

# AN EMPLOYMENT OPPORTUNITY OR A DISCRIMINATION DILEMMA?: SHELTERED WORKSHOPS AND THE EMPLOYMENT OF THE DISABLED

LAURA C. HOFFMAN\*

## INTRODUCTION

In January 2011, a U.S. disability rights organization, National Disability Rights Network (NDRN),<sup>1</sup> published a report that criticizes the use of certain employment practices involving people with disabilities.<sup>2</sup> Within the report, NDRN argues that the continued use of these practices amounts to the systemic discrimination of the disabled in employment, rather than to the assured provision of civil rights protections for the disabled.<sup>3</sup> One of these practices is the use of sheltered workshops,<sup>4</sup> which are “facility-based day programs attended by adults with disabilities as an alternative to working in the open labor market.”<sup>5</sup> By providing relatively simple work activities and customized educational programs, these workshops may be designed to assist the disabled with finding long-term employment or transitioning into the open labor market.<sup>6</sup> However, according to the Executive Director of NDRN, “[s]heltered workshops are not what they promise to be, and sometimes serve as an unsettling example of how good intentions can lead to terrible outcomes.”<sup>7</sup> This report was only the beginning for NDRN on this issue; the organization released another report in April 2012 containing even more criticism for the use of sheltered workshops as an employment option for people with disabilities, bringing even greater attention to this

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\* Dr. Laura C. Hoffman earned her S.J.D. from Loyola University Chicago School of Law’s Beazley Institute of Health Law and Policy in 2012. Dr. Hoffman earned a LL.M. in Child and Family Law from Loyola University Chicago School of Law in 2010 and a second LL.M. in Government and Law with a concentration in Civil and Constitutional Rights from American University Washington College of Law in 2009. She became licensed to practice law in the State of Ohio in 2008, and earned her J.D. from Ave Maria School of Law in 2007. She holds a B.A. in Political Science, *cum laude*, from the University of Notre Dame, 2004. She would like to thank her professional mentors, Professor Diane Geraghty, Professor John Blum, and Professor Michael Zimmer for their support and encouragement of her professional career. Finally, she leaves a special thank-you to her parents, Ronald and Janet Hoffman, and Robert L. Choromanski, Esq., for their gifts of unconditional love. Dr. Hoffman may be reached at [lhoffman@luc.edu](mailto:lhoffman@luc.edu).

<sup>1</sup> NAT’L DISABILITY RIGHTS NETWORK, <http://www.napas.org/> (last visited Oct. 31, 2012).

<sup>2</sup> NAT’L DISABILITY RTS. NETWORK, SEGREGATED & EXPLOITED: THE FAILURE OF THE DISABILITY SERVICE SYSTEM TO PROVIDE QUALITY WORK (2011), *available at* <http://www.napas.org/images/Documents/Resources/Publications/Reports/Segregated-and-Exploited.pdf> [hereinafter SEGREGATED & EXPLOITED].

<sup>3</sup> *Id.* at 32.

<sup>4</sup> *See id.* (“Sheltered employment was originally conceived to provide people with disabilities opportunities for activity and productivity during the day. . . . However, purpose and practice part ways as the reality for most individuals working in a sheltered workshop is not a transition point but a dead end.”).

<sup>5</sup> Alberto Migliore, *Sheltered Workshops*, in INTERNATIONAL ENCYCLOPEDIA OF REHABILITATION 1 (Ctr. Int’l Rehab. Research Info. & Exch. ed., 2010), *available at* [http://cirrie.buffalo.edu/encyclopedia/en/pdf/sheltered\\_workshops.pdf](http://cirrie.buffalo.edu/encyclopedia/en/pdf/sheltered_workshops.pdf) (citations omitted).

<sup>6</sup> *Id.*

<sup>7</sup> Curtis L. Decker, Esq., *A Letter from the Executive Director*, in SEGREGATED & EXPLOITED, *supra* note 2, at 3.

issue both within the disability community and across the United States.<sup>8</sup>

The U.S. also has a number of federal laws designed to ensure equal opportunity in employment for people with disabilities.<sup>9</sup> Most notably, Title I of the Americans with Disabilities Act (ADA) prohibits discrimination against the disabled in all aspects of employment for covered entities.<sup>10</sup> Despite these protections, many of the employment practices implemented for the benefit of the disabled do not actually result in additional equal employment opportunities. Recent statistics released by the Bureau of Labor Statistics (BLS) at the U.S. Department of Labor paint a dismal picture for the overall employment prospects of people with disabilities.<sup>11</sup> According to the BLS report, “[i]n 2011, 17.8 percent of persons with a disability were employed . . . [i]n contrast, the employment-population ratio for persons without a disability was 63.6 percent.”<sup>12</sup> Moreover, the disabled population continued to show greater joblessness than the non-disabled population through June 2012, according to statistics compiled on a monthly basis for U.S. employment overall.<sup>13</sup>

Given these troubling statistics, it is necessary to ask whether sheltered workshops are a relevant and successful means of encouraging the employment for the disabled today. Do sheltered workshops represent an antiquated view of people with disabilities and continue what was thought to be an outdated mentality concerning those with disabilities and their ability to participate in society, especially in terms of employment? Or, do sheltered workshops provide something of value and worth to the disabled, by at least providing the opportunity for employment? This Article reexamines the use of sheltered workshops for the employment of the disabled and what this use means for the current legal protections in employment available to individuals with disabilities.

Policy development regarding the treatment of individuals with disabilities in the workplace has also been global. Historically, the international community has sought the promotion of equal employment opportunities for people with disabilities, beginning with the International Labor Organization (ILO) in 1944.<sup>14</sup> Since then, several other pronouncements of international policy regarding individuals with disabilities have similarly expressed a unified commitment to ensuring the disabled are treated equally in all aspects of employment.<sup>15</sup> “A number of []

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<sup>8</sup> NAT’L DISABILITY RTS. NETWORK, BEYOND SEGREGATED AND EXPLOITED: UPDATE ON THE EMPLOYMENT OF PEOPLE WITH DISABILITIES (2012), available at [http://www.ndrn.org/images/Documents/Resources/Publications/Reports/Beyond\\_Segregated\\_and\\_Exploited.pdf](http://www.ndrn.org/images/Documents/Resources/Publications/Reports/Beyond_Segregated_and_Exploited.pdf) [hereinafter BEYOND SEGREGATED AND EXPLOITED].

<sup>9</sup> See Office of Disability Emp’t Policy, *Employment Laws: Disability & Discrimination*, U.S. DEP’T OF LABOR, <http://www.dol.gov/odep/ietoolkit/> (last visited Nov. 10, 2012) (noting the Americans with Disabilities Act, the Rehabilitation Act, the Workforce Investment Act, the Vietnam Era Veterans’ Readjustment Assistance Act, and the Civil Service Reform Act).

<sup>10</sup> See Americans with Disabilities Act, 42 U.S.C. § 12101(b) (2006) (stating that the Act invokes congressional powers to protect the opportunities of the disabled and combat any discrimination against them).

<sup>11</sup> News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Persons with a Disability: Labor Force Characteristics—2011 (June 8, 2012), available at <http://www.bls.gov/news.release/pdf/disabl.pdf>.

<sup>12</sup> *Id.* at 1.

<sup>13</sup> Shaun Heasley, *Fewer People With Disabilities Landing Jobs*, DISABILITY SCOOP (July 9, 2012), <http://www.disabilityscoop.com/2012/07/09/june-12-jobs/15972/> (“Some 13.3 percent of those with disabilities were jobless in June, . . . [m]eanwhile the jobless rate for the general population remained flat at 8.2 percent. . . .”).

<sup>14</sup> See Migliore, *supra* note 5, at 4.

<sup>15</sup> See *id.* (“Although initially sheltered workshops were accepted as alternative day programs for adults with severe disabilities, the international organizations have always emphasized employment in the open labor market as the

international documents support[] full integration of adults with disabilities in society, including the Universal Declaration of Human Rights in 1948, the UN Declaration on the Rights of Mentally Retarded Persons in 1971, [and] the most recent UN Convention on the Rights of Persons with Disabilities in 2006.”<sup>16</sup> One of the most recent statements from the international policy community on the rights of individuals with disabilities is the U.N. Convention on the Rights of Persons with Disabilities, adopted on December 13, 2006.<sup>17</sup> The Convention has several sections devoted to expressing the idea that individuals with disabilities must be treated equally with respect to their legal protections.<sup>18</sup> Article 5 reaffirms that the disabled are entitled to equal treatment under the law: “all persons are equal before and under the law and are entitled without any discrimination to the equal protection and benefit of the law.”<sup>19</sup> Article 27 of the Convention is specifically devoted to the work and employment of the disabled.<sup>20</sup> Specifically, Section 27(1)(b) highlights the responsibility of State Parties to “[p]rotect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protections from harassment, and the redress of grievances . . . .”<sup>21</sup>

While globally, many countries have made use of sheltered workshops for employment of the disabled, some countries have taken legislative action to reduce or eliminate the use of this practice.<sup>22</sup> This article reexamines the issues surrounding the use of sheltered workshops from a comparative perspective. First, this article will trace the history of the use of sheltered workshops and disability law policy in the United States. Next, this article will examine existing international and foreign laws and policies on the employment of disabled persons, and the potential implications of these laws and policies on the use of sheltered workshops. This article will then examine what, if anything, other countries have done to implement international policies on the employment of the disabled, with regard to the sheltered workshops issue. The arguments for and against the use of sheltered workshops will also be considered in this article. Finally, it will be argued that the United States faces immense global pressure to reconsider its practices of using sheltered workshops and that U.S. policymakers should find alternative employment options for the disabled, possibly through the use of purposeful integration.

