Ruthie-Marie Beckwith

DISABILITY SERVITUDE

From Peonage to Poverty

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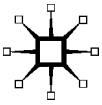

DISABILITY SERVITUDE

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This book is dedicated to Mark G. Friedman—fellow traveler and spouse extraordinaire.

"I have always thought that all men should be free;

but if any should be slaves it should be first those who desire it for themselves,

and secondly those who desire it for others."[1]

[1] *The Collected Works of Abraham Lincoln* edited by Roy P. Basler, Volume VIII, "Speech to One Hundred Fortieth Indiana Regiment" (March 17, 1865), p. 361.

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FOREWORD

This book is crucial for a full understanding of the American disability rights movement. Few people realize that our sad history of segregation, isolation, and institutionalization of citizens with all kinds of disabilities was utterly dependent on forced labor – call it involuntary servitude or slavery, it was people with disabilities, their freedom taken away, doing work without pay.

As evidence of the little known importance of the topic of this book, I offer personal experience. I have worked as a scientist and program evaluator in the human services, particularly the disability field, for 45 years. I only learned in the past five years that, without peonage, our institutions could never have become so large. Nor would they ever have been economically viable in the twentieth century. I have studied American institutions since 1970, and have personally visited more than 150 of the 283 public institutions for citizens with intellectual and developmental disabilities that once existed. I have done more studies of what happened to people when they left these institutions than any other researcher. I thought myself to be well informed about the causes of the rise and demise of our institutional system of segregation. Yet I did not know that the end of the institutional model was brought about in large measure simply because forced labor, quite properly called a new form of slavery, was halted.

This book traces the growth of our public state-operated institutions and mental hospitals and the shift in their focus on training and moral therapy to large, custodial facilities that housed up to 6,000 people. Grossly underfunded by our legislatures, there was never enough staff to properly support everyone even in a custodial care sense. Instead, a large number of the people living in these settings were "allowed" to work to take care of the other people. They were "allowed" to work in the farms, do the laundry, grow and cook the food, dress and feed and transport the folks with the most significant disabilities. They were "allowed" to maintain the institutions as an unpaid forced labor.

In the old days, the justifications for unpaid forced labor used by institutional proponents were precisely parallel to those used to justify slavery before the Civil War. "They are happier working. Work builds self-esteem. They need to be kept busy. It's good vocational training. They love caring for the 'crib cases' *[a demeaning term of the day referring to people of all ages who were rarely taken out of metal or wooden cribs].* Work is therapeutic."

In the 1960s and 1970s, a true nexus of change combined to bring American to a realization that our institutions were unfit for human beings, and to start action to end them. One of the key changes was in public awareness, via the Kennedy family, and the relatively new medium of television investigative reporting. The first of the latter focused on Pennhurst State School in Philadelphia, with the unprecedented five successive nights of Bill Baldini's "Suffer the Little Children" and its unbelievable images of man's inhumanity to man. A second was the Right to Education, first won in Pennsylvania in 1971, which sharply reduced the common practice of sending adolescents to public institutions when they became larger, and were not permitted in our public schools. A third was a wave of litigation, first to improve institutional conditions, and later to close them entirely.

But, as this book explains, previously ignored within this explanation of "causes" has been the economic impact of the end of forced labor. When America saw that its institutions were unacceptable, and commonly tried to improve them via decreasing the overcrowding, adding staff, and applying standards and monitoring, we quickly saw the cost of public institutions rise exponentially. Suddenly, without the free labor, institutions slid into economic infeasibility. Figure F.1 shows the average per person costs for the large settings in the United States.[1]

The graph makes it very clear that the costs of institutional settings, of which about 80 percent or more were personnel costs, went up and kept going up when peonage ended.

When the nation's leadership in the human services learned that small, community-based family-like homes for individuals with intellectual and developmental disabilities were costing less than the institutions,[2] the policy tide turned faster and faster. Studies in the 1970s and 1980s showed with great clarity that qualities of life were much better, and people gained skills and learned more, in small community settings.

When better quality could be obtained at lower public cost, how could the tide of right versus wrong be stopped? The entire model of large-scale isolation, segregation, overcrowding, and abuse—all of which arose from the social Darwinism and eugenics of the 1800s—was happily hastened to its rapid decline by the end of disability servitude.

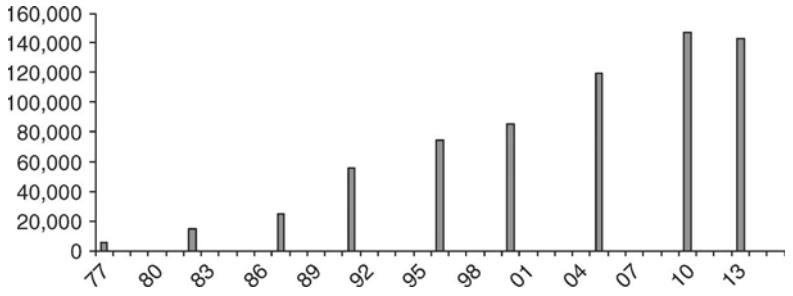

Figure F.1 ICF/IID expenditures per person 1977 to 2012.

However, the underlying message of this book is that we are not quite finished yet. America still has about 26,000 people with intellectual and developmental disabilities in state institutions. Many more are in large private institutions. Over 400,000 individuals with intellectual and other disabilities continue to experience segregation as they labor in sheltered workshops for far less than minimum wage. We spent entire generations making people do complex and important work in institutions, then when they came out into our communities, we somehow concluded that they could not work alongside the rest of us—and consigned so many people to sheltered workshops at subminimum wage. Subminimum wage workers with disabilities in the United States—incredibly—earned an average of $1.36 per hour (NCI, 2008[3]). This tide is turning, too, with the United States Department of Justice interpreting the Supreme Court's 1999 Olmstead decision to preclude "unnecessary segregation" in the work world, not just where people live.

We are not done—but we have come a great long way toward justice and inclusion of all.

James W. Conroy, PhD

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PREFACE

The genesis for this book began in 1980, when I worked for an agency that provided residential services to individuals with intellectual disabilities in Nashville, TN. The first wave of deinstitutionalization from Clover Bottom Developmental Center, Tennessee's oldest state institution had started in 1974 as part of the *Saville v. Treadway* consent decree. Consequently, many of the individuals who lived in the agency's group homes and apartments scattered throughout Nashville had been residents at Clover Bottom. One of those individuals was Herman Kaplan, a named plaintiff in *Townsend v. Treadway*, one of the nation's first anti-peonage cases filed in 1972.

At the same time, I was also an enthusiastic graduate student in the Special Education Department at Peabody College for Teachers. One of the courses in the program, "The Law, Change Agents, and Advocacy," was taught by Dr. Floyd Dennis, a lawyer who had been involved in the *Townsend v. Treadway* case. Through Dr. Dennis's course, I learned about institutional peonage and what the former residents I had come to know personally had endured.

Herman lived in an apartment in East Nashville along with several other former residents who had been among the first to leave Clover Bottom in the early 1970s. At the apartments, they formed a close-knit group and made it a point to look out for each other. I can't say that I knew Herman well, but he had an air of pride about him. It was the sort of pride that made it clear that he had the kind of nerve that it would take to go up against the State of Tennessee at a time when no one thought that people with intellectual disabilities could think for themselves.

In 1982, I was fortunate enough to help a group of people who lived in the agency's group homes form a statewide self-advocacy group, People First of Tennessee, Inc. My involvement in the self-advocacy movement continued to grow and over the course of the next two decades People First members who had lived in Tennessee's state-run institutions told me their stories. While we crisscrossed the state together to start local chapters, I heard stories about the school, dances in the gym, and Red

Cross lady volunteers. I heard stories about the various superintendents who had passed through while on their way to loftier positions of power and influence.

I also heard stories about working in the fields, washing dishes in the dining halls, and washing mounds and mounds of laundry. I heard stories about working on the wards bathing and feeding and cleaning up after residents who could not do that for themselves. One thing I never heard was how much money they got paid to do the work they were told to do. Now, to be sure, most of the people who told me their stories were by nature very kind and eager to help out. But the fact that they hadn't gotten paid for any of the work they had performed just didn't seem fair to them. It didn't seem fair to me, either.

That sense of unfairness made me want to learn more about *Townsend v. Treadway*. I wanted to know more about how it was that Herman and his fellow plaintiffs didn't prevail after they found the courage to go to Federal Court to tell their stories. *I wanted to somehow understand how they had worked day after day, year after year, for overseers to whom the very idea that they should be paid had never occurred*.

Over the years the sense of injustice I felt did not abate. In fact, it continued to grow as I worked to help liberate even more people from state-run institutions. It continued to grow when I saw the meager paychecks people received at the end of a week of working for subminimum wages in sheltered workshops. It continued to grow as I heard the same arguments that were used to segregate individuals with disabilities in state-run institutions used to justify their continued segregation in sheltered workshops.

Little did I know that *Townsend v. Treadway* was actually the trailhead of a path that would lead me to the discovery of other peonage cases that had enshrined the stories of hundreds of thousands of invisible resident and patient workers in state-run institutions. I began pursuing information about institutional peonage and involuntary servitude in earnest in 2001, 15 years after I had moved on from my job at the agency and the year after I left my job working for People First of Tennessee, Inc.

The Library of Congress was the first place I was fortunate to visit in my search for data. Founded in 1800, the building itself is awe-inspiring. Its most distinguished feature is the copper-clad dome that sits atop the Main Reading Room. Most visitors like me who come to the library to do research start out in the Main Reading Room.

When I was there in 2001, the library relied on a mechanical system to submit and receive requested books, documents, and other publications. It seemed a lot like the systems servers in restaurants used to turn in orders; you fill out little slips of paper, hand them to the librarian who

clips it to the mechanical relay and off it goes. So, one by one my little slips of paper made their way to the stacks and what information was available would come back up in a square bucket. Basically, you just had to hope for the best.

The information I found at the Library of Congress led me to other dusty stacks in library basements and on gleaming shelves in university law libraries. As I continued to track down information about each of the peonage cases, the stories I unearthed nursed the ever-growing sense of injustice I had for the losses the resident and patient workers had experienced. In lawsuit after lawsuit, the callous disregard that those in positions of power had for the resident and patient workers' grievances was matched only by the absence of justice they encountered in the courts.

At the same time I started to research the history of the peonage cases, I was invited to help people with a variety of disabilities start very small businesses as vehicles for self-employment in a number of states. The people I worked with were primarily those whom the service system had officially declared to be unemployable. Many were former residents and patients at state-run institutions. Others lived with their families who earnestly wanted their family member to succeed. Still others had people in their lives who had actively undermined and sabotaged any prospects they might have for earning income.

My initial objective with everyone I was supposed to help was to determine, based on their life experiences and interests, what niche they might fill with regard to the needs of their communities. Once the possible match of their talents and gifts with a community need was established, the real work of helping them create a niche that could be used to leverage income would begin. One person I was asked to help, however, wasn't really interested in what I had to offer. It wasn't that he didn't want to earn money; it was because he had his own idea about how to go about it.

The community Ben lived in was small, but large enough to support a number of businesses that would hire individuals with disabilities. Ben, a former resident of a state-run institution, had set his sights on working at McDonalds. By the time I arrived on the scene, Ben had been putting in a job application to work at McDonalds on a weekly basis for quite some time. He would go there, put in the application, and then return home with little else to do for the day. I met with Ben and his support staff regularly but Ben didn't seem committed to the notion of becoming self-employed. Frustrated with the lack of progress, I asked Ben to go out to lunch with me so I could get a deeper understanding of how his resistance might be overcome.

Ben picked a local pizza place for our meeting. One of his support staff joined us and we made small talk while we ate. After the pizza was dispensed with, I started talking about being self-employed and Ben started talking about McDonalds. I stopped myself and finally asked Ben what it was about working at McDonalds that was so appealing. What did he want to do there? Flip burgers? Fill the soda machines? Hand people their food at the drive through window? I really wanted to understand where he saw himself fitting in at this particular fast food restaurant. But, Ben's motivation was totally different than what I had been driving at. Without missing a beat, Ben looked me straight in the face and said, "*Make minimum wage*."

I continued to work as a consultant for the next decade and Ben's story continued to haunt my efforts. In all the time that Ben had been papering McDonalds with job applications, no one had asked him *why* he wanted to work there. They had simply assumed, as others had done with the former resident and patient workers in the institutions, that Ben really wasn't capable of working at McDonalds. Instead, he had worked in the sheltered workshop until he was kicked out and left with no other opportunities.

During those years, all the information I had gathered about the peonage cases stayed in a box in the corner of my office—I just couldn't bring myself to hide it away. And, as time went on, the sense of injustice I felt for the plight of the resident and patient workers merged with the sense of injustice I felt for the plight of the sheltered workshop workers and people such as Ben. The combination of both histories of exploitation represented a much bigger story than the demise of institutional involuntary servitude; how to tell that story was a much bigger problem to contemplate. Nevertheless, when the Internet opened the gates to databases brimming with information to be had just for the asking, I took it as a sign that it was time to do something about that overflowing box of files.

My original intention was to write a chapter about institutional peonage for someone else's book. It soon became clear that the implications of the combined story were much larger than a single chapter could hold. So, in the summer of 2013, I moved my box and myself into my husband's office and began to write, and write, and write. The book you hold is the end product of my attempts to trace the history of how the labor of workers with disabilities has been viewed, manipulated, and exploited within our society. It is also the product of my attempts to recover and restore an appreciation for the capabilities and competencies that the labor of workers with disabilities has demonstrated despite their past exclusion from mainstream employment.

Ultimately, this book reflects my determination to bring into light and make visible the labor that workers with disabilities performed in segregation, unseen and unappreciated. It came about from a deep desire to honor the work and sacrifices they made, day after day, year after year, without the respect or rewards they so rightly deserved.

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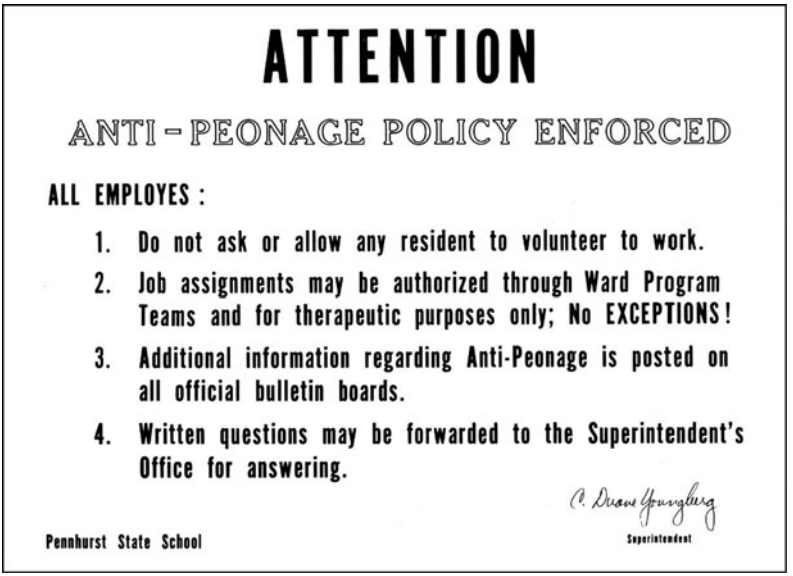
CHAPTER 1

INTRODUCTION

For well over a century, institutional peonage held individuals with a broad range of disabilities in thrall to the maintenance and operation of the nation's public institutions. By 1972, residents accounted for 47,000 workers in the institutions for individuals with intellectual disabilities alone. Estimates of the number of patient workers in state-run mental hospitals ranged from 5 to 90 percent of the 235,000 total patient population (Pyle, 1978, p. 38). Resident and patient workers shoveled coal; labored in the fields; worked in the laundry; cooked and served meals in the dining halls; scrubbed and cleaned throughout the facilities; and provided direct care for fellow residents. Resident and patient workers drove tractors, ran machinery, and even fought forest fires. They did all these things and more—all unpaid—an invisible workforce that labored for 10–12 hours a day, seven days a week. But, in 1979, seven short years later, it all came to a sudden halt.

Beginning in the early 1970s, residents and/or patients in institutional settings from across the country brought a number of lawsuits with Thirteenth Amendment claims—asserting their right to be free from involuntary servitude. Passed by Congress and ratified by the States in 1865, the primary intent of the Thirteenth Amendment was to abolish slavery and involuntary servitude for anyone other than convicted criminals.

The peonage cases, along with a number of other significant legislative and litigation efforts, set the field on a new course of normalization and the expansion of community-based services. In 1974, in the matter of *Souder v. Brennan*, the Federal District Court in DC ruled that, for the first time, the Fair Labor Standards Act (FLSA) as amended in 1966 applied to hospitals, including the public institutions. This meant that, for the first time, resident workers were to be paid minimum wage for the


ATTENTION

ANTI-PEONAGE POLICY ENFORCED

ALL EMPLOYES :

1. Do not ask or allow any resident to volunteer to work.
2. Job assignments may be authorized through Ward Program Teams and for therapeutic purposes only; No EXCEPTIONS!
3. Additional information regarding Anti-Peonage is posted on all official bulletin boards.
4. Written questions may be forwarded to the Superintendent's Office for answering.

C. Drew Youngberg
Superintendent

Pennhurst State School

Photo 1.1 Anti-peonage policy enforced, Pennhurst State School, Pennsylvania. (From the author's collection).

labor they performed. Instead, states opted to cease their work programs and replace the resident workers with other nondisabled paid employees.

The peonage cases brought into question over one hundred years of involuntary servitude by institutionalized individuals with disabilities. Their century of labor, unpaid but nonetheless regarded as worthy, is all but forgotten. Instead, today, over 400,000 individuals with intellectual disabilities spend their days in sheltered workshops where their *potential for employment* is measured daily, piece-by-piece, year after year, and remunerated at subminimum wages that nondisabled employees would not tolerate.

The authoritative posturing of the institutional establishment at the end of the nineteenth and into the twentieth centuries laid the foundation for the legal challenges to institutional peonage. The establishment's posturing likewise influenced the ultimate outcome and thereby produced unanticipated consequences on the ability of individuals with disabilities to be considered equal members of the United States workforce. Further, the subsequent failure of efforts to secure economic equality for individuals with intellectual disabilities has placed them especially at risk for further exploitation and abuse.

Disability Servitude traces the evolution of how the productivity of individuals with intellectual disabilities came to be exploited, devalued, and denied. It draws into the open those stories that represent the best of what people can achieve, even under the most coercive of circumstances, and then, be cast out into the most limiting and subservient of preoccupations.

It is hoped that this inquiry will better inform both sides of the issue the degree to which historical involutions[1] have held us captive to outdated social policies that were based on erroneous and poorly examined assumptions. In doing so, the ultimate purpose of this book is to galvanize renewed resolve for dismantling the remaining vestiges of involuntary servitude and the prevention of yet another saga of isolated exploitation from gaining a foothold in our society.

The legacy of the peonage cases is complex but one that warrants greater examination—present-day challenges that bar the path to economic equality have roots that reach much farther back than has been appreciated. *Disability Servitude* calls for stronger narratives to counter those that have been used to dehumanize, and subsequently, put individuals with disabilities at even greater risks of exploitation. For, if the cause of economic equality, long championed, is to be achieved, the right to be free of poverty-making practices must be fully embraced—before another century of servitude has come to pass.

CHAPTER 2

INSTITUTIONALIZED PEONAGE AND INVOLUNTARY SERVITUDE

> Let us, then, be up and doing,
> With a heart for any fate;
> Still achieving, still pursuing,
> Learn to labor and to wait.[1]

In Greek mythology, Sisyphus was the man who, for eternity, was condemned by Zeus to roll a boulder uphill only to have it roll back down again each time he made it to the top. His punishment was to labor at something that, in addition to being a struggle, was repetitive, futile, temporary, and *meaningless*. The myth of Sisyphus is viewed as a metaphor for anything that is considered an exercise in futility; an activity that will have no impact, but when carried out willingly is believed to be symbolic in nature. This was not true in the case of Sisyphus who labored with his stone as a form of punishment from which there would be no redemption, nor reprieve.

The story of Sisyphus came to mind recently as two anecdotes surfaced while researching the history of peonage as it was practiced by institutions for people with disabilities until 1973, when the US Supreme Court ruled that the "patient-workers"[2] could no longer be made to labor for free or nominal compensation. The two anecdotes describe labor that, similar to Sisyphus, individuals with intellectual disabilities were condemned to do in a state institution in 1902 as well as a state-funded sheltered workshop—one hundred years later.

> *Our stone piles at Waverly are pretty nearly the first step to industrial work. We have two circles of stones about thirty feet apart. We fill one of these circles full of stones about as big as a man's head. Then all of the stones of one circle are carried to the other side. And the boys get a lunch and go home.* [italics added] We begin

> with many cases so low the teacher has to put the stone into the boy's hand and hold it to keep him from dropping it and urge him to drop it in the right place. It is surprising how few catch on to the idea of carrying these stones. That is the primary lesson in our industrial training—that stone pile. (Fernald, 1902, p. 79)
>
> In a far corner of the room sat Barry, segregated away from his peers. *On the table in front of him were two boxes, one with rocks and the other without. Advocates were told that Barry's task each day was to count the rocks as he placed them from one box to the other.* [italics added] Barry went to the workshop to build skills that would help him get a job, but was given a box of rocks. (National Disability Rights Network, 2011, p. 23)[3]

Margaret Gould's[4] (1999) tribute to the 36 Honorees of the 20th Century Recognition Project, identified eight lessons she believed illustrated the progress made over the past 100 years in the field of intellectual and developmental disabilities. The first lesson she described is the need to move past continuous debates services and supports such as institutions versus community-based care in that, "This debate impeded innovation from emerging as we myopically argued principles that we know would not hold" (p. 1).

More recently, *Lane v. Kitzhaber*,[5] a class action lawsuit filed in Oregon in 2012, has upped the ante of the perennial debate over yet another form of human service institutions—the sheltered workshop. The substance of this lawsuit—the desires of individuals to pursue work of their choice at compensatory wages—resonates with past civil rights cases that relate to individuals with disabilities; the right to be free from unnecessary segregation as in *Olmstead v. L.C.*[6] and the right to fair compensation under the FLSA of 1966.[7] The necessity to engage in adversarial litigation in order to uphold rights that all nondisabled working-age adults take for granted puts proof to the fact that a mastery of Gould's first lesson has yet to be achieved.

However, even as the debates regarding institutions and sheltered workshops continue, a larger question emerges when their historical evolutions are examined: What led to all but impenetrable walls of suppression being raised around the liberty of individuals with disabilities to pursue economic autonomy? In her presentation, Gould also observed that, "What we measure will determine the results we achieve" (p. 3). This fundamental adage has great validity when applied to past and present services provided to individuals with disabilities.

That the emergent institutional establishment at the end of the nineteenth century promulgated a distorted picture of the true potential of individuals with disabilities is well documented by other

historians (Ferguson, 1994; Trent 1994; Wolfensberger, 1975). That this same distorted picture continues to impact current efforts to afford opportunities for integrated employment at commensurate wages to individuals with disabilities is less well known or understood. Compounding the distortion and lack of understanding were the mismeasurement and misrepresentations of the productivity resident and patient workers demonstrated in the operation of state-run institutions across the country. Even so, the loss of their labor created a vacuum that left institution workforces and "industrial therapy" programs scrambling for new resources. Absent from consideration of options was the legacy of the resident and patient workers contributions; and, consequently, a century-long effort to roll the barrier of segregation out of the path of economic equity resulted only in it rolling down the hill again.

Early History

To a large degree, current policy and practice associated with individuals with disabilities is based on fear-induced exclusionary propaganda, formulated by an emergent institutional industrial complex that had already been called into question by its founders (Howe, 1866; Seguin, 1870). So thorough was the indoctrination of society into believing that individuals with disabilities, and those with intellectual disabilities in particular, were incompetent and lacked the capacity for even the most basic of human feelings and motivations, that this disinformation was accepted as fact 50 years later[8] and on into the twenty-first century.[9]

The establishment of separate institutions for individuals with intellectual disabilities that began in the 1850s represented the first organized effort to develop the innate potential of individuals with intellectual disabilities (Wolfensberger, 1975, p. 24). As with those engaged in the development of asylums, these initial endeavors were inspired by the concept of "Moral Therapy" formulated by Pinel and used by Seguin as part of his development of approaches that would teach human function (Trent, 1994, p. 43). The early success and adoption of these approaches demonstrated that individuals with intellectual disabilities could be returned to the community as self-sufficient citizens. For example, Raymond (1948), as cited by White and Wolfensberger (1969) found that, "by 1869, eighteen years after Howe had founded the Massachusetts School for Idiots and Feebleminded Youth, its total enrollment was still less than 90. During that period, 465 children had been admitted, 365 had been discharged, many of them as self-supporting members of the community" (p. 5).

Along this vein, in his *A Lecture on Idiocy*, Galt (1895) elaborated further on the need for states to develop institutions that focused exclusively on the "idiot":

> The state must come to the aid of these despised and neglected children of misfortune. Early systematic and unremitting training is necessary to accomplish the surprising and almost incredible results that have been witnessed in the schools for idiots in other countries. Experience, patience and unfaltering devotion to the cause, are qualities absolutely demanded to insure success. (pp. 36–37)

As the campaign for separation of individuals with intellectual disabilities from those with mental, physical, and other traits that had resulted in their institutionalization or incarceration spread across the states, so did an increasing demand for admission of individuals with more severe disabilities. These individuals were far less responsive to the optimistic programs of treatment the training schools had created. Thus, the benevolent beginnings that focused on education, unfortunately, would not endure in the wake of their successes and growing willingness to accommodate an even greater number of individuals. The expanding numbers contributed to an irreversible dichotomy of approaches, as well as a shift in the perceived overall mission of the Training Schools.

In 1893, Fernald described how these changes affected institutional operations, "As now organized, our American institutions are broadly divided into two departments, the school, or educational, and the custodial" (Fernald, 1893, p. 216). Despite this shift, Fernald reiterated an institution's mission as one that still included fostering self-sufficiency and return of individuals to their home communities. At the same time, he also provided a more detailed description of how much the institution depended on their labor:

> In the institution the boys assist the baker, carpenter, and engineer. They do much of the shoemaking, the tailoring, and the painting. They drive teams, build roads, and dig ditches. Nearly all of the institutions have large farms and gardens, which supply enormous quantities of milk and vegetables for the consumption of the inmates. This farm and garden work is largely done by the adult male imbeciles. (Fernald, 1893, p. 218)

The original intention that their residents would attain a modest level of self-sufficiency, and thus be able to return to their respective communities, began to change. However, it was with no small degree of irony that the residents' growing capacity to respond to instruction and training became the cornerstone of rationalizations for not only expanding the

size of the institution, but also retaining those whose newly acquired skills were critical to its sustainability. Ultimately, the original purpose of the founders of the effort to uplift and ennoble the "feebleminded" would be suborned to the point that key leaders in the field at that time found it necessary to deny their former successes.

> The work was good of its kind, and we have not improved upon it, nor can we, for it was expended chiefly upon the class which, as I have told you, is largely unimprovable. (Barr, 1899, p. 209)

Although the vast majority of the field's leadership was willing to cast out their former vision, they were less willing to cast out the focus of their efforts—the residents who had successful learning experiences and gained the skills to move back into society.

> We have proved, too, that in large institutions we can give employment to those adult imbeciles who are beyond what we call the "school age," but are, unfortunately, not beyond the reproductive age, and who must therefore remain under guardianship, or else prove a menace to the public welfare . . . *No* one will gainsay the fact that an imbecile who can pay for his board and his clothes by his own work justifies the expense of bringing within his reach what we will call a " home market." He can no longer be considered a pauper State charge, consuming more than he produces. (Knight, 1895, pp. 561–562)

So, only five decades after its inception, those residents who had proven to be the most capable became the sacrificial lambs to the institutional establishment, with their liberty to be constrained not by their disabilities, but by their *abilities*. In turn, the sacrifice of their freedom and largely compulsory, uncompensated labor would be characterized as the means by which they would be able to expiate their sin of being seen as a burden to society.

Professionalism and The Perpetration of Dehumanization

In *Dehumanization and the Institutional Career* (Vail, 1966), dehumanization is described as the loss of humanity and human attributes (p. 30). The process of dehumanization can be carried out in public as well as private venues. Vail described four key modes of dehumanization that serve to instill an increasing and cumulative shift in the perceptions of the individual and onlookers:

1. Shifting the image of an adult into that of a child;
2. Using and/or treating the individual as an inanimate object;

3. Depicting and/or treating the individual as an animal or beast; and
4. Treating the individual as "taboo," as a thing that must be not be spoken of and actively ignored. (Vail, 1966, p. 36)

Ferguson (1994) shared an unassailable example of Vail's first key mode, "shifting the image of an adult to a child," in his explanation of Bernstein's 1903 intentional denigration of residents at the Rome State Custodial Asylum:

> Bernstein explained that he referred to his inmates as "boys" and "girls" regardless of their ages because "thus speaking of them in their presence tends to incite them in subjection, as they, if called boys and girls, they hearing it, never learn to think of themselves as anyone but children. (Ferguson, 1994, p. 118)

Wolfensberger (1975) laid a critically needed foundation for understanding how a movement that emerged from a desire to mitigate the limitations brought about by impairment devolved into the unchallenged, unchecked denigration and demonization of the innate humanity of people with disabilities. In order to arrive at the pinnacle of this damaging assault on the very personhood of individuals with intellectual disabilities, the leadership launched an unprecedented campaign of institutional expansion and seemingly scientific rhetoric.

In their assessment of the evolution of dehumanization in the institutions, White and Wolfensberger (1969) noted that, "Planning for the mentally retarded during the last twenty years of the 19th Century involved a monstrous warping and twisting of the idealistic programs started by Howe and Wilbur: it resulted in the philosophy that is cast into the location and design of most of the facilities in use today" (p. 9).

In "Bureaucratizing Values," Blatt's (1981) explanation of how changes in the values of bureaucracy come about is applicable to the historical shifts in how individuals with disabilities have been viewed in our society. "One of the characteristics of political activity is that it can seldom expect to succeed by openly seeking its final goal. A program must be presented, rather than as a totally realized whole, in politically feasible steps" (p. 39). Unfortunately, these incremental, and often imperceptible changes, more often have unintended, or detrimental effects.

As the number of institutions expanded in the late nineteenth century, the superintendents relied on their self-proclaimed status as experts in the care and treatment of the "feebleminded," along with their influence with a growing number of state legislatures, to manipulate the public's

perception of the need for more custodial arrangements. By overstating their capacity initially to provide for the protection of individuals with intellectual disabilities, and subsequently society as a whole, they were able to garner significant commitments of public resources to segregation. More importantly, the control they exercised over the message of what individuals were and weren't capable of achieving resulted in a legacy of myths and misconceptions that have continued to influence public policy over a century later.

Professional status was of particular concern to many in the second generation of superintendents. The establishment of the Association of Medical Officers of American Institutions for Idiotic and Feeble-Minded Persons in 1876 was the initial step taken by superintendents who sought to separate themselves, and the field, from the influential Association of Medical Superintendents of American Institutions for the Insane. As stated by Fernald (1893), "The object of the Association is the consideration and discussion of all questions relating to the management, training, and education of idiots and feeble-minded persons. It also lends its influence to the establishment and fostering of institutions for this purpose" (pp. 213–214).

Dr. I. N. Kerlin (1877) was the first to put forth proposals regarding the size, location, organizational structure, and treatment of residents in institutions that would fall directly under their jurisdiction.

> I submit this commonplace paper with this suggestion; that it be referred, with accompanying documents . . . to a special committee, to draft a series of propositions and resolutions setting forth the object of our work—the nature and claims of idiocy and imbecility, the principles on which our institutions are to be founded and conducted, and some details as to the location, building, and general management. (Kerlin, 1877, p. 20)

As observed by Ferguson (1994), "One ingredient in any successful claim to professionalism is a distinct area of special expertise. With the rise of occupational professionalism in the late nineteenth century, the fastest way to establish such expertise was through creation and control of a training and licensing process" (pp. 123–124). As an example, he noted that Charles Bernstein, Superintendent of Rome State Custodial Asylum in New York from 1903 to 1942, was successful at elevating his stature by creating a two-year training program for aspiring attendants.

Aside from the fact that less than 10 percent of individuals with intellectual disabilities were incarcerated in public institutions at the beginning of the twentieth century, the degree of influence attained by the leadership of the elite cadre of superintendents extended far beyond their small

minority (Trent, 1994, p. 95). Kerlin outlined ten recommendations for actions to be taken with regard to individuals who were not yet incarcerated (Yepsen, 1934, pp. 101–102). Three of these recommendations illustrate the breadth of the reach the superintendents felt they had achieved including: the expansion of special education; the identification and registration of all individuals with a "mental deficiency" within a community; and, the promotion of sterilization (Yepsen, 1934, pp. 105–106).

Underlying the success the superintendents achieved in expanding their spheres of influence was the pernicious and systematic dehumanization of individuals with disabilities themselves. In order to solidify their influence and provide sufficient rationale for an increase in the size and number of institutions, the leadership of the field began a campaign of persuasion that incrementally painted an ever more dismal portrait of individuals with intellectual disabilities. And, as previously noted, the campaign began with an attack on the ability of their residents to progress.

Following the self-inflicted downgrading of their own ability to effect long-term change with their residents (an acceptable revision in that this was a belief that was still well within the public's general experience), the superintendents moved on to calling attention to characteristics that established individuals with intellectual disabilities as "other"[10]—individuals whose very humanity could be called into question. Smith (1999) referred to the use of dehumanizing language as "exclusionary discourse" that is used to "otherize" people and push them to the outer boundaries of society (p. 120).

The superintendent's relabeling of their residents as "deviant" beings from whom the public needed protection is a clear example of such. Unfortunately, their rhetoric, of itself, was sufficient in establishing a need for the wholesale segregation of all individuals with disabilities. Further, inasmuch as objections by families to the preemptive removal of their relatives with intellectual disabilities were minimized and subsequently ignored, the leadership of the field experienced little resistance to the gravitation toward an alliance with the emergent eugenics movement of the late 1800s. In doing so, their exclusionary discourse became irrevocably entwined with eugenics—another movement that believed it was necessary to eliminate any deviancy within society.

The superintendents' campaign to discredit the capabilities, and ultimately, the very humanity of individuals with disabilities had its roots in the early efforts of Francis Galton, a cousin of Charles Darwin (Trent, 1994, p. 135). Galton promoted the theory that Darwin's theories regarding the heredity of physical traits were also applicable to mental traits through a process that he labeled "eugenics" (Galton, 1883, p. 17):

> The proportion of weakly and misshapen individuals is not to be estimated by those whom we meet in the streets; the worst cases are out of sight. We should parade before our mind's eye the inmates of the lunatic, idiot, and pauper asylums, the prisoners, the patients in hospitals, the sufferers at home, the crippled, and the congenitally blind. (p. 16)

At the turn of the twentieth century, in addition to Galton's theories, the superintendents embraced another tool to add legitimacy to their claims: the Binet-Simon Measuring Scale of Intelligence. Goddard (1909) was the first to propose its usefulness at the annual meeting the American Association for the Study of the Feeble-minded in his presentation, "Suggestions for Prognostical Classification of Mental Defectives" (Goddard, 1909, p. 50). Following Goddard's presentation, Dr. F. W. Keating, the superintendent of Rosewood State Training School, successfully called for the appointment of its first committee to consider the classification of "mental defectives" (American Association for the Study of the Feeble-Minded, 1909, p. 46).

The revision of Binet-Simon Measuring Scale of Intelligence in 1908 was based on a larger standardization sample and included an increased number of test items. It was also the first edition that made it possible to calculate a subject's *mental age* (Kaplan and Saccuzzo, 2012, p. 15). Consequently, it opened the door to the practice of limiting expectations for individual growth and development to the "mental age" determined by the test. Further, by doing so it contributed greatly to the denigration of individuals with intellectual disabilities, particularly with regard to "shifting the image of an adult into that of a child." The adoption of the notion of "mental age" was to become so ingrained in the institutional culture that by 1920, potential employers of "girls" who were available to do hand sewing and hand laundry from work colonies established by Bernstein, were told, "that the mental age of these colonists is 8 to 10 years and that they must be treated accordingly—watched and made to mind like children—although they can do a great deal of work" (Waggaman, 1920, p. 16).

Goddard's subsequent publication, *The Feebleminded Its Causes and Consequences* (Goddard, 1914) relied heavily on his experience with the Binet-Simon at Vineland Research Laboratory. In his chapter on training and education, he stated unequivocally that, "a person can never be trained to do intelligently any task the doing of which requires intelligence of a higher level than that to which he has attained" (p. 576), Goddard then went on to introduce an "industrial classification system" (see Figure 2.1) that would influence the degree to which training and education would be offered to individuals with intellectual disabilities for decades to come.

