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Olmstead Goes to Work

Thank you for that introduction. I'd also like to thank Dean Rawson and Professors Sharpe and Hoffman for inviting me to deliver this year's McKnight Lecture and hosting me on my visit here. Case Western Law School is a place where a lot of exciting things are happening. It's a pleasure to get to spend the day with you.

The title of my lecture is "*Olmstead* Goes to Work." My thesis can be simply stated: The Supreme Court's decision in *Olmstead v. L.C.*, which interpreted the Americans with Disabilities Act to prohibit the unnecessary institutionalization of people with disabilities, is of great relevance to the problem of non-employment of people with severe disabilities. This thesis may strike many of you as counterintuitive. *Olmstead* is most typically understood as addressing the question of *where* people with disabilities live—in institutions or the community. But *Olmstead* is in fact most crucially about *how* people with disabilities live—whether people with disabilities can lead integrated lives, with the same array of day-to-day choices, opportunities, and interactions that people without disabilities take for granted. As I hope to show, integrated, meaningful employment of people with

severe disabilities—notably including significant mental illness and developmental disabilities—is key to making the promise of *Olmstead* a reality.

At the Department of Justice, we have prioritized *Olmstead* in our disability rights enforcement program. Carrying out President Obama’s Community Living initiative, we have investigated, filed, or participated in *Olmstead* cases in 21 states and the District of Columbia. In these cases, we have addressed an array of issues. We have sought to ensure that, when people with disabilities leave congregate institutions, they have the opportunity to live integrated, meaningful lives in the community. One key component of this effort is integrated, meaningful employment.

In the remainder of my lecture, I will address three questions: What is *Olmstead*? What does it have to do with employment? And how can we ensure that *Olmstead* goes to work?

What is Olmstead?

In thinking about *Olmstead*, and indeed most questions of disability rights law, I often find it useful to begin with the writings of a man who did not live to witness the adoption of the ADA. That man is Jacobus tenBroek, who famously urged that the “right to live in the world” was key to disability equality, and who also wrote that integration was “the answer” to achieving that right. Professor tenBroek was, without a doubt, a person who lived an integrated life in the world. In 1925, at the age of 14, he lost his eyesight. Fifteen years later, he earned a

Doctor of Laws degree from the University of California at Berkeley. The same year, he was instrumental in founding the National Federation of the Blind—the first major nationwide organization that was run not just “for” people with disabilities but “by” them as well. Professor tenBroek soon took an appointment at his alma mater, where he taught in the speech and political science departments as well as in the law school. He continued to teach at Berkeley, and serve as a national leader of the nascent disability rights movement, until he died in 1968.

Most legal scholars know Professor tenBroek for his contributions to constitutional scholarship: His 1949 article with Joseph Tussman, “The Equal Protection of the Laws,” set forth the analytical framework that structured a generation’s understanding of the Constitution’s equal protection guarantee, and his book on *The Antislavery Origins of the Fourteenth Amendment* remains a classic. Perhaps not surprisingly for a man of his academic and activist background, Professor tenBroek made the key early contributions to the emergent legal theory of disability rights.

When Professor tenBroek wrote about integration as “the answer,” he wrote from experience. His 1966 article in the *California Law Review* describing “The Right to Live in the World” begins with one of the most extraordinary author’s notes I have ever read. In the author’s note, Professor tenBroek responds, defiantly, to what he anticipates will be criticism that the article is based too much on personal experience. (He needn’t have worried, I think; much of the article is taken up with an incredibly thorough canvass of state statutes and court decisions, a canvass that

could leave no doubt that Professor tenBroek had done his homework.) The author's note takes up half a page, in tiny type. But one sentence encapsulates Professor tenBroek's point: "This article is amply flecked with footnotes, citing a wide range of formal materials. The views expressed, the author believes, are verified by his personal experience as a disabled individual far more than by all the footnote references put together."