## I. THE HISTORY OF SHELTERED WORKSHOPS & U.S. POLICY ON EMPLOYMENT OF PEOPLE WITH DISABILITIES

While many in the United States may find the concept of sheltered workshops foreign, sheltered workshops have existed in the U.S. for well over a century.<sup>23</sup> At the Perkins Institute

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preferred outcome.”).

<sup>16</sup> *Id.* (citation omitted).

<sup>17</sup> Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

<sup>18</sup> *See, e.g., id.* at 72 (stating in art. 1 that: “The purpose of the present Convention is to promote, protect, and ensure the full and equal enjoyment of human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”).

<sup>19</sup> *Id.* at 75.

<sup>20</sup> *Id.* at 86.

<sup>21</sup> *Id.*

<sup>22</sup> *See, e.g.,* Migliore, *supra* note 5, at 2 (noting countries where legislation was repealed that had previously allowed sheltered workshops to pay disabled workers sub-minimum wages).

<sup>23</sup> SEGREGATED & EXPLOITED, *supra* note 2, at 11 (noting that sheltered workshops existed at the Perkins

for the Blind, jobs for the blind were protected from competition in the open labor market as early as 1840 to ensure that the disabled had permanent job opportunities.<sup>24</sup> Over one hundred years later, during the 1950's and 1960's, sheltered workshops increased in popularity.<sup>25</sup> There is evidence that sheltered workshops erupted as an employment mechanism for people with disabilities after World War II:

The decades after World War II were characterized by the highest increase of sheltered workshops and by the expansion of services to include adults with intellectual disabilities. For instance, between 1948 and 1976, the number of sheltered workshops in the USA increased from 85 to about 3000. In 2007, an estimated 136,000 adults with disabilities attended sheltered workshop [sic] in 42 states in the USA.<sup>26</sup>

One need look no further than the United States to observe that the use of sheltered workshops as a means of employing the disabled has become an issue of contention.<sup>27</sup> The National Industrial Recovery Act (NIRA) of 1933-1935 was the first major U.S. legislative pronouncement on the employment of the disabled, and was the precursor to the Fair Labor Standards Act of 1938.<sup>28</sup> Until it was declared unconstitutional in 1935, NIRA provided for "a productivity-based sub-minimum wage, arranged through a system of certificates" for disabled workers, offering them 75% of the minimum wage in competitive industries and maintaining no wage floor in sheltered workshops.<sup>29</sup> The treatment of the disabled through the use of the sub-minimum wage continued with the 1938 passage of the Fair Labor Standards Act (FLSA), which opened the door for the continued utilization of sheltered workshops in the employment of the disabled.<sup>30</sup> Under the FLSA, the certification system was reestablished under Section 14, and "[n]o statutory wage floor was set for persons with disabilities, though, *administratively*, minimum wages for the disabled in competitive industry came to be set at 75% of the federal/FLSA minimum. In the sheltered workshops, the floor was productivity-based with no lower limit."<sup>31</sup>

In 1963, U.S. policy regarding employment and people with disabilities appeared to turn away from the use of sheltered workshops towards more inclusive employment opportunities.<sup>32</sup> According to NDRN:

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Institute for the Blind in Massachusetts, in 1840).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 12.

<sup>26</sup> Migliore, *supra* note 5, at 2 (citations omitted).

<sup>27</sup> *See id.* at 2-4 (noting that Vermont replaced sheltered workshop services with integrated employment services, that surveys showed that sheltered workshops paid significantly below minimum wages, and that the transition rate from sheltered workshops to the open labor market is very low).

<sup>28</sup> WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., RL 30674, TREATMENT OF WORKERS WITH DISABILITIES UNDER SECTION 14(C) OF THE FAIR LABOR STANDARDS ACT 12 (2005), available at [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1211&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1211&context=key_workplace).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *See* SEGREGATED & EXPLOITED, *supra* note 2, at 12.

In 1963, the Developmental Disabilities Assistance and Bill of Rights Act (DD Act) was passed. Beginning the shift in national policy, the DD Act focused on the need to provide support and opportunities that promote independence, productivity, integration, and inclusion of people with disabilities in the community with an emphasis on employment.<sup>33</sup>

The next several U.S. policy developments regarding the disabled and employment portray a nation struggling to determine how to place those with disabilities in employment and to define equal access to employment. U.S. employment policy regarding individuals with disabilities remained closely tied to wages and the use of the sub-minimum wage. In 1966, amendments to the DD Act increased disabled people's opportunities for employment using sheltered workshops.<sup>34</sup> NDRN described this policy shift as including "an even broader definition of disability under the FLSA, increasing the number of workers that can be paid less than the federal minimum wage while also increasing the prevalence of sheltered workshops."<sup>35</sup> However, the sub-minimum wage did not remain in continual use:

[T]he Rehabilitation Act (Rehab Act) of 1973 provided a clear emphasis on the importance of competitive wages, even for those individuals with the most significant disabilities. However, in 1986, a step backward occurred when the FLSA was amended again. This amendment removed any specific minimum wage floor for workers with disabilities, making it even more profitable for employers to exploit their employees with disabilities.<sup>36</sup>

The Rehabilitation Act essentially initiated a U.S. disability policy of employment and community integration. With the Act, "Congress promoted the idea of community integration . . . identif[y]ing 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.'"<sup>37</sup>

#### A. *The ADA & the Olmstead Decision*

Perhaps the greatest changes to protecting the legal rights of people with disabilities, including protections regarding employment, came with the passage of the Americans with Disabilities Act (ADA) in 1990.<sup>38</sup> Congress articulated the primary purpose for enacting the ADA as to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>39</sup> The ADA specifically targets the elimination of discrimination, including "segregation," and ensuring that individuals with disabilities are not prohibited

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 13.

<sup>35</sup> *Id.* (citation omitted).

<sup>36</sup> *Id.* (citations omitted).

<sup>37</sup> *Id.* at 15.

<sup>38</sup> Americans with Disabilities Act, § 42 U.S.C. § 12101 (2012).

<sup>39</sup> 42 U.S.C. § 12101(b)(1).

from fully participating in all aspects of society.<sup>40</sup> Title II of the ADA, which addresses public entities,<sup>41</sup> is crucial to the employment rights of the disabled. Title II provides that “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.”<sup>42</sup> Regulations issued in 1991 provided guidance to public entities for interpreting the ADA, directing them to “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”<sup>43</sup>

Interpretation of this portion of the ADA was significantly shaped by the U.S. Supreme Court’s decision in *Olmstead v. L.C.*, where the Court held that the Americans with Disabilities Act (ADA) required the removal of individuals with disabilities from institutional settings and into communities whenever possible.<sup>44</sup> This statement on community integration is arguably a statement against sheltered workshops as a means of employment for individuals with disabilities. In *Olmstead*, mentally disabled individuals challenged their confinement to institutions by Georgia health officials under the ADA pursuant to Title II.<sup>45</sup> Writing the majority opinion for the Court, Justice O’Connor stated:

[W]e confront the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions. The answer, we hold, is a qualified yes. Such action is in order when the State’s treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.<sup>46</sup>

In reaching this conclusion, the Court initially highlighted the significance of the passage of the ADA in breaking down the barriers of people with disabilities from being fully integrated into society: “The ADA stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living.”<sup>47</sup> The Court also noted that the ADA requires the prevention of discrimination, including the segregation of individuals with disabilities.<sup>48</sup> The Court acknowledged two reasons why institutionalization is contrary to the ADA’s purpose through the creation of unreasonable assumptions about individuals with disabilities: first, that “institutional placement” of disabled persons able to “handle and benefit from community settings perpetuates unwarranted assumptions that [they] are incapable or unworthy of participating in community life”;<sup>49</sup> and second, that institutionalization “severely diminishes the

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<sup>40</sup> 42 U.S.C. § 12101(a).

<sup>41</sup> Americans with Disabilities Act, 42 U.S.C. § 12132.

<sup>42</sup> *Id.*

<sup>43</sup> 28 C.F.R. § 35.130(d) (2012).

<sup>44</sup> *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999).

<sup>45</sup> *Olmstead*, 527 U.S. at 588.

<sup>46</sup> *Id.* at 587.

<sup>47</sup> *Id.* at 599.

<sup>48</sup> *Id.* at 600.

<sup>49</sup> *Id.*

everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”<sup>50</sup>

Although *Olmstead* was decided in 1999, significant action on its implementation did not move to the forefront as a government priority until 2009, when the Civil Rights Division of the U.S. Department of Justice launched an “aggressive effort” to enforce the decision, noting the holding’s requirement that states must “eliminate unnecessary segregation of persons with disabilities and . . . ensure that persons with disabilities receive services in the most integrated setting appropriate to their needs.”<sup>51</sup> President Obama proclaimed 2009 “The Year of Community Living” in recognition of the 10<sup>th</sup> anniversary of the *Olmstead* decision and the need to continue efforts to ensure people with disabilities are further integrated into community living.<sup>52</sup>

The funding of sheltered workshops and how it relates to both the ADA and the *Olmstead* decision is often overlooked and deserves addressing, as NDRN has reported.<sup>53</sup> The National Disability Rights Network’s many criticisms of fiscal policy regarding sheltered workshops include noting that several funding policies are contrary to the mandates of integrated employment set forth in the ADA and *Olmstead*.<sup>54</sup> The National Disability Rights Network has also noted that “states are still able to access money to facilitate the continuation of sheltered settings for individuals with disabilities” despite support for *Olmstead*’s integration principles by the Center for Medicare and Medicaid Services (CMS) and the Rehabilitation Services Administration (RSA).<sup>55</sup> NDRN further explained that current Social Security law does not promote employment opportunities that are integrated and in community settings:

The funding for segregated employment options continues partially because § 1915(c)(5)(b) of the Social Security Act provides that states may request funding for prevocational services and supported employment. However, there is absolutely nothing in the federal rules and regulations that require prevocational services or supported employment be provided in community-based or integrated settings. In fact, the sole limit is that such services cannot otherwise be available to the person seeking services under a different statutory scheme like the Rehabilitation Act of 1973, as amended or the Individuals with Disabilities Education Act (IDEA).<sup>56</sup>

This is just a sampling of some of the current challenges in preventing the phasing out or

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<sup>50</sup> *Olmstead v. L.C.*, 527 U.S. 581, 601 (1999).