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INDUSTRIAL CLASSIFICATION

MENTAL AGE	INDUSTRIAL CAPACITY	GRADE	
Under I year	(a) Helpless, (b) Can walk, (c) With voluntary regard	Low	Idiot
1 yr.	Feeds self. Eats everything	Middle	
2 yrs.	Eats discriminatingly (food from non-food)	High	
3 "	No work, Plays a little	Low	Imbecile
4 "	Tries to help		
5 "	Only simplest tasks	Middle	
6 "	Tasks of short duration, Washes dishes	High	
7 "	Little errands in the house, Dusts		
8 "	Errands, Light work, Makes beds	Low	Moron
9 "	Heavier work, Scrubs, Mends, Lays bricks, Cares for bath-room		
10 "	Good institution helpers, Routine work	Middle	
11 "	Fairly complicated work with only occasional oversight	High	
12 "	Uses machinery, Can care for animals, No supervision for routine work, Cannot plan		

Figure 2.1 Industrial classification of mental defectives.

Source: From Feeblemindedness, Its causes and consequences, Henry H. Goddard, 1914, p. 581.

Heavy reliance on the medical model to categorize and classify "deviancy" resulted in the adoption of tools such as Intelligence Quotients (IQs) and adaptive behavior measures to compare individuals to a statistical norm. These comparisons were presented as scientific evidence of the "differentness" and consequent need for "treatment," which of course, could ostensibly only be carried out in special segregated settings. Quantitative quotients used to determine the degrees of "otherness," such as mental age, IQs, and *productivity quotients* came to be viewed as fixed, immutable, and irrefutable aspects of the narrative used to describe individuals with disabilities. Moreover, they have continued to be used as the means by which the segregation of individuals with disabilities

is rationalized, justified, and financially rewarded up to and including present-day practices in 2015.

In the *Burden of the Feebleminded*, Fernald (1912) issued one of the most damning indictments in the campaign of degradation—the treating an individual as a beast or animal:

> The social and economic burdens of uncomplicated feeble-mindedness are only too well known. The feeble-minded are a parasitic, predatory class, never capable of self-support or of managing their own affairs. The great majority will ultimately become public charges in some form. They cause unutterable sorrow at home and are a menace and danger to the community. (Fernald, 1912, pp. 991–915)

Sentiments such as those expressed by Fernald would be likewise expressed five decades later by the superintendent of Pineland Hospital and Training Center in Pownal, Maine.

> Today they are saved, they survive, their numbers are growing into legions of so-called human beings deprived of the animal instinct of survival, deprived of cognitive and perceptive functions, disoriented, totally demented. (Roche Report, 1968, p. 5)

Ultimately, these early twentieth-century superintendents of the institutions were successful in establishing their positions as the definitive experts in the field. In fact, their authority was so pervasive that, in many states, institutions would become the center of a hub around which the development of all other services and supports would evolve. This model of growth and development provides some explanation of how these same dehumanizing practices and rationales would later be found in community service settings. For example, Taylor et al. (1981) found an abundance of examples in their review of facility responses to results from Intermediate Care Facilities for the Mentally Retarded (ICFs/MR) monitoring efforts. They found that dehumanizing rationales were frequently used as responses to cited deficiencies:

> Since the residents of our Unit I, the halls with bird names, range from two to four years in mental age and also display numerous behavior disorders, we find it necessary to keep bathroom supplies such as soap, tissue, and towels out of reach most of time. (Taylor et al., 1981, p. 85)

A century later, Carey (2009) provided a concise appraisal of the limitations created by the superintendents in their dominant role as gatekeepers to rights and services. "Even though they spoke at times of "rights,"

rarely did they imagine that people with disabilities should have rights that could shape the behavior of professionals or render meaningless professional judgment of who should and should not receive services and rights" (p. 104). It was this veil of professional hubris and influence that current residents and former residents would seek to penetrate when they asserted their right to be paid fairly for the work they performed while institutionalized.

Involuntary Servitude and Peonage in Public Institutions

> During my study of consumer/survivor/ex-patient history I took [these] photographs [of lead shoes] at Vermont State School. The staff person who gave me a short tour of the old hospital told me that in the late 19th and early 20th century, these heavy "lead shoes" were routinely attached to the patients' feet when they worked on the hospital's farm. The lead shoes were strapped over the feet and then a chain was inserted through the round holes, tethering both feet at no more than a stride's length apart. In effect, the lead shoes stopped patients from running away from the hospital while they were working in the fields. (Deegan, 2013)

Photo 2.1 Lead shoes worn while working on the hospital farm, Vermont State Hospital, Vermont (Courtesy of Pat Deegan, photographer).

Institutional peonage was defined by Friedman (1973) to be the widespread practice of employing residents in institutions for the mentally handicapped to perform productive labor associated with the maintenance of the institution without adequate compensation (p. 639).[11] Originally, the labor of the residents in the original model of "training schools" was instituted as part of a comprehensive philosophy of training for social assimilation. The shift to social isolation based on the carefully cultivated public intolerance, rapidly transformed such labor into involuntary servitude and peonage in order to accommodate the resultant growth rate in the institutional population. Their labor became an invisible subsidy of the deprivation of liberty they encountered comparable to that of southern textile workers or miners who "owed their soul to the Company Store."

As indicated earlier, institutional peonage was also a widespread practice in state-run institutions for individuals with mental illness where such practices were viewed as "therapeutic" and promoted under the auspices of "industrial therapy" (Gerjuoy, Fessenden, Goril, & Price, 1965, p. 1). In this shift in language (yet another example of involution) they sought to distance its practice from work programs they viewed as, "less reputable than custodialism" (p. 5). In their promotion of "industrial therapy" as an effective, in-hospital, treatment tool for individuals with mental illness, Gerjuoy et. al. ascribed the inception of industrial therapy to the historical emergence of "moral therapy."[12] In addition to the influence of "moral therapy" on the utilization of patient labor, Gerjuoy et. al. acknowledged that, "The emergence in post-medieval society of the total-care institution as a subcommunity into which society relegated its misfits gave rise to powerful economic pressures for intramural work by patients" (p. 5).

The devaluation of the labor of the "resident workers" left an imprint that indelibly marked individuals with intellectual disabilities and/or mental illness as incapable of meaningful and productive contributions—unworthy of full economic reward. This brand permeated the consciousness of professionals, families, and the individuals themselves, and influenced the inadequate development of alternatives to their exploitation when the practice of involuntary servitude was called into question. Following the dissolution of the institutional peonage, the degree to which the institution depended on their labor became a taboo subject. The vacuum created by this "taboo" was filled by myths of incompetence, dependency, and lassitude by those in control of the message. The extensive written descriptions of the broad range of work performed, the long hours the residents had been required to toil, were swept aside by the sheer numbers of individuals who were leaving the facilities.

Residents in the training schools and patients in the mental hospitals performed the same types of work, under the same conditions. In addition to being viewed as a form of "treatment," it was also considered a means by which they could contribute to the cause of reducing the overall costs of their institutionalization. Walter Wilson (1933), a labor activist concerned with forced labor, made mention of it in his book on the subject, but such references were rare and failed to influence public opinion regarding its practice:

> Less recognized but very important sources of forced labor in the United States are orphan homes, religious homes for children, government schools for Indian children, poorhouses, insane asylums, and similar institutions. Unfortunately, no study has ever been made of them but it is commonly recognized that they all exploit direct forced labor, in fact, hard labor imposed on inmates of these institutions is an American Tradition. An example of the sort of thing we mean is indicated by an admission from Mrs. Franklin D. Roosevelt, who is connected with the Rome School for mental defectives, that girls from that institution were being exploited in private homes for 60 cents a day, the "wages" being paid, not to the girls, but to the state. (Wilson, 1933, 22)

Prevalence

One of the most ubiquitous forms of peonage was labor performed on the farms established at nearly every facility or colony that continued well into the twentieth century. However, some institutions were less successful with the exclusive use of residents for farm production to the point of self-sufficiency residents. A report on Lincoln State School and Colony in Illinois claimed credit for being the first such farm colony in the world when it was founded in 1891 (Ide, 1928, pp. 1–2).

Waggaman (1920) provides a breakdown of the products produced and/or services performed by resident workers in three states along with the status of institution establishment in several others. Over the course of 1916, the 300 resident workers at the Templeton Colony—an extension of the Massachusetts School for the Feeble-minded produced 465,903 quarts of milk; 1,353 barrels of apples; 5,856 bushels of potatoes; 3,343 bushels of corn; 13,611 pounds of pork; and 253 tons of hay. Altogether, the products of their labor valued at over $67,000 at that time.

The *1924–1926 Report on the Pennhurst State School* described a significant increase in milk production of an average of 9,618 pounds of milk per head (Pennhurst State School, n.d., p. 21). Images of residents laboring in all aspects of the Pennhurst farm operation taken in 1954 attest to their usefulness as cultivated acreage doubled from 740 acres in 1916 to

1,400 acres in 1954 (Pirmann, 2015, p. 40). In his testimony before the US Senate Subcommittee on Consitutional Rights in 1970, Dr. F. Lewis Bartlett decried the minimizing of patient labor on the grounds of the Norristown State Hospital by the Pennsylvania Evening Bulletin in testimony. He went on to add that:

> The Pennsylvania State hospital farm program is a big operation with vested interests and its patient laborers are not limited to 77 duffers "gravitating" to the business end of shovels and pitchforks. According to the Department of Public Welfare, 3,000 patients, in 1963, farmed 9,700 acres, attained a crop yield one and a half times that of neighboring farms and produced $4.2 million worth of food . . . However, it has since become self evident that maintaining a labor force of 3,000 patients, able and compliant enough to work and needed to keep the operation and fiscal delusion alive, represented a cost of some kind, and no amount of rationalizing the work as therapy could convert the extravagances of exploiting patient labor to a profit. (Constitutional Rights of the Mentally Ill, 1970, pp. 196–197).

However, not all farms were reported to be as profitable as those in Massachusetts and Pennsylvania. By 1931, the Superintendent of the Florida Farm Colony found that few of institution's residents were physically strong and/or sufficiently motivated to be used in the farm's workforce (Noll, 2015, p. 34). Likewise, in North Carolina, the Superintendent of the Caswell Training School notified the State Board of Charities that the institution's "boys" could not be depended on to cultivate more than 100 acres (p. 34).

The use of resident labor in areas other than farm work was equally ubiquitous. For example, Ide's report went on to document that, of the 2,460 present on the day the 1928 institution's census was taken, 1,411 were working in the 29 industries within the institution—a little over 50 percent of the total (Ide, 1928, pp. 1–2). Furthermore, as institutions continued to increase in size and number, so did the amount of work performed by their residents.

Studies carried out in the mid-twentieth century illustrate the extent to which public institutions for individuals with intellectual disabilities and/or mental illness relied on the utilization of resident labor remained relatively constant in subsequent decades. In Minnesota, a study of institutions for individuals with intellectual disabilities reported on the utilization of resident workers in great detail (State of Minnesota, 1964). In the four institutions studied, 2,716 residents out of a total of 6,344 were assigned to 25 different work assignments with most working 40 hours a week (p. 55). The greatest number of residents worked as nursing aides

(423 ¾), custodians (260 ¼), and laundry workers (114 ½) (p. 58). The study also included detailed descriptions of the work assignments along with productivity studies that resulted an estimated need for 924 ½ new positions at an annual cost of $2,435,652 (p. 59).

In Pennsylvania, Pyle (1978) focused her dissertation on the changes in institutions for individuals with mental illness as the result of the filing of the peonage case, *Downs v. Department of Public Welfare*. Her findings indicated that at the time the Pennsylvania litigation was filed, approximately 6,700 individuals with mental illness or intellectual disabilities were considered to be in peonage (Pyle, 1978, p. 46).

On a regional level, Payne, Johnson, and Abelson (1969) conducted a survey of 22 institutions in 18 Western states representing a total of 24,257 individuals with intellectual disabilities. Their data regarding resident labor focused on ambulatory males and revealed that 53 percent of the 9,538 (5,055) ambulatory were working as ward helpers and 40 percent (3,815) were assigned to work projects. Among the data, they also found 288 males who had intelligence quotients of above the generally accepted limit at that time (80-plus). A more detailed examination for reasons that would explain their continued institutionalization determined that 95 percent of this group worked as ward helpers or were being considered for that position (p. 58).

Results from a national survey about vocational training sent to 93 institutions were reported in the *American Journal of Mental Deficiency* in 1957. Responses by 52 of the institutions to the question about the numbers of patients who were working provided an estimate of about 27,000 or 27 percent of the total reported population (Goldberg, 1957, p. 698). According to the responses, residents were employed as farm helpers, hotel workers, hospital workers, laundry workers, janitors, kitchen helpers, mother's helpers, factory workers, nursing home helper, car washer, restaurant helper, ushers, gas station helpers, army, poultry farm helpers, bellboys, elevator operators, gravediggers, Western Union messengers, and mink ranchers. Thirty-one percent of the institutions said patients were remunerated for work at rates that varied between 25 cents to 5 dollars per month. Other forms of compensation identified included commissary cards, treats, special privileges, the prestige value of errand jobs, coupon books; $2 per month for 40 hours per week and $1 per month for 20 hours per week.

In 1963, the Committee on Residential Care of the National Association of Retarded Citizens (NARC) conducted a national survey of 111 institutions with 99 returns (NARC, 1963). The responses of 73 institutions resulted in a total of 24,640 resident workers *in training*. However, this number was felt to be low inasmuch the structure of the

interview question did not provide for the reporting of those resident workers who had *completed* their training (p. 146). A third national survey of institutionalized adults conducted in 1967 (Frohlich, 1974) found that one patient in three was assigned work in the institution, mostly in the psychiatric institutions, schools, and homes for the mentally retarded. Again, most patients were not paid for working.

The most extensive report on the prevalence of institutional peonage was Richard Kenney's dissertation, *The Prevalence of Peonage in State Supported Total Institutions for the Mentally Retarded*. In his introduction Kenney (1972) observed: "Here we have individuals who are incarcerated, without their tacit approval, who work at a job for nothing or minimal wages; and it is the consensus even today that they should pay for the privilege of being institutionalized" (p. 11). Of the 167 state institutions Kenney contacted, 72 institutions located in 37 states returned usable data. Altogether, of a census of 80,089 residents, 12,400 were reported to be full-time workers (15.5%) and another 7,988 were reported to be part-time workers (9.97%)—for an overall total of 25.5 percent.

Symbolic payment reported by Kenney's respondents was in the form of special privileges that included: "medical care," "psychological services," "dental care," along with "coffee breaks twice a day" (p. 103). With regard to the value of the residents' labor, there were almost 1,200 resident workers whom the practitioners felt were, on an individual basis, equal to staff members in productivity (p. 118). The application of the overall percentage (25.5) identified by Kenney (1972) to the 1970 resident census of 186,743 in institutions for individuals with intellectual disabilities, indicates that the total number of resident workers could have been well over 47,000.

Finally, in *The Economics of Mental Retardation*, Conley (1973) included the unpaid work of resident workers in his overall study of the cost of service provision to individuals with intellectual disabilities. His estimate of the fair market value of the resident workers was based on the results of a study from the Polk State School in Pennsylvania. The Polk study identified a number of important variables including:

1. The percentage of resident workers by degree of disability;
2. The ratio of work performance ratings by degree of disability;
3. The unpaid resident workers outnumbered full-time paid employees by a ratio of almost 2 to 1; and
4. *The unpaid resident-workers at Polk State School worked 45 percent more hours than all of the paid employees of the institution.* [Italics added] (pp. 99–101)

Conley then applied a hypothetical wage rate scale of $.00 to $1.50 to the performance ratings along with the other variables to the estimated number of 52,000 resident workers nationwide in 1968. When taking all of the factors into account, he determined that the total value of *unpaid* patient labor would therefore be of the order of $1,101,800 for 1,770,000 hours worked in public institutions in 1968 (pp. 101–102). At the 2015 hourly minimum wage rate of $7.25 per hour, the current economic value of the unpaid resident worker hours would have been *$12,832,500.*

Labor and Coercion

Whether the labor that the residents performed was done so voluntarily or under coercion is a matter of perspective, that of the institution or that of the individual resident. In his history, *Mental Illness and American Society,* Grob (1987) attributed resident labor as an attempt to offset the disorganization and monotony of hospital life and minimized the contribution that might have been made to institutional operations.

> Although patient labor had some minor impact on institutional finances, economic considerations played a decidedly minor role. Virtually no one suggested that patients be required to work in order to pay for their upkeep and thus relieve the fiscal burden on the state. On the contrary, work was important because of its therapeutic effect; financial gains were simply a desirable but not a necessary byproduct. Work, however, never proved the hoped-for panacea. Many hospitals lacked facilities for other than routine labor. (Grob, 1987, p. 23)

In 1946, Zahn expressed his outrage over the treatment of resident workers at the Rosewood State Training School in Maryland, "Rosewood's program of 'work therapy,' if it can seriously be so named, goes beyond the limits of justice and is instead an outright exploitation of patients' labor" (p. 2). He continued with a lengthy description of how one resident in particular was overworked:

> The more capable and willing a patient is, the more he or she is overworked. One patient does practically all of the heavy work in a cottage having a large proportion of helpless patients; his workday *every day* begins at 5:30 AM and continues to about 7 PM. A young girl works as a nurse's aide in the clinic. After the morning treatment period is over, she (and the other clinic assistants—patients, of course) wash the entire basement floor, offices and all, and at frequent intervals wax and polish the floor as well. This should be enough to be considered a full day's work, extending as it does from 8:30 to 5; but, because she is such a capable worker,

> this girl is kept in a cottage housing children much younger than herself, so that she may help with the care of the little patients *before and after* her duties in the hospital. In addition, after a thoroughly exploited day, she frequently cleans the attendants' private living quarters to earn a little spending money. Most of her friends and two of her sisters are at a different cottage that houses girls of her age; however, she is so valuable at the small girls' cottage that, in spite of her many pleas and the consideration her other work should entitle her to, she is consistently refused a transfer to that cottage wherein she rightfully belongs. (p. 3)

The first investigative report on conditions at a state-run institution for individuals with mental illness also appeared in the middle of the twentieth century. In a three-part series published in Parade magazine, Goldman and Ross (1956) observed that:

> But perhaps the hottest issue of all involves unpaid labor. Parade found patients who worked for 10, 12, 14 hours a day for nothing, or close to it. Most officials admit hospitals could not operate without such workers 'because hospital budgets aren't high enough. (Goldman & Ross, 1956, p. 17)

Other references to resident labor, how it benefited the institution and how it was coerced are prevalent throughout the literature. Two such reports include:

> There were periods of rebellion. Seven times in three years she refused to work. But the attendants, whose work load was increased by her recalcitrance, threatened to enter unfavorable notations in her record, took away her cigarettes, ignored her physical complaints (she frequently suffered headaches and pains in her lower back and legs), turned off the TV in the middle of whatever program she was watching, and in general made her life on the ward so disagreeable that she was eventually forced to choose the drudgery of the kitchen over the antagonism of the ward. (Ennis, 1972, pp. 111–112)
>
> Good workers were jealously guarded by hard-pressed employees; discharge of any one of them to the community was a loss. One can readily see how the work system mitigated against the return to the community of precisely those patients, the good workers, who might do best outside the hospital. Patients worked in some thirty to forty hospital areas, the vast majority without a cent of pay. To the work supervisors, they were a special breed—a cross between a favorite pet and a slave laborer. (Greenblatt, Sharaf, & Stone, 1971, pp. 107–108)

In "A Personal Memoir of the State Hospitals of the 1950s," William Vogel (1991) provided what may be the most poignant assessment of

the labor the residents performed. While working for two years as an attendant, Vogel identified a variety of motivations that influenced the residents' willingness to work including increased feelings of self-worth, avoidance of boredom, efforts to curry favor with the staff, coercion by staff, and, "because they believed (often incorrectly) that if they demonstrated a capacity for work, they would be discharged sooner" (p. 596).

Acknowledging and exposing the practice

By the middle of the twentieth century, the presence of residents laboring in the institutions was felt throughout their operation. By 1967, the total population in the institutions for individuals with intellectual disabilities had grown to a high point of 194,650 individuals (Lakin, Krantz, Bruininks, Clumpner & Hill, 1982, p. 19). The application of the Kenny's (1972) finding of a 25 percent engagement of residents in some type of institutional labor to this would indicate a resident workforce of approximately 48,662 individuals—individuals whose labor was performed far away from the scrutiny of the public eye.

Some visitors to the facilities, however, did take notice and their observations found their way into publications available to the general public. Edith Stern (1948) toured a number of Southern institutions and described overcrowded environments, devoid of decoration. When she asked why some of the residents weren't returned to the community following their training, one state official told her, "I'm sure over twenty per cent of the high-grades now in state training schools could get out and get along if they weren't so useful," and another stated that, "I'd have to hire ten men to do the work of the farm boys" (pp. 7–8).

Nonetheless, the rare article regarding conditions in the state-run institutions that caught the public eye was not sufficient to garner sustained attention, let alone generate discussions regarding the facilities' operational dependency on residents they were pledged to serve. One notable exception to the lack of attention paid to the issue of institutional peonage by professionals within the field was the publication of an article by Benedict Nagler and Marjorie Kirkland, employees at the Lynchburg Training School and Hospital. Nagler and Kirkland (1961) began their essay, Institutional Work Programs—Boon or Bane, with a clear indictment of resident labor, "The exploitation of patients which characterized institutional work programs in the past is no longer compatible with institutional philosophies and goals, yet legislatures, as a rule, have not increased budgets to the extent that institutions can get along without patients' work" (p. 375).

Despite a lack of debate about the challenge to unpaid patient labor put forth by Nagler and Kirkland, two subsequent articles published in 1963 and 1964, were able to acquire much broader audiences. The "Economic Value of the Psychiatric Inpatient" was published in *The Lancet* in 1963. The author, J. A. R. Bickford, was the first to outrightly assert that the patients' unpaid labor was essential to the economy of the mental hospital. He provided detailed analysis of the value of the types and sheer number of hours of work performed by mental hospital patients across England. He affirmed that, "Patients as patients are not thought of when this term is used (that would make the speaker uncomfortable), but only the commodity they provide—labour." Labor, Bickford strongly asserted, that, "In fact, without it, the hospital could not run and the mental-hospital service would collapse."

Bickford's article also delved into the question of how much patients should be paid:

> One way would be to assess the number of cleaners, gardeners, labourers, porters, seamstresses who should be employed, calculate their wages, and distribute the money between the patients who work; but this will never happen. A patient who uses a motor-mower all day in the summer gets 8s. a week, a patient who works for thirty hours a week as a kitchen maid or ward-domestic the same or less. *Perhaps a woman in her nineties who cleans all day gets nothing because she has a small pension and the hospital cannot afford to pay her.* [Italics added] (Bickford, 1963, p. 714)

Bickford emphasized that, "The work is interesting, the patient becomes skilled. The atmosphere is happy. A lot of excellent work is done for the National Health Service. All the same, these departments should be forbidden. Once the patient has become useful, the hospital is reluctant to discharge him, and he is probably unwilling to go" (Bickford, 1963, p. 714).

F. Lewis Bartlett's article, "Institutional Peonage, Our Exploitation of Mental Patients," was published the following year in the *Atlantic Monthly*. His reflections mirrored that of Bickford and were based on his experience during his psychiatry resident as part of his medical training. During his psychiatric residency, he had created a small team of patients that he named the "First Aiders." These patients assisted with the handling of difficult patients and in return, they received better housing and a 50-cent canteen card per week. In hindsight, Bartlett questioned the impact his creation of the team had on its individual members in that, "Their role of institutional worker was so established and self-effacing

and accepted that the question of their further recovery never came up" (Bartlett, 1964, p. 116).

Bartlett's concern about his actions was an example of "self-dehumanization"—another outcome relating to the dehumanization. Vail noted that, "The involvement of self in the dehumanization process should be considered. In addition to the corrosion and corruption of self that happens to the victims, the agents and the witnesses, there is a special act of self-dehumanization. This may occur in mild forms in bureaucracy where the mode is to 'blend in' and become an organization man" (Vail, 1966, p. 31).

Vail (1966) provided his own observations regarding the compensation of patients for work done:

> It is hard to understand why the suggestion that men should be paid for the work that they do should arouse such intense feelings as does the proposal that patients employed in state hospitals industries should be tangibly rewarded. There is apparently an amazing double standard at work: On the one hand, American as almost made a religion out of free enterprise and the profit motive as an incentive to excellence; on the other hand, we can turn right around and insist that a particular group can work for years for the sheer joy of it; for the reward of knowing that their contribution is essential; or in fair exchange for the protection they are getting. Nor are we free from the tainted rationalizations of the slave-holder, that these merry folk are really undergoing an experience that is good for them, even though the practices patently do not square with the standards of the capitalist society to which they someday will return. (p. 178)

Smith (1972) recorded his personal experiences with dehumanization based on a two-part study he conducted in which he had himself intentionally admitted to a state mental hospital. Smith, a psychiatrist, wanted first-hand experience with the conditions that newly admitted patients encountered. He also wanted to categorize the types of dehumanization present in a psychiatric hospital ward using Vail's checklist for depersonalization. Following a ten-day hospitalization, he used Vail's 22-question protocol to analyze his experience. With regard to work, Smith's checklist supplied the following responses to Questions H, "To what extent do we negate the usual incentives to work: pay, advancement, prestige, taking care of one's needs? Do we give the patient any reason to feel he should work?"

1. There is no pay or apparent opportunity for advancement, and work is not necessary in taking care of one's needs.

2. Doing menial clean-up tasks on the ward enhances one's chances of approval for a limited ground pass.
3. There is no significant prestige in having a job on the grounds.
4. Patients who work at the canteen receive $.20 per hour. (p. 83)

Based on his experience, Smith concluded that reducing dehumanization and helping the patient readapt to society in order to live a productive life were at odds with the traditions of the institution.

The Bickford and Bartlett articles provided the catalyst for debates over resident labor within the field on both sides of the Atlantic. Professionals across institutions for individuals with intellectual disabilities, mental illness, and even juvenile facilities began to deliberate on the practice along with the lack of clear-cut answers to what would happen if state budgets were made to include wages for the work of their institutions' invisible work forces.

CHAPTER 3

FIGHTING FOREST FIRES: THE LOST HERITAGE OF COMPETENCE AND CONTRIBUTION

> *One of the purposes of the undertaking was to show how helpful the colonists could be in running the fire lines, in fighting fires, in agricultural work, and reforestation . . . The colonists came from the Vineland Training School. (Waggaman, 1920, p. 12)*

When Robert Perske wrote "The Dignity of Risk and the Mentally Retarded" in 1972, fighting forest fires might not have been a useful metaphor for how individuals with intellectual disabilities should be prepared to face the world. Yet, the men who built and lived at the Four Mile Colony in New Jersey did so in 1922.

> The boys' most difficult and exciting task has always been fighting forest fires. The brave firefighters know their job better than ever, and are constantly on call from neighborhoods for miles around. The first mention of this enemy was on May 17, 1914, the Colony's first spring. Not a year has passed without its visitation. Perhaps the worst one of all was in the spring of 1922, when for three days the Colony was cut off from all outside communication. The fire was completely around them, with all roads impassible, and all telephone wires down. (Devery, 1939, pp. 63–64)

It is highly unlikely that employment as a "Hot Shot" would be an acceptable job placement for individuals with intellectual disabilities in the twenty-first century. Still, fighting fires was only one of hundreds of examples of contributions that individuals with intellectual disabilities made over the course of the previous century.

Evidence of the productivity of individuals with disabilities and their capacity for economic self-sufficiency at the beginning of the twentieth century, was overshadowed by the "social control of the feebleminded and other deviants" rhetoric of the most highly regarded leaders of the

field at that time. Yet, the historical record of institutions throughout the nineteenth and twentieth centuries provide both anecdotal as well as research data attesting to the productivity of individuals with disabilities in segregated as well as nonsegregated environments.

With regard as to how productivity is properly viewed, Horner and Bellamy (1980) provided a definitional framework, "Productive capacity refers to an individual's or organizations' predicted level of productivity at any point in time. While productivity refers to how much was produced, productive capacity refers to an estimate of how much will be produced" (pp. 4–5). They also provided examples of factors that affect the productive capacity of individuals, including:

> (a) the type of task being performed, (b) the existing skill level of the worker, (c) the ability of the worker to learn requisite skills not in his or her repertoire, (d) setting conditions under which training and production take place, and (e) the level of capitalization and automation of the production process. (p. 5)

Horner and Bellamy stressed that productivity is not static and can change as the result of the job demands and experience and that, as such, it would not be useful to consider productivity as a stable personality trait.

Early Work with School-Age Youth

Throughout the early growth period of the institutions, another social reform movement was underway within public education to establish special classes for students who were not able to keep pace with their peers. The advent of intellectual testing made it possible to develop such classes based on the evidence of lower IQs. The founders of these classrooms did so in direct contradiction of the emerging trend toward establishing "social control" by expanding institutions. Moreover, the positive outcomes achieved through instruction in public education settings are important indicators of how the direction of public resources to segregation in public institutions undermined more promising service approaches. Regrettably, the accomplishments of ordinary public school teachers did not carry the same weight as the pronouncements of the institutional establishment and would ultimately be ignored when the organization of segregated community services began in earnest.

The first public school classrooms for children with intellectual disabilities were created between 1895 and 1900 (Channing, 1932). An early focus of the high-school-aged classroom curriculum was preparation for employment upon graduation. An article in the *Educational*

Research Bulletin reported on the emphasis the Los Angeles City Schools were placing on the preparation of Special Education students for wage-earning occupations (McCredy, 1930, p. 6). Hendrick and MacMillan (1988) also described how the public school curriculum was modified to provide students with intellectual disabilities with preparation for jobs in the 1920s.

> While acknowledging that level of intelligence determined the type of job graduates could expect to obtain, school officials were confident that success in a job was determined by other factors which could be taught, such as physical vitality, industry, reliability, sociability, obedience, accuracy, neatness, speed, and punctuality. (p. 410)

In 1930, the United States Department of Labor commissioned Alice Channing to conduct a study to find out how these students were faring after graduation (Channing, 1932). Over the course of two years, Channing researched the employment histories of 949 boys and girls from seven cities who had been out of school for three years or more, and another 167 boys and girls who had lived in two Illinois State Institutions. She found that 74 percent of the boys and 69 percent of the girls had worked continuously for the same employer for at least a year—in occupations with wages that were in keeping with mostly unskilled and semi-skilled labor that required little training (p. 67).

Thirty-one percent of the boys and 38 percent of the girls received assistance in finding work from friends or relatives.[1] Only five percent of the boys and seven percent of the girls had any assistance from formal public agencies such as schools, or employment offices (Channing, 1932, p. 16). Correspondingly, the boys and girls leaving the two institutions in Illinois found employment in somewhat equal numbers; 89 percent of those who left the institution and 94 percent of the special education students had been employed at some time, and 45 percent of those who left the institutions and 57 percent who left school were employed at the time of Channing's interviews (Channing, 1932, p. 95).

A subsequent report on the implementation of a school to work program implemented in Hartford, Connecticut, was presented by Maude Keator (1936) at the Sixtieth Annual Session of the American Association on Mental Deficiency (AAMD). In "Industrial Supervision of Mentally Inferior Youths", Keator reported that:

> The aim of the Commission is a most unpretentious one. No attempt at diagnosis nor classification is made, nor is remedial treatment instituted. The findings of the public school system are accepted, and, above all, the

Photo 3.1 Patient-made dresses, Clarinda State Hospital, Clarinda, Iowa (Courtesy of Christopher Payne, photographer).

> Commission endeavors to avoid the toes of possibly overlapping organizations. When a special class child reaches the sixteenth birthday, the public school notifies the chairman of the Commission. As soon as possible thereafter, a social worker calls at the home to size up the situation as a whole, and also to make an inventory of the child's possibilities. (p. 90)

Particularly noteworthy is the fact that Keator's program successfully placed 61 students in a broad range of jobs *at height of the Great Depression*. At no point in her report did she allude to the economic downturn or the nature of student's disability as barriers to employment.

Productivity In and Outside of the Institutions

Labor performed by resident and patient workers in the institutions covered a broad range of domestic, agricultural, and industrial work common to that era. Recapturing those data provide for a broader and more in-depth examination of the types of labor in which individuals with intellectual disabilities found success. The historic record also includes the efforts of researchers to formulate new approaches for enhancing

productivity, the premise of which ranged from increasing motivation to enhanced opportunities for skill development and performance. Finally, the recovered data are an important negation of the common misconception that individuals with intellectual and other disabilities are unable to engage in work that is complex, demanding, technologically driven, and socially integrated.

Proclamations that serve to highlight the "discovery" that individuals with disabilities have demonstrated their capacity to be capable, competent employees were no less prevalent at the beginning of the twentieth century than they are today. Delegates to the State Board of Charities and Corrections, General Assembly of Nineteen Sixteen from Virginia, provided another example of productivity, "Speaking of the efficiency of the feeble-minded man, Mr. Alexander Johnson, of Vineland, N.J., says he can be made to provide for himself by his work, and places his economic value at 55 cents per day" (Hoke, 1915, p. 16).

Reports and narratives regarding the work performed in the "Colonies" established by the institutions at the beginning of the twentieth century are particularly abundant. In 1919, Fernald provided the Massachusetts Society for Mental Hygiene with a report on the results of the "After-Care Study of the Patients Discharged from Waverly for a Period of Twenty-five Years." Histories obtained for 176 women discharged found that at least "30 percent of the group were economic assets to the extent of at least earning their own way in the world" (Davies, 1930, p. 194).

Davies was able to provide additional examples of labor performed in the Industrial Colonies established in 1917 by the Rome State School in New York. During World War I, women from the Industrial Colonies were recruited to work in textile mills that were struggling to meet government orders and they continued employment there after the war. With regard to compensation, Davis reported that: "The colony girls received the same rate of pay as other girls or women doing the same work. Wages were paid on a piecework basis" (Davies, 1959, p. 134).

In 1960, Dorothy Durling, an assistant psychologist at the Wrenthem State School in Massachusetts, carried out a survey to determine the nature of vocational rehabilitation programs in state mental hospitals. A total of 114 replies out of 215 (53%) were received. The replies indicated that 63 percent were receiving some form of vocational training. The training provided focused on training for integrated employment in commercial, trade, domestic science, farming, animal husbandry, dairy, and beautician occupations. One hospital had established a training program for stenographers and typists (p. 107).

The presidency of John F. Kennedy serves as a historical line of demarcation between the golden era of the institutional industrial complex—with

its narrow focus on promoting segregation and other limits on life's opportunities—and the far broader agenda envisioned by the 26 members appointed to the President's Panel on Mental Retardation in 1961. In 1966, the renamed President's Committee on Mental Retardation[2] (PCMR) began a long-term effort to educate the president and the field on the potential of individuals with intellectual disabilities for economic autonomy.

One of the first initiatives of PCMR was changing the examination procedures for civil service employment application in the federal government so that federal agencies would be able to hire individuals with intellectual disabilities. In 1967, the Committee reported that:

> Trained mentally retarded workers are in wide demand in industry and government. Over 3,000 mentally retarded workers are now employed in 39 federal agencies; until 3 years ago, examination procedures barred all such workers from federal employment. (President's Committee on Mental Retardation, 1967, p. 15)

As indicated in Table 3.1, by 1969 these numbers had grown to over 5,784 individuals (United States President's Committee on Mental Retardation, 1969, pp. 17–18). In 1972, the Civil Service Commission reported that a cumulative total of 7,442 individuals with intellectual disabilities had been hired by 40 Federal agencies across the United States. Of those, 53 percent were still employed and 2,105 had received promotions or changed pay systems (p. 3).

The job titles of the civil service positions obtained by individuals with intellectual disabilities in the 1969 report are very similar to those identified in *Making Job Opportunities for Mentally Retarded People a Reality*, the 1980 publication developed by the NARC[3]. This manual was intended to help NARC members develop new employment opportunities for individuals with intellectual disabilities (p. iv). Guidelines for vocational preparation, job development and placement, and the use of volunteers to promote employment were included. Table 3.2 presents the list of jobs identified as ones in which individuals with intellectual disabilities have "proven their capabilities and usefulness" (p. 8).

In the mid-twentieth century, another new presidential committee called for greater attention to the employability of individuals with disabilities. An article in the President's Committee on Employment of the Handicapped newsletter in 1963, Remco Industries in Newark, NJ, described the impact that adding individuals with intellectual disabilities made on their bottom line: "Overall plant efficiency is 92 per cent. Efficiency of retarded workers, who make up about one-quarter of the

Table 3.1 *MR 69 Toward Progress: The Story of a Decade* civil service employment status

Mentally Retarded Adults Employed by the Federal Government

Job Title	*Number*	*Job Title*	*Number*
Animal caretaker	5	Laundry worker	273
Bindery worker	5	Library assistant	7
Building maintenance wkr.	114	Mail clerk	170
Buoy maintenance helper	2	Mail clk. (motor veh. opr.)	1
Card punch operator	51	Mail and file clerk	27
Carpenter	1	Mail handler	186
Carpenter helper	5	Medical technician	8
Cartographic aide	3	Messenger	296
Charman	2	Mess attendant	445
Clerk	629	Nursery worker	3
Clerk, File	158	Office draftsman	2
Clerk (money counter)	3	Office machine operator	164
Clerk (numbering)	2	Paint worker	2
Clerk-receptions	1	Photocopy operator	8
Clerk-typist	89	Photographic processing aide	7
Control clerk	6	Physical Science aide	5
Cook	1	Porter	18
Currency examiner	1	Press cleaner	9
Dishwasher	5	Press (flatwork)	15

continued

Table 3.1 Continued

Mentally Retarded Adults Employed by the Federal Government

Job Title	*Number*	*Job Title*	*Number*
Elevator operator	11	Printing plant worker	22
Engineering aide	6	Publications supply clerk	17
Farm laborer	7	Radio repairer helper	1
Food service worker	219	Sales store worker	16
Forest worker	14	Small arms repairer helper	6
Furniture repairman helper	3	Stock clerk	77
Garageman	3	Substitute mail handler	734
Groceryman	2	Supply clerk	23
Ground maintenance worker	27	Telephone operator	1
Housekeeping aide	109	Vehicle maintenance worker	10
Janitor	341	Ward attendant	13
Laboratory worker	28	Warehouseman	26
Laborer	1303	Washman	15
Laundry marker	4	Washman helper	17
		Total	5,784

The US Civil Service Commission has written agreements with 42 federal departments and agencies to employ the mentally retarded in accordance with federal personnel practices.In mid-1969, the government employed 5,784 mentally retarded persons in 66 job titles.

