] Such concerns over the invalidation of state laws based solely on a consent decree logically would extend to invalidation, or even definitive interpretation, of federal laws and regulations pursuant to the Government's agreement with a private party, as well.

Professors Martin Redish and Andrianna Kastanek raised similar justiciability-related objections to settlement class actions in the *University of Chicago Law Review* a few years ago:

> [B]ecause by its nature [a settlement class action suit] does not involve any live dispute between the parties that a federal court is being asked to resolve through litigation, and because from the outset of the proceeding the parties are in full accord as to how the claims should be disposed of, there is missing the adverseness between the parties that is a central element of Article III's case-or-controversy requirement.[148]

Thus, Article III's adverseness requirement presents a serious and largely under-appreciated challenge to federal court approval of consent decrees.[149] Unlike a mere stipulation of law[150] or confession of error,[151] a consent decree purports to formally dispose of an entire case. If parties wish to voluntarily terminate litigation on mutually agreeable terms, then they may do so through a settlement agreement accompanied by voluntary dismissal, rather than a consent decree.

A settlement agreement does not raise Article III concerns because it is a private contract, and an unadorned dismissal is an ap-

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147 *Id.* (Rehnquist, J., dissenting).

148 Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 547 (2006); *see also* Owen M. Fiss, *The History of an Idea*, 78 FORDHAM L. REV. 1273, 1278 (2009) (arguing that a court's review of a proposed class action settlement "is often made without the benefit of a truly adversarial process—the parties who control the litigation have already reached agreement").

149 *Cf.* Fiss, *supra* note 148, at 1278 (stating briefly that it is "impermissible for judges to approve settlements and lend their authority to them as when a consent decree is entered" because the court would be ruling "without the benefit of a truly adversarial process"); Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of the Federal Courts*, 69 NOTRE DAME L. REV. 447, 526 (1994) (stating in passing that there is "no live controversy between adverse parties" when they seek a consent decree); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 413 (2001) (arguing that "judicial activity fits oddly into the adversarial framework" when "[t]he parties are no longer adverse to one other, but rather in accord on the settlement terms").

150 U.S. Nat'l Bank v. Indep. Ins. Agents, Inc., 508 U.S. 439, 448 (1993).

151 Lawrence v. Chater, 516 U.S. 163, 170–71 (1996).

propriate means of terminating a case that no longer presents a justiciable controversy.[152] As discussed later,[153] because settlement agreements are simply contracts, government officials and agencies cannot use them to circumvent constitutional or statutory limits on their authority or restrict their successors' discretion in interpreting laws, promulgating regulations, or enforcing legal requirements.[154] Thus, while settlement agreements always are more appropriate than consent decrees from an Article III perspective, the distinction is especially important in government-defendant cases.[155]

B. Functional Analysis of Adverseness

Consent decrees also are problematic when considered in light of the functional considerations underlying Article III's adverseness requirement. First, requiring adverseness between the parties improves the quality of judicial decision-making.[156] Litigants with competing interests and goals typically offer different perspectives on a case and have a strong incentive to provide the court with all pertinent facts and law. Courts are more likely to reach the correct answer when parties actively identify the flaws or omissions in each other's arguments. Conversely, when all litigants desire the same result, they have little incentive to highlight defects in their arguments or present adverse considerations persuasively, beyond the bare minimum required by the rules of ethics.[157]

Adverseness also promotes judicial economy, by ensuring that courts' limited resources are dedicated to parties that actually require judicial intervention to resolve their disputes and determine their respective rights and obligations. Litigants that have reached an understanding are free to memorialize it in a settlement agreement and need not call upon a court to issue a consent decree. Although plaintiffs might prefer a consent decree so that they can enforce their

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152 U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 21–22 (1994).

153 *See infra* Section IV.A.

154 *See* United States v. Winstar, 518 U.S. 839, 888–89, 896 (1996) (plurality opinion) (reaffirming the continued validity of the reserved powers doctrine and sovereign acts doctrine as limits on the ability of government entities to enter into contracts limiting the exercise of their sovereign authority); Stone v. Mississippi, 101 U.S. 814, 820 (1879) ("[A]gencies can govern according to their discretion . . . while in power; but they cannot give away nor sell the discretion of those that are to come after them . . . .").

155 *See also infra* Part III.

156 *See* Poe v. Ullman, 367 U.S. 497, 503 (1961) ("[T]he adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed . . . .").

157 Giradeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 650 (1983).

rights through summary contempt proceedings rather than being relegated to a breach of contract claim, that difference in remedy does not render a settlement agreement an inadequate alternative.[158]

A third justification for Article III's adverseness requirement is to help ensure that courts do not stray beyond their constitutional role by performing functions entrusted to the legislative or executive branches.[159] Many consent decrees in non-institutional public law cases require courts to invalidate or adopt a definitive interpretation of a legal provision, potentially without even considering the merits of the matter.[160] Alternatively, they can require executive branch officials to apply or enforce legal provisions in a certain manner, thereby restricting the future exercise of their discretion, even if the court or successor administrations would have interpreted those provisions differently.[161] While courts may nullify the actions or restrict the discretion of governmental entities when necessary to ensure compliance with constitutional or statutory requirements,[162] doing so based purely on the litigants' consent is unwarranted judicial interference with those entities' institutional prerogatives.

Finally, adverseness reduces the likelihood that litigants will use the judicial system to obtain a ruling that will prejudice third parties.[163] This is most evident in the context of government-defendant cases. When government defendants use consent decrees to override laws or regulations, or bind the discretion of successor administrations and officials, those decrees prejudice not only the government defendants' successors, but also the voters who directly or indirectly

158 As discussed in Section IV.A, the use of settlement agreements rather than consent decrees would have the biggest impact in government-defendant cases. Contracts in which an agency or official purports to limit or waive its statutory authority to promulgate or enforce regulations generally are unenforceable, particularly through specific performance. The fact that settlement agreements are more limited than consent decrees in that respect is not a deficiency, however, but rather a substantial reason for favoring them. *See infra* Part IV.

159 *See* Flast v. Cohen, 392 U.S. 83, 95 (1968) (noting that Article III "limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process").

160 *See* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) (establishing a four-factor test for approving consent decrees); Cleveland Cnty. Ass'n for Gov't By the People v. Cleveland Cnty. Bd. of Comm'rs, 142 F.3d 468, 477 (D.C. Cir. 1998) (holding that a consent decree may override a state law to rectify either "an admitted or adjudged violation" of federal law); DEG, LLC v. Twp. of Fairfield, 966 A.2d 1036, 1045–46 (N.J. 2009) (holding that a state Attorney General may settle a case involving a constitutional challenge to a state law to avoid an adjudication on the merits).

161 *See, e.g.*, Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1120 (D.C. Cir. 1983).

162 *See* Milliken v. Bradley, 418 U.S. 717, 744–45 (1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15–16 (1971).

163 Redish & Kastanek, *supra* note 148, at 549.

put them in office, many of whom may not have legal standing to challenge the decree. Thus, consent decrees—particularly in government-defendant cases—are inconsistent with the purposes underlying Article III's adverseness requirement.

C. Judicial Attempts to Reconcile Consent Decrees with Article III

Although a few district courts occasionally have refused to enter consent decrees due to lack of adverseness,[164] the Supreme Court consistently has approved their use, without persuasively explaining their constitutional foundation. Most commentators cite *Swift & Co. v. United States*[165] or *Pope v. United States*[166] to establish that it has "long been settled" that "a consent decree, in which a public administrative agency presents for judicial approval a prenegotiated settlement . . . in order to provide prospective relief . . . constitutes a 'case or controversy' sufficient to confer subject matter jurisdiction under Article III."[167] Neither of these cases, however, resolves the justiciability issue.

In *Swift*, meatpacking companies that had agreed to an antitrust consent decree several years earlier asked the Court to vacate it.[168] They argued that the district court had lacked jurisdiction under Article III to enter the decree in the first instance because the fact that all parties to the suit had sought such relief indicated that the "controversy had ceased."[169] The Court rejected the claim, holding that a party to a consent decree may not later collaterally attack it based on lack of jurisdiction.[170] The Court explained that, if the district court

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164 *See, e.g.*, Idaho Bus. Holdings, LLC v. City of Tempe, No. CV-06-2137-PHX-FJM, 2007 U.S. Dist. LEXIS 62352, at *2 (D. Ariz. Aug. 22, 2007) (holding that, where "the parties purport to have settled their case and thus there is no longer a case within the meaning of Article III," it would not "be appropriate" to enter a consent decree "adjudicat[ing] a constitutional question"); Hazel B. v. Otis, Civ. Action File No. 6820, 1974 U.S. Dist. LEXIS 12024, at *6 (D. Vt. Mar. 2, 1974) (declining to issue a consent decree because "[t]he courts are without judicial power to dispose of constitutional issues where proceedings are not clearly adversary or in which there is no actual antagonistic assertion of rights, even if undertaken in good faith"); Macklin v. Kaiser Co., 69 F. Supp. 137, 141 (D. Or. 1946) ("As a result of [the] absence of controversy, the stipulation of settlement renders the case moot. The court is not then bound to enter judgment to enforce the stipulation of settlement made by the parties.").

165 276 U.S. 311, 313–15 (1928).

166 323 U.S. 1, 3–5 (1944).

167 *E.g.*, Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 928 n.115 (1996); Randolph D. Moss, Note, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 YALE L.J. 1811, 1819 n.47 (1986).

168 276 U.S. 311, 321 (1928).

169 *Id.* at 326.

170 *Id.* at 311–12.

that issued the decree had "erred in deciding that there was a case or controversy, the error is one which could have been corrected only by an appeal."[171]

Thus, the *Swift* Court dodged the issue of whether the pendency of a proposed consent decree causes a case to lose its adversarial nature. Nevertheless, *Swift* customarily is cited as recognizing that consent decrees are consistent with Article III[172] because the Court also stated, in somewhat cryptic dicta, that the defendants' argument "ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated."[173] Although these observations are accurate, they do not address whether parties seeking a consent decree stand in a sufficiently adversarial relationship to allow a court to entertain and grant their request for injunctive relief.

In *Pope*—which did not even involve a consent decree—Congress had passed a special law allowing a particular contractor to sue in the Court of Claims to be reimbursed for expenses he had incurred while building a tunnel for the District of Columbia's water system.[174] The Court of Claims held that the law was unconstitutional, because it effectively gave the plaintiff a right to judgment and "decid[ed] all questions of fact except certain simple computations."[175] The Supreme Court reversed, holding among other things, "When a plaintiff brings suit to enforce a legal obligation[,] it is not any the less a case or controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or incontestable."[176] The Court declared, "It is a judicial function and an exercise of the judicial power to render judgment on consent. A judgment upon consent is a 'judicial act.'"[177]

The Court's holding may not be as broad as it initially appears. The Court cited *Swift* which, as discussed above, addressed the justiciability of consent decree requests only briefly in dicta, as well as other cases that enforced consent decrees without reaching the jurisdictional issue.[178] The *Pope* Court went on to explain that a case is justiciable if the court is required to "determine[] that the unchallenged

171 *Id.* at 326.
172 *See, e.g.*, Effron, *supra* note 16, at 1811; Moss, *supra* note 167, at 1819 n.47.
173 *Swift*, 276 U.S. at 326.
174 Pope v. United States, 323 U.S. 1, 4 (1944).
175 *Id.* at 8.
176 *Id.* at 11.
177 *Id.* at 12.
178 *Id.*

facts shown of record establish a legally binding obligation" and "adjudicate[] the plaintiff's right of recovery and the extent of it."[179] A consent decree in which the parties agree to both liability and relief, and the court is not required to make any independent legal or factual determinations, does not appear to fall within this holding. Thus, even the seminal Supreme Court cases on the issue fail to establish that consent decrees are consistent with Article III.

D. Article III's Adverseness Requirement and Other Judicial Practices

Some authorities—including Charles Alan Wright and Arthur R. Miller's *Federal Practice and Procedure* treatise[180]—argue that consent decrees do not raise justiciability concerns because federal courts act in numerous other types of uncontested proceedings, by issuing certificates of naturalization, entering default judgments, granting uncontested bankruptcies, accepting confessions of error, and receiving guilty pleas.[181] These examples present interesting challenges to Article III's adverseness requirement but, upon close examination, do not suggest that a "case or controversy" may exist when all parties ask the court to enter the same judgment in a civil case.[182]

1. Naturalization Proceedings

Federal district courts throughout the country regularly naturalize new citizens, despite the fact that such proceedings, at least in the modern era, are typically uncontested. Under current law, the judiciary's involvement in uncontested naturalizations is both ministerial and ceremonial, limited to issuing the oath of allegiance[183] and "address[ing] the newly naturalized citizen[s] upon the form and genius of our Government."[184] This role is a largely historical appurte-

179 *Id.*

180 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3530 (3d ed. 2013).

181 *See* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1373–74 (1973) (noting that "it is difficult to assert that 'real' adversaries are necessary to the existence of a case or controversy"); Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 903 (stating that courts often issue orders in "a variety of non-adversarial contexts").

182 *Cf.* Muskrat v. United States, 219 U.S. 346, 361 (1911) ("[The] judicial power . . . is the right to determine actual controversies arising between adverse litigants . . . .").

183 8 U.S.C. §§ 1421(b)(1)(A), 1448(a) (2012).

184 *Id.* § 1448a.

nance[185] to a federal court's main function and reveals little about Article III.

In *Tutun v. United States*,[186] the Supreme Court held that a federal appellate court had statutory jurisdiction to review a district court's denial of a naturalization petition. The opinion noted in passing that naturalization proceedings were "cases" under Article III, because "[t]he United States is always a possible adverse party," but did not delve further into the question of adverseness.[187]

This approach seems inconsistent with the Court's core adverseness jurisprudence.[188] It is difficult to understand how a particular uncontested proceeding may be deemed sufficiently "adverse" to satisfy Article III, based solely on the hypothetical possibility that the Government (or some other litigant) might contest some other matter that some other party brings under the same statute in the future. The fact that the Government is "always a possible adverse party" in certain types of suits, such as naturalization proceedings,[189] does not establish that it actually is an adverse party in a particular case where it neither contests a person's claims nor opposes their requested relief.

Tutun's brief and incidental treatment of adverseness, which was not even the question at issue in the case, perhaps may be viewed as either an insufficiently considered assertion or an ad hoc exception to the Court's core adverseness jurisprudence. The Court's reasoning also may have been driven by the role that state and federal courts have played in naturalization proceedings since the Founding Era,[190] rather than more broadly applicable justiciability principles.

It also may be pertinent that *Tutun* was issued before the rise of the administrative state. The role that *Tutun* endorses for the judiciary—reviewing and adjudicating the substance of uncontested applications for citizenship[191]—is one that likely would be seen today as the proper role of an administrative agency rather than a federal court.

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185 Congress has granted state and federal courts power to naturalize citizens who satisfy statutory requirements since the Naturalization Act of 1790, § 1, 1 Stat. 103, 103 (Mar. 26, 1790).

186 270 U.S. 568, 580 (1926).

187 *Id.* at 577. The situation in *Tutun* was somewhat more complicated than the Court's cursory treatment of the adverseness issue may suggest because, at least by the appellate stage, the Government was arguing against the Petitioner's position. *See* 1925 J. SUP. CT. U.S. 179, 199.

188 *See supra* Section II.A.

189 *Tutun*, 270 U.S. at 577.

190 *See supra* note 188.

191 *Tutun*, 270 U.S. at 576–77.

Thus, the case may no longer present an accurate conception of the judicial power.

Even if one accepts the validity of *Tutun*'s holdings, however, it could be argued that a distinction exists between a naturalization petition that the Government declines to oppose, or on which it takes no position, and a consent decree where the government affirmatively consents to and joins in the plaintiff's request for relief. Indeed, the rules of civil procedure treat a failure to oppose a plaintiff's claims very differently from an express stipulation or affirmative consent.[192] Thus, while naturalization proceedings—like the other examples discussed in this Section—may offer some support for the judicial practice of issuing consent decrees, they do not foreclose justiciability concerns about them.

2. Default Judgments

A default judgment differs substantially from a consent decree for Article III purposes. When a plaintiff moves for default, the defendant has not agreed that the plaintiff has a right to relief. Rather, by failing to file a responsive pleading, the defendant implicitly admits only the well-pled factual allegations of the complaint.[193] Despite its lack of participation, the defendant is not deemed to implicitly have assented to the validity of the plaintiff's legal claims, the specific remedies the plaintiff seeks, or entry of judgment against it. As discussed earlier, courts retain an independent obligation to ensure the legal sufficiency of the plaintiff's claims and the propriety of the requested relief, especially in government-defendant cases.[194] Thus, despite a defendant's lack of active opposition, the defendant in a default judgment case remains implicitly or formally opposed to the plaintiff—a presumption that is impossible to retain when the defendant expressly requests the same relief as the plaintiff through a proposed consent decree.

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192 *See supra* Section I.B (discussing the different standards that courts apply when confronting the various procedural vehicles through which litigants can seek substantive rulings or judgments without having the court fully consider the merits of either the case or a particular issue within the case); *see also* Morley, *supra* note 77.

193 FED. R. CIV. P. 8(b)(6) ("An allegation . . . is admitted if a responsive pleading is required and the allegation is not denied."); City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 137 (2d Cir. 2011) ("It is an 'ancient common law axiom' that a defendant who defaults thereby admits all 'well-pleaded' factual allegations contained in the complaint.").

194 *See supra* notes 81–86 and accompanying text.

3. Uncontested Bankruptcies

Uncontested bankruptcies raise some of the same issues as both naturalization petitions and default judgments. A creditor, of course, may unilaterally forgive a debtor's obligations to it. Indeed, all of a debtor's creditors could agree to forgive her debts, either completely or with particular repayment terms, without judicial proceedings or bankruptcy.

A debtor must seek a discharge through bankruptcy only if one or more creditors refuse to release her from her obligations. The fact that the debtor and creditors cannot voluntarily resolve their conflicts among themselves establishes that they are adverse. As with a default judgment, this underlying adverseness is not eliminated by the fact that a creditor might not find it economically worthwhile to contest a bankruptcy proceeding or have any colorable claims or defenses to raise.[195] Moreover, when a petitioner files an uncontested bankruptcy, a creditor who fails to contest it is simply taking no position on the issue. Like an uncontested naturalization petition or default judgment, this is distinguishable from a consent decree in which the defendant both joins in the plaintiff's request and affirmatively agrees to the requested relief.

4. Confessions of Error

Confessions of error also do not attenuate Article III's adverseness requirements. Adverseness has never been understood to mean that litigants must contest every possible issue of fact and law in a case; to the contrary, the pretrial process is geared largely toward narrowing the scope of contested issues that the court must resolve.[196] Most confessions of error, even on substantial points of law, are not wholly dispositive of the case and require remand for further adversarial proceedings, on remedy if nothing else. Thus, a court's decision to accept a confession of error does not suggest a complete lack of adverseness in the underlying case.

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195 If debtors and creditors collectively settle upon a repayment plan and present it to a court, then that would be the substantive equivalent of a consent decree that the court (according to this Article) lacks jurisdiction to enter. Such an agreement should be embodied in a private contract, rather than a court order or consent decree.