Professor tenBroek argued that integration for people with disabilities followed from the basic principles of the civil rights movement that was, at the time he wrote, at the apotheosis of its power. "Are humans to be denied human rights?" he asked:

Are persons after all not to be persons if they are physically disabled? Are members of the community to be robbed of their rights to live in the community, their certificates cancelled upon development or discovery of disability? These rhetorical questions, the hallmarks of crusade and reform throughout American history, have in our generation become the plea of the disabled as well. As with the black man, so with the blind. As with the Puerto Rican, so with the post-polio. As with the Indian, so with the indigent disabled.

Although Professor tenBroek argued that a policy of integrationism was immanent in a wide range of legal developments, both statutory and common-law based, he lamented the courts' failure to adopt such a policy to its fullest extent. "No courts have held or even darkly hinted," he wrote, that

a blind man may rise in the morning, help get the children off to school, bid his wife goodbye, and proceed along the streets and bus lines to his daily work, without dog, cane, or guide, if such is his habit or preference, now and then brushing a tree or kicking a curb, but, notwithstanding, proceeding with firm step and sure air, knowing that he is part of the public for whom the streets are built and maintained in reasonable safety, by the help of his taxes, and that he shares with others this part of the world in which he, too, has a right to live.

Reading Professor tenBroek's words, one can appreciate both the analytic and the emotional core of the case for integration of people with disabilities. Professor tenBroek, of course, wrote against a backdrop of a long history of segregation, a history that did not begin or end with the eugenics movement of the early Twentieth Century. For centuries, people with disabilities were pushed aside, shut out, and ignored. Whether because of fear or because of misplaced paternalism, people with disabilities were forced to live in out-of-the-way facilities where basic, day-to-day decisions were made by others. People with disabilities became effectively invisible in the public square, and unfamiliarity combined with fear to encourage prejudice.

The Twentieth Century phenomenon of institutionalization of people with disabilities, which peaked in the mid-1950s, was but a later chapter in the same story. People with intellectual, developmental, and psychiatric disabilities were confined to institutions for their care and protection, but institutionalization

massively restrained their freedom. And as more and more people moved out of institutions in the 1970s and 1980s, we learned that institutionalization was often unnecessary for their care and treatment. This was true even for individuals who all observers had previously thought needed to live in institutions.

Consider Nicholas Romeo, a resident of Pennsylvania's Pennhurst State School whose case went to the Supreme Court. He had what the Court characterized as a "profound[]" intellectual disability, "with an I.Q. between 8 and 10." His own counsel had conceded, in light of what he called "the severe character of his [disability]," that Romeo could never live outside of an institution. Yet "ten months after the court's decision," as the late Timothy Cook told us, "Nicholas Romeo moved to a community residence in Philadelphia," where he lived successfully. The residents released from Pennhurst were studied extensively, and Mr. Romeo's experience was typical. In the psychiatric disability area, too, individuals who were once thought to need long-term institutionalization have proven that they can live successfully in homes or apartments in the community with supportive services.

Ending the unnecessary institutionalization of people with disabilities is crucial to disability civil rights, we now understand, for two major reasons. First, unnecessary institutionalization deprives people with disabilities of important opportunities that are available to people without disabilities: the opportunity to access what Eleanor Roosevelt called the "small places, close to home"—neighborhoods, schools, factories, farms, or offices, as Mrs. Roosevelt said, but also

movie theaters and sporting arenas, bookstores, and gyms; the opportunity to seek out and make connections with a diverse array of people of one's own choosing; and, indeed, the opportunity to take risks, to be free from constant protection. The disability rights movement has taught us that there is dignity in risk, and that to be denied the right to choose how to live one's life—for good or for ill—is to be denied equal respect as a human being. Segregating people with disabilities into institutions often rests on a too-easy paternalism, a sense that “those folks” need to be protected from the vicissitudes of the world. Sometimes, to be sure, people—both with and without disabilities—need protection. But people with disabilities are too often shut off from important opportunities in the community because of a stereotype-driven view that their disabilities render them uniquely in need of protection.

