

2019

Putting Olmstead To Work: Toward A Less Segregated Workplace

Alexander Lane

Follow this and additional works at: <https://scholarship.law.umn.edu/jii>

Recommended Citation

Lane, Alexander, "Putting Olmstead To Work: Toward A Less Segregated Workplace" (2019). *Journal of Inequality Inquiry*. 3.

<https://scholarship.law.umn.edu/jii/3>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Journal of Inequality Inquiry collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

PUTTING *OLMSTEAD* TO WORK: TOWARD A LESS SEGREGATED WORKPLACE

Alexander Lane†

Today, across the United States of America, hundreds of thousands of people with disabilities are being isolated and financially exploited by their employers. Many are segregated away from traditional work and kept out of sight . . . For many people with disabilities, their dream of leaving their ‘job training program’ will never come true. They labor away making only a tiny portion of what they should because there is a system in place that provides no true alternatives.

– Curtis L. Decker, Esq., Executive Director of the National Disability Rights Network ¹

I. Introduction

At the Harold V. Birch Vocational Academy, “a Providence high school where students with intellectual disabilities participated in an in-school sheltered workshop, separated from their non-disabled peers,” Jerry D’Agostino worked to sort, assemble, and package jewelry and buttons.² At the Academy, Jerry earned well below minimum wage until graduating in 2010.³ Thereafter, Jerry continued to perform this “benchwork” at another sheltered workshop—Goodwill Industries.⁴ Jerry felt this work was

†. J.D. Candidate, University of Minnesota Law School, 2019; B.A., Western Washington University, 2016. Alexander would like to thank the staff and editors of *Law & Inequality: A Journal of Theory and Practice*, in particular Alicia Granse, for their help in preparing this Article for publication. Alexander would also like to thank his family for their constant support and encouragement.

1. NAT’L DISABILITY RIGHTS NETWORK, *SEGREGATED AND EXPLOITED: THE FAILURE OF THE DISABILITY SERVICE SYSTEM TO PROVIDE QUALITY WORK* 3 (2011), <https://www.ndrn.org/images/Documents/Resources/Publications/Reports/Segregated-and-Exploited.pdf>.

2. *Faces of Olmstead*, DEP’T OF JUSTICE, https://www.ada.gov/olmstead/faces_of_olmstead.htm (last visited Oct. 3, 2018) (containing a collection of personal stories of persons with disabilities following the June 2013 Interim Settlement Agreement between the Department of Justice and the State of Rhode Island and the City of Providence.) (“Under the agreement individuals will receive access to integrated supported employment and integrated day activity services, allowing them to become more active participants in the community.”).

3. *Id.*

4. *Id.*

boring and lamented the amount of downtime involved.⁵ Prior to the June 2013 Interim Settlement Agreement between the Department of Justice and the State of Rhode Island and City of Providence, Jerry believed spending his days in a sheltered workshop performing rote benchwork for less than minimum wage would be a life sentence.⁶

Jerry’s story is not uncommon in the United States. According to a 2011 report by the National Disability Rights Network (NDRN), “[e]ven with the dramatic improvements in competitive employment, there remains three individuals in segregated day programs for every one person working in competitive employment.”⁷ In 2012, Goodwill Industries—Jerry’s post-graduation sheltered workshop employer—reported employing more than 260,000 individuals with disabilities.⁸ The wisdom and legality of sheltered workplaces have increasingly been called into question. In response, this Note proposes the Department of Justice promulgate regulations to clarify if and when sheltered workshops are legal under Section II of the Americans with Disabilities Act of 1990 (ADA). Comprehensive regulations offer a better opportunity to clarify the policies underlying the act than does litigation.

With the 1990 passage of the ADA, Congress intended “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁹ In the 1999 decision, *Olmstead v. L.C. ex rel. Zimring*, the United States Supreme Court held that the ADA stood for the proposition that people with disabilities have a right to live in a broader community alongside their non-disabled peers.¹⁰ However, *Olmstead* only prohibited the *residential* segregation of people with disabilities in *residential institutions*—not vocational segregation.¹¹

5. *Id.*

6. *Id.* (“I thought I would be doing benchwork my whole life.”).

