The Civil Rights Movement

March 25, 2015, marked the fiftieth anniversary of the third and final Selma to Montgomery civil rights march of 1965. The first was held on March 7, and is, perhaps, the most infamous of the three. The march came to be known as "Bloody Sunday" after six hundred demonstrators were turned back less than a mile into the march at the Edmund Pettus Bridge when state troopers and county posse attacked the unarmed marchers with billy clubs and tear gas.

The demonstrators had set out to walk the fifty-four miles from Selma to the Alabama state capital of Montgomery to draw attention to pervasive racist practices that unlawfully and unfairly limited the right of African-American citizens to exercise their constitutional right to vote. While the demonstrators paid a high price to win their rights, their efforts proved effective. Their sacrifices were rewarded when the Voting Rights Act was adopted by the Congress later that same year. But, that was 1965.

Just one year earlier the Congress had passed the Civil Rights Act of 1964. So why were African-American people demonstrating for voting rights? Did not the Civil Rights Act of 1964 already protect them?

Civil rights leaders, including the Reverend Dr. Martin Luther King, Jr., understood that the attainment of equality is not an event but a slow and often agonizing, frequently discouraging struggle of people working to emerge from subjugation to equal status. It is the process of changing the hearts and minds of the dominant society. It has transformative
moments, but neither its beginning nor its end are fixed in time. In Dr. King’s words: “Let us therefore continue our triumphant march to the realization of the American dream.”

Unquestionably, the Civil Rights Act of 1964 was a pivotal event in the struggle of African Americans to attain their civil rights; however it was, by no means, the first nor only federal action taken to end racial discrimination and its malignant and corrosive consequences.

It can be argued that the slow and torturous journey to gain civil rights began a century earlier with the abolition of slavery. On January 1, 1863, President Abraham Lincoln issued the Emancipation Proclamation and declared: “all persons held as slaves" within the rebellious states "are, and henceforward shall be free." But, paradoxically, the Emancipation Proclamation did not free everyone. Slaves were granted freedom, but freedom was only for slaves living in states that had seceded from the Union. In the loyal Border States the right of white people to hold black people in bondage continued.

The struggle for equal status began when American slaves were freed, but it took over a century before the inherent equality of African-American people would be affirmed in law. The Emancipation Proclamation of 1863 and the Civil Rights Act of 1964 were not unrelated, dissociated independent events; they marked distinct, transformative moments in a social evolution, the painstakingly slow social awakening of the human consciousness and conscience to face injustice and to acknowledge the humanity of all people.

The Emancipation Proclamation was not the end but the beginning. Soon thereafter, on December 6, 1865, the Thirteenth Amendment to the Constitution of the United States of America abolished slavery and involuntary servitude, except as punishment for a crime. Eight years later, the Congress enacted the Civil Rights Act of 1871, also known as the Ku Klux Klan Act. The act granted to the President the authority to suspend the writ of habeas corpus to combat the Ku Klux Klan and the other white supremacy organizations during the Reconstruction Era. The tide of history seemed to be moving toward integration at a steady and heartening rate.

But then followed the Civil Rights Act of 1875, prohibiting discrimination in hotels, trains, and other public facilities, an important milestone, but one that would soon be challenged. At first all seemed to be well. In 1877 the Supreme Court ruled in Hall v. DeCuir that the states could not prohibit segregation on common carriers such as railroads, streetcars, or riverboats. While a dramatic victory for African Americans, the court decision proved to be

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too much for whites to bear. The slaves were free, but the antebellum south continued to enforce strict separation of the races. Freedom was one thing, but equality was quite another.

The constitutionality of the 1875 Civil Rights Act continued to come under fire. In 1883 the court overturned key protections of the Civil Rights Act of 1875, thereby laying the foundation for the idea of “separate but equal,” although the term was not introduced at that time. But more was to follow. Seven years later the court approved a Mississippi statute requiring segregation on intrastate carriers in Louisville, New Orleans & Texas Railway v. Mississippi (1890).

