

Employment for People with Disabilities: A Role for Anti-Subordination

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For Mickey, Luke, Niamh, Christian, Eamonn

TABLE OF CONTENTS

<i>Introduction</i>	239
I. <i>Sheltered Workshops: Past and Present</i>	242
A. <i>History of Sheltered Workshops</i>	242
B. <i>In Workshops Today</i>	244
II. <i>Legal Framework</i>	245
A. <i>Supporting Workshops: the FLSA § 14(c) and AbilityOne</i>	246
B. <i>Against Workshops: ADA Integration Mandate and Olmstead</i>	248
C. <i>Closing Workshops</i>	254
D. <i>After Workshops</i>	255
E. <i>Considered Together</i>	257
III. <i>Advocacy Framework</i>	257
IV. <i>Theoretical Framework</i>	260
A. <i>Medical and Social Models</i>	261
B. <i>Integration</i>	262
C. <i>Anti-Subordination</i>	264
V. <i>A Role For Anti-Subordination</i>	266
A. <i>Anti-Subordination in Theory</i>	266
B. <i>Practical Realities: Anti-Subordination in Employment</i> ..	269
<i>Conclusion</i>	271

INTRODUCTION

My friend Rosheen¹ loves music; she is tall and elegant and smiles shyly but sweetly. She has autism. She does not speak and clearly communicates only occasionally, through pointing or sign language. She jumps a lot, hums, and likes to rattle beads and coins in saucers, watching how they roll as she rocks the saucer carefully. Rosheen does not have a “regular”

* J.D., Harvard Law School, 2015. I would like to thank Professors Benjamin Sachs, Michael Stein, Ruth Colker and Elizabeth Emens for their advice and guidance on this project. All errors are my own.

¹ Details and name have been changed. “Rosheen” is based on two individuals.

job. She works during the day in a sheltered workshop, where she performs tasks such as putting game pieces in bags, with the assistance of staff members without disabilities. Other people with disabilities alongside with her, and she does not receive a full-wage salary for her work. Hundreds of thousands of people with disabilities in the United States work in arrangements like Rosheen's, spending their days in sheltered settings that provide employment, typically along with other services geared toward people with disabilities.² Sheltered workshops are defined broadly as "facility-based day programs attended by adults with disabilities as an alternative to working in the open labor market."³ Participants typically complete simple tasks to fulfill orders that the workshop receives on a contract basis, often through state and local governments.⁴ Workshop jobs include packaging markers, assembling promotional bags, and assembling Post Office mailing trays.⁵ Because of a longstanding provision of the Fair Labor Standards Act (the "FLSA"), the pay for such sheltered piecework is typically calculated based on productivity and is exempt from minimum wage requirements.⁶

Policies and individual decisions about sheltered workshops and other employment options for people with disabilities are complex. Sheltered workshops appeal to some because of the certainty they afford participants and their families: they give people like Rosheen, who may struggle to adapt to competitive workplaces, the ability to rely on a steady job and daily routine. Virtually all workshops also provide participants a variety of services, often including some combination of transportation to and from work, meals, physical and occupational therapy, medical liaison support, and housing support.⁷ The "sheltered" nature of a workshop is appealing to people who struggle to interact socially or are particularly vulnerable, for the safety, social atmosphere, and acceptance created by an all-disabled environment.⁸ These features may be particularly important to parents who worry about their child's ability to succeed in a mainstream setting and to people with significant and complex disabilities.

² See U.S. GENERAL ACCOUNTING OFFICE, GAO-01-886, SPECIAL MINIMUM WAGE PROGRAM: CENTERS OFFER EMPLOYMENT AND SERVICES TO WORKERS WITH DISABILITIES, BUT LABOR SHOULD IMPROVE OVERSIGHT 18 (2001) [hereinafter GAO REPORT] (estimating 424,000 workers getting special minimum wage under FLSA § 14(c)), <http://www.gao.gov/assets/240/232264.pdf>, archived at <http://perma.cc/4E2G-AV4Z>.

³ Alberto Migliore, *Sheltered Workshops*, INTERNATIONAL ENCYCLOPEDIA OF REHABILITATION (2010), <http://cirrie.buffalo.edu/encyclopedia/en/article/136/>, archived at <http://perma.cc/9ER7-RRU4>.

⁴ See GAO REPORT, *supra* note 2, at 10–12.

⁵ *Id.* at 12.

⁶ Fair Labor Standards Act, 29 U.S.C. § 214(c) (2014); see also *infra* Section III.A.

⁷ GAO REPORT, *supra* note 2, at 9.

⁸ See, e.g., Families Speaking UP, *Sheltered Workshops for the Disabled Win Big Reprieve in Massachusetts* (July 14, 2014), <http://www.familiespeakingup.com/2014/07/22/sheltered-workshops-for-the-disabled-win-big-reprieve-in-massachusetts-2/>, archived at <http://perma.cc/2QZS-FGHS>; Migliore, *supra* note 3.

Critics contend, however, that sheltered employment constitutes discriminatory segregation,⁹ violates the Americans with Disabilities Act (the “ADA”),¹⁰ and takes advantage of individuals with disabilities by underpaying them and failing to provide the job training that would allow them to succeed in competitive employment for standard wages.¹¹ They point out that many high school special education programs send overwhelming majorities of students with disabilities directly to sheltered workshops rather than meaningfully counseling them, supporting them, and helping them find suitable mainstream employment.¹² Although sheltered workshops typically identify at least a subset of their work as training and preparation for competitive jobs, critics point to statistics revealing that only a small percentage of workshop employees ever move on to competitive employment. They argue that these statistics suggest that people with disabilities become essentially institutionalized in sheltered workshops when, with proper—and legally required—support, they could thrive in non-separated, full-wage employment.¹³

This Note analyzes the legal, advocacy, and theoretical frameworks surrounding sheltered employment for adults with disabilities, with a particular focus on the effect of employment policies on people with significant and complex disabilities. Past legal scholarship has explored the benefits of and problems with sheltered workshops and predicted the impact of efforts both to support them and to shut them down.¹⁴ A few articles have criticized the minimum wage exemption for employees with disabilities that is set forth in § 14(c) of the FLSA.¹⁵ Until now, however, sheltered employment and the

⁹ See, e.g., NAT’L DISABILITY RIGHTS NETWORK, *SEGREGATED & EXPLOITED: A CALL TO ACTION!* 45 (2011), <http://www.ndrn.org/images/Documents/Resources/Publications/Reports/Segregated-and-Exploited.pdf>, archived at <http://perma.cc/HW9U-N8MT>.

¹⁰ See *id.*

¹¹ See *id.* at 8; see also Editorial Board, *Doubly Disabled in Life*, N.Y. TIMES (April 11, 2014), <http://www.nytimes.com/2014/04/12/opinion/doubly-disabled-in-life.html>.

¹² See, e.g., *Doubly Disabled in Life*, *supra* note 11.

¹³ See, e.g., NAT’L DISABILITY RIGHTS NETWORK, *supra* note 9, at 24; NAT’L DISABILITY RIGHTS NETWORK, *BEYOND SEGREGATED AND EXPLOITED: UPDATE ON THE EMPLOYMENT OF PEOPLE WITH DISABILITIES* 18 (2012), http://www.ndrn.org/images/Documents/Resources/Publications/Reports/Beyond_Segregated_and_Exploited.pdf, archived at <http://perma.cc/P2WA-CRSH>.

¹⁴ Laura C. Hoffman, *An Employment Opportunity or a Discrimination Dilemma? Sheltered Workshops and the Employment of the Disabled*, 16 U. PA. J.L. & SOC. CHANGE 151 (2013); Susan Stefan, *Beyond Residential Segregation: The Application of Olmstead to Segregated Employment Settings*, 26 GA. ST. U.L. REV. 875 (2010); J. Gardner Armsby, *The War on Sheltered Workshops: Will ADA Title II Discrimination Lawsuits Terminate an Employment Option for Adults with Disabilities?*, 31 GA. ST. U.L. REV. 443 (2015); Gena Rinali, *Gimme Shelter?: Lane v. Kitzhaber and its Impact on Integrated Employment Services for People with Disabilities*, 22 AM. U.J. GENDER SOC. POL’Y & L. 749 (2014).

¹⁵ Laura C. Hoffman, *Sub-Minimum Wage or Sub-Human? The Potential Impact on the Civil Rights of People with Disabilities in Employment*, 17 PUB. INT. L. REP. 14 (2011); Matthew Crawford & Joshua Goodman, *Below the Minimum: A Critical Review of the 14(c) Wage Program for Employees with Disabilities*, 30 HOFSTRA LAB. & EMP. L.J. 591 (2013); Melia Preedy, *Subminimum or Subpar? A Note in Favor of Repealing the Fair Labor Standards Act’s Subminimum Wage Program*, 37 SEATTLE U.L. REV. 1097 (2014).

sub-minimum wage have not been examined under the theoretical frameworks of integrationism and anti-subordination.¹⁶ Broadly, integrationism posits that separate accommodations for people with disabilities are discriminatory *per se*,¹⁷ while anti-subordination theory eschews such bright-line rules and assesses whether the setting, integrated or segregated, is the most appropriate for the individual and reflects the person's actual preferences.¹⁸ This Note begins the discussion of how these theories are relevant to employment policy, and suggests that certain features of anti-subordination theory could be valuable in meeting the diversity of needs and preferences of people with disabilities. This Note suggests that an employment policy with an anti-subordination component could provide a spectrum of options that is particularly important for people, like Rosheen, with complex and significant disabilities. Further, the Note contends that the inclusion of anti-subordination theory, along with integrationism, best accommodates the history of subordination while also respecting individual preferences and needs.

Part II describes the history, evolution, and current reality of sheltered employment for people with disabilities. Parts III and IV analyze the legal and advocacy debates, respectively, concerning sheltered workshops. Part V parses the theoretical frameworks underlying these legal and advocacy positions. Part VI argues that the addition of an underlying theory of anti-subordination to the dominant theory of pure integration adds important nuance to employment policy for people with disabilities.

I. SHELTERED WORKSHOPS: PAST AND PRESENT

A. *History of Sheltered Workshops*

The modern history of sheltered workshops in the United States begins in 1838, when the Perkins Institute for the Blind opened a skills-training workshop near Boston to prepare graduates who were blind or visually impaired for participation in competitive, mainstream employment.¹⁹ In spite of their training, however, graduates of this program could not secure employment outside the workshop, and many returned to Perkins seeking long-term employment.²⁰ As Jacobus tenBroek, founding president of the National Federation of the Blind, explained, although the training program at Perkins had prepared its *graduates* for the workforce, “nothing had been

¹⁶ See generally Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415 (2007) (discussing anti-subordination from a disability perspective with respect to education, housing, and voting).

¹⁷ See *infra* Section V.B.

¹⁸ See *infra* Section V.C.

¹⁹ Stefan, *supra* note 14, at 898. Today, “competitive” or “mainstream” employment refers to work in an integrated setting for pay that is customary for non-disabled workers performing the same tasks. See NAT'L DISABILITY RIGHTS NETWORK, *supra* note 9, at 7.