<sup>51</sup> U.S. Dep’t of Justice, *Olmstead: Community Integration for Everyone*, ADA HOME PAGE (last updated Sept. 27, 2012), <http://www.ada.gov/olmstead/index.htm>.

<sup>52</sup> Press Release, The White House Office of the Press Sec’y, President Obama Commemorates Anniversary of *Olmstead* and Announces New Initiatives to Assist Americans with Disabilities (June 22, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/President-Obama-Commemorates-Anniversary-of-Olmstead-and-Announces-New-Initiatives-to-Assist-Americans-with-Disabilities](http://www.whitehouse.gov/the_press_office/President-Obama-Commemorates-Anniversary-of-Olmstead-and-Announces-New-Initiatives-to-Assist-Americans-with-Disabilities) (explaining further that the Administration has allocated over \$140 million in Recovery Act funding for independent living centers across the country and “acknowledge[ing] that strides have been made, and . . . that there is much work to do in order to maximize the choices and opportunities for individuals to receive long-term services and supports in institutional and community settings”).

<sup>53</sup> See BEYOND SEGREGATED AND EXPLOITED, *supra* note 8, at 16-19.

<sup>54</sup> *Id.* at 16.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 16-17 (footnote omitted).

elimination of sheltered workshops. There is no doubt that future employment policymaking endeavors involving people with disabilities must consider the financial scheme of any employment options. In addition, they must address how to legislatively structure this scheme to ensure that the very heart of both the ADA and the *Olmstead* decision of inclusiveness and community integration are actualized for the benefit of people with disabilities in society.

## II. INTERNATIONAL POLICY & SHELTERED WORKSHOPS

The U.S. has not been the only country involved in policy issues regarding the employment of people with disabilities and sheltered workshops. Similarly, the development of international laws and policies on sheltered workshops has had a storied history:

Clearly, there is very considerable inter-country variation in the definitions, limits, context and conditions applicable to sheltered employment and as a result in whether persons with disabilities are granted full employment status. It depends, for example, on whether the structure in question is governed by labour legislation or by legislation on health care and social policy. In fact this dual, differentiating approach was confirmed in a ruling by the European Court of Justice in 1987, which has not been overturned by subsequent case law. In effect, a dividing line was drawn between the sheltered sector and “ordinary” employment.<sup>57</sup>

The treatment of sheltered workshops in the law varies by country.<sup>58</sup> While most countries specifically address sheltered workshops in legislation, others refrain from enacting specific legislation that would address the organization or operation of sheltered workshops.<sup>59</sup> Such legislation is enacted “both to protect employees and to specify exceptions to the application of labour law (notably, as regards a fixed minimum wage).”<sup>60</sup>

While labor law is a typical starting place internationally for coverage of sheltered workshops, there are significant differences in how sheltered workshops are addressed, even within the labor law area:

[I]n some countries, sheltered employment is explicitly excluded from standard labour legislation (e.g. Australia, unless there was an enterprise agreement or an “award” in a branch of activity in question); in some other countries, existing labour law applies in the absence of any specific reference to sheltered employment in legislation.<sup>61</sup>

The treatment of sheltered workshops internationally in labor law may also differ de-

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<sup>57</sup> Laurent Visier, *Sheltered Employment for Persons with Disabilities*, 137 INT’L LAB. REV. 347, 347-48 (1998) (citation omitted).

<sup>58</sup> *Id.* at 351.

<sup>59</sup> *Id.* (noting that Costa Rica, Greece, India, Ireland, South Africa, and Sweden all have no such legislation).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

pending on the type of sheltered workshop.<sup>62</sup> For instance, “[w]hen there are two or more types of workshop, a distinction is generally drawn between those concerned primarily with production and those where the treatment is the focus.”<sup>63</sup> Workshops focused on production are supervised by a labor ministry, and those focused on treatment supervised by a health ministry – meaning they would be subject to different regulations.<sup>64</sup> Along these lines, “[w]orkers with less severe disabilities are largely found in [production workshops], while treatment-oriented workshops employ a large proportion of persons with mental impairment.”<sup>65</sup>

Unlike policy statements issued in the U.S., there have been some strong international policy statements that have suggested that sheltered workshops contradict with the human rights of individuals with disabilities. On December 10, 1948, the United Nations adopted the Universal Declaration of Human Rights – soon to be known as a landmark human rights document.<sup>66</sup> In describing the Universal Declaration of Human Rights, the U.N. made the following statement regarding its significance in addressing human rights issues and concerns:

Fifty years ago, the United Nations General Assembly adopted the Universal Declaration of Human Rights as a bulwark against oppression and discrimination. In the wake of a devastating world war, which had witnessed some of the most barbarous crimes in human history, the Universal Declaration marked the first time that the rights and freedoms of individuals were set forth in such detail. It also represented the first international recognition that human rights and fundamental freedoms are applicable to every person, everywhere. In this sense, the Universal Declaration was a landmark achievement in world history. Today, it continues to affect people’s lives and inspire human rights activism and legislation all over the world.<sup>67</sup>

The Universal Declaration on Human Rights sets out thirty articles detailing human rights protections that must be observed under the Declaration.<sup>68</sup> Article 1 expresses the primary foundation of all of the enumerated rights, protecting the dignity of the human person: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>69</sup>

There are a number of other interesting provisions that may apply to the employment of disabled persons. Article 3 articulates protection for “life, liberty, and the security of person,”<sup>70</sup> which implicitly should include employment. An equal protection provision is found under Article 7 that acknowledges the importance of equality: “All are equal before the law and are entitled

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<sup>62</sup> *Id.*

<sup>63</sup> *Visier, supra* note 57, at 351.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *See A United Nations Priority: Universal Declaration of Human Rights*, UNITED NATIONS, <http://www.un.org/rights/HRToday/declar.htm> (last visited Nov. 1, 2012).

<sup>67</sup> *Id.*

<sup>68</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/RES/217(III), at 71 (Dec. 10, 1948).

<sup>69</sup> *Id.* at 72.

<sup>70</sup> *Id.*

without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”<sup>71</sup> A number of provisions under Article 23 that specifically relate to work are also applicable to the employment of disabled persons.<sup>72</sup> For example, Article 23(1) is particularly pertinent to the issue of sheltered workshops, as this provision emphasizes many of the arguments frequently raised against the disabled working in sheltered workshops: “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”<sup>73</sup> Another provision touching on the issue of the sheltered employment of disabled individuals is the declaration of a human right to a standard of living to provide for one’s needs under Article 25.<sup>74</sup> This is a critical provision, because many of the disabled individuals working in sheltered workshops are paid sub-minimum wages. Therefore, they are unlikely to have the ability to provide for themselves, let alone for a family, without additional assistance.

The next notable international policy statement to address the needs and issues facing people with disabilities came from the U.N. General Assembly in 1971 with the Declaration of the Rights of Mentally Retarded Persons.<sup>75</sup> “Bearing in mind the need to assist persons with mental disabilities to develop their full abilities and of promoting their integration, the General Assembly calls for national and international action to ensure that the Declaration is used as a common basis and frame of reference for the protection of their rights.”<sup>76</sup> Similarly to the Universal Declaration of Human Rights, this Declaration starts by stressing the human dignity of individuals with mental disabilities: “The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.”<sup>77</sup> Another provision of the Declaration specifically addresses the employment of those with mental disabilities: “The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.”<sup>78</sup> Finally, a provision of the Declaration calls for the elimination of conditions that could be categorized as abusive or exploitive to individuals with mental disabilities, stating that “[t]he mentally retarded person has a right to protection from exploitation, abuse and degrading treatment.”<sup>79</sup>

Many have argued that the employment of people with disabilities in sheltered workshops is “exploitive” and therefore, of the exact treatment type that the Declaration on the Rights of Mentally Retarded Persons was designed to prevent. The next declaration proclaiming international support for the disabled came in 1975.<sup>80</sup> Reinforcing the U.N.’s previous statements on the

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<sup>71</sup> *Id.* at 73.

<sup>72</sup> *Id.* at 75.

<sup>73</sup> *Id.* (emphasis added).

<sup>74</sup> G.A. Res. 217A (III), *supra* note 68, at 76.

<sup>75</sup> Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856 (XXVI), U.N. Doc. A/RES/2856, at 93 (Dec. 20, 1971).

<sup>76</sup> United Nations, *Developmental and Psychiatric Disabilities*, UNITED NATIONS ENABLE, <http://www.un.org/esa/socdev/enable/disdevelopmental.htm> (last visited Nov. 20, 2012).

<sup>77</sup> G.A. Res. 2856 (XXVI), *supra* note 75, at ¶ 1.

<sup>78</sup> *Id.* at ¶ 3.

<sup>79</sup> *Id.* at ¶ 6.