196 Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1746 (1992) (noting that pretrial informational disclosures give parties opportunities to narrow issues and eliminate meritless claims).

5. Guilty Pleas

Guilty pleas present the closest analogue to consent decrees, particularly when they involve an agreement between the government and defendant as to both guilt and sentence.[197] It could be argued that the longstanding and widely accepted practice of accepting guilty pleas establishes the justiciability of consent decrees. Although federal courts ultimately derive their authority in both civil and criminal matters from the same language in Article III, it may be that the constitutional requirements for a criminal "case or controversy" differ from those of a civil "case or controversy."[198]

The civil and criminal justice systems serve fundamentally different purposes from each other in numerous ways. Moreover, the practice of accepting guilty pleas may be justified by compelling considerations that do not apply to consent decrees in civil cases. Conceivably, the government and criminal defendants could settle criminal cases through private contracts requiring the defendant to serve a specified prison sentence, pay a fine, and agree to be designated a "felon." It generally would be regarded as intolerable for courts to be excluded from the criminal justice process in that manner, however, especially given the prevalence of plea bargaining.[199] Having courts accept guilty pleas and enter judgments of conviction protects the constitutional rights of the defendant; ensures that waivers of those rights are knowing, intelligent, and voluntary;[200] allows courts to maintain at least a degree of oversight over the executive branch's prosecutorial power; and places a judicial imprimatur on convictions.

No such compelling considerations apply to the civil justice system. Civil litigants commonly resolve their differences through private settlement agreements. Courts are neither expected nor required to play a role in most civil settlements, except in unusual circumstances such as class-action cases,[201] because waivers of rights in civil cases are not subject to the same safeguards that apply in crimi-

197 A guilty plea that leaves a degree of sentencing discretion with the court is comparable to a stipulation of liability, which is insufficient in itself to defeat adverseness.

198 Some scholars have offered a slightly different take, arguing that the term "cases" in Article III includes both civil and criminal matters, while the term "controversies" is limited solely to civil matters. William E. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 265–67 (1990); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1575 (1990).

199 *See* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (arguing that plea bargaining "has swept across the penal landscape").

200 United States v. Ruiz, 536 U.S. 622, 629 (2002).

201 FED. R. CIV. P. 23(e).

nal prosecutions.[202] The need to maintain a degree of oversight over the executive branch is absent in most civil cases, as is the possibility that a person will be completely deprived of her freedom. Thus, the constitutional and practical considerations that warrant interpreting Article III as permitting the acceptance of guilty pleas in criminal cases do not apply in the civil context. While it is tempting to analogize between guilty pleas and civil consent decrees, the differences between the civil and criminal justice systems preclude guilty pleas from serving as a basis for jettisoning Article III's adverseness requirement from the civil realm.

E. Other Arguments for the Justiciability of Consent Decrees

Most defenses of the justiciability of consent decrees are based on either *Swift*[203] and *Pope*,[204] or analogies to other types of proceedings before federal courts that do not involve adverse parties; all of these arguments have been addressed in the Sections above. Professor Judith Resnik contends that the very fact that a plaintiff seeks a consent decree "suggest[s] that, despite parties' agreement to discontinue litigation, a 'case' or 'controversy' exists, enabling courts to have the authority to enter judgment."[205] The fact that one or more putative parties to a contract (such as a settlement agreement) might wish to embody that agreement in a court order, however, does not give rise to Article III adverseness or a justiciable controversy. One can imagine any number of agreements for which a risk-averse or distrustful signatory might wish to be able to invoke a court's summary contempt power; such a desire does not give rise to a justiciable controversy.

Professors Martin H. Redish and Adrianna D. Kastanek argue instead that the Supreme Court's holding in *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*[206] grants courts authority to enter consent decrees.[207] *Bancorp* holds that, when a case becomes moot, a court may issue any orders that are "'reasonably ancillary to [its] pri-

202 *See, e.g.*, FED. R. CRIM. P. 11 (establishing a detailed procedure that courts must follow before accepting guilty pleas).

203 Swift & Co. v. United States, 276 U.S. 311, 326 (1928).

204 Pope v. United States, 323 U.S. 1, 11–12 (1944).

205 Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1514 (1994).

206 513 U.S. 18 (1994).

207 Redish & Kastanek, *supra* note 148, at 590.

mary, dispute-deciding function,'"[208] in order to "'make such disposition of the whole case as justice may require.'"[209] Professors Redish and Kastanek argue that a "court's ability to enter a consent decree that resolves previously adversarial litigation is appropriately viewed as ancillary to the adjudicatory process."[210]

This reading of *Bancorp* is too ambitious. *Bancorp* recognizes that federal courts have the quintessentially housekeeping power to dispose of cases that no longer present justiciable controversies; it does not authorize affirmative grants of substantive relief. Imposing legal obligations on one or more parties is not "ancillary" to a court's dispute-deciding function, but rather a direct and substantial result of it. *Bancorp* does not allow courts to go beyond the administrative steps, such as dismissal[211] and vacatur of lower-court opinions, necessary to dispose of a case that should no longer be pending.

Perhaps the most compelling argument upon which supporters of consent decrees can rely is the judiciary's largely unbroken historical practice of issuing them.[212] Although longstanding practices going back to the nation's Founding typically carry great weight in constitutional interpretation,[213] particularly in separation-of-powers controversies,[214] judicial practices concerning justiciability are not especially persuasive because the Court did not develop and begin enforcing many aspects of Article III's case-or-controversy requirement until relatively late in the nation's history.[215] Historical practice, therefore,

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208 *Bancorp*, 513 U.S. at 22 (quoting Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 111 (1970) (Harlan, J., concurring in denial of writ of certiorari)).

209 *Id.* at 21 (quoting Walling v. James v. Reuter, Inc., 321 U.S. 671, 677 (1944)).

210 Redish & Kastanek, *supra* note 148, at 590.

211 *See Bancorp*, 513 U.S. at 29 ("The case is dismissed as moot.").

212 *See* Swift & Co. v. United States, 276 U.S. 311, 323–24 (1928) (discussing pre-Revolutionary English practice concerning consent decrees).

213 Eldred v. Ashcroft, 537 U.S. 186, 213 (2003) ("[C]onsistent congressional practice is entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of [over two] centur[ies], it is almost conclusive." (quotation marks omitted)); *see also* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 678 (1970) (holding that an "unbroken practice" in constitutional interpretation "is not something to be lightly cast aside").

214 *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 826 (1997) (relying on "historical practice" in determining the scope of legislative standing under Article III).

215 Joshua L. Sohn, *The Case for Prudential Standing*, 39 U. MEMPHIS L. REV. 727, 735 (2009) ("American Framing-era courts commonly entertained cases that would flunk the Supreme Court's modern standing requirements."); Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 66–67 (2008) ("[T]he Supreme Court's opinions over the nation's first 150 years [show] that direct injury was not a necessary element of a 'case' or 'controversy.'"); *see generally* Pushaw, *supra* note 149 (arguing that the original understanding of the terms

is not an especially informative guide to Article III's applicability to consent decrees.

Consent decrees, therefore, raise strong Article III adverseness concerns—whether jurisdictional or merely prudential— that should make the judiciary reluctant to issue them. Courts should require litigants to enter into settlement agreements to terminate litigation, rather than approving consent decrees. In most cases, the main impact of such a switch would be requiring litigants to invoke breach-of-contract remedies, rather than summary contempt proceedings, if the agreement is violated. As Part III explains, however, limiting government defendants to settlement agreements rather than consent decrees would preclude many of the separation-of-powers concerns that such decrees can create in public law cases.

III. CONSENT DECREES AND SEPARATION OF POWERS

Justiciability concerns aside, consent decrees in government-defendant cases raise serious separation-of-powers problems because they allow executive officials and agencies to improperly entrench their preferred policies, interpretations of the law, and enforcement priorities against changes by subsequent administrations, without having a court decide whether such restrictions are legally or constitutionally required.[216] The leading critiques of government-defendant consent decrees contend that they therefore violate Article II.[217] This Part offers a somewhat different view.

Section A explains that Article II, as well as the Veto Clause of Article I,[218] bar consent decrees that purport to limit power or discretion that the Constitution directly and specifically confers on the President, but such decrees tend to be rare. Section B shows that similar Article II objections do not apply to consent decrees that limit power or discretion that statutes and regulations confer on the President or other executive branch officials—the category into which most consent decrees in government-defendant cases fall. Rather, such decrees are improper because Congress has not delegated authority to either the Attorney General or executive officials to permanently en-

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"cases" and "controversies" as used in Article III allowed federal courts to hear certain types of matters that current justiciability doctrine prohibits).

216 As explained in Part I, the standard for approving consent decrees is very lax and generally does not require the court to consider the legal merits of the parties' legal theories or even whether the plaintiff is entitled to relief. *See supra* Section I.A.

217 McConnell, *supra* note 16, at 300–01, 321; Rabkin & Devins, *supra* note 16, at 237, 276.

218 U.S. CONST. art. I, § 7.

trench restrictions on agencies' discretion concerning regulations, policies, legal interpretations, or enforcement.

A. Consent Decrees and Executive Powers Conferred by the Constitution

As several commentators and OLC correctly conclude, Article II prohibits consent decrees that restrict powers and discretion that the Constitution directly and specifically confers on the President without the need for statutory mediation.[219] Most of these constitutional grants of authority, such as the powers to recommend legislation or grant pardons, are set forth in Article II,[220] although Article I confers the President's veto power.[221] Under this standard, the consent decree in *United States v. Board of Education of Chicago*, which required the Government to "make every good faith effort to find and provide every available form of financial resources adequate for the implementation of [a school] desegregation plan" for Chicago,[222] would be invalid under the Recommendations Clause,[223] insofar as it required the President to seek appropriations from Congress or prohibited him from seeking to reduce financial aid to Chicago schools.[224]

A consent decree that attempts to limit or control the President's exercise of a constitutionally conferred power would conflict with, and effectively amend, the constitutional provision granting that authority. A sub-constitutional authority, such as a consent decree, cannot trump an express constitutional provision.[225] Of course, a court may restrict of exercise of executive authority when necessary to enforce constitutional rights or other limits on governmental power, but courts do not make such merits-related determinations when issuing consent decrees, and nothing in the Constitution suggests that a

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219 McConnell, *supra* note 16, at 319–20; OLC Consent Decree Opinion, *supra* note 25; *see also* Rabkin & Devins, *supra* note 16, at 232–34.

220 *See* U.S. CONST. art. II. § 2, cl. 1; *id.* art. II § 3, cl. 1.

221 *Id.* art. I, § 7.

222 588 F. Supp. 132, 139 (N.D. Ill. 1984), *vacated* 744 F.2d 1300 (7th Cir. 1984).

223 U.S. CONST. art. II, § 3, cl. 1.

224 *See Bd. of Educ. of Chicago*, 588 F. Supp. at 237–39, 242 (identifying acts "taken by the Executive Branch in connection with Congressional consideration" of school funding legislation that purportedly violated the consent decree, and holding that the decree required the Executive Branch to engage in "lobbying activities" and "seek . . . reappropriation or new legislation when other sources of available funds prove inadequate"). The Seventh Circuit interpreted the consent decree narrowly to avoid imposing such obligations on the President, but held that the executive branch's interactions with Congress "contravene[d] the spirit of the Decree" and did "not befit a signatory of the stature of the United States Department of Justice." *Bd. of Educ. of Chicago*, 744 F.2d at 1308.

225 OLC Consent Decree Opinion, *supra* note 25; McConnell, *supra* note 16, at 320.

President may impose his view or interpretation of the document on his successors.

Professor Peter Shane rejects this approach, arguing that the President may agree to a consent decree that limits his constitutionally conferred authority so long as the either does not "prevent the executive from accomplishing its constitutionally assigned functions" or "is justified by an overriding need."[226] He relies on *Nixon v. Administrator of General Services*, in which the Supreme Court held that separation-of-powers problems arise only when one branch "'prevents'" another "'from accomplishing its constitutionally assigned functions.'"[227]

This approach appears unavoidably subjective and ad hoc,[228] and would dangerously permit de jure executive entrenchment of an incumbent's preferred policies or legal interpretations. While the *Nixon* Court holding that Professor Shane embraces may be a reasonable way of addressing potential interbranch usurpations, it offers no protection against a President's attempted entrenchment of restrictions on the office's constitutional authority. Thus, Article II should be read as precluding consent decrees that limit powers that the Constitution expressly confers on the President.

B. Consent Decrees and Executive Powers Conferred by Statute or Regulation

Some opponents of consent decrees go even further, arguing that Article II prevents executive agencies and officials from entering into many types of consent decrees that limit or control the exercise of their *statutorily* conferred powers and discretion,[229] such as by requiring them to interpret, apply, or enforce legal provisions in certain ways; promulgate certain regulations; or utilize certain tests or methodologies when developing regulations. One variant of this argument is based on the premise that the Article II Vesting Clause,[230] Take Care Clause,[231] and/or general tripartite structure of the federal government guarantee the Executive the power to interpret statutes, decide what regulations to promulgate, and determine enforcement priorities.[232]

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226 Shane, *supra* note 16, at 258.

227 *Id.* at 257–58 (quoting Nixon v. Admin. of Gov't Servs., 433 U.S. 425, 443 (1977)).

228 *Cf.* McConnell, *supra* note 16, at 318–19 (arguing that Professor Shane's proposed standard is "weak" and provides "no real protection at all").

229 McConnell, *supra* note 16, at 300–01, 321; Rabkin & Devins, *supra* note 16, at 237, 276.

230 U.S. CONST. art. II, § 1, cl. 1 ("The executive power shall be vested in a President of the United States of America.").

231 *Id.* art. II, § 3 ("[The President] shall take care that the laws be faithfully executed.").

232 *See* McConnell, *supra* note 16, at 298, 300–01, 321; Rabkin & Devins, *supra* note 16, at 230.

A closely related claim is that such decrees are inconsistent with the President's four-year term, because they allow earlier administrations to "preclud[e] subsequent Presidents from changing [their] policies."[233] Professor Michael W. McConnell argues, "If changes in policy have already been ruled out by binding and irrevocable agreements with private parties, then there is no point in holding [elections]."[234]

These arguments read too much into Article II. Article II does not require Congress to delegate authority to the executive branch to promulgate regulations, interpret statutes, or exercise discretion over how to enforce them. At the extreme, Congress may specify all pertinent statutory details in painstaking and minute detail, deny agencies the ability to promulgate regulations,[235] and either mandate or prohibit enforcement of certain laws under various circumstances (perhaps even creating a private right of action in case the executive fails to comply).[236]

Likewise, the Constitution likely allows Congress to grant an agency the temporary ability, for only a specified period of time, to promulgate regulations, develop policies, and determine enforcement priorities under a particular statute. Congress may specify that the agency's determinations as of the end of that period will be prospectively binding on the agency into the indefinite future, unless and until Congress chooses to override them (or otherwise amend the law). Nothing in either the Constitution or Supreme Court precedent suggests that a congressional delegation of authority to the Executive Branch must be perpetual. The end result on an agency (and successor administrations) once a temporally limited delegation expires would be the same as if Congress itself had codified all of the interpretations and decisions that the agency made while the delegation remained in effect. Such measures would not violate Article II.

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233 McConnell, *supra* note 16, at 298, 300 (arguing that "[a]ny attempt by a President to assert legal control over the powers of his successors, unless specifically authorized, is a violation" of the constitutional provision "provid[ing] that Presidents shall serve four-year terms of office").

234 *Id.* at 300.

235 Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

236 *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 833 (1985) ("Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue.").

From the perspective of executive power, the key issue with consent decrees thus appears to be a question of statutory interpretation—whether Congress expressly or implicitly authorized government defendants to agree to them.[237] If an agency's organic statute or the Attorney General's general litigation authority[238] allowed a government defendant to agree to consent decrees, that authorization would not improperly limit the constitutional powers of future administrations that would be bound by such decrees. Executive officials generally have no Article II basis for demanding that Congress guarantee them a certain range of discretion. Conversely, if federal laws cannot fairly be read as authorizing an agency to enter into consent decrees (particularly consent decrees that impose legal restrictions or requirements on the agency beyond those required by federal law), then a consent decree involving that agency would be a statutory, rather than constitutional, violation. Either way, there is no constitutional problem.

Substantial arguments may be raised on both sides of the statutory issue of whether Congress has authorized federal agencies and officials to enter into consent decrees. On the one hand, agencies' organic statutes may be treated as implicitly authorizing consent decrees, based on congressional acquiescence in the longstanding practice of government defendants entering into them. This argument is bolstered by the fact that Congress has enacted laws that regulate consent decrees in particular areas, such as antitrust.[239]

OLC further suggests that at least part of the basis for government defendants' ability to agree to consent decrees is the Attorney General's statutory authority to represent the United States in litigation.[240] According to this argument, the power to litigate on behalf of federal agencies and officials necessarily includes the ability to settle such lawsuits on such terms as the Attorney General, in the exercise of his professional judgment, deems reasonable, including entering into consent decrees.

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237 Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 621 (1983) ("A contemporaneous and consistent construction of a statute by those charged with its enforcement combined with congressional acquiescence creates a presumption in favor of the administrative interpretation, to which we should give great weight . . . ." (quotation marks omitted)).

238 28 U.S.C. § 516 (2006) ("[T]he conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); *id.* § 519 ("[T]he Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party . . . .").

239 *See* Tunney Act, 15 U.S.C. § 16 (2006).

240 OLC Consent Decree Opinion, *supra* note 25 (citing 28 U.S.C. §§ 516, 519).

On the other hand, statutory delegations of authority to an agency generally are not interpreted as allowing the agency or its officials to limit their successors' statutorily conferred discretion. As the Supreme Court explained in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, an agency's discretionary decisions are considered matters of policy that the agency may revise "on a continuing basis" and are not "carved in stone."[241] It seems unlikely that Congress would bar agencies from entrenching limits on successors' discretion through traditional policymaking procedures, including formal rulemaking and adjudicatory processes, yet implicitly permit them to do so through consent decrees, which neither are subject to a detailed merits review nor involve public participation. Indeed, it would be odd to allow federal agencies to entrench particular legal interpretations, policies, or enforcement schemes—particularly without a judicial determination that they are constitutionally or legally valid or required—simply to settle litigation, when agencies generally are regarded as lacking authority to engage in such entrenchment to pursue other equally or even more important goals.[242]

Similarly, it is far from clear that DOJ's statutory right and power to represent federal agencies and officials in litigation implies the ability to agree to bind agencies to restrictions on their discretion or authority, beyond those that the agencies themselves otherwise would have the statutory authority to approve. While an attorney representing a client may agree to settlements on the client's behalf, an attorney-client relationship cannot give the attorney authority to agree to arrangements to which the client would lack the independent legal authority to consent directly.

Because consent decrees are subject to a serious risk of manipulation, allow for circumvention of the traditional legislative and regulatory processes, and can lead to entrenchment of incumbents' policy preferences, courts should be reluctant to infer congressional authorization for them absent a specific, clear statement to that effect.[243] Congress's general grants of litigation authority to DOJ, therefore, should be seen as insufficient to authorize the use of consent decrees

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241 467 U.S. 837, 863, 865 (1984).