²⁰ Stefan, *supra* note 14 at 898.

done to persuade *society* of the capacities of these blind trainees.”²¹ The Perkins Institute was designed to prepare graduates to move on to competitive employment,²² but it gradually evolved into a permanent, segregated employment site until it closed in 1951.²³ Other organizations also developed workshops in the early twentieth century, including religious groups such as the Salvation Army, which primarily hired homeless men, many of whom were also alcoholics.²⁴ By the 1930s, Goodwill Industries was providing sheltered employment and rehabilitative training for people with disabilities.²⁵ Workshops for people with tuberculosis were also established in the early twentieth century,²⁶ as were workshops for individuals with other specific disabilities, such as cerebral palsy,²⁷ intellectual disabilities,²⁸ and epilepsy.²⁹

The inability of workshop graduates to find mainstream work quietly transformed the concept of “sheltered employment” from a temporary training program to a permanent end-point. The fact that individuals with disabilities worked in sheltered rather than mainstream settings became proof of their inability to work elsewhere. As Professor Susan Stefan describes, “[o]ver time, sheltered workshops became indelibly associated with the premise and principle that people who worked in them were so severely handicapped that they were incapable of being trained to work in the competitive workforce.”³⁰

With the New Deal and the return of thousands of disabled veterans to the United States after World War II, awareness of people with disabilities grew, and public policy began addressing the needs of people with disabilities. Sheltered workshops proliferated.³¹ While there were an estimated 85 sheltered workshops in the United States in 1948, by 1976 that number had risen to 3,000.³² From the late twentieth century to the present, sheltered workshops began to transition their focus from people with physical and sensory disabilities to those with developmental or intellectual disabilities.³³

²¹ Jacobus tenBroek, *The Character and Function of Sheltered Workshops*, NATIONAL FEDERATION OF THE BLIND (1995), <http://www.blind.net/resources/employment/the-character-and-function-of-sheltered-workshops.html>, archived at <http://perma.cc/VA9J-U7G7> (emphasis added).

²² Stefan, *supra* note 14, at 898.

²³ *Id.*

²⁴ NATHAN NELSON, WORKSHOPS FOR THE HANDICAPPED IN THE UNITED STATES: AN HISTORICAL AND DEVELOPMENTAL PERSPECTIVE 34 (1971).

²⁵ *Id.* at 37–38. It is not clear how many Goodwill employees moved on to competitive employment, nor how many remained at Goodwill permanently. See *id.*

²⁶ *Id.* at 42.

²⁷ *Id.* at 63.

²⁸ *Id.* at 66–74.

²⁹ *Id.* at 77–80.

³⁰ Stefan, *supra* note 14, at 899.

³¹ Migliore, *supra* note 3.

³² Hoffman, *supra* note 14, at 154.

³³ Stefan, *supra* note 14, at 899–900.

Today, more than 85% of sheltered workshop participants have intellectual or psychiatric disabilities.³⁴

Federal legislative policy has been erratic with respect to sheltered employment in the last 70 years, as discussed in more detail in Part III. Policy began to move away from segregated employment in 1973 with the passage of the Rehabilitation Act,³⁵ which emphasizes the importance of competitive employment,³⁶ and the 1990 ADA,³⁷ the first section of which is devoted to decreasing barriers to employment for people with disabilities. Simultaneously, however, two pieces of legislation continued to support segregated employment. A longstanding minimum wage exception to the FLSA³⁸ and a federal statute known as AbilityOne,³⁹ that requires the federal government to purchase many products solely from segregated work settings, both support sheltered rather than competitive employment.

B. In Workshops Today

In a sheltered workshop, adults with disabilities—primarily intellectual or developmental disabilities—work together, usually completing relatively simple piecework.⁴⁰ By definition, workshop participants are surrounded almost entirely by other people with disabilities, with the exception of non-disabled staff who oversee, support, and manage the workshop. Sheltered workshops typically enter into sub-contracting arrangements, often with government agencies, through which workshop participants are given tasks such as heat-sealing plastic bags or doing simple one- and two-step assembly tasks.⁴¹ Some workshop participants also do simple janitorial or maintenance work off-site.⁴² Workshop employees are typically paid based on their productivity, not hours worked, which often results in paychecks considerably below the federal minimum wage, sometimes well under a dollar per hour.⁴³ Sheltered workshops do not always have enough contracts to keep participants busy each day, and when there is not enough work, staff may assign make-work tasks such as counting rocks and moving them from one

³⁴ GAO REPORT, *supra* note 2, at 19 (noting that 74% of § 14(c) participants have “mental retardation” and another 12% have “mental illness” as their primary impairment).

³⁵ 29 U.S.C. §§ 701–796 (2014).

³⁶ 29 U.S.C. § 795g (2014) (“It is the purpose of this subchapter to authorize [funding and support] to enable [individuals with disabilities] to achieve an employment outcome of supported employment in competitive integrated employment.”).

³⁷ Americans With Disabilities Act, 42 U.S.C. §§ 12101–12213 (2014).

³⁸ 29 U.S.C. § 214(c) (2014).

³⁹ 41 U.S.C. § 8504(a) (2011).

⁴⁰ See GAO REPORT, *supra* note 2, at 10.

⁴¹ *Id.* at 12.

⁴² *Id.*

⁴³ See *infra* Section III.A; see also Jillian Berman, *Some Disabled Goodwill Workers Earn as Little as 22 Cents an Hour as Execs Earn Six Figures: Report*, HUFFINGTON POST (June 21, 2013), http://www.huffingtonpost.com/2013/06/21/goodwill-workers-disabilities-low-wage_n_3478013.html archived at perma.cc/8YPS-R9R3.

box to another in order to keep everyone busy.⁴⁴ In other cases, work shortages mean that participants do puzzles, artwork, or do other non-productive tasks.⁴⁵

In addition to managing employment, virtually all sheltered workshops provide other types of support for participants, such as transportation services, psychological support, or other therapeutic services.⁴⁶ Thus, someone like Rosheen may be picked up and dropped off from work by a workshop bus, and the same organization that runs the workshop may also schedule medical appointments, hire support staff, arrange for social activities such as Special Olympics teams, or run group homes where workshop participants live.

II. LEGAL FRAMEWORK

The federal legal framework governing employment of people with disabilities is decidedly contradictory. Certain laws reflect a federal policy that strongly supports the perpetuation of sheltered and sub-minimum wage employment.⁴⁷ The Javits Wagner O'Day Act of 1971, also known as Ability-One, requires the federal government to purchase certain products from sheltered workshops, although it does not specify the wages to be paid to employers with disabilities.⁴⁸ Further, a long-standing section of the FLSA allows employers of people with disabilities to pay sub-minimum wages if the employees are less productive than an average, non-disabled employee.⁴⁹

By contrast, more recent statutes clearly oppose this arrangement. The ADA, as interpreted by the Supreme Court and enforced in recent years by the Department of Justice ("DOJ"), calls for the curtailment of segregated employment.⁵⁰ Pursuant to a 2014 Executive Order, the federal government has eliminated its use of sub-minimum wages for federal employees.⁵¹ In July 2014, President Obama signed into law the Workforce Innovation and Opportunity Act, which requires that, as of 2016, most people with disabilities under age 24 will have to make certain attempts to attain competitive, full-wage employment before they can be hired for sub-minimum wage jobs.⁵² While these divergent policies can be reconciled from a technical perspective, they cannot be reconciled philosophically to create a coherent policy concerning employment of people with disabilities.

⁴⁴ NAT'L DISABILITY RIGHTS NETWORK, *supra* note 9, at 23.

⁴⁵ *See id.*

⁴⁶ GAO REPORT, *supra* note 2, at 13.

⁴⁷ *See infra* Section III.A.

⁴⁸ 41 U.S.C. § 8504(a) (2011).

⁴⁹ 29 U.S.C. § 214(c) (2014).

⁵⁰ *See infra* Section III.B.

⁵¹ Exec. Order No. 13,658, 79 Fed. Reg. 9851 (Feb. 12, 2014).

⁵² Workforce Innovation and Opportunity Act, Pub. L. No. 113-128 (2014); *see also* THE INSTITUTE BRIEF, WIA IS NOW WOIA: WHAT THE NEW BILL MEANS FOR PEOPLE WITH DISABILITIES 1-2 (August 2014), https://www.communityinclusion.org/pdf/IB31_F.pdf, archived at <https://perma.cc/V28D-43P9>.

A. Supporting Workshops: the FLSA § 14(c) and AbilityOne

Statutes and mandates supporting sheltered employment and permitting sub-minimum wages predate the ADA by decades.⁵³ The first federal foray into regulating and supporting the employment of people with disabilities came in the wake of World War I, as an early amendment to the 1933 National Industrial Recovery Act (“NIRA”), which established, *inter alia*, the minimum wage and overtime pay rules.⁵⁴ Although the NIRA initially included no reference to people with disabilities, in 1934 President Franklin Roosevelt issued an Executive Order establishing an exception to minimum wages for employees “whose earning capacity is limited because of age, physical or mental handicap, or other infirmity” and creating a certificate system through which employers of workers with disabilities could qualify for this exemption.⁵⁵ The NIRA’s successor, the FLSA, passed in 1938, retained the minimum wage exemption.⁵⁶ The modern FLSA exemption for workers with disabilities, § 14(c), is functionally identical to the original 1938 provision.⁵⁷

Individuals who are employed under § 14(c) certificates work primarily in sheltered workshops and are paid based on productivity rather than time worked, which is typically well below minimum wage. In earlier iterations of the § 14(c) program, sub-minimum wages were subject to a “special” minimum wage of between 50% and 75% of the federal minimum wage.⁵⁸ Today, there is no floor: wages are determined entirely by a worker’s relative productivity and accuracy as compared against an average, non-disabled worker.⁵⁹ Employees exempt from the minimum wage under § 14(c) are sometimes paid less than a quarter per hour,⁶⁰ with 23% of § 14(c) workers receiving less than one dollar per hour.⁶¹ Section 14(c) certificates are not entirely coextensive with sheltered workshops because mainstream employ-

⁵³ The FLSA was enacted in 1938, nearly 50 years before the Rehabilitation Act was passed in 1973.

⁵⁴ WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., RL30674, TREATMENT OF WORKERS WITH DISABILITIES UNDER SECTION 14(C) OF THE FAIR LABOR STANDARDS ACT 6–7 (2005).

⁵⁵ *Id.*

⁵⁶ Fair Labor Standards Act, Pub. L. 75-718, ch. 676, § 14, 52 Stats. 1060 (1938) (current version at 29 U.S.C. § 214 (2014)).

⁵⁷ As of 1938, the Fair Labor Standards Act allowed for “the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable.” Fair Labor Standards Act, Pub. L. 75-718, ch. 676, § 14, 52 Stats. 1060 (1938) (current version at 29 U.S.C. § 214 (2014)). The current Fair Labor Standards Act allows for the employment “under special certificates, of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury, at wages which are [] lower than the minimum wage applicable.” 29 U.S.C. § 214(c) (2014).

⁵⁸ Whittaker, *supra* note 54, at 28.

⁵⁹ *Id.* at 1.

⁶⁰ See, e.g., GAO REPORT, *supra* note 2, at 22 (one work center had average pay of \$0.63 per hour); Berman, *supra* note 43.

⁶¹ GAO REPORT, *supra* note 2, at 22.

ers can also apply for § 14(c) certificates. However, sheltered employers receive more than 80% of § 14(c) minimum wage exemption certificates,⁶² and 94.5% of workers who are paid below the minimum wage under § 14(c) are employed in sheltered work environments.⁶³

It is difficult to determine whether § 14(c) certificates are essential for the financial security of sheltered workshops. As of 2001, the U.S. Government Accountability Office estimated that only 35% of sheltered workshops' funding came from employment contracts, with most of the remaining funding coming from state and federal agencies.⁶⁴ Unlike private businesses, sheltered workshops rely heavily on revenue unrelated to their employees' work, including private donations and state and federal funding stemming from their non-workshop services.⁶⁵ Moreover, day habilitation centers without workshop components already exist for adults with disabilities (although these, too, are subject to serious concerns about institutionalization, choice, and integration).⁶⁶ Still, it is reasonable to assume that, with an average of 35% of funding coming from employment contracts, FLSA § 14(c) is critical to the continued existence of many, if not most, sheltered workshops.