7. NAT’L DISABILITY RIGHTS NETWORK, *supra* note 1, at 9.

8. Laura Walling, *Goodwill Helps People with Disabilities Reach Their Full Potential*, GOODWILL INDUSTRIES INT’L, INC., <http://www.goodwill.org/blog/advocate/goodwill-helps-people-with-disabilities-reach-their-full-potential/> (last visited Oct. 3, 2018). Goodwill Industries “does not support the phase out or elimination of the Special Wage Certificate,” a certificate from the Wage and Hour Division of the Department of Labor that allows employers to pay workers with disabilities less than the federal minimum wage under Section 14(c) of the Fair Labor Standards Act, 29 U.S.C. § 214(c). *Id.*

9. CIVIL RIGHTS DIV., 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.* 1 (2011), https://www.ada.gov/olmstead/q&a_olmstead.pdf (quoting 42 U.S.C. § 12101(b)(1)).

10. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999).

11. *See id.*

With regard to the segregative nature of sheltered workshops, the NDRN, a nonprofit organization seeking federal support for advocacy on behalf of people with disabilities, has argued that: 1) segregated work and sheltered environments contradict national policy; 2) work segregation of people with disabilities is damaging; and 3) sheltered workshops lead nowhere.¹² This Note argues the Department of Justice should promulgate regulations clarifying the appropriate application, if any, of such sheltered workshops—in particular, the Department of Justice should follow the lead of the Department of Education in promulgating regulations to the effect that persons with disabilities should be situated in the least restrictive environment appropriate to that person within the workplace.

Though sheltered workshops have existed in the United States since at least 1840, their popularity exploded in the 1950s and 1960s.¹³ Segregated workshops are “facility-based day programs attended by adults with disabilities as an alternative to working in the open labor market.”¹⁴ These workshops were designed to “enable men with severe physical impairments to contribute to society.”¹⁵ Sheltered workshops have drawn increasing scrutiny since the 2011 publication of the NDRN’s *Segregated & Exploited: The Failure of the Disability Service System to Provide Quality Work*.¹⁶ A number of persons with disabilities in Oregon have challenged sheltered workshops as violating Title II of the ADA, 42 U.S.C. §§ 12131–12134, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a).¹⁷ However, no such case has yet been decided on the merits—leaving the question open as to whether in fact such workshops do violate these provisions of federal law. In order to clear up this uncertainty, and to protect workers with

12. NAT’L DISABILITY RIGHTS NETWORK, *supra* note 1, at 15–27, 32–34.

13. 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, 154 (2013).

14. *Id.* at 151.

15. Gena Rinaldi, *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, 751 (2014).

16. *See, e.g., id.* (discussing the NDRN report that demonstrated hundreds of thousands of people remain segregated in sheltered workshops); Hoffman, *supra* note 13, at 151–52 (stating that the NDRN report brought greater attention to this issue).

17. *See, e.g., Lane v. Kitzhaber*, 841 F. Supp. 2d 1199 (D. Or. 2012) (involving a class action filed by eight individuals with intellectual or developmental disabilities alleging that the Oregon Department of Human Services violated Title II of the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973 by unnecessarily keeping them segregated in sheltered workshops).

disabilities and employers alike, the Department of Justice should promulgate regulations that ensure: 1) workers with disabilities are not segregated from their non-disabled peers in the workplace where such segregation places these workers in a more restrictive environment than necessary; and 2) where segregated workshops are indeed in the best interest of workers with disabilities, their use is regulated to protect these workers.

To that end, Part I of this Note discusses the history of segregation in the United States that led to the landmark *Olmstead*¹⁸ decision. Part II provides an overview of Title II of the ADA and Section 504 of the Rehabilitation Act and relevant precedent. Part III discusses the analogous case of the desegregation of educational settings along the axis of disability. Finally, Part IV discusses and recommends possible courses of action that the Department of Justice could pursue in promulgating regulations to adequately oversee the use of sheltered workshops. The continuing debates surrounding the benefits and detriments to relying on sheltered workshops, combined with the sporadic implementation of supported services approaches, creates an opportunity for guidance at the federal level through the Department of Justice's promulgation of regulations that would instruct the states on the appropriate use and appearance of sheltered workshops.

II. Background

Sheltered workshops are “characterized by repetitive piecework, which has been subcontracted to the sheltered workshops by companies that never interact with the disabled employees performing the work.”¹⁹ This is at odds with the spirit and perhaps the letter of acts promoting community integration for persons with disabilities. The Rehabilitation Act of 1973²⁰ “promoted the idea of community integration . . . identif[ying] one of its purposes as ‘promot[ing] and expand[ing] employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment.’”²¹

18. *See* *Olmstead*, 527 U.S. 581.

