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## **BRINGING AGE DISCRIMINATION AND DISABILITY DISCRIMINATION TOGETHER: TOO FEW INTERSECTIONS, TOO MANY INTERSTICES**

**Leslie Pickering Francis\* and Anita Silvers\*\***

Are harmful biases against different biological conditions of people, for example, skin color, sex, senescence, or disabling impairment fundamentally similar, so that legal prohibitions of, or protections against, their wrongful influences should be the same? U.S. jurisprudence has tended to answer “no” and, therefore, to treat each kind of discrimination as being wrong in its own way. As illustrated by one of the examples that we discuss below, groups seeking constitutional protection from inequality have found courts disinclined to weigh as alike the

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harm that unequal treatment, such as state-imposed segregated housing, does to different kinds of people.<sup>1</sup>

To be sure, especially over the past quarter century, the tendency to see different kinds of groups' vulnerability to discrimination as disparate has receded somewhat, especially when the categories of race and sex are compared. But theories about and assessments of discrimination against some other groups distance them from one another, despite initial resemblances. Old age and disability, for instance, would seem to have some adverse features in common. Membership in either group suggests depleted capability, decreased social contribution, significant fragility, and heightened susceptibility to maltreatment by other people.

Given these congruencies between their targets, age discrimination and disability discrimination might seem to call for corresponding theoretical responses and comparable practical attention as well. Yet some have argued that no wrong occurs when advanced age—that is, *aged-ness*<sup>2</sup>—is made disadvantageous, for the elderly have had a fair chance at the goods of life. By contrast, this argument goes, there is never a fair chance for people with disabilities, and members of some other socially disadvantaged groups, such as the impoverished, are also likely never to have had one. So while denying resources in short supply to people based on their disability or their poverty would be unfair, old people may be told that they have had a fair chance at the goods of life and now must accept reduced rations, just because they are old.

In this article, we challenge the view that takes discrimination based on disability and discrimination based on aged-ness as so discrepant that they do not deserve similar

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1. See *infra*, notes 2 to 105 and accompanying text.

2. We should note that there is a difference between discrimination based on age, and discrimination based on aged-ness. The former merely references age (and could prohibit discrimination at any age), while the latter specifically refers to discrimination based on advancing age. The Age Discrimination in Employment Act elides the difference, limiting protection to those over the age of forty, but prohibiting discrimination based on age after that point. 29 U.S.C. § 631(a) (2009).

efforts for justice. Against this fragmented approach that treats sufferers from discrimination disparately, depending on the types of people they are, we argue instead for an inclusive justice that affords “meaningful access” to all. To do so, we examine various accounts of the obligation of the state to liberate people from the disadvantageous effects of biases against groups to which they belong.

The problem we propose to correct here suggests that bias based on advanced age and bias based on disability should be valued not merely differently but antithetically. Not least of the potentially pernicious consequences of this problem is pitting the interests of elderly individuals against the interests of individuals of all ages who have disabilities. As some people belong to both these groups, their intersectionality draws them, on the view we shall oppose, into being in conflict with themselves.

Our illustrations are taken from housing policy, fees for access to public services and events, and health care. In each case, we argue that the standard of “meaningful access” has been poorly understood, if applied at all. These are important examples, but they are by no means the only illustrations of the problem. To mention one other, in the fall of 2009 the United States Congress passed federal hate crimes legislation, finding that “[t]he incidence of violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem.”<sup>3</sup> Notably absent from these protected categories is aged-ness, despite extensive documentation of widespread abuse and violence against the elderly.<sup>4</sup>

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3. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, H.R. 2647, Pub. L. No. No: 111-84, Division E, § 4702(1) (2009).

4. See, e.g., U.S. Administration on Aging, National Center on Elder Abuse, *Fact Sheet*, [http://www.ncea.aoa.gov/ncearoot/Main\\_Site/pdf/publication/Final\\_Statistics050331.pdf](http://www.ncea.aoa.gov/ncearoot/Main_Site/pdf/publication/Final_Statistics050331.pdf) (last visited Nov. 9, 2009) (estimating that 1-2 million adults over age sixty-five are abused each year and quoting prevalence rates of 2-10%).