Table 3.2 Jobs recommended by NARC for individuals with intellectual disabilities

The list of jobs that retarded people can perform continues to grow. Some, but certainly not all, of the various jobs* in which retarded workers have proven their capabilities and usefulness are as follows.

Animal caretaker	*Farm laborer*	*Dayworker*
Building maintenance	Sales worker	Upholsterer
Laundry worker	Ground maintenance	Porter
Library assistant	Stock clerk	Food service worker
Key punch operator	Janitor	Presser
Mail clerk	Telephone operator	Forest worker
Carpenter	Laboratory worker	Printing plant worker
Medical technician	Vehicle maintenance	Furniture repairperson
Clerk	Laborer	Radio repairperson
Messenger	Warehouseperson	Photocopy operator
Cook	Domestic worker	Welder
Nursery worker	Baker	Routeperson
Dishwasher	Packer	Assembler
Office machine operator	Textile machine tender	Inspector
Elevator operator	Silk screen operator	Sorter
Painter	Manicurist	Ward attendant
Engineering aide	Usher	

*Adapted from *Give an Opportunity-Gain an Asset*, National Association for Retarded Citizens, 1974.

workforce, is 87 per cent. The retardates score 3 per cent better than average for attendance and punctuality, and their retention rate is 2 per cent higher" (American Psychiatric Association, 1963, p. 270).

In a similar vein, Poindexter (1963) described how a help wanted advertisement by B & K Enterprises in Berkley, CA, specifically targeted individuals with a history of mental illness. Poindexter had agreed to assist two former students who had formed a toy company with recruiting a workforce in time to meet a 30-day deadline. After the completion of a standard hiring process, 11 "mentally recovered" individuals were hired. Poindexter shared that the owners were pleased with the overall general efficiency of their new workforce, there were no accidents and absenteeism was below average.

As described earlier, the detailed examination of patient labor carried out by the Minnesota Department of Public Welfare in 1964 provided calculated determinants of resident worker productivity across four institutions in 25 work assignments. On the average, resident workers were

found to be approximately 66 percent as productive as paid personnel. However, data collected also indicated instances in which the original estimates for replacement employees for resident workers were underestimated by 33 percent (p. 22). One facility went so far as to compare the productivity of their laundry with one in the local community and found that: "It's interesting to note that during the busy season our production per operator hour is up and goes down during the slower season but Meyer's production comes up after the seasonal help is laid off" (p. 50).

In another comparison of the productivity of workers with intellectual disabilities and those without, Cowden (1969) describes the contribution of 19 individuals with intellectual disabilities made to the tomato harvest when the lack of workers threatened tomato growers with financial loss:

> We estimated that about a fourth of the patients produced 60 to 75 percent as much as nonpatients; nearly half produced 30 to 60 percent as much; and a third produced less than 30 per cent as much. However, the patients were better at selecting usable tomatoes than the nonpatients were. They removed stems and picked fewer rotten, sunburned, unripe and wormy tomatoes; all fruit picked by the patients passed inspection. (Cowden, 1969, p. 49)

In this instance, it doesn't take much to conclude that the differential performance in terms of productivity between both sets of tomato harvesters should have given greater weight to the higher positive inspection ratings afforded to the resident workers.

In *The right to work: Employers, employability, and retardation*, Bluhm (1977) emphasized that individuals with intellectual disabilities had a "moral and legal right to be engaged in productive work and to be gainfully employed" (p. 213). The types of jobs that individuals with intellectual disabilities held at that time were described as simple, repetitive, and routine. However, he described a broad range of occupations where individuals were employed including, "waiters, dishwashers, barbers, cosmeticians, laundry workers, custodial workers, service station attendants, clerks, store sales personnel, bakers, tailors, dressmakers, painters, routemen, mechanics, and upholsterers" (p. 208). Clearly, not all of the occupations on Bluhm's list would be considered from an employer's viewpoint to be simple, repetitive, or routine.

Early Academic Research

Academic research efforts also identified successful interventions and processes that enhanced individual productivity and employability. Studies

that focused on assessing and improving productivity were carried out before and after the ending of resident labor. Remarkably, one of the earliest studies focused on the successful use of money as a rehabilitation incentive for residents with mental illness. Peffer's description of the study's results began with a discussion of the various types of reinforcement used to motivate residents and reasons for their exclusion.

> [Money] is an incentive that is as effective within the hospital as it is outside. It is a basis of our American cultural norms. But its greatest advantage is its exchange power. We do not have to struggle to fit a reward for each patient—each patient becomes the chooser of his own final reward system through the acquisition of the means to purchase what he values. This in itself becomes part of the rehabilitation process. (Peffer, 1953, p. 85)

Loos and Tizard (1954/1955) investigated the efficiency of residents who had more significant degrees of intellectual disability at performing tasks in an institution-based sheltered workshop. Their overall conclusions were that such individuals could learn simple industrial work; that they were influenced by the conditions under which they worked; that understanding the reason for working consistently and carefully was an important condition; and that working as a member of a small group with other individuals whose disabilities were not as significant also increased their efficiency (p. 403). They provided this final observation regarding the study's outcomes:

> The writer does believe, however, that the main factor responsible for the change was the major alteration in the structure of the workshop. The imbeciles instead of working only with patients of the same grade now found themselves cooperating with high grade patients on fresh terms of equality, making a manifestly important contribution to the total job. For perhaps the first time in their lives they were able actually to see that what they were doing was useful and to understand how it related to a finished product. Even the patients with Binet IQs in the 20s developed a sense of pride in the work of "their team." (Loos & Tizard, 1954/1955 pp. 402–403)

Another study, conducted in the workshop at Murdoch Center in North Carolina, involved teaching residents with mild-to-moderate intellectual disabilities how to assemble an electro-mechanical relay panel to demonstrate their work potential (Tate & Baroff, 1967). The residents mastered the assembly with the aid of jigs and consistent instruction. Workers were compensated using a combination of money (five cents per hour) and tokens.

> The most outstanding worker was a 31 year old multiply handicapped resident with an IQ score of 53 who had been institutionalized for 19 years. He walked with a shuffling gait, had a drooping jaw, and his speech was barely intelligible. Within six months he had mastered all phases of relay panel assembly and could carry out the final electrical test. (Tate & Baroff, 1967, p. 406)

Hartlage (1965) demonstrated similar results with patients of Central State Hospital in Kentucky. He had observed that, "Society differentiates between remunerative work and any form of work undertaken without monetary return by labeling these latter 'hobbies or avocations', and attaches considerably more importance to the type of remunerative work done by the individual than to his non-remunerative activities" (p. 330). This rationale was the basis for his study of 50 long-term patients with hospitalization lengths as long as 16 years, in which he found significant improvement in their work performance when they were compensated financially in comparison to a control group that received an equivalent amount of cigarettes, coffee, or other reinforcers.

Not all of the studies focused on resident productivity within the institution. Younie and Colombatto (1964) conducted a national survey regarding the availability of off-campus, work-experience programs after operating one for residents of the Southbury Training School in Connecticut. They identified 35 similar programs along with a broad range of operational differences. Institutions that actively solicited off-campus jobs had an average of 43 residents working, whereas those that did no job development had an average of 38 residents working off-campus. The most frequently noted off-campus jobs were housework, mowing lawns, gardening, farming, car washing, painting, and babysitting (p. 140).

As the numbers of individuals with intellectual disabilities in community-based day programs, work activity centers, and sheltered workshops continued to increase, subsequent studies shifted their focus to improving the productivity of individuals in those settings. The use of behavior management technology had been shown to be effective for both new skill acquisition as well as increased productivity in performance (Bellamy, 1975). In his seminal study on training individuals who previously were not considered capable of productive labor, Marc Gold (1972) demonstrated that individuals with severe intellectual disabilities could master a complex assembly task.

To further demonstrate the capabilities of individuals with developmental disabilities, Gold created "The Austin Project" where actual industrial work sites in companies such as Motorola were used as a

placement approach (Roche, 1980). Roche's description of the project captured the testimony of Edward Williams, one of the ten individuals included in the training:

> When asked why he is working at Motorola, he said, "I've been living with my mother, a widow, for the past three years. She's really worked hard so that she, my brother and I could be a family. I really want this job. Now it's my turn to contribute." (p. 4)

Martin, Cornick, Hughes, Mullen, and Ducharme (1984) demonstrated the ability of individuals with developmental disabilities to perform *complex supervisory* activities in a sheltered workshop. Four individuals were trained in the use of the multiple component production supervisory strategy (PSS), a tool introduced by Martin, Pallotta-Cornick, Johnstone, and Goyos (1980) that had been demonstrated to increase production by an average of 68 percent (p. 199). The results showed that the individuals with intellectual disabilities were approximately as effective as the regular sheltered workshop staff at maintaining the production rate of their peers.

Lastly, Pooley and Bump (1993) applied a log-linear learning curve formula to determine the cost-effectiveness of newly hired employees with intellectual disabilities. Their use of this analytical tool revealed several key findings. When compared with nondisabled coworkers they found that:

- The non-disabled workers follow the same log-linear learning curve as co-workers with intellectual disabilities;
- Non-disabled workers have an initial task time that is almost four times lower than co-workers with intellectual disabilities;
- Non-disabled workers had a lower learning rate than co-workers with intellectual disabilities; however,
- When factoring in a higher rate of turnover and other lower costs related to part-time workers, the employees with intellectual disabilities were far more cost-effective; they worked consistently at assignments that they had mastered whereas each new group of non-disabled workers required yet another dip in productivity until they, too, had mastered the assignments. (Pooley & Bump, 1993, pp. 5–6)

In *Mental Retardation and Developmental Disabilities, An Annual Review. Vol. VII*, Marc Gold (1985) emphasized how the aftermath of involuntary servitude contributed to the low expectations exhibited in community

programs for employment other than what was offered in the work activity centers and sheltered workshops:

> While the specific cases are of no particular concern to this chapter, the conceptual issue which is of importance relates to the inherent assumption underlying much of the institutional peonage that has gone on: that the retarded are incapable of a quantity and quality of work which would necessitate paying them a normal wage. This assumption has been supported by the low level performance of retarded individuals at work, in and out of institutions, under conditions where no attempts were made to provide skills and attitudes which would allow them to produce significantly above current levels of expectancy. (p. 255)

Gold's closing observation included an explanation of his "Competence-Deviance Hypothesis":

> In our field the overwhelming emphasis has been on the elimination of deviance, rather than the development of competence, as the terms are used here. The goal seems to be to bring individuals up to zero. This results in the all-too-frequent situation where a retarded individual who is existing successfully in the community, or on the job, commits some minor infraction, such as picking his nose, swearing at someone or showing up late, and is fired or institutionalized. Clearly, this would not be the effect of such infractions if there was competence to maintain a positive balance. But with a mean of zero, the slightest deviance might precipitate exclusion.[4]
>
> The profession must recognize that normalization means competence as well as the elimination of deviance. And vocationally, the retarded at all levels have demonstrated competence. We must capitalize on current training technologies to give all retarded individuals sufficient competence to maintain a positive balance and a place in society. (Gold, 1985, p. 260)

The research and anecdotal evidence found throughout the early to mid-twentieth century noted herein verifies that individuals with intellectual disabilities and individuals with mental illness, with and without an institutional history, have a rich history of mastering and performing relevant and meaningful labor. However, because this legacy of competence was lost, residents who were moving to the community and those who had never been institutionalized became ensnared in at best, well-intentioned but nonetheless, segregated and undemanding lives.

CHAPTER 4

THE PEONAGE CASES

> Look at my face, toil-furrowed; look at my calloused hands;
> Master, I've done Thy bidding, wrought in Thy many lands—
> Wrought for the little masters, big-bellied they be, and rich;
> I've done their desire for a daily hire, and I die like a dog in a ditch.[1]

The decade of the 1970s proved to be one of momentous decisions, particularly for individuals with intellectual and developmental disabilities. The filing of *Wyatt v. Stickney*,[2] a class action lawsuit over conditions at Bryce Hospital, Partlow State School, and Searcy State Hospital in Alabama in 1970 would set the stage for a decades-long litigation over conditions in public institutions. In 1971, the ICF/MR program was established. The ICF/MR program gave made it possible for states to use federal Medicaid funding for their state-run institutions for individuals with intellectual disabilities for the first time. Geraldo Rivera's 1972 investigation of Willowbrook State School for the mentally retarded thrust institution conditions into the public consciousness when it aired on national television. The deplorable conditions at Willowbrook ultimately became the focus of another seminal lawsuit—*NYSARC & Parisi v. Carey*.[3]

Other signal events in the decade of the 1970s included the passage of Section 504 of the Rehabilitation Act of 1973;[4] the creation of Supplemental Security Income[5] for indigent individuals with disabilities; and, the passage of P. L. 94–142, the Education of All Handicapped Children Act in 1975. Each of these developments alone represents a civil rights victory for individuals with disabilities regardless of where they lived. The impact of litigation and legislation created a tectonic shift in what type of services had to be made available, how those services would be delivered, and finally, where individuals with disabilities should be able to obtain them. These early legislation and litigation victories laid

the foundation of efforts to secure and enforce the human and constitutional rights of individuals with disabilities in American Society that continued well into the future.

Gunnar Dybwad,[6] the first executive director of the NARC, reflecting on the decade of advocacy and activism, shared his perceptions of the emerging field of disability law:

> To be sure, there has been at times poor judgment, too much rigidity, and undue delay, but overall the past ten years have been very productive and we, the practitioners in the field of human services, owe a debt of gratitude to the courts and attorneys who have fought valiantly so that others may have a more decent, dignified, and richer life. (Dybwad, 1983, p. 326)

Few professionals in the field at that time had a full appreciation of the advocacy being carried out on behalf of the resident workers. However, Dybwad (1969) was one of the first to acknowledge issues affecting individuals with intellectual disabilities, in a speech to the Social Work Division of the AAMD:

> But what about the Social Service Departments and their professional responsibility? What is their responsibility in the face of flagrant violations of a resident child's or adult's human rights which come to their attention?... or the use of residents for peonage, involuntary servitude at long hours, again outlawed by the Constitution? (p. 7)

The ensuing legal quest for the answer to the peonage question Dybwad raised played a significant role in how the history labor of individuals with disabilities would be viewed and valued well beyond the twentieth century. Even so, the more encompassing and increasing numbers of lawsuits with a broad range of legal claims against institutions such as Wyatt and Willowbrook ultimately overshadowed those that focused exclusively on disability servitude. As such, the impact of the Peonage Cases is not well understood nor appreciated by the field's stakeholders today.

As previously noted, the articles in the *Lancet* and *Atlantic Monthly* had opened the door for a reexamination of the resident workers' status as "employees" or "patients." As employees, their work could be viewed as unrelated to their treatment, performed to the institution's benefit, and therefore, would have the same protections under the FLSA as any other employees. As patients, their work would continue to be categorized as a form of "therapy under the jurisdiction of their doctor" and would continue to be unpaid, whether or not the institution benefitted. These arguments formed the core of the debate between the litigating parties when the peonage cases were filed, and ironically, they were utilized

50 years later by the National Labor Relations Board (NLRB) as a justification for not recognizing the rights of individuals who work in sheltered workshops to organize for collective bargaining purposes (Sorrell, 2010, p. 619).

Some advocates considered unpaid labor to be a form of involuntary servitude. As such, they believed that labor residents who performed while institutionalized had the right to be paid for current labor they performed as well as *back pay* for previous labor. And, with the passage of the 1966 Amendments to the FLSA, they saw an opening for taking action.

As interpreted by the Department of Labor, coverage of the 1966 Amendments to the Act was extended to business enterprises including: (a) hospitals (excluding government hospitals); (b) institutions primarily engaged in the care of the aged, mentally ill or defective who reside on the premises; and (c) schools for handicapped or gifted children. Further, employees could not be paid less than minimum wage if the employer had not obtained an approved subminimum wage certificate that allowed for payment to individuals with disabilities at a rate of no less than a "floor" of 50 percent of minimum wage (Friedman, 1974, p. 571).

One of the prevailing questions raised by this interpretation was how changes to the law affected resident workers in the public institutions. Three years prior to the passage of the FLSA amendments of 1966, the New Jersey State Board of Control of Institutions and Agencies had resolved that, "residents who work in assignments not primarily conceived as of training for release, who will not be considered for early release and require an extended custodial program, and whose work contributes substantially to the institution's economy shall be paid" (Kott, 1963, p. 161). Yet, in Kenney's dissertation, of the 72 respondents to the question regarding compliance with the FLSA, 36 reported that they did not know if their facility operated under the Act or did not comment (Kenney, 1972, pp. 97, 104). Twenty claimed that their facility did not operate under the Act and 15 claimed that they did. Finally, 29 respondents reported that no monetary compensation was provided; and, for those that did, compensation ranged from $.10—$1.00 per hour.

Positions regarding the interpretation of the FLSA Amendments were well articulated long before any litigation was filed on behalf of the resident workers. In 1968, Drs. Joseph Adlestein and Dr. Donald Jolly, Commissioners of Mental Health and Mental Retardation in Pennsylvania, commented on provisions of Pennsylvania Senate Bill 1275 that would establish a right to treatment and a right to remuneration for institution work (Adlestein & Jolly, 1968). Their depiction of resident labor left the impression that the residents requested work assignments,

that such assignments were rare, and that work assignments in general were not practical given the residents involvement in "social milieu" therapy programs. They closed with recommendations that some form of cash payment be made available to those residents who did work and that they be classified differently than other nonresident employees of the state in order to accommodate lower work standards and compensation (p. 552).

A 1971 article in the *Wall Street Journal* (Sansweet, 1971) also addressed the proposed Pennsylvania legislation. In addition to content regarding rights relating to civil liberties for mental patients, the article described coverage of the nature and types of "institutional peonage" practiced across the country. The article also quoted F. Lewis Bartlett in stating that, "Reducing patient menial labor could allow increased attention to treatment and thus speed the patient's cure . . . But the initial cost of hiring more workers poses a major obstacle to the bill's early passage" (p. 63). It was at this point that the first peonage case of the decade was filed.[7]

The legal strategies pursued by plaintiff's counsel were two-pronged:

1. Cases asked the US Department of Labor to enforce the new FLSA amendments on behalf of resident workers, and/or
2. Cases alleged Thirteenth Amendment violations in that resident workers were coerced into performing labor for the economic benefit of the institution.

As presented in Table 4.1, between 1964 and 1988, private public interest lawyers filed a total of 18 institutional peonage cases in state and federal courts on behalf of individuals with disabilities who performed labor in public institutions. A much older case in Kentucky, *Stone v. City of Paducah*, was filed in 1905 in response to an ordinance that would have required "idiots, insane persons" to work. At that time, the Court ruled that the ordinance violated Section 25 of the Kentucky State Constitution and the Thirteenth Amendment of the United States Constitution.

Between the years 1905 to 1964, no additional litigation was filed on behalf of individuals with disabilities. On the other hand, prior to 1905, the United States Department of Justice had prosecuted over 100 peonage cases relating to the forced labor of immigrants and Blacks who were held by their employers over alleged indebtedness (Arneson, 2007, p. 1068). None of those cases were known to have involved disability servitude.

Historically, *Wyatt v. Stickney* is considered to be the first *right to treatment* case.[8] As such, its primary claims and causes of action were not focused on institutional peonage case, per se. However, it was the first case where the court ruled that work was "dehumanizing" unless it was

Table 4.1 Legal cases pertaining to individuals with disabilities and involuntary servitude, and institutional peonage, and the Amendments to Fair Labor Standards Act of 1966

Year	*State*	*Case*	*Primary approach to peonage*
1905	KY	The Southwestern Reporter, Volume 86, 1905 *Stone v. City of Paducah* 86 SW. 531, 120 KY 322 27 KY Law Reporter 717	13th Amendment
1964	MO	*Tyler v. Harris*, 226 F. Supp. 852, 855 (W. D. Mo. 1964)	13th Amendment
1966	MO	*Johnston v. Ciccone*, 260 F. Supp 553, 556 (W. D. Mo. 1966)	13th Amendment
1966	PA	*Jobson v. Henne*, 1966, 355 F.2nd 129: 1966 U.S. App. Lexis 7617	13th Amendment
1968	MO	*Parks v. Ciccone*, 281 F. Supp. 805, 811 (W. D. Mo 1968)	13th Amendment
1970	MO	*Henry v. Ciccone*, 315 F. Supp. 889 (W. D. Mo. 1970)	13th Amendment
1972	AL	*Wyatt v. Stickney*, 344 F. Supp. 373, 387 (M. D. Ala. 1972)	Included in Right to Treatment
1972	FL	*Roebuck v. Department of Health*, Civil No. TCA 1041 (N.D. Fla. Filed 7/6/72)	FLSA Section 216
1972	ME	*Jortburg v. United States Department of Labor*, Civil Action No. 13–113 (S. D. Maine 1972)	FLSA Section 216
1972	PA	*Downs v. Department of Public Welfare*, Civil Action No. 73–1246 (E. D. Pa. 1972)	FLSA Section 216
1972	TN	Originally filed as *Townsend v. Treadway*, Civil No. 6500 (D. Tenn, 9/21/73)	FLSA Section 216
1973	DE	*Rita P. Carey v. White*, Civil No. 4772 (D. Del., filed 9/5/73)	FLSA Section 216
1973	DC	*Souder v. Brennan*, Civil Action No. 482–73, (D. D. C. 1973) *Souder v. Brennan*, 367 F. Supp. 808 (D.D.C. 1973)	Injunctive actions against the Secretary of Labor to force enforcement of law
1973	NY	*Dale v. State of New York*, decided May 31, 1973 by State Court of Claims, appeal noted June 1973	13th Amendment
1973	TN	*Townsend v. Cloverbottom*, Doc. No. A-2576 (Ch. Nashville and Davidson Counties, TN, filed 5/22/73)	FLSA Section 216
1973	CT	*Albrecht v. Carlson*, CA. No. H-263 (D. Conn. Filed 12/13/1973	FLSA Section 216

continued

Table 4.1 Continued

Year	*State*	*Case*	*Primary approach to peonage*
1973	IA	*Brennan v. Iowa*, No. 73–1500 (Ct. of Appeals, 8th Circuit)	FLSA Section 216
1974	WI	*Wiedenfeller v. Kidulis*, 380 F. Supp 445 (E. D. Wis. 1974)	13th Amendment
1976	CA	*National League of Cities v. Usery*, 426 U.S. 833 (1976)	10th Amendment
1988	MI	*United States v. Kozminski*, 1988 (108 S. Ct. 2751, 101 L.Ed 2nd 788)	13th Amendment

voluntary and compensated at no less than FLSA minimum wage rates. The court also ruled that the state could not take back wages as a "set-off" payment for care. These rulings set the precedent for peonage cases that were filed thereafter. Unfortunately, out of the 17 other cases that did focus primarily on involuntary servitude, only one case, *Souder v. Brennan*, resulted in the affirmation that the resident workers fell under the FLSA definition of employees and thus were entitled to its provisions. Two later cases, *National League of Cities v. Usery* (which reversed the Souder decision) and *United States v. Kozminsky* (which excluded assertions of psychological coercion), would have less favorable, but far more reaching implications for resident labor in public institutions.

Several of the peonage cases originated from efforts by attorneys to assist former resident workers with obtaining back wages and other benefits that should have been paid, such as Social Security and Medicare withholdings. Other isolated cases occurred where the individual filed a claim with support from advocates or friends and subsequently received a favorable ruling from the Social Security Administration.

> Here is another story of peonage, although from the Midwest, not the south. Some years ago I helped a woman in Michigan fight the social security system to get her labor recognized as labor. She had been "placed" from the state hospital in the late 50s? with a family. She received "room and board" in return for in-home chores. Basically she did the housekeeping. It was part of a "work" program, releasing people from the state institutions. The family she was placed with paid the institution for her labor! The good news is that the family, who originally thought they were helping someone through a state endorsed program, came to consider her as part of the family. And began to see the unfairness of the state institution getting the money for her work. Many years later they fought

> on her behalf to get her work compensated and won Social Security benefits for her. (Nancy Rosenau, former Director of Community Services at Macomb Oakland Regional Center, 2001, personal communication)

Another factor attorneys had to consider when bringing a case was that in many states, residents in the public institutions were wards of the state—states that as guardians were very unlikely to petition the courts for relief on behalf of their institutionalized populations. In Ohio, it became necessary for the plaintiff's counsel in *Rolland W. Walker v. Gallopolis State Institute*[9] to file a motion for the appointment of a guardian ad litem for their clients in order for their claims to be brought forward.

> No one could argue that the rights of employees similarly situated to Rolland Walker have been safeguarded if those employees must rely upon the defendants, the very people against whom they press their claim, to insure them their day in court. Rule 17 provides the Court with a vehicle to assure these people an adequate opportunity to present their claims in court. (O'Neill & Fairfield, 1975, p. 4)

Townsend v. Treadway

Prior to the creation of the Supplemental Security Benefit in 1974, resident workers of retirement age who left the public institutions, like all other eligible older Americans, filed for Social Security retirement benefits only to learn that not only had they not received wages, but the institution had not contributed to Social Security on their behalf. That circumstance led to the 1972 filing of *Townsend v. Treadway*, the Tennessee peonage case.

The lead plaintiffs were four individuals with intellectual disabilities who had moved out of the Clover Bottom State Training School and Hospital in Nashville. The former residents, Aarol Townsend, Herman Kaplan, Clint Tucker, and Nancy Gills, all sought back wages and benefits. Arrol Townsend was a 34-year-old who lived at Clover Bottom from 1951 to 1971. At the time he was admitted his work schedule was 12 hours per day, seven days per week. In 1957, he worked seven hours a day, five days a week in the dining room. For the last eight years, he had worked in the dairy that operated as part of the farm that supplied produce and other food to the residents of the institutions, as well as the surrounding community.

Herman Kaplan was a 52-year-old who lived at Clover Bottom from 1937 to 1971. At the time he was admitted, he was assigned work 12 hours per day, seven days per week. In 1957, his work schedule was also

reduced to seven hours per day, five days per week. He had worked in the dairy for 12 years, the boiler room for five and one-half years, and on grounds maintenance another eight years.

Clint Tucker was a 71-year-old who lived at Clover Bottom from 1928 to 1971. Upon admission, he was assigned work 12 hours per day, seven days per week. In 1957, his work schedule was also reduced to seven hours per day, five days per week. He had worked on the garbage wagon for 22 years, in the boiler room for five years, in the hospital for three years, in the kitchen for two years, and in the laundry for one year.

Finally, Nancy Gills Tucker lived at Clover Bottom from 1923 to 1970. Like the other plaintiffs, at the time she was admitted, she was assigned work 12 hours per day, seven days per week. In 1957, her work schedule was also reduced to seven hours per day, five days per week. She had worked in infirmary, cafeteria, dining room, and as custodian.

Larry Woods, a Nashville based attorney, recalled how he became involved with the lead plaintiffs:

> Floyd Dennis[10] was working with a group of residents who were moving. The issue of Social Security came up. People shared what they had done. They raised animals, planted crops, harvested and shucked corn, painted walls, mowed lawns, made beds. They had done any job, orderlies for the profoundly retarded, food cleanup, cooked in early days, and worked in the cannery. They earned $1.50 a day working 8 hours and with overtime it came out to $.08 per hour. Floyd asked me to come, to get involved to help them get Social Security. Then they told me they "had to do work," so I added involuntary servitude. (Larry Woods, personal communication, 1991)

The Thirteenth Amendment claims for injunctive relief and damages in *Townsend v. Treadway* were denied. The FLSA claims were dismissed on the basis of the Supreme Court ruling in *Employees of the Department of Public Health and Welfare v. Missouri*[11] that the Eleventh Amendment forbids a federal court from rendering judgment on FLSA claims against a nonconsenting state (Friedman, 1974, p. 576). The case was refiled in Tennessee Chancery Court where the court found that, "The state hospital had neither consented to be sued nor had it waived its immunity," and dismissed the suit (Gelhaar, 1981, p. 516). Although the plaintiffs and other resident workers who labored in Tennessee's state institutions without pay did not prevail, *Townsend v. Treadway* resulted in Tennessee ending the practice of unpaid resident labor. It also paved the way for the filing of *Saville v. Treadway*,[12] Tennessee's first deinstitutionalization lawsuit. Twenty years later, Larry Woods would reflect:

> The people were excited to get to tell their story in court. As their lawyer, I was pleased they took an interest in their own welfare. They were not angry at Clover Bottom; it was had more like feelings of *lost opportunity*, that they could have been doing other work, and could be drawing Social Security [retirement benefits]. (Larry Woods, personal communication, 1991)[13]

Souder v. Brennan

In *Souder v. Brennan*,[14] the challenge was to determine how FLSA could be applied to the resident workers. It was filed in 1972 on behalf of Eugene Nelson Sauder, Joseph Lagone, and Edwin Leady with the AAMD and the National Association for Mental Health as organizational plaintiffs. The American Federation of State, County, and Municipal Employees (AFSCME), the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) joined as Intervenor-Plaintiff. A year later, Judge Aubrey Robinson, in the United States District Court of the District of Columbia, ruled on behalf of the plaintiffs, stating that under the 1966 Amendments to the FLSA, resident workers in nonfederal institutions for individuals with mental and intellectual disabilities were entitled to minimum wage and overtime compensation.

Eugene Nelson Sauder, a 47-year old who was involuntarily admitted to Orient State in Ohio at age 15 after parents' death in 1940. He had worked in a kitchen of his cottage seven days per week, 11 hours a day on five days and five hours per day on the other two. On the two days he was not in the kitchen, he did housekeeping and yard work. He had two days off per month and was paid $2 per month for kitchen and $2–3/week for house and yard work.

Joseph Lagone was a 32-year old who lived at Pennhurst State School and Hospital in Pennsylvania since 1955. He worked five to six days a week for six to eight hours per day cleaning his building for no pay.

Edwin Leady was a 62-year old who lived at the Haverford State Hospital in Pennsylvania since 1966. He worked four days a week, five hours a day as a messenger for no pay from 1966 to 1972 during which time he missed only 12 days of work (11 days in 1969 when he had surgery).

Judge Robinson expounded on the basis of his ruling regarding the "employment" status of resident workers by stating that:

> Economic reality is the test of employment and the reality is that many of the patient-workers perform work for which they are in no way handicapped and from which the institution derives full economic benefit. So

> long as the institution derives any consequential economic benefit the economic reality test would indicate an employment relationship rather than mere therapeutic exercise. To hold otherwise would be to make therapy the sole justification for thousands of positions as dishwashers, kitchen helpers, messengers and the like. (Robinson, 1973, n.p.)

The *Souder v. Brennan* instructions were in keeping with the decision in *Wyatt v. Stickney,* although the Judge Robinson's memorandum was neither as lengthy nor as detailed as that of Judge Johnson. One specific requirement, in deference to the intervenor-plaintiff, was that the collective bargaining representatives or other representatives for nonpatient residents of non-Federal institutions, who dealt with the employer on their behalf with respect to wages, hours, or other terms and conditions of employment, be notified of this decision. In 1976, Tarr-Whelan, an AFSCME union spokesperson responded to the question as to why the union had sought to intervene in *Souder v. Brennan*:

> There are two reasons for this change of position. One is a philosophical reason that unions are in the business to see that everyone gets paid adequately. *A minimum wage is the right of anyone who works* [italics added]. The second reason is philosophical, but is more pragmatic. AFSCME feels that many of the fears among workers regarding the payment of residents in institutions—fears that their jobs will disappear or that there will be no place for them—are misplaced. Our position now is that the employee and the resident have many of the same problems. (p. 583)

The *Souder v. Brennan* ruling granted declaratory and injunctive relief, but not unpaid wages or benefits. In order to file a claim for those, the plaintiffs had to turn to the state court system. Eugene Souder did so in *Mossman v. Donahey*;[15] however, as was the case for the plaintiffs in *Townsend v. Treadway*, Eugene Souder's claim for monetary relief was denied on the basis of the Eleventh Amendment of the US Constitution, which prohibits a private citizen from being able to file a lawsuit against a state in state court as well as in federal court (Gelhaar, 1981, 515).

Despite establishing the right to be compensated in keeping with the FLSA for nontherapeutic labor performed while a resident in an institution *prospectively*, hundreds of thousands of resident-workers found themselves in a "Constitutional Catch-22" when it came to filing claims under the Act for the back wages to which any other employee would be entitled. For those resident workers who were still in the institution, this affront became doubly devastating when all but a few of the public institutions stopped "permitting" residents to continue working at the assignments they had held for years. In response to the wholesale elimination

of approximately one-third of the institutional work force nationwide, most states were forced to replace the resident workers with nondisabled employees who were paid the same wages the resident workers had been denied.

National League of Cities v. Usery

Paul Friedman and other members of the emergent disability law bar had seen the institutional peonage cases as an important element in the overall push for disability rights. In 1974, he stated that, "The control of institutional labor is of course only a first step toward eliminating a wider pattern of discrimination against the mentally ill and mentally retarded" (p. 587). As such, the US Supreme Court decision in *National League of Cities v. Usery*,[16] the case that overturned *Souder v. Brennan*, was a major setback in the effort to afford resident workers economic equality.

The plaintiffs in this case included the *National League of Cities*, the National Governor's Conference, several municipalities, and 20 states whose claim was that under the Tenth Amendment,[17] Congress did not have the authority to require the states to comply with the FLSA of 1974 (MacMullin, 1989, p. 927). The Supreme Court issued a 5–4 decision in their favor. Thus, by ruling that the application of the FLSA to state governments was unconstitutional, *Souder v. Brennan* could no longer serve as a basis for resident workers claims for equal compensation.

Although *National League of Cities v. Usery* would be overturned by yet another case at a later date, the damage had been done. The Department of Labor, which had issued rules in *Souder v. Brennan*, had never proceeded with the enforcement of the Act and in the absence of federal oversight, over the course of the next decade the economic equality of people with disabilities disintegrated into a race to the bottom of the subminimum wage floor. Further, the 1986 amendments to the Act eliminated the "floor" of no less than 50 percent of minimum wage with and replaced it with compensation to be based solely on individual productivity, thereby eliminating any minimum wage on which individuals with disabilities could depend.

United States v. Kozminsky

United States v. Kozminsky,[18] the final case that included involuntary servitude claims under the Thirteenth Amendment, had no claims relating to *institutional* peonage. In 1983, Robert Fulmer and Louis Molitoris, two men with intellectual disabilities, were found in poor health and in squalid conditions on the Kozminsky farm in Chelsea, Michigan.

Originally paid $15 a week for labor they performed seven days a week often 17 hours per day and eventually for no pay. They experienced physical abuse and threats, in addition to a threat to reinstitutionalize one of the men if he did not do as he was told. The Supreme Court's ruled that, "Government cannot prove a § 241 conspiracy to violate rights secured by the Thirteenth Amendment without proving that the conspiracy involved the use or threatened use of physical or legal coercion."[19]

Huq (2001) expressed her concern with the court's explicit exclusion of psychological coercion and other forms of coercion, along with the determination that groups such as immigrants, children, and "mental incompetents" were not entitled to any special protections. In doing so, Huq felt that the court had drastically limited the scope of Thirteenth Amendment protection. Her contention was that as long as the Justices could not consider instances where someone who was perceived as "strong" could be subjugated to the will of another, fewer claims would be filed, as people would not want to stigmatize themselves as "hapless victims" in order to claim involuntary servitude.

The overall implications of Kozminski have great bearing on the ability of individuals with intellectual disabilities and/or mental illness to assert, on their own behalf, their right to be free from abuse and exploitation. Further, if by virtue of a lack of appropriate services, they are forced to experience unremitting segregation, offered only work for which they are not suited, and paid wages that would not serve as an incentive for any adult who labors in our society, how could they not be perceived to be experiencing some measure of involuntary servitude, regardless of where it is occurring.