242 *See generally* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002) (arguing that the government can use entrenchment to achieve goals that otherwise would be difficult or impossible).

243 *Cf.* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (arguing that clear statement requirements in statutory interpretation are a form of "quasi-constitutional law" that can provide "structural constitutional protections . . . [for] underenforced constitutional norms").

in government-defendant cases. Thus, under current law, consent decrees raise separation-of-powers problems primarily because federal defendants lack statutory authority to enter into them.[244]

Although this critique of consent decrees is not constitutionally based, it is broader than other leading criticisms of them. Professor McConnell, for example, argues that a consent decree is appropriate in a government-defendant case if the court could have issued such an order following a trial on the merits.[245] He explains, "If government lawyers, in an exercise of professional discretion, decide to compromise [by entering into a consent decree], this poses no more constitutional problem than would a similar litigated decree."[246] In Professor McConnell's view, consent decrees raise entrenchment-related concerns only when they "contain[] elements that differ from or go beyond what a court could order in a litigated judgment."[247]

Professor McConnell contends, in essence, that government defendants should be permitted to concede liability and enter into consent decrees, so long as the remedy is appropriately tailored and does not extend beyond what is necessary to correct the alleged legal violation.[248] A government entity's imposition of a permanent de jure limitation on a successor's discretion is statutorily improper, however, unless the law actually requires it. Because courts do not adjudicate the merits of the plaintiffs' claims when reviewing proposed consent decrees, the process provides no assurance that there is a sufficient constitutional or statutory basis for constraining future administrations' interpretive, regulatory, or enforcement authority.

Professors Jeremy A. Rabkin and Neal E. Devins also have cautioned against consent decrees in government-defendant cases, but only ones that (i) require the President to make or withhold "legislative and budgetary recommendations to Congress"; (ii) interfere with the executive's "spending priorities"; or (iii) "unduly constrain" ex-

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244 If Congress were expressly to authorize an agency to execute consent decrees, then the law would be subject to review primarily on delegation-related grounds, but the non-delegation doctrine is virtually moribund. *See* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2100 (2004) (noting "courts' unwillingness to enforce" a non-delegation norm).

245 McConnell, *supra* note 16, at 302.

246 *Id.*

247 *Id.*

248 *Id.*; c*f.* Alfred M. Mamlet, *Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits*, 33 EMORY L.J. 685, 686–87 (1984) (arguing that courts should afford government officials the broadest possible discretion in remedying constitutional violations in institutional or structural cases, rather than imposing detailed requirements).

ecutive discretion in "setting broad enforcement priorities."[249] Again, these points are valid but, like Professor McConnell's argument, focus solely on the impropriety of certain remedies, rather than the existence of a consent decree itself or the concession of liability. Moreover, Professors Rabkin and Devins do not demonstrate that we should be any less concerned about limitations on other areas of traditional executive discretion, such as the promulgation of regulations, interpretation of statutes, or limitations on other agency policies. Thus, while existing critiques of consent decrees raise valid concerns, they do not go far enough in identifying the actual basis and full scope of the problem. While all consent decrees raise justiciability problems, those involving government defendants allow those entities to exceed their statutory authority, improperly entrench their policy preferences, and circumvent traditional legislative and regulatory processes.

IV. NEW APPROACHES TO CONSENT DECREES IN GOVERNMENT-DEFENDANT CASES

This Part recommends reforms to judicial doctrines concerning consent decrees. Section A proposes the most far-ranging solution, urging courts to avoid the justiciability problems of consent decrees by refusing to issue them and requiring litigants—especially government defendants—to execute private settlement agreements instead. In case courts are not willing to implement such a major change, Section B offers a new framework for determining whether to approve consent decrees in government-defendant cases. Most notably, this Section encourages courts to confirm that the plaintiffs have stated valid claims, ensure that the relief is adequately tailored to redressing the challenged harm, and facilitate intervention by third parties to help ensure that these other requirements are satisfied.

A. Settlement Agreements as a Replacement for Consent Decrees

Because consent decrees raise serious justiciability concerns under Article III,[250] courts should decline to issue them and instead require litigants that wish to end litigation voluntarily, on negotiated terms, to execute a settlement agreement. A settlement agreement is a private contract among some or all of the parties to a case that requires termination of the settling plaintiffs' claims. The defendants often

249 Rabkin & Devins, *supra* note 16, at 276–77.

250 *See supra* Part II.

agree to some concession, such as paying the plaintiffs, taking or refraining from certain acts, dismissing counterclaims, or waiving or disclaiming certain alleged rights of their own.

The settlement agreement itself, rather than a court order, specifies the parties' obligations toward each other and, in most cases, the court is not required to review or approve it.[251] As litigants may stipulate to dismiss a case without the court's approval, a court has little or no opportunity to reject most settlements.[252] Indeed, the court may not even see the settlement agreement; many settlement agreements contain confidentiality clauses that prohibit public disclosure of their terms.[253] A settlement agreement is enforceable in the same manner as any other contract: through a breach-of-contract suit for compensatory damages or, if the requirements for equitable relief are satisfied, specific performance.[254]

In general, a claim for breach of a settlement agreement must be brought in state court unless there is an independent basis for federal jurisdiction.[255] The Supreme Court has held, however, that parties to a settlement agreement arising from a federal lawsuit may stipulate that the federal court in which that lawsuit was filed may exercise jurisdiction over disputes concerning the agreement.[256]

Settlement agreements, as a type of contract, do not raise Article III justiciability concerns, because the court is not issuing a substantive order that affirms or alters the parties' legal rights and obligations. Rather, the court simply dismisses the case, which is the procedurally appropriate response when a live controversy no longer exists.[257]

In cases between private parties, the main effect of requiring litigants to use settlement agreements rather than consent decrees is that, when one party fails to satisfy its obligations, the other side must file a breach of contract suit, rather than pursue summary contempt

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251 As discussed below, *see infra* notes 297–98 and accompanying text, courts must approve settlement agreements in class action cases and certain types of federal statutory actions.

252 *See* FED. R. CIV. P. 41(a)(1)(A)(ii).

253 *See* Erik S. Knutsen, *Keeping Settlements Secret*, 37 FLA. ST. U. L. REV. 945, 945–46 (2010).

254 Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 382 (1994).

255 *Id.*

256 *Id.* at 381. At least one circuit has questioned this strategy's efficacy, holding that "jurisdictional retention provisions, even when contained in court orders, will not enable parties to return to federal court to litigate settlement disputes" unless some other basis exists for invoking the court's subject-matter jurisdiction. Anthony DiSarro, *Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 AM. U. L. REV. 275, 305 (2010) (citing Lynch v. Samatamason, Inc., 279 F.3d 487, 489 (7th Cir. 2002)).

257 U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 21 (1994).

proceedings.[258] Using settlement agreements instead of consent decrees would have the biggest impact in government-defendant cases, because settlement agreements allow agencies and officials to voluntarily resolve lawsuits without raising concerns about justiciability, separation of powers, or the defendants' underlying statutory authority. In the event that the government enters into a settlement agreement that declares a legal provision invalid and bars the government from enforcing it, requires the government to apply or enforce a provision in certain ways, or mandates that an agency promulgate particular regulations, a court likely would refuse to enforce the agreement against unwilling officials under the "reserved powers" doctrine.

The reserved powers doctrine provides that a contract in which a governmental entity purports to refrain from enacting particular laws, or from enforcing or interpreting them in particular ways, generally is unenforceable.[259] The doctrine recognizes that "the power of governing is a trust committed by the people to the government, no part of which can be granted away."[260]

> [Government] agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances."[261]

The reserved powers doctrine originally was formulated under the Contracts Clause[262] and applied to the States, but later rulings recognize that it extends to the federal Government, as well.[263] It is a necessary implication of the Constitution itself. Article I, § 8 begins with the phrase, "Congress *shall* have power," and then confers eighteen different powers on it.[264] Allowing the Government to enter into a

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258 For an in-depth discussion of the differences between settlement agreements and consent decrees, see DiSarro, *supra* note 256.

259 Stone v. Mississippi, 101 U.S. 814, 821 (1879).

260 *Id.* at 820.

261 *Id.*; *see also* U.S. Trust Co. v. New Jersey, 431 U.S. 1, 23–24 (1977) (holding that the reserved powers doctrine prevents states from entering into contracts that require them to surrender an attribute of their sovereignty, but not financial agreements); *cf.* V.F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment, 86 A.2d 127, 131 (N.J. 1952) (explaining that the prohibition on "contract zoning" arises from a municipality's inability to contract away part of its police power).

262 U.S. CONST. art. I, § 10.

263 *See* United States v. Winstar, 518 U.S. 839, 888–89 (1996) (plurality opinion); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982). *But see* Alan R. Burch, *Purchasing the Right to Govern:* Winstar *and the Need to Reconceptualize the Law of Regulatory Agreements*, 88 KY. L.J. 245, 264 (1999) ("The reserved powers doctrine is essentially an artifact of legal history.").

264 U.S. CONST. art. I, § 8.

contract limiting or restricting the use of one of those powers effectively would limit or modify that express grant of authority. Just as a statute cannot bar Congress from exercising a constitutionally conferred power,[265] neither may an alternate sub-constitutional instrument, such as a contract.[266]

The reserved powers doctrine is a more generalized version of the "contract zoning" doctrine in land-use law, which many states have adopted. The contract zoning doctrine generally prohibits municipalities and zoning officials from entering into contracts, including settlement agreements, in which they agree to grant variances, rezone parcels of land, or amend master land-use plans.[267] One of the main justifications for this prohibition is that "[z]oning is an exercise of the police power to serve the common good and general welfare. It is elementary that the legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts."[268] The reserved powers doctrine arises from the same considerations.

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265 Marbury v. Madison 5 U.S. (5 Cranch) 137, 178 (1803) ("[I]f both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law . . . the constitution . . . must . . . govern[] the case . . . .").

266 Depending on one's view of the nature of contract, it can be argued that a contract does not absolutely require an obligated party to perform or refrain from the specified acts, but rather gives the obligated party the choice of either satisfying its specified contractual obligations or paying damages to its counterparty. *See, e.g.*, United States v. Blankenship, 382 F.3d 1110, 1133 (11th Cir. 2004) ("[A] contract gives a party two equally viable options (perform or pay compensation), between which it is generally at liberty to choose."). Even under that view of contracts, however, a government defendant may avoid performing the acts specified in a settlement agreement simply by compensating the plaintiffs for the resulting damages, if any. Under a consent decree, in contrast, the court can issue orders and use the coercive powers of civil and criminal contempt to force a government entity into compliance. *See, e.g.*, Spallone v. United States, 487 U.S. 1251 (1988) (upholding a daily fine of $1 million against a municipality until it complied with a court order). Whether the reserved powers doctrine should bar plaintiffs from recovering compensatory damages from a government defendant that breaches a settlement agreement is a separate issue beyond the scope of this Article.

267 *See, e.g.*, Dacy v. Ruidoso, 845 P.2d 793, 797 (N.M. 1992) ("[C]ontract zoning is illegal whenever it arises from a promise by a municipality to zone property in a certain manner . . . ." (emphasis omitted)); Hartnett v. Austin, 93 So. 2d 86, 89–90 (Fla. 1956).

268 V.F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment, 86 A.2d 127, 131 (N.J. 1952); *accord Dacy*, 845 P.2d at 797; *see also* Ford Leasing Dev. Co. v. Bd. of Cnty. Comm'rs of Jefferson, 528 P.2d 237, 240 (Colo. 1974); Haas v. Mobile, 265 So. 2d 564, 566 (Ala. 1972). Other cases explain that contract zoning is illegal because, by promising to "zone property in a specified manner . . . a municipality preempts the power of the zoning authority to zone the property according to prescribed legislative procedures." *Dacy*, 845 P.2d at 797; *see also* Prock v. Town of Danville, 655 N.E.2d 553, 559–60 (Ind. App. 1995).

The "sovereign acts" doctrine is an alternate possible basis upon which a court may refuse to enforce certain settlement agreements or other contracts with government defendants, although its applicability is far less likely following the Supreme Court's ruling in *United States v. Winstar Corp.*[269] The sovereign acts doctrine provides that "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign."[270] Under this principle, "'Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to . . . violate the particular contracts into which it enters with private persons.'"[271] Whereas the reserved powers doctrine focuses on the validity and enforceability of the original agreement, the sovereign acts doctrine imposes some limits on the types of subsequent official actions that may be considered breaches of a generally enforceable agreement.

The sovereign acts doctrine ensures that, if the government enters the marketplace in a "nonregulatory capacity," by executing a contract in the same capacity as a private entity, it does not thereby implicitly limit its ability to act in its sovereign "regulatory capacity."[272] The Court held that the doctrine was inapplicable in *Winstar* because the Government had entered into the contracts at issue there in a "fused" combination of "'regulatory' and 'nonregulatory' capacities."[273] The doctrine likely would be similarly inapplicable to an agreement settling a case challenging the validity, interpretation, or enforcement of a legal provision, because the government would enter any such agreement in "fused" regulatory and nonregulatory capacities, if not exclusively in its regulatory capacity.

A second obstacle to applying the sovereign acts doctrine in this context is that it prevents only "public and general" acts of the government from constituting a breach of a government contract.[274] *Winstar* held that a government act is not public and general "if it has the substantial effect of releasing the Government from its contractual obligations."[275] Although the exact scope of this ruling is not well

269 518 U.S. 839, 891–910 (1996) (plurality opinion).
270 Horowitz v. United States, 267 U.S. 458, 461 (1925).
271 *Id.* (quoting Jones v. United States, 1 Ct. Cl. 383, 384 (1865)).
272 *Winstar*, 518 U.S. at 892–94.
273 *Id.*
274 *Id.* at 895–96 (citing *Jones*, 1 Ct. Cl. at 385).
275 *Id.* at 899.

defined,[276] it is reasonably arguable that, if the Government agrees to refrain from enforcing a legal provision, to interpret or enforce a provision in a particular manner, or to promulgate certain regulations, then any contrary actions would have the "substantial effect" of violating the agreement.

Even if a court rejected all of these doctrines and held that a settlement agreement invalidating, definitively construing, or requiring enforcement of a legal provision were valid, the court would be unlikely to grant specific performance. "[E]ven where courts have found that a legislature is bound by the contractual promises of a former legislature, the remedy is simply damages, not enforcement of a legislative scheme that the future body does not favor."[277] A court also has the further alternative of treating the settlement agreement as rescinded, rejuvenating the original legal challenge. Thus, unlike consent decrees, executive officials cannot use settlement agreements to circumvent statutory limitations on their authority or entrench their preferred constitutional and policy preferences in a legally enforceable manner.[278]

Allowing government defendants to enter into settlement agreements, but not consent decrees, would best balance the competing interests at stake in a public law case. If a government agency or official agrees with a litigant concerning the proper interpretation, application, or enforcement of a legal provision, it is free to voluntarily adopt that approach as an exercise of its executive or prosecutorial discretion,[279] and embody that agreement in a settlement.

Of course, from a plaintiff's perspective, settlement agreements are less desirable than consent decrees because they cannot be enforced through summary contempt proceedings, and future admin-

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276 *See* Connor Bros. Constr. Co. v. Geren, 550 F.3d 1368, 1374–76 (Fed. Cir. 2008) (examining several factors in determining whether the Army's challenged actions were "public and general").

277 John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1781 (2003).

278 To the extent that settlement agreements do pose such a threat, it might be worthwhile to consider whether some or all of this Article's procedural recommendations concerning consent decrees should apply to them. *See infra* Section IV.B. Because litigants have virtually unlimited discretion to dismiss pending litigation by stipulation, FED. R. CIV. P. 41(a)(1)(A)(ii), and courts generally have no opportunity to review, and are not required to approve, settlement agreements, extending this Article's recommendations to such agreements would require more substantial changes to existing rules and procedures.

279 *See* Chevron U.S.A., Inc. v. Natural Res. Defense Council, 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 134 (1944). The fact that the agency performs certain acts or omissions pursuant to a settlement agreement does not change their substantive legality, which may be challenged by adversely affected third parties.

istrations that have different views of the law may choose to abrogate them. As discussed above, the reserved powers doctrine, restrictions on specific performance, and potentially even the sovereign acts doctrine likely would prevent plaintiffs from enforcing agreements against unwilling successors. At most, an aggrieved plaintiff may be able to seek damages or have its agreement vacated and the underlying lawsuit reinstated. These limitations, however, are the unavoidable consequences of agencies' general lack of statutory authority to entrench particular policies or interpretations of the law and irrevocably impose them on their successors.

Despite their limitations, settlement agreements can play a valuable role in allowing plaintiffs to negotiate agreeable resolutions to cases against government defendants. Institutional inertia may contribute to the "stickiness" of settlement agreements, regardless of their legal enforceability. Moreover, if a plaintiff's legal theory is sound and a court likely would rule in its favor, then subsequent administrations would be unlikely to nullify a negotiated settlement.[280] Successor administrations are most likely to abrogate settlement agreements where the plaintiffs' underlying claims are weak or the legal issues are unsettled, but these are precisely the types of cases for which we would not want an incumbent administration to irrevocably bind its successors without a court ruling on the merits, and for which judicial resolution of the issues is desirable. Thus, using settlements instead of consent decrees not only prevents Article III justiciability problems but also, in the context of government-defendant cases, helps prevent government officials and agencies from entrenching their policy preferences and making permanent commitments to which they lack the legal authority to agree.

B. Procedural Safeguards for Consent Decrees in Government-Defendant Cases

If courts are unwilling to abandon the use of consent decrees altogether, then they should implement additional safeguards in gov-

280 *Cf.* Easterbrook, *supra* note 16, at 22–24 (explaining how the likelihood of favorable or adverse court rulings affects parties' incentives); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979) (arguing that "the outcome that the law will impose" if a case is litigated affects the behavior and bargaining of the potential litigants); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984) (arguing that the likelihood that a particular dispute will result in litigation depends on the "expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement").

ernment-defendant cases to alleviate separation-of-powers concerns, ensure that agencies do not agree to decrees that exceed their statutory authority, and minimize improper entrenchment. Individual courts could implement many of the reforms suggested in this Section as exercises of their equitable discretion when considering proposed consent decrees. The Supreme Court similarly might be able to impose most of them through its inherent power over judicial administration.[281] Alternatively, these reforms could be implemented through amendments to either the Federal Rules of Civil Procedure or Title 28.

Subsection 1 discusses the substantive standards courts should employ in reviewing proposed consent decrees in government-defendant cases, and procedural requirements that would aid in such review. Subsection 2 explains the steps courts should take to facilitate intervention in such cases, which could substantially improve their review of proposed decrees under the heightened standards this Article proposes.

1. Standards for Approval

A court should not issue a consent decree in a government-defendant case unless, in addition to the factors set forth in *Local No. 93* being satisfied,[282] the court determines that (i) the plaintiff has stated valid claims and (ii) the relief is closely tailored to remedy the legal violations at issue. Requiring courts to review the legal sufficiency of plaintiffs' claims would go a long way toward remedying one of the main problems with consent decrees in government-defendant cases—that the court lacks a legally valid basis for issuing them.