## AGED-NESS AND DISABILITY: ERRORS IN THEORY OF JUSTICE

We begin with some brief remarks about two missteps in justice theory that have helped support the mistaken belief in the incongruousness of advanced age and disability. Despite their disagreements on other matters, theories of justice advanced by egalitarians and utilitarians have seemed to concur in supporting the conclusion that age rationing can be justified. From the egalitarian side, some have argued that the elderly should take a back seat, because they have had more of the good of life.<sup>5</sup> Richard Lamm,<sup>6</sup> the former Governor of Colorado, and Daniel Callahan,<sup>7</sup> from the Hastings Center, are examples. From the utilitarian side, others have argued that welfare maximization counts against the elderly: we will "get more for our money" in health care if we employ measures such as quality adjusted life years (QALYs) in assessing cost-effectiveness of care.<sup>8</sup> Such measures do not bode well for the elderly, who presumably have fewer years of life left than the young.

Disadvantageous treatment on the basis of disability, however, has seemed to be another matter, for here utilitarian and egalitarian justice theories are not drawn together in agreement. Welfare-maximizing utilitarians appear unabashedly to think of disability as relevant in regard to the

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5. See, e.g., RICHARD LAMM, *THE BRAVE NEW WORLD OF HEALTH CARE* (Fulcrum Publishing 2003); DANIEL CALLAHAN, *SETTING LIMITS: MEDICAL GOALS IN AN AGING SOCIETY* (Simon & Schuster 1987); NORMAN DANIELS, *AM I MY PARENTS' KEEPER?* (Oxford Univ. Press 1988); Margaret P. Battin, *Age Rationing and the Just Distribution of Health Care: Is There a Duty to Die?*, 97 *ETHICS* 317 (1987); J. Grimley Evans, *The Rationing Debate: Rationing Health Care by Age: The Case Against*, 314 *BRIT. MED. J.* 822 (1997) (characterizing the debate as the "fair innings" issue); The New Old Age Blog, <http://newoldage.blogs.nytimes.com/2008/11/24/rationing-health-care-part-2/>, for a discussion of these debates in the context of contemporary health care reform (last visited Sept. 2, 2009).

6. See LAMM, *supra* note 5; see also Anita Silvers, *Damaged Goods: Does Disability DisQALYfy People from Just Health Care?*, 62(2) *MT. SINAI J. MED* 102 (1995).

7. See Callahan, *supra* note 5.

8. See, e.g., Sudhir Anand & Kara Hanson, *Disability-Adjusted Life Years: A Critical Review*, 16 *J. HEALTH ECON.* 685 (1997); John Harris, *QALYfying the Value of Life*, 13 *J. MED. ETHICS* 117 (1987).

justice of distributions, for they assume that people with disabilities will wring less benefit out of a particular resource than the nondisabled. If directing resources to people with disabilities produces less overall good than alternatives, so be it, from the point of view of utilitarian justice.

The utilitarian philosopher Peter Singer's position on the effect of disability on the value of people's lives has become emblematic of this theory, although more nuanced and less dogmatic utilitarianisms are not too hard to find. Singer's earliest venture on to this platform was his proposal that newborns with serious disabilities be allowed to die, and he continues to maintain this view, even though over the years he has elevated the seriousness a disability must exhibit to warrant such disregard.<sup>9</sup> Much more recently, Singer has argued on welfare maximizing grounds that having quadriplegia disqualifies individuals from priority for health care resources.<sup>10</sup> The debate between Singer and disability advocate Harriet McBryde Johnson about disability bias also is well known.<sup>11</sup>

Many egalitarians, by comparison, would object: welfarist prioritarrians, for example, might hold that people with disabilities are among the worst off who have primary claims on resources, even if those resources would produce less welfare for them than for others higher up the scale of well-being.<sup>12</sup> Although these matters are so complex that we cannot fully address them here, it is important for our later argument to note two related mistakes in presumptions prompting the several positions we have just described. These errors—really two sides

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9. See HELGE KUHSE & PETER SINGER, *SHOULD THE BABY LIVE?: THE PROBLEM OF HANDICAPPED INFANTS* (Oxford Univ. Press 1985).

10. Peter Singer, *Why We Must Ration Health Care*, N.Y. TIMES MAG., July 19, 2009, at 42-43.

11. See, e.g., Peter Singer, *Happy Nevertheless*, N.Y. TIMES MAG., Dec. 28, 2008, at 34; Harriet McBryde Johnson, *The Disability Gulag*, N.Y. TIMES MAG., Nov. 23, 2003, at 58; Harriet McBryde Johnson, *Unspeakable Conversations*, N.Y. TIMES MAG., Feb. 6, 2003 at 50. For another example of a clear statement that disability is correlated with reduced welfare see Eric Rakowski, *Who Should Pay for Bad Genes?*, 90 CAL. L. REV. 1345, 1346 (2002).