In addition to the FLSA sub-minimum wage certificates, AbilityOne requires that certain purchases by the federal government of goods and services be procured "from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled."⁶⁷ While AbilityOne does not dictate the wages employees will earn, it defines "qualified nonprofit agencies" as workplaces at which people who are blind or disabled account for at least 75% of the annual work hours required to manufacture the purchased product.⁶⁸ Although it is agnostic about the wages employees will earn, the definition of qualified nonprofit agencies virtually guarantees that many, and perhaps most, of these products will be purchased from sheltered workshops.⁶⁹ The list of products and services that must be procured through AbilityOne is extensive, including clothing, electrical supplies, med-

⁶² *Id.* at 10.

⁶³ *Id.* at 18.

⁶⁴ *Id.* at 15 (indicating average sources of "work center" funding, 35% of which derives from production contracts, 9% from retail sales, and 46% from state and county agencies).

⁶⁵ *Id.*

⁶⁶ See, e.g., Day Services, NEW YORK OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES (Nov. 6, 2014, 5:47 PM) http://www.opwdd.ny.gov/opwdd_services_supports/supports_for_independent_and_family_living/day_services, archived at <http://perma.cc/S6CN-JUC4>.

⁶⁷ 41 U.S.C. § 8504(a) (2011).

⁶⁸ 41 U.S.C. §§ 8501(6)(C), 8501(7)(C).

⁶⁹ Notably, however, the AbilityOne Program reported in 2014 that the average hourly wage for employees under its contracts was \$12.44 per hour. ABILITYONE PROGRAM, WE ARE ABILITYONE, 2014 ANNUAL REPORT 31 (2014), http://www.abilityone.gov/media_room/documents/Commission_AnnualReport_Final_040815_nocropmarks_508v2_FINAL.pdf, archived at perma.cc/R3DV-RAML. The U.S. Department of Labor determined that in 2014 only 9.5% of people working on AbilityOne contracts were paid below the minimum wage. ADVISORY COMMITTEE ON INCREASING COMPETITIVE INTEGRATED EMPLOYMENT FOR INDIVIDUALS WITH DISABILITIES, U.S. DEP'T OF LABOR, INTERIM REPORT 92 (2015), <http://www.dol.gov/odep/pdf/20150808.pdf>, archived perma.cc/RZ7W-HM9A.

ical supplies, office supplies, food distribution products; and custodial, food, hospitality, recycling, administrative, and maintenance services.⁷⁰

Taken together, FLSA's sub-minimum wage certificates and AbilityOne provide significant support for sheltered employment by mandating purchases from workshops on a large scale and incentivizing the hiring of large numbers of disabled employees in majority-disability workplaces. Although these legislative policies remain in place today, conflicting federal policies have recently been implemented to eliminate the very employment environments that AbilityOne and FLSA subsidize and encourage.

B. Against Workshops: ADA Integration Mandate and Olmstead

Passed in 1990, the ADA prohibits discrimination against people with disabilities in employment (Title I), public services (Title II), and public accommodations (Title III).⁷¹ The ADA defines disability broadly, including any "physical or mental impairment that substantially limits one or more major life activities . . . or being regarded as having such an impairment."⁷² The ADA also rejects a medical definition of disability, embracing instead a social model, in which disability is understood primarily as a challenge of stigma rather than of impairment.⁷³ Under this social model of disability, societal barriers make an impairment disabling. The impairment of being unable to walk, for example, is only disabling because we are surrounded by stairs, not because walking is inherently necessary to participate in society.⁷⁴ By including protection for people who are *regarded* as having impairments, even if they are not in fact impaired, the ADA acknowledges perception, stereotype, and stigma as key challenges among people who are disabled or seen to be disabled.

The ADA's overarching purpose is to "eliminat[e] discrimination against individuals with disabilities."⁷⁵ Discrimination under the ADA includes, *inter alia*, the "serious and pervasive social problem" of "isolat[ion] and segregat[ion of] individuals with disabilities."⁷⁶ The ADA's statement of purpose, like its definition of disability, focuses on not only impairment but also stigma and perception as key factors in the marginalization of people with disabilities. Title II of the ADA prohibits public entities from excluding qualified individuals with disabilities from "participation in, or the benefits of, services, programs, or activities of a public entity."⁷⁷ Sub-

⁷⁰ *Procurement List Products*, U.S. ABILITYONE COMMISSION, http://www.abilityone.gov/procurement_list/product_list.html, archived at <http://perma.cc/F524-QLZU>.

⁷¹ 42 U.S.C. § 12101 (2014).

⁷² *Id.* § 12102(1).

⁷³ See *infra* Section V.A.

⁷⁴ Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or An Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 420–421 (2011).

⁷⁵ 42 U.S.C. § 12101(b)(1) (2014).

⁷⁶ *Id.* § 12101(2).

⁷⁷ *Id.* § 12132.

sequent regulations have interpreted this language to establish an “integration mandate,”⁷⁸ requiring that public entities “administer services, programs, and activities *in the most integrated setting appropriate* to the needs of qualified individuals with disabilities.”⁷⁹ The DOJ has described the most integrated setting as one that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.”⁸⁰

Nine years after the passage of the ADA, the Supreme Court held in *Olmstead v. L.C.*⁸¹ that Georgia’s policy of unnecessarily institutionalizing people with psychiatric and intellectual disabilities constituted discrimination on the basis of disability and thus violated Title II of the ADA and the integration mandate.⁸² In *Olmstead*, the plaintiffs were two women with mental disabilities.⁸³ Both had been voluntarily admitted to state psychiatric hospitals, where they were treated for approximately a year, after which physicians concluded that each woman could leave the hospital and receive care in community-based residences.⁸⁴ Because there was inadequate funding to support this arrangement, however, both women remained institutionalized considerably beyond what was medically necessary: One plaintiff remained in the hospital for nearly three years after her psychiatrist determined that her condition had stabilized and that her needs could be met in the community.⁸⁵ Justice Ginsburg, writing for the *Olmstead* majority, held that “unjustified institutional isolation” is a form of discrimination by reason of disability⁸⁶ and violates the ADA.⁸⁷

It took ten years for the DOJ to build on *Olmstead*’s expansive precedent and launch large-scale legal challenges to discrimination based on segregation.⁸⁸ Since 2009, the DOJ Civil Rights Division’s Disability Rights Section has pursued nearly fifty cases and complaints seeking to enforce and expand *Olmstead*, striving for what the DOJ refers to as “[c]ommunity [i]ntegration for [e]veryone.”⁸⁹

⁷⁸ See, e.g., *Townsend v. Quasim*, 328 F.3d 511, 515–16 (9th Cir. 2003).

⁷⁹ 28 C.F.R. § 35.130(d) (2011) (emphasis added).

⁸⁰ U.S. Dep’t of Justice, *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.*, ADA.gov (2011), http://www.ada.gov/olmstead/q&a_olmstead.htm, archived at <http://perma.cc/7JRU-RWLZ>.

⁸¹ 527 U.S. 581 (1999).

⁸² *Id.*

⁸³ *Id.* at 593.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 600.

⁸⁷ *Id.* at 607.

⁸⁸ See *Olmstead: Community Integration for Everyone – Home Page*, ADA.gov, <http://www.ada.gov/olmstead/index.htm> (last visited Oct. 29, 2015), archived at <http://perma.cc/XS37-MKAY> (“In 2009, the Civil Rights Division [of the Department of Justice] launched an aggressive effort to enforce [*Olmstead*].”).

⁸⁹ See *id.*; see also *Olmstead: Community Integration for Everyone – Olmstead Enforcement – Cases by Issue*, ADA.gov, [hereinafter *Olmstead Cases by Issue*], http://www.ada.gov/olmstead/olmstead_cases_by_issue.htm (last visited Oct. 29, 2015), archived at <http://perma.cc/9R7N-39KZ>.

The cases have targeted a variety of contexts that, the DOJ alleges, encompass discriminatory segregation.⁹⁰ Much of the litigation and advocacy focuses on issues of housing and institutionalization and thus hews relatively closely to the facts of *Olmstead*.⁹¹ These cases challenge discrimination in housing through segregation, institutionalization, and risk of institutionalization.⁹² Some cases challenge states' use of nursing homes to house children⁹³ and adults⁹⁴ with disabilities. Others target the housing of people with psychiatric⁹⁵ and developmental⁹⁶ disabilities in large group homes rather than in community-based settings. Still other litigation focuses on people with disabilities who live in the community but are at risk of discriminatory institutionalization, often owing to the proposed elimination of state funding necessary to support community living.⁹⁷

Since 2012, however, the DOJ has launched more expansive *Olmstead* litigation, including two challenges to the overuse of sheltered employment for people with disabilities: *Lane v. Kitzhaber*⁹⁸ and *United States v. Rhode Island*.⁹⁹ In 2012, the DOJ intervened in *Lane*, a case in Oregon in which plaintiffs with intellectual and developmental disabilities challenged the state's failure to provide training and services that would allow them to work in mainstream, rather than sheltered, employment settings.¹⁰⁰ In its Complaint in Intervention, the DOJ argued that, although the plaintiffs alleged no risk of institutionalization or housing discrimination (each plaintiff already lived in the community), the precepts of *Olmstead* were nonetheless vio-

⁹⁰ See *Olmstead Cases by Issue*, *supra*.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See *Olmstead: Community Integration for Everyone – Olmstead Enforcement*, INFORMATION AND TECHNICAL ASSISTANCE ON THE AMERICANS WITH DISABILITIES ACT, http://www.ada.gov/olmstead/olmstead_cases_list2.htm#fla (last visited Oct. 29, 2015), archived at <http://perma.cc/262R-67FB> (describing United States' Statement of Interest in Opposition to the State Defendants' Renewed Motion to Dismiss Private Plaintiffs' Complaint, *United States v. Florida*, No. 1:13-cv-61576 (S.D. Fla. July 22, 2013)).

⁹⁴ *Id.* (describing the March 14, 2013 settlement agreement reached in *United States v. Marion County Nursing Home District* (E.D. Mo. 2013); describing the Brief for the United States as Amicus Curiae in Support of Appellee filed April 2, 2009 in *Long v. Benson*, 383 F. App'x. 930, (11th Cir. 2010)).

⁹⁵ *Id.* (describing settlement agreement reached in *United States v. New York*, No. 13-cv-4165 (E.D.N.Y. 2013) (settlement agreement filed July 23, 2013; amended settlement agreement filed Jan. 30, 2014); describing settlement agreement reached in *United States v. North Carolina*, No. 5:12-cv-557 (E.D.N.C. 2012) (settlement agreement filed August 23, 2012)).

⁹⁶ *Id.* (describing settlement agreement reached in *United States v. Virginia*, No. 3:12cv059 (E.D. Va. 2012) (order approving consent decree entered August 23, 2012); describing complaint in *U.S. v. Arkansas*, No. 4:09-CV-00033 (E.D. Ark. Jan. 16, 2009) (dismissed with prejudice June 8, 2011)).

⁹⁷ *Id.* (describing statement of interest filed in *Smith v. Department of Public Welfare of the Commonwealth of Pennsylvania*, No. 2:13-cv-05670 (E.D. Pa. June 12, 2014) (persons with disabilities at risk of institutionalization due to state cuts to budget for community-based services)).

⁹⁸ *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1201 (D. Or. 2012).

⁹⁹ Complaint for Declaratory and Injunctive Relief, *United States v. State of Rhode Island and City of Providence*, Case No. 1:13-cv-0042-L-PAS (D.R.I. June 13, 2013).