<sup>80</sup> Declaration on the Rights of Disabled Persons, G.A. Res. 3447 (XXX), U.N. Doc. A/RES/3447, at 88 (Dec. 9, 1975).

human dignity of individuals with disabilities, the Declaration on the Rights of Disabled Persons articulates with a similar emphasis:

Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow-citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible.<sup>81</sup>

The 1975 Declaration also stresses the vital role society must play in ensuring the integration of the disabled.<sup>82</sup> According to the 1975 Declaration, actions should be taken to ensure that individuals with disabilities are able to support themselves: “Disabled persons are entitled to the measures designed to enable them to become as self-reliant as possible.”<sup>83</sup> Finally, the 1975 Declaration addresses the issue of employment, stating that: “Disabled persons have the right to economic and social security and to a decent level of living. They have the right, according to their capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation and to join trade unions.”<sup>84</sup> Similar to previous documents, the 1975 Declaration also has a provision prohibiting the exploitation of the disabled.<sup>85</sup> The international community took another major step forward for individuals with disabilities in 1982 with the General Assembly’s adoption of the World Programme of Action Concerning Disabled Persons,<sup>86</sup> which the United Nations today considers “a groundbreaking international instrument” for the disabled.<sup>87</sup> The World Programme of Action describes the treatment of disabled persons and outlines recommendations for government responses and responsibilities:

Societies sometimes cater only to people who are in full possession of all their physical and mental faculties. They have to recognize the fact that, despite preventive efforts, there will always be a number of people with impairments and disabilities, and that societies have to identify and remove obstacles to their full participation. Thus, whenever pedagogically possible, education should take place in the ordinary school system, work be provided through open employment and housing be made available as to the population in general. It is the duty of every Government to ensure that the benefits of development programmes also reach disabled citizens. Measures to this effect should be incorporated into the general planning process and the administrative structure of

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<sup>81</sup> *Id.* at ¶ 3.

<sup>82</sup> *See generally* G.A. Res. 3447 (XXX), *supra* note 80 (explaining the importance of both preventing physical disabilities and assisting the disabled in the development of their abilities).

<sup>83</sup> *Id.* at ¶ 5.

<sup>84</sup> *Id.* at ¶ 7.

<sup>85</sup> *Id.* at ¶ 10.

<sup>86</sup> World Programme of Action Concerning Disabled Persons, G.A. Res. 37/52, U.N. Doc. A/RES/37/52 (Dec. 3, 1982).

<sup>87</sup> United Nations, *Developmental and Psychiatric Disabilities*, UNITED NATIONS ENABLE, <http://www.un.org/esa/socdev/enable/disdevelopmental.htm> (last visited Nov. 9, 2012).

every society. Extra services which disabled persons might need should, as far as possible, be part of the general services of a country.<sup>88</sup>

The World Programme of Action was followed in 1993 by the adoption of the United Nations' Standard Rules on the Equalization of Opportunities for Persons with Disabilities.<sup>89</sup> The Standard Rules builds on the goals of prevention, rehabilitation, and equalization enunciated in the World Programme of Action by providing 22 rules and guidelines for national action which are organized across three clusters: preconditions for equal participation, targets for equal participation, and implementation measures.<sup>90</sup> The Rules set out Target Areas for Equal Participation, and under Rule 7 the guidance emphasizes that individuals with disabilities should be fully integrated into employment settings and valued for their abilities, rather than discriminated against for their limitations.<sup>91</sup>

The most significant international policy statement on people with disabilities and the protection of their dignity and rights came in 2006, when the U.N. adopted the Convention on the Rights of People with Disabilities.<sup>92</sup> Evidencing the scale of its international support, the Convention was signed by eighty-two countries on its opening day – more signatures than any other U.N. Convention had received in a single day.<sup>93</sup> The Convention offered novel substance, and is the “first comprehensive human rights treaty of the 21st century and the first human rights convention to be open for signature by regional integration organizations.”<sup>94</sup> The Convention on the Rights of Persons with Disabilities is the most comprehensive international policy statement designed to ensure the protection of the rights of the disabled. Through the Convention, the U.N. is promoting the decades-long international movement to view people with disabilities based on their abilities and rights, rather than as recipients of medical treatment or social charity.<sup>95</sup> According to the U.N., the Convention is “intended as a human rights instrument with an explicit, social development dimension. It adopts a broad categorization of persons with disabilities and reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms.”<sup>96</sup>

The purpose of the Convention is defined under Article 1 as: “[T]o promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”<sup>97</sup> Article 3 lays out the general principles of the Convention, including respect for inherent dignity, individual autonomy, societal inclusion, equality of opportunity, and accessibility.<sup>98</sup> Article 4 outlines the general obliga-

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<sup>88</sup> World Programme of Action Concerning Disabled Persons, G.A. Res. 37/52, U.N. GAOR, 37th Sess. Supp. No. 1, U.N. Doc. A/37/51 (Dec. 3, 1982), available at <http://www.un-documents.net/wpacdp.htm>.

<sup>89</sup> G.A. Res. 48/96, Annex, U.N. Doc. A/RES/48/96 (Dec. 20, 1993), at 202.

<sup>90</sup> *Developmental and Psychiatric Disabilities*, *supra* note 87.

<sup>91</sup> See G.A. Res. 48/96, *supra* note 89, at 202, 207.

<sup>92</sup> Convention on the Rights of Persons with Disabilities, adopted Dec. 13, 2006, 2515 U.N.T.S. 3.

<sup>93</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, UNITED NATIONS ENABLE, <http://www.un.org/disabilities/default.asp?id=150> (last visited Nov. 23, 2012).

<sup>94</sup> *Id.*

<sup>95</sup> See *id.*

<sup>96</sup> *Id.*

<sup>97</sup> Convention on the Rights of Persons with Disabilities, *supra* note 92, at art. 1, ¶ 1.

<sup>98</sup> See *id.* at art. 3.

tions of State Parties who commit to the Convention, and under the second provision sets forth:

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.<sup>99</sup>

The meaning of this provision in the larger context of the Convention is that countries ratifying the Convention commit to using their resources to promote the inclusion of individuals with disabilities in economic opportunities, including employment.

Issues regarding the employment of individuals with disabilities are specifically addressed in Article 27 of the Convention.<sup>100</sup> With respect to the role of State Parties, the Convention states: “States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.”<sup>101</sup> It is important to note several principles in this statement that are critical to the policy considerations of using sheltered workshops as an employment mechanism for the disabled, including what it means to have an inclusive or integrated employment environment, self-determination, independence, and accessibility. Article 27 continues by stating that State Parties “shall safeguard and promote the realization of the right to work” of those already disabled and those who become disabled.<sup>102</sup> Thus, State Parties to this Convention commit themselves to taking action, including through the use of legislative means, in the area of employment policy to ensure that such principles are upheld for the benefit of those with disabilities.<sup>103</sup> The U.S. signed the Convention in 2009, but has not yet ratified it.<sup>104</sup> The Obama Administration recently sent senators the treaty package for consideration, and opened the door for the start of debates on ratification of the Convention.<sup>105</sup>

### III. THE PROS & CONS OF SHELTERED WORKSHOPS

A number of different issues have been raised regarding sheltered workshops, including whether such workshops are an effective means of employing individuals with disabilities and whether such workshops represent a truly equal opportunity for employment of the disabled. Careful exploration of the arguments for and against the use of sheltered workshops is critical to

<sup>99</sup> *Id.* at art. 4, ¶ 2.

<sup>100</sup> *See Id.* at art. 27.

<sup>101</sup> *Id.* at art. 27, ¶ 1.

<sup>102</sup> *Id.*

<sup>103</sup> *See* Convention on the Rights of Persons with Disabilities, *supra* note 92, at art. 27, ¶ 1.

<sup>104</sup> United Nations, *Convention and Optional Protocol Signatures and Ratifications*, UNITED NATIONS ENABLE, <http://www.un.org/disabilities/countries.asp?id=166> (last visited Nov. 23, 2012). The U.S. signed the Convention on July 30, 2009. Signing the Convention connotes official U.S. support for the Convention, whereas ratification of the Convention requires approval by the U.S. Senate and would give the Convention the force of law in the United States.

<sup>105</sup> Michelle Diamant, *Disability Rights a Focus in the Senate*, DISABILITY SCOOP (July 13, 2012), [www.disabilityscoop.com/2012/07/13/disability-rights-senate/16008/](http://www.disabilityscoop.com/2012/07/13/disability-rights-senate/16008/).

the determination of whether sheltered workshops can or should continue to serve as an employment option for individuals with disabilities.

### A. *Why Sheltered Workshops Can Benefit the Disabled*

A number of reasons have been cited as to why sheltered workshops are a viable employment option for people with disabilities. Alberto Migliore, in an article for the *International Encyclopedia of Rehabilitation*, points to the following benefits of sheltered workshops: “[T]hey 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 for fostering friendships, they ensure structure during the weekdays, and they ensure assistance for life without affecting disability benefits.”<sup>106</sup> Safety, the first listed advantage, has been the subject of several studies demonstrating the prevalence of this concern among the disabled themselves and those caring for and advocating for the disabled.<sup>107</sup> One such study, an ethnographic survey of sixteen disabled adults in a sheltered workshop, found benefits to placement in sheltered workshops over participation in market employment due to the protection that workshops offer from the perceived risks of the outside world, including the risks of crime, harassment, and overly complex work assignments.<sup>108</sup> In another study, surveying the parents and caregivers of individuals with disabilities, seventy percent of these caregivers described safety as a major concern and one quarter of these caregivers identified safety as the primary reason for their selection of a sheltered workshop placement.<sup>109</sup> This research suggests that the specific vulnerabilities of people with disabilities may be a significant factor in creating and crafting employment options for them.

Another advantage of sheltered workshops is their ability to provide work commensurate with the capabilities of the disabled, particularly those with more severe disabilities. Staff at sheltered workshops have justified the participation of individuals with disabilities in these workshops on the grounds that disabled persons may have difficulty concentrating, may lack the communication skills and motivation needed to work, and may have problems understanding instructions.<sup>110</sup> Such hurdles may be insurmountable in the traditional, competitive employment environment that requires the completion of complex or specialized projects.<sup>111</sup> Sheltered workshops, with their ability to make allowances for the needs of the disabled, are able to offer employment to individuals who may not otherwise be employable, even if the work offered may be less rigorous than that offered in the traditional work environment.