Second, unnecessary institutionalization reinforces public stereotypes and prejudices against people with disabilities. To make large numbers of people with disabilities live behind the walls of a psychiatric hospital, developmental center, nursing home, or group home is to further entrench the same paternalistic attitudes that lead to institutionalization in the first place. And lack of familiarity breeds fear and prejudice. To break down those attitudes requires public visibility and interactions between people with and without disabilities, precisely what segregation makes impossible.

In her opinion for the Court in the *Olmstead* case, Justice Ginsburg relied on these two points in explaining that unnecessary institutionalization of people with disabilities is properly regarded as discrimination against them:

Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. [S]econd, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.

[D]issimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.

It should be no surprise that Justice Ginsburg, the Thurgood Marshall of the women's rights movement, put point so well. For it was the women's movement that was most responsible for teaching us that discrimination can be paternalistic, well-intentioned, and still wrong. The image of the pedestal as cage, perhaps the central metaphor of the constitutional law of sex discrimination that Justice

Ginsburg created as a lawyer, captures the matter precisely. Just as the constitutional law of sex discrimination strikes a blow against a “romantic paternalism” that shuts women off from important opportunities, the *Olmstead* holding strikes a parallel blow against paternalistic exclusions of people with disabilities.

What Does Olmstead Have To Do With Employment?

You might be saying: This is very interesting, and maybe even important, but why are you talking about deinstitutionalization in an employment law lecture? It’s because the principle of *Olmstead*—that persons with disabilities have a right to spend their lives in the most integrated setting appropriate for them as individuals—is just as sensibly applied to the employment setting. As should be evident from the way I have described it earlier, *Olmstead* is not just about where people live. Most fundamentally, it is about how people live. The right to live in the most integrated setting is important because congregate living limits one’s ability to make choices about what to do with one’s day and how to live one’s life. As Justice Ginsburg said, it limits “family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.” One cannot be a full and equal citizen if one has to eat meals, go to the movies, and even turn on and off one’s lights, at times and with companions chosen by others. And a full and equal life in the community—the ultimate goal of *Olmstead*—cannot be achieved

without a meaningful, integrated way to spend the day, including integrated “work options.”

Work is central to a meaningful, integrated day, and to full and equal citizenship. As Professor Kenneth Karst wrote, “work means much more than a paycheck; it is the exercise of responsibility.” It is “a means of proving yourself worthy in your own eyes and in the eyes of others.” Crucially, work is the place where people with all sorts of group affiliations interact and share common projects. And it is that sort of intergroup interaction that breaks down stereotypes and prejudices. When people with disabilities have an opportunity to work with nondisabled peers, those peers learn what people with disabilities—even severe disabilities—can do, and they also learn not to make presumptions about what people with disabilities cannot do. In other words, they begin to unlearn what Justice Ginsburg called the “unwarranted assumptions” that people with significant disabilities “are incapable or unworthy of participating in community life.”

Although the process of ensuring that people with disabilities can live in the community is, unfortunately, far from complete, we have made a great deal of progress. But as people move from inappropriately segregated housing settings like psychiatric hospitals, developmental disability centers, nursing homes, and group homes, we cannot achieve the promise of *Olmstead* unless we ensure that they do not just live in integrated housing but that they also live integrated lives. Opportunities for integrated, meaningful work can be especially important for those who have lived, or been at risk of living, in institutions. Meaningful, integrated

work helps break cycles of dependence. For people with mental illness, “working in one’s community is “central to recovery and,” according to many experts, “should be a major goal of the mental health system.” [Becker et al. 2006] For people with developmental disabilities, meaningful and integrated work teaches skills. For everyone, it provides the chance to earn money which can then be used to engage in whatever activities an individual chooses.