CHAPTER 5

THE AFTERMATH

In the *Shadow of Slavery: Peonage in the South 1901–1969*, Daniel (1990) refers to individuals with disabilities only once; in the revised preface to the second edition. In this instance, he observed that, in its 1988 ruling in *U.S. v. Kozminsky* that only physical and legal coercion could lead to involuntary servitude, the Supreme Court seemed, "far removed from the day-to-day lives of people threatened with losing their freedom of mobility." He went on to say that:

> In polite historical and judicial forums, the essence of involuntary servitude is often drained of life. On the one hand there is a dispassionate historical debate over labor mobility; on the other, a legal argument over precedent and intent. Such discussions only rarely deal with social and economic conditions that produce peonage, or even with historical questions raised by a long and continuing tradition of labor control that has often resulted in human bondage. (Daniel, 1990, p. xiv)

Daniel was correct in that questions such as why the public facilities were allowed to become so dependent on resident labor, and if some forms of labor were no longer considered "therapeutic," what other forms of therapy would be better suited to promoting habilitation and recovery were rarely voiced. Consequently, he asked what needed to be done in order to assure that such exploitation would not be repeated in the future was not examined. Whereas in Pennsylvania, in response to proposed legislation that would provide for remuneration,[1] Jeanette S. Reibman, a member of the Pennsylvania State Senate, pointed out an otherwise overlooked comparison to prisoners who received wages:

> Moreover, in the Commonwealth of Pennsylvania, prison labor must be paid for. Even though the payment is token, the principle is observed.

> Not even prisoners can be expected to work without compensation. This places the mentally ill several grades below that of the convicted criminal who must pay a debt to society for a violation of the laws of the land. (Reibman, 1968, p. 541)

Even fewer questions were raised regarding how the resident workers felt about the exploitation they had experienced and the ruling that they could no longer work without being paid. One exception was a questionnaire with true-false items used by Egan (1976) to examine the experiences and attitudes of paid resident workers at the Dixmont State Hospital in Pennsylvania. His findings indicated that 94.5 percent enjoyed working and 89.8 percent endorsed the statement, "Being paid to work while I am still in the hospital is the best opportunity I've had in a long time" (Egan, 1976, p. 102). Other than this assessment of the attitudes about work held resident workers that were already paid, there were no corresponding surveys of those who were not.

Predictably, professionals reacted to *Souder v. Brennan* in keeping with caste and rank; those who worked more closely with the residents expressed concern over the possibility that the decisions would eliminate the "therapeutic programs" that kept the residents occupied, advocates believed that the residents would begin receiving compensation that would lead to economic equality, and administrators would both minimize the extent to which their day-to-day operations were dependent on the residents' labor while simultaneously petitioning for increases in their budgets to shore up the gaping holes in their workforces.

The economic realities and logistics of adding over 47,000 resident workers to the payrolls of facilities for individuals with intellectual disabilities shaped the entirety of the field's response to *Souder v. Brennan*. States Attorney Generals across the country were inundated with questions about how rules regarding how assignments were to be made, whether resident workers were considered regular State employees with wages and benefits as state employees, and how the decision affected residents who worked in sheltered workshops and work activity centers on the institutions' grounds.

An opinion letter from Office of the Attorney General of Texas responded to questions from the Commissioner of the Texas Department of Mental Health and Mental Retardation (Hill, 1975). The letter outlined the areas in which *Souder v. Brennan* would not apply such as providing for "fringe" benefits because they were not explicitly addressed in FLSA. It closed with a response to the Commissioner's question about increased appropriations: "The necessary specific appropriations for the payment of wages and overtime pay to patient-workers covered by FLSA

are available to MHMR from a number of appropriated items in the current 1975–1976 budget" (p. 2270). In other words, no extra funds to provide compensation would be forthcoming.

The End of Patient Labor

The *Souder v. Brennan* decision did not produce the outcomes hoped for by the litigation's named plaintiffs. Armstrong (1976) followed up on Nelson E. Souder after the case was decided:

> Nelson E. Souder who lent his name to one of the famous patients' rights cases is now living with his sister in Newark, Ohio, and is working in a sheltered workshop there. At the time Souder v. Brennan was filed in 1973, he was a resident of Orient (Ohio) State Institute for the retarded where he had lived since 1940. The suit alleged that Mr. Souder worked in a cottage kitchen at the institute for 11 hours a day five days a week. On the other two days, he did kitchen work for 5 1/2 hours, and housecleaning and yard work for retired state employees in the area for four hours. He received $2 a month for his kitchen work, and between $2 and $3 a week for his housework. He was released from the institute on March 24, 1973, while his case was pending. (p. 107)

In the final segment of their series on institutional peonage, *behavior today* (1975) provided an update on another *Souder v. Brennan* named plaintiff:

> POSTSCRIPT: BT checked on the status of the patient-worker plaintiffs involved in the Souder suit. Edward Leedy, who had been a messenger at Haverford State Hospital in Pennsylvania, died before the Robinson decision was handed down…Joseph Langone, who worked five or six days a week for no pay at Pennhurst State School and Hospital in Pennsylvania is still at the institution, but he is no longer employed. His social worker says he is in a small group socialization training program which is not work related and which teaches basic self-care skills. (p. 365)

"Compensation of 'Patient Workers'" (Simon, 1976) began with the observation that, "Almost any social reform has unintended consequences" (p. 93). Simon expressed disagreement with the belief that the decision in *Wyatt v. Stickney* would necessarily lead to the end of resident labor and/or their replacement with regular workers from the outside. He felt that the utilization of the FLSA rules issued in 1975 that allowed for individuals with disabilities to be paid less than the minimum wage in accordance with their productivity would be a viable economic alternative to full-scale resident labor elimination. Regardless of the future

of their availability for work assignments, Simon stressed that the more important point was that the decision destroyed, "the old incentive to exploit 'patient workers' even to the point of allegedly hanging on to those who do not require continued institutionalization" (p. 93).

Moore (1975) echoed Simon's conclusions:

> But the most important effect will be on the patients—the retarded and mentally ill who have worked so long and so invisibly without pay. Having finally earned the right to fair wages for honest labor, they face the sad prospect of not being able to work at all. A judicial decision intended to wipe out a form of exploitation will destroy, in many instances, a man or woman's best chance to regain confidence and competence for ordinary life. (p. 79)

The second *Report on Enforcement Activities Under the Fair Labor Standards Act with Respect to Patient workers at Hospitals and Institutions* focused on the timeframe of August 1, 1975 to January 31, 1976 (United States Department of Labor, 1976). During these six months, the Wage and Hour Division had completed 81 investigations and had action pending on 10 cases from the prior review. The Wage and Hour division found 72 of the 81 institutions employed 6,669. A total of 64 public and 17 private institutions were investigated. Twenty-eight institutions served individuals with mental illness, 42 served individuals with intellectual disabilities, and 11 were for other types of disabilities.

Almost a year and a half after the *Souder v. Brennan* ruling, the Wage and Hour Division found monetary violations in 57 institutions with back wages of $4,015,186 due to 8,625 patient workers. The largest amount of unpaid wages due to patient workers for a single institution was $850,122 due to 500 resident workers in a large public institution for individuals with mental illness. By the end of the first year of their investigations, 47 institutions had restored $373,307 in unpaid wages to 1,941 patient workers. Negotiations with regard to compliance had occurred in 28 cases and litigation had been filed in 2 cases. On January 26, 1975 the Department of Labor filed suit against the California for refusing to pay minimum wage to patient workers in 11 state-operated mental health hospitals (p. 3).

Soon after the decision in *Souder v. Brennan*, Richardson (1975) reported the findings of research he had conducted on a systematic replication of the national survey of vocational practices in institutions by Goldberg in 1957. Using Goldberg's questions as a model, Richardson followed the same methodology and received responses from 135 institutions. The responses indicated that 90 percent of the resident workers were receiving

remuneration, with 69 percent receiving money. In 1957, only 31 percent of the respondents had reported that they were providing resident workers with any type of compensation (Richardson, 1975, p. 17).

Overall, Richardson's data indicated that 32,178 residents were involved in some form of vocational training, of which 20,700 were considered to be "employment"—or 21 percent of the total populations in the 135 institutions that responded. In comparison, in 1957, Goldberg had reported 27 percent as employed and in 1972, Kenney had reported 25.5 percent in 1972; a decline of only 1.5 percent over a 15-year period. Thus, Richardson's findings revealed a decline of 4.5 percent within a three-year time frame. The decline that took place over the following three years would prove to be far more dramatic.

Walsh and Sootkoos (1976) at first described the frustrations that emerged when staff was not able to explain to the resident workers with more significant disabilities why they could no longer go to work. Those resident workers persisted in attempts to carry out their assigned duties despite staff intervention. They also indicated that, even when funds were subsequently allocated for a work program, it was difficult to determine whether existing subminimum wage certificates would be applicable to residents with more severe disabilities. Nevertheless, Walsh and Sootkoos concluded that the discontinued use of resident workers in "non-therapeutic" assignments would be in the best interests of the residents in the long run. They felt that if the residents were there to receive treatment and care, then the institutions should be adequately staffed to do so, and that adjustments would need to be made or the regulations would foster, "inadequate staffing or renewed exploitation of resident labor or unnecessary spending to achieve questionable results" (p. 18).

By the time the decision in *National League of Cities v. Usery* was issued three years later, the vast majority of "patient work programs" in public institutions for mental illness and intellectual disabilities had been dismantled. A six-part series in *behavior today* chronicled the demise of the century-old tradition on a state-by-state basis. In Part I, the article noted that the Department of Labor had estimated that the *Souder v. Brennan ruling* could potentially be applicable to over 27,000 residential care facilities, with private facilities in greater number and the largest proportion of resident workers. The private facilities fell under the Jurisdiction of the Regional Offices and were therefore not included in the state-by-state review (1974, p. 331). Paradoxically, the chief of rehabilitation services at St. Elizabeth's Hospital in Washington DC expressed concern that, "paying the residents workers could increase their dependency on the institution" (1974, p. 337).

Table 5.1 Changes in the numbers of resident workers in public institutions for individuals with mental illness and intellectual disabilities as of January 27, 1975

State★	*Intent*	*Data included*	*Total census*	*Total pre-Souder PW/RW*	*Total post-Souder PW/RW*
AL	Trimming began immediately after Wyatt decision	Both	1,470	1,470	680
AK	"The mental health division set about paying 25 resident workers according to Labor Dept. guidelines."	Both	250	25	25
AR	Some outpatients working with pay and benefits; still some nonpaid resident work	Both	2,900	250	102
AZ	Had only one facility with one worker; worker eliminated	ID Only	700	1	0
CA	Workers put in estimated 188,829 hours in a month. Is tracking hours and productivity; may pay in future	Both	16,000	3,000	UK
CO	Is seeking funds to pay 600 resident workers	Unclear	UK	600	0
CT	Will not cut back; has the funds to pay	Both	3,600	1,200	1,200
DC	Target date of September 12, 1974 to pay 400 pw $.35 per hour not met	Both	UK	400	400
DE	Is trying to an exemption to department policy that would cut out all labor	Both	1,100	50	25
FL	Started in March 1973 to phase out some; others are paid if therapeutic (census is for MI only)	Both	6,000	1450	1,250
GA	Pay workers out of institution budgets or eliminate	Both	10,000	900	0
HI	Will apply for certificate	Both	900	128	UK

ID	Officials angry about law interpretations. Paid some workers	Both	900	UK	UK
IL	Eliminated resident labor. Will expand sheltered workshops work activity centers	Both	14,000	1,214	0
IN	Will phase out over 2 years; will hire 150 most productivity	Unclear	Unclear	1,100	0
IA	Will pay RW estimated cost will be $1.2 million	Unclear	UK	UK	UK
LA	We are making desperate effort not to cut back	Unclear	5,300	1,700	UK
KA	Will pay those who are working but no specifics	Both	3,000	UK	UK
KY	Eliminate resident labor	Both	2,500	200	0
MA	Will retain RW and integrate with therapy at a later date	UK	UK	UK	UK
MD	Phase out resident labor due to estimated cost of $1 mil.	Both	7,500	600	400
ME	Residents encouraged to work off-campus	Unclear	UK	UK	UK
MI	Phase out resident labor; estimated need for $800,000 to pay	Both	12,000	UK	UK
MN	Had paid since 1967; will reduce to meet minimum wage	Both	6,000	2,100	1,575
MS	Paying 125 residents but doubts ability to continue	ID Only	6,700	580	125
MO	Governor denied request for funds to pay	Both	7,000	600	0
MT	Is already being sued by DOJ; paying some on time-limited basis	Both	1,000	104	UK
NC	Began paying 50% minimum wage in FY 73–74	Both	9,722	2,224	2,000
ND	State mental hospital was cut out. Older ID residents cry every night because they don't have a farm to go to.	Both	1,950	230	30

continued

Table 5.1 Continued

*State**	*Intent*	*Data included*	*Total census*	*Total pre-Souder PW/RW*	*Total post-Souder PW/RW*
NE	Resident labor phased out: pre-Souder was extensive	Unclear	1,600	UK	0
NH	Special session of legislature gave $310,000 for patient pay at state hospital. ID labor stopped until appropriate comes through	MI	1,250	300	300
NV	Will try to do the best they can without the funds to do it	MI Only	350	90	41
NJ	Public advocate threatened suit if workers laid off due to funding issues	Both	7,200	2,250	0
NM	Proceeding with certificate requests; worried about Unions	Both	2,000	250	UK
NY	Previously reduced numbers; $1.85 wage now paid to 5,600	Both	55,000	5,600	200
OH	Eliminated labor in MH, will continue in ID commensurate	ID Only	6,500	1,000	60
OK	Will not pay; hired Rec Therapists and OT's to keep people busy	Both	9,400	UK	0
OR	Hopes to continue some resident labor	Both	3,000	1,000	Some
PA	Increased focus on improving treatment goals: allows housekeeping, dietary, laundry and patient care only if necessary	Both	29,000	4,000	Sharp cutback
RI	ID labor eliminated but "state budget office okayed continuing resident work at the mental hospital because the institution couldn't get along without it"	Both	UK	300	200

SC	Requested funds pay residents; told to hire outside help	Both	7,241	1,127	150
SD	Hopes to continue based on productivity	Both	1,400	UK	547
TN	Already started paying wages to some	MH	UK	800	250
TX	Would continue if had funds but is pursing stopgap phase-out policy	Both	21,000	21,000	0
UT	Has drastically cut RW in MH facilities and eliminated in ID	Both	900	750	16
VT	Will discontinue what few jobs exist	Both	880	UK	0
VA	Only a dozen will begin getting minimum wage	Both	UK	1,000	12
WA	Certifying individuals based on productivity and treatment recommendations	Not reported	UK	UK	UK
WI	Has requested funds to pay 249 resident workers	Both	3,050	UK	249
WV	Is planning for certification had bee paying $0.50, residents expected to pay room and board if they receive wages	Both	3,500	1,500	UK
WY	Has requested $611,000; should have been paying all along	Both	820	392	232
	Totals		**274,583**	**61,485**	**10,069**

In the second installment of the *behavior today* series, D'Arrigo, a management analyst with the Department of Mental Hygiene, reported that New York had previously reduced unpaid resident labor from 5,600 to virtually none as part of an anti-peonage initiative that began prior to *Souder v. Brennan*. The majority of workers went to regulated work settings—sheltered workshops, work activity centers, and approved vocational rehabilitation programs. Some residents were discharged and immediately hired by institutions as state employees or found full-time jobs on the outside. Other New York institutions used vacant civil service slots as part of a paid training program (1974, p. 346).

On the basis of the reports in *behavior today*, many states had already begun examining the use of resident labor following the *Wyatt v. Stickney* ruling regarding resident labor on April 13, 1972 (*behavior today*, 1974a; 1974b; 1974c; 1975a; 1975b; 1975c). The *Souder v. Brennan* decision was issued 20 months later on December 7, 1973. The numbers reported in the *behavior today* series on the status of resident labor in public institutions for individuals with mental illness and intellectual disabilities are compiled in Table 5.1. The data collected were incomplete and—officials were unclear as to the degree to which resident labor would continue, or reported on outcomes for only one type of facility or the other. Despite these limitations, to the extent that the data were reported, the results indicate a 75 percent drop resident worker assignments in less than a two-year period.

Articles included in the *behavior today's* "Peonage to Pay" six-part series included viewpoints expressed by a variety of state officials across the country. Comments included concerns that paying the resident and patient workers could increase their dependency on the institution and that the residents would need training in using money so they wouldn't be taken advantage of by some "sharpie" (*behavior today*, 1974b, p. 337). At a regional meeting in Philadelphia, officials asked what to do with an aged patient, "who makes beds in a frenzy and just won't stop Philadelphia." They were told to, "Pay her or put her in a straightjacket" (*behavior today*, 1974a, p. 332).

Forced Idleness

Pyle's 1978 dissertation focused on *Downs v. Department of Public Welfare* and, as such, provided a more in-depth view of how the peonage litigation served to shape public policy. In the 1974 consent decree, Pennsylvania was ordered to end involuntary servitude within 45 days and to prepare to pay residents for their labor by December 1975. In April 1975, Pennsylvania filed a state plan for mental health services that restricted

resident labor to no more than 15 hours per week and limited it to four areas of hospital functioning—dietary, housekeeping, laundry, and patient care (p. 45). Pyle noted that: "Surveys done in February, 1975, by the Department of Public Welfare Monitoring Teams suggest that compliance with the court order rather than commitment to care and treatment was the overriding determinant of patient disposition" (p. 47). Lastly, her findings indicated that due to a freeze on state hiring that occurred in 1967, no additional staff was hired for existing treatment programs and no new programs were initiated. Thus, at a time when residents were restricted from working, their forced inactivity was exacerbated by a lack of planning for increased therapeutic interventions.

In New Jersey, the Governor issued an Executive Order that discontinued all working assignments for residents except for those in the sheltered workshop or clearly part of a documented treatment plan. In response to the ruling and the Governor's Executive Order, the Superintendent and Assistant Superintendent of Hunterdon State School in Clinton, NJ simply noted the lack of union opposition to the reduction in the use of resident labor (Sloan & Levitt, 1975). Instead, they indicated that many employees expressed relief over not having to supervise resident workers. They reported that after it was explained to the regular employees that it would be to their advantage not to have working patients, "that their own jobs would not be jeopardized by the possibility of being replaced by patient workers," no major resistance to ending resident work assignments materialized (p. 23).

An example of how, in lieu of paying the resident workers, an increased number of positions in public institutions became available to "paid employees," occurred in New Jersey where resident workers were replaced by "paid employees" based on the percentage of duties the resident workers had been performing (Oudenne, 1974). If the resident workers had been doing the work of two half-time housekeepers, the institution received one full time equivalent employee. This move from resident workers to "paid employees" occurred despite the fact that AFSCME had portrayed their participation as plaintiff-intervenor in *Souder v. Brennan* as supporters of resident worker compensation (Tarr-Whelan, 1976). Following the actual decision, it became apparent fairly quickly that the union was not going to jump on the opportunity to add the 47,000 resident workers to its rolls as dues paying members.

Setoffs

Another consequence experienced by the resident workers who began receiving wages for their labor, was actions taken by some states to levy

Photo 5.1 Residents rolling silverware in Rose Building Work Activity Center, Faribault State Hospital, Minnesota (Courtesy of the Minnesota Governor's Council on Developmental Disabilities).

room and board charges in return. Referred to as "set-offs," the idea of individuals having private responsibility for contributing to the cost of care dates back to the Elizabethan Poor Law of 1601.

In the sixth edition of *From Poor Law to Welfare State*, Trattnor (2007) traced the influence of the Elizabeth Poor Law on the provision of aid to the helpless and needy. Passed in 1601, the law sought to clarify and define the responsibility of government with regard to the deserving and undeserving poor. As such, government activities for the able-bodied were to focus the provision of work as a means of addressing "involuntary unemployment." Conversely, the "incapacitated, helpless, or 'worthy poor'," were viewed as eligible for "either home ("outdoor") or ("indoor") relief" (pp. 11–12).

The Poor Law perspective fueled the development of the almshouses, poor houses, work farms, and so on, all of which required their "inmates" to labor for their provisions. For example, an 1827 New York law required relatives of sufficient ability to reimburse the overseer of the poor for support costs of persons maintained in the asylum. But, if relatives kept the person, he or she could not be removed from their care and no one had to pay; hence the development of the confinement of individuals with

disabilities in a family member's attic, pen, cage, and so on (Mernitz, 1960, p. 448).

Challenges to the practice of recouping funds for room and board were made based on the grounds that the wages residents would receive could never begin to cover the current cost of their care—not to mention the fact that they were expressly forbidden by 1975 Labor Department Regulations. Regardless, Kapp (1978) submitted that setoffs, "could provide a fair way to balance the resident's fundamental need to work (and to do so without exploitation), against the legitimate interest of the state mental health official in averting bankruptcy" (p. 304). He concluded that:

> Payment of wages, even if immediately recouped by the state, would give the resident knowledge that he or she is earing his room or board, and is not a mere ward of the state, knowledge that carries a sense of accomplishment, self-respect, and dignity of considerable therapeutic worth. (p. 304)

These sentiments were echoed by officials at Gracewood State School and Hospital in Georgia following the implementation of their post-Souder vocational program that paid resident workers in over 80 positions:

> Mr. Oellerich and Mr. Latimer said the general feeling among staff is that patients should pay their own way when living in an institution, they suggested a charge of approximately 40 percent of gross wages for upkeep. They said employees and some members of the public resent the fact that a few of the more productive working residents, who do not have to pay living expenses, have more monthly spendable income than some of the lower-paid regular employees.
>
> (Foote, 1976, p. 95)

In the event that facilities intended to implement a "setoffs" program, the *Guidelines for Work by Residents in Public and Private Institutions for the Mentally Retarded*, published by the AAMD[2] (AAMD, 1973), addressed recovery of room and board from residents. "Guideline J" affirmed the ability of institutions to institute this practice, but additionally recommended that resident workers be allowed to retain $25.00 or 25 percent of his or her wages, and that no charges be made in excess of the resident's capacity to pay. Its commentary again referenced the higher moral standing such payments to the institutions would accrue to the resident:

> *Commentary*: The benefits and privileges of employment must carry with them corresponding responsibilities. A working resident who is paid for

> his labor should be expected to reimburse the institution for board, lodging and ancillary services in accordance with his means. (AAMD, 1973, p. 60)

Tennessee, like many states, promulgated rules regarding patient and resident work programs in 1978. Nonetheless, *Chapter 0490—2—2, Patient/Resident Work Programs, Section 0940–2–2-.08 Deductions from Wages in the 1999* revised edition, still included a loophole for obtaining additional income from the resident:

> No deductions will be made from the wages paid to working patients/residents for the cost of maintenance, hospitalization, burial funds or other nonstandard provisions. However on the basis of ability-to-pay criteria, the institution may negotiate with the patient/resident or his responsible relative or guardian concerning an increase in payment for care and treatment rendered as a result of the individual's increased income. (Tennessee Department of Mental Health and Mental Retardation, p. 2)

The fairly universal provision of piecework rate labor in the newly created or expanded in-house sheltered workshops suppressed what might have been a resident's true income potential in other forms of labor. As such, the overall amount of funds available for room and board recoupment remained nominal until the advent of Supplemental Security Income (SSI) program in 1974.[3] At that point institutions were able to claim up to $25 per month of a resident's SSI to offset room and board costs. However, this small amount of additional revenue to the institution was not sufficient to overcome the costs of the demands placed on facilities to implement the newly minted right to treatment established in *Wyatt v. Stickney.* The right to treatment ruling, in conjunction with the after effects of the demise of institutional peonage, left the poorly staffed programmatic personnel departments scrambling for alternative forms of "therapeutic treatment" and increased the pressure for more residents to be released into the community.

The Creation of Sheltered Workshops and Other Work Programs in Institutions

Eleven years after the *Souder v. Brennan*, Blaine (1987) conducted a survey of 13 private psychiatric hospitals to explore professional reactions to the decision and its impact on hospital programs and patient treatment, along with their opinions regarding the value of work for the residents of their facilities. The survey's respondents reported that

they valued work programs, found them to be beneficial, and strongly believed that such programs should be for the benefit of the individual and not the hospital.

Respondents felt that the *Souder v. Brennan* decision had hindered the implementation of alternative work programs due to the complexity of obtaining FLSA certification for work program participants and excessive compliance documentation. Another concern voiced regarding the termination of prior unpaid resident work assignments was that treatment interventions had become much more intensive, resulting in shorter hospital stays.

Eventually, the *Souder v. Brennan* decision resulted in the termination of all resident work programs that had engaged residents in the day-to-day operation and maintenance of the institutions. Even though *National League of Cities v. Usery* subsequently reversed the ruling that resident workers be paid a minimum wage with options for certifications for lesser wages based on productivity, most states had proceeded down the one-way street of replacing resident workers with an outside, mostly nondisabled workforce. Resident workers, such as those found in Photo 5.1, who could have continued to perform their duties but for remuneration, were relegated to a future of enforced idleness or work that was paid by the piece in the facilities' sheltered workshops.

Before the *National League of Cities v. Usery* ruling, several professionals complained loudly about the termination of the more traditional work assignments. They beseeched the field in general, along with officials in their respective states to either seek a reversal in the decision to find a way to redefine work that would be in keeping with more therapeutic guidelines, and/or increase funding for other forms of treatment programs. In three separate articles, Daniel Safier elaborated on the key issues associated with the implementation of the FLSA with regard to patient rehabilitation.

In "Patient Rehabilitation Through Hospital Work Under Fair Labor Standards," Safier and Barnum (1975) described the use of subminimum wage certificates to pay residents for work done in occupational therapy or sheltered employment. The sheltered employment assignments in this instance were nonpiecework labor in keeping with what resident workers had previously performed, but were now compensated on a subminimum wage scale. The program targeted individuals with chronic mental health issues and resulted in 34 of 64 individuals progressing to either the "sheltered workshop" program or regular community employment.

In 1976, Safier provided a history of the evolution of work therapy programs in mental hospitals and the development of the FLSA of 1938 leading up to the controversial 1966 amendments to the Act. He identified

three administrative issues in light of the *Souder v. Brennan* decision: hospital operations costs, hospital policy regarding the provision of work programs, and the clinical value of work for wages in treatment. He stressed that, in his experience, FLSA compliance need not be a "dominating preoccupation of coerced concern" (Safier, 1976, pp. 91–92).

Michael L. Perlin, a lawyer who focused on mental health issues, directed his remarks to those states that had terminated all institution-based work programs. He expressed concern that, at a minimum, such responses were violations of the residents' right to treatment. In particular, like Safier, he stressed the importance of work and his perception that the opportunity to earn wages served to enhance its overall therapeutic effect, adding that:

> When New York hospital patients involved in an occupational therapy program were promised compensation, the knowledge that they would receive compensation "was electrifying" to them: Work which had taken "two weeks was now completed in three days"; patients "began to take noticeable pride in their appearance and performance"; and finally, instead of being viewed "as 'old-timers' doomed to lifelong confinement, they were seen as 'worthwhile rehabilitation prospects'." (Perlin, 1975, p. 321)

Other clinicians reported similar reactions from those residents who were included in programs that were focused on retaining the traditional work assignment opportunities for residents in ways that they could be compensated.

Sternlicht and Schaffer (1973) described the results of a Willowbrook study that hired 17 former residents where the only noteworthy item on job supervisor's ratings was poor appearance, "We feel this could be because of the janitorial nature of the jobs, or because the employees wore clothes donated to them while they were residents" (pp. 698–699). As advantages, they cited the supportive work environment in which resident workers were less likely to be ridiculed by coworkers along with onsite availability of adjustment counseling. They felt the resident workers success was due to the length of time they had been institutionalized and the training they had experienced during that time.

Changes in work programs within the Veterans Administration (VA) system likewise occurred even though, as a Federal program, they were not subject from the FLSA requirements. The VA system opted to eliminate its nonpaid inpatient "industrial therapy" programs and reassigned those individuals to its "incentive therapy" programs, where work was compensated at rates of 30 to 60 cents an hour (Hospital & Community Psychiatry, 1976, p. 111). No adjustments to its sheltered workshop programs were reported.

As public and private hospitals expanded their sheltered workshops, the fundamental change in the type of work and the impact this change would have on productivity and earning potential were rarely considered by programmatic staff anxious to keep residents engaged in work and rehabilitative activities. Foote (1976) describes the development of sheltered workshop programs used by four mental institutions in Iowa, Georgia, New York, and the District of Columbia to develop programs in compliance with Department of Labor regulations governing patient workers. Programs included creating regular paying positions for resident workers or obtaining Section 14(c) certificates or a combination of the two.

Another national study of public residential facilities (PRFs) by Sheerenberger (1978) found that:

> Of 166 PRFs, 54% stated that they had work activity centers. Of these, 81% were fully certified by the U.S. Department of Labor, 19% were not. Forty-five percent operated sheltered workshops of which 52% were fully certified by the U.S. Department of Labor.
>
> In addition, 54% of the 166 PRFs had working residents as defined by the U.S. Department of Labor. Of the 2744 residents working for at least at least a minimum wage, 77% were employed by the respective PRF and 23% were employed by outside agencies. (p. 197)

In 1976, David Schwartz noted a particular irony in the shift to a sheltered workshop model:

> It is ironic that mental hospitals whose wards are full of inactive people often have a history of providing meaningful occupation for hundreds of patients through hospital farms, orchards, cider mills, and shops, even though the work had the economic emphasis of a different social era. (p. 101)

Years later, Schwartz would reflect:

> My first assignment at Willard, when I was 22, in 1970, was to end institutional peonage (the concept had just been recognized) and to arrange and supervise work for the patient's benefit, and for which they were paid at least something. I heard many stories by patients about the old days, when they would be woken up at 5:30 when the hospital steamship had arrived at the dock with a load of coal to shovel into the hospital train coal cars.
>
> My own view is that the abolition of institutional peonage, like the abolition of child labor, brought with it the usual unforeseen negative consequences, like the fact that a thirteen-year-old boy can't get a job running

> an espresso maker. It also took some meaningful work opportunities from people with disabilities, I think.
>
> Of course, a large institutional peonage system now flourishes in the prison system. Those of us in the DD movement know that the way to abolish institutional peonage is to abolish institutions (D. B. Schwartz, personal communication, October 4, 2013).

Yet, these insights, recognized by many professionals in the field at the time, failed to forestall the shift to workshops continued and expanded across the country.

Post-Peonage Minimizing and Denigration of Resident Workers Labor

In due course, the collective amnesia of the field's leadership relative to their extensive reliance on involuntary servitude deteriorated even further into the denigration of the nature and types of real contributions they had made to the operation of the public institutions. For example, the website of the Treatment Advocacy Center includes an overview of *Souder v. Brennan* and lays responsibility for the enforced idleness of the former resident workers at the feet of plaintiff's counsel:

> The *Souder* case has proved one of the most destructive to patient welfare of all the cases brought by the mental health bar. Careless Congressional legislation opened the way for the mental health bar, since, given the absence of any mention of patient-labor in the legislative history, it seems clear that Congress thought it was extending FLSA protections to workers in institutions for the mentally ill and developmentally disabled, and the possible implications for patient-labor had not occurred to those who voted for the legislation. Thanks to *Souder*, enforced idleness has become one of the worst features of mental hospitals and a standard complaint of commissions investigating state hospitals has been (in the words of a New York commission) "the total lack of occupation" on the wards. (2013, n.p.)

Even now, in the twenty-first century, the blame for the idleness brought about by the Souder decision is reflected back upon the victims of involuntary servitude. It is important to note that the Treatment Advocacy Center commentary has much in common with criticism of the legal push for economic autonomy for individuals with disabilities. It makes no acknowledgment of the conditions that brought about the litigation and fails to hold the field's professionals accountable for failing to create alternatives to the exploitation that was being perpetrated and its subsequent aftermath.

Commentary at the time of the peonage cases was similarly equivocal. In "Of Pride and Peonage," Warren (1973) began with recognition of the excellent work habits that many individuals with intellectual disabilities demonstrated but rapidly shifted to a comparison of resident labor to other forms of unpaid work:

> Work, in institutions or elsewhere, is not often described as a major source of pride and thus worthwhile even in the absence of remuneration. Yet many people work for no pay. Volunteers. Consulting editors. Committee members. AAMD officers. (AAMD editors make about 70 cents per hour and consider it a privilege to work on AJMD, AAMD Monographs and MR). (p. 2)

It is difficult to see much validity in a comparison of the voluntary, often career-enhancing work of professionals, to the seven days per week, 12 hours per day, coerced and uncompensated labor of a resident workers in the boiler rooms, laundry rooms, kitchens, and similar assignments in institutions across the country.

Lebar (1976) likewise minimized the uncompensated labor performed by residents, despite a preponderance of historical evidence from leaders in the field to the contrary (Best, 1965; Cowden, 1969; Davies, 1959). Lebar's identified three primary premises in his assessment of the peonage issue in "Worker-Patients: Receiving Therapy or Suffering Peonage?".

1. The work consisted of nonessential tasks under staff supervision and was a form of therapy;
2. The economic benefit of this labor had never been a major consideration; and
3. Patients do it because they are "simply hungering for something productive to do." (p. 219)

Lebar concluded with: "Clearly there is a close relationship between productive work and the health of mental patients—a fact that should overshadow the spurious measurement of economic advantage to the institution . . . and to avoid further damage, corrective federal legislation should be passed to exempt patient workers from FLSA" (p. 220).

The articles by Warren, Lebar, and others regarding the impact of the peonage cases added yet another layer of veneer on the altar of dehumanization that had been raised by the field's leadership at the turn of the century. It was as though they had placed the very essence of the potential productivity of individuals with disabilities within a field of impenetrable

stasis, like a dragonfly found encased in prehistoric amber; identifiable, yet inaccessible; believed to be lost in the sands of time—recoverable only by highly dedicated and committed prospectors.

Accelerated Deinstitutionalization

When asked what he felt the biggest accomplishments were with *Townsend v. Treadway*, Larry Woods, the attorney that brought the suit, listed accelerated deinstitutionalization in the top two:

1. We got peonage stopped; and
2. Clover Bottom couldn't support that population without the residents working so it accelerated the deinstitutionalization; set the pace and course. (Larry Woods, personal communication, 1991)

An examination of the time period subsequent to the peonage cases unmistakably supports Wood's conclusion that they played a role in the acceleration of deinstitutionalization of institutions for individuals with intellectual disabilities. As predicted by Bickford (1963) and Bartlett (1964), profound changes occurred in the nation's system of public institutions when it was clear that resident workers were no longer able to work without being paid.

During the three-year interval between the late 1973 decision in *Souder v. Brennan* and the 1977 *National League of Cities* court decisions, 20,000 individuals with intellectual disabilities were released into hastily planned community programs. With the inclusion of individuals with mental illness, the decline in institutionalization averaged 27,200 individuals per year—a rate more than three times that of the previous decade (Clark, 1979, p. 463).

> In the middle 1960s, when rapid deinstitutionalization began, state hospitals were so severely understaffed that no net reductions in expenditures or staff took place. Instead, with the release of more functional patients and a gradual end to enforced labor (peonage), state hospital personnel were placed under new pressures to provide service to those left behind, a considerably more disabled population. (Clark, 1979, p. 470)

Paul Friedman was one of the attorneys for the plaintiffs in *Souder v. Brennan* and one of the strongest proponents of the effort to eliminate institutional peonage. On two different occasions (1976, 1977), he attributed the problem of unemployment among individuals who were deinstitutionalized to job discrimination within the community:

> In the future, more subtle and perhaps more basic issues will be encountered such as what to do to remedy job discrimination against patients released from institutions, and the even more vexing problem of how to ensure that mentally handicapped employees receive wages consistent with minimum wage standards. (Friedman, 1976, p. 580)
>
> Although institutional peonage was perhaps the most obvious abuse affecting employment of the mentally retarded, the more prevalent problem is in the community at large, where mentally retarded persons are subjected, like other minority groups, to various forms of job discrimination. (Friedman, 1977, p. 63)

The recognition that resident workers should not be performing the functions of paid employees was the basis for the official statement, "Aims of Fernald," made by Beatrice Barrett in 1968. The statement's intent was to underscore the mission of the Fernald State School in Massachusetts: to train and educate its residents, a purpose that had been abandoned by its namesake decades before:

> Originally, staffing assignments at Fernald were based on the assumption that part of the work would be done by mildly retarded residents. However, we know now that mildly retarded people are able to live successfully in the community. Therefore, we must do everything possible to move such people out of the institution quickly. We must make certain that they are prepared for independent life. We must test their progress toward independent living by providing them with increasing responsibility for their own self-care and self-direction. (n.p.)

Other factors such as an expanding Federal commitment to deinstitutionalization (Comptroller General of the United States, 1977) would aid in the acceleration of releases to the point that close to 60,000 individuals with intellectual disabilities had moved by the 1980s (Lakin et al., 1982, p. 19).

The acceleration of deinstitutionalization in the 1970s and 1980s brought with it an influx of Federal resources such as the Rehabilitation Act of 1973 and the Home and Community Based Waiver option (HCBW) under Title XIX of the Social Security Act. The HCBW program was created to serve as an alternative to what was formerly funding limited to only ICFs/MR.[4] Yet, growth in the integrated employment of individuals with intellectual disabilities faltered when work activity centers and sheltered workshops became major vocational placements for people. *Residential deinstitutionalization* was being rapidly replaced with *work institutionalization*. In retrospect this was an incongruous trend for Special Education students who, having moved out of self-contained classrooms

and into the mainstream of regular educational environment, upon leaving school were being placed back into segregated, self-contained work settings (Whitehead, 1986).