The social dynamic and environment created by sheltered workshops is another perceived advantage of such institutions.<sup>112</sup> For many, this makes sheltered workshops more desirable for people with disabilities than the traditional, competitive work environment:

Another advantage of sheltered workshops is that they provide the opportunity for people with disabilities to develop friendships with others who have similar

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<sup>106</sup> Migliore, *supra* note 5, at 2.

<sup>107</sup> *See id.*

<sup>108</sup> *Id.*

<sup>109</sup> *See id.*

<sup>110</sup> *See id.* at 3.

<sup>111</sup> *See id.*

<sup>112</sup> *See* Migliore, *supra* note 5, at 3.

experiences due to their disabilities. In a study involving about 210 adults with disabilities in sheltered workshop [sic], their parents and caregivers, and staff in these sheltered workshop [sic], about half of the respondents considered social environment in sheltered workshops to be an important factor in preferring sheltered workshops to outside employment. In addition, about one-third of staff reported that social environment was the most important factor influencing adults with disabilities to favor sheltered workshops. . . . [O]f the over 90% adults who expressed satisfaction with their work in sheltered workshops, 30% singled out friendships as being the rationale for enjoying work.<sup>113</sup>

This rationale suggests that individuals with disabilities may experience a stigma in the traditional work environment if they are unable to relate well to others. The social dimension of sheltered workshops may thus make them a more viable and beneficial option for employment. Not only may individuals with disabilities be ridiculed or ostracized in the traditional employment environment compared to others, but they may not be able to develop as much socially if they are unable to make the same social connections that may be possible where they may be more comfortable and accepted by others who also have disabilities.

Finally, Migliore suggests that employing people with disabilities in sheltered workshops can provide them with greater consistency and routine in life than if they were employed through the competitive labor market.<sup>114</sup> Individuals with disabilities, who may otherwise experience difficulties acquiring and maintaining employment, do not have the same concerns with employment through sheltered workshops. Such employment provides them not only with a place of employment, but also likely with security through much, if not all, of their lifetime:

[S]heltered workshops . . . offer consistent assistance throughout the week and for virtually the entire adult life span. Sheltered workshops typically are open five days a week throughout the year, even in the case of a recession. When there is no work, consumers engage in non-paid activities, take classes, or participate in leisure activities. In addition, although waiting lists may delay placements, once consumers are accepted in sheltered workshops they are unlikely to ever lose their positions. Also, placing individuals in sheltered workshops is much easier than finding them jobs in the open labor market because placement is more predictable.<sup>115</sup>

Sheltered workshops provide many individuals with disabilities security throughout adulthood that they may not otherwise receive if forced to acquire employment through the traditional labor market.

### *B. What's Wrong with Sheltered Workshops?*

But just as there are many arguments favoring sheltered workshops, there are equally numerous arguments challenging sheltered workshops as a legitimate means of employing people with disabilities as compared to the open labor market. Alberto Migliore, in his article *Sheltered*

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<sup>113</sup> *Id.* at 3 (citations omitted).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* (citations omitted).

*Workshops*, discusses four arguments against the use of sheltered workshops, including the working conditions in sheltered workshops, the limited ability to transition into open employment, workshop non-compliance with international standards, and a lack of self-determination for individuals employed by the workshops.<sup>116</sup>

First, Migliore states that people with disabilities working in sheltered workshops do not enjoy the same protections in employment as employees who are employed in the traditional work environment.<sup>117</sup> “Although sheltered workshops engage in production and operate as businesses, workers with disabilities in sheltered workshop [sic] do not get the same level of protection standards available to workers in the open labor market.”<sup>118</sup> One of the issues frequently raised regarding the employment of the disabled in sheltered workshops is that these individuals are paid at sub-minimum wages both domestically and internationally:

[A] survey involving 5,000 adults with disabilities in sheltered workshop [sic] in 24 states in the USA revealed that, on average, adults with disabilities in sheltered workshop [sic] earned \$101 per month, based on an average 74 hours of work per month. In a study carried out in Spain and based on 60 workers from 20 sheltered workshops, about half of the respondents reported dissatisfaction with the low wages paid at their sites. Lower wages are possible even in countries that have minimum wage regulations because typically sheltered workshops can apply for exemption from such regulations.<sup>119</sup>

Generally, it is also argued that individuals with disabilities working in sheltered workshops are often not treated as equals to employees in the traditional work environment. “As a matter of fact, adults with disabilities who work in sheltered workshops typically do not have employee status and negotiation power.”<sup>120</sup> In addition to this lack of employee status, other benefits that may be lacking involve employees’ safety and well-being. Migliore describes these limitations on the protection of the disabled working in sheltered workshops as follows:

The lack of worker protection in sheltered workshop [sic] may also extend to health and safety standards. A report based on inspections in 10 sheltered workshops revealed that workers with disabilities in sheltered workshop [sic] would benefit from better ergonomics, monitoring of exposure to chemicals, and documentation of injuries and illnesses.<sup>121</sup>

Ironically, one of the same arguments favoring sheltered workshops for individuals with disabilities – safety – appears to be a source of contention.

Another concern Migliore raises about the use of sheltered workshops is that they do not foster the ability of people with disabilities to transition to traditional employment.<sup>122</sup> Although

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<sup>116</sup> *See id.*

<sup>117</sup> *See id.* at 3-4.

<sup>118</sup> Migliore, *supra* note 5, at 3.

<sup>119</sup> *Id.* (citations omitted).

<sup>120</sup> *Id.* (citation omitted).

<sup>121</sup> *Id.* at 4 (citation omitted).

<sup>122</sup> *See id.*

the initial purpose of sheltered workshops was to prepare individuals with disabilities to transition into traditional employment opportunities, the reality of that goal has not come to fruition:

Segregated employment was initially conceived to provide people with disabilities opportunities for activity and productivity during the day. As social attitudes that required isolation for people with disabilities started to change, segregated employment's purpose shifted to one that could prepare individuals to be employed in a traditional job in the community. However, purpose and practice part ways as the reality for most individuals working in a sheltered workshop is not a transition point but rather a dead end. While sheltered workshops purport to offer pre-employment and pre-vocational skills, these programs most often only prepare people with disabilities for long term sheltered employment.<sup>123</sup>

Individuals with disabilities who work in sheltered workshops are not given the skills necessary to allow them to transition to the open labor market, resulting in a transition rate ranging between less than one and five percent:

In addition, adults with disabilities, especially people with intellectual disabilities, have difficulties transferring skills across different work environments. As a result, training that takes place in sheltered workshops has little meaning for outside employment. As a matter of fact, employers may resist hiring someone from a sheltered workshop because of the stigma associated with such background. Finally, transition from sheltered workshops into the open labor market is in conflict with the need for sheltered workshops to retain the higher functioning workers. Skilled workers are an important resource for sheltered workshops if these production centers are to meet the demands of the contracted work and generate sufficient revenues.<sup>124</sup>

The NDRN describes the working conditions that exist in sheltered workshops as failing to ensure that the disabled will have greater future employment opportunities:

They spend their time in day wasting activities, often practicing assembly skills which will be taken apart by the line supervisor or their peers in order to keep everyone busy. Low challenge work such as sorting, collating, labeling, folding, mailing, sewing, subassembly, heat sealing, hand packaging or other similarly light assembly work comprise the bulk of services done for businesses on a contract basis. Typically these skills are sometimes not even transferable to traditional work because most sheltered workshops do not have modern tools or machinery. So, in the end, they fail to prepare workers for traditional work – even traditional factory work – at all.<sup>125</sup>

As previously discussed, many international policies and standards oppose the utilization

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<sup>123</sup> SEGREGATED & EXPLOITED, *supra* note 2, at 32.

<sup>124</sup> Migliore, *supra* note 5, at 4.

<sup>125</sup> SEGREGATED & EXPLOITED, *supra* note 2, at 32 (footnote omitted).

of sheltered workshops because they do not meet international standards promoting integration of adults with disabilities into society. “Although initially sheltered workshops were accepted as alternative day programs for adults with severe disabilities, the international organizations have always emphasized employment in the open labor market as the preferred outcome.”<sup>126</sup> While those favoring sheltered workshops often argue that people with disabilities are benefited by the environment and social relationships that sheltered workshops provide, those opposing them argue that sheltered workshops hinder the development of individuals with disabilities by keeping them from developing social relationships with the non-disabled.<sup>127</sup>

Finally, those opposed to sheltered workshops argue that individuals with disabilities lose the right to self-determination by working in sheltered workshops.<sup>128</sup> Rather than promoting self-determination, sheltered workshops are viewed as dictating to the individual with a disability what his or her working situation will be, not involving the individual in the process and moving the individual towards a traditional employment setting. According to the NDRN:

People with disabilities are often fast tracked into segregated employment and do not have the benefit of individualized work assessments. Even though most individuals with disabilities in sheltered workshops favor employment outside of workshops, questions about where an individual would like to work, or what skills they can strengthen or develop are irrelevant. Choice is largely irrelevant. While individuals may experience the normal task requirements of work such as using a time clock, working a fixed schedule, and being supervised, most [sheltered workshops] provide bench work and do not promote self direction, self determination or skill development.<sup>129</sup>

Perhaps even more alarming is that sheltered workshops may actually disregard an individual’s disability.<sup>130</sup> As a result, it can become virtually impossible for an individual with a disability to advance beyond a sheltered workshop and into competitive employment:

Loud and dusty industrial settings are often the only option for people with sensory sensitivities, or crowded and busy rooms are the settings for people with autism. An argument that service providers make to prove that an individual would not be successful in competitive employment is that their productivity is low in the sheltered workshop. Ironically, a person with a disability would receive more individualized accommodations in a competitive work environment because of the protections set forth in the ADA.<sup>131</sup>

It may also be the case that people with disabilities working for sheltered workshops are

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<sup>126</sup> Migliore, *supra* note 5, at 4.