How to Take Olmstead to Work

Unfortunately, the employment rate for people with severe disabilities has remained stubbornly low. In 2010, only 35.3 percent of people with disabilities were working. [RRTC 2010 Statistical Compendium] Among people with severe mental illness in particular, the non-employment rate approaches 90 percent by some estimates. [ODEP] “People with psychiatric impairments constitute the largest and most rapidly growing subgroup of Social Security disability beneficiaries.” [Drake et al. 2009] According to a 2008 study published in the American Journal of Psychiatry, the lack of employment among people with serious mental illness imposes almost a \$200 billion annual drag on the economy. [Kessler et al. 2008]

Entire books have been written about the persistence of non-employment among people with disabilities. I, myself, have devoted a significant chunk of a book to that topic. But what is important here is that, even when they do have the opportunity to work, far too many individuals with severe disabilities today work in segregated settings. A recent report by the National Disability Rights Network

found that “for every one person [with a disability] working in competitive employment, three people remain in segregated settings.” Academic researchers report similar figures. [Wehman et al. 2003] And this is something for which the States, along with many other actors, bear some responsibility. The same report found that States spent one Medicaid dollar for supported employment—which, as I will discuss, enables people with disabilities to work in a market setting—for every four Medicaid dollars they spent on segregated day programs.

Foremost among these programs is what we used to call the sheltered workshop. The sheltered workshop was a well-intended idea that sought to teach people with disabilities (notably those who are blind or have mental disabilities) job skills so that they could join the labor market. But it was soon apparent that the reality was often quite different. In 1960, Professor tenBroek described the sheltered workshop as “a vague combination of the workhouse, the almshouse, the factory, and the asylum, carefully segregated from normal competitive society and administered by a custodial staff armed with sweeping discretionary authority.” He explained that “[b]ecause of their customary role as sheltered (*i.e.*, segregated, covered, and noncompetitive) employment retreats, the social and psychological environment of the workshops is often not conducive to the paramount objective of vocational rehabilitation: that of restoring the disabled person to a vocational status of normality and equality.” Instead, he argued, they had a tendency to “become terminal places of employment in which so-called unemployable may find a drudge’s niche at the workbench.” According to the recent National Disability Rights

Network report, much the same can be said of many congregate employment programs today: they “purport to offer pre-employment and pre-vocational skills,” but in many cases they “only prepare people with disabilities for long term sheltered employment.” The disability researcher Alberto Migliore further explains that “[e]ven when work is the main focus of sheltered workshops, the work environment tends to be different from the one in mainstream businesses.” Unlike mainstream businesses, he explains, sheltered workshops do not seek to “match[] people's skills to the production needs,” nor do they base their internal hierarchy on “contractual parameters.” Instead, hierarchy within the workshop is “shaped by the status of a person as either a consumer or a staff member who supervises consumers.”

There is, to be sure, variation among today’s congregate employment programs, and that variation matters when we are identifying problems and solutions. And federal law itself incentivizes sheltered workshops in some circumstances; I do not come to quarrel with those laws. But where states allocate discretionary money in a way that effectively denies choice and forces people to accept inappropriate and segregated work placements, that is an *Olmstead* problem. In many congregate employment programs, the work involves menial tasks like shredding paper, often using outdated equipment and factory set-ups that do not replicate the way businesses performing similar tasks organize their workplaces. These “jobs” are unlikely ever to develop the skills necessary to do the work that enterprises need to carry out their operations. As the National Disability Rights Network explained, “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.”

And for too large a proportion of the clients of these programs, the assigned tasks are even farther removed from real work. In some programs, Professor Susan Stefan notes, clients are assigned “make-work, such as folding and unfolding newspapers.” [Stefan 2010] In one workshop in Oregon, advocates met an individual whose job was to count rocks as he moved them from one box to another. [NDRN 2011] There is, to be sure, a range of different abilities, and no one-size-fits-all answer exists to the question of what sort of employment is right for every person with a disability. But when individuals with disabilities spend years—indeed, decades—in congregate programs doing so-called jobs like these, yet do not learn any real vocational skills, we should not lightly conclude that it is the disability that is the problem. Rather, the programs’ failure to teach any significant, job-market-relevant skills leaves their clients stuck. As a recent review of the literature concludes, “[t]he ineffectiveness of sheltered workshops for helping individuals progress to competitive employment is well established.” [Bond 2004]