The percentage of individuals who found employment upon leaving the institutions during the largest period of the decline was very small. Golley, Freedman, Wyngaarden, and Kurtz (1978) conducted a national study of 440 individuals who moved to community settings rather than other institutions between 1972 and 1974. They found that, of the 247 individuals who were in work placements, 75 percent (185) were in sheltered workshops and 25 percent (62) were in regular employment—and the rate of competitive employment declined in relationship to the individual's degree of disability. A comment about a study group member who shared his dissatisfaction with the sheltered workshop underscored the problem of changing the nature of employment from regular labor to piecework:

> Dennis was unusual because he was the first person I spoke to who would have preferred to go back to the institution. He said the reason for that was at the institution he had a job working in the laundry. In the community he just worked in a sheltered workshop which did not give him a feeling of satisfaction. (p. 72)

Employment was clearly viewed as an important source of self-esteem and security by the study members. So much so that when asked if anything worried them, one individual commented, "*I get nervous that I will be sent back to the institution because I'm not working*" (p. 134).

J. David Smith's 1995 memoir about John Lovelace, an individual with an intellectual disability, described the relationship that ensued from his work to have a Do Not Resuscitate (DNR) order removed from John's record. John was a former resident of Lynchburg Training School and Hospital in Virginia. While John was at Lynchburg, it was noted that:

> He likes to be busy and useful. He likes to earn money. Having a little pocket money seems to be one of the few symbols in life available to him of some independence in his life. And work is often an earned privilege in all kinds of institutions: For inmates, patients, and others, to be trusted to work is to have elevated status. (p. 50)

As preparation for deinstitutionalization, John was enrolled in Lynchburg's Work Activity Center, where his "outbursts" would result in suspension from work. Even after he moved into the community, one of the greatest frustrations and source of conflicts that continued to deeply affect his life

was John's inability to secure work for five days per week. His schedule of two to three days per week was not producing the income he needed. Smith went on to share the "Mercantile Theory of Mental Retardation," a satire he had gleaned from a book he had once read:

> Being mentally retarded can thus be seen as not being part of the economic and social system: being outside of the commerce of life and, therefore, having no value to that system. The experience of being a surplus person is one that many mentally retarded people share, along with others who, because of age, background, or other disability, are viewed as having no value. (p. 92–93)

Even at the turn of the twentieth century, when deinstitutionalization was being planned for an individual, integrated employment was typically not considered a priority upon release. Hayden, DePaepe, Soulen, and Polister (1995) conducted a one-year follow-up of movers and stayers in Minnesota and found only a slight difference in employment participation. The majority of movers and stayers attended day habilitation or work activity programs during both the baseline and one-year follow-up assessments. The percentages of movers and stayers who worked within a supportive employment or enclave increased slightly for both groups. No one was competitively employed at baseline. At the one-year follow-up assessment, only one stayer was competitively employed.

Conversely, Conroy, Spreat, Yuskauskas and Elks (2003) found that a 28.5 percent increase in supported employment had occurred over the course of the six years following the closure of the Hissom Memorial Center[5] in Oklahoma. In 1990, 47.9 percent of the 382 Hissom Memorial Center focus class members were involved in pre-vocational day activities, 28.3 percent in school, 8.6 percent in sheltered employment, and 6.5 percent in supported or competitive employment. In 1995, 16 percent were involved in pre-vocational day activities, 12.8 percent in school, 30.6 percent in sheltered employment, and 35 percent in supported or competitive employment with some overlapping participation. Seventy-eight (20.4%) people in 1990 had no day program reported and 70 people in 1995 (20.4%). Over the course of the six years, the use of pre-vocational day services dropped by 122 individuals, sheltered workshop services increased by 84 individuals and supported/competitive employment increased by 107 individuals.

CHAPTER 6

THE PECULIAR INSTITUTION OF SUBMINIMUM WAGE

> Men must sell and men must buy
> Else an end to every nation;
> But I see no reason why
> We should suffer exploitation.[1]

The notion that the labor of one particular segment of the nation's workforce is of less worth or value has served to undermine the advancement of workers with disabilities to full inclusion in opportunities for employment. In 2014, the United States Bureau of Labor Statistics indicated that only the employment rate for individuals with a disability had actually declined from 17.6 percent in 2013 to 17.1 percent in 2014 (United States Bureau of Labor Statistics, 2014, p. 1). Further, even when employed, a significant portion of workers with disabilities labor in segregated workplaces for wages that became less and less likely a vehicle for self-sufficiency.

The origins and evolution of the provision for paying workers with disabilities less than those without is multifaceted. It is hoped that an overview of the historical significance and other facets of the subminimum wage's peculiar place in the overall construct of fair compensation will underscore the continued need for statutory reform. The passage of the FLSA of 1938 included provisions for paying workers with disabilities less than what the law required for all others. Amendments to the FLSA have altered the limitations on wage reductions to wages paid to workers with disabilities. However, the underlying rationale that serves as the basis for such reductions has remained unaltered—that workers with disabilities cannot perform or produce at the same level of nondisabled

workers—and, can therefore be justifiably penalized in the form of reduced compensation.

The impact of the subminimum wage provisions (also referred to by its section of the FLSA as Section14(c) 3 wages) on the economic status of workers with disabilities is also important to understand. Diminishing subminimum earnings in comparison to the rise in the statutory minimum wage, coupled with issues associated with segregated work sites, also warrant greater scrutiny. Further, results of investigations and studies that have been conducted to date have expanded the list of concerns over sheltered employment into broader debates of social justice and human rights. Finally, failed efforts to reform or eliminate the subminimum wage illustrate how the perpetuation of the devaluation of individuals with disabilities continues to manifest itself in our society.

Historical Overview

The creation of the subminimum wage has its roots in the New Deal's "National Industrial Recovery Act" (NIRA), the precursor to the Fair Labor Amendments Act. Labor codes under the NIRA, as enacted in 1933, did not apply to charitable institutions unless they engaged in industry or trade. Private industry began expressing their concerns that the sheltered workshops would have an unfair advantage in competition. So, in 1933, Hugh S. Johnson, the Administrator for Industrial Recovery appointed a "Special Committee" to investigate conditions among workers with disabilities in sheltered workshops. The Special Committee recommended that sheltered workshops comply with the "spirit and intent" of the National Recovery Administration but not be required to comply with its various labor and industrial codes (Clarke & Cyr, 1936, p. 2).

Following their investigation of sheltered workshops, Johnson then asked the Special Committee to investigate how workers with disabilities in private industry fared under the National Recovery Administration. The Report of the Special Committee was issued on February 1, 1934 (Clarke & Cyr, 1936, p. 21). Their findings prompted President Roosevelt to issue Executive Order 6606-F to clarify the application of NIRA rules and regulations to handicapped workers (Clarke & Cyr, 1936 p. 15). The order, issued on February 17, 1934, was the first of its kind to legally authorize employers the option of paying less than the statutory minimum wage, that is a "sub-minimum" wage:

> 1. A person whose earning capacity is limited because of age, physical or mental handicap, or other infirmity, may be employed on light work at a wage below the minimum established by a Code, if the employer obtains

> from the state authority, designated by the United States Department of Labor, a certificate authorizing such person's employment at such wages and for such hours as shall be stated in the certificate. (United States, National Recovery Administration, 1933, p. 706)

On March 3, 1934, President Roosevelt's executive order was followed with Johnson's Administrative Order X-9. Order X-9 granted the first conditional exemption of the labor rules and regulations to sheltered workshops while also establishing the first National Sheltered Workshop Committee. The appointment of the six members of the Committee gave the sheltered workshop industry standing in the national industrial forum and a means by which they could interface with private industry as well as government leaders (Clarke & Cyr, 1936, p. 24).

The first committee members included representatives from the National Rehabilitation Association, Inc., the Milwaukee Goodwill Industries, the Industrial Home for the Blind, the Institute for the Crippled and Disabled, Altro Workshops, and the National Conference of Catholic Charities. The charge of the Committee was to oversee policy regarding the role of the workshops within the overall economy (Clarke & Cyr, 1936, p. 25).

As the oversight work of the National Sheltered Workshop Committee evolved, so did the accommodations afforded to organized labor. The National Sheltered Workshop Committee served as the initial organizing catalyst for the sheltered workshop industry. Although the NIRA was struck down by the Supreme Court in 1935, the work of the National Sheltered Workshops Committee carried out by the National Recovery Administration resulted in an immutable articulation of the purposes of sheltered workshops, *"the rehabilitation of workers, the provision of remuneration employment to the handicapped, and the dispensing of vocational training rather than operating for profit"* [italics added] (Clarke & Cyr, 1936, p. 9).

The Fair Labor Standards Act

Immediately following the 1935 Supreme Court ruling that the National Recovery Administration was unconstitutional, the Roosevelt administration began crafting an alternative. In its place, the FLSA of 1938 became the basis for addressing the nation's changing employment patterns from agriculture to manufacturing. The FLSA of 1938 expanded labor protections and included provisions for individuals to file claims against employers for violations of the Act—provisions and protections that were not extended to workers with disabilities. *Instead, Section 14(c) of the FLSA created a completely separate means by which employers could pay*

Table 6.1 Subminimum wage statutes along with specific requirements with regard to the "floor" upon which wages were to be based

Statute	*Certificated employment in the competitive sector*	*Certificated employment in sheltered workshops*	*Certificated employment in work activities centers (WACs)*	*Ramifications*	*Implications*
National Industrial Recovery Act (NIRA, 1933–1935) as per Executive Order 6066-F, 2/17/34.	Competitive employers must pay workers with disabilities *no less than 75%* of their industry's minimum wage.	Sheltered workshops had no minimum wage requirement (referred to as a "floor").	N/A (There was no official "work activity center" designation at this point in history).	1. If hired by a regular employer, a worker with a disability had to be paid at least 75% of the minimum wage. 2. If hired by a sheltered workshop, wages paid based on "productivity."	After receiving a certificate of exemption from Department of Labor, workers in competitive employment were *guaranteed* a percentage of the minimum wage.
Fair Labor Standards Act (FLSA, 1938) as per discretion of Secretary of Labor.	Competitive employers must pay workers with disabilities *no less than 75%* of the statutory minimum wage.	Sheltered workshops had no minimum wage requirement; individual wage rates were to be based on the productivity of worker.	N/A (There was no official "work activity center" designation at this point in history).	1. If hired by a regular employer, a worker with a disability had to be paid at least 75% of the minimum wage. 2. If hired by a sheltered workshop, wages paid based on "productivity."	After receiving a certificate of exemption from Department of Labor, workers in competitive employment were *guaranteed* a percentage of the minimum wage.

The 1966 FLSA Amendments.[2]	Competitive employers must pay workers with disabilities *no less than 50%* of the statutory minimum wage.	Sheltered workshops must pay workers with disabilities *no less than 50%* of the statutory minimum wage.	Work activities centers were added as a type of employer. WACs had no statutory minimum wage requirement; individual wage rates were to be "related to the worker's productivity."	1. If hired by a regular employer, a worker with a disability had to be paid at least 50% of the minimum wage. 2. If hired by sheltered workshop, wages must be at least 50% of the minimum wage. 3. If hired by a sheltered workshop, wages paid based on "productivity."	After receiving a certificate of exemption from Department of Labor, workers in competitive employment and sheltered employment were *guaranteed* a percentage of the minimum wage. Significant increase in application for work activity center certifications instead of sheltered workshop certifications followed.
The 1986 FLSA Amendments.	Competitive employers have no statutory minimum wage, but the wage rate paid must be: 1. "commensurate" to those paid to workers without disabilities in the area and 2. related to the individual's productivity.	Sheltered workshops are treated the same way as competitive employers. They have no statutory minimum wage, but the wage rate paid must be: 1. "commensurate" to those paid to workers without disabilities in the area and 2. related to the individual's productivity.	Work activity centers are treated the same way as competitive employers. They have no statutory minimum wage, but the wage rate paid must be: 1. "commensurate" to those paid to workers without disabilities in the area and 2. related to the individual's productivity.	1. If hired by a competitive employer, sheltered workshop, or work activity center, the calculation of the wage rate of a worker with a disability is to be based on what other workers in area of employment are earning.	Workers with disabilities *no longer guaranteed* a "sub-minimum" wage if employer had obtained a certificate of exemption that included him/her, regardless of work setting.

Adapted from: Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act, Whittaker, 2005, p. CRS-2

workers with disabilities less than the statutory minimum wage—more commonly referred to as the "sub-minimum wage."

Section 14(c) of the FLSA was crafted to specifically apply exemptions to the law to learners, apprentices, and "handicapped workers." Its language bore striking resemblance to Executive Order 6066-F issued by Roosevelt during the reign of the National Recovery Administration.

> (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates. (www.ushistory.org, 2015, n.p.)

As such, the original legislation's subsequent revisions to Section 14 of the FLSA would continue to provide for the payment of subminimum wages. The nature and type of certificates of exemption that employers could pursue, along with the "floor," the standard by which wages could be determined, were modified by amendments passed in 1966 and 1986. Nonetheless, despite episodic efforts on the part of various congresspersons and congressional committees, the essential provisions of Section 14(c) 3 have remained the same (United States Congress, House Committee on Education, & Labor, Subcommittee on Labor Standards, 1986, p. 63). Table 6.1 summarizes the enactment of subminimum wage statute along with specific requirements with regard to the "floor" upon which wages were to be determined.

How Subminimum Wages Are Determined Under the Current Statute

The 1986 FLSA Amendments are the most recent version of the nation's labor laws. Enacted in 1986, it requires employers who have certificates of exemption to base subminimum wages paid to a worker with a disability on "a commensurate" rate. Further, this rate is to be determined by evaluating the worker's productivity in his/her first month of employment. However, as described in audit reports and investigations noted later in this chapter, how the rate is calculated is complicated. As such, it is prone to error and/or deliberate manipulation.

Example 1: Commensurate wage rate based on prevailing hourly rate

In this instance, the time involved in completing the work assignment by workers who are not disabled is measured. Then the time involved

in completing the work assignment by the worker with a disability is measured. The worker with a disability is then paid on the basis of a percentage of the wage that is usually paid for that work in their area. So, for example, a job cleaning hotel rooms in Memphis pays $8.00 per hour and the average number of rooms to be cleaned is two rooms per hour. However, the worker with a disability can only clean one room per hour (50% of what a worker without a disability can clean), then the worker with a disability could be paid a subminimum wage of $4.00 per hour for that work.

Example 2: Commensurate wage based on a piece rate for parts or products produced

In this instance, the number of pieces or products normally produced by workers who are not disabled is measured. Then, the wage that is usually paid in the area for producing those types of pieces or products is divided by number of pieces or products measured to get a *rate per piece*. The worker with a disability is then paid a wage based on the number of pieces or products that he/she completes. So, for example, if a worker without a disability in a shirt factory who can sew 80 sleeves an hour is paid $8.00 an hour, then the piece rate for that work would be $.10 per sleeve. The worker with a disability is then paid for the number of sleeves they sew during a shift. However, the worker with a disability only sews 80 sleeves in an eight-hour day. Then that worker is paid $8.00 for that day (or what would be an hourly rate of $1.00 per hour).

Given the complexity of determining hourly or piece wage rates, it is easy to see where errors could and do occur. It is also easy to see how rates can be manipulated to pay less than what the statute requires. Productivity can be affected by using rates based on labor that performed by nondisabled workers who worked at a pace that could, in fact, not be sustained across time. For example, a work sample where four rooms were cleaned in an hour instead of two. Productivity based on a piece rate measure can also be influenced in a number of ways that can impact the legitimacy of the commensurate rate. For example, including arranging the work in a way is inefficient and therefore takes more time to complete is another problem workers with disabilities encounter. Another example is positioning the product or pieces to be produced work differently from how the work was completed when the rate was originally measured.

Complicating matters are issues associated with the overall management of the workplace itself. Gaps in the availability of work to perform are commonplace and downtime can result in the loss income as well as work skills and/or motivation. Six-hour workdays are common and

attendance is frequently limited by the availability of transportation. The adherence to an outdated "school" schedule that closes programs for long holiday periods or "staff in-service" also decreases the overall number of workdays available for production.

Sheltered workshops and work activity centers (referred to by the Department of Labor Wage and Hour Division as Community Rehabilitation Programs (CRPs)) are required to file their process for determining the individual wage rates for the work performed every two years. Competitive employers with certificates of exemption are required to report the process annually. Even so, enforcement of the law has long been criticized for failing to ensure that workers with disabilities are actually paid the wages that employers claim they have or will be paid. These issues, in particular, have been noted repeatedly in the various investigations, surveys, and studies of workplaces that have certificates of exemption allowing for the payment of subminimum wages.

Investigations, Studies, and Status Quo

The first examination of the status of workers with disabilities paid subminimum wages under Section 14(c) 3 took place in 1967. Included in the Fair Labor Standards Amendments in 1966 was a provision for the Secretary of the Department of Labor to initiate a special study of wage payments to clients of sheltered workshops. At that time Congress was considering the goal of raising the wages of workers with disabilities to the statutory minimum wage as soon as was feasible (United States Department of Labor, 1967, p. 1). Thus, the study's primary purpose was to measure the impact of the 1966 FLSA Amendments on the wages of workers with disabilities.

The Sheltered Workshop Report of the Secretary of Labor (United States Department of Labor, 1967) indicated that little impact on wages had taken place as the result of the new required statutory subminimum wage. Instead, the report identified a trend within the sheltered workshop industry of agencies changing their designation from a sheltered workshop to a work activity center in order to avoid the new statutory wage. Wage stagnation notwithstanding, Labor Secretary, W. William Wirtz focused his most disparaging remarks on the prevalence of outdated workshop methods and modes of operation:

> By the very definition of their condition, the clients of workshops are limited in their abilities to produce. Not only are their personal handicaps a factor, but they are limited by frequently obsolete methods of

> organization and production of the workshop. To measure the "worth" of a handicapped client by his "productivity" while making him work with outmoded equipment, or on jobs long ago automated, or with modern equipment which is not adapted to the individual's needs is to doom the great majority of handicapped clients to subminimum wages. (p. 3)

Altogether, including the 1967 report, 11 investigations, and studies regarding sheltered workshops and the impact of FLSA Section 14(c) 3 program have been carried under the auspices of various departments of the Federal government. Table 6.2 provides a recap of their findings and recommendations.

As summarized in Table 6.2, the most significant issues identified in the ten investigations, studies, and reports included:

1. Problems in the methods used by employers to determine the subminimum wages paid to workers with disabilities.
2. The lack of growth in the subminimum wages paid to workers with disabilities despite increases in the minimum wage across time.
3. Problems in the overall administration and oversight of the subminimum provision of the Act by the Wage and Hour Division in the Department of Labor.

Finally, all 9 of the 11 investigations and studies used samples that were, for the most part, based on national distribution of the employers who held subminimum wage certificates.

Issues with employer individual wage determinations

One of the primary arguments against the continuation of the provision for paying subminimum wages has been the low wages paid by sheltered workshops. Payment of absurdly low compensation of sheltered workshop workers has been reported in a broad swath of popular media as well as academic publications. The history behind the enforced poverty of workers with disabilities is reflective of the good intentions of an administration that sought to raise a nation out of depression. It also underscores how and the extent to which stigma and dehumanization continue to impact the economic security of workers with disabilities in the twenty-first century.

Eight of the 11 reports (Greenleigh Associates, 1976; United States Department of Labor; Advisory Committee on Sheltered Workshops, 1976; United States General Accounting Office, 1981; Minimum Wage Study Commission, 1981; United States General Accounting

Table 6.2 Investigations regarding FLSA Section 14(c) Implementation

Source	*Year*	*Scope*	*Major findings*	*Major recommendations*
United States Department of Labor, Wage and Hour and Public Contracts Divisions (1967). Sheltered workshop report of the secretary of labor. Government Printing Office, Washington: DC	1967	Comparative analysis of wage data submitted to DOL pre/post 1966 FLSA Amendment. Three groups; 29,101 regular clients who received base rate, 3,634 trainees with special certificates and 1,920 clients with exceptions. 838 workshops (815 with one or more regular clients and 23 shops with no regular clients.	1. Legal requirement that clients be paid at least 50% of minimum wage did little to raise wages. 2. Workshops changed identity to "work activity centers" to avoid statutory rate	To achieve Congress' goal of minimum wage for clients in sheltered workshops: 1. Consider wage supplements. 2. Open new markets for workshop products. 3. Additional financial support to modernize facilities and methods. 4. New out-placement services.
United States Department of Labor. Advisory Committee on Sheltered Workshops. (1976). Report on enforcement activities under the Fair Labor Standards Act with respect to patient workers at hospitals and institutions: August 1, 1975 through January 31, 1976. US Dept. of Labor, Advisory Committee on Sheltered Workshops	1976	Second semi-annual follow-up by Wage and Hour Division focused on compliance with FLSA Amendments of 1966. Sample of 81 institutions; 64 public and 17 private institutions, 28 for MI, 42 for ID, 11 other.	1. In 72 institutions, found 6,669 patient workers. 2. Identified monetary violations when combined with first semi-annual report of $4,015,186 due to 8,625 patient workers. 3. Total of $373,307 restored to 1,941 patient workers. 4. Litigation filed against California	None

Greenleigh Associates, Inc., and United States Rehabilitation Services Administration (1976). The Role of the sheltered workshops in the rehabilitation of the severely handicapped. Greenleigh Associates, Inc.	1976	National survey of 400 workshops based on stratified sample of all operating sheltered workshops and work activity centers. Also included individual interview with 2,140 current/former workshop clients.	1. Total number of workshops increased from 978 in 1967 to approx. 2,600 in 1974 with average daily caseload of 174,200. 2. 13% placement rate for shops, 7% for work activity centers. 3. Workshop production inefficient, pricing inaccurate, and contract procurement ineffective.	1. Dual roles of rehabilitation and business/ employment functions should be separated. 2. Develop uniform standards. 3. Take steps to increase client income.
United States Department of Labor (1977). Sheltered workshop study: A nationwide report on sheltered workshops and their employment of handicapped individuals, Volume 1. Washington, DC: US Dept. of Labor, Employment Standards Administration.	1977	First Volume of wage study based on 1973 data. Total of 88,791 workshop clients: regular 30,365; work activity centers 44,401; training and evaluation 13,785.	1. Client earnings increased very little over past 5 years. 2. Separating regular shops and work activity centers did not produce significant change. 3. 12% community placement rate. 4. 75% of work activity centers were for individuals with intellectual disabilities.	None in this volume; see Volume II.

continued

Table 6.1 Continued

Source	*Year*	*Scope*	*Major findings*	*Major recommendations*
United States Department of Labor (1979). Sheltered workshop study: A nationwide report on sheltered workshops and their employment of handicapped individuals, Volume 2. Washington, DC: US Dept. of Labor, Employment Standards Administration.	1979	Wage study based on 1976 data. Total of 138,713 workshop clients; regular 35,494; work activity centers, 80,735; other 22,179	1. Workshop wages did not keep pace with the 44% increase in Federal Minimum Wage over past 3 years. 2. Subcontract work most common with only a small portion involved in manufacturing or service work. 3. Many clients worked short workweek (20 hours)—lack of work felt to be a factor.	1. Require all shops receiving Federal funds to comply with FLSA. 2. Conduct a series of pilot studies to explore feasibility of wage subsidies. 3. Extend Workman's Comp and Social Security benefits to shop workers with disabilities.
United States General Accounting Office (1980). Report to the Secretary of Health, Education and Welfare: better reevaluations of handicapped persons in sheltered workshops could increase their opportunities for competitive employment. United States General Accounting Office, Washington, DC.	1980	Onsite review of 169 cases in Illinois and Missouri with visits to 19 RSA field offices and 18 Sheltered Workshops along with an analysis of national data submitted to the Agency.	1. Five states did not classify persons in a work activities center as rehabilitated and so did not reevaluate. 2. Only 4 of 89 reevaluations in Illinois and Missouri met headquarters criteria for determining competitive employment potential.	1. Revise guidelines to require that reevaluations be performed for all former vocational rehabilitation clients in sheltered employment, including persons placed in work activity centers. 2. Monitor State procedures and provide assistance to assure that annual reevaluations are made and they are comprehensive and timely.

United States General Accounting Office (1981). Stronger federal efforts needed for providing employment opportunities and enforcing labor standards in sheltered workshops: Report to the Honorable Barry M. Goldwater, Jr, House of Representatives. United States General Accounting Office. Washington, DC.	1981	Onsite review of 524 workshops in 5 Federal regions	1. 85% of total workshop population were employed under special certificates. 2. 60% of workshops (317) had underpaid 11,482 workers by about $2.7 million. 3. Piece rates not always based on reasonable production standards.	1. Eliminate current 50% of minimum wage "floor" to decrease paperwork demands. 2. Establish system for documenting individual minimum wage rates.
Minimum Wage Study Commission (1981). Report of the Minimum Wage Study Commission. United States. Washington, DC.	1981	Onsite visits with comprehensive evaluation of 25 workshops, including 11 workshops for the blind, 7 serving persons with variety of disabilities, and 7 serving persons with developmental disabilities. Total sample size of 1,925 individuals.	1. Wages vary due to nature of the shop, the certificates it operates under, and types of workers. 2. The sources of revenue at DD shops was completely different from the others with over 70% of revenue coming from service revenue and/or contributions. 3. Every DD workshop was forced to rely on subcontract work for production revenue. 4. All DD shops had job placement counselors on staff. 5. The average DD workshop placed 37 persons in the past year. 6. Confusion and a wide variety of methods used to establish production standards.	1. Shops should be provided with guidance on how to establish commensurate wages.

continued

Table 6.1 Continued

Source	*Year*	*Scope*	*Major findings*	*Major recommendations*
United States General Accounting Office (2001). Centers offer employment and support services to workers with disabilities, but Labor should improve oversight. United States General Accounting Office, Washington, DC.	2001	Random sample of workshops and businesses with 14(c) 3 certificates; talked with researchers, disability groups, employer groups, etc.	1. Labor has not ensured that 14(c) 3 workers receive proper wages. 2. Labor has not collected the data it needs to manage the program. 3. Labor staff are not adequately trained to monitor program	1. Labor needs to collect the data it needs to carry out enforcement function. 2. Labor needs to systematically follow up with employers. 3. Labor needs to follow up with lack of employer responses to 14(c) 3 renewal notices.
United States Department of Labor, Office of Inspector General, Office of Audit (1981). The wage and hour division's administration of special minimum wages for workers with disabilities, audit report No. 05–01–002–04–420, United States Department of Labor, Washington, DC.	2001	Fieldwork audit in the Wage and Hour Division's (WHD) Midwest Regional Office and on-site at 10 certificate holders in 7 states.	1. WHD gave Section 14(c) 3 program low priority. 2. Unreliable management information system. 3. Policy that provided for assessments of minute amounts of back wages as low as $.01. 4. Numerous problems with wage calculation methods at 4 of 10 employers reviewed. 5. Institutionalized patient workers not paid commensurate wage. 6. Special education students individual productivity not measured. 7. WHD allocated only 6 staff nationwide to administer program.	1. Increase monitoring and technical assistance. 2. Include process for increased 14(c) 3 monitoring in Employment Standards Administration strategic planning process 3. Increase technical assistance to employers 4. Establish Advisory Committee to solicit recommendations for program guidance. 5. Establish partnerships with ODEP and other government programs for employment of people with disabilities.

"The National Community Rehabilitation Program Investigation-Based Compliance Survey" by the US Department of Labor Employment Standards Wage and Hour Division as summarized in the Wage and Hour Division Fact Sheet, No. 39 G, April 2005.	2005	Wage and Hour investigations of 70 Community Rehabilitation Programs (CRPs) out of 3,001 CRPs holding 14(c) 3 certificates. Included 8,234 staff and 6,490 workers with disabilities.	1. CRP's employ 95% of all workers with disabilities who receive subminimum wages under Section 14(c) 3. 2. 36% were in compliance with monetary provisions of FLSA. 3. 74% of CRPs properly compensated staff. 4. 37% properly compensated workers with disabilities. 5. 11 of every 100 workers were due back wages. 6. Most common error was incorrect use of prevailing wage in piece-rate calculations.	None.

Office, 2001; United States Department of Labor, 2001; and United States Department of Labor Office of Compliance Assistance Policy, 2007) cited problems with the methods used to calculate individual wages.

For example, the 1981 GAO report to Senator Barry Goldwater, found that:

> For fiscal years 1977–79, Labor reported that 317 (or 60 percent) of the 524 workshops investigated had underpaid 11,482 handicapped workers about $2.7 million. GAO's analysis in five Labor regions showed that:
>
> Sheltered workshops often failed to pay wages based on an individual's productivity or to comply with the terms and conditions of an approved Labor certificate. (See pp. 38 and 39)
>
> Problems existed in computing piece rates, establishing hourly rates, determining prevailing wage rates in local industry, and maintaining adequate records." (See pp. 32 to 37)

That same year, the United States General Accounting Office (1981) reported to the House Subcommittee on Manpower and Housing Committee on Government Operations that the nonprofits that administer Javits-Wagner-O'Day[3] (JWOD) programs were in need of greater oversight, especially with regard to individual wages. In a written statement regarding the report, Edward A. Densmore, the deputy director of the Human Resources Division of the General Accounting Office offered more specific criticisms:

> Workshops were not required to (1) maintain a certain percentage of handicapped labor for commodities or services sold to the Federal Government and (2) identify placements into competitive employment attributable to employment opportunities created by the program. In addition, workshops did not always comply with Federal labor standards, especially in establishing piece or hourly rates, determining the prevailing wage rates in local industry, and recordkeeping, and Labor efforts to enforce Federal labor standards needed strengthening. (United States General Accounting Office, 1983, p. 4)

Twenty years later, in its 2001 investigation, the United States General Accounting Office (US GAO) concluded that:

> Labor does not know the program's precise size, the resources currently devoted to it, the rate at which employers comply with program requirements, or the timeliness or results of its oversight activities. Without this information, Labor cannot be sure that it is giving the program the

> appropriate priority or gauge the effectiveness of its efforts to ensure employer compliance. (US GAO, 2001, p. 35)

Issues with the lack of wage growth

Four of the 11 reports cited problems with the lack of growth in the wages of workers with disabilities (United States Department of Labor, 1967; Greenleigh Associates, 1976; United States Department of Labor, 1977; and United States Department of Labor, 1979). The FLSA Amendments of 1966 requirement that regular sheltered workshops pay no less than 50 percent of the minimum wage. However, the United States Department of Labor (1967) found that the new requirement had not resulted in overall increased earnings for their workers with disabilities. In fact, the findings were that in order to avoid the statutory minimum, many workshops changed their designation from sheltered workshops to work activity centers where no statutory minimum applied.

Greenleigh and Associates (1976) attributed the lack of growth in wages, in part, to the "inefficient workshop production, inaccurate pricing, and ineffective contract procurement" (p. 351). They went on to observe that:

> While there are many structural barriers in the general economy to the maximization of the business effectiveness of workshops, there are as many areas in which staff development, cooperative agreements, industrial engineering, and management improvement would greatly enhance the workshops' performance in these areas. (p. 352)

Only two of the studies (Greenleigh and Associates, 1976; United States Department of Labor, 1977) made reference to the movement of sheltered employees to competitive employment. Greenleigh and Associates (1976) identified a 13 percent placement rate for sheltered workshops and a 7 percent placement rate for work activity centers. The United States Department of Labor (1977) reported an overall placement rate of 12 percent.

Issues with administration and oversight

Four of the reports (Greenleigh and Associates, 1976; United States General Accounting Office, 1981; United States General Accounting Office, 2001; and United States Department of Labor, Office of the Inspector General, Office of Audit, 2001) identified significant problems with the implementation, oversight, and enforcement of Section 14(c)

of the FLSA. The 1981 US GAO report to Senator Barry Goldwater, observed that four of the five regions reported spending less than 1.0 staff year on investigations in comparison to the 0.5 to 1.5 staff years they spent on the annual certification process" (US GAO, 1981, p. 40).

Two decades later, the 2001 Audit Report issued by the Department of Labor's Office of the Inspector General noted that the Wage and Hour Division had allocated only *six* staff nationwide to administer the program. The report also noted that the Division's data management system was so unreliable that, "annual statistical data could not be validated" (p. 9).

Recommendations for improvement cited in reports

As with the findings reported in the reports described above, similar recommendations were noted repeatedly. Beginning in 1967, and over the course of the subsequent five decades, reviewers consistently recommended that Congress take steps to increase the wages of workers with disabilities. However, those same reports then suggested that, in lieu of eliminating the subminimum wage, Congress consider wage supplements to establish economic equity for workers with disabilities (United States Department of Labor, 1967, United States Department of Labor, 1979).

Other recommendations included:

1. Requiring all workshops that received Federal Funds to comply with the Fair Labor Standards Act (United States Department of Labor, 1979).
2. Separating dual roles of rehabilitation and business/employment of sheltered workshops into two distinct operations (Greenleigh and Associates, 1976).
3. Establishing an Advisory Committee to solicit recommendations for program guidance (United States Department of Labor, 2001).

As noted earlier, the findings of the ten reports summarized in Table 6.2 demonstrate a consistent effort on the part of policymakers to avoid addressing the underlying economic injustices experienced by workers with disabilities. Still, one report stands out from among the others in that the descriptions of the audit's site visits provide striking examples of how the harm that is accrued to workers with disabilities through inaction has continued to replicate itself like a self-mutating computer virus. In particular, the narrative descriptions of the two site visits included in *The Wage and Hour Division's Administration of Special Minimum Wages for Workers with Disabilities* (United States Department of

Labor, 2001) provide disturbing evidence of the need for far more than greater scrutiny of Section 14(c) 3 employers.

Institutionalized Patient Workers

The following excerpts from the description of the audit team's 1999 visit to a site that served individuals with severe mental illness illustrates how the practice of institutional peonage continues to impact the lives of individuals with disabilities (United States Department of Labor, 2001).

> The institution provides patients with part-time, in-house employment, which serves to keep the patients occupied, help build self-esteem and provides needed spending money for clothing, sodas, cigarettes and other items. In 1999, the most productive patients received a salary of $75 per month washing dishes. The least productive patient performed what the institution called "courtesy work," such as filing papers and picking up mail. The time spent on courtesy work was minimal, generally less than one hour per day. Courtesy workers received a flat rate of $10 per month for the performance of their duties.
>
> The patients were paid a salary for the various jobs performed, and the salary amount was determined by what the institution considered a reasonable value for the work performed. For example, most kitchen workers received a salary of $75 per month and worked up to 20 hours per week.
>
> In 1998, WHD conducted a review of the institution's application for renewal. As part of the application package, WHD requires the attachment of three individual productivity studies. The productivity studies were not attached and WHD contacted the employer and requested the studies.
>
> The institution completed the studies, submitted the information to WHD and a certificate was issued. However, the individual productivity studies were not honored by the employer because the studies required paying average wages equaling $2 per hour, which was higher than the $1 to $1.25 per hour the institution traditionally paid. The productivity studies were submitted simply to meet the WHD requirement, not to determine and pay the commensurate wage. (United States Department of Labor, 2001, pp. 15–17)

Processing Plant Workers

The following excerpts are from the description of the audit team's 1999 visit to a private sector employer that employed workers with disabilities at a turkey processing plant. The description details how the employer manipulated the subminimum wages of the 50 workers with disabilities

at the plant (United States Department of Labor, 2001). In this instance, the description also underscores the need for a requirement that bans employers who have repeatedly been cited for subminimum wage and hour violations.

> Approximately 50 workers performed a variety of entry-level jobs at the plant under Section 14(c). The employer also operates a group home near the plant where workers receive cash, meals, lodging and other services, which includes supervision, transportation, entertainment and other assistance.
>
> The employer's 1999 certification renewal application to WHD reported average earnings of $5.65 per hour for turkey processing plant workers. To arrive at $5.65, the employer totaled all yearly expenses related to the employment of the workers with disabilities, then divided total expenses by the total number of hours worked during the year ($560,885 divided by 99,243 hours = $5.65 per hour). The actual compensation each Section 14(c) worker received was between $60 and $65 per month in cash, plus meals, lodging and other services.
>
> The company valued the cash, plus meals, lodging and other services each worker received at $864 per month per person. All expenses directly and indirectly related to the employment of the workers were included in the methodology used to determine the value of noncash compensation. In our opinion, these expenses included costs that would not be allowed under the FLSA.
>
> Expenses used to determine the value of the noncash compensation included $67,200 per year for the use of the group home where the Section 14(c) workers lived. The group home is owned by a city located near the processing plant. The company pays the city $600 per month in rent for use of the facility. The additional $60,000 per year represents what the employer considered the "fair value" for recouping the costs of the improvements made to the city-owned property during the 1970s.
>
> WHD, after conducting the 1999 compliance application review, did not question the employer's reporting average wages of $5.65 per hour or the method used to calculate noncash wage payments.
>
> The current method to account for noncash compensation was established, according to one of the company's owners, after WHD conducted an onsite review approximately 40 years ago. (United States Department of Labor, 2001, pp. 15–17)[4]

The irony of the Inspector General's audit report's description of the treatment of institutionalized patient workers and plant production workers is that it merges the past practices of the involuntary servitude of patient

workers of the twentieth century with the continued abuse and exploitation of the production plan workers in the twenty-first century. It also underscores how urgent the need is for workers with disabilities across all work settings to be educated about their rights and have a forum in which to air and alleviate their concerns.