19. Susan Stefan, *Beyond Residential Segregation: The Application of Olmstead to Segregated Employment Settings*, 26 GA. ST. U. L. REV. 875, 895 (2010) (citing ZANA MARIE LUTFIYYA, PAT ROGAN, & BONNIE SHOULTZ, CTR. ON HUMAN POLICY, SUPPORTED EMPLOYMENT: A CONCEPTUAL OVERVIEW (1988), <http://thechp.syr.edu/c hp-archives-supported-employment-a-conceptual-overview/>).

20. 29 U.S.C. §§ 701–797 (2012).

21. NAT'L DISABILITY RIGHTS NETWORK, *supra* note 1, at 15.

However, a far greater level of protection for people with disabilities came in 1990 when Congress passed the ADA.²² The stated purpose of the ADA was:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.²³

However, with regard to sheltered workshops, the “national mandate for the elimination of discrimination against individuals with disabilities” has been anything but “clear and comprehensive.”²⁴ The provision of the ADA at issue in *Olmstead*²⁵ and here, found in Title II, reads: “Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”²⁶ This provision, which clearly establishes that individuals with disabilities cannot be excluded from appropriate activities, does not directly address the creation of programs specifically for those with disabilities.

The first case dealing with discrimination against people with disabilities preceded even the passage of the ADA—*Homeward Bound, Inc. v. Hissom Medical Center*.²⁷ *Homeward Bound* “created principles and remedies that remain as alive and true today as they were over twenty years ago.”²⁸ There, the court found that “all

22. Americans with Disabilities Act of 1990, Pub. L. No. 101-33, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

23. 42 U.S.C. § 12101(b) (2012).

24. *Id.*

25. *See Olmstead*, 527 U.S. 581.

26. 42 U.S.C. § 12132 (2012). The definition of a “qualified individual with a disability” is “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” *Id.* at § 12131(2).

27. Stefan, *supra* note 19, at 883 (citing *Homeward Bound, Inc. v. Hissom Medical Ctr.*, No. 85-C-437-E, 1987 WL 27104 (N.D. Okla. July 24, 1987)).

28. Stefan, *supra* note 19, at 883.

Hissom class members are to receive prevocational and vocational services commensurate with his/her need. This will necessitate that the State accelerate and perhaps redirect its efforts to create employment options for persons with severe disabilities.”²⁹

Following the passage of the ADA, in *Olmstead*,³⁰ the Supreme Court interpreted this portion of the ADA to “require[] the removal of individuals with disabilities from institutional settings and into communities whenever possible.”³¹ Under Title II of the ADA, the Attorney General “shall promulgate regulations in an accessible format that implement [Title II, including 42 U.S.C. § 12132’s discrimination proscription].”³² One such regulation, the “integration regulation,” provides that: “A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”³³ Another such regulation, the “reasonable-modifications regulation,” provides: “A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”³⁴ In *Olmstead*, Justice Ginsburg, for the majority, found that the remedies appropriate for a violation falling under Title II of the ADA are those made available by section 505 of the Rehabilitation Act of 1973.³⁵ The Court held that, under these regulations, “[u]njustified isolation . . . is properly regarded as discrimination based on disability.”³⁶ However, it also recognized that States need to maintain “a range of facilities for the care and treatment of persons with diverse mental disabilities, and the State’s obligation to administer services with an even hand.”³⁷ This recognition of the segregation of persons with disabilities in housing as a form of discrimination based on disability flows directly from

29. *Homeward Bound*, WL 27104 at *38.

30. *See Olmstead*, 527 U.S. at 581.

31. Hoffman, *supra* note 13, at 156.

32. 42 U.S.C. § 12134(a) (2012).

33. 28 C.F.R. § 35.130(d) (1998).

34. *Id.* at § 35.130(b)(7).

35. *Olmstead*, 527 U.S. at 590 (citing 42 U.S.C. § 12133) (“The remedies, procedures, and rights set forth in [§ 505 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.”).

36. *Olmstead*, 527 U.S. at 597.

37. *Id.*

the language of Title II of the ADA.³⁸ In prohibiting this form of segregative discrimination, Justice Ginsburg did not go so far as to apply this logic to segregation found in the workplace.