From this discussion, it should be apparent that many congregate employment programs bear the essential characteristics of segregation that we saw

in residential institutions. They congregate people with disabilities and separate them from the community, subject them to regimented rules, and fail to provide access to the opportunities to build skills and engage in self-development that nondisabled people have. Available evidence indicates that many people with disabilities would not choose to work in these settings if another alternative were offered. A 2004 study observed that people with severe mental illness want not just work but “competitive employment, defined as community jobs that any person can apply for, in regular places of business, paying at least minimum wage, with mostly nondisabled coworkers.” [Bond 2004] In any event, too many people in congregate settings are not ever offered an alternative. This problem is most poignant for people with significant disabilities finishing school. For their entire educational lives, many of these individuals have studied and been prepared to work in integrated settings. That is the great success of the Individuals with Disabilities Education Act. But once they age out of IDEA services, many are left with only segregated employment options, because their state does not devote sufficient resources to supporting integrated employment.

One might at this point say, “What’s the alternative?” We know that Title I of the ADA has not been effective in moving large numbers of people with disabilities into the workforce—even if some scholars’ claims that the statute has made things *worse* are inconsistent with the weight of the evidence. And it is easy to see that the ADA’s employment provisions will not suffice here. Title I simply prohibits discrimination and requires reasonable accommodations; it does not

require any employer to hire any particular individual with a disability. To the extent that the clients of congregate employment programs require supports that fall outside of the statutory reasonable accommodation requirement—whether because they would be costly or burdensome if provided by the employer, or because courts will conclude that they are the sorts of “personal items” that an employer need not provide—employers on the open market can simply refuse to hire them. One might be forgiven for asking whether segregated, even sheltered, work is just an appropriate response to a sad reality that many people with severe disabilities simply cannot perform work with sufficient skill and efficiency to make it cost-effective for open-market employers to hire them.

If this sounds like justifications that have been offered in the past for the long-term institutionalization of people with mental illness and developmental disabilities, it should. Where institutionalization often rested on a paternalism that underestimated the ability of institutionalized persons to live in the community with appropriate supports, the presumption that congregate employment clients cannot perform work that is desired by open-market employers underestimates the ability of many of those individuals to work in the competitive marketplace with appropriate supports. Again, there is no one-size-fits-all answer, but the ADA requires that people with disabilities receive services in the most integrated setting appropriate for them. There is thus a strong presumption in favor of integration.

Over the past several decades, rehabilitation professionals have developed the model of “supported employment” as an evidence-based practice to promote

integrated employment opportunities for people with severe disabilities. Paul Wehman, one of the leading researchers in the area, explains that “[t]he goal of supported employment programs is to help people with the most significant disabilities to be successful in paid employment in the integrated work setting of their choice.” [Wehman et al. 2003] Supported employment programs do this by “help[ing] clients identify what kind of work they would like to do, find a job as quickly as possible, and succeed on the job or move to another job.” [Drake et al. 2009] As Wehman explains, supported employment rests on a number of key values:

- that “[e]veryone, regardless of the level or the type of disability, has the capability to do a job and the right to have a job”;
- that employment should occur “within the local labor market in regular community businesses”;
- that “[w]hen people with disabilities choose and regulate their own employment supports and services, career satisfaction will result”;
- that “[p]eople with disabilities should earn wages and benefits equal to that of co-workers performing the same or similar job”;
- that “[p]eople with disabilities should be viewed in terms of their abilities, strengths, and interests rather than their disabilities”;
- that “[c]ommunity relationships both at and away from work lead to mutual respect and acceptance”; and

- that “[p]eople with disabilities need to determine their personal goals and receive assistance in assembling the supports for achieving their ambitions.” [Wehman et al. 2003]

Crucially, supported employment reflects what might be called an “employment first” approach—when carried out according to the key principles of the model, “[t]he only requirement for admission to a supported employment program is a desire to work in a competitive job.” [Bond 2004] Rather than asking whether competitive work is consistent with a client’s disability or requiring extensive vocational training *before* an individual can find a job, the supported employment model builds on the client’s strengths and interests and seeks to place the client in competitive employment immediately while providing the necessary supports. These supports include working with employers to find and mold appropriate jobs, job coaching, transportation, assistive technologies, specialized job training, and individually tailored supervision. “[S]upported employment assists people with the most severe disabilities so that they are able to obtain competitive employment directly—on the basis of the client's preferences, skills, and experiences—and provides the level of professional help that the client needs.” [Salyers et al. 2004] The money for these services can come from a number of sources, including state Medicaid and vocational rehabilitation funds.