12. See Derek Parfit, *Equality and Priority*, in IDEALS OF EQUALITY 1 (Andrew Mason ed., Blackwell 1998).

of the same coin of viewing justice in a certain quantified way— can be found in writings attributed to both the egalitarian and utilitarian camps. One has to do with a misunderstanding about the substance of equality. The other arises from a misunderstanding about the substance of quality of life.

The first mistake is committed by theorists who link equality to the comparative quanta of the goods of life that individuals have had. On this account, elders are likely to be deemed already to have enjoyed more equality than youngsters, just because older people have had a longer span during which to acquire and enjoy various goods. Egalitarians who think this way transmute equality into a quantum of something, often welfare or the like. They adopt a distributive rather than a procedural understanding of equality, so they do not base equality on receiving equal respect as a person, but base equality on receiving the same amount of what is good, whether welfare or some other good.<sup>13</sup> This mistake obviously skews how disadvantageous treatment of the elderly will be weighed.

Of note, it may also skew weighing of disadvantageous treatment of the disabled by any theorist who supposes that the disabled enjoy special benefits and care. On this mistake, the disabled would be regarded as having received their fair quantum of the goods of life, just perhaps using them up more quickly. An analogy would be to lifetime caps on health insurance payments, with the elderly having consumed their share over their lifespan, and the disabled having spent theirs more quickly because of presumed "special" needs.

The second mistake is committed by those who regard the overall quantum of welfare produced by a distributive scheme as important in judgments of justice. For these non-prioritarian welfarists, the amount of good produced overall matters, even if those who benefit are higher on a scale of welfare than some who do not. This view is illustrated in Peter Singer's claims in

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13. For a criticism of such equality "of what" views, and a defense of the point of equality as ending oppression, see Elizabeth Anderson, *What is the Point of Equality*, 109 *ETHICS* 287 (1999).

his debates with Harriet McBryde Johnson and also is found in Singer's other discussions of disability. This is the idea that when people suffer severe and irreversible deficits of normal levels of physical or mental functioning, the quality of their lives also is so deficient as to undermine their potential for happiness.<sup>14</sup> Thus distributions of goods to them will produce less in overall benefit than distributions of goods to others. In later reflection on his exchange of views with Johnson, Singer seems to admit that his judgments about her life had misfired, but without conceding her fundamental point that misjudgments about the risks that people with disabilities face daily because of non-prioritarian welfarist assumptions about what management would be good for them<sup>15</sup> are pervasive among utilitarians.<sup>16</sup>

These mistakes, moreover, can be linked to problematic policy positions on age and disability. For example, the idea that the touchstone for equality is a quantum of welfare, and that those who are worse off have priority on resources to reach that level of welfare, feeds the idea that egalitarianism must confront "bottomless pits" or "black holes" of demands on resources.<sup>17</sup> This idea has led some to shy away from casting access to health care, for example, in terms of rights.<sup>18</sup>

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14. For a fuller discussion of these biases as they have played into misunderstandings of what non-discrimination requires with respect to the treatment of newborns, see Anita Silvers & Leslie P. Francis, *Playing God with Baby Doe: Quality of Life and Unpredictable Life Standards at the Start of Life*, GA. ST. L. REV. (forthcoming 2009). For a discussion of logical flaws in quality of life scales, especially as these relate to measuring the quality of disabled people's lives, see Anita Silvers, *Predicting Genetic Disability While Commodifying Health*, in QUALITY OF LIFE AND HUMAN DIFFERENCE 43 (Jerome Bickenbach et al. eds., Cambridge Univ. Press 2005).

15. Jonathan Wolff and Avner De-Shalit call such interactive risks "corrosive" disadvantages. JONATHAN WOLFF & AVNER DE-SHALIT, *DISADVANTAGE* 133, ch. 8 (Oxford Univ. Press 2007).

16. See Singer, *supra* note 11, at 34 (even the title of the tribute, *Happy Nevertheless*, reveals bias in Singer's assumptions about disability as an insuperable source of suffering).