¹⁰⁰ *Lane*, 841 F. Supp. 2d at 1201.

lated.¹⁰¹ The “most integrated setting” mandate under the ADA and *Olmstead* applied to workday activities, according to the DOJ, and thus required the state to provide plaintiffs with support to access mainstream employment and avoid unnecessary segregation.¹⁰² In particular, the DOJ alleged that Oregon administered employment, rehabilitation, vocational, and education service systems “in a manner that unnecessarily causes qualified individuals with disabilities to be denied the benefit of [these systems] in the most integrated setting appropriate to their needs,” and that the state failed to modify the systems to avoid such discrimination.¹⁰³ The DOJ further contended that reasonable modifications to Oregon’s employment services system would provide integrated employment settings to plaintiffs (and others) currently placed in, or at risk of being placed in, sheltered settings.¹⁰⁴ The DOJ emphasized that the plaintiffs in *Lane* had expressed a preference for integrated over sheltered employment.¹⁰⁵ In September 2015, the parties in *Lane*¹⁰⁶ entered into a settlement agreement, according to which Oregon will transition 1,115 sheltered workshop employees into competitive, integrated employment over the next seven years, and at least 4,900 youth with disabilities will receive supported employment services to prepare them for competitive employment.¹⁰⁷

In 2013, the DOJ launched an investigation into sheltered work in Rhode Island, filing a complaint in June 2013.¹⁰⁸ The complaint alleged that Rhode Island and the city of Providence violated Title II by failing to administer their supported employment and special education programs in accordance with the ADA integration mandate.¹⁰⁹ The allegations against Rhode Island were similar to those raised against Oregon. The DOJ argued that

¹⁰¹ United States’ Complaint in Intervention ¶¶ 35-37, 54, 68-70, *Lane v. Kitzhaber*, Case No. 3:12-cv-00138-ST (D. Or. March 27, 2013).

¹⁰² *Lane*, 841 F. Supp. 2d at 1203.

¹⁰³ United States’ Complaint in Intervention ¶ 84, *Lane v. Kitzhaber*, Case No. 3:12-cv-00138-ST (D. Or. March 27, 2013). In support of these allegations, the DOJ described systemic problems in Oregon’s vocational services for people with disabilities. The DOJ noted that the state Office of Vocational and Rehabilitation Services, which is tasked with formulating individualized employment plans, was failing people with disabilities by “administer[ing] a system of vocational assessments that is largely inappropriate for individuals with” intellectual or developmental disabilities. *Id.* ¶ 76.

¹⁰⁴ *Id.* ¶ 76.

¹⁰⁵ *Id.* ¶ 69.

¹⁰⁶ In 2015, the case was renamed *Lane v. Brown*. U.S. Dep’t of Justice, *Justice Department Reaches Proposed ADA Settlement Agreement on Oregon’s Developmental Disabilities System*, THE UNITED STATES DEPARTMENT OF JUSTICE, (Sept. 8, 2015), <http://www.justice.gov/opa/pr/justice-department-reaches-proposed-ada-settlement-agreement-oregons-developmental>, archived at <http://perma.cc/V45L-JJMM>.

¹⁰⁷ Settlement Agreement, *Lane v. Brown*, Case No. 3:12-cv-00138-ST (Sept. 8, 2015), http://www.ada.gov/olmstead/documents/lane_sa.pdf, archived at perma.cc/Y8R7-R7ME; see also U.S. Dep’t of Justice, *supra* note 106.

¹⁰⁸ Complaint for Declaratory and Injunctive Relief, *United States v. Rhode Island and City of Providence*, Case No. 1:13-cv-0042-L-PAS (D.R.I. June 13, 2013), <http://www.ada.gov/olmstead/documents/ri-providence-complaint.pdf>, archived at <http://perma.cc/TCN8-BEUK>.

¹⁰⁹ *Id.* ¶¶ 110-112.

Rhode Island had been sending students with disabilities from its special education training program to its largest sheltered workshop, Training Thru Placement (“TTP”), in unnecessarily high numbers, and that TTP participants then remained in the workshop for decades, with few participants ever moving on to integrated employment.¹¹⁰ The DOJ stated that Rhode Island’s policy of sending students in high numbers to TTP constituted unlawful discrimination through workplace segregation.¹¹¹

The complaint noted that many individuals employed at TTP had expressed a preference for supported or mainstream employment.¹¹² It further alleged violations of the FLSA § 14(c) certificate program, which was under investigation by the Department of Labor at the time the complaint was filed.¹¹³ The average wage at TTP was \$1.57 per hour, while at least one person was paid as little as \$0.14 per hour.¹¹⁴ Providence was also accused of segregating high school students with disabilities by funneling them into a self-contained special educational program in which students completed sheltered workshop tasks rather than receiving training for mainstream employment and that served as a “direct pipeline”¹¹⁵ for post-graduate placement at TTP.¹¹⁶

The same day that the complaint was filed, the DOJ, Providence, and Rhode Island announced an interim settlement agreement, according to which new placements would no longer be made to TTP¹¹⁷ and a schedule for gradually increasing placement in integrated mainstream employment would be established.¹¹⁸ Although the settlement was announced with optimism in June 2013,¹¹⁹ by January 2014 the DOJ was expressing concern that Rhode Island was failing to meet its obligations under the settlement.¹²⁰ In

¹¹⁰ *Id.* ¶¶ 67, 83.

¹¹¹ *Id.* ¶¶ 87–93.

¹¹² *Id.* ¶ 89. Supported employment takes place in a mainstream setting with individualized assistance and supports based on the employee’s needs and abilities. See NAT’L DISABILITY RIGHTS NETWORK, *supra* note 9.

¹¹³ Complaint for Declaratory and Injunctive Relief at ¶ 5, *United States v. Rhode Island and City of Providence*, Case No. 1:13-cv-0042-L-PAS (D.R.I. June 13, 2013), <http://www.ada.gov/olmstead/documents/ri-providence-complaint.pdf>, archived at <http://perma.cc/TCN8-BEUK>.

¹¹⁴ *Id.*

¹¹⁵ *Id.* ¶ 9.

¹¹⁶ *Id.* ¶¶ 7–8.

¹¹⁷ Interim Settlement Agreement, Department of Justice, City of Providence, State of Rhode Island, Interim Settlement Agreement 5 ¶ 5, <http://www.ada.gov/olmstead/documents/ri-providence-interim-settlement.pdf>, archived at <http://perma.cc/QVR8-VL2G>.

¹¹⁸ *Id.* at 5–6, ¶ 9.

¹¹⁹ See United States Department of Justice, Office of Public Affairs, *Department of Justice Reaches Landmark Settlement Agreement with Rhode Island and City of Providence Under the ADA*, JUSTICE NEWS (June 13, 2013), <http://www.justice.gov/opa/pr/departments-justice-reaches-landmark-settlement-agreement-rhode-island-and-city-providence>, archived at <http://perma.cc/MQ7D-D3L5>.

¹²⁰ See Letter from Jocelyn Samuels, Acting Assistant Attorney General, Re: United States’ Title II ADA Investigation for Employment, Vocational, and Day Services for Persons with Intellectual and Developmental Disabilities in Rhode Island 5 (Jan. 6 2014), http://www.ada.gov/olmstead/documents/ri_lof.pdf, archived at <http://perma.cc/MB5U-S4BV>.

April 2014, the DOJ filed another complaint, alleging that Rhode Island was still failing to educate and employ people with intellectual and developmental disabilities in the most integrated setting, in violation of Title II and *Olmstead*.¹²¹ The day after the second complaint was filed, the DOJ and Rhode Island filed a consent decree, which, while not focusing on TTP, stipulated obligations on Rhode Island substantially similar to those in the original settlement.¹²²

Although *Olmstead* and subsequent cases acknowledge the importance of individual choice and could allow for the continuing availability of workshops for some, the early results of this litigation suggest that states are abandoning sheltered employment altogether. The *Olmstead* decision and the DOJ's subsequent employment litigation indicate that the plaintiffs specifically want to move away from segregated settings.¹²³ *Olmstead* itself holds that moving from a psychiatric hospital to a community-based setting is appropriate when, *inter alia*, it is "not opposed by the affected individual."¹²⁴ Similarly, the DOJ complaints in *Rhode Island* and *Lane* made clear that the plaintiffs wanted to leave their sheltered settings.¹²⁵ In practice, however, the result of challenges to the overuse of sheltered employment has tended to be elimination of sheltered workshops altogether. Thus, while the Rhode Island consent decree extensively referred to individualized planning, it also stated that Rhode Island would cease funding for *any* new clients in its sheltered workshops.¹²⁶ Vermont has already closed all of its workshops, and New York and Massachusetts have proposed similar measures for the complete elimination of workshops.¹²⁷

In addition to the DOJ's *Olmstead* litigation, President Barack Obama has indicated his opposition to the use of both sheltered employment and sub-minimum wages, which, as described above, are closely intertwined

¹²¹ Complaint at ¶ 1, *United States v. Rhode Island*, Case No. CA14-175 (D.R.I. Apr. 8, 2014), <http://www.ada.gov/olmstead/documents/ri-olmstead-complaint.pdf>, archived at <http://perma.cc/MB5U-S4BV>.

¹²² See generally Consent Decree, *United States v. Rhode Island*, Case No. CA14-175 (D.R.I. Apr. 9, 2014), <http://www.ada.gov/olmstead/documents/ri-olmstead-statewide-agree.pdf>, archived at <http://perma.cc/S48Y-9LHW>.

¹²³ See *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999); *United States' Complaint in Intervention at ¶ 69, Lane v. Kitzhaber*, Case 3:12-cv-00138-ST (D. Or. Mar. 27, 2013), http://www.ada.gov/olmstead/documents/lane_complaint.pdf, archived at perma.cc/74GZ-94M3; *Complaint at ¶ 16, United States v. Rhode Island*, Case No. CA14-175 (D. R.I. Apr. 8, 2014), <http://www.ada.gov/olmstead/documents/ri-olmstead-complaint.pdf>, archived at perma.cc/Y99S-5ME9.

¹²⁴ *Olmstead*, 527 U.S. at 587.

¹²⁵ See *United States' Complaint in Intervention at ¶ 69, Lane v. Kitzhaber*, Case 3:12-cv-00138-ST (D. Or. Mar. 27, 2013), http://www.ada.gov/olmstead/documents/lane_complaint.pdf, archived at perma.cc/74GZ-94M3; *Complaint at ¶ 16, United States v. Rhode Island*, Case No. CA14-175 (D.R.I. Apr. 8, 2014), <http://www.ada.gov/olmstead/documents/ri-olmstead-complaint.pdf>, archived at perma.cc/Y99S-5ME9.

¹²⁶ Consent Decree at 6, ¶ 4, *United States v. Rhode Island*, Case No. CA14-175 (D.R.I. Apr. 9, 2014), <http://www.ada.gov/olmstead/documents/ri-olmstead-statewide-agreement.pdf>, archived at <http://perma.cc/S48Y-9LHW>.

¹²⁷ See *infra* Section III.C.

with the continued existence of sheltered employment.¹²⁸ Executive Order 13,658, signed by the President in February 2014, increases the minimum wage for federal contractors to \$10.10 per hour, including for workers who had previously been paid sub-minimum wages under § 14(c) certificates.¹²⁹ When President Obama signed into law the Workforce Innovation and Opportunity Act in 2014, which, as of 2016, will limit access to sheltered workshops for many young adults, he noted that the law includes “new steps to support Americans with disabilities who want to live and work independently.”¹³⁰

C. Closing Workshops

The April 2014 Rhode Island consent decree was widely reported and celebrated.¹³¹ Although the DOJ has not publicly announced any investigations into other states’ sheltered workshop regimes, many states, doubtless aware of events in Rhode Island, are preemptively transitioning away from sheltered employment.¹³² New York decided to phase out sheltered employment, but it has faced considerable backlash against this decision, particularly from family members of sheltered workshop employees.¹³³ In March 2015, in response to opposition to the planned elimination of sheltered employment, a bill known as the “Employment First Choice Act” was proposed to the New York State Senate that would soften the workshop-closure plan and “establish a procedure through which persons with developmental disabilities may choose to remain in a nonintegrated setting.”¹³⁴

¹²⁸ See *supra* Section III.A.