Because a consent decree is a hybrid between a contract and a court order, its validity depends on either the parties' consent or the court's authority to remedy legal violations. As discussed earlier, agencies generally do not have statutory authority to limit their successors' exercise of their statutorily delegated policy-making, interpretive, or enforcement authority. Thus, a court order validly may impose such restrictions only if they are appropriately tailored responses to actual constitutional or statutory violations.

Courts are well-positioned to engage in these merits-related inquiries. Many government-defendant cases in which a plaintiff seeks injunctive relief (other than a structural or institutional injunction)

281 Hanna v. Plumer, 380 U.S. 460, 472–73 (1965).

282 Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986).

can be resolved largely as a matter of law. They involve challenges to the constitutionality of legal provisions; the substantive validity of agency regulations, policies, or procedures; the sufficiency of the process underlying an agency issuance; an agency's decision to enforce or not enforce a particular legal provision; and the like. The pertinent evidence tends to be "legislative"-type facts contained within the administrative record, which is subject to judicial notice and may be considered in determining whether a complaint states a valid claim.[283]

The Supreme Court adopted a comparable approach toward confessions of error in *Young v. United States*.[284] The *Young* Court held that agreement between the Government and its opponent on a legal principle "does not relieve th[e] Court of the performance of the judicial function."[285] The Court recognized that it has a "judicial obligation[] . . . to examine independently the errors confessed."[286] Although the Court abandoned that approach several decades later,[287] the *Young* Doctrine is well-suited for both confessions of error and proposed consent decrees; it allows courts to ensure that the judicial power is exercised in response only to actual statutory or constitutional violations.

After ascertaining that a plaintiff properly has alleged an actual legal violation, the court also should ensure the propriety of the requested relief. Although government officials and agencies may choose to enact policies and procedures that go beyond the constitutionally or statutorily required minimum, they generally may not bind their successors to those decisions.[288] Because government entities lack statutory power to entrench their policy preferences and limit their successors' discretion, a court should not impose such restrictions through a consent decree unless they are a closely tailored means of remedying a constitutional or statutory violation.

The Prison Litigation Reform Act ("PLRA") already applies a strict variation of this standard to "[p]rospective relief" in litigation con-

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283 *See* Marshall Cnty. Health Care Auth. v. Shalala, 988 F.2d 1221, 1222 (D.C. Cir. 1993) (holding that a district court may examine matters of public record in ruling on a Rule 12(b)(6) motion).

284 315 U.S. 257 (1942).

285 *Id.* at 258.

286 *Id.* at 258–59.

287 Lawrence v. Chater, 516 U.S. 163, 171 (1996) (holding that the Court will accept any "plausible" confession of error without further considering the merits of the underlying issue).

288 *See generally supra* Part III.

cerning "prison conditions."[289] It provides that such relief "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs."[290] The PLRA adds, "The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."[291]

The Supreme Court has applied a comparable standard in fully litigated constitutional cases. In *Dayton Board of Education v. Brinkman*, the Court held that a desegregation remedy may cover only the "incremental segregative effect [that constitutional] violations had on the racial distribution of the . . . school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations."[292] Similarly, in *Califano v. Yamasaki*, the Court reiterated that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief for the plaintiffs," based on the nature of their claims.[293] Imposing such requirements on the scope of relief in consent decrees ensures that government defendants cannot use them as a way of improperly enhancing their authority by gratuitously entrenching their policy preferences and discretionary determinations into law.

The lack of adverseness between the parties seeking a consent decree can hinder a court's ability to accurately determine the legal sufficiency of the plaintiff's claims and the propriety of the requested relief. The next Subsection discusses various steps that courts should take to facilitate intervention by third parties to provide helpful analysis and authorities. Especially because intervenors may not be available to oppose a consent decree, however, the court also should require a government defendant seeking a consent decree to file an *Anders*-type brief, identifying and responding to potential legal argu-

289 18 U.S.C. § 3626(a)(1)(A)(2006).

290 *Id.*

291 *Id.*; *see also id.* § 3626(a)(1)(B)(i)–(iii) ("The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law . . . unless—(i) federal law requires such relief . . . ; (ii) the relief is necessary to correct the violation of a Federal right; and (iii) no other relief will correct the violation of the Federal right.").

292 433 U.S. 406, 420 (1977); *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) (requiring that any race-conscious relief to remedy the effects of past discrimination be "narrowly tailored").

293 442 U.S. 682, 702 (1979).

ments that reasonably could be raised against the plaintiffs' claims or requested relief.

In *Anders v. California*, the Supreme Court established a special briefing requirement for a court-appointed attorney who wishes to withdraw from representing a criminal defendant in a statutorily guaranteed appeal on the grounds that there are no potentially colorable issues to litigate.[294] The Court held that the attorney must file a "brief referring to anything in the record that might arguably support the appeal. . . . [T]he court—not counsel—then proceeds, after full examination of all the proceedings, to decide whether the case is wholly frivolous."[295] These requirements would be somewhat modified in the context of a consent decree, requiring the government defendant to demonstrate that the proposed consent decree satisfies the standards proposed above and respond to a reasonable range of potential counterarguments. If litigants wish a court to memorialize a settlement with a government defendant in an order that binds subsequent administrations—entrenchment of a type to which the government defendant could not consent on its own—it is reasonable to require that the moving parties demonstrate that such relief is legally appropriate.

Courts also generally should be required to hold hearings on proposed consent decrees, at which intervenors can present contrary arguments and the court can question the parties about the sufficiency of the government defendant's *Anders*-type brief. These requirements undoubtedly will increase the time it takes for litigants in government-defendant cases to obtain consent decrees, but such delays almost always accompany the incorporation of additional procedural protections into an administrative or judicial process. Courts already must hold hearings or otherwise engage in substantial reviews of settlements in numerous contexts, such as class actions[296] and antitrust cases,[297] so these requirements should be feasible.

2. Facilitating Intervention

When government defendants seek to enter into consent decrees, the court also should facilitate intervention by third parties to ensure

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294 386 U.S. 738, 744 (1967).

295 *Id.*

296 FED. R. CIV. P. 23(e)(2) (providing that a court may approve a settlement in a class action case "only after a hearing and on finding that it is fair, reasonable, and adequate").

297 15 U.S.C. § 16(e)–(g) (2006) (requiring a court to determine that an antitrust consent decree is in the public interest before approving it).

that the pertinent legal issues are adequately and accurately presented, and that the proposed decree is appropriate. Intervenors' participation can help ensure the accuracy of the court's conclusion by offering a more adversarial presentation of the issues and identify the weaknesses, oversights, and omissions in the settling parties' arguments.

As an initial matter, courts should require government defendants seeking a consent decree to file a public notice and a copy of their *Anders*-type brief in the *Federal Register*. Such notice already is required in antitrust[298] and environmental cases,[299] among others. This notice will alert third parties that intervention may be necessary to defend the legal provision, policy, or governmental act at issue.

Courts also should apply Rule 24's standards for intervention liberally in this context.[300] Third parties seeking to intervene to defend legal provisions or administrative actions that government defendants no longer wish to uphold often face a variety of obstacles. First, some courts have held that, when litigants seek to settle weeks, months, or years after a case was filed, a motion to intervene to attempt to block the proposed settlement is untimely.[301] Timeliness under these circumstances should be measured from the date the motion for a consent decree is filed, not from the outset of the case. The public is entitled to assume that government defendants will vigorously defend against challenges to legal provisions and administrative determinations. They should not be given an incentive to file protective intervention motions at the outset of cases, before a substantial need to intervene has arisen.

Second, some courts also bar litigants from intervening in government-defendant cases on the grounds that defending legal provisions and other governmental acts is the responsibility of the Attorney General, who is presumed to adequately represent putative intervenors' interests.[302] When the Attorney General seeks a consent

298 *Id.* § 16(b).

299 42 U.S.C. § 9622(i)(1) (2006).

300 FED. R. CIV. P. 24.

301 *See, e.g.*, Cnty. of Orange v. Air Cal., 799 F.2d 535, 538 (9th Cir. 1986) ("[T]he fact that [the putative intervenor] waited until after all the parties had come to an agreement after five years of litigation should . . . weigh heavily against [it]."); *see also* Choike v. Slippery Rock Univ., 297 F. App'x 138, 141 (3d Cir. 2008) (holding that intervention was untimely in part because it threatened to "'derail' the settlement").

302 *See, e.g.*, Curry v. Regents of the Univ. of Minn., 167 F.3d 420, 423 (8th Cir. 1999) ("[W]hen a government entity is a party and the case concerns a matter of sovereign interest, the government is presumed adequately to represent the interests of the public."); Edwards v. City of Houston, 78 F.3d 983, 1005 (5th Cir. 1996) ("[W]hen the putative rep-

decree, however, and the adverseness in the underlying case evaporates, an intervenor can help the court confirm that the requirements proposed above for granting a consent decree have been satisfied.[303] Furthermore, if the Attorney General wishes to concede the validity of the plaintiff's claims, then she cannot be adequately representing the interests of private parties that would oppose them.

Third, courts have denied requests for permissive intervention to oppose consent decrees on the grounds that they would prolong the proceedings.[304] As discussed above, however, prolonging proceedings regarding consent decrees is, to some extent, desirable to prevent them from being abused.

Finally, courts should allow intervenors to rely on "piggyback" standing to join cases, rather than requiring them to demonstrate Article III standing in their own right. In general, intervenors are not required to establish their own Article III standing to join a case, but rather may "piggyback" on the standing of the existing parties.[305] Courts typically hold that this piggyback standing evaporates when the district court enters a consent decree. To remain in the case and appeal the decree, an intervenor must establish independent Article III standing, which they often are unable to do.[306]

As discussed in Part II, when litigants reach a consensus and seek judicial approval of a consent decree, a justiciable controversy no longer exists between them, and the court should dismiss the lawsuit rather than enter a substantive order that declares or modifies the parties' rights and obligations. If a court rejects that approach, however, and concludes that it has jurisdiction to enter a consent decree, then the decree should not terminate the existence of the controversy between the litigants until it is finalized through the exhaustion

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resentative is a governmental body or officer charged by law with representing the interests of the absentee, a presumption of adequate representation arises . . . .").

303 *See supra* Subsection IV.B.1.

304 *See, e.g.*, Bloomington v. Westinghouse Elec. Corp., 824 F.2d 531, 536–37 (7th Cir. 1987) (holding that intervention would prejudice the litigants because of the time they had invested in negotiating a settlement).

305 Dillard v. Chilton Cnty. Comm'n, 495 F.3d 1324, 1330 (11th Cir. 2007) ("[I]ntervenors in this circuit may in some cases be permitted to 'piggyback' upon the standing of original parties to satisfy the standing requirement."); *see also* Diamond v. Charles, 476 U.S. 54, 64 (1986) ("[T]his ability to ride 'piggyback' on the State's undoubted standing exists only if the State is in fact an appellant before the Court . . . .").

306 *Dillard*, 495 F.3d at 1336 (holding that intervenors failed to allege a particularized injury-in-fact sufficient to confer Article III standing independent of the original parties); *Diamond*, 476 U.S. at 55 ("[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art[icle] III. ").

of—or expiration of the period for—appellate review. This approach would allow putative intervenors to invoke piggyback standing to appeal the propriety of the decree, particularly if the court adopts the standards that this Article recommends.

CONCLUSION

A consent decree is a potent mechanism through which government agencies and officials can impose legal obligations on their successors, entrench their policy preferences, and limit the discretion of future administrations. They are much more pernicious than settlement agreements because critical limitations, such as the reserved powers doctrine and the general prohibition on specific performance of government contracts, do not apply to them.

Consent decrees exceed the bounds of courts' Article III powers. When litigants reach agreement on their respective rights and seek a consent decree from the court, neither adverseness nor a justiciable controversy continues to exist between them. The proper course is for the court to direct the parties to embody their understanding in a settlement agreement and dismiss the case, rather than issuing a substantive order that declares, establishes, or modifies the parties' legal obligations without adversarial testing or argument.

In most cases, the use of a consent decree rather than a settlement agreement affects only the remedies available to the litigants for alleged breaches. Settlement agreements may be enforced only through breach-of-contract claims, while consent decrees may be enforced through summary contempt proceedings. In government-defendant cases, however, the limitations that apply to government contracts ensure that government agencies and officials cannot use settlement agreements to exceed their statutory authority by entrenching their policy preferences and limiting their successors' statutorily conferred discretion. Because courts generally do not apply such limitations to consent decrees and subject them to only a minimal level of scrutiny,[307] government entities can use them to elevate discretionary legal interpretations and policy determinations into legally binding mandates and restrictions on their successors. If courts continue to issue consent decrees despite the Article III adverseness concerns, then they should limit the potential for abuse by requiring a government defendant seeking one to demonstrate that the plain-

307 *See supra* Part I.

tiff has stated valid claims and that the relief is an appropriate remedy for the violations at issue.

CIVIL RIGHTS ✦ BLOG ESSAY

NOVEMBER 13, 2024

Defending Consent Decrees in the Wake of *Horne v. Flores*

ALAIZAH KOORJI

CONSENT DECREES HAVE LONG BEEN USED BY FEDERAL COURTS TO vindicate basic constitutional and civil rights. In the years following the U.S. Supreme Court's decision in *Horne v. Flores*, however, state defendants and courts have overstated that decision's federalism concerns, threatening to weaken hard-fought institutional reform orders and consent decrees in areas like voting rights, educational equity, police and prison reform, and environmental regulation.

Institutional reform litigation is essential to protecting vulnerable communities against governmental harms — from limiting police officers' use of chokeholds and other deadly force, to requiring that immigration authorities provide children with soap, blankets, and toothbrushes in

detention. In many institutional reform cases, plaintiffs bring suit in federal court for violations of their federal rights and seek broad remedies to fix illegal state and local practices. Sometimes institutional reform litigation resolves by a consent decree — which functions both as a private settlement between parties and a judicial order. These court-enforced agreements provide a roadmap to bring state and local defendants into compliance with federal law.

That progress has been jeopardized by the weaponization of a 2009 Supreme Court case, *Horne v. Flores*, in which the Supreme Court considered a motion to terminate an institutional reform order. The lawsuit was originally brought by a class of English Language Learner (ELL) students who alleged that Arizona, its State Board of Education, and the Superintendent of Public Instruction violated the Equal Educational Opportunities Act of 1974, a federal law that requires states to take "appropriate action to overcome language barriers" in schools. In that case, the district court ordered the State to implement measures to improve ELL instruction. Years later, the State moved to terminate the order under FRCP (60)(b)(5) because, though it had not complied with the order, the legislature had recently enacted a bill that increased ELL funding. The lower courts denied the State's motion, but the Supreme Court remanded the case, directing the district court to properly consider the changed circumstances — *i.e.* the new legislation — that might have rendered continued enforcement of the order inequitable. The *Horne* Court explained that institutional reform litigation raises sensitive federalism concerns that can affect local and state policymaking for many years. But, in directing courts to engage in a balancing test, the Court also explained that "[i]t goes without saying that federal courts must vigilantly enforce federal law and must not hesitate in awarding necessary relief."

The holding in *Horne v. Flores* was not groundbreaking, and it certainly did not cast doubt on the constitutionality of institutional reform orders, whether arrived at by consent decree or a judicial order like the one at issue in that case. Nevertheless, critics of federal judicial oversight and institutional reform have misrepresented the Court's holding and overstated *Horne*'s federalism concerns. Namely, critics take issue with how long such decrees operate; they would have plaintiffs advocate within the political branches rather than seek decades-long federal supervision that they contend impinges upon state sovereignty. Critics also argue that these consent decrees are undemocratic because they bind

policymakers to the decisions of their predecessors and hamstring them from addressing the present-day needs of their constituents. But *Horne v. Flores* should not be read to needlessly limit the power of federal courts, and advocates of institutional reform should respond to the foregoing arguments with three principal defenses:

1. Consent decrees are often the only way for marginalized groups to vindicate their rights.

Advocates should emphasize that the human beings behind institutional reform litigation turn to federal courts in the face of grave and sometimes life-threatening harms. These are plaintiffs who often hold minority identities and who — by design — lack power to have their voices heard in the political process. Plaintiffs include, for instance, Black voters whose political power has been systemically denied and diluted across local, state and federal elections. In the town of Newbern, Alabama, Black voters had been deprived of the opportunity to participate in mayoral elections since 1965 — with mayoral seats "passed down" to almost all white residents for decades — until a 2024 institutional reform settlement in *Braxton v. Stokes*. Before the State of Louisiana entered into a 1992 consent decree in *Chisom v. Edwards* to remedy illegal vote dilution in Orleans Parish, Black voters were not represented on the Louisiana Supreme Court for 179 years. And — on the federal level — until a district court ordered the creation of a majority-Black congressional district in 1992, Alabama had elected no Black representatives to the United States Congress "[f]or the first 115 years following Reconstruction."

Other disempowered groups who rely on institutional reform are Black and Brown children whose schools are still racially segregated and woefully underfunded compared to schools attended by their white peers, low-income communities subject to racial profiling and police brutality, and incarcerated people who face overcrowded prisons and physical abuse. Not only have these plaintiffs been stripped of sufficient power to have sway within their state's legislative and executive bodies, it is often these very parts of government that are responsible for perpetuating the harms they challenge.

Where it's simply not feasible to obtain immediate relief through the political branches, federal courts should not shut the courthouse door to marginalized groups and abdicate their duty to enforce basic rights.

2. Essential to our democracy, consent decrees protect constitutional and civil rights, not policy choices.

Consent decrees are not "undemocratic." To the contrary, institutional reform claims arise under laws that are fundamental to our democracy and the protection of our country's most vulnerable: the Voting Rights Act, the Civil Rights Act, the Fourth Amendment, the Eighth Amendment, and the Equal Protection and Due Process Clauses.

The argument that policymakers should not be held to the decisions of their predecessors ignores that policymakers are not entitled to violate federal law at any point. Indeed, consent decree mandates such as desegregating a school, providing incarcerated people with clean water or ending discrimination in the workplace do not constitute "policy choices" that are up for debate, regardless of evolving policy preferences in the electorate. A Secretary of State who enters into a consent decree to remedy violations of the Voting Rights Act does not meaningfully restrict the policy decisions of a subsequent Secretary of State because they are similarly prohibited from flouting that federal law. Moreover, such consent decrees serve policymakers and their successors, who could otherwise be saddled with the costs of complex litigation and the stigma of being found liable for a civil rights violation.

3. While implementing durable remedies under consent decrees may take time, there is also a mechanism under the Federal Rules that affords state actors flexibility in their compliance.