<sup>127</sup> See SEGREGATED & EXPLOITED, *supra* note 2, at 32 (“Since sheltered workshops are seriously limited by adequate quantities and types of paid work, there are frequent periods of inactivity during which individuals are denied interactions with their peers who do not have disabilities.”).

<sup>128</sup> See Migliore, *supra* note 5, at 4-5.

<sup>129</sup> SEGREGATED & EXPLOITED, *supra* note 2, at 33 (footnote omitted).

<sup>130</sup> See *id.* (“Many times the very environments they are required to work in do not take into account their disabilities.”).

<sup>131</sup> *Id.*

purposely being prevented from employment advancement for the benefit of the sheltered workshops themselves.<sup>132</sup> The ability to keep individuals with disabilities employed is critical to the functioning of sheltered workshops:

Sheltered workshops, whether not-for-profit or for-profit, are still businesses that need the income generated from contracts and government sources. And like any other business there is an incentive to keep the best employees on the payroll. This practice perpetuates the stereotype that workers with disabilities cannot work in traditional settings because the best workers, the ones who would most likely succeed in competitive employment, rarely graduate from the workshop's "training program."<sup>133</sup>

Thus, there are a number of arguments opposing sheltered workshops. Employee protection issues ranging from worker pay to worker safety are in question. Additionally, sheltered workshops may actually inhibit a person with a disability from advancing to the traditional employment environment, as the skills necessary for advancement are not properly developed in the context of sheltered workshop employment. Many international standards and statements about protecting the human dignity and right to work of individuals with disabilities also run contrary to the use of the sheltered workshops.

#### IV. ACTIONS DEMONSTRATING A SHIFT TOWARDS THE ELIMINATION OF SHELTERED WORKSHOPS?

Despite the existence of arguments on both sides of the debate regarding the use of sheltered workshops, recent national and international actions suggest that sheltered workshops will one day become an antiquated or non-existent option for the employment of people with disabilities.

##### *A. U.S. Employment First Movement*

While the U.S. movement towards ending sheltered workshops is slower than the global movement, there are indications that U.S. domestic policy will inevitably provide the greatest opportunities for integrated employment and the elimination of sheltered workshops as an employment option. The earliest indicator of such a policy movement in the U.S. is suggested by the *Olmstead* case.<sup>134</sup> The landmark 1999 U.S. Supreme Court decision was designed to promote the integration of individuals with disabilities into the community — which includes through employment.<sup>135</sup> However, in terms of legislative policy, the states have been more active in promoting policy changes that support the employment of individuals with disabilities in integrated and competitive work environments. Several states have created legislation known as “employment first” or “people first” policies, which are designed to facilitate the placement of people with disabilities into integrated work environments before sheltered workshops whenever possible.<sup>136</sup>

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<sup>132</sup> See *id.* at 33-34.

<sup>133</sup> *Id.* at 34.

<sup>134</sup> For a more in-depth discussion of *Olmstead*, see *supra* Part II.A.

<sup>135</sup> *Olmstead v. L.C.*, 527 U.S. 581 (1999).

<sup>136</sup> See, e.g., Office of Disability Emp't Policy, *Employment First Leadership Mentor Program*, U.S. DEP'T

According to the U.S. Department of Labor, “Employment First is a concept to facilitate the full inclusion of people with the most significant disabilities in the workplace and community. Under the Employment First approach, community-based, integrated employment is the first option for employment services for youth and adults with significant disabilities.”<sup>137</sup> The difference between work in a sheltered workshop and integrated employment is that “[i]ntegrated employment refers to jobs held by people with disabilities in typical workplace settings where the majority of persons employed are not persons with disabilities, they earn at least minimum wage and they are paid directly by the employer.”<sup>138</sup> Other early state efforts to shift the policies surrounding the employment of individuals with disabilities have been described as follows:

[I]n 2007 the state of Vermont (USA) discontinued providing sheltered workshop services replacing them with integrated employment services. Early in the 2000s the state of Washington (USA) established an employment first policy. According to this policy, applicants with disabilities are assisted in finding employment in the open labor market before any other day services are considered.<sup>139</sup>

One of the most recent attempts to shift to the Employment First policy, documented by NDRN, has involved the State of Kansas: “The Disability Rights Center of Kansas successfully advocated for the nation’s most aggressive and thorough “Employment First” statute, which requires that state agencies develop a policy to place people with disabilities in competitive and integrated settings, and for the state to develop goals to turn this policy into reality.”<sup>140</sup>

The U.S. Department of Labor houses the Office of Disability Employment Policy (ODEP).<sup>141</sup> ODEP has credited the State of Washington with the establishment of the first Employment First policy for individuals with disabilities and, because of this, ODEP is using Washington to develop a mentoring program for other states to establish Employment First policies.<sup>142</sup> The efforts by the State of Washington to create this policy and the federal government’s interest in furthering this policy development are described as follows:

Washington implemented its Working Age Adult Policy in 2006, the first “Employment First” policy in the country. This policy was the culmination of over three decades of concerted activity to insure that persons with disabilities have quality of life through employment. Because of Washington’s experience and leadership in this area, it will provide mentoring to other states who are striving

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OF LAB., <http://www.dol.gov/odep/media/newsroom/employmentfirststates.htm> (last visited Nov. 23, 2012) (describing membership in ODEP pilot program to promote integrated employment).

<sup>137</sup> Office of Disability Emp’t Policy, *Employment First*, U.S. DEP’T OF LAB., <http://www.dol.gov/odep/topic/s/EmploymentFirst.htm> (last visited Nov. 23, 2012).

<sup>138</sup> *Id.*

<sup>139</sup> See Migliore, *supra* note 5, at 2.

<sup>140</sup> BEYOND SEGREGATED AND EXPLOITED, *supra* note 8, at 7.

<sup>141</sup> Office of Disability Employment Policy, U.S. DEP’T OF LAB., <http://www.dol.gov/odep/#.ULD3Oe2Q3ao> (last visited Nov. 23, 2012).

<sup>142</sup> *Employment First Leadership Mentor Program*, *supra* note 136.

to enact policy and to support practices that will lead to increased opportunities for integrated for individuals with significant disabilities.<sup>143</sup>

To date, three other states are participating with Washington in the mentoring program, including Iowa, Oregon, and Tennessee.<sup>144</sup> The purpose of the mentoring program and the role of ODEP in implementing this program are described as follows:

To advance Employment First, ODEP created the Employment First State Leadership Mentor Program. This program helps states align policies, regulations and funding priorities to encourage integrated employment as the primary outcome for individuals with significant disabilities. Through the initiative, ODEP is providing support and informational resources for selected states that desire systems change reflecting the Employment First approach but have struggled to fully implement it as the primary service delivery system for people with disabilities.<sup>145</sup>

ODEP also makes a toolkit available online for those interested in implementing Employment First policies for the integrated employment of individuals with disabilities.<sup>146</sup> According to the ODEP toolkit, “[s]everal states and the Federal government have already identified integrated employment as the optimal choice for employment for people with disabilities.”<sup>147</sup> A number of resources are made available to policymakers through the ODEP toolkit on how to develop effective Employment First policies for the disabled.<sup>148</sup> Employment First policies are a major step towards fully integrating individuals with disabilities into traditional work environments and would provide the disabled with standard employee rights, such as safety and health protections.

### B. Changes in Policy Regarding Transition

There are other indicators in the U.S. that the use of sheltered workshops may soon decline as an acceptable employment option for the disabled. Education policy within federal special education law is also changing to help young people with disabilities become employed.<sup>149</sup> The U.S. Department of Education recently advocated support for a main tenant of the federal Individuals with Disabilities Education Act (IDEA): placing transitioning individuals in the “least restrictive environment.”<sup>150</sup> To assist in their transition into employment, young people with dis-

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Employment First*, *supra* note 137.

<sup>146</sup> Office of Disability Emp’t Policy, *Integrated Employment Toolkit*, U.S. DEP’T OF LAB., <http://www.dol.gov/odep/ietoolkit/> (last visited Nov. 2, 2012).

<sup>147</sup> Office of Disability Emp’t Policy, *Integrated Employment Toolkit: Policymakers*, U.S. DEP’T OF LAB., <http://www.dol.gov/odep/ietoolkit/policymakers.htm> (last visited Nov. 2, 2012).

<sup>148</sup> *See id.*

<sup>149</sup> *See* Nirvi Shah, ‘Least-Restrictive Environment’ Must Be Considered at Workplace, Too, EDUC. WEEK (July 2, 2012, 9:20 AM), [http://blogs.edweek.org/edweek/speced/2012/07/least-restrictive\\_environment\\_.html](http://blogs.edweek.org/edweek/speced/2012/07/least-restrictive_environment_.html).

<sup>150</sup> *Id.*

abilities would have an educational placement “with non-disabled peers to the extent possible.”<sup>151</sup>

This statement on IDEA also has critical implications for the development of employment policies for the disabled. The U.S. Department of Education’s answer regarding the relationship between the provision of IDEA for “least restrictive environment” (LRE) and transition—including employment as a part of transition—has been stated as follows:

The LRE requirements are a fundamental provision of Part B of the IDEA. According to the LRE requirements in 34 CRF 300.114—300.18, each public agency must ensure that (1) 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 nondisabled; and (2) special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Before a child with a disability can be placed outside the regular educational environment, the group of persons making the placement decision must consider whether supplementary aides and services could be provided that would enable the education of the child in the regular educational setting to be achieved satisfactorily. If a determination is made that a particular child with a disability cannot be educated satisfactorily in the regular educational environment, even with the provision of appropriate supplementary aids and services, that child then could be placed in a setting other than the regular educational setting. Placement decisions, including those related to transition services (including work placement), must be based on these LRE principles and made by the IEP [(individualized education program)] Team.<sup>152</sup>

This is a major step forward for people with disabilities in employment. By targeting education policy, many with more severe disabilities may immediately transition to employment following high school, rather than moving on to higher education.