¹²⁹ Exec. Order No. 13,658, 79 Fed. Reg. 9851 (Feb. 12, 2014).

¹³⁰ *Remarks by the President and Vice President at Bill Signing of the Workforce Innovation and Opportunity Act*, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY (July 22, 2014, 12:18 PM), <https://www.whitehouse.gov/the-press-office/2014/07/22/remarks-president-and-vice-president-bill-signing-workforce-innovation-a>, archived at <https://perma.cc/89ZW-K5ET>.

¹³¹ See, e.g., Dan Barry, *Rhode Island Settles Case on Jobs for the Disabled*, N.Y. TIMES (Apr. 8, 2014), <http://www.nytimes.com/2014/04/09/us/developmentally-disabled-get-more-workplace-protections.html>; Editorial Board, *Doubly Disabled in Life*, N.Y. TIMES (Apr. 11, 2014), <http://www.nytimes.com/2014/04/12/opinion/doubly-disabled-in-life.html>.

¹³² See, e.g., Rick Karlin, *Sheltered Workshops Are In Midst of a Storm*, TIMES UNION (July 20, 2013), <http://www.timesunion.com/local/article/Sheltered-workshops-are-in-midst-of-a-storm-4677272.php>, archived at <http://perma.cc/W9B9-48Q2> (New York phasing out funding for sheltered workshops); Halle Stockton, *Vermont Closed Workshops for People with Disabilities; What Happened Next?*, PUB. SOURCE (Sept. 28, 2014), <http://publicsource.org/investigations/vermont-closed-workshops-for-people-with-disabilities-what-happened-next#.VRwQQ4IbzI>, archived at <http://perma.cc/RRR5-GD44> (Vermont closed all sheltered workshops).

¹³³ Brian Dwyer, *Jefferson County Rallies Against Closing Sheltered Workshop*, TIME WARNER CABLE NEWS, N.Y. (Jan. 27, 2015), <http://www.twcnews.com/nys/central-ny/news/2015/01/27/jefferson-county-rallies-against-closing-sheltered-workshop.html>, archived at <http://perma.cc/H74D-83MH>.

¹³⁴ Employment First Choice Act, N.Y. S. Res. 3893-A (2015).

New York is not alone. In 2003, after a one-year phase out, Vermont had closed all of its sheltered workshops.¹³⁵ It remains the only state with no segregated employment.¹³⁶ In 2013, Massachusetts announced a “Blueprint for Success,” which called for “[c]los[ing] the ‘front door’ to sheltered workshops as of January 1, 2014 by halting any new referrals to this service” and “[c]los[ing] sheltered workshops [entirely] by June 30, 2015.”¹³⁷ However, as was the case in New York, many—particularly family members of people with disabilities—in Massachusetts opposed this plan, and the 2015 state budget limited the impact of the “Blueprint” by prohibiting the state from “reduc[ing] the availability or decreas[ing] funding for sheltered workshops serving persons with disabilities who voluntarily seek or wish to retain such employment services.”¹³⁸ In both New York and Massachusetts, the long-term prospects for sheltered workshops remain unknown.

D. *After Workshops*

Plans to close sheltered workshops promise to transition people with disabilities into non-segregated employment settings. Vermont is more than a decade into its post-workshop experience, and workshop opponents often hail its transition as a model of success. The Association of People Supporting Employment First hosts an annual “Sheltered Workshop Conversion” forum to bring the lessons of Vermont to organizations and advocates in other states seeking to transition from sheltered to integrated employment.¹³⁹ A 2014 article on the impact of Vermont’s sheltered workshop closure reported that “sheltered workshops have become a blip in Vermont’s history” and noted that “[o]ne of the first steps” for other states wishing to follow Vermont’s lead is to “[t]hrow out the argument that some people are too disabled to be employed.”¹⁴⁰

However, the 2014 State Data National Report on Employment Services and Outcomes (“State Data Report”) casts doubt on the optimistic claim that former sheltered workshop employees have all integrated success-

¹³⁵ *Site Descriptions, Burlington, Vermont*, NATIONAL COUNCIL ON DISABILITY, <http://www.ncd.gov/publications/2012/August232012/sites> (last visited Oct. 30, 2015), *archived at* <http://perma.cc/RJV6-3WHL>.

¹³⁶ JOHN BUTTERWORTH ET AL., *STATE DATA: THE NATIONAL REPORT ON EMPLOYMENT SERVICES AND OUTCOMES 22* (2014), http://www.statedata.info/sites/statedata.info/files/files/state_data_book_2015.pdf, *archived at* <http://perma.cc/XG6K-9KPW>.

¹³⁷ Mass. Dep’t of Dev. Serv., Ass’n of Dev. Disabilities Providers, *The Arc of Mass. Blueprint for Success: Employing Individuals with Intellectual Disabilities in Massachusetts* (November 2, 2013), <http://www.mass.gov/eohhs/docs/dmr/blueprint-for-success.pdf>, *archived at* <http://perma.cc/W7WZ-MMSV> [hereinafter *Blueprint for Success*].

¹³⁸ FY 2015 BUDGET, COMMONWEALTH OF MASSACHUSETTS (July 15, 2014), <https://malegislature.gov/Budget/FinalBudget/2015>.

¹³⁹ *A Time for Change . . . Sheltered Workshop Conversion*, VERMONT APSE (2007), http://vermontapse.org/vermont_conversion_institute, *archived at* <http://perma.cc/4J8D-QFQ9>.

¹⁴⁰ Stockton, *supra* note 132.

fully into mainstream employment. The State Data Report, issued by the Institute for Community Inclusion (which opposes sheltered employment), found that only 38% of people with disabilities in Vermont participated in integrated employment in 2013,¹⁴¹ and that those with intellectual disabilities who *were* employed worked an average of only sixteen hours per week.¹⁴² Because Vermont no longer has any sheltered employment settings, this means that the remaining 63% of people with disabilities in Vermont were not employed in any capacity,¹⁴³ and those who had employment were working well under half-time. According to the Report, all of the 63% of Vermonters with disabilities who are not employed are participants in “community-based non-work,”¹⁴⁴ which, by definition, excludes paid work.¹⁴⁵ Although Vermont has among the highest percentages of people with disabilities in integrated employment nationwide,¹⁴⁶ its average sixteen-hour workweek for people with intellectual disabilities is below the nationwide average of twenty-three hours per week.¹⁴⁷

While an in-depth empirical study of the arc of employment outcomes and opportunities for individuals in Vermont is outside the scope of this Note, these statistics call into question whether integrated employment “for all” is in fact the reality, even more than a decade into Vermont’s much-hailed post-workshop experiment. Rather than definitively proving the virtue of closing sheltered workshops, Vermont’s modest successes, coupled with ongoing high unemployment among people with disabilities, raise further questions about employment outcomes for people with disabilities. It is not immediately obvious, for example, that people with intellectual disabilities would prefer non-work settings, like day habilitation, rather than sheltered work settings, yet the statistics suggest that many people in Vermont who might have otherwise been in sheltered work settings are now not working in any capacity. Contrary to the common narrative of Vermont’s experiment, this data suggests that closing workshops does not necessarily result in high employment for people with disabilities, and further examination is needed as to ideal outcomes, options, and considerations.

¹⁴¹ JOHN BUTTERWORTH ET AL., *STATEDATA: THE NATIONAL REPORT ON EMPLOYMENT SERVICES AND OUTCOMES* 21 (2014), http://www.statedata.info/sites/statedata.info/files/files/state_data_book_2015.pdf, archived at <http://perma.cc/XG6K-9KPW>.

¹⁴² *Id.* at 31.

¹⁴³ The Report does not explain why the total percentage of employment in Vermont adds to 101%. This is presumed to be a typographical or rounding error.

¹⁴⁴ JOHN BUTTERWORTH ET AL., *supra* note 141, at 21.

¹⁴⁵ *Id.* at 17.

¹⁴⁶ *Id.* at 21.

¹⁴⁷ *Id.* at 31. This nationwide average includes both sheltered and mainstream employment.

E. Considered Together

When these statutes and case law are considered together, the federal legal stance toward employment policy for people with disabilities is contradictory and complex. Longstanding laws, such as § 14(c) of the FLSA and AbilityOne, ensure that segregated employment settings can survive, and even thrive, financially. Yet the DOJ is using the ADA and Supreme Court precedent to challenge the very legality of sheltered workshops, at least as they exist today. Theoretically, even with *Olmstead* litigation, mainstream employers could continue to use § 14(c) certificates to employ small percentages of disabled workers and seek to pay sub-minimum wages for these supported employment arrangements.¹⁴⁸ Likewise, the language of AbilityOne does not require that the listed products come from nonprofit organizations that pay sub-minimum wages.¹⁴⁹ However, these federal policies coexist uneasily with the ADA, representing strongly divergent philosophies that are difficult to harmonize.

Perhaps more important than technical reconciliation is the reality that both sheltered and sub-minimum wage employment are in decline. As discussed above, from a pragmatic perspective, although AbilityOne and FLSA § 14(c) remain in force, there is a clear trend among states to close sheltered workshops entirely.¹⁵⁰ This trend is mitigated somewhat, however, by backlash and opposition. Today, the future of sheltered workshops in New York, Massachusetts, and other states remains in limbo, and the data on Vermont's experiment reveals questions and uncertainties about its success. And while AbilityOne and the FLSA remain in place, a perception that *Olmstead* requires eliminating sheltered employment may, in practice, render longstanding policies in support of workshops obsolete.

III. ADVOCACY FRAMEWORK

Along with the contradictions in legal frameworks and policies, advocates—people who have a direct, personal stake in the employment of people with disabilities—provide another source of competing perspectives with respect to sheltered employment. While people with disabilities frequently advocate for the closure of sheltered employment and a focus on competitive jobs,¹⁵¹ their families tend to focus on the benefits of maintaining sheltered employment.¹⁵² As discussed further in this section, issues of communication, agency, and choice make these divergent perspectives difficult to analyze and parse.

¹⁴⁸ See GAO REPORT, *supra* note 2, at 9–10.

¹⁴⁹ See 41 U.S.C. § 8504 (2011).

¹⁵⁰ See *supra* Section III.C.

¹⁵¹ See *id.*

¹⁵² See *supra* notes 156–58 and accompanying text.

Some groups of vocal, well-organized self-advocates strongly oppose sheltered employment. The Autistic Self Advocacy Network (“ASAN”), which consists primarily of members with autism,¹⁵³ opposes the use of “sheltered workshops and other facility-based settings that separate and congregate people on the basis of disability.”¹⁵⁴ Many people who are blind and visually impaired join with the National Federation of the Blind (“NFB”) in objecting to the use of sub-minimum wages and sheltered workshops for people who have vision impairments, focusing in particular on the § 14(c) sub-minimum wage workshops for blind workers employed by Goodwill.¹⁵⁵

Family members of people with disabilities are often as passionate as self-advocates, but frequently directly oppose the advocacy of people with disabilities themselves. Families Speaking Up, a website dedicated to “ensur[ing] that all voices are heard in the intellectual/developmental disabilities debate,”¹⁵⁶ opposes the closure of sheltered workshops and reports on both the failures of such closures¹⁵⁷ and the instances in which families (and, in some instances, people with disabilities) have “saved” sheltered workshops.¹⁵⁸

A large-scale analysis of the perspectives of people with disabilities and their families, and the trends among these populations, is beyond the scope of this Note. That two large organizations (ASAN and NFB) are vocally opposed to sheltered employment cannot, of course, be taken as representative of the viewpoint of a heterogeneous population of people with disabilities. Likewise, the perspectives of all parents and family members cannot be

¹⁵³ *About ASAN*, ASAN: AUTISTIC SELF ADVOCACY NETWORK, (2015), <http://autisticadvocacy.org/about-asan/>, archived at <http://perma.cc/66J2-TANP> (“The Autistic Self Advocacy Network is a 501(c)(3) nonprofit organization run by and for Autistic people.”). Although ASAN includes family members and friends of those with autism, its primary focus is, as the name indicates, self-advocacy by and for people with autism.

