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POVERTY,
EMPLOYMENT,
AND DISABILITY:
THE NEXT GREAT
CIVIL RIGHTS
BATTLE

By Alexander Wohl

At a time when many U.S. policymakers increasingly are focused on the issue of poverty and economic disparity as an important and neglected social problem (not to mention a perceived potent political tool), a particularly striking set of statistics is one often ignored—the disproportionately high level of poverty among Americans with disabilities.

Persons with disabilities experience the highest rates of poverty of any subcategory of Americans charted by the Census Bureau. Of the nearly 30 million individuals with disabilities ages 18–64, 27

percent, or more than 4 million people, live in poverty. This is more than double the rate of 12.5 percent for the entire population. Equally troubling and certainly related is the disproportionate labor force participation rate: For people with disabilities, it is 19.5 percent and for people without disabilities it is 68.7 percent. OFFICE OF DISABILITY EMP'T POL'Y, DEP'T OF LABOR, <http://www.dol.gov/odep>.

Though these numbers are revealing, they also do not tell us much about the causes and effects of this economic disparity, particularly those involving the relationship

of poverty to underemployment of individuals with disabilities; the inadequate and often regressive role of government programs intended to provide support and assistance, including health care; and the underlying history of discrimination experienced by people with disabilities that has prolonged and exacerbated these problems.

A History of Segregation and Discrimination

The history of the treatment of people with disabilities is a long and often horrific chronology of exploitation, neglect, discrimination,

and segregation that has continued into the modern era. In the United States, these prejudices and prohibitions date to the nation's founding, when individuals with disabilities were often excluded from immigrating into the original colonies. Since then, Americans with disabilities have been on the receiving end of a variety of odious and discriminatory acts, ranging from the 1919 expelling of a child with cerebral palsy from a Wisconsin public school because teachers and children "found him depressing and nauseating," to sweeping laws based on the pseudoscience of eugenics that included mandated sterilization.

DORIS ZAMES FLEISCHER & FRIEDA ZAMES, *THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION* (2011).

An outgrowth of 19th century Social Darwinism, the eugenics movement was premised on the idea that preventing reproduction of "unfit persons" with mental and physical disabilities would strengthen society. In legal terms, the low point of this effort came with the Supreme Court's 1927 holding in *Buck v. Bell*, which allowed compulsory sterilization of the "unfit," including the mentally retarded, "for the protection and health of the state" and was epitomized by Justice Oliver Wendell Holmes Jr.'s now infamous language that "[t]hree generations of imbeciles are enough." Over half the states enacted such laws, and by the 1970s more than 60,000 people with disabilities had been sterilized without their consent.

Today, we have more enlightened and intelligent attitudes about people with disabilities. Our society provides more support, assistance, education, and even employment opportunities. People with disabilities are living healthier and longer lives.

And yet, we are not, by any means, where we should be. Our social and legal system continues

to lag in its ability to offer genuine equality. In part, this is the result of the lingering gap in public awareness and understanding about individuals with disabilities—that they are people who can be independent and contribute to their communities, and therefore should be treated like anyone else. These deficiencies are sometimes revealed in tragic ways, such as the killing by police of a young man with Down syndrome because he would not leave a movie theater and officials lacked the training, understanding, or simple compassion to address the situation properly. Theresa Vargas, *Md. Man with Down Syndrome Who Died in Police Custody Loved Law Enforcement*, WASH. POST, Feb. 19, 2013.

But these shortcomings are also the result of an outdated government model that promotes segregation and limits independence through programs and policies that often force people with disabilities to choose between health care and the ability to work and save money, and that allow businesses to pay subminimum wages to people with disabilities.

As Justin Dart, one of the moving forces behind the landmark Americans with Disabilities Act, commented shortly after the law was enacted, "Our society is still infected by an insidious, now almost subconscious, assumption that people with disabilities are less than fully human and therefore are not entitled to the respect, the opportunities, and the services and support systems that are available to other people as a matter of right." Justin Dart, *Introduction: The ADA: A Promise to Be Kept*, in *IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS* (Lawrence O. Gostin & Henry A. Beyer eds., 1993).

That the history of the United States in this area is no worse than that of other nations (and in many ways is arguably better) is

hardly cause for celebration. One expects the American tradition of safeguarding individual rights to provide respect for, and protection of, all people. And while legal rights and protections for people with disabilities in the United States have grown over the last century, most are relatively recent additions to our legal system and remain inadequate.