Following *Olmstead*, however, plaintiffs with disabilities have filed multiple lawsuits to apply the logic of *Olmstead* to similar segregation in the workplace—especially in so-called “sheltered workshops.”³⁹ In *Lane v. Kitzhaber*,⁴⁰ eight individuals with intellectual or developmental disabilities who received employment services from the Oregon Department of Human Services (DHS) brought a class action against DHS and various state officials, including Oregon’s governor, the Director of DHS, and the Administrator of the Office of Developmental Disability Services, alleging violations of the ADA and Rehabilitation Act.⁴¹ Seven of the eight plaintiffs worked in sheltered workshops—“segregated employment settings that employ people with disabilities or where people with disabilities work separately from others”—and would have preferred to receive supported employment services “which would prepare and allow them to work in an integrated employment setting, which they define as a real job in a community-based business setting, where employees have an opportunity to work alongside non-disabled coworkers and earn at least minimum wage.”⁴² The court found that the case fell under the purview of the ADA because it involved “the state’s provision (or failure to provide) integrated employment *services*, including supported employment programs.”⁴³ Therefore, the court denied the defendants’ motion to dismiss.⁴⁴ The case settled soon thereafter, leaving the question of whether the law permitted sheltered workshops in any circumstances unanswered.

However, others have suggested some benefits to sheltered workshops. For example, “they are safer alternatives to outside employment, they are less demanding for people with disabilities in terms of work and social skills, they provide greater opportunities

38. *Id.* at 600 (citing 42 U.S.C. § 12101(a)(2) (“[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”). *See also* 42 U.S.C. § 12101(a)(5) (2012) (“[I]ndividuals with disabilities continually encounter various forms of discrimination, including . . . segregation . . .”).

39. *See, e.g.*, 841 F. Supp. 2d 1199 (2012).

40. *Id.*

41. *Id.* at 1199.

42. *Id.* at 1201.

43. *Id.* at 1202.

44. *Id.* at 1208.

for fostering friendships, they ensure structure during the weekdays, and they ensure assistance for life without affecting disability benefits.”⁴⁵ While some states have largely moved toward supported employment services, others continue to rely primarily on sheltered workshops.⁴⁶

Opposition to the phasing out of sheltered workshops on the basis that they provide needed services for some individuals with disabilities misses the mark. In *Olmstead* itself, Justice Ginsburg found that “[t]he ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk,” and that it is not “the ADA’s mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter.”⁴⁷ Here, the situation of sheltered workshops is analogous—the ADA should not be read to require an abolition of *all* placements in sheltered workshops, but rather to prohibit the over-utilization of such workshops where less restrictive settings are available and appropriate given the needs of the individual in question. This accords with the findings of the district court in *Lane v. Kitzhaber*,⁴⁸ and with the logic of *Olmstead* in prohibiting the segregation of persons with disabilities except where such segregation is appropriate, as determined on an *individualized* basis.

The Department of Justice has already begun trying its hand at applying *Olmstead* to the issue of sheltered workshops and whether such practices bring states out of compliance with Title II of the ADA. In 2012, the Department of Justice sent a letter to the Attorney General of Oregon, stating that:

Title II of the ADA and *Olmstead* mandate that individuals be given the opportunity to be integrated into the community more than just by their mere transition into integrated residential settings. Rather, individuals with disabilities have the right to live integrated lives, by participating in all aspects of community life . . . [T]housands of individuals still spend the majority of their day-time hours receiving employment services in *segregated sheltered workshops*, even though they are

45. Hoffman, *supra* note 13, at 164 (citing Alberto Migliore, *Sheltered Workshops*, INT’L ENCYCLOPEDIA OF REHABILITATION (2010), <http://sphhp.buffalo.edu/rehabilitation-science/research-and-facilities/funded-research-archive/center-for-international-rehab-research-info-exchange.html>).

46. Stefan, *supra* note 19, at 930–31 (finding that New Mexico, Vermont, and Washington largely rely on supported employment services, while Idaho, Missouri, and Nevada continue to rely primarily on sheltered workshops).

47. *Olmstead*, 527 U.S. at 604–05.