The Disingenuous Rulings of the National Labor Relations Board

The nation's workforce has a long history of organizing to assert their rights to fair wages, reasonable hours, and safe working conditions. The National Industrial Relations Act and its successor, the FLSA of 1938, both sought to bring an end to the exploitation of workers who, prior to statutory protections on the Federal level, worked 12-hour days, six to seven days a week, under conditions that could be dangerous or outright deadly.[5] Each of those statutes also included collective bargaining rights for unions.

The Wagner Act, separate legislation passed on July 5, 1935, designated the NLRB with the responsibility of mediating labor disputes (Cox & Dunlop, 1950, p. 1). The NLRB provided an avenue for labor to air their grievances against an employer without fear of repercussions for doing so. However, one group of the nation's workforce, workers with disabilities, has never been afforded the right to seek redress for unfair labor practices—a right that workers without disabilities have long enjoyed.

Rulings by the NLRB regarding the ability of individuals who labor in sheltered workshops to organize for collective bargaining purposes are reminiscent of efforts to determine the applicability of FLSA to resident and patient workers in the institutions such as—*Are they really employees, after all?* As with the workers in sheltered workshops, the casting of resident and patient labor as "therapeutic" served as the basis for justifying little or no compensation for their labor.

The ambiguity and conflicting interpretations regarding the mystique of what sheltered workshops are intended to provide have resulted in the unilateral denial of individuals with disabilities of their ability to petition for their rights under FLSA. Bean (1989) observed that NLRB decisions were made on an ad hoc basis, and as such, did not provide a stable basis for future rulings. "As a result, sheltered workshop employers and their handicapped employees have no guidelines by which to gauge their conduct within the employer-employee relationship" (p. 349).

For example, in three different cases, the NLRB provided three different rationales for denying the sheltered workshop employees petitions:

1. In *Sheltered Workshops of San Diego, Inc. v. United Association of Handicapped*,[6] the board ruled that "the workshops purposes are directed entirely toward rehabilitation of unemployable persons and its commercial activities should be viewed only as a means to an end".
2. In *St. Louis Lighthouse for the Blind, Employer, v. Local 160, AFL-CIO, Petitioner*[7] NLRB Case No. 14-RC-4309 the board ruled that the St. Louis workshop is essentially a custodial agency, where workers are to be regarded as wards.
3. In *Pulliam v. Flemming*,[8] [Civil Action No. 17714 February 8, 1960] US D. C. W.D. Pa. the board ruled that the earnings of a sheltered workshop worker are properly to be regarded not as wages for work performed, but as income derived from purely philanthropic sources. (National Federation for the Blind, n.d., pp. 12–26)

Essentially, the NLRB rulings described above depict sheltered workshops as philanthropic entities that provide a place for their unemployable wards to receive rehabilitation. It is important to note that, despite opposition from the sheltered workshop industry, organized labor had attempted to insert itself into the debate about the status of sheltered workshop workers.

Rothman (1964) stressed labors basic assertions that sheltered workshop workers should be treated as employees, and therefore should have the same collective bargaining rights afforded all other employees. Yet, two years later, the guidelines in *Organized Labor and Sheltered Employment, Platform for Partnership* largely included recommendations on collaboration with management to improve working conditions rather than empowering the workers (National Institutes on Rehabilitation and Health Services, 1966). However, this mid-twentieth-century attention to the issue of securing economic equity for sheltered workshop workers waned with little else occurring until AFSCME's motion to intervene in the peonage case, *Souder v. Brennan* in 1972.

Ironically, for individuals with intellectual disabilities, AAMD's 1973 *Guidelines for Work by Residents in Public and Private Institutions for the Mentally Retarded* did include a guideline along with commentary that defined work. Specific commentary accompanying "Guideline G" also addressed work performed on a piece-rate basis:

> Work is any directed activity, or series of related activities, which benefits the economy of an institution, contributes to its maintenance, or produces a salable product. Commentary: . . . When a resident is engaged in producing salable goods and products on a piece rate basis, such activities will be considered work when the net profit from sales exceeds the costs to the institution connected with the production of such items. (AAMD, 1973, p. 62)

The practice of compensating individuals with disabilities at less than the minimum wage was established on subjective determinations of how the work of individuals with disabilities would compare to nondisabled workers in the competitive labor market during the 1930s, at time when the field was just emerging from an era of dehumanization and denigration. As such, despite evidence accumulated over the past 100 years relative to their productivity, individuals with intellectual disabilities have yet to be liberated from what Gersuny and Lefton (1970) referred to as "servitude" within these sheltered workshop settings (p. 74).

> Servile labor is subjected to functionally diffuse subordination on the basis of status, while free labor is subjected to functionally subjected subordination on the basis of contract. Servitude represents a state of degrading and burdensome subjection in which the incumbent is largely deprived of autonomy. (p.73)
>
> In this sense there is a similarity between recruitment of a servile labor force and the recruitment of clients for service organizations. The disparity of power between organizations dispensing a service and clients dependent on receiving that service is such that servitude enters into the situation. The greater the client's disability, the greater his dependency and therefore the more servile his status. (p. 75)

Gersuny and Lefton (1970) identified what they felt to be a significant barrier to overcoming servitude as a consequence of the NLRB rulings:

> Basically the explanation of servitude as an aspect of clienthood evokes a physical model: when a powerful service organization establishes a connection with powerless clients, the power of the former rushes into the power vacuum among the latter in ways illustrated. Since they lack other resources, the clients of such agencies could improve their power position only by forming coalitions with their peers. Through such coalitions they could bargain with various service organizations and change clienthood from a status relationship to a contractual relationship. The refusal

> of sheltered workshop managements to bargain with union representing their clients serves to perpetuate servitude as a characteristic of clienthood. (pp. 80–81)

Tomassetti (2012) reviewed three recent decisions from the NLRB and again, the decisions rendered. Her review reiterated the difficulty that individuals with disabilities continue to experience in trying to shed their "clienthood" as they attempt to assert their employment rights:

1. In *Brevard Achievement Center*[9] the Board held that individuals with disabilities enrolled in a rehabilitation center and who worked at a federal space base were not employees even though they performed the labor for the same hours as other nondisabled janitors.
2. In 2007, the Board made the same determination in *Goodwill Industries of North Georgia*,[10] a case where individuals with disabilities were working under a contract that the rehabilitation center had with an outside employer, by focusing on whether they consumed social services while working.
3. In *Davis Memorial Goodwill Industries*[11] the board granted employment status for employees of a sheltered workshop but the decision was overruled; again, the basis was the "primarily rehabilitative" standard. (p. 820)

Sorrell (2010) likewise conducted a thorough analysis of NLRB cases. His analysis produced similar findings. In *Goodwill Industries of Denver*,[12] the Board ruled that the sheltered workshop employees who worked offsite were not covered on the basis of the rehabilitation and other benefits they received from the sheltered workshop. However, the Board found that:

> At the other extreme, the employees without disabilities had none of the benefits of reduced discipline, counseling, or job placement; instead, they were held to rigid production standards. The Board determined that these workers were section 2(3) employees entitled to NLRA protections. As a result, the Board directed an election for a unit of the employees without disabilities. If this election were successful, the unit would be able to negotiate a collective bargaining agreement with Goodwill and could possibly gain benefits such as just cause termination, extended health benefits, and grievance processing procedures. Because the client/trainees were excluded from the unit, they would not share in any of these contractual benefits. (p. 622)

Sorrell also noted that, due to the variability of the grounds for the rulings by the NLRB, the federal courts have refused to authorize enforcement

of decisions that the Board had made in the employees favor (p. 625). Further, many of the rationales for the rulings show a clear bias against organized labor, arguing that the presumed cost the sheltered workshop would incur if the sheltered workers were organized would reduce its financial ability to provide rehabilitation. He also noted cases where the Board argued that the sheltered workshop employees would not gain anything because the sheltered workshop would have broader concern for their well-being than a Union and as such they would be better off without their National Labor Relations Act rights than with them (p. 632). Another ruling ventured that, "If rehabilitative employees become too troublesome, then benevolent employers would simply stop providing services" (p. 632).

Finally, Sorrell raised the question of whether the Board's perspective was tainted by paternalism and outdated stereotypes. In questioning the capacity of the rehabilitation employees to engage in collective bargaining as well as deal with issues such as employer harassment common to the typical workplace, the Board reinforced the myth that individuals with disabilities need "protection" rather than rights.

Diminishing Returns of Subminimum Wage Earnings

C. S. Moore identified a number of difficulties the National Sheltered Workshop Committee faced in determining the existing sheltered workshop wages in her thesis, *The Adjustment of Sheltered Workshops to the National Industrial Recovery Act Standards and Its Aftermath* (Moore, 1939). One of the first challenges the Committee faced was that many sheltered workshops, such as those operated by the Good Shepherd, provided compensation only in the form of "maintenance and training" (Moore, 1939, p. 30). At the time, "maintenance and training" had not been considered a form of compensation and therefore, Good Shepherd's workshops did fall within the official definition of "sheltered workshop."

The definition of "sheltered workshop" was spelled out in the Administrative Order X-9 issued on March 3, 1934 as:

> A sheltered workshop is defined as a charitable institution, or activities thereof, conducted not for profit, but for the purpose of providing remunerative employment for physically, mentally or socially handicapped workers. (Clarke & Cyr, 1936, p. 5)

To resolve the Good Shepherd dilemma, the Committee expanded the definition of compensation to include, "the coin of the realm or *its equivalent*" [emphasis added] (Clarke & Cyr, 1936, p. 11). Accordingly, the

provision of lodging, food, and training by Good Shepherd could be considered compensation and was considered as falling within the definition of a sheltered workshop.

Nonetheless, when the first national minimum wage of $.25 per hour was established in 1938, the results of a national sample of 91 sheltered workshops conducted under the National Recovery Administration found that the average hourly wage was $.24 per hour (Moore, 1939, p. 37). Unfortunately, the nearly equitable wages paid by the 91 sheltered workshops included in the national sample would prove impossible to maintain. In 1938, when the initial minimum wage of $.25 was established, the average subminimum wage paid of $.24 by sheltered workshop employers was nearly 100 percent of the prevailing wage (see Table 6.3 and Figure 6.1). However, in the following six decades, this percentage

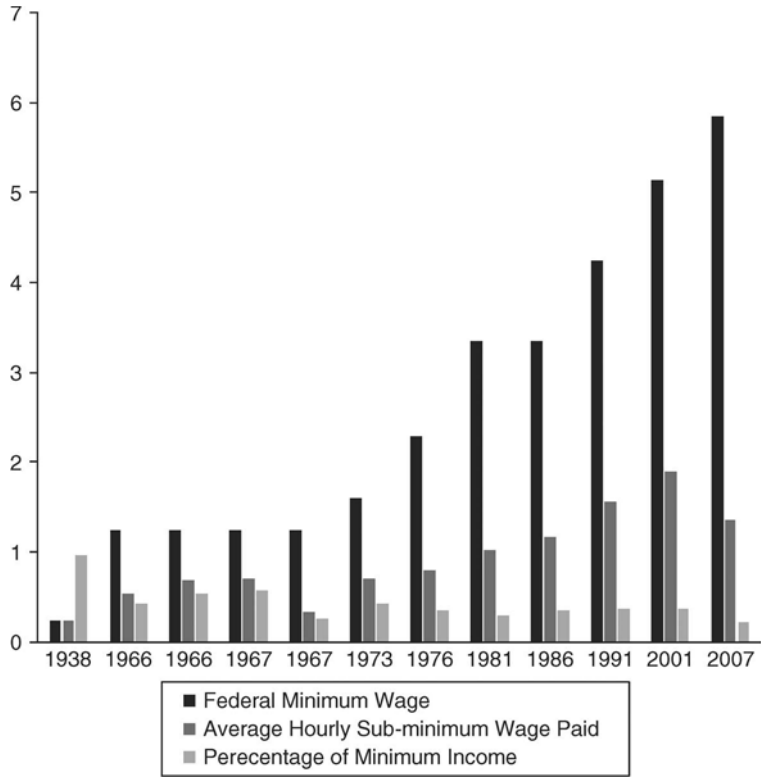

Figure 6.1 Percentage of subminimum wage to minimum wage paid by wage year.

Table 6.3 Percentage of subminimum wages to minimum wages paid by wage year by source

Source	*Wage year*	*Federal minimum wage*	*Average hourly subminimum wage paid*	*Percentage of minimum income*
Moore, C. S. (1939) The adjustment of sheltered workshops to the National Industrial Recovery Act standards and its aftermath.	1938	$0.25	$0.24	98%
Button, W. H. (1967) Wage levels in sheltered employment.	1966	$1.25	$0.55	44%
United States Department of Labor, Wage and Hour and Public Contracts Divisions (1967).	1965–1966	$1.25	0.69	55%
United States Department of Labor, Wage and Hour and Public Contracts Divisions (1967). Sheltered workshop report of the secretary of labor.	1967	$1.25	0.72	58%
United States Department of Labor, Wage and Hour and Public Contracts Divisions (1967). Sheltered workshop report of the secretary of labor.	1967	$1.25	$0.34	27%
United States Department of Labor. (1977). Sheltered workshop study: A nationwide report on sheltered workshops and their employment of handicapped individuals, Volume 1.	1973	$1.60	$0.71	44%
United States Department of Labor. (1979). Sheltered workshop study: A nationwide report on sheltered workshops and their employment of handicapped individuals, Volume 2.	1976	$2.30	$0.81	35%
Berkowitz, M. (1981). Wages in sheltered employment. In The Minimum Wage Study Commission, *Report of the Minimum Wage Study Commission.*	1981	$3.35	$1.03	31%

continued

Table 6.1 Continued

Source	*Wage year*	*Federal minimum wage*	*Average hourly subminimum wage paid*	*Percentage of minimum income*
Cimera, R. E. (2010). The national cost-efficiency of supported employees with intellectual disabilities: The worker's perspective.	1986	$3.35	$1.17	35%
Cramp, J. (1993). Sheltered employment and the second generation workshop.	1991	$4.25	$1.57	37%
United States General Accounting Office (2001). Centers offer employment and support services to workers with disabilities, but Labor should improve oversight. (Overall average of 7 Sites from p. 23).	2001	$5.15	$1.90	37%
Cimera, R. E. (2010). The national cost-efficiency of supported employees with intellectual disabilities: The worker's perspective.	2007	$5.85	$1.36	23%
National Core Indicators. (2008). *Employment data, phase IX final report*. Human Services Research Institute and National Association of State Directors of Developmental Disabilities Services.	2007	$5.85	1.36	23%

would plummet to only 23 percent; workshop laborers would go from receiving close to 100 percent of the prevailing minimum wage to only 23 percent of minimum wage.

Arguments against Section 14(c) wage provision are grounded in the principles of equal access to employment opportunities and economic equality. In "Income, Wages, Salaries", Merton Bernstein (1976), a preeminent scholar of labor law, provided a broad review of laws governing income. With regard to the subminimum wage, he observed that:

> Implicit in the arrangement is that exempted categories produce goods and services worth less than the minimum wage. It also supposes, although often incorrectly, lesser financial needs by members of specific groups. A sub-minimum wage constitutes an indefensible subsidy by those least able to provide it. (p. 292)

Bernstein went on to say, "As long as the mentally retarded are shunned and regarded as sub-human, entitled only to a sub-minimum wage, few if any programs on their behalf can be adequate" (p. 294).

Ferris (1976) confronted the very premises used to preserve subminimum wage—an outdated measure of productivity that remains in use only for individuals with disabilities:

> The Fair Labor Standards Act establishes a minimum wage based presumably on that wage's ability to support a specified and acceptable standard of living. The rate set as the minimum wage for *non-handicapped* workers is not determined by any benchmarks based on productivity or ability. Why then should the 5 million disabled, including 3 million mentally retarded, individuals who are in need of vocational rehabilitation, training, and employment have to endure special, lower minimum rates which are, in fact, established on the basis of special benchmark production levels in the profitmaking sector of society. (p. 297)

Ferris's criticism of the subminimum wage is similarly useful for challenging proponents of institutions, including the outdated practice of "bundling services" that an individual may neither need nor desire:

> Given the choice, most retarded adolescents, adults, and their families would prefer to earn a decent wage and pay for necessary therapeutic and ancillary services, rather than continue their dependence on others. (Ferris, 1976, p. 298)

Morris, Ritchie, and Clay (2002) examined several options for the reduction of Section 14(c) utilization including improved oversight, increased

systems capacity for more options, developing new strategies for employment and asset development, the elimination of Section 14(c) altogether, and developing work incentives for employers. They concluded that the complexity of the issues warranted multiple public policy changes along with coordination and collaboration among major federal policymakers (p. 27).

The continuing need for reform was repeated again in *The Fair Labor Standards Act: Continuing Issues in the Debate* (Whittaker, 2008). In this particular report, Whittaker noted that: "From the beginning, the social services industry tended to dominate the program and generally spoke for employers of the disabled. It was not clear, however, who spoke for persons with disabilities" (p. CRS-19). It was only after the rules and procedures were in place, he went on to observe, that individuals who actually worked in the workshops were brought into the picture (p. CRS-20).

More recent legal arguments have used the employment provisions of the Americans with Disabilities Act of 2008[13] and the integration ruling incorporated into the Supreme Court decision in *Olmstead v. L. C.*[14] as the basis for eliminating Section 14(c). In 2012, Samuel Bagenstos, the Principal Deputy Assistant Attorney General in the United States Department of Justice Civil Rights Division, concluded that subminimum wage was, in fact, discriminatory in that the law does not authorize below minimum wages for all less-productive workers—only those who have disabilities. He concluded that Section 14(c) denies people the guarantee of a minimum wage for potentially any job, at any point in their career, based on their own disability status—a status that can be lifelong (Bagenstos, 2012, pp. 5–6).

Efforts by the National Federation for the Blind to eliminate Section 14(c) of the FLSA have been longstanding (Whittaker, 2005, p. CRS-17). Other national self-advocacy groups including Self-Advocates Becoming Empowered (SABE), along with national advocacy groups, have increasingly challenged the continued relevancy of the Section 14(c) subminimum wage provision. These challenges and calls for the elimination of subminimum wage have emerged as greater evidence of the demonstrated potential of individuals with even the most severe of disabilities to engage in supported or competitive employment has grown.

Chester Finn, past president of SABE shared his personal experience in a letter to the SABE board in 2010:

> When I first went to a sheltered workshop I did not want to go. I took it as an opportunity to learn something I didn't know. I was determined to stay there for a short period of time, get some experience and leave. But most people never get that opportunity to leave. I have never heard from my

> friends or other people I know say, "I want to be in a sheltered workshop or a day program." They are there because they were told by an agency or other people that is where they should be. On the other hand the people I know that got an opportunity to have a real job are successful when they got support. (SABE, 2013)

Self-advocacy organizing around this issue extends beyond the borders of the United States. Through their participation in the Employment Equity Coalition, People First of Canada began an effort to increase their members understanding of the differences between jobs in sheltered workshops and "real jobs." In 1992, Patrick Worth, past president of People First of Canada, described their grassroots campaign to promote integrated employment over sheltered workshop placement for their membership.

> It took a lot of education to teach our members that they could earn more money by working for an employer in community. Most of them were earning 50 cents or 10 cents an hour. What they did not understand was that they could be earning four or five dollars an hour in the community. They were also worried about losing their benefits, and having to pay for their own medical and dental plans. That is still a fear today.
>
> They were so convinced by people, we were all convinced, especially by service providers that we could not do anything, because we were so disabled that we could not develop our own dreams. Most of us were put into workshops doing the same thing every day for 20 years, for little money, for nothing, because people thought they were too disabled. (Kappel, 1996, p. 117)

In 2010, Callahan explained how, for workers with disabilities, the subminimum wage provision served to perpetuate the labor practices of the Industrial Revolution that the FLSA was intended to upend. He explained that prior to the passage of FLSA, employers were free to pay whatever they wanted and to set the standard for such pay. As such, production targets could be made unattainable and thus, workers would either exhaust themselves with the effort of meeting them or fail to make as much income as they needed. Under the FLSA employers could institute production targets, but wages for whatever work employees performed could not fall below the statutory minimum (Callahan, 2010, p. 21).

In the past, proposals that have called for the elimination of subminimum wage were inevitably entangled with questions regarding the relevancy of employers who continue to exercise its provisions—which are overwhelmingly sheltered workshops. To eliminate one would be to essentially pave the way for the elimination of the other. By and large,

from the perspective of economic autonomy, the greatest two indictments of sheltered workshops, across decades of operation, are the lack of movement by sheltered workshop clients to integrated community employment and inability to earn a fair wage—regardless of the nature or severity of their disability.

The most recent effort to rectify the unequal treatment of workers with disabilities was the Fair Wages for Workers with Disabilities Act of 2011 introduced by Representative Cliff Stearns (Crawford & Goodman, 2013). As Crawford and Goodman explained, the bill would have gradually repealed the Section 14(c) 3 subminimum wage provision.

> The bill explains that as a result of "advancements in vocational rehabilitation, technology, and training" there are "greater opportunities than in the past" for disabled workers to participate in the workforce. Additionally, employees with disabilities, including those with the most severe disabilities "can be as productive as nondisabled employees." The bill further expresses that employers have an incentive to exploit subminimum wage workers rather than help them move on to integrated employment. Importantly, Representative Steams contended that employer complaints that they will not be financially viable in the event of repeal are overstated. Finally, the bill sets forth a policy to discontinue the issuance by the DOL of any new special wage certificates and a gradual transition over a three-year period of revoking certificates already in existence. (p. 599)

Absent Federal action on the issue, disability rights advocates have been successful in persuading legislatures to eliminate payment of subminimum wages from wage and hour laws at the state level. Even when efforts were taken on a state level to eliminate the subminimum wage, reaction by the sheltered workshop industrial complex swiftly snatched the possibility from the jaws of economic equality. In 2006, Arizona voters approved Proposition 202, which enabled Arizona to provide for a higher wage than under FLSA; it did not include a provision for subminimum wage. The ensuing uproar resulted in a legislative hearing, followed by a ruling from the Arizona Attorney General in 2007 that individuals with developmental disabilities were not exempt from the law.

However, in a move worthy of the NLRB, the Industrial Commission of Arizona (ICA), the entity responsible for implementing Proposition 202, issued rules for its implementation that made it possible to redefine who could be considered to be an "employee."

> Therefore, the ICA's policy outlined parameters whereby individuals with disabilities would not be deemed "employees" and in turn would not be subject to the requirements of the Arizona Minimum Wage Act, stating

> in the policy statement: "An individual does not meet the definition of employee . . . if that individual performs work activities for the primary or personal benefit of the individual (as opposed to the employer) without an agreement for compensation.
>
> The Policy Statement then went on to indicate that the ICA had determined that these non-employee "work activities" could be performed as a component of two types of programs: a Vocational Training Program, or a Service Recipient Program. In both programs there is no expectation of compensation, but payment of a stipend is allowed for work performed. (Butterworth, Hall, Hoff & Migliore, 2007, p. 21)

Reaction to this determination demonstrated the naiveté that the organizers of Proposition 202 shared relative to the degree to which the dehumanization of individuals with disabilities remains ingrained in society's perceptions of their labor:

> The opinions expressed publicly indicated broad based support for this policy from entities on both sides of the issue. Jeffrey Battle, president and chief executive officer of Scottsdale Training and Rehabilitation Services, which had advocated for reinstatement of the sub-minimum wage, stated, "We are thrilled and delighted because it preserves the option of remunerative work."
>
> Those who were against reinstatement of the sub-minimum wage also stated their support, primarily because the policy potentially could be a catalyst for increasing community employment for individuals with developmental disabilities. Rebekah Friend, president of the Arizona AFL-CIO, commented that by redefining terms instead of creating blanket exemptions there is hope for the disabled worker to advance. Ms. Friend noted, "I think we have a heavy lift in Arizona, as society goes, to find opportunities for these people to earn minimum wage." (Butterworth et al., 2007, p. 23)

Lastly, whereas Proposition 202 had simply omitted the provision for the payment of subminimum wages, New Hampshire's approach was much more straightforward. On May 7, New Hampshire's governor signed a new law banning the payment of wages less than the federal minimum wage that explicitly included workers with disabilities. As reported in the online Rooted in Rights Report, "The one page bill prohibits employers from employing individuals with disabilities at an hourly rate lower than the federal minimum wage except for practical experience or training programs and family businesses" (Jones, 2015, p. 1).

CHAPTER 7

INSTITUTIONAL PEONAGE AND INVOLUNTARY SERVITUDE IN SEGREGATED "EMPLOYMENT" SETTINGS

From the beginning, the planning efforts that focused on what resident and patient workers who were moving out of the state-run institutions would do during the day were based on low expectations. For individuals with intellectual disabilities, these low expectations, coupled with an almost universal adoption of a "developmental approach" to assessing and meeting individual needs, all but assured the perpetuation of segregation and further dehumanization. Conversely, for individuals with mental illness, these low expectations would devolve into *no* expectations that any type of services, other than predatory boarding homes, would be made available.

> Even if none of these harmful effects becomes manifest following a wholesale transfer to a boarding home and because of inadequate followup, patients are not helped with reorientation so that they may rejoin the community. Generally they are left to vegetate in unspeakable conditions. (United States Senate Subcommittee on Long Term Care, 1976, p. 772)

The disregard for the prior work experience the resident workers had gained under institutional peonage was already permeating the planning. State governments nationwide, as evidenced by their refusal to provide compensation, had summarily dismissed the value of the resident workers' labor in typical jobs. Under this set of circumstances the expansion of sheltered workshops that historically had served only individuals who had physical disabilities or were blind rapidly became the primary source of "employment" for individuals with intellectual disabilities for decades to come.

This influx of new "clients" to sheltered workshops was different from one that occurred after World War II. Still, the rationale used for the shift away from laboring in jobs that were typical of those in the general workforce to a segregated workplace would remain the same. Despite evidence that workers with disabilities had been successfully employed in integrated work settings when the workforce had been depleted by the war effort, the need for training in a sheltered workshop was touted as a justification for their removal:

> Handicapped workers who were drafted into industry during the war years even before the completion of their training in "sheltered workshops" are now finding it difficult to hold their jobs, according to the Labor Information Bulletin, with the result that many are being forced to return to the charitable, non-profit workshops to complete their training. (Social Service Review, 1947, pp. 396–397)

Nearly 20 years later, resident and patient workers were facing similar prospects. Prior to their return to the community, resident and patient workers had been integrally responsible for the day-to-day operation of 167 institutions for individuals with intellectual disabilities and approximately 310 mental hospitals nationwide. While institutionalized, their productivity as resident and patient workers was only called into question when it became clear that the institutions would have to either pay them minimum wage or forego their labor.

As with the expansion of the institutions earlier in the twentieth century, the need for day programs, activity centers, and sheltered workshops was promoted widely as the only means by which individuals with intellectual disabilities and/or severe mental illness could receive the "therapeutic" training said to be needed in order for them to become competitively employed.

Sheltered Workshops, Work Activity Centers, Adult Activity Centers

In *Workshops for the Handicapped in the United States*, Nathan Nelson (1971) attributed the emergence of sheltered workshops to the social control efforts of an earlier era—workhouses. In addition to relieving local governments of the financial burden of providing for the indigent, the creation of workhouses reflected the philosophy that recipients of assistance should be put to useful work. When this approach was adopted specifically for individuals with disabilities, the shift in terminology from "workhouses" to "workshops" served to maintain the aura of pauperism.

The first sheltered workshop designed to provide the opportunity to labor as a condition of receiving aid was established in 1784 as part of a school for the blind in Paris (Nelson, 1971, p. 25). Foucault (1988) provided a succinct explanation for the creation of work programs for individuals with mental illness in France:

> The unemployed person was no longer driven away or punished; he was taken charge, at the expense of the nation but at the cost of his individual liberty. Between him and society, an implicit system of obligation was established: he had the right to be fed, but he must accept the physical and moral constraints of confinement. (p. 48)

The first sheltered workshop in the United States was established in 1837 at the Perkins Institution for the Blind near Boston, Massachusetts (Nelson, 1971, p. 27). The Perkins Institution workshop, as well as workshops established at schools for the blind in five other states, experienced ongoing financial difficulties. Efforts, such as legislation passed in Massachusetts in 1935 that gave preference to their products in state and local purchases, provided some financial gains, but losses continued and the workshops in the schools for the blind closed.

Independent workshops for the blind emerged in the latter part of the nineteenth century, the first of which was the Pennsylvania Working Home for Blind Men established by Hinman Hall in 1874 (p. 27). These early workshops were similarly developed for the exclusive training of individuals who were blind, along with providing wage-earning employment. Eventually other groups of individuals with disabilities would be served, including those with physical handicaps and mental disabilities.

The founding of Goodwill Industries by Edgar James Helms at the end of the nineteenth century has been viewed as a response to the shifts in the economy and public policies that had effectively rendered individuals with disabilities dependent and unproductive citizens. Helms, a Methodist reformer, "believed that his Industries did far more than merely provide employment to 'crippled, disabled, and needy people' left destitute by 'improved machinery, mass production and competition'" (Rose, 2008, p. 226). His grander vision was the provision of work as a broader safeguard against the return of individuals with disabilities to poorhouses and almshouses.

The actualization of Helms's stated intentions were subject to question during a 1927 visit to Helm's Morgan Memorial Goodwill, by Edgar M. Wahlberg, the superintendent of Grand Junction Goodwill Industries in Colorado. Wahlberg, in his criticism of Helm's program, targeted two key failures of Morgan Memorial's efforts to address the employment

needs of its workers. These included the pressure of retaining speedy workers for the sake of efficiency and profits; and, failure to pay workers a living wage (Rose, 2008, p. 249). Nonetheless, despite these and other shortcomings, workshops continued to increase in popularity with private disability organizations and policymakers concerned with disability issues throughout the twentieth century.

During the second half of the twentieth century, this terminology shifted yet again. At that time, services that assisted individuals with disabilities during the day were referred to as either sheltered workshops or work activity centers. A third category called "adult activity centers" was rapidly gaining ground as the result of a grassroots effort by the parents of individuals who had never been institutionalized. All three models of services would become critical elements in the deinstitutionalization movement of individuals with intellectual and developmental disabilities. Table 7.1 summarizes the definitions of and key distinctions between the three service models as they existed during the *Souder v. Brennan* ruling and until the enactment of the Fair Labor Amendments Act of 1984.

Expanded Reliance on Segregated Work Settings

The preconditions that led the expansion of the sheltered workshops in the last three decades of the twentieth century were similar in nature to the preconditions for perpetuating dehumanization and exploitation as an artifact of the expansion of public institutions. These conditions included a continued belief in the need for segregation, the incompetency of individuals with intellectual disabilities, and the emergency of the sheltered workshop industrial complex as a lobbying force.

In 1967, 85 percent of all persons with intellectual disabilities in the service system were in large, state-run hospitals (United States Department of Labor, 1977, p. 25). By 1988, two decades later, only 34 percent remained. In 1968, the number of individuals in segregated employment was 39,524; by 1976, 156,475 individuals worked in segregated employment. As shown in Table 7.2, the shift in where individuals with disabilities lived coincided with an almost *fourfold increase* in the utilization of adult day programs, work activity centers, and sheltered workshops (p. 25).

The immense growth in work activity centers, a variation of sheltered workshops intended to serve individuals with more significant disabilities, was attributed to the new FLSA Amendments of 1966 that mandated sheltered workshop workers be paid at least 50 percent the statutory minimum wage. But, as determined by the *Sheltered Workshop Report* issued by the Secretary of Labor in 1967, the number of workshop applications

Table 7.1 Definitions of and distinctions between day service models

Source	*Definition*	*Wage and hour distinctions under FLSA Amendments of 1966*
Lilly, K. L. (1979) Redefining the purpose of sheltered workshops.	*Sheltered workshops* (regular programs) are institutions that carry out a recognized program of rehabilitation for handicapped workers, and / or providing such individuals with remunerative employment of other occupational rehabilitating activity of an educational or therapeutic nature (would later be referred to as Community Rehabilitation Centers or CRPs).	Sheltered workshops must pay workers with disabilities *no less than 50%* of the statutory minimum wage.
Lilly, K. L. (1979) Redefining the purpose of sheltered workshops.	*Work activity centers* (regular programs) are institutions that carry out a recognized program of rehabilitation for handicapped workers, and/ or providing such individuals with remunerative employment of other occupational rehabilitating activity of an educational or therapeutic nature.	Work activity centers had no statutory minimum wage requirement; individual wage rates were to be "related to the worker's productivity."
Cortazzo, A. (1971) Activity centers for retarded adults.	*Adult activity centers* are "designed exclusively to provide therapeutic activities for handicapped workers whose physical or mental impairment is so severe as to make their productive capacity inconsequential."	Adult activity centers were not specifically included in the FLSA Amendments of 1966, but would be held to same requirement as work activity centers for any work that was performed.

had dropped to 452. *However, the number of applications for work activity centers was 386*. Essentially, instead of proceeding to pay their workers with disabilities wages at the newly instituted wage "floor," a significant number of sheltered workshops filed requests for certificates of exemption as work activity centers (Department of Labor, 1967, p. 17).

Figure 7.1 and Table 7.2 present the numbers of individuals identified by fiscal year by type of wage and hour certification. Put plainly, the growth in the number of certificated sheltered workshops and work activity centers over the next three decades was exponential.

The second volume of the *Sheltered Workshop Study* report issued in 1979 covered the years 1973 and 1976. Its data showed that by 1976, the number of workers the total number of individuals with intellectual disabilities reported was 88,532—72 percent of whom were in work activity

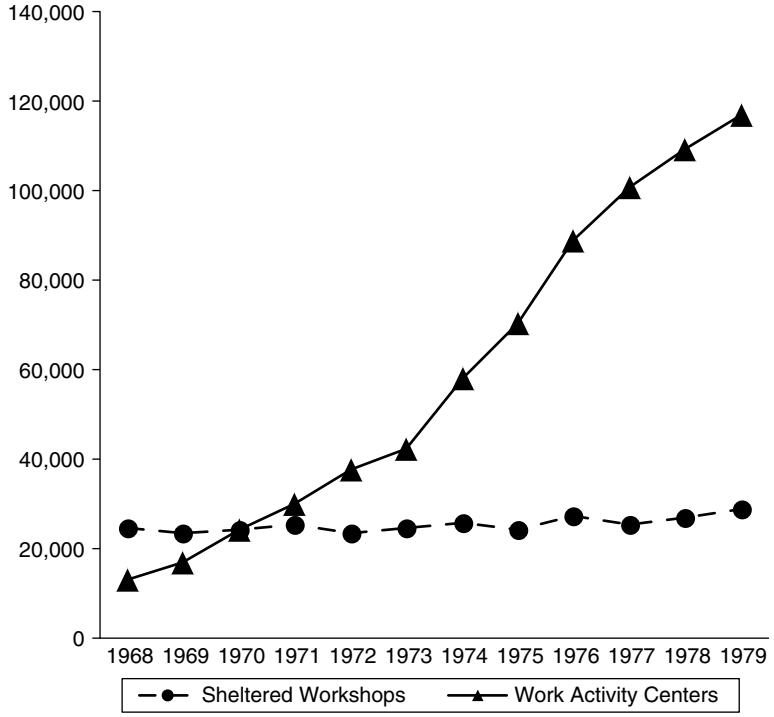

Figure 7.1 Number of individuals employed by fiscal year and type of labor certificate.

Table 7.2 Number of individuals employed by fiscal year and type of labor certificate

Fiscal year	*Sheltered workshops*	*Work activity centers*
1968	24,503	12,996
1969	23,434	16,923
1970	25,208	24,075
1971	25,407	29,749
1972	23,506	37,771
1973	24,634	42,403
1974	25,825	57,932
1975	24,257	70,240
1976	27,387	88,735
1977	25,283	100,912
1978	26,718	109,191
1979	28,634	117,017

United States General Accounting Office, 1981, p. 125.

centers. The total number of individuals with mental illness had grown to 19,893—41 percent of whom were in work activity centers (United States Department of Labor, 1979, p. 25). Lastly, the Minimum Wage Commission identified a total of 4,150 certificated shops with a total of 185,916 individuals enrolled for fiscal year 1980 (Berkowitz, 1981, p. 471).

With regard to the growth in adult activity centers, the President's Committee on Mental Retardation commissioned a second national study of the grassroots activity center movement in 1971. The first such study, conducted in 1964, identified a total of 1,154 individuals with intellectual disabilities being served by 94 adult activity centers in operation programs with another 91 in the planning stages nationwide. Seven years later, a total of 13,495 individuals were being served in 706 adult activity centers (Cortazzo, 1972, p. 17).

The study reported that few adult activities centers paid attention to preparation for employment. Those that did identified possible placement in a sheltered workshop as the ultimate objective. Nonetheless, 20 percent of the programs did believe that some opportunity to perform at least a small amount of work for pay was important for their clients' self-esteem (p. 12). Cortazzo ended the report with a prediction that the adult activity center development would continue to grow at an accelerated rate. In fact, the grassroots efforts of parents of individuals who had never been institutionalized would become an important cornerstone of daytime services and supports.