During the years 1887 to 1892 nine states passed laws requiring separation of the races on public conveyances, such as streetcars and railroads. Segregation of the races was viewed to be natural and not discriminatory. The Louisiana Separate Car Act of 1890 included the language that in order to “promote the comfort of passengers,” railroads had to provide “equal but separate accommodations for the white and colored races” on lines running in the state.

Even in the face of defeat after defeat, proponents of racial equality somehow managed to maintain their spirit and fight back. On June 7, 1892, Homer Plessy walked into the Press Street Depot in New Orleans, bought a first-class ticket to Covington, and boarded the East Louisiana Railroad’s Number 8 train. When ordered to move, Homer Plessy refused. “I am an American citizen,” he told the trainman. “I have paid for a first-class ticket, and intend to ride to Covington in the first-class car.” Plessy was arrested and charged with violating the Separate Car Act. A long series of court battles followed.

On May 18, 1896, the U.S. Supreme Court ruled against Plessy, heralding seven decades of what came to be known as the Jim Crow era, a period in American history infamous for perpetuating the presumed legitimacy of racial segregation. But, eventually the injustice of segregation would be challenged and the tide would begin to turn.

The Civil Rights Act of 1957 created the Civil Rights Commission. Then the Civil Rights Act of 1960 established federal inspection of local voter registration polls.

Then followed what was unarguably the most significant declaration of human rights of the twentieth century: the Civil Rights Act of 1964. The Civil Rights Act prohibited discrimination based on race, color, religion, sex, and national origin by federal and state governments as well as some public places. But the passage of the Civil Rights Act did not end the struggle for equality. Just one year later, Congress passed the Voter Rights Act of 1965.

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Reflecting on the events leading to the passage of the Voter Rights Act, The Reverend Dr. Martin Luther King said: “…today as I stand before you and think back over that great march, I can say, as Sister Pollard said—a seventy-year-old Negro woman who lived in this community during the bus boycott—and one day, she was asked while walking if she didn’t want to ride. And when she answered, ‘No,’ the person said, ‘Well, aren’t you tired?’ And with her ungrammatical profundity, she said, ‘My feets is tired, but my soul is rested.’ And in a real sense this afternoon, we can say that our feet are tired, but our souls are rested.” Dr King went on to say: “The Civil Rights Act of 1964 gave Negroes some part of their rightful dignity, but without the vote it was dignity without strength.”

Three years later the Congress enacted the Civil Rights Act of 1968, also known as the Fair Housing Act, to be followed by the Civil Rights Act of 1991, providing the right to trial by jury on discrimination claims and introducing the possibility of emotional distress damages, although the law limited the amount that a jury could award. And the struggle for equality is not over; it will not be over until African Americans and other minority groups are regarded as equals, treated as equals, and are able to live free from discrimination.

**Civil Rights and Disability Rights**

But how do we address the civil rights for people with disabilities? If people with disabilities suffer discrimination based on prejudice and preconception, then it logically follows that people with disabilities, like other disenfranchised people, deserve to have their civil rights consecrated in law. But society does not regard the prejudice people with disabilities face as comparable to the discrimination faced by other members of minority groups.

By definition disability means a loss of mental or physical function, but its social construction encompasses much more. Society regards disability not just as a limitation in sight, hearing, mobility or mental or intellectual functioning, but as a condition of generalized defect and damage. While it is recognized that people with disabilities face discrimination, it is quietly yet firmly believed that the limited opportunity they face is at least in equal degree the inevitable, unescapable consequence of their infirmity.