¹⁵⁴ *ASAN Action Alert*, KINDTREE – AUTISM ROCKS, <http://www.kindtree.org/asan-action-alert> (last visited Oct. 30, 2015), archived at <http://perma.cc/8TH4-9UYL>; see also Samantha Crane, *ASAN Letter: Wisconsin’s Sheltered Workshops Aren’t “Community-Based,”* ASAN: AUTISTIC SELF ADVOCACY NETWORK (Oct. 7, 2014), <http://autisticadvocacy.org/2014/10/asan-letter-wisconsin-sheltered-workshops-arent-community-based/>, archived at <http://perma.cc/4P7Y-VJFY>.

¹⁵⁵ *See The Issue of Fair Wages for Workers with Disabilities*, NATIONAL FEDERATION OF THE BLIND (2015), <https://nfb.org/fair-wages>, archived at <https://perma.cc/9CH8-GKYG> (“The subminimum wage model fails to provide adequate training or employment to disabled workers.”).

¹⁵⁶ *About Us*, FAMILIES SPEAKING UP, <http://www.familiespeakingup.com> (last visited Oct. 30, 2015), archived at <http://perma.cc/R2VK-U2VS>.

¹⁵⁷ *See Andrew Edelson, Only 35 of 1,000 Sacked Remploy Workers Have Found New Jobs*, FAMILIES SPEAKING UP, <http://www.familiespeakingup.com/2012/12/20/35-of-1000-sacked-remploy-workers-have-found-new-jobs/> (last visited Oct. 30, 2015), archived at <http://perma.cc/Q6FJ-D7G7>; Andrew Edelson, *Irish Times – Concern Over Closure of Sheltered Workshops*, FAMILIES SPEAKING UP, <http://www.familiespeakingup.com/2013/01/20/irish-times-concern-over-closure-of-sheltered-workshops/> (last visited Oct. 30, 2015), archived at <http://perma.cc/2FRA-HE6X>.

¹⁵⁸ *See, e.g., Sally Humphrey, New Jersey Saves Sheltered Workshops*, FAMILIES SPEAKING UP (Nov. 6, 2013), <http://www.familiespeakingup.com/2013/11/06/new-jersey-saves-sheltered-workshops/>, archived at <http://perma.cc/CPC6-WXF8>.

inferred from a few organizations and statements published online. Detailed research on these matters, accounting for the full diversity of experiences and abilities and preferences, would be a valuable contribution to this field.

A non-scientific consideration of the perspectives of people with disabilities and their families, and an observation that these populations frequently have different viewpoints, is relevant here primarily to illustrate some of the challenges that are particular to disability advocacy. In most advocacy settings, the wishes of an affected adult population would unquestionably take precedence over the opinions of family members. Indeed, some disability advocacy organizations make precisely this point: ASAN's motto is "nothing about us without us,"¹⁵⁹ a slogan that has been adopted widely in the disability rights community¹⁶⁰ and suggests that people with disabilities must always be actively involved in making decisions about their lives and in establishing the policies that affect them.

The reality of disability complicates the role of families, though, because there *are* people who, because of their disabilities, have genuinely limited ability to conceptualize complex preferences or communicate their wishes. While the greatest challenges of disability may well be those of stigma and inaccessibility,¹⁶¹ disability also encompasses real impairments, and some people with significant intellectual and developmental disabilities may have limited ability to communicate complex or long-term wishes. Parents of people with significant disabilities may worry that their children will be left out of the disability-rights discussion because of the challenges inherent in their ability to be self-advocates.¹⁶² It may seem reasonable, in this context, for parents to intervene and advocate for what they think their children want. This may seem particularly urgent for parents who understand their children to be marginalized even within the already-marginalized disability community¹⁶³ and limited in their ability to advocate for themselves through traditional means of communication and debate. The parents of a woman like Rosheen may be justified in feeling that, without their advocacy, Rosheen would not be able to stand up for herself, and that the broader disability community would not effectively advocate for her either. Yet, although rational, the ultimate outcome is, quite literally, paternalism (or, more often, maternalism). And paternalism for people with disabilities is

¹⁵⁹ See ASAN: AUTISTIC SELF-ADVOCACY NETWORK (2015), <http://autisticadvocacy.org>, archived at <http://perma.cc/N56R-WGT8>.

¹⁶⁰ See JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 3 (2000).

¹⁶¹ See *infra* Section V.A.

¹⁶² See *About Us*, *supra* note 156 ("We believe that . . . [p]rograms that are at risk of being eliminated are those that serve individuals with the most severe disabilities who are the least able to speak up for themselves.").

¹⁶³ See Mark Deal, *Disabled People's Attitudes Toward Other Impairment Groups: A Hierarchy of Impairments*, 16 DISABILITY & SOC'Y 897, 906 (2003); Liz Main, *Pyjama Girl and the Disability Hierarchy*, BBC NEWS (June 5, 2006), http://www.bbc.co.uk/ouch/opinion/pyjama_girl_and_the_disability_hierarchy.shtml, archived at <http://perma.cc/TH8P-FUEY>.

precisely what self-advocates fight hardest against and what makes them vehemently declare their rights to make their own decisions about their own lives. Further, parents may find it difficult to disentangle their wishes from their understanding of their children's preferences and may simply substitute their judgment for the opinions of their children.

The undoubted desirability of self-advocacy when possible, along with the need for advocacy supported by others in certain cases, are not inherently at odds. However, there are real concerns about this dynamic. First, when people with disabilities require support in communicating their needs or thinking about the long-term future, outright manipulation or subtle alteration of a person's true beliefs by an advocate may be virtually impossible to detect, particularly where the support comes from family members, who have their own preferences and opinions. Advocacy by others risks being overzealous, not fully necessary, and not fully representative of the person's own wishes.

Second, family members may tend to believe that people with disabilities who cannot be independent self-advocates would typically benefit most in segregated settings, such as sheltered employment.¹⁶⁴ This pattern may not be inherently problematic: as discussed below, people with the most complex, significant disabilities may in fact be less able both to speak for themselves and to thrive in the kind of competitive work environments favored by self-advocates. Nevertheless, the possibility that parents are excessively risk-averse and conservative in determining their vulnerable children's abilities, coupled with what is sometimes a genuine difficulty to understand a person's own wishes and preferences, makes the positions of parents difficult to parse and analyze.¹⁶⁵

In the face of these normatively fraught debates, amid the heterogeneity of disability, and taking into account the reality that disability can substantively impact one's ability to be an independent self-advocate for reasons beyond external prejudice, it is difficult to know what to make of the divisions and contradictions within the world of disability advocacy. Given the complexity and conflicts that put advocates on both sides of this issue, an analysis of theoretical frameworks will be useful in understanding the way forward.

IV. THEORETICAL FRAMEWORK

Examining the competing frameworks underlying these points of view helps illuminate how the policies and perspectives in the statutory schemes can be resolved. This section begins with an overview of the medical and

¹⁶⁴ See *supra* Part IV.

¹⁶⁵ Ideally, a person with a disability who struggled to communicate would be supported by a team, including people other than parents, in a structure that might provide a check against the low expectations and risk-aversion that may be particularly common among parents of adult children with disabilities.

social models of disability. It then defines and analyzes two major theoretical frameworks underlying these competing perspectives on sheltered employment: integration and anti-subordination. This Note contributes uniquely to this field by considering the role anti-subordination theory could play in policy and advocacy debates around sheltered and mainstream employment. Until now, anti-subordination theory has been applied primarily in the housing, voting, and educational contexts.¹⁶⁶ This new application of anti-subordination to employment argues that the theory adds a valuable tool to enact the social model of disability in the employment context, as discussed further in Parts VI and VII.

A. *Medical and Social Models*

A foundational transition in understandings of disability in recent decades has been the move from the medical to the social model of disability.¹⁶⁷ The medical model is primarily deficit-focused, considering a person's disability a problem to be "cured" by that person's doctors.¹⁶⁸ Essentially, the medical model sees the fundamental challenge of disability as the functional or psychological losses stemming from the impairment itself, a problem located within the individual who is impaired.¹⁶⁹ By contrast, the social model of disability "distinguishes between *impairment*, the physical fact of lacking an arm or leg . . . and *disability* as the social process that turns an impairment into a negative by creating barriers to access."¹⁷⁰ A memorable articulation of the social and medical models comes from writer Simi Linton, who uses a wheelchair: "If I want to go to vote or use the library, and these places are inaccessible, do I need a doctor or a lawyer?"¹⁷¹ Understanding that one needs a lawyer to solve this problem demonstrates that the reason impairments are disabling is a product of the structure of society rather than the impairment itself. The social model of disability has been critiqued by some within the disability rights movement as oversimplifying the reality of disability by downplaying the role of underlying impairments

¹⁶⁶ See generally Colker, *supra* note 16.

¹⁶⁷ See Adam M. Samaha, *What Good is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1251–52 (2007).

¹⁶⁸ Kanter, *supra* note 74, at 419–20.

¹⁶⁹ See *id.*

¹⁷⁰ *Id.* at 426 (citing LENNARD DAVIS, BENDING OVER BACKWARDS: DISABILITY, DISMODERNISM, AND OTHER DIFFICULT POSITIONS 12 (2002) (internal alterations and quotations omitted) (emphasis added)).

¹⁷¹ SIMI LINTON, MY BODY POLITIC 120 (2006); see also Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1370–72 (2009).

in the societal creation of disability.¹⁷² However, it nonetheless remains a foundational tenet of contemporary disability rights advocacy.¹⁷³

B. Integration

One of the predominant theories underlying disability advocacy today is integration. Borrowing heavily from the Civil Rights movement, the theory of disability integration asserts that separate facilities for people with disabilities are inherently unequal.¹⁷⁴ Integrationists support mainstreaming in education for all or virtually all children, support independent or community living¹⁷⁵ for adults with disabilities, and oppose employment models in which people with disabilities are treated differently, or separated, from non-disabled employees.¹⁷⁶

Jacobus tenBroek first posited integrationism as a theory of disability rights in 1966.¹⁷⁷ His landmark article defined integrationism as “the right to live in the world”¹⁷⁸ and articulated a “passionate plea”¹⁷⁹ for its implementation. Disability discrimination law has evolved towards integrationism in recent years, culminating in the successful passage of the ADA, a “classic integrationist measure.”¹⁸⁰ Professor Ruth Colker, though ultimately challenging the wisdom of un rebuttable or pure integrationism, explains its compelling historical origins:

From a historical perspective, the connection between separation and inequality makes sense. Special education was the ‘dead end’ academically that did not seek to prepare children for higher education or well paying careers. Disability institutionalization was a way to hide and degrade individuals with disabilities rather than provide them with treatment. Segregation served to suppress voting behavior by individuals with disabilities Together, these

¹⁷² See Samaha, *supra* note 167, at 1262 (noting that critics of the social model claim that societal stigma accounts for only “a fraction of all impairment related disadvantage”), 1263 (observing that disadvantage caused by society under the social model is ambiguous and imprecisely defined), 1264–65.

¹⁷³ See *id.* at 1251–52.

¹⁷⁴ See Colker, *supra* note 16, at 1417.