The Disability Rights Movement

The first significant law that provided assistance to people with disabilities was a 1950 amendment to the Social Security Act called Aid to the Permanently and Totally Disabled, a title that reflected the prevailing view that those with the most significant disabilities would never contribute to society in any meaningful way. That law laid the groundwork for the creation in 1956 of Social Security Disability Insurance (SSDI), which expanded the Social Security safety net to include coverage for those who became disabled (although individuals who were blind had been covered from the start).

Overlapping with this increase in support was the growth of the independent living movement, and out of that developed a broader disability rights movement. It is no coincidence that this occurred during the 1960s and 1970s in places like the University of California at Berkeley, the heart of the free speech, civil rights, and anti-war protests of that tumultuous era.

The 1970s saw the enactment of several important laws relating to disability, including the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act (IDEA) of 1975 (originally called the Education for All Handicapped Children Act). The combined impact of these and other laws helped expand the understanding and rights of individuals with disabilities and initiate a new era of social and legal activism.

For example, section 504 of the Rehabilitation Act for the first time put in federal law the term “discrimination” to describe the exclusion and segregation of persons with disabilities. The law, created in part because Congress failed to amend the 1964 Civil Rights Act to include disability (and was twice vetoed by President Richard Nixon), challenged basic assumptions about disability and helped change the focus of public discussion from one about limitations imposed by disability, to barriers imposed by society that create limitations for people with disabilities.

THE ADA HAS BEEN LESS SUCCESSFUL IN TERMS OF PROMOTING ECONOMIC PROGRESS AMONG AMERICANS WITH DISABILITIES.

This activity helped lay the groundwork for the most important of these laws to date, the Americans with Disability Act (ADA) of 1990. With its mandate to remove barriers for those with disabilities in public transportation, public accommodations, and telecommunications services, the ADA had the goal of ensuring full participation in society for people with disabilities by facilitating equal opportunity, independent living, and economic self-sufficiency. It was no accident that Congress spent a good deal of time during consideration of the law hearing testimony concerning the rate of poverty and unemployment for people with disabilities.

The ADA has led to increases in both accessibility and public awareness. But for a number of reasons, the seismic shift in the treatment of people with disabilities that had been predicted as a result of the law has yet to be realized.

Businesses and others sought to undermine the law by suggesting it would be too costly and burdensome, or that it was, as writer Ruth Shalit

bluntly asserted, “creating a ‘lifelong buffet of perks, special breaks and procedural protections’ for people with questionable disabilities.” And many federal courts, including the Supreme Court, interpreted narrowly a number of the law’s provisions, including one of the most significant: the requirement that reasonable accommodations be made for individuals with disabilities.

While the ADA certainly changed the physical face of our society—increasing the number of curb ramps and other physical accommodations, for example—it has been less successful in terms of promoting

economic progress among Americans with disabilities, suggests Kathleen Martinez, the assistant secretary of labor in charge of the Office of Disability Employment Policy.

Some of that may be due to the law’s greater focus on issues involving individuals with physical disabilities and less on those with developmental disabilities and cognitive impairments. More fundamental is that because the law is an antidiscrimination statute, it does not address many of the underlying causes of poverty. RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT* (2007); SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* (2009).

Economic Discrimination

One notable exception to the trend of courts limiting recovery of plaintiffs under the ADA or reading the law narrowly was the Supreme Court’s 1999 decision in *Olmstead v. L.C.*, which addressed the law’s integration mandate and considered

it against the backdrop of the long history of isolation and segregation of people with disabilities and the right to live independently.

Olmstead involved the cases of two women, one with a developmental disability and the other a mental illness, who were voluntarily admitted to a Georgia state psychiatric institution. Following their medical treatment, health professionals agreed that both women were ready to move to a community-based program. Nonetheless, Georgia, a state with a long and unpleasant history of neglect and poor treatment of individuals with cognitive impairments in its institutions (including laws that created a commission to make recommendations to relieve the state of “the menace of the uncared-for feeble-minded who are such a fertile source of crime, poverty, prostitution and misery”), kept the two women confined.

The women sued for release. A federal trial court rejected the state’s contention that they could only be provided services in an institution, holding that their continued confinement violated the ADA and that “‘segregation’ of individuals with disabilities is a ‘form of discrimination’ that Congress intended to eliminate.” The Supreme Court, in a 6–3 decision written by Justice Ruth Bader Ginsburg, upheld the lower courts, holding that unjustified isolation is discrimination based on disability and goes against the ADA’s goal of ensuring “equality of opportunity, full participation, independent living, and economic self-sufficiency.” To deny both “diminishes the everyday life activities of individuals” and “perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.”