So, what about civil rights protections for people with disabilities? Twenty-five years ago, the Congress passed the Americans with Disabilities Act (ADA), landmark legislation affirming the right of people with disabilities to live free from discrimination. There is no question that the ADA transformed America’s thinking about disability and the rights of people with disabilities. But when we compare the protections contained in the ADA to those contained in the Civil Rights Act of 1964, we find a number of dramatic and disappointing differences.
While the ADA prohibits employment discrimination based on disability, it is a limited prohibition. Specifically, the ADA forbids employment discrimination against people with disabilities but only to those individuals who are deemed to be a “qualified individual.” People with disabilities are protected from employment discrimination, but not all people with disabilities. Only the “qualified,” the worthy, only those people with disabilities who do not cost too much to accommodate or are not too much bother. People with disabilities are minorities, but they are an orphan minority, a subordinate minority. People with disabilities have some civil rights protections, but not the same protections afforded to ethnic minorities and other protected classes of individuals.

In barring discrimination against other minority individuals, it is striking to note that the term “qualified individual” is not contained in Title VII of the Civil Rights Act of 1964. The act simply says, “It shall be an unlawful employment practice for an employer … to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” (Title VII, Civil Rights Act of 1964 Sec. 703(a)(1) or 42 USC 2000e-2(a)(1))

The Civil Rights Act makes no mention of a “qualified individual from a specified ethnic background,” no mention of a “qualified woman,” no mention of a “qualified member of a defined religious faith,” and no mention of a “qualified individual of a particular national origin.” While not explicitly stated, it is assumed that people are not inherently inferior by virtue of race, color, religion, sex or national origin. In other words, it is understood that they are inherently normal people, capable people, people whose lives are unjustly constricted by prejudice. They are not required to prove that they are qualified, because they are assumed to be qualified; they are assumed to be equal in capacity and ability. They are not infirm nor limited by their minority status but by prejudice. But the same is not assumed to be true for people with disabilities. The idea of barring employment discrimination against people with disabilities is reserved to those people with disabilities who are deemed to be “qualified.”

The ADA states: “(a) General rule: No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” (42 U.S.C. § 12112(a)).

But what makes a person with a disability qualified? What is the standard that divides the able from the unable? The ADA defines the term qualified individual with a disability as follows:

“(8) Qualified individual. The term “qualified individual” means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration
shall be given to the employer’s judgment as to what functions of a job are essential, and if an
employer has prepared a written description before advertising or interviewing applicants for
the job, this description shall be considered evidence of the essential functions of the job.”
(42 U.S.C. § 12111(8)).

So, not all people with disabilities are protected from employment discrimination. The
individual with a disability must first show that he or she is a “qualified person.” And who
decides whether the individual is qualified, able to perform the essential functions of the job?
As we see, the ADA states that “…consideration shall be given to the employer’s judgment …”
People with disabilities are members of a minority group, but their protections are not the same
as the protections available to others. People with disabilities are minorities, but they are orphan
minorities.

The definition of a qualified individual with a disability is linked to the concept of a
“reasonable accommodation.” People with disabilities are guaranteed the right to be given
accommodations, but not any accommodation, only those deemed to be reasonable. Of course
the converse of reasonable is unreasonable, and no one would argue that people with disabilities
must have the right to unreasonable accommodations, but the question of what makes an
accommodation reasonable is more than a rhetorical flourish, an interesting intellectual
exercise; it is foundational.

The distinction between reasonable and unreasonable accommodations is rooted in
society’s conception that people with disabilities are like and unlike other minority individuals.
They face social barriers but they are equally limited by their own incapacity. While it is kind
and fair to grant them accommodations: the accommodations must be reasonable, that is, they
must not cost too much or be too much bother or inconvenience. It is a distinction between the
worthy and the unworthy. Those people with disabilities who, albeit damaged, can do a little
something. It is the benevolence of the master to the ward, the superior to the inferior, the
parent to the child. And as with the determination of what constitutes the essential functions of
the job, the determination of whether an accommodation is reasonable falls to the employer. Of
course the authority of the employer is neither absolute nor unfettered. Still, it is revealing to
note that the employers’ defense, the employers’ standard of proof when challenged is to show
that an accommodation is not reasonable because it imposes an “undue hardship” on the
employer, that is, it costs too much or is too much bother.