In Tennessee, *Challenge for Dignity: A 5-year Action Plan for Tennessee's Mentally Retarded Citizens*, an early Tennessee Department of Mental Health (1973) planning document, laid out strategies for the expansion the state's initial community based programs. The planning effort was undertaken in order to (1) avert a need to construct a fourth developmental center; (2) move inappropriately placed institutionalized persons back to communities; (3) plan for reduction of services for school age children due to changes in education law; and (4) engage communities in contributing to support and care. The culminating five-year goal, targeted for 1979, was for the total number of institutionalized Tennesseans with intellectual disabilities to remain at 2,356—a number that would provide for more "normalized" living environments in the state institutions (pp. 38–41).

Tennessee's plan adopted the creation of adult activity centers as the first step in developing community services with no mention of future programs that would foster competitive employment.

> Adult activity centers must first be established, reach their maximum size, and then stabilize. After the establishment of the adult activity center, a

> small workshop program is usually added to accommodate clients of the adult activity center who have grown in their capabilities. This movement provides openings in the adult activity center for new clients. The workshop can then continue to grow in size until it is actually being supported by the adult activity component, thus reversing the original roles. (Tennessee Department of Mental Health, 1973, p. 48)

Unfortunately, this shortsightedness was highly typical of deinstitutionalization efforts across the country. For the resident workers, the opportunity to leave the institution certainly represented a much better alternative to involuntary servitude. However, the bias toward the creation of segregated work environments could be attributed to the ongoing dominance of institutional personnel in the public planning processes and oversight of the development of community services. The leadership of in the field (as well as parents) continued to approach the needs of individuals with intellectual and/or mental illness from the framework of segregation, and that perspective was readily imprinted on the fledgling community systems.

Mounting Criticism of Segregated Employment Settings

Criticism of this all but exclusive reliance on segregated settings, in lieu of integrated employment opportunities, was largely ignored. TenBroek (1966–1967) was one of the first critics to liken the segregated work settings to how individuals with disabilities were treated in the past:

> In what is perhaps their most characteristic form the state and federal statutes simply perpetuate a relic of the past: 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. (p. 66)

TenBroek's criticism contributed immensely to ongoing opposition to sheltered workshops expressed by the National Federation of the Blind (NFB). One song, "Blind Workshop Blues" by Arthur Segal featured in *The NFB Songbook* (1991), takes clear aim at sheltered workshops for the blind:

> When you're workin' in the workshop, you got no money in your pants;
>
> For the bosses in the workshop don't give a blind guy a chance.
>
> Baby, I got the blind workshop blues.
>
> You're dining on steak and salad, like some mogul at the Ritz;

> Blindness lands you in the workshop and you're eatin' beans and grits.
> Baby, I got the blind workshop blues. (p. 31)

Lorne Elkin (1968) was one of the earliest researchers to provide evidence that performance in a sheltered workshop was not an effective predictor of employment success. Elkin studied 18 women with intellectual disabilities who had been employed as domestic workers for an average of 15.4 months. When the women were given the standard battery of tests used to measure successful performance in a sheltered workshop setting, the only measure that was significantly related to the women's domestic performance was the O'Connor Finger Dexterity Test. However, at the time, Elkin attributed the lack of correlation with other predictive measures to be a flaw in the selection of subjects and the inadequacies of the battery given for specifically measuring performance on the domestic jobs (p. 538).

In 1970, Olshansky predicted that efforts to effect normalization within sheltered workshops would ultimately prove insufficient. Olshansky felt that whereas work provided individuals with intellectual disabilities with the same values, it also represented a means by which they could shed the stigma associated with their disability label. However, in order to "acquire an identity as normal persons," they would have to enter the regular, nonsegregated work force (Olshansky, 1970, p. 31).

Notwithstanding Olshansky's viewpoint that access to integrated work would serve to decrease the stigma associated with a label of intellectual disability, professions in the field of mental health were increasingly relying on the use of sheltered workshops with former mental patients. For example, Cristol (1970) called for the creation of terminal sheltered workshops for individuals with chronic schizophrenia who were considered to have "too many deficits in becoming members of the regular work force" (p. 445).

Lamb and Goertzel's study of former mental patients in 1971 is another illustration of presumptive incapacity for integrated employment. As mental patients were discharged, they were placed either a "high-expectation" environment or a "low expectation" environment based on professional perceptions of their potential. The vocational rehabilitation of the "high-expectation" group started in a day-treatment center with the hope that most would be able to progress to a sheltered workshop and eventually into paid competitive employment. "Low-expectation" group members were simply placed into a boarding home or family care home (Lamb & Goertzel, 1971, p. 29).

Power and Marinelli's (1974) conclusions regarding the effective integration of normalization principles into sheltered workshop operation

mirrored that of Olshansky. They found that the transformation of the sheltered employment workplace would necessitate a change in workshop staff attitudes. Otherwise, they cautioned that, "If a workshop expects and accepts poor performance, clients will perform poorly" (p. 71).

Kiernan and Stark (1986) unpacked two commonly held misconceptions regarding the employability of individuals with intellectual disabilities; "they cannot work, except possibly in sheltered work environments," and "their productivity and earnings will necessarily be low or minimum" (p. 55). They attributed these misconceptions to the use of social incompetence as part of the definitional criteria of intellectual disability[1] and the notion that productivity was directly correlated with intelligence.

Another basis for such misconceptions was the continuing adherence to the developmental model by professions in the field of intellectual disability. This model was formulated on a viewpoint that, in "normal development," a child moves from being "dependent" to "independent" as a function of growing up. Strohman (1989) provides an example of its application to employment in *Mental Retardation in Social Context* in the form of a "Continuum of Employment Options from Dependent to Independent" (p. 295). The "continuum" depicted an array of options through which an individual with an intellectual disability would sequentially progress prior to accessing integrated employment. Strohman's application of developmental model of services to employment, however, did not take into consideration the fact that "normal" children are not required to proceed through an array of segregated, subminimum wage-paying settings in order to obtain competitive employment.

Later critiques of the predominately segregated options available to adults with intellectual disabilities focused on a number of key factors that Schuster (1990) labeled as economic and philosophic (p. 234). Schuster identified four primary economic factors that contributed to the failure to acquire appropriate work experiences; low wage rates; unavailability of work; changing industrial forecasts for blue-collar employment; and financial dependence (pp. 234–236). Schuster's philosophic factors include conflicts with normalization, the perpetuation of segregation, and lack of opportunity to grow as an employee and human being (pp. 236–238). Yet another factor was the actual interaction between the economic and philosophical factors that comes from the tension of workshops' dual roles of "rehabilitation" and "employment."

In the "Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act," Whittaker (2005) put forth Monroe Berkowitz's explanation of how restrictions and limitations in job mobility placed sheltered workshop workers at greater risk for exploitation:

> Precise and measurable definitions of exploitation are difficult to establish. The ability of a worker who is dissatisfied with his pay and treatment to leave his employer is the best protection any individual, impaired or not, has against exploitation. Limited demand for impaired workers, as well as the inability of some client/employers to recognize and act on unfair practices, weakens the protection offered by the market . . . the limited mobility of disabled workers create[s] a condition in which exploitation (in the sense of being paid less than nonhandicapped workers) can occur. (p. CRS-25)

Yet, despite the growing criticism of disparate wages, as recently as 2013, in a statement to NBC News, the United States Department of Labor said that the FLSA provision for subminimum wage "provides workers with disabilities the opportunity to be given meaningful work and receive an income" (Allgov, 2013).

Gill (2005) drew upon personal experience working as a nondisabled employee of a sheltered workshop as the basis of his appraisal of the relationship between the sheltered workshop and the individual with a disability. Through the lens of what he termed "contractualizing disability," Gill put forth that:

> Disability status takes the place of equal rights. The societal contract with those in the workshop is enforced; society will fund jobs for disabled persons in exchange for these jobs being located in isolation. The individual takes the "job" in exchange for lower wages and isolation while the community pays higher taxes while excluding persons with labels of disability from their presence. The workshop is a location of isolation and forced docility. (Gill, 2005, p. 619)

As such, "contractualizing disability" in the sense of exchanging one's personhood as a condition of receiving services and supports, falls very much within Vail's (1966) process of dehumanization in the context of commodification.

Finally, another example of the exchange inherent in the utilization of sheltered workshops can be found in the description of sheltered workshops provided by Corbière and Lecomte (2009). In their descriptions of the relevancy of various aspects of vocational services for individuals with mental illness, they indicated that: "Sheltered workshops create a certain environmental security where everyone working suffers from mental illness, and where there is acceptance and tolerance in regard to the varying levels of productivity from each worker" (p. 40). In this instance, security, tolerance, and acceptance are only attainable by individuals with severe mental illness through an agreement that exchanges their freedom

and future economic opportunities with work in segregated, sheltered employment.

In order to carefully dissect the arguments for continued reliance on the economic exploitation and segregation of a significant percentage of the nation's citizens with disabilities, it is important to call to mind the Vail's modes of "dehumanization." As previously described, the process of dehumanization can consist of treating an adult as a child; treating the individual as an inanimate object or commodity; depicting the individual as a "pet" or beast; and treating the individual as someone who should be ignored or disregarded (Vail, 1966). Maintaining an awareness of these modalities, along with evidence-based practices relative to the productivity of individuals with intellectual disabilities, can assist the observer with the identification of underlying biases.

The Continued Perpetuation of Dehumanization and Exploitation

Kahrman (2010) stated unequivocally his opinion that the continued utilization of sheltered workshops and day programs constitutes a form of exploitation:

> There are companies running day programs for brain injury survivors in my state that are out and out lying when they tell you that they are all about helping participants increase independence. The majority of day programs I've seen rarely discharge anyone, and many do everything they can think of to keep people in the program. A participant wants to return to work? Cool. Give him the task of cleaning up, throw him a dollar or two, praise him for working and keep him in the program so we can keep billing for the time he's here. That is slavery. (n.p.)

Weiss (2010) provided similar criticism in "People with Disabilities and Human Exploitation":

> They claim that a paycheck gives people with disabilities self-esteem, even if it is not enough to live off of. Some of the people with disabilities these employers 'pay' live in group housing, giving these employers grounds to argue that their employees with disabilities cost of living is lower, so they do not rely on a paycheck. I guess the obscene profit margins being reaped by these employers does not figure into the picture anywhere. (Weiss, 2010, p. 1)

Possible opportunities for exploitation of individuals who labor in sheltered workshops that could occur were not raised as an issue when the

provision for subminimum wages was first created under the NIRA and its successor, the FLSA of 1938. Instead, the authorities lauded the benevolence and self-sacrificing aspects of the sheltered workshops espoused purpose.

> The most distinctive feature of the sheltered workshop is the fact that its primary purpose is never profit. Such an establishment may be restricted to a certain type of handicapped person, but its primary purpose is always that of providing such a group with a living wage and the proper working conditions. A sheltered workshop may be operated on as strict a production basis as any commercial enterprise, yet its primary purpose will be, not profit, but the welfare of the handicapped. Many establishments of sheltered employment resign themselves to operation without profit. (Clarke & Cyr, 1936, p. 11)

These purposes were embraced to the extent that, at the time of the Great Depression, when negotiations for the exemption of sheltered workshop employees under the NIRA were underway, the prevailing message was that the, "relief rolls of the nation have been relieved by the activities of sheltered workshops of supporting forty-two (42,000) handicapped workers" (Clarke & Cyr, 1936, p. 35). Fortunately, by the end of the twentieth century, viewpoints concerning the efficacy of sheltered employment began to change.

In 1982, McCord used the prevailing understanding of the principle of normalization to counter the field's continued reliance on sheltered employment and other segregated day supports. His criticism began with description of the principle of normalization as one that urges human service agencies to change the perceptions and values of the viewer such that stigma and deviancy are minimized and the societal image of the individual with a disability is enhanced. Moreover, McCord emphasized that:

> This can only be accomplished by the maximum integration of individuals with handicaps into all aspects of society, including the work environment. Workshops are maintaining society's devaluation of persons with handicaps by using segregated settings. (p. 248)

Another example of the need to move away from the payment of subminimum wages was in a Hastings Center Report published in 1984 (McDonald & Herr, 1984). The report included a response from Stanley Herr to a case study that had asked what types of individuals with disabilities a sheltered workshop should serve. Herr's response drew attention to an article in the *Wall Street Journal* (October 17, 1979) regarding

the expansion of sheltered workshops could be achieved by paying "token wages":

> the notion that token wages should be paid in in order to engage more mentally retarded persons is an invitation to open-ended exploitation of these individuals. Imagine the uproar if this were proposed as a solution for unemployment among non-handicapped workers! (p. 54)

Renewed efforts to institute reforms within sheltered workshops began primarily at the end of the twentieth century (Whitehead, 1986, p. 19; Rosen, Bussone, Dakunchak, & Cramp, 1993, p. 32). One approach to reform began in the late 1980s in the form of a national systems change initiative to convert sheltered workshops to supported employment. However, in 1995, Weiner-Zivolich and Zivolich criticized the outcome of the initiative inasmuch as the majority of individuals with severe disabilities continued to be served in sheltered workshops or nonwork day programs. They referred to the results of national polls in which individuals with severe disabilities had repeatedly expressed their desire for integrated employment services. In response to the lack of progress, they asked, "Why do they continue to wait, 10 years later, for the segregation industry to hear and respond to this request" (p. 311) (Weiner-Zivolich & Zivolich, 1995, p. 311).

A little over a decade later, the results of a 2009 national survey of community rehabilitation providers (CRPs) who held Section 14(c) 3 subminimum wage certifications stressed yet again the lack of progress being made in promoting more integrated employment options (Inge, Wehman, Revell, Erickson, Butterworth, & Gilmore, 2009). Inge et al. found that 55.8 percent of the 52,946 of the individuals being served by the CRPs that were surveyed were in facility-based segregated programming, 19,042 were in facility-based, segregated work programs and 10,489 were in facility-based, segregated nonwork programs (p. 71). Additionally, 73.7 percent of the 19,042 individuals working in facility-based, segregated work programs were earning less than minimum wage.

Individuals with severe mental illness have likewise been relegated to segregated, nonwork settings in the form of "day treatment." Mental health-funded facility-based day treatment services are very similar to facility based nonwork programs for individuals with developmental disabilities—participants play bingo, do arts and crafts, discuss current events, and go on "outings." For 2001, last year a national analysis of day treatment spending was conducted; state mental health systems spent $840 million dollars on day treatment services (Judge David Bazelon Center for Mental Health Law, 2014, p. 7).

The question of exploitation continued to be raised as an issue in the systems change efforts of the early twentieth century. For example, in *A Legacy of exploitation: intellectual disability, unpaid labor, & disability services,* Abbas (2013) challenged the continued use of sheltered workshops:

> While there are important spaces within the community in which persons with intellectual disabilities labor without pay, the sheltered workshop illustrates an important site of this labor and speaks directly to a continuation, within the context of community, of the kinds of exploitive labor that were once central to the functioning of the institution. Even under the guise of inclusion and their physical location within a community, sheltered workshops continue to serve as an important reminder of the unpaid, and largely unrecognized, contributions of persons with intellectual disabilities. This labor also reminds us of the ways in which some disability services still rely on the labor and marginal status of persons with intellectual disabilities in order to function efficiently and effectively. (Abbas, 2013, p. 3)

The exploitation associated with institutional peonage revolved around the use of resident and patient workers to perpetuate the practice of institutionalization; likewise, the continued labor of workers with disabilities in sheltered workshops perpetuates the practice of segregation. Similarly, the presence of exploitation as it relates to personal gains in the form of increased professional standing and public influence is as evident in the management and oversight of sheltered employment as it was with institutions in the previous century.

The "charitable" purposes still espoused by the sheltered workshop industrial complex, provide creative cover for skirting or exploiting the ability to pay subminimum wages, while simultaneously billing for rehabilitation and habilitation payments from government programs such as Medicaid and Rehabilitative Services. Incidents of fraud and abuse are exposed on a regular basis and constitute yet another form of exploitation—exploitation of a situation.

As an example, corresponding disparities within the Randolph-Sheppard (RS)[2] and JWOD[3] agencies identified by an investigative series in the *Oregonian*, were summarized at length in the *Braille Monitor.*

> The Oregonian analyzed tax forms for Javits-Wagner-O'Day's fifty largest contractors, which together account for about two-thirds of the program's sales. More than a dozen reported executives with pay and benefits exceeding $350,000 in 2004, the most recent year for which complete tax records are available. The list includes Bill Hudson, president of LC Industries Inc. in Durham, North Carolina, who made $537,787; John

> Miller, chief executive of Goodwill Industries of Southeastern Wisconsin, who made $444,405; and Terry Allen Perl, chief executive of The Chimes Inc. in Baltimore, who drew $704,175. The charities said salaries for all three were set by their board members based on pay at similar-sized operations. The largest Javits-Wagner-O'Day contractor, an El Paso, Texas, company with $276 million in sales to the military and other agencies last year, reports no salary for its president, Robert E. Jones. Instead the National Center for the Employment of the Disabled said it paid $4 million in 2004 to a management firm controlled by Jones' family trust. (Braille Monitor, 2006, p. 6)

In his blog, Ending Disability Segregation, Dileo (2013) addressed eight critical issues regarding the subminimum wage. He provided the following example to illustrate the issue of wage disparity between management, the direct support staff, and the people served.

> In 2011, the top five highest paid employees for Goodwill Industries of the Columbia Willamette (Oregon) made a combined total of $1,506,373 in salary and benefits. With this amount of money going to a few top staff, and at the same time the mission of the agency is stated as "to enhance the quality of life of the people we serve," there is a severe mismatch of mission and results. A Watchdog.org analysis of the recent tax returns for 109 Goodwills that use the Special Wage Certificate found top executives were paid more than $53.7 million. Seventeen Goodwills reported executive compensation in excess of $1 million per year with 30 CEOs receiving more than $293,000 per year in total compensation. With excessive funding going to management salaries, it's impossible to accept that the workers with disabilities (whom agencies exist to serve) should be subject to incredibly low wages, while doing ANY of the work that supports these executive salaries. This is the very definition of exploitation. (Dileo, 2013, p. 1)

Counter Arguments to Continued Segregation and Exploitation

The 1990 passage of the Americans with Disabilities Act and other civil rights legislation served to open doors in a society that, in the past, had been barred to individuals with disabilities. Increased access made the presence of individuals with disabilities more prevalent and expanded opportunities for community integration. However, this did not mean that the twin evils of dehumanization and exploitation were successfully overthrown. This is particularly discernable in the opinions expressed by proponents of continued segregation as well as subminimum wage. In 1969, Olshansky attempted to debunk several assumptions commonly

made regarding the vocational rehabilitation of individuals with intellectual disabilities. Four of the "Questionable Assumptions" Olshansky specifically disputed are still accepted by many without question today, such as:

1. The level of intelligence required for different kinds of jobs is known;
2. A slow learner is necessarily a poor learner;
3. Intelligence is a constant and global quality; and
4. Individuals with intellectual disabilities have a greater toleration for boredom than normal people. (pp. 51–52)

Following his "examination" of those assumptions, Olshansky drew the conclusion that:

> What has limited the performance of many mentally retarded persons is not their lack of intelligence, but rather a lack of appropriate opportunities. What has limited their work progress is that we have judged them too much on their past inadequacies instead of giving sufficient thought to ways to develop their potential. (p. 52)

The dismantling of public policies that maintain the twin edifices of segregation and exploitation necessitate far more powerful counternarratives than have been formulated to date. Such narratives must have sufficient power to overcome what Gunnar Dybwad referred to as the Momentum of the Current Service Pattern: "The sheer extent, size, and monetary value, and the economic utility to contain certain communities, of the current physical plants, facilities, and services for the mentally retarded tend to block or delay action toward change" (Dybwad, 1969, p. 391).

In consideration of the need for narratives to the promotion of the segregation and exploitation of workers with disabilities, the most commonly used rationales to maintain the status quo are summarized in Table 7.3. Included as well are corresponding counternarratives drawn from literature that challenge the validity of those rationales. Challenges to the myths, misassumptions, and deliberate defamation of the capabilities of individuals with disabilities are particularly critical in the effort to eliminate the provisions for subminimum wages, without which most sheltered workshops would no longer prove viable. Finally, if these counternarratives, along with others, were thereby transformed into narratives of possibility, the stories of real workers with disabilities who earn real wages in integrated workplaces would then become the norm, rather than the exception to the rules.

Table 7.3 Common rationales for continued use of Fair Labor Standards Act, Section 14(c) and sheltered workshops

Rationalization for subminimum wage/sheltered workshops	
Best (1965)	**Counternarratives**
Employers will be skeptical	McLoughlin (2002) found that 81% of employers who had already experienced working with employees with disabilities were optimistic about hiring individuals of this population. In contrast 53% of employers who had never had workers with disabilities were pessimistic about hiring from this population (Migliore, 2006, p. 21).
It will take a big effort to meet employers objections to hiring them	Trained mentally retarded workers are in wide demand in industry and government. Over 3,000 mentally retarded workers are now employed in 39 federal agencies; until 3 years ago, examination procedures barred all such workers from federal employment (US PCMR, 1967, p. 15).
Have to address impulsiveness, frequent absences, irregularity in arrival and departure, poor care of tools, inferior work, inability to read or understand written directions, and unattractive appearance.	Overall plant efficiency is 92%. Efficiency of retarded workers, who make up about one-quarter of the work force is 87%. The retardates score 3% better than average for attendance and punctuality, and their retention rate is 2% higher (American Psychiatric Association, APA 1963, p. 270).
Strohman (1989)	**Counternarratives**
Work is too complicated.	Within six months he had mastered all phases of relay panel assembly and could carry out the final electrical test. He was one of several residents who completely assembled a panel from state to finish and then checked it out electrically. Besides high skill, reliability, and conscientiousness, he was one of the institution's most ambitious residents, usually holding several jobs simultaneously (Tate & Baroff, 1967, p. 406).

Emotional, physical, medical conditions interfere with effective performance.	Given the choice, most retarded adolescents, adults, and their families would prefer to earn a decent wage (or live in integrated community settings, language inserted) and pay for necessary therapeutic and ancillary services, rather than continue their dependence on others (Ferris, 1976, p. 298).
Attitude of person; conditioned to be dependent and fail is too hard to reverse.	For perhaps the first time in their lives they were able actually to see that what they were doing was useful and to understand how it related to a finished product. Even the patients with Binet IQs in the twenties developed a sense of pride in the work of "their team" (Loos & Tizard, 1954/1955, pp. 402–403).
Attitudes of coworkers; it might take years for coworkers to accept having people with MR work beside them.	In other instances, employment consultants discovered that simply convening a work group to discuss issues of myths and stereotypes about disability in the workplace improved attitudes and morale as the group became aware of its own sources of power and influence in the work environment (Community Living Research Project, 2006, p. 28).
Attitudes and policies of employers.	See above.
National and local economic rates.	Of particular note is that Keator's program successfully placed 61 students in a broad range of jobs at height of the Great Depression. At no point did she allude to the economic downturn or the nature of student's disability as barriers to employment. See Keator (1936) Industrial Supervision of Mentally Inferior Youths.
Financial disincentives will lose their benefits.	However, not only has research consistently found that the monetary benefits of working exceed the corresponding costs by as much as five to one (20), but it also determined that the wages earned by supported employees have increased substantially since the 1980s while the relative wages earned by sheltered employees have decreased (Cimera, 2012, p. 114).

continued

Table 7.3 Continued

Rationalization for subminimum wage/sheltered workshops

Olschner (2010)	**Counternarratives**
Wealth is created by adding value to goods and services; i.e. Takes more people with disabilities to add the same value as one person.	The most common way to add value to a business beyond typical productivity, is to meet unmet needs. The concept of unmet needs refers to a host of workplace tasks that need to be performed, theoretically at least, but that, in actuality, are not being performed. By targeting unmet business needs as an organizing concept, individuals with disabilities who have specific contributions to offer can move beyond the demands associated with productivity standards (Callahan, 2010, p .23).
Work is high-value and sophisticated, highly technical skill beyond capacity of people with ID to learn.	Today's electronic technologies, including computers, cell phones, Internet, and electronic organizers, hold great promise for individuals with intellectual disabilities, yet little research has been conducted to explore patterns of use among this population. Drawing upon a survey of 83 adults with intellectual disabilities, we examined factors affecting use for three key electronic technologies: computer, Internet, and electronic organizers. Forty-one percent of participants used a computer; 25%, the Internet; and 11%, electronic organizers. Age, work setting, and self-perceived ability to manually copy information affected likelihood of use. Primary barriers reported by participants included lack of access, training, and support, and expense of technologies. Interest in using such technologies was high, and participants offered suggestions for improved accessibility (Carey, Friedman & Bryen, 2005).
Employment of persons with disabilities is problematic in market-driven economy.	When factoring in a higher rate of turnover and other lower costs related to part-time workers, the employees with intellectual disabilities were far more cost-effective; they worked consistently at assignments that they had mastered whereas each new group of nondisabled workers required yet another dip in productivity until they, too, had mastered the assignments (Pooley & Bump, 1993, pp. 5–6).

Sheltered workshops were designed to shelter people with disabilities from competition.	Ultimately the objectives of sheltered workshops were articulated to be, "the rehabilitation of workers, the provision of remuneration employment to the handicapped, and the dispensing of vocational training rather than operating for profit" (Clarke & Cyr, 1936, p. 9).
Pay was designed to provide incentives for clients to improve their skills earnings and self-support.	Of course, employers could still set production standards and even offer incentives for increased productivity, but at the end of the day, employees could expect to receive at least minimum wage for their hours worked. But what happens when disability affects productivity? Congress chose to use a strategy common in the Industrial Revolution to address this issue—to pay workers only what they produced (Callahan, 2010, p. 21).
Contract income will not cover the higher wages.	Problems existed in computing piece rates, establishing hourly rates, determining prevailing wage rates in local industry, and maintaining adequate records (GAO, 1981, p. iii).
Fee for service funding won't and cannot be used to cover higher wages.	Cimera examined all 231,204 supported employees served by vocational rehabilitation throughout the United States from 2002 to 2007. He found that supported employees returned an average of $1.46 per $1.00 of taxpayer costs (Cimera, 2012, p. 112).
Blanket minimum-wage policy would bar a rehab programs ability to measure productivity and would remove a major incentive for clients to improve their performance.	Such rates, because they are productivity-based, may fluctuate from one production process to the next—from one day to the next. In practice, it would appear, wage rates are set, essentially, at whatever the employee determines the economic value of the worker to be and can document (Whittacker, 2005, pp. CRS-34, CRS 35).
Why not subsidize?	Implicit in the arrangement is that exempted categories produce goods and services worth less than the minimum wage. It also supposes, although often incorrectly, lesser financial needs by members of specific groups. A subminimum wage constitutes an indefensible subsidy by those least able to provide it (Bernstein, 1976, p. 292).

continued

Table 7. 3 Continued

Rationalization for subminimum wage/sheltered workshops	
It would be too costly.	With excessive funding going to management salaries, it's impossible to accept that the workers with disabilities (whom agencies exist to serve) should be subject to incredibly low wages, while doing ANY of the work that supports these executive salaries. This is the very definition of exploitation (Dileo, 2013, p.1).
Increase will cause family members to complain because they will lose their benefits.	See above
Would take away income from direct service staff.	Martin, Cornick, Hughes, Mullen, and Ducharme (1984) demonstrated the ability of individuals with developmental disabilities to perform complex supervisory activities in a sheltered workshop. Four individuals were trained in the use of the multiple component production supervisory strategy (PSS), a tool introduced by Martin, Pallotta-Cornick, Johnstone, and Goyos (1980) that had been demonstrated to increase production by an average of 68% (p. 199).
Department of Labor (Allgov) (2013)	**Counternarrative**
Provides opportunity to be given meaningful work and receive an income.	For the mentally retarded work provides the same values, but in addition it provides the means of shedding their stigmatization as a consequence of being labeled mentally retarded. If they are to acquire an identity as normal persons, they have to enter the labor market and join the millions of adults in the labor force (Olshansky, 1970, p. 31).
Migliore (2013)	**Counternarratives**
Sheltered workshops are safer.	In 1999, NIOSH conducted a study of 11 sheltered workshops in 4 states and published recommendations related to the health and safety of workers with developmental disabilities. An important conclusion of the study was that workers with developmental disabilities would benefit from increased management awareness of safety and health issues.

	In particular, NIOSH researchers noted that managers were found to have limited understanding of federal and state regulations concerning the health and safety of their employees and did not know where to go to find answers to their questions. (Retrieved October 1, 2013 from: http://www.cdc.gov/niosh/topics/widd/stateDb.html).
Outside work is too complex.	The cumulative results of the extensive programmatic research efforts in this area yield an overriding conclusion; With proper utilization of behavioral techniques, even moderately and severely retarded people can be vocationally trained to perform at levels that far exceed the expectations we held as recently as ten years ago (Browning, Litvin, & Thorin, 1983, p. 9).
Opportunity to make friends with their own kind.	Limited connectedness beyond the workshop, therefore, is more related to the problem of social isolation experienced by many with disabilities than to a true need or desire to be in the workshop. Individuals need to be supported to make friendships in community employment, as well as to maintain their friendships from the workshop. People with disabilities need opportunities to form relationships with individuals who share common interests and hobbies rather than just a disability (Timmons et al., 2011, p. 22–23).
Consistent five day per week assistance across the life span.	Number of hours worked weekly is a critical quality indicator for a supported employment program for a number of reasons. First on an individual customer basis, hours of weekly employment establish the base for a number of meaningful employment outcomes. Lower hour, part-time jobs are usually characterized by lower pay and Limited benefits. In comparison, employment of 30 or more hours per week brings better access to higher wages and potential benefits such as health coverage, vacation, and sick leave, and insurance coverage. Higher hours of weekly employment also improve access to work-related training provided through the employer and social interaction with coworkers (Wehman, Revelle, & Brooke, 2003, pp. 51–52).

continued

Table 7.3 Continued

Rationalization for subminimum wage/sheltered workshops	
Parents prefer it.	A corollary of our present ideological confusion is the strong but inappropriate ideology prevalent today that parents have a right to decide whether to keep a retarded child or to divest themselves of it. The literature is replete with this implication, or with explicit statements that, 'the placement decision is the parents.' One cannot accede to parental opposition because, first, it may not be in the interests of the person in the institution, and second, there are serious limitations on the parental view which arise from misunderstanding of community services, anxiety about the unknown, and other factors (Ferleger, 1995, p. 17).
Arizona sheltered workshop operator (2007)	**Counternarratives**
Paying Minimum Wage would be a form of "charity" CEO Randy Gray, himself the father of a son with autism, told TNS companies should not have to pay minimum wages to people with severe disabilities because "that would be charity." "If an individual is at 5 percent productivity, why should an employer or anybody have to pay more than 5 percent?" Gray said (Kemp, 2011).	In other words, for those with intellectual disabilities the equality issue is not simply that they have not been fairly tested or evaluated in terms of their right to have a particular job but that classes of jobs have not been created for which they would legitimately qualify. It is not a matter of simply ensuring equal opportunities to compete for jobs and fair processes of determining qualifications (as is the case with race) or even restructuring existing jobs according to recognizable differences (as is the case for women), but entitlement to enter the job market itself, even if existing qualifications, determined to be fairly established cannot be met (Rioux, 1994 pp. 89–90).

In MR71: Entering the Era of Human Ecology, the President's Committee on Mental Retardation claimed with some confidence that the vocational success of the individuals with intellectual disabilities was better than commonly perceived:

> An estimated 87 percent of mildly retarded adult males (IQ 50–69) are employed, a rate that is only four percentage points below that of males in the general population. Among mildly retarded women, the comparable rate was 33 percent. (pp. 28–29)

Regrettably, this optimistic viewpoint was not to be sustained. By 1976, 75 percent of the sheltered workshop and work activity center population was comprised of people with intellectual disabilities (Browning, 1997). Pressure mounted for school transition programs for individuals with intellectual disabilities to focus on sheltered employment as students' transition outcomes. Thus, the progress noninstitutionalized individuals had made in securing the regular employment after attending special education classes in public schools, was in fact, eroding.

Braddock, Rizzolo and Hemp (2004) concluded that the majority of the growth of employment services for individuals with developmental disabilities during 1988–2000 was in segregated settings. In 2002, data shared by state level ID/DD agencies revealed that only 24 percent of vocational and day program participants in the United States worked in supported or competitive employment while the remaining 76 percent of participants received services in segregated settings, including sheltered employment, day activity, and day habilitation programs (Braddock, Rizzolo, & Hemp, 2004, p. 319).

Despite the progressive efforts of the supported employment visionaries, the central outcome of the last quarter of the twentieth century became a system that remained solidly tilted in the direction of segregation. And, the tilt continues to persist as reported in *StateData: The National Report on Employment Services and Outcomes* (Butterworth et al., 2011). The Butterworth et al. most recent findings indicate in that in 2010, a total of 80 percent of individuals with intellectual disabilities (452,251 of 566,188) continued to receive segregated, facility-based and nonwork services (p. 22).

On the Matter of Choice and the Choosers

One of the most influential advocates for keeping the provision for paying subminimum wages under Section 14(c) in place is ACCSES, a trade association that represents more than 1,200 disability service providers

across the country. Purporting themselves to be the *Voice of Disability Service Providers*, their primary positions have centered on informed choice and self-determination:

> At the same time, the right of an individual with a significant disability to make choice consistent with the principle of self-determination should also include the right to work in a center-based program operated by a qualified nonprofit community rehabilitation program that provides individualized jobs, on-going services and supports, job stability and security the individual needs and desires, provides intangible benefits, and the opportunity for promotion and advancement. (ACCSES, n.d., p. 3)

However, ACCSES's rhetoric is highly similar to another segregationist organization, the Voice of the Retarded (VOR). For example, the VOR's Grassroots Advocacy Manual includes the following template position in support of state-run institutions, also referred to as Intermediate Care Facilities for People with Mental Retardation (ICFs/MR):

> Intermediate Care Facilities for People with Mental Retardation
>
> Provide Life Sustaining Quality of Life to Residents
>
> Intermediate Care Facilities for People with Mental Retardation (ICFs/MR) provide the least restrictive, cost effective, comfortable, and safe homes for the most needy, the most fragile, the most disabled citizens of our country. ICF/MR residents have multiple disabilities, extreme functional limitations, chronic medical conditions and/or behavioral challenges. Residents benefit from federal assurances that certain quality of care standards will be met, including access to health care, appropriate staffing ratios, and attention to therapeutic needs. (VOR, n.d.)

Paradoxically, "freedom of choice" or "self-determination" have served as the centerpiece of arguments that segregationists used to assert the continuation of residential congregate care and congregate day services for the past three decades. It is important to note that, as was the case with the early proponents of institutionalization at the beginning of the twentieth century, current arguments supporting segregation consistently include statements that dehumanize individuals purported to be in "need" of "expert", "specialized", or "otherized" services.

Bringing to light the "context" in which the "choice" is being made is also critical to any analysis of these rationales. Ferleger (1995) pointed out that the transaction of "choosing" is most often not a transparent one, particularly when limitations or restrictions are being imposed upon individuals with disabilities.

> A choice may be attributed to the person with retardation which is not the choice of that person. There often is another "chooser" who, in the background or quite directly, actually makes or directs the choice. While we may sometimes accept the surrogate or *sub silentio* choice-making, such acceptance should be conscious and should acknowledge that, from the perspective of the person subjected to the choice, it is imposed. (p. 17)

Ferleger went on to outline the issues and problems associated with the "choices" imposed on individuals with disabilities by four main wielders of real or co-opted authority—parents, providers, professionals, and the government.

Parents are generally viewed as the primary surrogate or sub silentio choosers or collaborators with the creators of segregated settings where family members will live and/or spend their days.[4] When confronted with parental opposition to desegregation, Ferleger (1995) asserted that:

> A corollary of our present ideological confusion is the strong but inappropriate ideology prevalent today that parents have a right to decide whether to keep a retarded child or to divest themselves of it. The literature is replete with this implication, or with explicit statements that, "the placement decision is the parents."
>
> One cannot accede to parental opposition because, first, it may not be in the interests of the person in the institution, and second, there are serious limitations on the parental views which arise from misunderstanding of community services, anxiety about the unknown, and other factors. (p. 17)

Choices made by Providers are twofold; the first lies within the overall design of the programs or services the provider has chosen to make available to current or potential "clients" and those that influence the nature and amount of services that are afforded to clients on an individual level. In both these instances, the individual with a disability has influence only to the extent that the providers are willing to confer power over doing so.

An example of how power is or is not conferred was reported by Timmons, Hall, Bose, Wolfe, and Winsor (2011) in their study of factors that influence the employment decisions made by individuals with intellectual disabilities. They found that the services provided by the community rehabilitation programs (CRP) shape the way staff perceive the workers with disabilities along with the options they are offered. This can serve to either enhance or restrict the options that are offered to an individual as evidenced by staff from one CRP stating that direct

job-development opportunities were offered, "only to those individuals who *want* to work in the community" (p. 290).

Choices made by professionals can be the most difficult to reject or deflect in that they can be based on accrued power dating back to the reliance of the superintendents assertion of "expertise" in the design and delivery of services to individuals with disabilities. Such power is exercised on a broad scale within the contexts of organizational policies and procedures; the rules that govern the behavior of individuals with disabilities for their own good and safety. Professional power is also exercised in the context of what is included or excluded from individual service or support plans that outline specific services the professionals believe are needed to assure that individuals conform to the lowest common denominator of expectations.