Evidence from the implementation of supported employment programs in a number of states suggests that many people with disabilities—even quite severe disabilities—who currently receive services in congregate employment settings

could in fact work in the competitive market. A recent review of the literature found that there are no “specific client factors (such as diagnosis, symptomatology, age, gender, disability status, prior hospitalization, and education) that consistently predict better employment outcomes. In other words,” this review continued, “the literature provides no empirical justification for excluding any consumer from receiving supported employment services, based on the clinical or work history, ‘readiness,’ or any other factor commonly used as screening criteria.” [Bond 2004] And the evidence shows that supported employment is far more likely to result in durable employment in the competitive labor market than is pre-vocational training (up to three times more likely in some studies). [Salyers et al. 2004]

Again, this finding parallels what we have learned about institutionalization. For many years, the prevailing view was that it would not be safe or responsible to allow people with developmental disabilities or mental illness to leave state institutions until they first showed that they had learned sufficient self-care, behavioral, and other skills that they would need to live in a community environment. But evidence mounted that one best learns skills in the setting in which those skills are intended to be used, and the prevailing view shifted. Now most experts in the field will tell you that forcing a person to stay in an institution until he learns self-care and behavioral skills unnecessarily delays the acquisition of those skills at the same time as it unnecessarily prolongs the institutionalization—in many cases, for years. We now understand that the best way to promote positive behaviors or the acquisition of skills that are needed in the

community is to give individuals the opportunity to live in the community with appropriate supports to develop those behaviors and skills. It should not be surprising that, for many people, the same point holds true with respect to job skills.

Moreover, although supported employment has an initial cost for each client—as the job and attendant supports are set up—that cost in most instances declines over time. A meta-analysis of relevant studies “concluded that supported employment programs began to provide a net benefit to the taxpayer through the taxes paid by disabled individuals in competitive employment beginning in the fourth year of the supported employment program.” [Stefan 2010] Other studies conclude that wider implementation of supported employment could save the federal and state governments hundreds of millions in SSDI and SSI costs (as people with disabilities earn more money of their own) and Medicaid costs (because a client’s Medicaid costs tend to go down by between \$5,000 and \$15,000 per year after he transitions into work). [Drake et al. 2009] And once the cost of segregated employment is taken into account—a cost that, for each client, tends to remain stable over time—the fiscal case for wider adoption of supported employment becomes all that much stronger. Indeed, as Professor Stefan reports, a number of studies have “found that supported employment was consistently less costly than sheltered work if measured over at least a four-year period.” [Stefan 2010]

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If you were skeptical that *Olmstead* had anything to do with employment, I hope that I have overcome your skepticism. In our *Olmstead* enforcement at the Department of Justice, we have understood that we cannot simply require that states allow people with disabilities to leave congregate residential settings. We have recognized that people with disabilities must have the opportunity to spend meaningful, integrated days as well. Our landmark *Olmstead* settlement with the State of Georgia this past October, which commits the state to provide community-based services to thousands of people with mental illness and developmental disabilities who were in or at risk of entering state psychiatric hospitals, specifically identifies supported employment as one of the services the State must provide in the community. And in our letter of investigative findings regarding the Commonwealth of Virginia's unnecessary institutionalization of people with disabilities, we have highlighted not just that residential segregation but also the Commonwealth's overreliance on segregated employment and day programs for those people with developmental disabilities who live in community-based residential settings. We will continue to pursue these issues in our *Olmstead* investigations and litigation across the country. They are central to achieving the promise of *Olmstead*.

Thank you.