Even with the promise of *Olmstead*, however, as well as other legal advances, individuals with disabilities who live or want to live independently continue to face a host of challenges, the majority of

which revolve around employment and health care.

As noted, people with disabilities participate in the workforce at a rate far lower than any other group tracked by the U.S. Bureau of Labor Statistics, and usually make far less income. This low workforce participation rate is not due to lack of desire, but a system that puts the ability to earn and save money in direct conflict with the ability to maintain health insurance or other critical supports, as well as underlying discriminatory treatment. *See, e.g.,* COMM. ON HEALTH, EDUC. LABOR & PENSIONS, U.S. SENATE, UNFINISHED BUSINESS: MAKING EMPLOYMENT OF PEOPLE WITH DISABILITIES A NATIONAL PRIORITY (July 2012).

Everyone understands that some employers will not hire a person because of characteristics such as race or sex—and that those decisions are illegal. Choices not to hire persons with disabilities can involve more subtle means of discrimination, based on arguments that include the assertion that someone cannot do a job, that the hiring would require extra expenses as a result of the need to provide accommodations for that employee, or, in the case of employers who provide health insurance, that it would increase their insurance rates. Not only are these considerations illegal, they are also exacerbated by false presumptions of incompetence based on low expectations. As one scholar noted, “critics of the ADA overestimate the cost of such accommodation [and] also underestimate the cost of discrimination, not only to individuals with disabilities, but also to society in general.” FLEISCHER & ZAMES, *supra*.

But the bigger barrier to economic equality and independence faced by people with disabilities is the complex and often counterproductive matrix of laws and government programs intended to provide support and assistance.

These supports generally fail to deliver a level of benefits adequate to alleviate poverty and have a regressive design that discourages and even punishes efforts to work, trapping these individuals in a life-long cycle of hardship. As Assistant Secretary of Labor for Disability Employment Policy Kathleen Martinez says, “It’s a poverty trap.”

Social Security Disability Insurance, for instance, which was created for disability retirement, provides a monthly payment to those individuals who were in the workforce and paid into Social Security but no longer can “engage in any kind of substantial gainful work.” But most people with disabilities have never been employed and are not eligible.

In 1972, Congress created another program, Supplemental Security Income (SSI), to help elderly and individuals with disabilities with “little or no income” and provide them “cash to meet basic needs for food, clothing, and shelter.” Unfortunately, SSI has significant limitations as well.

The total annual benefit for an individual in 2014 was just \$8,657.26, an amount that is reduced for married couples. To meet the needs of today’s economy on that budget is not possible. Consider just one expense—housing. A recent study found that it is “virtually impossible for people with disabilities receiving SSI to obtain decent, safe, affordable, and accessible housing in the community without a permanent housing subsidy.” And that gap is growing. EMILY COOPER ET AL., TECHNICAL ASSISTANCE COLLABORATIVE & CONSORTIUM FOR CITIZENS WITH DISABILITIES, PRICED OUT IN 2012: THE HOUSING CRISIS FOR PEOPLE WITH DISABILITIES (May 2013).

Probably the most significant aspect of SSI is that it acts as a gateway to Medicaid, the program that provides health care for low-income people. While many Americans opt

to forgo health care insurance for financial reasons, for most individuals with significant disabilities, that is not a realistic choice. For these individuals, critical health care services, such as being lifted out of bed, bathing assistance, and catheter management, are daily requirements. Costs for attendant care are covered by Medicaid, but because states have limited allocations for the program, the wait to get Medicaid through SSI can be several years, generally until someone leaves or more funds are allocated by the state.

Equally problematic is a prohibition on SSI participants from making or having too much money from what is called substantial gainful activity (SGA). But “too much” turns out to be very little. In 2014, SGA monthly limits were \$1,070 for nonblind disabled recipients and \$1,800 for blind recipients. Additionally, there is a total asset limitation under SSI of \$2,000, meaning participants are prohibited from accumulating savings of cash, stocks, or other assets in excess of that amount. This limit has not been raised since 1989.

One potential source of employment for people who are disabled actually reinforces dependence rather than supporting independence. State agencies responsible for administering disability programs contract with disability service providers that run non-income-generating day programs and others, like sheltered work, also known as segregated work, because participants work only with other individuals who have disabilities.