48. *Lane*, 841 F. Supp. 2d at 1204 (“[P]articipation for persons with disabilities in sheltered workshops ‘must be a choice, not a requirement.’”).

capable of, and want to receive employment services in the community. Such *unjustified segregation* makes many of the benefits of community life elusive for people with disabilities, even though they are residing in the community.⁴⁹

The letter goes on to argue that “[w]ork is undoubtedly at the core of how most Americans spend their time, contribute as taxpayers, relate to society, and, importantly, access the full benefits of citizenship, including economic self-sufficiency, independence, personal growth, and self-esteem.”⁵⁰

Finally, in 2011, the Department of Justice interpreted the integration mandate “to include the corpus of the Supreme Court’s decision in *Olmstead*, by specifically including integrated employment services as a remedy to unnecessary segregation in sheltered workshops.”⁵¹ This, in combination with the Letter to the Attorney General of Oregon, marks a shift in the stance of the Department of Justice on the legal status of sheltered workshops, integrated employment, and the integration mandate. However, because much remains unclear in the application of this mandate—even given the recent trend of the U.S. Department of Justice toward encouraging integration—much is left to be desired in terms of federal guidance on this issue. The shortcomings of Department of Justice policy, and suggested alternatives, are discussed in Part III of this Note, following a brief discussion of the analogous situation of the “Least Restrictive Environment” doctrine arising from the Individuals with Disabilities Education Act (IDEA),⁵² and a discussion on Minnesota’s “Olmstead Plan” as an example of a direction the Department of Justice could take.

III. The “Least Restrictive Environment” Doctrine in the Educational Sphere

Residential segregation is not the only sphere in which Congress and the courts have grappled with the relative autonomy of individuals with disabilities. Such debates have also been fought out in the context of the Developmentally Disabled Assistance and

49. Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, to John Kroger, Att’y Gen., State of Or. 2 (June 29, 2012), http://www.ada.gov/olmstead/documents/oregon_findings_letter.pdf (emphasis added).

50. Hoffman, *supra* note 13, at 174 (quoting Letter from Thomas E. Perez, *supra* note 49, at 3).

51. Rinaldi, *supra* note 15, at 755 (citing CIVIL RIGHTS DIV., U.S. DEPT OF JUSTICE, *supra* note 9).

52. 20 U.S.C. § 1400 *et seq.* (2010).

Bill of Rights Act of 1975⁵³ and the 2004 IDEA.⁵⁴ As far back as 1975, the Developmentally Disabled Assistance and Bill of Rights Act centered the discussion of the individual autonomy of persons with disabilities around the concept of “restriction.” In section 6010(2), Congress stated that “[t]he treatment, services, and habilitation for a person with developmental disabilities . . . should be provided in the setting that is least restrictive of the person’s personal liberty.”⁵⁵ However, this “least restrictive” requirement was not mandatory.⁵⁶ In fact, the Supreme Court held that this “least restrictive” language “when read in the context of other more specific provisions of the Act, does no more than express a congressional preference for certain kinds of treatment,” concluding that this statute did not create any new substantive rights in favor of persons with disabilities.⁵⁷ In 2004, Congress would finally make this “least restrictive” language mandatory under the IDEA.⁵⁸ However, as discussed in Part II of this Note, this language still remains unclear when it comes to issues of workplace segregation.

In comparison, in *Olmstead* the Supreme Court held that the ADA’s proscription of discrimination requires the placement of

persons with mental disabilities in community settings rather than in institutions when the State’s treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.⁵⁹

This marks a clear line of concern by the courts in preserving the liberty of individuals with disabilities from the educational sphere to the residential. The Department of Justice’s signaling of an interest in the overuse of “sheltered workshops” marks a foray into a third sphere—the occupational.

53. 42 U.S.C. § 6010(2) (1976), repealed by Pub. L. 106-402, Title IV, § 401(a), Oct. 30, 2000, 114 Stat. 1737.

54. 20 U.S.C. § 1400 *et seq.* (2010).

55. 42 U.S.C. § 6010(2) (1976).

56. *Olmstead*, 527 U.S. at 599 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981) (concluding that the § 6010 provisions “were intended to be hortatory, not mandatory.”)).

57. *Pennhurst*, 451 U.S. at 19–20.

58. 20 U.S.C. § 1416(a)(3) (stating that the Secretary shall monitor the states in adequately measuring performance in the “[p]rovision of a free appropriate public education in the *least restrictive environment*”) (emphasis added).

59. *Olmstead*, 527 U.S. at 587.