This year we are celebrating the 25th anniversary of the passage of the ADA--and
celebrating we are --but we must do more than celebrate; we must look back on where we were,
assess where we are now, and then chart the future. The ADA was a transformative moment in
the struggle for equal rights. The legal protections themselves were dramatic, but of greater
significance was the long awaited social awakening that enabled the law to be taken seriously
and adopted by the Congress. The progress we have made is worth celebrating, but as we celebrate, we must also look forward. If people with disabilities are to be successful in taking the next step toward equal status, we must secure full and equal civil rights protections in law and we must line up our programs, services and supports to conform to and sustain the conception of disability as a minority issue, a civil rights issue, a human rights issue. People with disabilities are minorities, but we are not an orphan minority.

Eliminate Subminimum Wages for People with Disabilities

It is time to eliminate Section 14(c) of the Fair Labor Standards Act (FLSA). Section 14(c) grants an exception from the minimum wage requirements under the FLSA. Section 14(c) does incalculable economic harm to people with disabilities, but its corrosive effects go far beyond their impoverishment. Section 14(c) perpetuates society’s harmful and unfounded belief that people with disabilities are broken people, damaged people, defective people—different from other minorities because their minority status is based on their infirmity, their inability, a condition that renders them less able and less productive than others—an orphan minority, a subordinate minority. The Section 14(c) exception sustains the idea that there are places for those people, people incapable of working alongside others, benevolent places separate and apart from society as a whole.

Federal regulations euphemize subminimum wages. Instead of calling them what they are, subminimum wages, the term Commensurate Wage is used (29 CFR Part 525). Commensurate wage is defined as “…a special minimum wage paid to a worker with a disability which is based on the worker’s individual productivity …. Commensurate wage is always a special minimum wage, i.e., a wage below the.” statutory minimum.”

Seventy-seven years ago this year, as a central piece of the New Deal, President Roosevelt secured passage of the FLSA. Among other protections, the FLSA guaranteed American workers a minimum wage; but not all American workers. From its inception the FLSA excused employers from paying people with disabilities the minimum wage. It was understood that people with disabilities could not be as productive as others, and if employers were required to pay them the minimum wage (at that time 25 cents an hour), people with disabilities would not be employed at all.

While neither just nor morally defensible, we understand that in 1938, when the FLSA was passed, no one would have seriously proposed that people with disabilities be included under the minimum wage requirement. In deed it would have been seen as an unkindness, a deepening of the hardships that already defined their lives. No one would pay a person with a disability the minimum wage, so instead of limited opportunities for employment, they would have none. People with disabilities were broken people, damaged people, inferior people. They suffered inferior status through no fault of their own, but they were inferior just the same.
The question is not whether there are people with complex disabilities that impair their productivity; the question is whether it is equitable and just to require people with disabilities to prove their worth and to do so by performing mind-numbing, repetitive work. People with disabilities are not given menial, monotonous work because it is the only work they can do but because it is work that fits society’s low expectations. It makes no sense to take a class of people, people who have a limitation in a physical or mental function, and constrict the number of jobs available to them. Objectively, one would think that people with disabilities need access to the widest number of employment options to facilitate a good match between the individual and the job. But beyond the objective flaw in the paradigm, the Section 14(c) exemption perpetuates discrimination; it reinforces the idea that people with disabilities are damaged, limited people—an orphan minority. It is time to cut the Gordian Knot and eliminate this vestige of a shameful past. It is time—past time—to repeal Section 14(c) of the FLSA.

Reform the Javits-Wagner-O’Day Act Program to Support Integrated, Competitive Employment

The AbilityOne Commission administers the Javits –Wagner - O'Day (JWOD) (Act 41 U.S.C. Section 46 et seq.). The AbilityOne Commission (known in law as the Committee for Purchase from People Who Are Blind or Severely Disabled) grants noncompetitive contracts to nonprofit community rehabilitation programs (CRPs) that provide specified supplies and services to agencies of the federal government. The qualified CRPs employ people who are blind or who have other significant disabilities. The act was passed by the 92nd United States Congress in 1971 and has not been amended or updated since that time.