Institutional reform requires state and local actors to fix entrenched and seemingly intractable systems, root and branch. Such a "durable remedy," as articulated in *Horne v. Flores*, is necessary to ensure that constitutional violations are addressed and that liable state actors won't immediately revert to

committing the same violations once the decree is lifted. A voting rights consent decree, for example, may require legislation that redraws voting districts, followed by a few election cycles and other indicia that shows that the illegal vote dilution at issue has been remedied. A school desegregation consent decree may require significant adjustments to school budgets, restructuring the school curriculum, and constructing new facilities. While these measures can take decades to implement, they obviate the need for piecemeal litigation and ensure that the state achieves a long-lasting solution.

Though critics bemoan the length of time that consent decrees remain in place, the slow pace of change is often attributable to state actors defying the terms of the decree in bad faith and refusing to uphold their end of the bargain. Take, for example, a consent decree between the United States and the State of Michigan that required the State to improve conditions related to healthcare, overcrowding, and safety in three correctional facilities. Because the State violated various provisions of the consent decree and failed to "exhibit[] the commendable history of cooperation and good faith" seen in other cases, the decree remained in place for longer to ensure the State's compliance. By contrast, where defendants take corrective action in good faith, they can successfully move the court to end judicial supervision. This was the case in *Consumer Advisory Board. v. Harvey*, where a state mental health institution in Maine entered into a consent decree to address allegations of inhumane treatment and involuntarily confining residents. The district court held that the consent decree was not meant to last in perpetuity and granted termination because the State had "exhibited a demonstrable commitment to achieving compliance with the Decree over the last decade."

To the extent that state actors are truly unable to perform their core governance functions, or that circumstances on the ground have changed such that the terms of the decree are no longer equitable and require modification, FRCP 60(b)(5) provides a safety valve for state actors so long as they meet their evidentiary burden. In *Parton v. White*, the State of Missouri successfully moved for modification of a correctional facilities consent decree, with the Eighth Circuit agreeing that unanticipated increases in the prison population made compliance with the original decree "substantially more onerous and detrimental to the public interest."

Finally, it is notable that institutional reform compliance has evolved over time. In the past, this form of litigation prescribed rigid, top-down remedies; now, it is often characterized by collaboration between the parties and stakeholders and ongoing revision.

Thus, FRCP 60(b)(5) provides a well-worn path for state actors to modify or terminate an institutional reform order to address *Horne v. Flores*'s federalism concerns.

Conclusion

Whether to violate a person's constitutional or civil rights is not an issue about which policymakers can reasonably differ. And consent decrees ensure that culpable state actors — no matter who personally holds those offices — fulfill the contractual terms to which they agreed. The ultimate dictate of *Horne v. Flores* is that courts must balance safeguarding federal rights with state and local interests when conducting the FRCP 60(b)(5) analysis. The Court's cautions regarding federalism should not be read to upend this framework or erode an essential area of civil and constitutional law.

Advocates can and should highlight the human beings behind institutional reform cases, as they are often without other recourse outside of federal courts to challenge serious state-sanctioned harms. And if there is a legitimate reason why enforcement of a decree is inequitable — be it budget fluctuations, population shifts, or changes to underlying circumstances — those local practicalities can be addressed through FRCP 60(b)(5), which allows institutional reform decrees to be malleable upon a proper evidentiary showing.

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CHAPTER 228

APPROVAL # 75

LAWS OF 19 77

SENATE BILL 6833 ASSEMBLY BILL _____

S. 6833 A. 8982

1977-1978 Regular Sessions

SENATE-ASSEMBLY

June 29, 1977

IN SENATE—Introduced by Sens. PADAVAN, CONKLIN, VOLKER, SCHERMERHORN, FARBER, PERRY, GAZZARA, NOLAN—read twice and ordered printed, and when printed to be committed to the Committee on mental Hygiene and Addiction Control

IN ASSEMBLY—Introduced by COMMITTEE ON RULES—(at the request of M. of A. Connelly, McCabe, Fink, Frey, Dearie, Walsh, Digge, Schimminger, Engel, Abramson, Friedman, Robach)—read once and referred to the Committee on Rules

AN ACT to amend the mental hygiene law, in relation to effecting a reorganization of the department of mental hygiene and to repeal certain provisions thereof relating thereto

Bill compared by _____

DATE RECEIVED BY GOVERNOR:

ACTION MUST BE TAKEN BY:

GOVERNOR'S ACTION:

DATE AUG 11 1977

Memorandum No. _____

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SENATE VOTE 51 Y 1 N

Date July 7, 1977

ASSEMBLY VOTE 99 Y 14 N

Date 7/7/77

Bill is disapproved

Counsel to Governor

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SENATE JOURNAL
JUL 7 1977
PAGE 52

1977

SENATE

The Senate Bill
by Mr. PADAVAN et al. Calendar No. 1829 Senate No. 6833
Assem. Rept. No. _____
Entitled: "

S. 6833
AN ACT to amend the mental hygiene law, in relation to effecting a reorganization of the department of mental hygiene and to repeal certain provisions thereof relating thereto

" was read the third time DEBATE WAS HAD THEREON

The President put the question whether the Senate would agree to the final passage of said bill, the same having been printed and upon the desks of the members in its final form at least three calendar legislative days, and it was decided in the affirmative, a majority of all the Senators elected voting in favor thereof and three-fifths being present, as follows:

AYE	Dist.		NAY	AYE	Dist.		NAY
	47	Mr. Anderson			15	Mr. Knorr	
	49	Mr. Auer			1	Mr. LaValle	
	16	*Mr. Babbush*			29	*Mr. Leichter*	
	45	Mr. Barclay			8	Mr. Levy	
	18	*Mr. Bartosiewicz*			22	*Mr. Lewis*	
	23	*Mr. Beatty*			50	Mr. Lombardi	
	25	*Ms. Bellamy*			24	Mr. Marchi	
	33	*Mr. Bernstein*	EXCUSED		5	Mr. Marino	
	19	*Mr. Bloom*			48	Mr. Mason	
	12	*Mr. Bronston*			28	*Mr. McCall*	
	41	Mr. Bruno			59	Mr. McFarland	
	9	*Ms. Burstein*			42	*Mr. Nolan*	
	7	Mr. Caemmerer			27	*Mr. Ohrenstein*	
	34	Mr. Calandra			17	*Mr. Owens*	
	21	Mr. Conklin			11	Mr. Padavan	
	46	Mr. Donovan			60	Mr. Paterson	
	6	Mr. Dunne			53	*Mr. Perry*	
	54	Mr. Eckert			36	Mr. Pisani	
	10	Mr. Farber	EXCUSED		57	Mr. Present	
	44	Mr. Farley			39	Mr. Rolison	
	35	Mr. Flynn			31	*Mr. Ruiz*	
	32	*Mr. Galiber*			40	Mr. Schermerhorn	
	30	*Mr. Garcia*			2	Mr. Smith, B.C.	
	14	*Mr. Gazzara*			51	Mr. Smith, W.T.	
	13	*Mr. Gold*			43	Mr. Stafford	
	26	Mr. Goodman			55	*Mr. Tauriello*	
	37	Mr. Gordon			3	Mr. Trunzo	
	56	*Mr. Griffin*			58	Mr. Volker	
	20	*Mr. Halperin*			52	Mr. Warder	
	4	Mr. Johnson			38	*Mrs. Winikow*	

AYES 57
NAYS 1

Ordered, that the Secretary deliver said bill to the Assembly and request its concurrence therein.

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No. 3-145 (Vacancy in Dist. 48)

1977

(Republicans in Italics)

Those Who Voted In the Affirmative	Those Who Voted In the Negative	Those Who Voted In the Affirmative	Those Who Voted In the Negative	Those Who Voted In the Affirmative	Those Who Voted In the Negative
Mr. ~~Abramson~~		Mr. Gorski		Mr. ~~Mrazek~~	
Miss Amatucci		Mr. Gottfried		*Mr. Murphy (G.A.)*	
Mr. ~~Barbaro~~		Mr. Graber		Mr. Murphy (M.J.)	
Mr. Bersani		Mr. Grannis		Mr. Nadler	
Mr. Betros		Mr. Greco		*Mr. Nagle*	
Mr. Bianchi		Mr. Greenberg		Mr. Nicolosi	
Mr. Boyland		Mr. Griffith		Mr. Nine	
Mr. Brewer		*Mr. Gulotta*		*Mr. Nortz*	
Mr. Burns		*Mr. Hanna*		Mr. Orazio	
Mr. Burrows		*Mr. Hannon*		Mr. Passannante	
Mr. Bush		Mr. Harenberg		Mr. ~~Pesce~~	
Mr. Butler		*Mr. Harris*		Mr. Posner	
Mr. Calogero		*Mr. Hawley*		Mr. Proud	
Mr. Cincotta		*Mr. Healey*		*Mr. Rappleyea*	
Mr. Cochrane		*Mr. Henderson*		*Mr. Reilly*	
Mrs. Connelly		*Mr. Herbst*		*Mr. Riford*	
Mr. Conners		Mr. Hevesi		Mr. Robach	
Mr. Connor		Mr. Hinchey		*Mr. Ross*	
Mr. Cook		Mr. Hochbrueckner		*Mr. Ryan (A.W.)*	
Mr. Cooperman		Mr. Hoyt		Mr. Ryan (E.F.X.)	
Mr. Culhane		*Mr. Hurley*		Mr. Schimminger	
Mr. Daly		Mr. Keane		Mr. Schmidt	
Mr. D'Amato		*Mr. Kelleher*		Mr. Schumer	
Mr. D'Andrea		Mr. Kidder		*Mr. Sears*	
Mr. Dearie		Mr. Koppell		Mr. Serrano	
Mr. DelliBovi		Mr. Kremer		Mr. Siegel	
Mr. Del Toro		Mr. Lafayette		Mr. Silver	
Mr. DeSalvio		Mr. Landes		*Mr. Solomon*	
Mr. DiCarlo		*Mr. Lane*		Mr. Stavisky	
Mrs. Diggs		Mr. Lasher		Mr. Stein	
Mr. Dokuchitz		*Mr. Lee*		*Mr. Stephens*	
Mr. Duryea		Mr. Lehner		Mr. Strelzin	
Mr. Dwyer		Mr. Lentol		Mr. Sullivan (E.C.)	
Mr. Emery		*Mr. Levy*		*Mr. Sullivan (P.M.)*	
Mr. Engel		Mr. Lewis		Mr. Tallon	
Mr. Esposito		Mrs. Lipschutz		*Mr. Tills*	
Mr. Eve		*Mr. Lopresto*		Mr. Vann	
Mr. Farrell		Mr. Marchiselli		*Mr. Velella*	
Mr. Ferris		*Mr. Marshall*		Mr. Virgilio	
Mr. Field		*Mr. Martin*		Mr. Walsh	
Mr. Fink		Mr. McCabe		*Mr. Warren*	
Mr. Finneran		Mrs. McGee		Mr. ~~Hoyle~~	
Mr. Flack		*Mr. McGrath*		Mr. Weprin	
Mr. Flanagan		Mr. McInerney		*Mr. Wertz*	
Mr. Fortune		*Mr. Mega*		Mr. Wilson	
Mr. Fremming		Mr. Miller (G.W.)		Mr. Yevoli	
Mr. Frey		*Mr. Miller (H.M.)*		*Mr. Zagame*	
Mr. Friedman		Mr. Miller (M.H.)		Mr. Zimmer	
Mr. Goldstein		Mr. Mirto		Mr. ~~Zweibel~~	
Mrs. Goodhue		*Mr. Molinari*			

AYES ..... 99 .....

NOES ..... 44 .....

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STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

AUG 11 1977

MEMORANDUM filed with the following bills:

Senate Bill Number 6833, entitled:

CHAPTER # 978
APPROVAL # 75

"AN ACT to amend the mental hygiene law, in relation to effecting a reorganization of the department of mental hygiene and to repeal certain provisions thereof relating thereto"

Senate Bill Number 6856, entitled:

CHAPTER # 654
APPROVAL # 76

"AN ACT to amend the mental hygiene law, in relation to demonstration programs"

Assembly Bill Number 7957, entitled:

APPROVAL # 778
77

"AN ACT to amend the social services law, in relation to medical assistance for the mentally retarded in certain treatment programs"

Assembly Bill Number 7956-A, entitled:

CHAPTER # 777
APPROVAL # 78

"AN ACT to amend the mental hygiene law and the social services law, in relation to parental liability for fees and the family court act in relation to duties to support recipient of public assistance or welfare in certain institutions"

Assembly Bill Number 8990, entitled:

CHAPTER # 656
APPROVAL # 79

"AN ACT to amend the mental hygiene law, in relation to fees for services rendered patients committed to the department of mental hygiene pursuant to section 330.20 of the criminal procedure law"

Senate Bill Number 6249-A, entitled:

CHAPTER # 660
APPROVAL # 80

"AN ACT to amend the mental hygiene law and the social services law, in relation to state financial support for persons who have been long-term patients of state facilities for the care and treatment of the mentally disabled"

A P P R O V E D

Together, these bills constitute a comprehensive program designed to reshape New York State's system of services for the mentally ill, the mentally retarded and developmentally disabled, the alcoholics and substance abusers, and those suffering from multiple disabilities. These bills will enable continued evolution in these essential service areas, enhancing our State and local governments' capacity to achieve our objectives of securing more humane and effective care and treatment for all the State's mentally disabled citizens.

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Originally proposed in my Annual Message to the Legislature at the beginning of this legislative session, these bills took their final shape and form through extensive discussions among executive and legislative staffs and hundreds of representatives of mental hygiene service providers and consumers throughout the State. There have been few occasions in which so many have had as large an active role in the development of a major legislative program which will affect the lives of millions of New Yorkers.

The specific accomplishments of this legislation include the following:

- The existing Department of Mental Hygiene and the Office of Drug Abuse Services will be re-established as three autonomous offices -- an Office of Mental Health, an Office of Mental Retardation and Developmental Disabilities, and an Office of Alcoholism and Substance Abuse. The Office of Alcoholism and Substance Abuse will be composed of a Division of Alcoholism and Alcohol Abuse, a Division of Substance Abuse Services and Commission on Alcohol and Substance Abuse Education and Prevention. Through this structure, it will be possible to develop programs and standards for care more specifically suited to the needs of the client groups the State is attempting to serve.

- The needs of the multiply disabled will be recognized in statute for the first time, with the heads of each of the new offices having specific responsibilities for identifying their multiply disabled clients and assuring the provision of appropriate services to them. Specific provisions of the program will guard against unnecessary fragmentation in the delivery of services to the multiply disabled.

- State and local relationships for the planning and delivery of services to the mentally disabled will be altered, giving local governments opportunities for expanded service roles. A five year cooperative effort among the State, local governments and other providers of services will be initiated.

- Chapters 620 and 621 of the Laws of 1974 which provide for full State support of the net costs of community services and support for former long-term residents of State mental hygiene facilities will be liberalized. The legislation is intended to facilitate rational deinstitutionalization, without additional local costs, of facility residents who can be more appropriately served by programs of community care.

- Income derived from the operation of sheltered workshops for the mentally retarded by voluntary agencies will be exempted from the definition of net operating costs which are eligible for State aid reimbursement. This legislation will introduce added incentives for the establishment of the sheltered workshops which are vital components of day programs for the mentally retarded.

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- Financial liability of parents for the support of disabled children living away from home will be eliminated. This legislation, with financial advantage to the State, will eliminate inequities which exist with respect to the financial liabilities of parents whose disabled children cannot be provided appropriate services in their home communities.

- Local governments will be relieved of the cost of care for persons committed to the custody of the Commissioner of Mental Hygiene after having been acquitted on criminal charges by reason of insanity.

- Provisions of the Social Services Law will be clarified in order to facilitate implementation of a program to provide medical assistance, without local financial obligation, for mentally retarded individuals in day treatment programs, operated either directly or under contract, of intermediate care facilities for the mentally retarded. This program will facilitate the establishment of community-based services for the mentally retarded at no expense to local governments.

These are sound accomplishments. While they do not solve all the problems which inhibit the more effective delivery of services to the mentally disabled, they will contribute to more effective and efficient use of available funds. They also provide a sound foundation for the commitment of additional resources to this service area. As I indicated in my Message to the Legislature transmitting this program, it reflects the recognition of constituent groups that it would be unwise to seek progress for any particular group at the expense of another.

Each of these bills has been developed by my staff not only with the active support and assistance of consumer and provider groups throughout the State but also with the benefit of the insights and perspectives of members of the Assembly Committee on Mental Hygiene under the leadership of Elizabeth Connelly and the Senate Committee on Mental Hygiene and Addiction Control under the leadership of Senators Padavan, Conklin, Perry and Volker. Enactment of these bills is a tribute to the ability of the Legislature and Executive, with the assistance of able staff, to act decisively on a major program for the betterment of the care, treatment and rehabilitation of the mentally disabled.

The bills are approved.

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S 8982 AR 4476

8982 Rivera 7/7/77

GOVERNOR'S PROGRAM BILL

1977

JUL 8 1977

M E M O R A N D U M

RE: AN ACT to amend the mental hygiene law, in relation to effecting a reorganization of the department of mental hygiene and to repeal certain provisions thereof relating thereto

Subj: SB 6833 (Padavan, Conklin, Volker et al) Program Bill

Purpose ~~of the bill~~:

To create three new autonomous offices in the Department of Mental Hygiene -- the Office of Mental Health, the Office of Mental Retardation and Developmental Disabilities and the Office of Alcoholism and Substance Abuse.

Summary of provisions:

Recodifies the existing Mental Hygiene Law by grouping the law into five titles and twenty-one articles as follows:

TITLE A - ORGANIZATION OF DEPARTMENT OF MENTAL HYGIENE

Art. 1 - Short titles and definitions -- creates definitions needed to implement the reorganizational triad. Except for the most limited generic and constitutionally required functions, the term "department" would refer to the Offices created by this bill.

Additionally, the term "developmental disabilities" is inserted. This definition follows Federal statutory law (see U.S.C.A. Sec.6001(7)(Supp. 1976)) except that there is specific mention of the "neurologically impaired" within the definition. The term "Commissioner" is defined as the Commissioner of Mental Health, the commissioner of mental retardation and developmental disabilities, the director of the division for alcoholism and alcohol abuse, and the director of the division of substance abuse services.

Several other minor definitional adjustments are made.

Art. 5 - Department of mental hygiene -- creates three new autonomous offices in the Department of Mental Hygiene - the Office of Mental Health, the Office of Mental Retardation and Developmental Disabilities, and the Office of Alcoholism and Substance Abuse.

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A. 8982

§ 5.01 Department of Mental Hygiene

Derivation of Section. This section is partly derived from MHL Sections 7.01 and 7.03 and partly new.

Substantive Changes. This section creates the three autonomous offices within the department: The Office of Mental Health; the Office of Mental Retardation and Developmental Disabilities and the Office of Alcoholism and Substance Abuse.

§ 5.03 Commissioners

Derivation of Section. This section is derived from MHL Section 7.03.

Substantive Changes. This section authorizes the appointment by the Governor, with the advice and consent of the Senate, of Commissioners of the Office of Mental Health, Office of Mental Retardation and Development Disabilities and of the members of the Commission on Alcohol and Substance Abuse Prevention and Education.

§ 5.05 Powers and duties of the head of the department

Derivation of Section. This section is new.