The IDEA “provides federal funds to assist state and local agencies to educate disabled children,” with eligibility for such funding conditioned on compliance with the Act.⁶⁰ Under the Act, the segregation of children with disabilities into special education classes is appropriate only where the child’s disability is so severe as to “prevent[] her from being educated satisfactorily in a regular education classroom.”⁶¹ Under section 1412(a)(5) of the IDEA, this requirement that children with disabilities be provided with a free appropriate public education in the “least restrictive environment” is known as “mainstreaming.”⁶² Under this requirement, “school districts must teach disabled children and able-bodied children together to the maximum extent possible.”⁶³

In passing the IDEA, Congress found that:

Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.⁶⁴

Here, Congress establishes the IDEA as aimed toward, in part, the economic self-sufficiency of individuals with disabilities. Furthermore, improving educational results of those persons is portrayed as only one element for achieving this goal. To that end, one requirement imposed by the IDEA is the “least restrictive environment”:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁶⁵

This focus on *restriction* as a marker of the inclusivity of educational settings provides a lens through which the Department

60. Brian L. Porto, *Application of 20 U.S.C.A. § 1412(a)(5), Least Restrictive Environment Provision of Individuals with Disabilities Education Act (IDEA)*, 20 U.S.C.A. §§ 1400 et seq., 189 A.L.R. Fed. 297 (2003).

61. *Id.*

62. *Id.*

63. *Id.*

64. 20 U.S.C. § 1400(c)(1).

65. 20 U.S.C. § 1412(a)(5)(A).

of Justice could examine and improve the lives of those disabled persons working in “sheltered workshops.”

Limiting restrictions on individuals with disabilities can also have positive impacts on individuals without disabilities. In an evaluation of special education services in four elementary and four secondary schools in a large, metropolitan school district in a southwestern city, Dr. Lorna Idol found that teachers overall strongly supported the practice of integrating special education students into general education classes.⁶⁶ In her study, Dr. Idol defined an inclusive school as one where “all students are educated in general education programs,” and defined inclusion as “when a student with special learning and/or behavioral needs is educated full time in the general education program. Essentially, *inclusion* means that the student with special education needs is attending the general school program, enrolled in age-appropriate classes 100% of the school day.”⁶⁷ In contrast, “mainstreaming” is a process by which “a student with special education needs is educated partially in a special education program, but to the maximum extent possible is educated in the general education program.”⁶⁸ In terms of educators’ attitudes towards inclusion, “there was a trend among the participating educators of moving more and more toward the inclusion of students with disabilities in the general education classes,” and educators “had generally favorable impressions of the impact of students with disabilities on other students in their classes,” with the exception of exceptionally disruptive students’ behavioral problems.⁶⁹

Under the IDEA, the educational placement of a child must accord with the “least restrictive environment” requirement.⁷⁰ In the Ninth Circuit, whether a child’s placement complies with this requirement is determined by balancing four factors: “(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student has on the teacher and children in the regular class; and (4) the cost of mainstreaming the student.”⁷¹ Here, the Ninth Circuit’s

66. Lorna Idol, *Toward Inclusion of Special Education Students in General Education: A Program Evaluation of Eight Schools*, 27 REMEDIAL & SPECIAL EDUC., no. 2, Mar.–Apr. 2006, at 77.

67. *Id.* (citing Lorna Idol, *Key Questions Related to Building Collaborative and Inclusive Schools*, 30 J. LEARNING DISABILITIES, no. 4, July–Aug. 1997, at 384).

68. Idol, *Key Questions*, *supra* note 67, at 384–85.

69. Idol, *Toward Inclusion*, *supra* note 66, at 91.

70. Susan C. Bon, *Confronting the Special Education Inclusion Debate: A Proposal to Adopt New State-Wide LRE Guidelines*, 249 ED. L. REP. 1, 4 (2009).

71. *Katherine G. ex. rel. Cynthia G. v. Kentfield Sch. Dist.*, 261 F. Supp. 2d 1159,

balancing approach acknowledges the importance of both educational *and* non-educational benefits of mainstreaming students with disabilities, as well as the effect on non-disabled persons and the economic impact of mainstreaming.

IV. Minnesota's "Olmstead Plan"

Minnesota's Olmstead Plan provides one example of a state embracing the Department of Justice's attempted expansion of *Olmstead* to include the workplace. An Olmstead Plan is a "public entity's plan for implementing its obligation to provide individuals with disabilities opportunities to live, work, and be served in integrated settings."⁷² The Olmstead Subcommittee of the Minnesota Department of Human Services oversees Minnesota's Olmstead Plan, following the *Olmstead* mandate.⁷³

The purpose of Minnesota's plan is to "ensur[e] that people with disabilities experience lives of inclusion and integration in the community, just like the lives of people without disabilities," and the plan envisions a society "where people with disabilities have the opportunity, both now and in the future, to live close to their families and friends and as independently as possible, to work in competitive, integrated employment, to be educated in integrated settings, and to participate in community life."⁷⁴ This reflects an acknowledgement of the inherent dignity of learning, living, and working in the broader community, and reflects the aims of the Department of Justice's inclusion mandate.