Choices made by the administrative branches of the states and federal governments for individuals with disabilities are based on a broad range of prevailing social, political, and economic variables. The remaining vestiges of segregation exist largely due to the inability of government to divest itself of the complexity of the bureaucratic systems that were created to marginalize a significant segment of the population. This inability similarly relies on the historical base of misconceptions about the lack of potential of individuals with disabilities for productivity and contribution to society. As such, choices by state and federal administrations have been the most difficult to reverse and, when change does occur, the most difficult to sustain.

In the past, when such transience was present in the state-run institutions for individuals with intellectual disabilities and mental illness, the judiciary, another branch of government, was moved to step in. In this instance, however, it is important to note that the issues associated with institutionalization were not framed in the context of program development and improvement. The claims that the peonage cases and other litigation that resulted in deinstitutionalization were solidly formulated on the constitutional rights that are guaranteed to all citizens in our society.

CHAPTER 8

PERPETUATION OF PEONAGE AND POVERTY IN THE TWENTY-FIRST CENTURY

The effects of the mid-twentieth century collapse of institutional peonage on future employment options available to individuals with disabilities have been long felt. The wholesale relegating of individuals with intellectual disabilities and, to a large extent, individuals with mental illness, into sheltered workshops as the only option for employment effectively sentenced those individuals to a lifetime of poverty and dependency on government benefit programs.

The misassumptions and misconceptions surrounding the productivity of individuals with disabilities have been tightly woven into the fabric of our society and service delivery systems. These misassumptions and misconceptions contributed to the devaluation of individuals with disabilities in our society and the extent to which they experienced, and continue to experience, abuse and exploitation."In Unfinished Business: Making Employment of People with Disabilities a National Priority," Senator Harkin noted that most individuals with a disability in the United States live in a state of perpetual poverty.

> Compared to individuals 18–64 years of age without a disability, people with disabilities are more than twice as likely to be living in poverty (Disability Statistics & Demographics Rehabilitation Research and Training Center, 2011). For individuals receiving federal disability benefits, the poverty rates are typically higher than for other individuals with disabilities. In 2008, the poverty rate for people receiving SSDI benefits only was 31 percent. The poverty rate for people receiving SSI benefits was 72 percent. (Disability Statistics & Demographics Rehabilitation Research and Training Center, 2013; Livermore, 2009, p. 10)

Nonwork and the "Right-not-to-work"

Today, state systems for individuals with developmental disabilities provide funding for a broad range of services under the Medicaid Home and Community Based Waiver program. In the past, services to support individual service recipient activities during the day were limited to facility-based day programs, most commonly activity centers and sheltered workshops. The expansion of supported employment added yet another category, although services in segregated settings still accounted for the greatest growth for the years 1988 to 2002 (Braddock, Hemp, Rizzolo, Haffer, Tanis, & Wu, 2004).

Community-based nonwork emerged as a new service during the mid-1990s. States indicated that the expanded options for day services led to a significant expansion in community-based services that were not work-based and that there was a desire for a broader range of days supports versus work (Butterworth, Gilmore, Kiernan, & Schalock, 1999, p. 21). Butterworth et al. provided an initial hypothesis for this change and its effect on the broader goal of increased access to integrated employment:

> The emergence of community-based non-work as a service category may indicate an increasing concern for the impact of services on quality of life, while at the same time raising possible concerns about the clarity of integrated employment as a goal. An increasing emphasis on community integration has the potential to draw resources and focus away from the clarity of integrated employment as a primary goal of day and employment services. Future studies will need to address the nature and quality of these services, and the impact of their growth on the overall growth rate of integrated employment. (p. 25)

The most significant outcomes of the proliferation of nonwork programs is the diversion of men and women of working age into lives that are bound by severe economic inequality. The $30 a month "allowance" that Social Security requires be given to SSI recipients doesn't go far in the twenty-first-century economy. Making it possible to legitimately opt out of any income-generating activity reinforces the myth that it's totally acceptable for people with disabilities to lives steeped in poverty—poverty that might have been somewhat mitigated by employment.

The growth in nonwork programs also distorts the picture of how much progress has been made in improving wages for workers with disabilities if the number of subminimum wage certificate holders is used as the sole indicator. For example, in October 2013, the Department of Labor, Wage and Hour Division's website identified 2,773 Community

Rehabilitation Facilities (CRF) certificate holders, 144 Employers of Patient-Workers, 173 Business Certificate Holders, and 417 School Work Experience Programs as having an approved or pending Section 14(c) certificate. A decline in CRF certificate holders from the 5,230[1] reported by the US GAO in 2001 to 3,507 in 2013 is listed on the Wage and Hour Division's could be interpreted as progress in the cause of eliminating the subminimum wage provision. However, the number of individuals covered under special wage certificates does not take into account the number of individuals who are now receiving nonwork services and thus have stopped working altogether.

Across the Atlantic ocean in Great Britain, rationale for this trend is somewhat different there, community-based nonwork has emerged both as a form of government-enforced "setoffs" as well a response to poor outcomes from employment programs and availability of benefits. Grover and Piggott (2013) responded to the British initiative in "A Right Not To Work":

> Given the history of failure in employment interventions for disabled people in Britain and given that Britain has also had legislation since the 1990s that has done little to improve the employment position of disabled people, we believe that an alternative approach is required; one that does not involve increasingly pressurising disabled people to partake in activities aimed at getting them to work. Hence, this paper has argued that disabled people should have a right not to work. (p. 11)

Mariam Kemple (2012) identified the risks associated with the stance that individuals with disabilities have an entitlement to be on the "dole" in her 2012 report in *The Guardian*. Kemple reported on the United Kingdom's Government "ideological cuts" to services implemented under Prime Minister Cameron's administration. Under the Welfare Reform Bill passed by parliament, people with disabilities "deemed fit" are required to enroll in "work programs" or face loss of benefits.

Malik (2012) elaborated further on the consequences of the policy that placed individuals with disabilities on employment and support allowance into a work-related activity category where they could be compelled to undertake unpaid work experience for charities, public bodies and high-street retailers. Her article, "Disabled people face unlimited unpaid work or cut in benefits," included an observation by Neil Bateman, from the National Association of Welfare Rights Advisors that: "If jobs are there to be done, people should get the rate for the job, instead of being part of a growing publicly funded, unpaid work forced, which, apart from being immoral, actually destroys paid jobs" (p. 3).

Growth in For-profit Company Uses of Subminimum Wage

When the Section 14(c) 3 provision was first created under the FLSA of 1938, it was anticipated that a significant number of workers with disabilities, such as disabled veterans, would remain or return to the general work force. At the same time, the prevailing belief was that the presence of a disability automatically rendered an individual less capable than his or her peers. To accommodate the employers of this particular component of the workforce with disabilities, the Act included a provision for businesses operating for profit to obtain a certificate of exemption. This made it possible for them to pay a subminimum wage to a worker who had a disability. Over the years, this provision has received very little scrutiny, as the numbers of workers with disabilities employed under individual specific certificates of exemption was small in comparison to those in the burgeoning sheltered workshop program.

Nonetheless, since the Great Recession, the Division of Wage and Hour has received a growing number of applications for Section 14(c) certificates by for-profit companies in the United States who have employed a worker with a disability. The primary issue raised in this instance is whether the perceived need for such an exemption is based on false assumptions of diminished productivity.

In 2001, the US GAO reported that sheltered workshops employed approximately ten times more 14(c) workers than for-profit companies; for-profit companies employed an average of 3 workers at special minimum wage rates for every 86 workers at special minimum wage rates employed by sheltered workshops. At that time, businesses held a total of 506 certificates that covered 1,549 individuals in comparison to the 4,724 certificates that covered 400,440 individuals in sheltered workshops (US GAO Report, 2001, p. 53).

More recently, Lazare (2013) provided a public list of for-profit businesses that pay disabled people below minimum wages that is not small and includes big names such as Ramada Inn, Holiday Inn, McDonald's, and 7 Eleven. High schools and universities are also numbered among institutions that petition to suppress wages for disabled people. Adams (2013) likewise noted that nonprofits that focus on employment have placed individuals in below minimum-wage jobs at franchises that include Applebee's as well as Barnes and Noble.

This trend is again playing itself out in a different way in Great Britain. The expectation that individuals with disabilities in Great Britain enter into "work fare" programs in exchange for subsistence benefits has

similarly been exploited by profit-making enterprises. For example, in 2012 *The Guardian* reported that it had:

> found that Tesco, Sainsbury's, Argos, Asda, Maplin, TK Maxx, Matalan, Primark, Holland & Barrett, Boots, McDonald's, Burger King and the Arcadia group of clothes stores, owned by the billionaire Sir Philip Green, have all taken staff via "work-for-your-benefits" programmes. (Malik, 2012, n.p.)

Modern Cases of Exploitation on National and International Levels

When individuals with disabilities experience exclusion from their communities, as well as the workforce at large, their risk of human exploitation and abuse increases. This risk is magnified when government officials and leaders in the sheltered workshop industrial complex use the prominence of their "expert" status to back segregation with the same dehumanizing rhetoric used by the superintendents in the early twentieth century to justify institutionalization. As such, any twenty-first-century conversation regarding perpetual segregation and the devaluation of the labor of individuals with disabilities with provision for subminimum wages, must also include the influence these practices have on the nature and degrees of stigmatization and discrimination they will experience in other areas of their lives.

The stigma that rests upon the pillars of dehumanization and exploitation exacts a heavy price. It places limitations on what people believe they can do for themselves as well as instilling low expectations in those who choose to help them. In the end, the demeaning and depersonalizing rhetoric that reinforces stigma and in turn is used to sell wholesale segregation only serves to diminish society as a whole. And, like a massive oil spill, it rides the currents around the globe to diminish individuals and other societies as well.

Reports of human exploitation on both national and international levels confirm the breadth of the problem and are far more visible due to the Internet. In the past decade, greater attention has been paid to the practice of involuntary servitude, along with human trafficking that results in involuntary servitude with women and children. Yet, the *Cost of Coercion*, a global report issued as a follow-up to the International Labor Organization's *Declaration on Fundamental Principles and Rights at Work* did not include people with disabilities as a group to be considered as vulnerable to exploitation (International Labor Organization, 2009).

Nonetheless, the International Labor Organization's reference for identifying forced labor in *Research on Indicators of Forced Labor: Successes, Challenges and Reflections on Future Engagement* contains many relevant, generalizable examples (Verite, 2013, n.p.). It is notable that the range of examples of coercion provided by the International Labor Organization is far greater than how the US Supreme Court has defined involuntary servitude in *United States v. Kozminski*.[2]

The International Labor Organization's 2005 reference for use in identifying forced labor provides examples in two distinct categories; a *lack of consent to work* and *the menace of a penalty*. The examples included for recognizing a lack of consent to work range from being born into slavery to retaining a person's important documents or possessions. The examples included for recognizing the menace of a penalty range from physical violence to exclusion and transfer to even worse working conditions (International Labor Organization, 2005, p. 6).

The most recent and notorious case in the United States was the same one that the United States Department of Labor, Office of Inspector General described in the audit report issued on March 19, 2001. Almost a decade after the Inspector General's site visit to audit a processing plan in Iowa, 32 men with intellectual disabilities who labored at the plant were awarded $1.3 million dollars for pay discrimination they experienced by Henry's Turkey Service in Iowa. The story behind their case underscores how segregation and devaluation of workers with disabilities can immeasurably increase their risk of neglect and exploitation. The fact that, in the ten years following the Inspector General's audit, investigations by a local agency and two additional inspections from the Department of Labor, resulted in no changes in their circumstances is particularly egregious.

Other examples on a national level include:

United States. Dept. of Labor. Equal Employment Opportunity Commission. (2012). Intellectually disabled workers awarded $1.3M for pay discrimination by Henry's Turkey Service. Press Release. EEOC report on Henry's Turkey Farm judgment.

Gosling, K. (2013). Disabled mother, child freed in "modern day slavery case." Mother with a childhood head injury and her daughter were tricked into moving in with four people who assaulted them and forced them to work for free.

Hegeman, R. (2006). Trial raises oversight concern. A Kansas story regarding lengthy effort to prosecute abuse and exploitation of people with disabilities ended up being tried as involuntary servitude. In two group homes, patients worked "nude" along with many other abuses, fraud etc. Owner was also conservator, landlord, employer of one person.

Roche, W. R. (2013). Group home abused woman, judge says, resident forced to care for others. Tennessean, Nashville, TN. Woman with head injury was placed in a conservatorship and a group home that made her clean and care for other residents while she paid rent of $850 a month.

Abqjournal.com (2013). Suit: Disabled women kept in "servitude." Two women with developmental disabilities who were released from Fort Stanton institution for individuals with intellectual disabilities three decades ago allege neglect, abuse and exploitation.

Patterns of involuntary servitude and other forms of exploitation serve as a measure of how much progress has been made in assuring the overall rights and freedoms of everyone in the disability community, regardless of nationality. The early European influence on the establishment of institutions and sheltered workshops for individuals with disabilities in the United States demonstrated how influential international opinions and practices have been in the past. Conversely, the international community has viewed the passage of the Americans with Disabilities Act as a model for guaranteeing the rights of individuals with disabilities. Now, in the age of global communications, the treatment of individuals with disabilities inside and outside of the United States has become much easier to trace.

Examples of the exploitation of individuals with disabilities in the form of involuntary servitude on an international level include:

International occurrences:

Demick, B. (2011). China's disabled exploited as slaves. "In the Beijing offices of Enable Disability Studies Institute, director Zhang Wei reels off a list of more than a dozen cases in the past decade in which people were enslaved in appalling conditions."

Economic Observer (2013). In China, the hidden slavery of the mentally disabled. Worldcrunch NEWSBITES. Three cases reported: Authorities led by a TV network raided and rescued 30 mentally handicapped workers from a local brick kiln. Kept in abject conditions in cramped noxious smelling room. Forced with beatings and threats to do hard labor every day of brick production in high temperatures while deprived of food and sleep.

Beth. (2012). Disabled sold as slaves on fishing boats, gang arrested. One of the victims had been worked to the bone for almost thirty years, and had never received a penny. At least 70 of 100 mentally disabled being administered by Mr. A had been sold to fishing boats and islands in the region. Other 30 being used as slaves.

That the individuals with disabilities in these examples were ultimately freed from the bonds that kept them in involuntary servitude is the good news. But, how much better would it have been for them if they had already been working and earning wages as valued employees in the first place?

CHAPTER 9

CONCLUSIONS: STONE BUILDINGS AND STONE WALLS

> *Toronto Asylum superintendent, David Clark wrote that the use of inmates in building these walls resulted in "tens of thousands of dollars saved" for the provincial government . . .* Asylum inmates built the first stone wall surrounding the 50 acres surrounding the asylum property in 1860 *[italics added]. (Reaume, 2010, p. 1)*

Dissatisfaction with the lack of meaningful outcomes from sheltered workshop employment and a growing emphasis on social integration has afforded individuals with disabilities an unprecedented opportunity to change the core of our country's social policies on employment. Growing advocacy efforts to eliminate subminimum wage provisions from the FLSA along with emerging trends in the provision of employment supports have reenergized the field's focus on jobs that are integrated and pay real wages. This chapter summarizes the journey the field has taken to get to this point and how the move to full integration can help individuals with disabilities achieve economic parity in our society.

Supported Employment as an Alternative to Stone Buildings and Stone Walls

Supported employment has its roots in the Developmental Disabilities Act of 1984 and the Rehabilitation Act of 1986 (Rusch & Hughes, 1989). Conceived as an approach to assisting individuals with significant disabilities with obtaining and maintaining employment, the primary focus was on effecting their integration in workplaces with nondisabled workers. Supported employment shifted the focus away from a philosophy of "fitting in" to one in which the development of employment supports unique to the needs of the individual in tandem with a thorough assessment of

the needs of the employer are used to assure success. Further, from its onset, supported employment demonstrated significant gains in assisting individuals who had previously been considered unemployable with obtaining integrated, no less than minimum wage jobs.

During its first decade, results from a national survey showed that participation in supported employment had grown from 10,000 individuals with disabilities in 1986 to over 139,812 in fiscal year 1995 (Wehman, Revell, & Kregel, 1997). The findings also demonstrated that the supported employment approach was effective across disabilities. By 1995, the 61.5 percent of total numbers of individuals in supported employment had an intellectual disability, 26.0 percent had mental illness, and 13.5 percent had other disabilities (pp. 4–7).

Encouraged by expansion of the numbers of individuals with significant disabilities engaged in integrated employment, Huang and Rubin (1997) posited that equal access to employment for individuals with intellectual disabilities is an obligation of society. To support their position, they called attention to the shift away from the paradigm that focused attention on the intellectual and functional limitations of the individual to one acknowledged how capabilities, environments, and need for supports are interrelated. They concluded that the characteristics of the individual and the characteristics of the environment are the primary factors that contribute to the successful employment of individuals with intellectual disabilities. Thus, in the case of individuals with intellectual disabilities, the role of employment supports had thereby shifted to one that focused on improving environmental conditions and overcoming attitudinal and structural barriers to employment.

Yet, as reported by Braddock, Rizzolo, and Hemp (2004) the 15 percent annual growth trend in supported employment evident at the end of the twentieth century rapidly declined to a 3 percent annual growth rate at the beginning of the twenty-first century (p. 319). Between 1988 and 2002, the number of individuals with intellectual and developmental disabilities in segregated, facility-based, employment settings increased from 236,614 to 365,165. Thus, the early promise and impact of supported employment continued to reside in the shadow of segregation.

Cimera (2006), on the other hand, viewed the data on supported employment's diminished annual growth percentages from a "the glass is half full" perspective. He noted that *overall*, there had been a programmatic growth of 64 percent. He pointed out that the Federal government's official survey of unemployment for individuals with disabilities decreased by 7.4 percent from 1989 to 2000. Thus, he concluded, "...supported employees are much better off with regard to rate of employment than are individuals with disabilities in general" (p. 146). Nonetheless, the

data provided by Braddock, Rizzolo, and Hemp (2004) had confirmed the continued dominance of segregated facility-based, work settings as the primary day service option utilized by individuals with intellectual and developmental disabilities. In his analysis of the presenting issues at the time, Cimera (2006) recommended two courses of action regaining momentum. His first suggestion was to gain a better understanding of the costs associated with supported employment and the second was to provide potential employers with better data regarding the cost-effectiveness of hiring supported employees.

The availability of supported employment for individuals with mental illness has been found to be even more limited. In 2012, 1.7 percent of individuals served by state mental health authorities received supported employment services (Judge David L. Bazelon Center for Mental Health Law, 2014, p. 6). Surprisingly only 18 states offered supported employment statewide and 23 only had supported employment available in part of the state. Access to integrated employment opportunities through supported employment efforts had occurred for less than 50,000 individuals with mental illness nationwide.

As efforts to recover lost ground by the supported employment movement expanded at both the grassroots and federal levels, so did the focus on other efforts to reduce the field's continued reliance on segregated employment settings. Current efforts to reduce the reliance on segregated employment settings have included two primary approaches: (1) Renewed calls for the elimination of the subminimum wage provision of Section 14(c) 3 and (2) challenges to the constitutionality of the continued segregation of sheltered workers.

Twenty-first-Century Efforts to Reduce Segregation and Exploitation

In 2007, Butterworth, Hall, Hoff, and Migliore provided a summary and analysis of efforts to reform or eliminate the use of subminimum wage for persons with disabilities. One effort was the Arizona 2006 ballot initiative to establish a minimum wage. As described earlier, this initiative did not include a subminimum wage. However, the end result was a reclassification of sheltered employees to "trainees," thus enabling providers to determine if, when, and what wages would be paid. A second, more successful approach identified by Butterworth et al. were initiatives to limit funding for services that paid subminimum wages to workers with disabilities. States that have effectively implemented this approach included Vermont, New Hampshire, Washington, and Tennessee (pp. 36–42).

On a national level, The National Council on Disability (NCD) (2012) recommended to the president that the FLSA Section 14(c) program be phased out in a manner that would provide for the orderly transition of the 420,000 individuals they estimated are currently paid under its provisions. The report also included two recommendations regarding education:

> **Recommendation:** The US Department of Education should prohibit the use of sheltered workshops as placements for transition related activities, or for skills assessments completed during a transition program in a public school. There should be clear financial sanctions for districts that violate this prohibition.
>
> **Recommendation:** When collecting data about post-school outcomes for individuals with disabilities, work in a sheltered workshop or in any setting for less than minimum wage should not be counted as a successful placement. (p. 21)

Finally, the most notable advance in establishing economic equality for individuals with disabilities was their inclusion as being covered by President Obama's Executive Order 13658 issued on February 20, 2014. The order requires that employees of contractors with the Federal government be paid no less than $10.10 per hour, and applies to all workers including those with disabilities.

A Question of Resolve

Existing barriers to employment most often consist of myths drawn from the era of harsh dehumanization that, like toxic waste, permeated society and arrested its understanding of how disability can now be mitigated in ways that were unimaginable over a hundred years ago. One solution proposed by Rioux (1994) was the adoption of an approach to equality that is based on well-being as a means to overcoming social and legal inequality in comparison to formal equality (identical treatment) and equality of opportunity (pluralistic or assimilative):

> In other words, for those with intellectual disabilities the equality issue is not simply that they have not been fairly tested or evaluated in terms of their right to have a particular job but that classes of jobs have not been created for which they would legitimately qualify. It is not a matter of simply ensuring equal opportunities to compete for jobs and fair processes of determining qualifications (as is the case with race) or even restructuring existing jobs according to recognizable differences (as is the case for women), but entitlement to enter the job market itself, even if

> existing qualifications, determined to be fairly established cannot be met. (p. 89–90)

Sometimes it is necessary to tear down old walls and old structures to make way for the new. The field of disabilities has been remarkably immune to this reality. Instead, each new generation of policies, programs, and processes is layered on top of its predecessors, creating a structure not unlike the nine unearthed levels of the ancient city of Troy. Within each layer of strata in the evolution of the service system, are the anecdotal and research findings regarding individual productivity; proven techniques and technology for effective training; cost-effectiveness analyses; and finally, the evidence of the harmful and dehumanizing effects of the field's failure to abandon outdated practices.

So why does the field continue to ignore its past and the impact it has on all the people with intellectual disabilities and people with mental illness who come within its reach—those who are waiting for the new opportunities they are promised year after year; and, those who are simply waiting for the resources being used to be reinvested so they can enjoy new opportunities as well? Similar questions about the disregard for their need for individuals with disabilities to have valued and visible roles in society as evidenced by the perpetuation of institutions and segregation have been raised repeatedly over the past four decades.

Rothman's (1964) reflection regarding the role history plays in society and the day-to-day lives of its citizens is an affirmation of the courage it takes, not only to take stock of one's sins of omission and commission, but to also take action so those sins can be forgiven. Barnett (1986) examined the historical record and reasserted that the basis for the growth and sustained use of institution lies in the adoption of an economic model of a public industry monopolized by a profession (p. 57). Coming to terms with its long history of segregation and exploitation of individuals with disabilities is what the field is called upon to do as an outcome of this book. Otherwise, the political and funding structure of the current system of services and supports will most assuredly continue to view individuals with disabilities as commodities that can be manipulated for profit.

The final question, therefore, must be one of resolve. Does the field have the resolve to confront the fears and anxieties that are partners with true progress? There is evidence of this type of resolve in the not-so-distant past. Just consider, in 1974, in the space of less than a year, approximately 47,000 residents in public institutions for individuals with intellectual disabilities went from being unpaid workers to complete idleness—all because no one wanted to pay them to do the jobs that the people who replaced them would be paid to do.

And consider also the fact that, in 1975, at the same time unpaid resident workers were being denied the right to remuneration and the worker programs in public institutions were being dismantled, Congress passed the Education for All Handicapped Children Act. Only three years later, *1.25 million children with disabilities who had never set foot in a public school*, boarded buses and were sitting in classrooms with teachers, materials, and all of the other traipsing needed for them to take advantage of that new opportunity. An opportunity many doubted possible became a reality.

Today, an estimated 425,000 individuals with significant disabilities are in services that use the subminimum wage basis for compensation (Callahan, 2010, p. 24). This number is almost equal to the total population of public institutions at the peak of their occupancy. Another 84,432 individuals with intellectual and developmental disabilities continue to reside in public and private institutions; the campaign for their liberation is being carried out—one litigation at a time (Braddock, Hemp, Rizzolo, Haffer, Tanis, & Wu, 2011).

Altogether, 505,432 individuals with intellectual and developmental disabilities who currently live or work in segregated settings, have futures almost within their reach that were unimaginable 50 years ago when President Kennedy made his *Special Message to the Congress on Mental Illness and Mental Retardation*.[1] An even greater number of individuals with mental illness and other disabilities remain in state mental hospitals, nursing homes, and day treatment programs. Their reality is one that calls for submission, isolation, dependency, idleness, and invisibility. What they require is a collective resolve from the field that it will use the tools that are already on hand to transform their reality to one of autonomy, integration, freedom, productivity, and affirmation of their existence. What then altogether may be accomplished, through cooperation and collaboration, would not seem unusual or extraordinary—but would instead bear witness to a greater understanding of what it means to embrace the humanity that is evident in each and every one.

NOTES

Foreword

1. Source for the construction of this graphic: Larson, S. A., Hallas-Muchow, L., Aiken, F., Hewitt, A., Pettingell, S., Anderson, L. L., Moseley, C., Sowers, M., Fay, M. L., Smith, D., & Kardell, Y. (2014). *In-Home and Residential Long-Term Supports and Services for Persons with Intellectual or Developmental Disabilities: Status and trends through 2012*. Minneapolis: University of Minnesota, Research and Training Center on Community Living, Institute on Community Integration.
2. Conroy, J., & Bradley, V. (1985). *The Pennhurst Longitudinal Study: A report of five years of research and analysis*. Philadelphia: Temple University Developmental Disabilities Center. Boston: Human Services Research Institute.
3. NCI. 2008. *Employment data, phase IX final report*. Human Services Research Institute and National Association of State Directors of Developmental Disabilities Services.

1 Introduction

1. Involution is change without transformation, as in modifying an established organizational approach in such a way that it is embellished with aspects of a newer one without having changed any of the underlying structures or expectations. For example, adopting the term "supported employment centers" as a substitute for "sheltered workshops."

2 Institutionalized Peonage and Involuntary Servitude

1. Excerpt from poem, "A Psalm of Life" by Henry Wadsworth Longfellow. In *The Complete Poetical Works of Longfellow.* Boston, MA: Houghton Mifflin Company, 1893.
2. Terms that describe individuals with disabilities throughout this chapter will be those found in the original source. Otherwise, except in the usage

of "residents" and/or "patients" to describe individuals who were institutionalized and "sheltered workers" to describe individuals who work in sheltered employment, People First language is utilized.

3. Author's emphasis added.
4. Margaret Gould served as the chairperson of the Twentieth Century Recognition Project, a project initiated by the National Preservation Trust on Mental Retardation to honor past contributors to the field.
5. *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199–2012.
6. *Olmstead v. L.C.*, 527 U.S. 581 (1999).
7. That is, *Souder v. Brennan*, 367 F. Supp. 808—Dist. Court, Dist. of Columbia 1973.
8. In *Changing Patterns in Residential Services for the Mentally Retarded*, Wolfensberger (1969) asserted that, "Dehumanization of retarded persons is so accepted to this day, and even by workers in our own field, that we witness a contemporary superintendent of a state institution referring to his retarded charges as 'so called human beings . . . below what we might call an animal level of functioning'" (p. 49).
9. See Howertown, J. (2013). "Read the unbelievably hateful letter sent to family with autistic child: Do the Right Thing and Move or Euthanize him." Retrieved from http://www.theblaze.com/stories/2013/08/19/read-the-unbelievably-hateful-letter-sent-to-family-with-autistic-child-do-the-right-thing-and-move-or-euthanize-him/.
10. "Other," is defined by Vail (1966, p. 36) as those things within society that are unnamed and unnamable, as in social taboos.
11. In addition to the Thirteenth Amendment, Section 1584 of Title 18 of the United States Code makes it unlawful to hold a person in a condition of slavery, that is a condition of compulsory service or labor against his/her will, whereas Section 1581 of Title 18 makes it unlawful to hold a person in "debt servitude" or peonage through force, the threat of force, or the threat of legal coercion to compel a person to work in order to repay a debt.
12. Moral treatment as developed by William Tuke and Philippe Pinel in the early 1800s "gave new emphasis to the psychological, or 'moral,' causes of insanity and developed moral methods to treat them" (Tomes, 1994, p. 62). Moral methods included the creation of an intimate, family environment that was quiet and orderly.

3 Fighting Forest Fires: The Lost Heritage of Competence and Contribution

1. In his written testimony to the US Equal Employment Opportunity Commission in 2011, Kiernan noted that: "While studies have documented that the family and friend network is a very effective strategy in finding employment for persons without disabilities, this network is not utilized as often for persons with disabilities" (p. 5).

2. Renamed the President's Committee on Individuals with Intellectual and Developmental Disabilities in 2003.
3. Subsequently renamed "The Arc."
4. Institutionalized and exclusion in this context can also mean the individual's return to a sheltered workshop or other comparable segregated environment.

4 The Peonage Cases

1. "The Song of the Slave-Wage" by Robert Service. In R. Service (1907). *The Spell of the Yukon and Other Verses*. Edward Stern, Inc.
2. *Wyatt v. Stickney* 3195 (M. D. Ala.); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971) ruling patients were being denied right to treatment; *Wyatt v. Stickney*, 334 F. Supp. 1341 (M.D. Ala. 1971) class enlarged to include Searcy Hospital and Partlow State School and Hospital; *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972) and *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972) orders establishing right to habilitation and minimal constitutional standards for treatment of persons with mental illness and persons with mental retardation; 1974 *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) rulings upheld after appeal.
3. NYSARC & *Parisi v. Carey* 72 Civ. 356 (E.D.N.Y.).
4. Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93–112, 87 Stat. 394 prohibited the discrimination of individuals with disabilities by any program or activity that received Federal financial assistance.
5. Public Law 92–603, the Supplemental Security Act of 1974.
6. Among others, Gunnar Dybwad testified at the Partlow trial in Alabama.
7. *Townsend v. Treadway* was originally filed as Civil No. 6500 (D. Tenn, 9/21/73) is also listed as *Townsend v. Cloverbottom*, Doc. No. A-2576 (Ch. Nashville and Davidson Counties, TN, filed 5/22/73).
8. Weisbrod et al. (1978) included this distinction in *Public Interest Law*,
   > Some of the most important cases in this area . . . are Wyatt v. Stickney, which established the constitutional right to treatment of involuntarily confined mental patients; Donaldson v. O'Connor, which set standards for involuntary commitment of individuals; Souder v. Brennan, which ended institutional peonage; and Jackson v. Indiana, which prevented indefinite commitment for individuals found mentally incompetent for trial (Weisbrod et al., 1978, p. 374).
9. Rolland W. *Walker v. Gallopolis State Institute*. Case Number: 1975–0510.
10. Dr. Floyd Dennis, an attorney, was on the faculty of the George Peabody College for Teachers.
11. *Employees of the Department of Public Health and Welfare v. Missouri*, 411 U. S. 279 (1973).

12. *Saville v. Treadway*, 404 F. Supp. 430 (M.D.Tenn.1974) consent agreement approved, 404 F.Supp. 433 (retarded individuals in state institutions have right to habilitative services).
13. It wasn't until 2013 that a group of 32 individuals with intellectual disabilities would prevail in a labor related cause when EEOC attorney Robert Canino obtained an unprecedented $246 million award in EEOC Case No. No. 3:11-cv-00041-CRW–TJS against Henry's Turkey Farm in Iowa. See also http://www.eeoc.gov/eeoc/newsroom/release/5-1-13b.cfm.
14. *Souder v. Brennan*, Civil Action No. 482–73 (D. D. C. 1973) *Souder v. Brennan*, 367 F. Supp. 808 (D.D.C. 1973).
15. *Mossman v. Donahey*, 46 Ohio St. 2d 1, 346 N. E. 2d (1976).
16. *National League of Cities v. Usery*, 426 U.S. 833 (1976).
17. The Tenth Amendment states that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
18. *United States v. Kozminski*, 1988 (108 S. Ct. 2751, 101 L. Ed 2nd 788).
19. Ibid., p. 2.

5 The Aftermath

1. Senate Bill 1275, House Bill 2117.
2. The Association of Medical Officers of American Institutions for Idiotic and Feeble-Minded Persons has been renamed five times. In 1907, it was renamed to the American Association for the Study of the Feebleminded (AASF). In 1933, it was renamed to the American Association on Mentally Deficient. In 1987, it was renamed to the American Association on Mental Retardation. Most recently, in 2007, it was renamed to the American Association on Intellectual and Developmental Disabilities (AAIDD).
3. Ibid., p. 24.
4. States ability to use ICF/MR funds to operate institutions for individuals with intellectual disabilities resulted in shorthand referral to them as ICFs/MR, regardless of size.
5. See Homeward Bound v. Hissom Memorial Center, 1987 WL 27104 (N.D. Okl.) and Homeward Bound v. Hissom Memorial Center, 963 F.2d 1352 (10th Cir. 1992).

6 The Peculiar Institution of Subminimum Wage

1. Excerpt from the poem, "Wages," by Hugh Owen Meredith, published in *Weekday Poems by Edward Arnold*, 1911.
2. In addition to setting subminimum wage standards, the Department of Labor's interpretation of the Act extended coverage to business enterprises that included "institutions primarily engaged in the care of the

aged, mentally ill or defective who reside on the premises." This ruling later served as the basis for the peonage lawsuits.

3. The Wagner-O'Day Act, as amended, established a program (commonly referred to as the Javits-Wagner-O'Day program) for directing the Federal Government's procurement of selected commodities and services from qualified sheltered workshops to increase job opportunities for the handicapped. Under the act, the Committee for Purchase from the Blind and Other Severely Handicapped was created for (1) approving suitable products or services for procurement from sheltered workshops, (2) establishing the fair market prices, and (3) establishing rules and regulations for implementing the program (U.S. General Accounting Office, 1981, p. 50).
4. The group of workers with disabilities and the egregious treatment they experienced as described in the audit report would continue for nearly a decade until the story of the "Boys in the Bunkhouse" (New York Times, 2013) exploded in national media reports. See especially http://www.nytimes.com/interactive/2014/03/09/us/the-boys-in-the-bunkhouse.html.
5. One such example of these conditions is the 1911 shirtwaist factory fire. See New York Times, March 1911, p. 1. "141 Men and Girls Die in Waist Factory Fire; Trapped High Up in Washington Place Building; Street Strewn with Bodies; Piles of Dead Inside" Retrieved from: http://triangleﬁre.ilr.cornell.edu/primary/index.html.
6. *Sheltered Workshops of San Diego, Inc. v. United Association of Handicapped*. 126 961 (1960).
7. *St. Louis Lighthouse for the Blind, Employer, v. Local 160, AFL-CIO, Petitioner* NLRB Case No. 14-RC-4309 (1962).
8. In *Pulliam v. Flemming* [Civil Action No. 17714 February 8, 1960] US. D.C. W.D. Pa. Unreported Ruling.
9. Brevard Achievement Ctr., 342, 982 (2004).
10. Goodwill Indus. of N. Ga., 350 32 (2007).
11. Davis Memorial Goodwill Indus., 381 1044 (1995), rev'd 108 F3d 406 (D.C. Cir. 1997).
12. Goodwill Indus. of Denver, 304 N.L.R.B. 764, 766 (1991).
13. P. L. 110–325 (S 3406) September 25, 2008.
14. Ibid., p. 2.

7 Institutional Peonage and Involuntary Servitude in Segregated "Employment" Settings

1. The definition of intellectual disability has since been modified a number of times by AAIDD. The most recent version, established in 2010, states that "*Intellectual disability* is a disability characterized by significant limitations in both *intellectual functioning* and in *adaptive behavior*, which covers many everyday social and practical skills. This disability originates

before the age of 18." Retrieved from http://aaidd.org/intellectual-disability/definition#.VYiPL-s-SqQ June 15, 2015.

2. The *Randolph–Sheppard Act*, mandates a priority to blind persons to operate vending facilities on Federal property.
3. The *Javits–Wagner–O'Day Act*, directs all federal agencies to purchase specified supplies and services from nonprofit agencies employing persons who are blind or have other significant disabilities.
4. See "Peace, Purpose and a Pool: Sweetwater Spectrum, a California residence for autistic adults…" where parents and professionals collaborated in the creation of a three-acre complex for 16 individuals with autism. http://www.nytimes.com/2013/10/10/garden/the-architecture-of-autism.html?hp&_r=0.

8 Perpetuation of Peonage and Poverty in the Twenty-first Century

1. This figure did not specifically include the number of Employers of Patient Workers or School Work Experience Programs certificate holders.
2. In *United States v. Kozminski*, the Supreme Court ruled that in order for the Government to prove a violation of someone's Thirteenth Amendment right to freedom from involuntary servitude, they must also prove that it involved the use or threatened use of physical or legal coercion.

9 Conclusions: Stone Buildings and Stone Walls

1. John F. Kennedy: "Special Message to the Congress on Mental Illness and Mental Retardation," February 5, 1963. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. Retrieved from http://www.presidency.ucsb.edu/ws/?pid=9546.

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