Substantive Changes. This section requires the Commissioners of the Offices Health and Mental Retardation and Developmental Disabilities to satisfy the constitutional mandate that the head of the department of mental hygiene provide for the visitation and inspection of all facilities either public or private used for the care and treatment of persons suffering from mental disability. (N.Y.S. Const., Art. XVII, Sec. 4)

Additionally, it establishes an inter-office coordinating council of the Commissioners of the Office of Mental Health and Mental Retardation and Developmental Disabilities and the Directors of the Divisions of Alcoholism and Alcohol Abuse, and Substance Abuse which will ensure that services are provided to the multiply disabled; coordinate cooperative efforts of the research institutes within each office; and to meet from time to time with the Conference of Local Mental Hygiene Directors.

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A. 8988

§ 5.07 Council for mental hygiene planning; statewide goals and objectives; statewide comprehensive plan of services for the mentally disabled

Derivation of Section. This section is derived from MHL Section 7.06.

Substantive Changes. The composition of the Council for Mental Hygiene Planning is altered slightly to ensure representation of the state, local government, non-governmental organizations and consumers. It is also changed so that the Commissioners and Directors of the Offices and Divisions established by this act serve as ex officio members of the Council. Each of the Commissioners is charged with the responsibility of preparing that portion of the statewide five-year plan which pertains to his area of responsibility.

§ 5.09 Facilities development corporation

Derivation of Section. This section is derived from MHL Sections 7.13(e) and 9.25.

Substantive Changes. None.

TITLE B - MENTAL HEALTH ACT

Art. 7 - Office of mental health -- sets out the organizational structure and operational functions of the newly created Office of Mental Health.

§ 7.01 Declaration of Policy

Derivation of Section. This section is derived from MHL Section 1.03.

Substantive Changes. This section has been reworded to deal only with the care and treatment of the mentally ill.

§ 7.03 Definitions

This section is new.

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§ 7.05 Advisory council on mental health; advisory committee on children and youth

Derivation of Section. Subdivision (a) is derived from MHL Sections 7.06 and 7.07. Subdivision (b) is new.

Substantive Changes. Subdivision (a) creates an advisory council on mental health that will assist the Commissioner of Mental Health and the Council for Mental Hygiene Planning in planning services to the mentally ill. Membership requirements comply with P.L. 94-63 and the regulations issued thereunder.

Subdivision (b) creates a new advisory committee that will assist the Commissioner of Mental Health in developing programs and policies for the care and treatment of mentally disturbed children.

§ 7.07 Office of mental health; scope of responsibilities

Derivation of Section. This section is derived from MHL Section 7.05(a), (c) and (d).

Substantive Changes. This section charges the Office for Mental Health with carrying out those responsibilities relating to the mentally ill formerly carried out by the Department of Mental Hygiene.

§ 7.09 Powers of the office and commissioner; how exercised

Derivation of Section. This section is partially derived from MHL Section 9.01 and is partly new.

Substantive Changes. Subdivision (a) empowers the Commissioner of Mental Health to enter into agreements with other Commissioners of the Department to assist him in carrying out the functions and duties assigned to him.

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Subdivision (b) deletes the second sentence of Section 9.01(a) which refers to the Mental Hygiene Council which is to be abolished.

§ 7.11 Organization and administration of the office of mental health and its facilities.

Derivation of Section. Subdivisions (a) and (b) are derived from MHL Section 7.13. Subdivision (c) is derived from MHL Section 7.15(c).

Substantive Changes. Subdivision (a) places the psychiatric centers formerly under the jurisdiction of the Department and its Commissioner under the jurisdiction of the Office of Mental Health and its Commissioner to enable the Office to carry out fully the responsibilities assigned to it by this Article.

Subdivision (c) places the State's psychiatric institutes under the jurisdiction of the Commissioner of Mental Health.

§ 7.13 Local services

Derivation of Section. This section is new.

Substantive Changes. This section provides that planning and funding of services to the mentally ill by local governments shall be in accordance with the provisions of Article 41 (This bill renumbers existing Article 11 of the Mental Hygiene Law to be Article 41) of this Chapter.

§ 7.15 Programs of the office of mental health

Derivation of Section. This section is derived from MHL Section 9.03.

Substantive Changes. MHL Section 9.03 has been revised to pertain to mental illness and the Office of Mental Health only.

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§ 7.17 Programs, services, and operation of facilities in the office of mental health

Derivation of Section. Subdivisions (a), (c) and (d) are derived from MHL Section 9.05. Subdivision (b) is derived from MHL Section 7.15.

Substantive Changes. Section 9.05 has been revised to pertain only to the Office of Mental Health and the mentally ill. The language of new Section 7.17(d) reflects the new structure of the Department.

§ 7.19 Personnel of the office

Derivation of Section. This section is derived from MHL Section 7.11.

Substantive Changes. None.

§ 7.21 Directors of facilities

Derivation of Section. This section is derived from MHL Section 7.17.

Substantive Changes. Subdivisions (c) and (d) have no major changes other than the revisions to make them pertain to the Office of Mental Health and the mentally ill.

Subdivision (b) has been modified to require directors to immediately notify the Mental Health Information Service of alleged incidents of patient abuse.

§ 7.23 Education and training

Derivation of Section. This section is derived from MHL Section 9.09.

Substantive Changes. This section has been revised to pertain to education and training programs in the Office of Mental Health only.

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§ 7.25 Safety

Derivation of Section. This section is derived from MHL Section 9.15.

Substantive Changes. None.

§ 7.27 Facility services

Derivation of Section. Subdivision (a) of this section is based on MHL Section 9.17. Subdivision (b) is derived from MHL Section 9.19, subdivision (c) is derived from MHL Section 9.21, and subdivision (d) is based on MHL Section 9.23.

Substantive Changes. These four miscellaneous sections are grouped together as one section called "facility services". All four subdivisions have been revised to pertain to facilities under the jurisdiction of the Office and Commissioner of Mental Health.

§ 7.29 Gifts

Derivation of Section. This section is derived from MHL Section 9.27.

Substantive Changes. This section has been revised so that it pertains to the Commissioner and Office of Mental Health.

§ 7.31 Disposition of moneys and securities

Derivation of Section. This section is derived from MHL Section 9.31.

Substantive Changes. This section has been revised so that it pertains to disposition of moneys and securities by the Commissioner and Office of Mental Health.

§ 7.33 Boards of visitors

Derivation of Section. This section is derived from MHL Section 7.19.

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Substantive Changes. This section has been revised so that it pertains to Boards of Visitors in psychiatric centers (hospitals) under the jurisdiction of the Office and Commissioner of Mental Health only. No other substantive revisions have been made in MHL Section 7.19.

§ 7.35 Civil actions against mental health volunteers; indemnity

Derivation of Section. This section is derived from MHL Section 9.11.

Substantive Changes. This section has been revised to pertain to civil actions against volunteers in programs of the Office of Mental Health only.

Art. 9 - Hospitalization of the mentally ill -- incorporates existing Article 31 of the Mental Hygiene Law as Article 9. Prior to making this incorporation Article 31 is amended to enable admission of mentally ill alcoholic patients to be admitted to alcoholism facilities operated by psychiatric centers under contract with the Office of Alcoholism and Substance Abuse.

TITLE C - MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES ACT

Art. 13 - Office of mental retardation and developmental disabilities -- sets out the organizational structure and operational functions of the newly created Office of Mental Retardation and Developmental Disabilities.

§ 13.01 Declaration of policy

Derivation of Section. This section is new.

Substantive Changes. This section sets forth the direction and goals of the new Office of Mental Retardation and Developmental Disabilities. It is the policy on which the organization and duties of the Office are to be based.

§ 13.03 Definitions

Derivation of Section. This section is new.

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§ 13.05 Advisory council on mental retardation and developmental disabilities

Derivation of Section. This section is derived from MHL Sections 7.06 and 7.07.

Substantive Changes. This section creates a new Advisory Council for Mental Retardation and Developmental Disabilities that will assist the Commissioner of Mental Retardation and Developmental Disabilities and the Council for Mental Hygiene Planning in planning services for the mentally retarded and developmentally disabled.

§ 13.07 Office of mental retardation and developmental disabilities; scope of responsibilities

Derivation of Section. This section is derived from MHL Section 7.05, except subdivision (b) which is new.

Substantive Changes. This section charges the Office of Mental Retardation and Developmental Disabilities with carrying out those responsibilities relating to the developmentally disabled formerly carried out by the Department of Mental Hygiene. Subdivision (b) assigns the Office with the new responsibility of advising and assisting the Governor in the development of statewide policies relating to the developmentally disabled.

Subdivision (d) charges the Office with carrying out the provisions of Article 31 as it relates to quality control of services to the developmentally disabled.

§ 13.09 Powers of the office and commissioner; how exercised

Derivation of Section. Subdivision (a) of Section 13.09 is derived from MHL Section 7.09. Subdivision (b) is derived from MHL Section 9.01(a).

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Substantive Changes. Subdivision (a) empowers the Commissioner of Mental Retardation and Developmental Disabilities to enter into agreements with other commissioners of the Department to assist him in carrying out the functions and duties assigned to him.

Subdivision (b) deletes the second sentence of Section 9.01(a) which refers to the Mental Hygiene Council because the Council is abolished.

§13.11 Organization and administration of the office of mental retardation and developmental disabilities and its facilities

Derivation of Section. This section is derived from MHL Section 1.13.

Substantive Changes. Subdivision (a) places the developmental centers formerly under the jurisdiction of the department and its Commissioner under the jurisdiction of the Office of Mental Retardation and Developmental Disabilities to enable the Office to carry out fully the responsibilities assigned to it by the new Article.

§13.13 Local services

Derivation of Section. This section is new.

Substantive Changes. This section provides that planning and funding of services to the mentally retarded and developmentally disabled by local governments shall be in accordance with Article 41 of this Chapter (former Article 11).

§13.15 Programs of the office of mental retardation and developmental disabilities

Derivation of Section. This section is derived from MHL Section 9.03.

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Substantive Changes. MHL Section 9.03 has been revised to pertain to developmental disabilities and the Office of Mental Retardation and Developmental Disabilities only.

§ 13.17 Programs, services and operations of facilities in the office of mental retardation and developmental disabilities

Derivation of Section. Subdivisions (a), (c) and (d) are derived from MHL Section 9.05. Subdivision (b) is derived from MHL Section 7.15.

Substantive Changes. MHL Section 9.05 has been revised to pertain to the Office of Mental Retardation and Developmental Disabilities and the developmentally disabled.

§ 13.19 Personnel of the office; regulations

Derivation of Section. This section is derived from MHL Section 7.11.

Substantive Changes. None.

§ 13.21 Directors of schools in the office of mental retardation and developmental disabilities

Derivation of Section. This section is derived from MHL Section 7.17.

Substantive Changes. Subdivisions (c) and (d) have no major changes other than the revisions to make them pertain to the Office of Mental Retardation and Developmental Disabilities and the developmentally disabled.

Subdivision (b) has been modified to require directors to immediately notify the Mental Health Information Service of alleged incidents of patient abuse.

§ 13.23 Education and training programs

Derivation of Section. This section is based on MHL Section 9.09.

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Substantive Changes. The section has been revised to pertain to education and training programs in the Office of Mental Retardation and Developmental Disabilities only. That part of subdivision (b) which pertains to schools of nursing is deleted because such schools are generally in mental health facilities.

§ 13.25 Safety

Derivation of Section. This section is derived from MHL Section 9.15.

Substantive changes. None.

§ 13.27 Facility services

Derivation of Section. Subdivision (a) of Section 5.31 is based on MHL Section 9.17. Subdivision (b) is derived from MHL Section 9.19, subdivision (c) is derived from MHL Section 9.21, and (d) is based on MHL Section 9.23.

Substantive Changes. These four miscellaneous sections are grouped together as one section called "facility services". All four subdivisions have been revised to pertain to facilities under the jurisdiction of the Office and Commissioner of Mental Retardation and Developmental Disabilities.

§ 13.29 Gifts

Derivation of Section. This section is derived from MHL Section 9.27.

Substantive Changes. This section has been revised so that it pertains to the Commissioner and Office of Mental Retardation and Developmental Disabilities.

§ 13.31 Disposition of moneys and securities

Derivation of Section. This section is based on MHL Section 9.31.

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Substantive Changes. This section has been revised so that it pertains to disposition of moneys and securities by the Commissioner and Office of Mental Retardation and Developmental Disabilities.

§ 13.33 Boards of visitors

Derivation of Section. This section is derived from MHL Section 7.19.

Substantive Changes. This section pertains to Boards of Visitors in schools under the jurisdiction of the Office and Commissioner of Mental Retardation and Developmental Disabilities only. No other substantive revisions have been made in MHL Section 7.19.

§ 13.35 Civil actions against mental retardation and developmental disabilities volunteers; indemnity

Derivation of Section. This section is derived from MHL Section 9.11.

Substantive Changes. This section has been revised to pertain to civil actions against volunteers in programs of the Office of Mental Retardation and Developmental Disabilities only.

Art. 15 - Admission of the mentally retarded to schools -- incorporates without change existing Article 33 of the Mental Hygiene Law

TITLE D - ALCOHOLISM AND SUBSTANCE ABUSE ACT

Art. 19 - Office of Alcoholism and Substance Abuse

§ 19.01 Declaration of Policy

States that alcoholism, opiate and non-opiate drug abuse are major health and mental health problems. Polydrug abuse and the use of drugs and alcohol is increasing and requires responsive treatment and prevention. The creation of a division of alcoholism and alcohol abuse and a division of drug abuse service will provide a framework for improved treatment services. The creation of the commission

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on alcohol and substance abuse prevention and education can provide opportunities for new initiatives to decrease the abuse of alcohol and other substances.

§ 19.03 Definitions

Incorporates present definitions from §§ 81.03, 83.05, 83.07, and adds new definitions for the "directors", the "divisions", the "commission on alcohol and drug abuse prevention and education", "chairman of the commission", "intoxicated person", and "incapaciated by alcohol".

§ 19.05 Office of Alcoholism and Substance Abuse

A. Establishes the office consisting of:
1. Commission on Alcohol and Substance Abuse Prevention and Education
2. Division of Alcoholism and Alcohol Abuse
3. Division of Substance Abuse Services

B. There will be three members of the Commission appointed by the Governor each to be confirmed by the Senate and designated as:
1. Director of the Division of Alcoholism and Alcohol Abuse
2. Director of the Division of Substance Abuse Services, and
3. Chairman of the Commission on Alcohol and Substance Abuse Prevention and Education, respectively

C. The Chairman and each director will have the power to:
1. establish rules and regulations
2. enter into agreements for efficient administration of the commission and the two divisions
3. hire and fire persons within their jurisdiction
4. establish budgets to be submitted by the commission
5. conduct private and public hearings
6. the commission, as a body, shall make an annual report to the Governor and Legislature

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§ 19.07 Powers and Duties of the Commission and Divisions

A. Subdivision (a) describes the powers of the division of alcoholism. The new powers include:

1. advise and assist the Governor in policy development
2. develop programs for persons suffering from alcoholism and their families
3. sponsor conferences
4. establish separate standards from substance abuse for treatment and staff
5. administer all appropriations for alcoholism
6. maintain an alcoholism research institute
7. coordinate alcohol related activities of other State departments
8. protect the rights of recovered alcoholics
9. establish standards for certifying and credentialling alcoholism counsellors
10. recommend ways to increase third party payments

B. Subdivision (b) enacts the powers of the division of substance abuse. This is derived from the current § 81.09.

C. Subdivision (c) establishes powers of the Commission which include:

1. develop preventive education programs,
2. administer school-based substance abuse programs,
3. promote prevention activities,
4. provide for public education on nature of alcohol and substance abuse, and
5. disseminate information on alcoholism and substance abuse services.

§ 19.09 Advisory Counsils on Alcoholism and Substance Abuse

Creates two advisory councils; an advisory council on alcoholism and an advisory council on substance abuse.

These councils are derived from existing §§ 7.06 and 81.05.

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New responsibility will involve assisting the Council on Mental Hygiene Planning in setting goals and objectives.

§ 19.11 Status of Facilities

Derivation of Section. This section is derived from MHL Section 81.11.

Substantive Changes. None.

§ 19.13. Civil actions against certain officers and employees of the state

Derivation of Section. This section is derived from MHL Section 81.08.

Substantive Changes. The scope of the coverage of MHL Section 81.08 is expanded to include officers or employees involved in providing services to persons in need of care and treatment for alcoholism.

§ 19.15 Use and indemnification of volunteers

Derivation of Section. This section is derived from MHL Section 9.11.

Substantive Changes. None.

§ 19.17 Education and training

Derivation of Section. This section is derived from MHL Section 9.09.

Substantive Changes. None.

§ 19.19 Funding of alcoholism services

Derivation of Section. This section is new.

Substantive Changes. This section provides that planning and funding of services to those suffering from alcoholism by local governments shall be in accordance with Article 41 of this Chapter.

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Art. 21 - Alcoholism facilities -- incorporates, with the exception of deletion of involuntary admission provisions, existing Article 35 of the Mental Hygiene Law.

Art. 23 - Substance abuse facilities -- incorporates without change Sections 81.13, 81.15, 81.17, 81.19, 81.21, 81.25, 81.27, 81.29, 81.30, 81.31, 81.32, 81.35, and 81.38 of the Mental Hygiene Law.

Art. 25 - Funding for alcoholism and substance abuse -- incorporates without change existing Articles 61, 83 and 85 of the Mental Hygiene Law.

TITLE E - GENERAL PROVISIONS

Several provisions of the Mental Hygiene Law have been renumbered and included within Title E. The substance of all of the sections of the law included within this Title remain the same.

Art. 29 - General provisions relating to in-patient facilities.

Art. 31 - Regulation and quality control.

Art. 33 - Patients rights

Art. 41 - Local and Unified Service -- incorporates and makes certain amendments to existing Article 11 of the Mental Hygiene Law to conform the law in light of reorganization and to make certain substantive changes. Among the substantive changes are:

§ 41.05 and § 41.11 — Changes the composition of community boards to include representatives of all covered disability groups and to require subcommittees for each of the disability groups. In cities of over one million population, the boards are required to have representatives from each of the counties within its jurisdiction.

§ 41.16 — Specifies state and local responsibilities relevant to the local planning process. It specifies that local directors shall have final responsibility for the preparation of local and unified services plans to be submitted to the department for approval. It also requires a single process for plan review and approval within the department.

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§ 41.17 Requires the commissioners of the department in consultation with the New York State Conference of Local Mental Hygiene Directors and other providers of services to develop, over a five year period, certain proposed standards and procedures for patient admissions and discharges to facilities for the mentally disabled, certain data bases relating to patient services and costs and, in consulation with recognized employee groups, programs addressed to departmental labor and employment issues.

§ 41.39 Provides state aid match through direct contracts if the sheltered workshop is not receiving any funds from the local governmental unit and so long as the program is in accordance with the approved local or unified services plan.

Art. 43 - Fees for services.

Art. 61 - Federal aid.

Art. 67 - Interstate relations.

Art. 71 - Acquisition of real property.