This Olmstead Plan, however, was not based on pure idealism. The State of Minnesota reached a settlement in a class action in the U.S. District Court in *Jensen v. DHS*, resulting in the modification of Minnesota's Olmstead Plan.⁷⁵ In *Jensen*, the court noted that an Olmstead Plan "must contain concrete, reliable, and realistic commitments, accompanied by specific and reasonable timetables,

1172 (N.D. Cal. 2003) (citing *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994)).

72. DEP'T OF HUMAN SERV., PUTTING THE PROMISE OF *OLMSTEAD* INTO PRACTICE: MINNESOTA'S *OLMSTEAD* PLAN 9 (Aug. 10, 2015 Rev.) (citing CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *supra* note 51, at 4; *see also* Caroline Strnad, *What is the Olmstead Plan and Why Should I Care?*, MINN. ORG. ON FETAL ALCOHOL SYNDROME (Aug. 12, 2013), <https://www.mofas.org/2013/08/what-is-the-olmstead-plan-and-why-should-i-care> ("An Olmstead Plan is the way for states to document its [sic] plan to provide services for individuals with disabilities in the most inclusive, integrated setting appropriate for the individual.").

73. DEP'T OF HUMAN SERV., *supra* note 72.

74. *Id.*

75. *Jensen v. Dep't of Human Serv.*, No. 09-1775, at 2 (D. Minn. Sept. 18, 2014).

for which the public agencies will be held accountable.”⁷⁶ It further noted that, to be effective, a Plan must “demonstrate success in actually moving individuals to integrated settings in furtherance of the goals.”⁷⁷ However, this approach leaves much to be desired. While a state-by-state litigation-focused approach, wherein the Department of Justice seeks settlement with each individual state to ensure compliance with its interpretation of the *Olmstead* decision, is useful insofar as it accomplishes integration on a local basis, a nation-wide regulation of sheltered workshops would enshrine the position that persons with disabilities deserve to live full lives in our society. This demonstrates a flaw in the use of *Olmstead* Plans as cure-alls in the struggle to phase out sheltered workshops—by shifting the struggle against segregation to individual states in a piece-meal, courts-based solution, hundreds of thousands of individuals with disabilities have been left behind. Instead, this Note advocates a national approach through the promulgation of regulations by the Department of Justice under the Americans with Disabilities Act. The particulars of this recommendation are laid out in Part VI of this Note.

V. Policy Recommendations

The Department of Justice should look to the regulations promulgated by the Department of Education relating to the IDEA’s “least restrictive environment” requirement.⁷⁸ By borrowing from the Department of Education’s regulations concerning the least restrictive environments, the Department of Justice can look to the well-established case law on the issue.⁷⁹ In fact, these regulations dovetail nicely with already-existing Department of Justice regulation 28 C.F.R. § 35.130(d), which states that “[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”⁸⁰ When compared with the Department of Education’s regulations concerning integrated educational

76. *Id.* at 5.

77. *Id.*

78. *See, e.g.*, 34 C.F.R. § 300.114 (promulgating regulations by the Department of Education regarding state eligibility for assistance for the education of children with disabilities).

79. *See, e.g.*, *Tammy S. v. Reedsburg Sch. Dist.*, 302 F. Supp. 2d 959, 979 (W.D. Wis. 2003) (“The least restrictive environment requirement ‘is relative and concentrates on other placement options’ than the one proposed by a school district.”) (quoting *Beth B. v. Van Clay*, 282 F.3d 493, 497 (7th Cir. 2002)).

80. 28 C.F.R. § 35.130(d).

settings,⁸¹ it is clear that both agencies value the maximum possible integration between disabled and non-disabled individuals in various settings. However, in order to clarify the uncertain legality of “sheltered workshops,” the Department of Justice should follow the Department of Education in specifying that this integration mandate applies to both *public and private institutions* with regard to employment. By only applying this integration mandate to public services, the Department of Justice has shifted the burden of providing maximum possible integration onto plaintiffs, many of whom may lack the bargaining power or means to challenge their private employer.