### C. U.S. Litigation Efforts

Aside from education policy and actual changes to employment policy to benefit individuals with disabilities, the litigation process—specifically the enforcement of current law—has been used to attempt to eliminate sheltered workshops. In January 2012, a legal precedent was set by the first class action lawsuit to challenge a state employment system for violating the Americans with Disabilities Act (ADA).<sup>153</sup> The employment scheme placed a substantially high number of individuals with disabilities in sheltered workshops, where “as a result, . . . those with disabilities are left with little choice but to toil away in sheltered workshop environments where they

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<sup>151</sup> *Id.*

<sup>152</sup> Letter from Melody Musgrove, Director, Office of Special Educ. Programs, U.S. Dep’t of Educ., to Jeffrey Spitzer-Resnick et al., Managing Attorneys, Disability Rights Wisconsin 2-3 (on file with Disability Rights Wisconsin), available at <http://blogs.edweek.org/edweek/speced/SpitzerReznick%20%281%29.pdf>.

<sup>153</sup> See Michelle Diamant, *Suit: Focus on Sheltered Workshops Violates ADA*, DISABILITY SCOOP (Jan. 31, 2012), <http://www.disabilityscoop.com/2012/01/31/suit-sheltered-workshops-ada/14881/>.

earn far less than the state minimum wage of \$8.80 per hour.”<sup>154</sup> The lawsuit challenges the dismal employment situations of roughly 2,300 Oregonians with developmental and intellectual disabilities in sheltered workshops, who are being paid at sub-minimum wages.<sup>155</sup> The purpose of the suit is to create a drastic system change to Oregon’s practices of employing the disabled.<sup>156</sup> “The lawsuit calls for Oregon to revise its system to emphasize supported employment. Such a move would lead to cost savings, advocates say, citing estimates that show sheltered workshops cost as much as three times more per person than offering assistance at jobs in the community.”<sup>157</sup> The Oregon Department of Justice immediately responded to the lawsuit, stating that steps were being taken to ensure that the State of Oregon was adequately and appropriately protecting the employment rights of its disabled citizens.<sup>158</sup> “In an emailed statement, the justice department said that Oregon is committed to improving services to disabled residents and that a stakeholder planning process to improve employment-related services is scheduled to begin this week.”<sup>159</sup>

One argument is that U.S. law does not necessarily need to change as far as employing individuals with disabilities, but that the law simply needs to be properly enforced. The latest example of this stepped-up enforcement involves sheltered workshops in Oregon. The U.S. Department of Justice (DOJ) has decided to take a stand on behalf of the Obama administration in advocating for significant changes to Oregon’s current employment system for people with disabilities.<sup>160</sup> After investigation, the DOJ found the State of Oregon’s mistreatment of individuals with developmental and intellectual disabilities in employment so severe, even within sheltered workshops, that it notified the State of Oregon of these concerns and will force the State to make changes to its current treatment of the disabled.<sup>161</sup> In reaching this conclusion, the DOJ relied on the landmark 1999 *Olmstead* decision and the ADA to argue that the State of Oregon had not complied with established standards for ensuring that individuals with disabilities have access to supported employment.<sup>162</sup>

The U.S. Department of Justice letter dated June 29, 2012 addressed to the Attorney General of Oregon John Kroger stated:

We have assessed the State’s compliance with Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12132 (2006), as interpreted by *Olmstead v. L.C.*, 527 U.S. 581(1999), which requires that services, programs, and activities provided by public entities, including states, be delivered in the

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Suzanne Stevens, *Oregon Responds to Disabilities Class Action Suit*, PORTLAND BUS. J. (Jan. 25, 2012, 6:11 PM PST), <http://www.bizjournals.com/portland/news/2012/01/25/oregon-responds-to-disabilities-class.html>.

<sup>159</sup> *Id.*

<sup>160</sup> Michelle Diamant, *Feds: Sheltered Workshops May Violate Disabilities Act*, DISABILITY SCOOP (May 1, 2012), <http://www.disabilityscoop.com/2012/05/01/feds-sheltered-violate/15511/>.

<sup>161</sup> Michelle Cole, *U.S. Justice Department Threatens to Sue Oregon Over Disabled Worker Programs*, THE OREGONIAN (Jul. 2, 2012, 8:54 PM), available at [http://www.oregonlive.com/politics/index.ssf/2012/07/us\\_justice\\_department\\_threaten.html](http://www.oregonlive.com/politics/index.ssf/2012/07/us_justice_department_threaten.html).

<sup>162</sup> Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, to John Kroger, Att’y Gen., State of Or. 1 (June 29, 2012) (on file with author), available at [http://www.ada.gov/olmstead/documents/oregon\\_findings\\_letter.pdf](http://www.ada.gov/olmstead/documents/oregon_findings_letter.pdf).

most integrated setting appropriate to the needs of persons with disabilities. The Department of Justice is authorized to seek a remedy for violations of Title II of the ADA, 42 U.S.C. § 12133. Consistent with the legal requirements set forth in the ADA and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1, we write to provide you notice of the State's failure to comply with the ADA and the minimum steps Oregon must take to meet its obligations under the law.<sup>163</sup>

While the DOJ begins by praising Oregon for its commitment to individuals with intellectual and developmental disabilities because of Oregon's elimination of state institutions confining those individuals and any state funding to such institutions, the DOJ continued by indicating that such actions were not enough to demonstrate integration under the law.<sup>164</sup> The DOJ stated:

Oregon has set an example for other states by demonstrating its express commitment to the benefits of transitioning individuals with intellectual and developmental disabilities into integrated, community residential settings. But 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.<sup>165</sup>

The DOJ also clearly indicates that the use of sheltered workshops as an employment option is at the heart of its order to Oregon:

[T]housands of individuals [in Oregon] still spend the majority of their day-time hours receiving employment services in segregated sheltered workshops, even though they are 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.<sup>166</sup>

The DOJ goes on to explain that Oregon ultimately denies the very principles of the ADA and the *Olmstead* ruling by offering community integration that does not ultimately include employment.<sup>167</sup> In essence, the DOJ argues that the denial of integration in employment for the disabled diminishes the core of community integration, which includes all aspects of life, not just the residence of a disabled individual.<sup>168</sup>

The DOJ points out 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-

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 2.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 2-3.

<sup>168</sup> Letter from Thomas E. Perez, *supra* note 162, at 3.

esteem.”<sup>169</sup> The DOJ has indicated that rather than working in a sheltered workshop, individuals should be able to work in supported employment if they are capable of partaking in the work.<sup>170</sup> But, the DOJ has not gone so far as to call for the complete elimination or ban of sheltered workshops, noting that “[w]hile sheltered workshops may be permissible placements for some individuals who choose them, we believe that Oregon over-relies on sheltered workshops and places people in segregated settings unnecessarily when they would prefer community placement with support services.”<sup>171</sup> Within the letter, the DOJ cited a number of reasons why the employment of people with disabilities in segregated settings, such as sheltered workshops, has a negative impact on the livelihood of individuals with disabilities.<sup>172</sup> The DOJ also listed a number of ways that the State of Oregon’s current employment system for the disabled is in violation of the ADA.<sup>173</sup>

In reaching these conclusions, the DOJ relied on, and confirmed the findings of a 2010 report, which found that 71% of Oregonians with intellectual and/or developmental disabilities were working in segregated sheltered workshop settings in 2008.<sup>174</sup> The DOJ has established that the employment of people with disabilities in sheltered workshops, who are capable of integrated employment in the community, does a disservice not only to the disabled, but to society as a whole: “As long as these discriminatory policies and practices remain, the interests, talents, skills, and contributions of such persons remain largely invisible to and untapped by the job market, and the greater community is deprived of their potential contributions.”<sup>175</sup> In finding that Oregon violated the ADA, the DOJ stated:

We conclude that the State fails to provide employment and vocational services to persons with intellectual and developmental disabilities in the most integrated setting appropriate to their needs. Under Title II of the ADA, 42 U.S.C. § 12132, a public entity must “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” The “most integrated setting” is one that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible[.]” As shown below, and as recognized by the State, sheltered workshops fail to provide this required level of integration and interaction between persons with and without disabilities.<sup>176</sup>

The DOJ goes on to specifically cite examples of why the State of Oregon’s utilization of

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *See id.* at 4. Individuals are potentially more likely to enter sheltered workshops as a result of Oregon actions and policies, including: (1) The State’s failure to develop community-based employment options and support services for those unnecessarily employed in sheltered workshops; (2) The State’s funding of sheltered workshops as opposed to community employment services; and (3) The favoring of employment in sheltered workshops under State’s criteria for receiving services or employment. Letter from Thomas E. Perez, *supra* note 162, at 3.

<sup>174</sup> Letter from Thomas E. Perez, *supra* note 162, at 4 (citing WASH. INITIATIVE FOR SUPPORTED EMP’T, COMMUNITY LEADERSHIP FOR EMPLOYMENT FIRST IN OREGON: A CALL TO ACTION 6 (2010), available at [http://www.dhs.state.or.us/dd/supp\\_emp/docs/wise.pdf](http://www.dhs.state.or.us/dd/supp_emp/docs/wise.pdf)).

<sup>175</sup> *Id.* at 5.