Last year the AbilityOne Commission allotted approximately $2.8 billion in noncompetitive federal contracts to CRPs that employ people with disabilities. To work on these contracts, an individual must be legally blind or must have a physical or mental disability that "constitutes a substantial handicap to employment and is of such a nature as to prevent the individual under such disability from currently engaging in normal competitive employment." But who decides that an individual is incapable of engaging in "normal competitive employment”? The CRP does. And who decides the individual's productivity? The CRP does. And who decides how many hours an individual will work each week? The CRP does. And who oversees the program? Essentially no one. The program has been plagued by countless abuses arising, in large part, from the inherent conflicts of interest that comprise the structure of the JWOD program.

JWOD federal contracts are used to support segregated work settings that often pay wages below the prevailing wage or minimum wage. The wages are kept low and the number of

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work hours are limited to protect Social Security disability benefits. As a result, the JWOD program helps sustain low wage employment in segregated settings.

The JWOD program should be updated to direct the purchasing power of the federal government to support equitable pay and integration. The following are four specific recommendations that would transform the JWOD program from one that works against integration into a program that fosters high wages, dignity and self-support:

First, the JWOD program should be conceptualized as a disability employment program, not as a federal procurement program. At present the majority of the federal agency representatives to the AbilityOne Commission are senior procurement officers. While the AbilityOne Commission includes public members an customarily the Commissioner of the Rehabilitation Services Administration, the program is largely guided by people with no knowledge or background in disability employment programs. The administration of the AbilityOne program should be moved to an agency such as the Rehabilitation Services Administration within the U.S. Department of Education or the Office of Disability Employment Policy within the U.S. Department of Labor.

Second, eligibility for the program should be based on a determination that the individual meets the Social Security Administration’s definition of disability. The individual would not need to be receiving SSI or SSDI benefits, only meet the disability portion of the programs eligibility criteria. The CRPs should not be allowed to determine the severity of the individual’s disability. By law eligibility for the program is reserved to those individuals with disabilities that are so significant that they are unable to work in competitive settings. At present there is a direct conflict of interest since it is the CRP that determines the severity of the individual’s disability, and hence, who is accepted for inclusion in the program. It is in the interest of the CRPs to qualify individuals who have minimal levels of disability, so the CRPs’ workforce is as productive as possible. This flies in the face of the act’s purpose and intent.

Third, noncompetitive JWOD federal contracts should not be used to support subminimum Wages to people with disabilities. JWOD contracts are given to nonprofit agencies that receive an array of governmental and philanthropic subsidies to provide employment for people with disabilities. It is unfair and unjust to allow the CRPs to determine the productivity of an individual since it is the CRP that stands to benefit by constricting the wages of its workers. The JWOD program should be used to support wages that enable people with disabilities to be self-supporting and to attain a decent standard of living, not to perpetuate penury and isolation.

Fourth, the JWOD program should limit contracts to work in integrated settings. This would require a thoughtful and planned transition, but it is something that is long overdue.
Eliminate the Earnings Limits for the Social Security Disability Programs

It is time to eliminate the earnings limit for the Social Security Disability Insurance (SSDI) and the Supplemental Security Income (SSI) programs. The earnings limits serve to keep people with disabilities in perpetual poverty and dependent on public programs to meet the costs associated with their disability.

Although the Social Security Administration (SSA) applies a strict definition of disability, monthly benefits are not paid to all people who meet the SSA definition of disability. The SSDI program pays benefits only to those individuals whose earnings, if any, are below the threshold known as “Substantial Gainful Activity” (SGA) (in 2015, $1,090 for disabled beneficiaries and $1,820 for blind beneficiaries). It has been known for many years that SSDI beneficiaries limit their income to stay below the SGA earnings limit, thereby protecting their SSDI benefits.