17. For a discussion of the maxim, see generally PETER SINGER, *ANIMAL LIBERATION: A NEW ETHIC FOR OUR TREATMENT OF ANIMALS* (New York: Random House 1975).

18. See Allen Buchanan, *The Right to a Decent Minimum of Health Care*, 13 PHIL.



Inescapable imprecisions—both inflationary and deprecating—in judging the retrospective welfare of the elderly and the prospective welfare of the disabled risks both underestimations and overestimations.

For the elderly, these may be overestimations of the benefits they have received in the past and underestimations of the benefits to come. For the disabled, these may be underestimations of the benefits they can realize and overestimations of the demands they might place on resources. Thus the mistakes we have identified can deepen resistance to policy efforts to address both disability bias and bias against the aged.

There is, however, a fundamental difference between utilitarians and egalitarians of almost any stripe that does matter to our argument. The difference can be put in terms of how the famous maxim, “each to count for one and none for more than one” is to be read. For pure utilitarians, as John Rawls pointed out, each person counts for one only by being figured into an overall calculus of maximization of the good.<sup>19</sup> For it is the magnitude of the overall good achieved, not the amount of good each person individually may enjoy that counts first for utilitarians.<sup>20</sup> Egalitarians, on the other hand, see justice as concerned with how each individual fares, rather than as simply a matter of the overall good to be achieved.<sup>21</sup> Each person matters in some way as a locus of good, as an individual being whose good life must be considered apart from the overall good.

Elsewhere we have considered justice envisioned equitably, that is, in terms of achieving meaningful access to important social goods for each.<sup>22</sup> In this article, we continue to draw

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PUB. AFF. 55, 63 (1984).

19. See JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard Univ. Press 1971).

20. See *id.* at 161-75.

21. See, e.g., Richard Arneson, *Egalitarianism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/egalitarianism/> (last visited Nov. 8, 2009).

22. See Leslie P. Francis & Anita Silvers, *Debilitating Alexander v. Choate: “Meaningful Access” to Health Care for People with Disabilities*, 35 FORDHAM URB. L.J.

attention to how the failure to see justice in this way is problematic. Here we will show how neglecting the justice of meaningful access has impeded understanding of how effective protection against both age discrimination and disability discrimination can be made congruent. We also shall show that, when this omission is exacerbated by the two mistakes we identified earlier in this section, efforts to safeguard people from disadvantage based on these two kinds of biases may be viewed as if they are in conflict with one another.

### AGE AND DISABILITY AS PROTECTED CATEGORIES

Beyond the ease with which their acronyms are confused, the Age Discrimination in Employment Act (ADEA)<sup>23</sup> and the Americans with Disabilities Act (ADA)<sup>24</sup> might seem to have much in common, as do the vulnerabilities of age and disability. Age and disability were the two categories added to federal prohibitions on employment discrimination after the initial adoption of Title VII of the Civil Rights Act.<sup>25</sup> These prohibitions were thought to be needed because both the elderly and the disabled had experienced arbitrary barriers to employment and suffered economic disadvantage as a result. But neither the elderly nor the disabled have been viewed in law as a “discrete and insular” minority<sup>26</sup> of the kind singled out for special

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101 (2008).

23. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (2009) (ADEA).

24. Americans with Disabilities Act, 42 U.S.C. § 12101 (2009) (ADA).

25. Pub. L. 82-352, 78 Stat. 241, Title VII (1964).

26. *See, e.g.,* *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) (explaining that the elderly are not a discrete and insular minority); Americans with Disabilities Amendments Act of 2008, Pub. L. 110-325, § 3(2) (amending the ADA of 1990 to remove the following text:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.)

constitutional scrutiny since Justice Stone's famous footnote.<sup>27</sup> These are categories, we are reminded, into which we all might fall someday, albeit that such reminders incorporate an ironic twist about the desirability of entering into either category. Thus neither old age nor disability delineates minorities in precisely the classic constitutional sense.