<sup>176</sup> *Id.* at 7-8 (citations omitted) (footnote omitted).

sheltered workshops is contrary to the ADA's provisions.<sup>177</sup> Among the examples provided is the failure of the sheltered workshops to provide for integration and interaction with the non-disabled:

Other State data indicate this lack of integration: in September 2009, the State reported that over 85% of persons in sheltered workshops had fewer than five persons without disabilities in their environment, with 41% reporting no one without a disability. By contrast, over 90% of persons with integrated employment had persons without disabilities in their immediate environment, with over 46% reporting six or more such individuals.<sup>178</sup>

In reaching its conclusions, the DOJ asserted that in the State of Oregon, sheltered workshops "were structured and functioned much more like other institutions" which failed to allow participants to interact with non-disabled persons in the larger community.<sup>179</sup> Therefore, sheltered workshops do not receive the legal protections that were established by the ADA and the *Olmstead* decision.

Additionally, the duration of placement for individuals with intellectual and developmental disabilities in sheltered workshops does not demonstrate any employment transition goals in the State of Oregon.<sup>180</sup> "According to the State's documents, the average duration of a sheltered workshop placement in September 2009 was 11.72 years. A number of sheltered workshop providers told us that some individuals have been in their workshops for as long as thirty years."<sup>181</sup> The DOJ also raised concerns regarding instances of "segregation within segregation," meaning that lesser-capable individuals with intellectual and developmental disabilities were sectioned apart from those who were more capable.<sup>182</sup> The DOJ also challenged the State of Oregon's sheltered workshops on the basis of their structure and setting, stating that "[t]he physical features of many sheltered workshops were also institutional in nature. Many workshops, like other institutional facilities, contain separate office space, conference rooms, lunch rooms and restrooms for management and staff, apart from the workshop space."<sup>183</sup> Even the geographical location of sheltered workshops in the community was seen as problematic, as "[t]he business model and location of many sheltered workshops further inhibits the integration of persons with disabilities. Due to the large size of most sheltered workshops and their need for space, many are located in industrial parks or in areas set off from other businesses and public transportation."<sup>184</sup>

All of these accusations have been made against the State of Oregon, even though Oregon has an Employment First policy.<sup>185</sup> The example of Oregon suggests that perhaps it is not necessary to perform a complete overhaul of federal legislation regarding employment and people

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<sup>177</sup> See *id.* at 8.

<sup>178</sup> *Id.* at 9 (citing SENIORS & PEOPLE WITH DISABILITIES, OFFICE OF FED. RES. REPORTING & FIN. ELIGIBILITY, SEMI-ANNUAL EMPLOYMENT OUTCOMES SYSTEM EVALUATION REPORT 19 (2009), available at <http://www.oregon.gov/dhs/spd/data/eos/eos2009report14n2.pdf>) (footnote omitted).

<sup>179</sup> *Id.*

<sup>180</sup> See Letter from Thomas E. Perez, *supra* note 162, at 10.

<sup>181</sup> *Id.* (footnote omitted).

<sup>182</sup> See *id.*

<sup>183</sup> *Id.* at 11.

<sup>184</sup> *Id.*

<sup>185</sup> See *id.* at 13.

with disabilities. Instead, the example serves to demonstrate that if enforcement of the *Olmstead* decision and the ADA were actively pursued, there may be no need to make drastic changes to our current system of anti-discrimination law for the disabled in employment. The problem is not a matter of the absence of legal protections, but of the adequate enforcement of those legal protections.

*D. Attempts at Altering U.S. Federal Policy to Tackle Sheltered Workshops*

As awareness has grown in the U.S. over issues involving employment of the disabled in sheltered workshops, there have been more efforts to drive national policy away from sheltered workshops – even with the existence of the U.S. laws and policies already discussed. The Workforce Investment Act (“WIA”) and the Rehabilitation Act were seen as places where policymakers could push for the creation of better employment circumstances than those existing within sheltered workshops.<sup>186</sup> The NDRN reported on these efforts, noting that:

In June 2010, Senator Tom Harkin . . . distributed a draft bill to jointly reauthorize the Workforce Investment Act (WIA) and Rehabilitation Act. These bills include a variety of employment programs for people with disabilities and for the general population, including vocational rehabilitation, funding for various supported employment programs for people with disabilities, and the Client Assistance Program and Protection and Advocacy for Individual Rights program, both of which advocate for people with disabilities in the employment setting. . . . The draft WIA/Rehabilitation Act bill included provisions designed to help ensure pursuit of alternative employment placements besides sheltered workshops and sub-minimum wage employers for young people with disabilities transitioning from education to employment.<sup>187</sup>

To the disappointment of disability advocates, the bill has not passed for reasons “unrelated” to the disability policy issues involved.<sup>188</sup> Later, in 2011, the Fair Wage for Workers with Disabilities Act was introduced, which would eliminate Section 14(c) of the Fair Labor Standards Act, disallowing a sub-minimum wage for disabled workers.<sup>189</sup> While the Bill does not direct legislative activity at sheltered workshops per se, it attacks the principle of employing the disabled using sub-minimum wages, which has frequently worked in conjunction with sheltered workshops to result in the segregation of individuals with disabilities in employment.

Otherwise, the attempts to change policy regarding sheltered workshops have come through advocacy of organizations like the NDRN to various federal agencies.<sup>190</sup> These agencies have included the Office of Disability Employment Policy, the Rehabilitation Services Administration, the Equal Employment Opportunity Commission, the Wage & Hour Division of the Department of Labor, the Office of Personnel Management, the Center for Medicare and Medicaid

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<sup>186</sup> See BEYOND SEGREGATED AND EXPLOITED, *supra* note 8, at 11.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

Services, and the DOJ.<sup>191</sup>

### *E. International Efforts to Eliminate Sheltered Workshops*

Both legislative changes and legal precedent have influenced international policy development regarding the use of sheltered workshops and the disabled. A number of countries have taken significant steps to eliminate sheltered workshops through the law. For example, “[i]n 1996 British Columbia (Canada) and in 2000 New Zealand repealed their respective legislation that allowed sheltered workshops to pay workers with disabilities below the minimum wage. As a result, sheltered workshops had to either increase the wages to at least minimum wage or to discontinue their work programs.”<sup>192</sup> Another significant international development occurred in January 2012, when the European Court of Human Rights (ECHR) decided its own landmark case regarding the institutionalization of the disabled, which may also have an impact on the employment of the disabled.<sup>193</sup>

The case involved multiple legal challenges by Mr. Stanev against the Republic of Bulgaria under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).<sup>194</sup>

The applicant complained about his placement in a social care home for people with mental disorders and his inability to obtain permission to leave the home (Article 5 §§ 1, 4 and 5 of the Convention). Relying on Article 3, taken alone and in conjunction with Article 13, he further complained about the living conditions in the home. He also submitted that he had no access to a court to seek release from partial guardianship (Article 6 of the Convention). Lastly, he alleged that the restrictions resulting from the guardianship regime, including his placement in the home, infringed his right to respect for his private life within the meaning of Article 8, taken alone and in conjunction with Article 13 of the Convention.<sup>195</sup>

Among his complaints, Mr. Stanev claimed under Article 5 § 1 of the Convention that he was unlawfully and arbitrarily deprived of his liberty as a result of his placement in an institution against his will.<sup>196</sup> The Court determined a violation of Article 5 § 1 had occurred, finding that the applicant was “detained” in a social care institution.<sup>197</sup> This was the first time ever that the Court made such a finding under the Convention.<sup>198</sup> In reaching this conclusion, the Court determined that none of the exceptions to Article 5 § 1 applied, including Article 5 § 1(e) – allowing for the lawful detention of an individual of “unsound mind”.<sup>199</sup> In this instance, the Government

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<sup>191</sup> *Id.* at 12-13.

<sup>192</sup> Migliore, *supra* note 5, at 2 (citation omitted).

<sup>193</sup> Stanev v. Bulgaria, App. No. 36760/06, Eur. Ct. H.R. (2012).

<sup>194</sup> *See id.* at 1-2.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 1.

<sup>197</sup> *See id.* at 34, 38.

<sup>198</sup> *Id.* at 38.

<sup>199</sup> *See Stanev v. Bulgaria, supra* note 193, at 38-39.

lacked a recent medical assessment of Mr. Stanev and failed to demonstrate that Mr. Stanev's state of health put him in immediate risk or required the imposition of any special restrictions to protect him.<sup>200</sup> As with the *Olmstead* case in the U.S., *Stanev* was considered a landmark decision because it was the first time the European Court of Human Rights decided a case favoring community integration for individuals with disabilities under a major human rights policy.<sup>201</sup>

## V. CONCLUSION

For years, sheltered workshops have been viewed as a valuable option for employing individuals with disabilities. But as time has progressed and more careful consideration has been given for examining what employment rights should mean for the disabled, previous notions about the values of sheltered workshops have been challenged and begun to erode. International disability policy has made a quicker response to this than domestic policies. However, there are indications that the U.S. has also begun to accept the necessity of this change for people with disabilities in order to ensure the realization of one of the primary principles of disability law: the protection of legal rights and equality in employment for the disabled. If the U.S. continues to promote the use of sheltered workshops as an employment option for the disabled, it will essentially revert back to the historical practices of discrimination that led to the disability rights movement. It is time for the United States to take its stand on the issue of sheltered workshops and join the global movement towards ending their existence. Human dignity must be reflected throughout the myriad of different legal protections that people with disabilities are provided, including the right to employment.

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<sup>200</sup> *Id.* at 37-38.

<sup>201</sup> See *Europe's Highest Human Rights Court Issues Landmark Disability Rights Ruling*, MENTAL DISABILITY ADVOCACY CENTER (Jan. 17, 2012), [http://mdac.info/en/17/01/2012/Europe\\_s\\_highest\\_human\\_rights\\_court\\_issues\\_landmark\\_disability\\_rights\\_ruling](http://mdac.info/en/17/01/2012/Europe_s_highest_human_rights_court_issues_landmark_disability_rights_ruling).