¹⁷⁵ Independent living and community living can have many definitions. See *Keeping the Promise: Self Advocates Defining the Meaning of Community Living*, AUTISTIC SELF ADVOCACY NETWORK, available at <http://autisticadvocacy.org/wp-content/uploads/2012/02/Keeping-the-Promise-Self-Advocates-Defining-the-Meaning-of-Community.pdf>, archived at <http://perma.cc/9AGM-B7M7>. It is used here to mean living outside of segregated and institutionalized settings.

¹⁷⁶ See Colker, *supra* note 16, at 1419.

¹⁷⁷ See generally Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841 (1966).

¹⁷⁸ *Id.* at 843.

¹⁷⁹ See Colker, *supra* note 16, at 1417.

¹⁸⁰ Mark C. Weber, *Home and Community-Based Services, Olmstead, and Positive Rights: A Preliminary Discussion*, 39 WAKE FOREST L. REV. 269, 279 (2004).

segregating practices contributed to the subordination of individuals with disabilities in society.¹⁸¹

The familiarity of the notions of integrationism help make the theory compelling. In post-Jim Crow America, “separate but equal” sounds inherently and undeniably wrongheaded and bigoted. Integrationism represents one of the most powerful currents of disability theory in the legal and political sphere. The ADA incorporates integrationism in the form of the integration mandate, which requires that public entities administer programs that “enable individuals with disabilities to interact with nondisabled persons to the fullest extent possible.”¹⁸² The integration perspective gained further credence with both the Supreme Court’s *Olmstead* decision¹⁸³ and the ensuing *Olmstead*-based litigation, which argue that any undue segregation is illegal discrimination based on disability.¹⁸⁴

The combination of the ADA, the implementation of the integration mandate, and *Olmstead* has laid the foundation for credible claims that any circumstance in which people with disabilities are clustered at a higher-than-average density is presumptively illegal discrimination by reason of disability.¹⁸⁵ To find and eradicate these clusters, one examines where people with disabilities spend their lives: where they live, learn, and work. Thus, the DOJ in its *Olmstead* enforcement has investigated and challenged high densities of people with disabilities in residential institutions (including long-term adult care facilities, as well as nursing homes and psychiatric wards); special education classrooms and schools; and sheltered workshops and adult day centers.¹⁸⁶

Success from an integrationist standpoint would mean individuals with disabilities learning in inclusive classrooms with typically-developing children,¹⁸⁷ living as adults in the community (potentially with support but as similar to “normal” living as possible),¹⁸⁸ and working in mainstream jobs with supports as needed.¹⁸⁹

¹⁸¹ See Colker, *supra* note 16, at 1419 (internal citations omitted).

¹⁸² 28 C.F.R. § 35.130 (2011).

¹⁸³ *Olmstead v. L.C.*, 527 U.S. 581 (1999).

¹⁸⁴ See *supra* Section III.B.

¹⁸⁵ But see Colker, *supra* note 16, at 1421–22.

¹⁸⁶ See *Olmstead Cases by Issue*, *supra* note 89.

¹⁸⁷ See Colker, *supra* note 16, at 1468.

¹⁸⁸ See *id.* at 1474–76.

¹⁸⁹ See NAT’L DISABILITY RIGHTS NETWORK, *supra* note 9, at 45. Common employment supports include intensive training to prepare for a job, job coaching to assist in finding and performing a job, and job-carving, in which an employer adapts a position for an employee with a disability by requiring only those tasks that the person can perform. See CENTER FOR MEDICARE AND MEDICAID SERVICES, CMCS INFORMATIONAL BULLETIN 3–4 (2011), <http://downloads.cms.gov/cmsgov/archived-downloads/CMCSBulletins/downloads/CIB-9-16-11.pdf>, archived at <http://perma.cc/J2RD-E63R>; Office of Disability Employment Policy, *What is Customized Employment?*, UNITED STATES DEP’T OF LABOR, <http://www.dol.gov/odep/categories/workforce/CustomizedEmployment/what/> (last visited Oct. 30, 2015), archived at <http://perma.cc/35QR-WUPV>.

C. Anti-Subordination

In contrast to integrationism, anti-subordination disability theory contends that “[t]he mantra ‘separate is inherently unequal’ needs to be replaced with the slogan ‘invidious segregation is inherently unequal.’”¹⁹⁰ Acknowledging the history of abuse, neglect, and discrimination that gave rise to inhumane and discriminatory disability-only institutions and organizations,¹⁹¹ anti-subordination theory nonetheless sees the immediate, full-scale dismantling of these institutions as an oversimplified response that fails to account for the diverse needs of people with disabilities.¹⁹² According to anti-subordination theory, “integration is not inherently beneficial [and] separation is not inherently degrading.”¹⁹³

Proponents of anti-subordination theory are not diametrically opposed to integration. Rather, they prioritize individual empowerment over the application of the unified, non-individualized goals of integration. A prominent anti-subordination advocate describes the theory as one of “agnostic[ism]” toward the setting that is most appropriate for any individual, other than a commitment to finding the setting that the person in fact prefers.¹⁹⁴ The clustering of people with disabilities, which would be presumptively discriminatory from an integrationist perspective, is not, in and of itself, discrimination from an anti-subordination point of view.¹⁹⁵ The presence or absence of discrimination is a matter of individualized assessment: are the people who make up the “cluster,” whether residential, educational, or vocational, victims of invidious segregation (as integrationists would presume)? Are these people able to live, work, or learn in a less restrictive setting? After serious thought and careful (potentially supported) discussion, do they *wish* to live in such a setting?

Anti-subordination theory calls for integration where appropriate but sees an ongoing role for disability-specific organizations and services for those who need and desire them. In education, in contrast to the current, uniform transition away from separate special education schools and segregated classrooms, anti-subordination theorists would seek integration where appropriate, but would maintain the option of separate programs and schools for students who would prefer and benefit from segregated environments.¹⁹⁶ Likewise, in contrast to the integrationist campaign away from group-living arrangements and towards independent living, anti-subordination advocates

¹⁹⁰ Colker, *supra* note 16, at 1483 (emphasis added).

¹⁹¹ Cf. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986).

¹⁹² Colker, *supra* note 16, at 1479.

¹⁹³ *Id.* at 1423.

¹⁹⁴ *Id.* at 1423 n.29.

¹⁹⁵ *Id.* at 1423.

¹⁹⁶ *Id.* at 1464–71.

would allow for the continuation of group homes and shared-living arrangements for people who needed or preferred such arrangements.¹⁹⁷

While theories of integrationism and anti-subordination are both consistent with the social model of disability, anti-subordination theory seems more at ease than integrationism with acknowledging the real differences that sometimes accompany disability. While a fully accessible world, one that essentially erases the relevance of impairment, may be relatively easy to imagine for a person who uses a wheelchair,¹⁹⁸ this environment may be much more difficult to contemplate for a person, such as Rosheen, who has a more complex constellation of impairments, which profoundly affect her ability to communicate and interact with others and the world.¹⁹⁹ Anti-subordination advocates seem more attuned to this reality, more comfortable with believing, simultaneously, that stigma and prejudice play a massive role in subordinating people with disabilities *and* that the impairment of a disability itself may be relevant, in some form, no matter how inclusive and accessible the rest of the world becomes.

There has been, until now, no literature on anti-subordination theory with respect to employment, but the anti-subordination perspective can be extrapolated from existing literature on anti-subordination theory.²⁰⁰ With respect to federal policy debates, an anti-subordinationist, like an integrationist, would contend that AbilityOne and the FLSA minimum wage exemptions have led to overreliance on sheltered and sub-minimum wage work for people who could be readily integrated into mainstream employment. An anti-subordinationist would agree with integrationists that sub-minimum wages are inherently discriminatory for valuing people with disabilities on different terms (productivity) than the terms by which non-disabled people are valued (time worked), and circumventing minimum wages on the basis of disability. An anti-subordinationist would also support the commitment of the ADA and the DOJ to mainstream integrated employment where preferred by the person in question. In line with integrationists, anti-subordinationists in employment would call for robust job training and coaching to prepare and assist people with disabilities who wish to work in mainstream settings. Unlike integrationists, however, anti-subordinationists would not view the continued existence of workshops as *per se* proof of discrimination.²⁰¹ They would not see this segregation as inherently discriminatory but would inquire into whether, in each individual case, the segregation was the result of *actual* discrimination.

Similarly, anti-subordination theory does not map squarely onto the advocacy positions of either total workshop closure advocated by self-advocates

¹⁹⁷ *Id.* at 1474–77.

¹⁹⁸ *See, e.g.*, Emens, *supra* note 171, at 1370–72.

¹⁹⁹ *Cf.* Liz Crow, *Including All of Our Lives: Renewing the Social Model of Disability*, in *EXPLORING THE DIVIDE* 55, 58 (Colin Barnes & Geoff Mercer, eds., 1996).

²⁰⁰ *See generally* Colker, *supra* note 16.

²⁰¹ *Cf. id.*

cates or the near-complete defense of sheltered employments among some family members. While the move from sheltered workshops and adult day centers to mainstream employment would be encouraged by anti-subordinationists when feasible and desired, a wholesale closure of sheltered workshops might be considered an over-expansive response.²⁰² An anti-subordination perspective would fully support self-advocates who fight for access to mainstream employment. Unlike integrationists, however, anti-subordination theorists would be skeptical of, but would not reject out of hand, the opinions of those who believe, genuinely and based on serious inquiry, that their family members or friends prefer sheltered, non-mainstream employment.²⁰³

V. A ROLE FOR ANTI-SUBORDINATION

Commitment to either an integrationist or an anti-subordinationist perspective informs legal and policy preferences with respect to sheltered workshops and sub-minimum wage employment. These theoretical commitments are particularly relevant given this field's conflicted and contradictory legal regime. This section argues that anti-subordination is a useful tool to supplement pure integration in theorizing sheltered employment. By focusing on each individual's needs and preferences, anti-subordination theory adds an important nuance to integration, thereby helping to realize the social model of disability by taking seriously the individual preferences and abilities of people with disabilities and minimizing presumptions about either the limits *or* desires of a person with a disability. This section acknowledges, however, the practical challenges of supporting anti-subordination in employment.

A. *Anti-Subordination in Theory*

While pure, un rebuttable integrationism served an important purpose in the early disability-rights era, it seems to have outlived its usefulness in the twenty-first century: Integrationism promotes a blanket approach to employment policy in a way that risks ultimately undermining the individuality of people with disabilities. Anti-subordination theory, by contrast, is expansive enough to encompass the heterogeneity of people with disabilities, both in their abilities and their preferences, by recognizing that non-mainstream settings may be appropriate and preferred for some individuals at some times. Policymakers and advocates should more explicitly consider anti-subordination theory as a complement to integrationist policies, in order to create a more person-centered perspective with respect to the vocational choices and options of adults with disabilities.

²⁰² *Cf. id.* at 1479–84.

²⁰³ *Cf. id.* at 1458–64.

A wariness of anti-subordination policies is understandable, given the history of separate services as a tool to promote invidious segregation and discrimination. But separation and clustering need not necessarily be discriminatory.²⁰⁴ Anti-subordination theory in employment adds a valuable component to integrationism by meaningfully considering each person as an individual. In so doing, the addition of anti-subordination theory to integration, implemented carefully, could most fully realize the ideal of the social model of disability.