Art. 75 - Community mental health services and mental retardation services companies.

Art. 77 - Conservators.

Art. 78 - Committee of incompetent of patient.

Art. 79 - Proceedings relative to incompetent veterans and infant wards of the United States Veterans' Administration.

Bill section 24 - Requirements are established for each of the commissioners to identify those multiply disabled individuals being served by the department and to evaluate the appropriateness of the services provided to such individuals. The commissioners are required to cooperate in the development of a comprehensive plan for the care and treatment of all mentally disabled persons suffering from more than one disability. A report on this matter is to be made to the Governor and the Legislature no later than January 1, 1979.

The effective date of this bill is April 1, 1978. The commissioner of the department of mental hygiene and persons designated by the Governor to exercise the responsibilities of the commissioner of mental retardation and developmental disabilities and those of

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the members of the commission on alcoh
stance abuse education and prevention
to take action necessary in order to a
transition.

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BILL MEMORANDUM

BILL NUMBER: A 8982

SPONSOR: Mr. Connelly

SUMMARY OF PROVISIONS:

Amends the Mental Hygiene Law in relation to effecting a reorganization of the Department of Mental Hygiene:

1. Creates three new autonomous Offices in DMH - the Office of Mental Health, the Office of Mental Retardation and Developmental Disabilities, and the Office of Alcoholism and Substance Abuse.

2. Creates a three member Commission on Alcohol and Substance Abuse Prevention and Education within OASA. One of the members will serve as Chairman of the Commission, one member will be the Director of the Division of Alcoholism and Alcohol Abuse, and one member will be the Director of the Division of Substance Abuse Services.

3. Creates an Inter-Office Coordinating Council. Members of this Council include the Commissioners of the Offices of Mental Health, Mental Retardation and Developmental Disabilities, and the Directors of the Divisions of Alcoholism and Alcohol Abuse, and the Division of Substance Abuse. Responsibilities of the Inter-Office Coordinating Council include:

   a. Comprehensive planning;
   b. Ensuring that services are provided to the multiply disabled;
   c. Coordination of research programs to eliminate wasteful duplication;
   d. Meeting from time to time with the Conference of Local Mental Hygiene Directors.

4. The Commissioners and members of the Commission on Alcohol and Substance Abuse Prevention and Education are to be appointed by the Governor with the advise and consent of the Senate.

5. A definition of the term "developmental disabilities", which follows Federal statutory law, except that there is specific mention of the neurologically impaired, has been included for the Office of Mental Retardation and Developmental Disabilities.

6. Each Commissioner and member of the Commission has separate budgeting authority, program responsibility and accountability for the effective functioning of each Office or Division. Each has the authority to enter into agreements with the other Offices of the Department to assist him in carrying out the functions and duties assigned to him. In addition, each is required to submit an annual report to the Governor and the Legislature delineating progress toward the development of long range planning and implementation of programs and procedures consistent with the statewide goals and objectives to be developed by the Council for Mental Hygiene Planning.

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7. The Council for MH Planning shall assess the progress of the Offices in achieving the goals and objectives of the Council. The composition of the Council has been slightly altered to ensure representation of the State, local government, non-governmental organizations and consumers.

8. Research programs are to be coordinated by the Inter-Office Coordinating Council to ensure a cooperative research effort and to eliminate wasteful duplication.

9. Each Commissioner shall prepare an annual report for the Governor and the Legislature regarding the delivery of care and services in family care homes and other community residences, and projected plans for providing and improving such homes and residences.

10. Mentally ill alcoholics may be admitted to alcoholism programs operated by psychiatric centers under contract with OASA.

11. Alcoholism, opiate and non-opiate substance abuse are major health and mental health problems.

12. The Commission on ASAP&E will have the following powers:

    a. Develop preventive education programs and promote prevention activities;
    b. Administer school-based substance abuse programs;
    c. Provide for public education on the nature of alcohol and substance abuse;
    d. Disseminate information on alcoholism and substance abuse services.

13. The Division of Alcoholism will have the following powers:

    a. advise and assist the Governor in policy development;
    b. develop programs for persons suffering from alcoholism and their families;
    c. sponsor conferences;
    d. establish separate standards from substance abuse for treatment and staff;
    e. administer all appropriations for alcoholism;
    f. maintain an alcoholism research institute;
    g. coordinate alcohol related activities of other State departments;
    h. protect the rights of recovered alcoholics;
    i. establish standards for certifying and credentialling alcoholism counsellors;
    j. recommend ways to increase third party payments.

14. The Commission, as a body, will provide an annual report to the Governor and the Legislature assessing the progress OASA is making to implement the programs and policies contained in this bill, including an accounting of the amounts, sources and uses of funds expended by each Division and the Commission. Each member of the Commission shall be responsible for preparing his section of the report.

15. Establishes an informal admission process for alcoholics and alcohol abusers.

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16. The composition of community boards has been changed to include all covered disability groups and requires subcommittees for each disability group. In cities of over one million, the boards are required to have representatives from each county within its jurisdiction.

17. Local directors will have the final responsibility for the preparation of local and unified services plans to be submitted to DMH for approval. The bill also requires a single process for plan review and approval within the Department.

18. Counties will be required to submit a five year comprehensive plan for services as is now mandated upon DMH.

19. Specific areas will be established for policy development regarding State and local coordination, including:

    a. Admission and discharge standards and procedures;
    b. Uniform evaluation system;
    c. Facility rates;
    d. Retraining and continued employment of State workers.

20. Provides for State aid match, through direct contracts, to sheltered workshops, if they are not receiving funds from the local governmental unit, so long as the program is in accordance with the approved local or unified services plan.

21. The Commissioner of Mental Hygiene and the individuals designated by the Governor to exercise the powers of the Commissioner of MR and DD, and the members of the Commission on ASAP&E are authorized to take necessary actions, including the preparation and submission of budget requests for the Offices established by this bill, to prepare for an orderly transition of the functions, powers and duties provided in this bill.

RECOMMENDATION: Approval

JUSTIFICATION:

The present administrative structure of DMH is heavily weighted in favor of the Division of Mental Health. As a result, the Divisions of Alcoholism and Mental Retardation have not been able to adequately develop and provide funding for programs that would provide needed services to their clients. In addition, the current administration of DMH has been unable to decrease emphasis on institutional care of the mentally ill in State run institutions and support the growth of community care.

This bill is an attempt to administratively restructure the DMH in order to allow for the development of a comprehensive system of care for the mentally disabled by establishing three autonomous Offices within DMH which will be functionally responsible for the provision of appropriate services to their separate client groups. A reorganization of the DMH will allow the Legislature to focus more directly on the funding needs of each office, each office's ability and willingness to effectuate positive changes within its area of service delivery, and, to develop coordianted services for the provision of needed services to the multiply disabled. The ability or inability of the three Offices to ensure the provision of services for the mentally disabled in the most effective and

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GOVERNOR HUGH CAREY
EXECUTIVE OFFICE
ALBANY NY 12207

JUL. 8 1977

DEAR GOVERNOR CAREY

THE BOARD OF VISITORS OF REGION NUMBER 6 ARE VEHEMENTLY OPPOSED TO THE PASSAGE OF ARTICLE NUMBER 27 AMENDING ARTICLE NUMBER 11 OF THE MENTAL HYGIENE LAWS. WE URGE FURTHER STUDY BY LEGISLATURE

ROCKLAND PSYCHIATRIC CENTER
ROCKLAND CHILDREN'S CENTER
MIDDLETOWN PSYCHIATRIC CENTER
THE HUDSON RIVER PSYCHIATRIC CENTER
PASSAIC DEVELOPMENTAL CENTER

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CS

Multiple memorandum received from the State Comptroller dated AUG 3 1977 stating the following bill is of "No Interest" to the Department of Audit and Control.

Intro. No. S-6833 Print No.

The original memorandum filed with: S-4033-A

AUG 4 1977

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S. 6833

THE SENATE
STATE OF NEW YORK
ALBANY 12247

FRANK PADAVAN
11TH DISTRICT
CHAIRMAN
COMMITTEE ON MENTAL HYGIENE
AND ADDICTION CONTROL

DISTRICT OFFICE
224-50 BRADDOCK AVENUE
QUEENS VILLAGE, NEW YORK 11428
468-9516

July 13, 1977

JUL 14 1977

Honorable Judah Gribetz
Counsel to the Governor
Executive Chamber
The Capitol
Albany, New York

Dear Judah:

Enclosed is a copy of Senate Bill 6833 which I introduced in the Senate to effect a reorganization of the Department of Mental Hygiene.

Since this is part of the Governor's program and the memo originated with your office, and it is voluminous, I have not enclosed a copy. I trust that the Governor will sign the bill.

Sincerely yours,

Frank Padavan

FP:pd

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Form 91-Adm.

A 8982

State of New York
Department of Mental Hygiene

ALVIN M. MESNIKOFF, M.D.
Director

ARNOLD WINSTON, M.D.
Deputy Director, Clinical

H. U. BLAISDELL
Deputy Director, Administration

SOUTH BEACH PSYCHIATRIC CENTER
HEIGHTS-HILL SERVICE
490 Fulton Street
Brooklyn, New York 11201
Tel.: 834-7373

Kenneth M. Glatt, Ph.D.
Chief of Service

JUL 8 1977

COMMUNITY ADVISORY BOARD

May 16, 1977

Honorable Hugh L. Carey
Governor of New York
Executive Chambers
Albany, New York 12224

Dear Governor Carey:

We are very concerned about the proposed legislation (Article 27) which calls for the State Department of Mental Hygiene no longer providing direct mental health service in the community.

We are impressed with the responsibility that the legislators have for the welfare of persons with mental disabilities. Because we believe that there are questions about the proposed legislation which deserve careful consideration bearing upon the welfare of those mentally disabled persons, we urge you to postpone action on this legislation pending thorough study, adequate consideration and open hearings for the community.

Sincerely,

Alice G. Owen

Alice G. Owen
Corresponding Secretary

AGO/lm

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S-6833

NEW YORK STATE
DEPARTMENT OF SOCIAL SERVICES
40 NORTH PEARL STREET, ALBANY, NEW YORK 12243
PHILIP L. TOIA
Commissioner

JUL 22 1977

July 20, 1977

Honorable Judah Gribetz
Counsel to the Governor
The Capitol
Albany, New York 12224

Re: Senate 6833
Ten Day Bill

Dear Mr. Gribetz:

Your office has requested this Department's comments on the above-referenced bill, which is before the Governor for signature.

The Department recommends approval of the bill for the reasons stated in the enclosed memorandum.

Sincerely,

Philip L. Toia

Enclosure

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Form 26.24 D.M.H.

S-6833

CS

LAWRENCE C. KOLB, M.D.
COMMISSIONER

ROBERT A. McKINLEY, M.D.
FIRST DEPUTY COMMISSIONER

STATE OF NEW YORK
DEPARTMENT OF MENTAL HYGIENE
OFFICE OF COUNSEL
44 HOLLAND AVENUE
ALBANY, N. Y. 12229
(518) 474-1331

WILLIAM A. CARNAHAN
COUNSEL

July 29, 1977

AUG 1 1977

Honorable Judah Gribetz
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York

Re: Senate 6833 by Senator Padavan, et al.

AN ACT to amend the mental hygiene law, in relation to effecting a reorganization of the department of mental hygiene and to repeal certain provisions thereof relating thereto

Dear Mr. Gribetz:

This is in response to your request that this Department comment upon above referenced ten-day bill.

The Department of Mental Hygiene drafted this bill in cooperation with your office and the Office of the Secretary to the Governor. This bill reflects the policy of the Department and has our support.

Yours Respectfully,

Paul Litwak

PAUL LITWAK
Deputy Counsel for Legislation

PL/klh

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S-6833

DIVISION OF THE BUDGET
ALBANY

MEMORANDUM

CS

To: Clarence J. Sundram

Date: July 29, 1977

From: Susan Rapp SR

Subject: 10-day bills

Pursuant to Frank White's instructions, the Division of the Budget will not comment on the following 10-day bills concerning the Mental Hygiene reorganization:

S. 6249-A	A. 7854
✓S. 6833	A. 7951-A
S. 6856	A. 7956-A
	A. 7957

SR:jh

AUG 1 1977

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C, S

A-8982
S. 6833

STATE OF NEW YORK
FACILITIES DEVELOPMENT CORPORATION
44 HOLLAND AVENUE, ALBANY, N.Y. 12208

DIRECTORS
CHARLES SCHLAIFER, Chairman
BENNETT ABRAMS
LAWRENCE C. KOLB, M.D.
ROBERT P. WHALEN, M.D.
J. LAWRENCE MURRAY, Executive Director

July 29, 1977

Hon. Judah Gribetz
Executive Chamber
State Capitol
Albany, New York 12224

AUG 1 1977

Re: Assembly 8982

Dear Mr. Gribetz:

This bill amends the Mental Hygiene Law to effectuate a reorganization of the Department of Mental Hygiene. It creates three new autonomous offices in the Department of Mental Hygiene - the Office of Mental Health, the Office of Mental Retardation and Developmental Disabilities and, the Office of Alcoholism and Substance Abuse Services.

The Facilities Development Corporation has reviewed the original draft and revised drafts of proposed legislation to reorganize the Department of Mental Hygiene. Our review was limited in scope to matters in the proposed legislation which would directly or indirectly affect the Corporation. The majority of our previous objections have been taken care of by the present bill.

The proposed new Sections 7.31 and 13.31 of the Mental Hygiene Law continue the present requirement of Section 9.31 of the Mental Hygiene Law to require the transfer of receipts of all money received for the care, maintenance and treatment of patients, to the Commissioner of Taxation and Finance as agent for the Facilities Development Corporation. The money is used to meet the principal and interest payments to the Housing Finance Agency for bonds issued by that Agency to finance mental hygiene facilities. It is, therefore, in fact, security for such bonds. Mental hygiene facilities as defined in Section 3 of the Facilities Development Corporation Act include Drug Abuse facilities. It will, therefore, be necessary to insert a section similar to Sections 7.31 and 13.31, in Title "D", which pertains to the new Office of Alcoholism and Substance Abuse. The money paid over to the Corporation from the

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Drug Abuse Program for the year 1976-77 was $7,503,031. The amount projected to be paid over in 1977-78 is $3 million, and the amount projected to be paid over in 1978-79 is $1-1/2 million.

In addition, the new Section 25.01, which would authorize each director to receive, use or distribute Federal financial assistance, may prevent payment over to the Corporation of the above projected future payments. If this does present a problem, it can be taken care of by amending legislation in 1978.

The legislative package for the reorganization of the Department of Mental Hygiene distributes all the existing powers of the Department among the three new autonomous offices and other state agencies and commissions. This raises a question as to whether or not the proposed reorganization violates Article V, Sections 2 and 3 of the New York State Constitution, which limits the number of civil departments and provides for legislative transfer of functions within the Executive Branch. These provisions were added to the Constitution in 1925 and were reconsidered and amended to their present form after intensive study in 1961. Limiting the number of departments by constitutional mandate was to enhance administrative responsibility and control and to prevent the proliferation of departments of government. We suggest that the question of the constitutionality of the reorganization proposal be submitted to the Attorney General for his opinion.

Except as noted above, this Corporation does not object to the approval of this bill.

Sincerely,

J. Lawrence Murray

J. LAWRENCE MURRAY
Executive Director

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MEMORANDUM ACCOMPANYING COMMENTS ON BILLS BEFORE

THE GOVERNOR FOR EXECUTIVE ACTION

New York State Department of Social Services

July 20, 1977

Introduced by Senator Padavan, et al

SENATE
Int. 6833

RECOMMENDATION: Approval

STATUTES INVOLVED: Mental Hygiene Law

EFFECTIVE DATE: The first day of April next succeeding the date upon which it shall have become law.

DISCUSSION:

1. Purpose of bill: To repeal provisions of law establishing the Department of Mental Hygiene and admitting alcoholics to alcoholism facilities. This bill would enact new provisions establishing three independent offices within the Mental Hygiene Department, namely, an Office of Mental Health, an Office of Mental Retardation and Developmental Disabilities and an Office of Alcoholism and Substance Abuse. Powers and duties of each such department and commissioner are delineated and a State Conference of Local Mental Hygiene Directors would be created in order to prevent unnecessary fragmentation in planning and financing.

2. Provisions of bill: Titles A, B, C, D, and E are created and various other Articles and Sections of the Mental Hygiene Law are repealed, renumbered, or amended in order to accomplish the above-stated purpose.

3. Prior legislative history: None.

4. Known position of others respecting bill: The New York State Department of Mental Hygiene has no comment regarding this bill.

5. Arguments in support of bill: Reorganization of the Department of Mental Hygiene will promote comprehensive planning, provide the organizational framework necessary for better delivery of services, and bring about greater accountability to client groups through the separation of offices according to function. The net result of this reorganization will be to provide the State of New York with a mechanism for more effective client care in the area of mental health services. Also, the quality of care provided to clients of the Department should be increased through the efficiency in administration that would result from the reorganization.

6. Reason for recommendation: See number five above.

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S-6833

New York State Health Planning Commission

EMPIRE STATE PLAZA, TOWER BUILDING, ROOM 1161, ALBANY, NEW YORK 12237 518-474-6416

MEMORANDUM

TO: Judah Gribetz

AUG 9 1977

FROM: David Solomon

DATE: August 5, 1977

SUBJECT: S.6833; AN ACT to amend the mental hygiene law, in relation to effecting a reorganization of the department of mental hygiene and to repeal certain provisions thereof relating thereto

The subject bill establishes three independent offices, an Office of Mental Health, an Office of Mental Retardation and Developmental Disabilities and an Office of Alcoholism and Substance Abuse, within the Department of Mental Hygiene. New Articles 1, 5, 7, 13, 19, 21, 23 and 25 and several complementary and new amendments are added to the Mental Hygiene Law.

The measure incorporates the recommendations of the Governor set forth in the State of the Health Message to reorganize the Department of Mental Hygiene so that separate classes of the mentally disabled can be most effectively and economically served. As set forth in the legislative finding, the establishment of the three offices will enhance the accountability of the Department and assist in assuring the measure of independence necessary to implement separate programs for the care and treatment of the various groups of patients.

The Health Planning Commission recommends approval of the measure.

DAS:mab

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LOUIS J. LEFKOWITZ
ATTORNEY GENERAL
STATE OF NEW YORK

TWO WORLD TRADE CENTER
NEW YORK, NEW YORK 10047

AUG 9 1977

S-6833

MEMORANDUM FOR THE GOVERNOR

RE: SENATE 6833

PURPOSE OF BILL: To effect an extensive amendment to the mental hygiene law especially with respect to the organization of the department of mental hygiene.

Article 5 of the proposed law reorganizes the department of mental hygiene to provide for three autonomous offices with no central authority to resolve day to day disagreements among them within the executive branch except for the governor. The experience of this office has shown that disputes do arise between developmental centers and psychiatric centers with respect to the most appropriate placement of individual patients. Such disputes are presently settled within the department of mental hygiene by a regional director or assistant commissioner. Although the proposed law contains various provisions respecting coordinating the efforts of the separate offices there is no central authority within the department and the legislative call for coordination may become more wish than mandate in the absence of frequent intervention by the governor.