The SSI program operates under somewhat different rules than the SSDI program; however both penalize work and lead to chronic poverty for individuals with disabilities (monthly payment amounts for the SSI program in 2015: $733 for an eligible individual, $1,100 for an eligible individual with an eligible spouse, and $367 for an essential person).

But why limit the earnings of individuals who receive SSI or SSDI benefits at all? Conceptually, both programs reflect a welfare model, that is, they presume that, once an individual has demonstrated his or her ability to work, the taxpayer should no longer supplement the individual’s income. What they fail to recognize is that people with disabilities incur costs throughout their lifetime related to their disability. The welfare model of disability income support assumes that either the individual will be able to pay his or her disability related costs or a public program will assist or the individual will have to make due the best he or she can. This leaves the person with a disability either without needed services or as a perpetual ward of the state.

From a disability rights standpoint, the threshold question is whether the cost of disability should be borne by the individual or whether it should be distributed across society as a whole. There are many examples of distributed costs: we are asked to pay taxes to support public schools, irrespective of whether we have school-age children; we are asked to pay for police, even if we do not directly use the service. It is recognized that schools and police benefit society generally, and their costs should be shared.

But perhaps a better example is road maintenance. For most of us if the road on which we live needs to be repaired or replaced, tax dollars are used to meet the expense. No one assesses the ability of each homeowner to pay a portion of the cost, based on the earnings of the individual. The road in front of an individual’s house is not used by everyone, but its...
maintenance is still seen as a legitimate public expense. The same should be true for the costs of disability.

Eliminating the SSDI and SSI earnings limits would immediately end the disincentive to work. By stimulating work activity, more taxes would be paid and people with disabilities would have the opportunity to attain a better standard of living. But more important, eliminating the earnings limits would mean that people with disabilities would have some money under their direct control to help offset the costs associated with their disability. No applying to charitable or governmental programs; no means testing. The individual would have some money to pay for assistive technology, the cost of hiring a job coach, transportation, and so on. Instead we means test SSDI and SSI recipients each and every month to make sure that they are still unemployed, still poor, and to what end? The Congress acknowledged the self-defeating consequence of limiting work and eliminated the earnings limit for retirees. It is time to do the same for people with disabilities.

End the Conception of Disability as an Orphan Minority

People with disabilities constitute a minority group in every legitimate sense of the word. They face discrimination and have their lives limited by socially constructed barriers to full participation. But their minority status is not regarded as entirely comparable to that of ethnic minorities, people of different colors, religions, faiths or national origins.

While people with disabilities have made significant strides toward true integration, their progress has been suppressed by society’s conception of people with disabilities as broken people, damaged people, inferior people. Civil rights are reserved for others while people with disabilities are made to make due with limited civil rights, qualified civil rights, conditional civil rights. People with disabilities are members of a minority group, but it is an orphan minority, a subordinate minority.

The ADA was a transformative moment in the struggle of people with disabilities for equal status, but as with the Civil Rights Act of 1964, it did not end the struggle for true equality. Equality will not be an event, a moment of social awakening. It will take years, generations, each building on the foundation laid by those who came before. It is fair, even compulsory, to take heart from what we have achieved, but the struggle must continue, continue until people with disabilities take their rightful place as equals among equals.

Concluding Comments

In the words of Nelson Mandela: “I have walked that long road to freedom. I have tried not to falter; I have made missteps along the way. But I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb. I have taken a moment here to rest, to steal a view of the glorious vista that surrounds me, to look back on the
distance I have come. But I can only rest for a moment, for with freedom come responsibilities, and I dare not linger, for my long walk is not ended.”

The same is true for people with disabilities. We must stand up against injustice; we must stand up against isolation and we must never falter. As days become weeks and weeks become months; and as months become years and years become decades; we must not lose heart. Humanity demands it; decency demands it; and justice demands it. We are not an orphan minority; we are not damaged people; lesser people. We are people, people with our own individual abilities, interests, and dreams. We are people deserving of full and equal civil rights, full and equal opportunity, and the human dignity that is the right of all people.

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