Disability is a heterogeneous category, encompassing people with a wide range of preferences, characteristics, and impairments who may have virtually nothing in common with each other save for their *dissimilarity*, by some metric, from what society considers “normal.” A shortcoming of the pure integrationist model is its tendency to marginalize a significant category of people with disabilities whose impairments are complex and significant, and whose disabilities may encompass a combination of intellectual, behavioral, and psychiatric impairments.²⁰⁵ In advocating that people with disabilities move wholesale into mainstream employment, integrationist policies tend to focus on people with less significant or complex impairments who can adapt with relative ease to “normal” work, school, and living arrangements.²⁰⁶ Undoubtedly, considerable numbers of such people have remained in sheltered workshops (and other separate settings) unnecessarily and for far too long.²⁰⁷ The DOJ focuses on these people in its litigation and advocacy efforts, as do media outlets.²⁰⁸ Without question, many people have benefited considerably from the sea change to integrationism in the last decades.

There are however people left out of this story: people with complex and significant combinations of behavioral impairments, medical needs, and psychiatric or intellectual disabilities—people for whom “mainstream” employment may not be a straightforward option in the immediate future.²⁰⁹ These people likely account for many of the 63% of people with disabilities who, more than a decade after the closure of all sheltered workshops in Vermont, remain unemployed there today.²¹⁰ By not fully addressing the abilities and preferences of these people with significant and complex disabilities, the pure integrationist model fails to truly dismantle the widespread stigma and exclusion of people with disabilities in American society. It ex-

²⁰⁴ See *id.*

²⁰⁵ Cf. Colker, *supra* note 16, at 1464–68.

²⁰⁶ Cf. *id.*

²⁰⁷ See, e.g., *Face of Olmstead*, INFORMATION AND TECHNICAL ASSISTANCE ON THE AMERICANS WITH DISABILITIES ACT, http://www.ada.gov/olmstead/faces_of_olmstead.htm (last visited Nov. 1, 2015), archived at <http://perma.cc/BE9Y-G5YF>.

²⁰⁸ See, e.g., *id.*; Dan Barry, *Rhode Island Settles Case on Jobs for the Disabled*, N.Y. TIMES (Apr. 8, 2014), <http://www.nytimes.com/2014/04/09/us/developmentally-disabled-get-more-workplace-protections.html>; Stockton, *supra* note 132.

²⁰⁹ See *id.*

²¹⁰ See *supra* Section III.D.

pands the circle of the socially accepted, but only to those who are close enough to “normal” and able to succeed in a typical workplace with relatively minimal supports. For those newly included in the circle, the change is profoundly positive. Still, pure integrationism risks implicitly requiring a proximity to “normal,” or an ability to hew to mainstream expectations, in order to claim the benefits of the disability rights movement. It widens the circle of who is “in,” but it may not fundamentally dismantle the system of “in” and “out.”

Pure integrationist policy risks doing a disservice to a significant subset of people with disabilities by neglecting to talk about those with the highest needs in their ranks, such as my friend Rosheen, the young woman with autism, who is non-verbal and cannot always respond to instructions. She cannot stay in one place for more than a few moments without needing to move, through flapping her arms or jumping or rocking; she is overwhelmed by loud sounds and strangers and changes in routine; when she becomes stressed, she sometimes expresses herself through screaming or hitting herself or those around her. She *might* be able to achieve supported mainstream employment in the right setting with the right supports, training, and employer. But it would not be obvious what such employment would look like, the execution of the training and supports would be challenging at every step, and the process would require resources that would likely be unrealistic in many cases. It would also not be obvious whether a job created for Rosheen in an integrated setting would necessarily be how *she* would prefer to spend her days. Through the eyes of a pure integrationist, if Rosheen did not find a good fit in the mainstream world of employment, she, or those around her, would have failed.

The heterogeneity of disability must be taken into account in theorizing disability rights, and the incorporation of anti-subordination theory into the present integration-based policy helps encompass this diversity. For many people with disabilities, the implementation of the social model of disability—a society where stigma is eliminated and employers take seriously the statutory requirement to make reasonable accommodations—would lay the foundation for full-time, full-wage mainstream employment in integrated environments. But for some people, like Rosheen, the social model at its best might be a *relaxing* of the constant demand that she conform her life to everyone else’s. Perhaps the most profound way to embrace her individuality is by accepting that her reality—her perceptions and abilities and needs—are in fact exceptional, and by acknowledging that this might mean that how she spends her days is also exceptional in some way. An anti-subordination carve-out creates room for substantive inclusion by embracing this reality, rather than ignoring it. The social model, at its best, calls for a re-evaluation of what criteria must be met for a person to be considered worthy in our society.²¹¹ And perhaps that re-evaluation should include an

²¹¹ Cf. Kanter, *supra* note 74, at 426–28.

honest assessment of whether productivity and a life that most resembles that of non-disabled people must be, for everyone, the ultimate goal. It is in this pursuit that pure integrationism seems to fall short.

B. Practical Realities: Anti-Subordination in Employment

It is easy to imagine what a pure integrationist employment world looks like, as it is already in place in Vermont and underway in Rhode Island, New York, Massachusetts, and other states.²¹² In this world, sheltered workshops would gradually cease accepting new employees, and existing employees would move into supported mainstream employment. Eventually, all sheltered, segregated workplaces would close their doors.²¹³ Pure integrationists argue that, through robust job training, coaching, job adaptation, and supports, all people with disabilities would succeed in mainstream, full-wage employment. However, an integrationist approach that incorporates anti-subordination theory would leave room for people who, based on individualized considerations of their preferences, will opt for something that looks less like the mainstream. In other words, while integrationism may remain the default goal for people with disabilities, separate working arrangements should remain an acceptable and viable alternative where appropriate. For clarity, I will refer to this approach as “integration plus.”

Successfully applying the integration plus theory would pose serious practical challenges. Part of the underlying problem with sheltered workshops is underfunding and little training or oversight for those who work with people with disabilities.²¹⁴ Implementing a well-tailored integration plus approach, with adequate safeguards ensuring meaningful choice, would require considerable effort and care.

Additionally, integrationists may argue that an expected gap between theory and reality should drive choices, and that pure integrationism in employment has clear practical advantages, particularly if shoddy implementation is anticipated. If one begins with the premise that in-depth individualized assessments will not realistically be applied universally, pure integrationism might move society toward greater acceptance in the aggregate, in the form of meaningful inclusion for those people who will be able to thrive in mainstream employment. By contrast, a careless, blanket implementation of integration plus could look distressingly similar to the world we already live in: one in which people with disabilities are easily determined, based on stigma and presumptions of inability, to be incapable of

²¹² See *supra* Section III.B.

²¹³ Indeed, they will close quite quickly, if the states already undertaking sheltered workshop closure are a harbinger of future implementation: Vermont phased out all of its sheltered employees into integrated work over the course of one year, and Massachusetts proposed an eighteen-month window between “closing the front door” of its workshops and closing them all together. See *supra* Section III.C–D.

²¹⁴ See, e.g., GAO REPORT at 23–34.

joining the mainstream, even where such integration could, in fact, be accomplished with relatively minor changes and creativity. Pure integrationism in employment has important benefits for making a clear, simple argument that could positively change the perceptions and practices of a society too used to presuming that people with disabilities are unable to make choices and participate meaningfully in society.

However, high-quality adoption of the integration plus theory in employment has too much value to be rejected simply because it will be difficult. Executed well, anti-subordination theory does not create a presumption of inability but rather establishes a careful process through which those who need exceptions, for whom integration is not their preferred option, have access to the supports and settings that suit their preferences and needs best.²¹⁵ The logistics of such a system would require considerable care: if it is too easy to “opt-out” of integration, many parents or teachers or people with disabilities themselves might miss the chance for an opportunity to integrate that would ultimately be successful and empowering. Yet, if the opt-out procedure is too rigorous, or exists only in theory, it risks leaving people who have the most complex disabilities without any supports, while sending an unnecessary message of failure and exclusion to those people who ultimately end up in an setting outside the mainstream. The empirical impact of integration plus would need to be studied to determine whether the drop in sheltered employment participation accompanying integration could coincide with the continued existence of sheltered settings for those who opt out.²¹⁶

The current debates about sheltered employment reveal the potential pitfalls of integration plus. Some proponents of sustaining sheltered workshops reveal attitudes and presumptions that support precisely the kind of paternalistic prejudice that disability rights advocates—both integrationists and anti-subordinationists—reject. For example, the CEO of a New York sheltered workshop threatened with closure stated that, of the 350 people with disabilities employed by her workshop, “at most 60 might be able to transition to jobs in the community, with the rest unable.”²¹⁷ While this statement cannot be definitively assessed without knowing more about the 350 people in the workshop, an estimate that only 17% of a workshop’s employees are even *possible* candidates for integrated employment seems very pessimistic, and suggests a presumption of inability that is seriously concerning.

²¹⁵ Cf. Colker, *supra* note 16, at 1460–71.

²¹⁶ However, an integration plus perspective would not necessarily advocate that sheltered workshops would continue: the institutional components of the workshops may be too deep-seated to be transformed, and a theory of integration plus might be best implemented by creating options based on meaningful choice that do not mimic employment, or that look entirely different than workshops do today.

²¹⁷ Jason Weinstein, *Debate Over the Fate of Sheltered Workshops*, Fox WICZ.COM, (Jan. 19, 2015), <http://www.wicz.com/news2005/viewarticle.asp?a=36599>, archived at <https://perma.cc/AM9E-QT2Y>.

Proponents of anti-subordination theory must concede that stigma, discrimination, the problems of the status quo, and the need for creativity create a very real risk that an anti-subordination carve-out would swallow the purported integration presumption. At its best, however, anti-subordination theory would be a valuable nuance to integration, a genuinely accessible caveat that would not be so prevalent as to swallow the integration presumption, which is so valuable for many people. The supplement of anti-subordination theory in employment has the potential to best realize the social model of disability, particularly for people with complex disabilities. It seems too powerful a theory, then, to reject entirely only because its implementation will require care. Disability is heterogeneous and people with disabilities have diverse needs: any solution that ignores this seems to give up too much.

CONCLUSION

The reality of the disability rights movement is a seemingly inevitable progression toward pure integrationism, as evidenced by the rapid evolution of employment opportunities and mandates for people with disabilities. This is a truly positive change for many: for the people with disabilities who will find jobs and thrive in integrated, mainstream settings; for their parents, who may begin to see their sons and daughters as capable and competent adults; and for their co-workers who may view disability differently after working closely with people with disabilities. Many people have spent too many years in sheltered employment, when they would prefer to work in mainstream settings that could be modified to meet their needs.

Sheltered employment has serious challenges, and the fastest, most practical way to reduce the overreliance on sheltered employment today may be a uniform claim that sheltered employment is *per se* discriminatory and a violation of the ADA, and that integrationism is the best solution for all people with disabilities. However, it is important to find a way to ensure that the needs and preferences of people most significantly impaired by disabilities are not entirely overlooked in the important campaign to re-examine employment for people with disabilities. The absence of discussion about people for whom pure employment integration is not the preferred option – based on a genuine understanding of these people’s own preferences, not the prejudices or fears of those around them – does them a disservice. Anti-subordination theory should play a role alongside integrationism in policy debates and in individual choices, although this should be incorporated into the current integrationist approach with care and serious individualized assessment. The implementation of an integration plus framework in employment might mean that sheltered workshops would not be closed entirely in a state or region, or it might lead to the creation of alternative programs and environments entirely unlike workshops or mainstream employment. But along with accepting the continued existence of either workshops or other alternatives to mainstream employment, an integration plus scheme would

also require a rigorous system to ensure that no one remained in sheltered workshops or other segregated settings simply out of inertia, bias, or lack of innovation.

This is a lot to ask of an employment program for people with disabilities, and would require care, attention, trial and error, and significant resources. People must not be shoehorned into categories or lives that are not meaningful or preferred, simply because such lives appear the most similar to those of their non-disabled peers. At the same time, advocates and policy-makers must remain vigilant that the room for flexibility that integration plus provides is used neither as an excuse to undermine people's abilities and hold them back from opportunities, nor as a tool for re-entrenching stigma and low expectations.