Article 19 subdivides the office of alcoholism and substance abuse into a commission and two divisions with no clear-cut overall executive authority over the separate entities.

Section 1.03 of the proposed law contains no definition of "family care" except to state in subdivision 28 thereof that the term "community residence" does not include "family care homes". Since the repeal and reenactment of mental hygiene law section 29.15 by the law of 1975 there has been no definition of "family care" in the mental hygiene law. Since some directors of mental hygiene facilities follow the practice of applying for court authorized retention of patients in family care homes and since local governments may seek to regulate such homes by zoning or licensing ordinances, family care should be specifically defined and provided for in the

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mental hygiene law.

Sections 7.11 b, 7.17 b, 13.11b and 13.17 b of the proposed law continue the legislature policy contained in present sections 7.13 b and 7.15 a, b, of prohibiting the commissioner from discontinuing any of fifty-seven named facilities and schools. No such restriction is placed on the directors in the office of alcoholism and substance abuse.

Sections 9.27, 9.37 and 9.39 of the proposed law specifically provide that the fact that a mentally ill person also suffers from alcohol or substance abuse shall not preclude such person's involuntary commitment as mentally ill. However, proposed sections 9.13 and 9.15 contain no such specific provision concerning the voluntary or informal admission of such a person. Although there is presently no reason to suppose that a mentally ill person who also suffers from alcohol or substance abuse is ineligible for hospitalization as mentally ill, the specific references to such persons in connection only with involuntary commitment in the proposed law could result in significance being attached to the omission of such reference with respect to voluntary or informal admissions.

Aside from the comments hereinabove made, I have no legal objections to the bill.

Dated: August 9, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General

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A-8982

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telegram

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JUL 8 1977

PMS GOVERNOR HUGH L CAREY EXECUTIVE CHAMBER, RUSH SEND IMMEDIATELY

STATE CAPITAL

ALBANY NY 12224

THE BOARD OF GOVERNORS OF THE HOSPITAL ASSOCIATION OF GREATER NEW YORK SUPPORTS IN PRINCIPLE S6833/A8982, A BILL TO REORGANIZE THE DEPARTMENT OF MENTAL HYGIENE. WE ENDORSE THE THRUST OF THIS LEGISLATION ALONG WITH THE THOROUGH AND CONSCIENTIOUS METHOD IN WHICH THE PLAN WAS CONCEIVED AND DEVELOPED.

THE BILL SEEKS TO CREATE A COMPREHENSIVE INTEGRATED SYSTEM OF PATIENT SERVICES TO BE PROVIDED IN THE HOME COMMUNITY. IF EFFECTIVELY IMPLEMENTED IT COULD RESULT IN A COLLABORATIVE DELIVERY SYSTEM FOR SINGLE DIAGNOSIS AND MULTIPLY HANDICAPPED PATIENTS

SF-1201 (R5-69)

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S-6833

JAMES O. ROEMER, JR.
JAMES D. FEATHERSTONHAUGH
E. GUY ROEMER

RICHARD I. BURSTEIN
MARJORIE E. KAROWE
PAULINE F. ROGERS
THOMAS A. CONWAY
STEPHEN J. WILEY
MICHAEL J. SMITH
WILLIAM M. WALLENS

ROEMER AND FEATHERSTONHAUGH
COUNSELLORS AT LAW
THE TWIN TOWERS
99 WASHINGTON AVENUE
ALBANY, NEW YORK 12210

TEL. (518) 436-7663

JUL 26 1977

July 15th, 1977

Hon. Judah Gribetz
Executive Chamber
State Capitol
Albany, New York 12224

RE: S. 6833, 6249-A, 6856
A. 7951-A, 7854-A

Dear Mr. Gribetz:

The above numbered bills passed as part of a Mental Hygiene reform, reorganization package. The package passed with bipartisan support and also with the support of the Civil Service Employees Association, as well as other interested groups. CSEA has not changed its support on this package. At this time, I would like to thank your office as well as the staff and the leadership of both houses of the legislature for insuring that CSEA played a part in the discussion of these bills.

Very truly yours,

ROEMER AND FEATHERSTONHAUGH

James D. Featherstonhaugh

James D. Featherstonhaugh

JDF:E
cc: Elizabeth A. Connelly
NYS ASSEMBLY
Room 741
Legislative Office Bldg.
Albany, New York

Frank Padavan
NYS SENATE
Room 803
Legislative Office Bldg.
Albany, New York

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Stanley Steingut
NYS ASSEMBLY
Room 832
Legislative Office Bldg.
Albany, New York

Stanley Fink
NYS ASSEMBLY
Room 925
Legislative Office Bldg.
Albany, New York

Warren M. Anderson
NYS SENATE
Room 910
Legislative Office Bldg.
Albany, New York

Perry B. Duryea
NYS ASSEMBLY
Room 933
Legislative Office Bldg.
Albany, New York

Manfred Ohrenstein
NYS SENATE
Room 907
Legislative Office Bldg.
Albany, New York

Willian T. Conklin
NYS SENATE
Room 330
The Capitol
Albany, New York

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FRED COOLITTLE
[illegible]
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STATE CAPITOL
ALBANY NY 12207

JUL 8 1977

THE NEW YORK STATE ASSOCIATION OF COMMUNITY MENTAL HEALTH, MENTAL RETARDATION AND ALCOHOLISM SERVICES BOARDS STRONGLY OPPOSES THE [illegible] AT THE PRESENT TIME, YOUR MENTAL HYGIENE REORGANIZATION PROPOSAL AND ALSO THE CONKLIN BILL AND VOLKER BILL, AND [illegible] PASSAGE AS A STUDY BILL YOUR PROPOSAL INCLUDING ARTICLE 27 [illegible] MUST ADEQUATE CONSIDERATION BE GIVEN TO THE POSSIBLE RESULT OF [illegible] CHANGES.

FREDERICK S COOLITTLE, PRESIDENT
THE NEW YORK STATE ASSOCIATION OF COMMUNITY MENTAL HEALTH, MENTAL RETARDATIO
AND ALCOHOLISM SERVICES BOARDS

[illegible] EST

[illegible]

COUNSEL'S OFFICE
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S-6833

JUL 19 1977

An organization of parents and friends to help all the mentally retarded, wherever they are, regardless of race, color, creed or age

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INCORPORATED

175 FIFTH AVENUE • NEW YORK, N.Y. 10010 • 674-1520

JOSEPH T. WEINGOLD, Executive Director

EXECUTIVE COMMITTEE

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President

EVALD GASSTROM
Senior Vice President
ice President - Southeast Region

ALFRED CAPPUCCILLI
Vice President - Central Region

MISS WINIFRED RABBITT
Vice President - Western Region

MRS. EDWARD PATTISON
ice President - Northeast Region

MRS. JAMES F. REVILLE
Treasurer

IRVING CAMINSKY, Ph.D.
Asst. Treasurer

MRS. EDWARD BURGESS
Secretary

A. LAWRENCE ABRAMS

MRS. CAMIL G. MAROUN, JR.

JAMES P. MURPHY

ELLIOT L. ARONIN
Immediate Past President

July 13, 1977

Hon. Judah Gribetz
Counsel to the Governor
Executive Chamber
State Capitol
Albany, N.Y. 12224

Dear Mr. Gribetz:

Re: S. 6833 Padavan

This bill is the bill effecting the reorganization of the Department of Mental Hygiene. It is well known that this organization was in favor of such a reorganization, but with removal of mental retardation from the Mental Hygiene Law, placing it in the Executive Department.

Nevertheless, we still consider this reorganization a step forward in the right direction, and we urge the Governor to sign this.

Sincerely,

Joseph T. Weingold
Executive Director

JTW:md

Retarded Children CAN Be Helped!

A NON-PROFIT TAX-EXEMPT ORGANIZATION

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S-6833

THE NEW YORK STATE

MENTAL HEALTH ASSOCIATION, INC.

POST OFFICE BOX 4957 • POUGHKEEPSIE, NEW YORK 12602

Legislative Office (518) 456-5715

COUNCIL OF CHAPTERS

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SECRETARY

DONALD BERGER
LEGISLATIVE CONSULTANT

DOUGLAS WATERSTREET
NATIONAL STAFF
(704) 528-6405

1977

S.6245-Padavan, et al
A. 7950-Connelly, et al
S. 6833 - A.8982

NOT endorsed -- amendment essential

Reorganization of Department of Mental Hygiene

This bill, dealing with reorganization of the Department of Mental Hygiene, is one of several proposals which would effectively change the present departmental structure. All the bills recognize current problems and offer solutions of one kind or another. All are responsible measures and can be justified.

The Governor's reorganization bill, by its inclusive nature, is the only one which attempts to deal with the problem of multiply handicapped persons. Yet even this bill does not go nearly far enough to assure to these people the treatment they are entitled to. At present, far too many of the multiply handicapped simply fall between the administrative and jurisdictional cracks and get improper, insufficient, or no treatment at all.

This bill, or any revised version of it or of any of the other reorganization plans which may finally emerge from legislative and executive negotiation, would therefore be unacceptable unless real provision is made to assure care to the multiply handicapped.

There must be assurance that primary jurisdiction for the care of every person with a behavioral problem will be assigned to a specific agency (or Office, or Department, or whatever finally emerges). In short, there must be a "no decline" option -- no loopholes, no buck-passing -- primary responsibility for the care of everyone needing care must be assigned.

And once primary jurisdiction is assured, there must be provision in the law to assure cooperation between agencies so that the best and most effective care is provided.

Without such amendments, no reorganization plan could prove more than just papre shuffling. With these provisions for care of the multiply handicapped, a responsible reorganization plan could go on to great success. We most strongly urge inclusion of these suggested amendments in any reorganization legislation.

##

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S-6833
C.S.S. C-978 of 1977

New York State Association of COUNTIES

150 STATE STREET ALBANY, NEW YORK 12207 (518) 465-1473

JUL 20 1977

July 19, 1977

C. William Baker
Charles R. Clark
Carmelo J. Basile
Lucien A. Morin
Wm. H. Sutton, Jr.
Joseph F. Griffo
Dorothy E. Kotel
F. W. Hequembourg
Walter J. Tennant, Jr.
William J. Murphy
Peter Q. Eschweiler
J. Gregory Wynne
Joseph R. Bala
Henry Schurr
Edwin L. Crawford
Herbert H. Smith

Hon. Judah Gribetz
Executive Chamber
State Capitol
Albany, New York 12224

Re: Senate 6833 by Senators Padavan, Conklin, Volker, Schermerhorn, Farber, Perry, Gazzara and Nolan.

Dear Mr. Gribetz:

This is a bill which would effect the reorganization of the Department of Mental Hygiene, repeal certain provisions relating to mental hygiene and incorporate in the department an office of alcoholism and also drug.

This Association realizes that the Department of Mental Hygiene is probably the largest state department in existence but after careful examination of this bill, the persons in county government knowing mental hygiene the best, report to our legislative committee that the setup will not improve service, it will impose an additional administrative burden on counties. Both the state and the counties will be forced to add personnel to take care of the duties imposed by this bill, and in general, the administration of mental patients, of drug patient and alcohol patients will be complicated by the provisions of the bill rather than simplified which is the avowed purpose of the reorganization.

This bill is disapproved by our Association.

Sincerely,

Herbert H. Smith

Herbert H. Smith,
Special Assistant for NYSAC

HHS:km

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A-8982
Council

New York State Branch
National Council of Community Mental Health Centers

Public Affairs Office 113 State Street Albany, N.Y. 12207 (518) 465-3545

JUL 8 1977

MEMORANDUM OF SUPPORT

Re: S.6833
A.8982

AN ACT to amend the mental hygiene law, in relation to effecting a reorganization of the department of mental hygiene and to repeal certain provisions thereof relating thereto

The New York State Branch of the National Council of Community Mental Health Centers, representing comprehensive community mental health centers in New York State, supports the plan to reorganize the Department of Mental Hygiene into three separate offices of Mental Health, Mental Retardation and Developmental Disabilities and Alcoholism and Substance Abuse.

We endorse the expressed determination to develop a comprehensive, integrated system of care and treatment for patients in their home communities. This continuum of services should include existing providers as well as the expanded participation from hospital-based mental health services, CMHC's, non-governmental facilities and voluntary agencies. We believe that this bill, through its emphasis on inter-office coordination and its intent to open up the local planning process, has the flexibility to provide a more innovative and responsible planning and delivery system.

We particularly favor the legislative mandate carried in the bill that would require an inventory and collaborative service arrangement to better serve the needs of the multiply handicapped.

Further, the reorganization plan does address the goals and objectives for State-local long range planning. If we are to achieve reform of the Department of Mental Hygiene system, we must necessarily seek the consistent standards and effective program review procedures that could result from a properly initiated planning effort.

Finally, we are mindful of the thorough process that was employed by the Governor and the Legislature in researching and drafting the reorganization plan. We are most anxious to continue our review and input as the legislation is approved and will work with your offices to help achieve success for the plan.

Respectfully submitted,

July 7, 1977

William T. Hart, Chairman
New York State Branch
National Council of CMHC's

jm

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S-6833

6.5

COMMUNITY SERVICE SOCIETY . 105 E. 22 STREET . N.Y. 10010

DEPARTMENT OF PUBLIC AFFAIRS
GEORGIA L. McMURRAY
Director
ALAN P. BROWNSTEIN
Staff Associate for Health

July 21, 1977

JUL 25 1977

Honorable Judah Gribetz
Executive Chamber
State Capitol
Albany, New York 12224

RE: S.6833 - To amend the mental hygiene law, in relation to effecting a reorganization of the department of mental hygiene and to repeal certain provisions thereof relating thereto

Dear Mr. Gribetz:

The Community Service Society agrees that there needs to be major change in the structure and financing of mental hygiene services in New York State. We support the goal of restructuring the massive Department of Mental Hygiene so as to clarify the roles of various components of the system, and to facilitate greater responsiveness to the service needs of communities and particular groups of mentally disabled persons. We are already on record in support of the consolidation of alcoholism and substance abuse services as a logical step to acknowledge the relationship among the addictive disorders and bring substance abuse into the mainstream of health care.

The Community Service Society is concerned that the plan for creating three autonomous offices presents inherent structural obstacles to achieving the desired reforms.

Our major reservation is based on our lack of confidence in the ability of a tripartite structure to develop a statewide system of comprehensive community-based services which would meet the needs of all the mentally disabled, including those with more than one disability.

The proposed legislation, recognizing the potentially fragmenting effects of the tripartite structure, mandates coordination of the offices, primarily through an Inter-Office Coordinating Council comprised of the commissioners of the Offices of Mental Health and Mental Retardation and Developmental Disabilities and the

COMMITTEE ON HEALTH
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HERBERT P. PATTERSON
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Treasurer
SAMUEL J. DUBOFF
Secretary
ALVIN L. SCHORR
General Director
*On Leave

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directors of the Divisions of Alcoholism and Alcohol Abuse and of Substance Abuse Services. Section 5.05 provides that the Council, "consistent with the autonomy of each office and division for matters within its jurisdiction, shall ensure that the state policy for the prevention, care, treatment and rehabilitation of mental illness, mental retardation and developmental disability, alcoholism and substance abuse is planned, developed and implemented comprehensively; that gaps in services to the multiply disabled are eliminated and that no person is denied treatment and services because he suffers from more than one disability; that procedures for the regulation of programs which offer care and treatment for more than one class of mentally disabled persons be coordinated between the offices having jurisdiction over such programs; and that research projects of the institutes are coordinated to maximize the success and cost effectiveness of such projects and to eliminate wasteful duplication."

The legislative language and procedural devices intended to safeguard coordination of the offices must be more than cosmetic if the restructured Department is to function effectively. The Community Service Society strongly urges that the primacy and integrity of the Inter-Office Coordinating Council be established as soon as possible. This would require early regulatory delineation of the Council's authority, adequate funding and full-time assignment of staff to carry out the Council's functions. The success of this statute is largely contingent on the ability of the Council to fulfil its mandate. The Governor in turn must provide leadership to insure that the Council has the resources and support necessary to perform its duties.

Thank you for providing us the opportunity to present our views on this matter.

Sincerely,

Charles B. Dorf
Chairman
Committee on Health

CBD/SWT:er

cc: Clarence Sundrum, Esq.
James Introne, Esq.

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NY CLS Men Hyg § 47.03

Current through 2025 released Chapters 1-430

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 47 Mental Hygiene Legal Service (§§ 47.01 — 47.03)

§ *47.03*. Functions, powers and duties of the service.

The mental hygiene legal service in each judicial department of the state shall perform the following duties:

(a) To study and review the admission and retention of all patients or residents which shall include a review of the willingness of the patient or resident to remain in his or her status and the determination of the facility director as to suitability of such status, as provided for by this chapter;

(b) To inform patients or residents and, in proper cases, others interested in such persons' welfare of procedures for admission and retention and of the patients' or residents' right to have judicial hearing and review, to be represented by legal counsel, and to seek independent medical opinion;

(c) [Eff until June 30, 2027] To provide legal services and assistance to patients or residents and their families related to the admission, retention, and care and treatment of such persons, to provide legal services and assistance to subjects of a petition or patients subject to *section 9.60* of this chapter, and to inform patients or residents, their families and, in proper cases, others interested in the patients' or residents' welfare of the availability of other legal resources which may be of assistance in matters not directly related to the admission, retention, and care and treatment of such patients or residents;

(c) [Eff June 30, 2027] To provide legal services and assistance to patients or residents and their families related to the admission, retention, and care and treatment of such persons, and to inform patients or residents, their families and, in proper cases, others interested in the patients' or residents' welfare of the availability of other legal resources which may be of assistance in matters not directly related to the admission, retention, and care and treatment of such patients or residents;

(d) To be granted access at any and all times to any facility or place or part thereof described in subdivision (a) of *section 47.01* of this article, and to all books, records and data pertaining to any such facility or place deemed necessary for carrying out its functions, powers and duties. The mental hygiene legal service may require from the officers or employees of such facility or place any information deemed necessary for the purpose of carrying out the service's functions, powers and duties. Information, books, records or data which are confidential and any limitations on the release thereof imposed by law upon the party furnishing the information, books, records or data shall apply to the service. Provided, however, whenever federal regulations restrict, or as a condition of federal aid require that a facility restrict the release of information contained in the clinical record of a patient or client, or restrict disclosure of the identity of a patient or access to that patient, to a greater extent than is allowed under this section, the provisions of such federal law or federal regulation shall be controlling;

(e) To initiate and take any legal action deemed necessary to safeguard the right of any patient or resident to protection from abuse or mistreatment, which may include investigation into any such allegations of abuse or mistreatment of any such patient or resident; and

(f) To provide legal services and assistance in accordance with article ten of this chapter.

History

Add, L 1985, ch 789, § 32, eff April 1, 1986; amd, *L 1993, ch 330, § 4*, eff April 1, 1994; *L 1999, ch 408, § 14*, eff Aug 9, 1999; *L 2007, ch 7, § 9*, eff April 13, 2007.

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