Approximately 420,000 Americans with disabilities participate in sheltered work programs, which pay artificially low, often subminimum wages to their employees, thanks to an antiquated exception to U.S. labor law and the Fair Labor Standards Act known as section 14c, enacted in 1938.

There are more than 3,300 such businesses, both for-profit and nonprofit, including large organizations like Goodwill and Easter Seals, which are part of this large and successful industry that reaps extraordinary profits from workers who are disabled and who are earning, in some instances, just pennies an hour. Anna Schecter, *Workers Paid Just Pennies an Hour—and It’s Legal*, NBC NEWS (June 25, 2013, 3:12 PM), http://investigations.nbcnews.com/_news/2013/06/25/19062348-disabled-workers-paid-just-pennies-an-hour-and-its-legal.

A Potential for Change

Not surprisingly, efforts to change these government programs and legal interpretations face enormous obstacles. It is never easy to alter federal funding streams, even less so in an age of extreme congressional partisanship and ineffectiveness. Add to this the disparity in power and resources between those individuals and families who advocate for greater integration and the service and community rehabilitation provider industry that uses profits from the current system to seek its preservation.

But this paradigm doesn’t mean there aren’t promising efforts underway to help eliminate the poverty and dependence that ensnares many with disabilities. While there currently are no proposals to raise asset limits under SSI, there is proposed legislation, known as the ABLE Act, which has overwhelming bipartisan support in Congress. This would create a tax-free savings vehicle as a new subsection of section 529, the college savings program, which would allow individuals and families to save up to \$100,000 to cover expenses that Medicaid does not without fear of losing life-sustaining benefits.

There also has been progress at the federal level and in individual

states to rebalance the Medicaid reimbursable rate structure. This would help make community-based, integrated supported employment more profitable than subminimum wage segregated work, which is now the primary service option through the network of sheltered work providers. That’s the goal of a promising Department of Labor initiative called Employment First, which provides mentoring and support for states that want to align policies, regulations, and funding priorities to encourage integrated employment as the primary outcome for individuals with significant disabilities and shift the pipeline from sheltered work.

“It’s really about moving the pendulum,” says Kathleen Martinez. “We want to start from the point of view of presuming that people, even those with the most significant disabilities, can work, until they show they can’t.” And being part of an integrated work environment produces benefits beyond the additional income for those who participate. “When you’re part of a team, people can see what you can contribute,” she explains, further expanding perceptions of people with disabilities.

There is also legislation, known as the Fair Wages for Workers with Disabilities Act, that would repeal the 14c exception to the Fair Labor Standards Act, but it faces entrenched opposition from those businesses that would be directly impacted. In the face of this opposition and under pressure from some disability rights groups, however, President Barack Obama recently included federal contractors in his Executive Order to raise the minimum wage. This effectively overrode the 14c exception for some federal contractors employing individuals with disabilities, to the extent that the administration could. Aamer Madhani, *Obama to Include Disabled*

Workers in Minimum Wage Order, USA TODAY, Feb. 12, 2014.

One other big question mark is the impact of the Patient Protection and Affordable Care Act (ACA). The new health care law not only expands Medicaid (for those states that agreed) but also prohibits denial of services for preexisting conditions. Both of these changes may shorten the waiting lists for state developmental disability waivers, allowing more individuals to get services in their communities and paving the way to increased independence.

And there continues to be progress on the legal front, thanks to the precedent of *Olmstead*. With the backing of the U.S. Department of Justice, advocates have used *Olmstead* to mount successful attacks on unjustified confinement in a number of state institutions and have also expanded this to protect “the civil rights of individuals with disabilities who are unnecessarily segregated in sheltered workshops and facility-based day programs.” See, e.g., *United States v. Rhode Island*, Docket No. 1:14-cv-00175 (D.R.I. 2014).

Ultimately, the ability of the disability rights movement to transform *Olmstead* into its *Brown v. Board of Education* and to ensure that people with disabilities have the civil and economic protections that every other American has will depend on several factors: additional legal victories, increased political power, and greater focus by those who have supported other civil rights movements. Only with this combination will the ability to inform and educate the public change the paradigm of how society views and treats people with disabilities.

Alexander Wohl is an adjunct professor at American University Washington College of Law and the author of Father, Son and Constitution: How Justice Tom Clark and Attorney General Clark Shaped American Democracy (Univ. Press of Kansas 2013).