Thus, the Department of Justice should promulgate the following regulation, or something substantially similar:

To the maximum extent appropriate, individuals with disabilities, including individuals in public or private institutions, are employed in a setting with individuals who are nondisabled; and separate environments, or other removal of individuals with disabilities from the regular occupational environment occurs only if the nature or severity of the disability is such that employment in the broader work environment cannot be achieved satisfactorily.

By making explicit that the Department of Justice’s inclusion mandate applies to the private workforce, this regulation would clarify the significant ambiguity in the law left in the wake of *Olmstead*,⁸² as well as make the inclusion mandate consistent between the occupational and educational spheres. Unlike the IDEA, Title I of the ADA applies to private and public employers alike.⁸³

Finally, this approach accounts for critics’ contention that the abolition of sheltered workshops would invariably lead to denying persons with disabilities access to fitting working environments. The *Olmstead* decision “is not about forcing integration upon individuals who choose otherwise or who would not be appropriately served in community settings.”⁸⁴ Rather, a clarification of the

81. See, e.g., 34 C.F.R. § 300.114(a)(2) (“Each public agency must ensure that . . . [t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled.”).

82. See *Lane*, 841 F. Supp. 2d 1199.

83. 42 U.S.C. § 12111(2), (5) (defining “covered entity” as an employer and defining an “employer” as “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.”); see also *Facts About the Americans with Disabilities Act*, EEOC, <https://www.eeoc.gov/eeoc/publications/fs-ada.cfm>.

84. *Jensen*, 138 F. Supp. 3d at 1075.

legality of sheltered workshops—along with a concomitant increase in scrutiny on the widespread use of them as a cure-all—would ensure that sheltered workshop settings are used *only* for those persons for whom a cloistered environment is appropriate. For the time being, sheltered workshops are widely used. To clarify when such environments are legal is not to deprive those persons who truly need a sheltered environment an ability to work; instead, it is merely to ensure that each individual is given the resources he or she requires to live a full and dignified life.

Conclusion

In 1948, Professor Jacobus tenBroek, President of the National Federation of the Blind, spoke at the Banquet of the Annual Convention of the Federation. In that speech, Professor tenBroek, himself blind, said:

A program of public assistance . . . must be so arranged as to leave the recipient's independence unimpaired. He must be free to spend his grant as he pleases. He must be left to make his own decisions about where and how he shall live and what he shall do. He must have the divine election, so far as social existence and his own talents permit, of making the choices which determine his own worldly destinies, not without guidance, if he wishes it, but without intrusion, if he does not. Man does not forfeit the rights of individuality and the dignity of the person by economic necessity or physical handicap; and the injunction to be thy brother's keeper is not an order to become his master.⁸⁵

His vision of a society in which persons with disabilities would be free of the humiliation of servitude is within reach. By promulgating regulations under the Americans with Disabilities Act, the Department of Justice could remove the stumbling block of segregation from the lives of persons with disabilities. By ensuring that all individuals are integrated into their respective workplaces to the greatest extent possible, the Department of Justice could bring us closer to Professor tenBroek's dream, and closer to a more just society.

Under the IDEA, students with intellectual disabilities are to be served in the "least restrictive environment" appropriate. Similarly, under *Olmstead*, persons with disabilities are to be housed in the "most integrated setting *appropriate* to the needs" of the individual in question.⁸⁶ In the burgeoning debate over the

85. Jacobus tenBroek, President, Nat'l Fed'n of the Blind, A Bill of Rights for the Blind (July 1948), <https://nfb.org/Images/nfb/Publications/convent/banquet48.html>.

86. *Olmstead*, 527 U.S. at 602.

legality, and propriety, of “sheltered workshops,” and the accompanying legal ambiguity of those programs, the Department of Justice should look to both the regulations promulgated by the Department of Education *and* the Supreme Court’s mandates under *Olmstead*. In doing so, the Department of Justice should promulgate its own regulations under the ADA stating that workplaces that hire persons with disabilities should place those individuals in the least restrictive—or most integrated—setting possible in the workplace. This would leave open the possibility for the use of “sheltered” work environments for those individuals for whom an integrated workplace would be infeasible, while also cutting back on the widespread over-use of those workplace settings so criticized by groups such as the National Disabilities Rights Network. By fully integrating workers with disabilities into the mainstream employment sphere where possible, this approach would both reduce the stigma associated with disability in the workplace as well as truly enshrine the “right to live in the world” for persons with disabilities.⁸⁷

87. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 918 (1966).