Despite, or perhaps because of, their ubiquity, old age and disability are categories about which the law has remained somewhat ambivalent. After the United States Supreme Court held that Congress' power to enforce the Fourteenth Amendment did not extend to abrogating state sovereign immunity from suits for discrimination in employment based on age,<sup>28</sup> an extension of this reasoning to discrimination based on disability soon followed.<sup>29</sup> In these decisions, the disabled and the elderly were set apart from those claiming discrimination based on race or sex.<sup>30</sup>

Addressing racial discrimination was, of course, at the very core of the Fourteenth Amendment, but the Court has continued to hold that discrimination based on sex has a kind of malignant history that, in the judgment of the Court, differentiation based on disability or age does not.<sup>31</sup> Instead, the Court has opined, the state may have very good reasons for differentiation based on age or disability: "Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed

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27. *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

28. *See Kimel*, 528 U.S. at 81 (holding that section 5 does not give Congress the power to reinterpret Fourteenth Amendment rights; such interpretive powers belong to the courts. Instead, Congress's section 5 power is the power to adopt enforcement mechanisms that are "congruent and proportional" to the Fourteenth Amendment rights violations to be condemned).

29. *See Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 370 (2001).

30. *See, e.g., id.; Kimel*, 528 U.S. 62.

31. *See Nev. v. Hibbs*, 538 U.S. 721 (2003) (holding that Congress had intended to authorize suits against states under the Family Medical Leave Act and that this was a proper use of Congress's enforcement powers under section 5 of the Fourteenth Amendment).

to reflect prejudice and antipathy.”<sup>32</sup> Instead, specially protective legislation may be in order for these groups, from property tax relief for the elderly to exemptions from ordinary responsibility for the disabled. Thus age and disability, in the judgment of the Court, may both matter and not matter in how society decides to treat people differently. Behind this ambivalence lurks a deeper tension between the goals of, on the one hand, eliminating depreciative generalized descriptions of the disabled and the elderly because such stereotyping of them as “defective” engenders their arbitrary social exclusion, and on the other hand, of stimulating special benefits for them, induced by generalized descriptions that emphasize their deficits.

Here, the apparent similarities between old age and disability may seem to end, however. Two well-known discrepancies are illustrative. Discrimination against people with disabilities in the sense of exclusion from beneficial social participation has been longstanding,<sup>33</sup> in the current opinion of the Court, which denies a similar history of pervasive discrimination against their group to the elderly.<sup>34</sup> Thus the Americans with Disabilities Act extended protection against exclusion beyond employment to public services, public accommodations, transportation, communications devices, and the like.<sup>35</sup> The Fair Housing Act protects people with disabilities against discrimination, but does not extend this same protection to the elderly.<sup>36</sup> Notably, the federal protection against housing discrimination based on familial status exempts the privileged

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32. *Kimel*, 528 U.S. at 83 (citing *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)).

33. Both the ADA of 1990 and the ADA Amendments Act are intended to “provide a comprehensive national mandate” for the “elimination of discrimination against people with disabilities.” Pub. L. 110-325 § 2(a)(1) (2008).

34. *Kimel*, 528 U.S. at 83. In his dissent in *Cleburne*, however, Justice Marshall excoriated the majority for their assumptions that the history of treatment of people with disabilities had been benign, and their concomitant announcement that people with disabilities were not a quasi-suspect class and thus disability discrimination should be tested against a rational basis standard. See *Cleburne*, 473 U.S. at 461-63 (Marshall, J., concurring in the judgment in part and dissenting in part).

35. ADA, *supra* note 24.

36. 42 U.S.C. § 3604(a) (2009).

forms of "senior living" communities that have sprung up across the Sun Belt and elsewhere.<sup>37</sup>

In what follows, we consider these twin portrayals of old age and disability, both as categories where discrimination is rife and as categories where special protections might be in order. In each case, we shall contend, there are double-binds between what is required for genuine inclusiveness and what has been pejoratively viewed as unjustified "special privilege." Both advanced age and disability often inflect functioning in ways that matter in regard to the ability to participate in and enjoy the benefits of social life. Our aim is to understand what it is to have meaningful access to important social goods when age, disability, or both are mediating factors. The examples we examine below reveal how the journey to opening up meaningful access for both these groups has been deflected by the logical mistakes we identified earlier, and suggest how a reformed and reformulated theory of justice could put these efforts back on the road.

#### FAIR HOUSING AND INDEPENDENT, INTEGRATED COMMUNITY LIVING

The current federal Fair Housing Act (FHAct) protects all citizens from discrimination in housing on the basis of race, color, national origin, religion, sex, handicap, or familial status (families with children under the age of eighteen living with parents or legal guardians; pregnant women and people trying to get custody of children under eighteen).<sup>38</sup> In its original form, enacted in 1968, the FHAct protected people from housing practices that discriminated on the basis of race, color, religion, or national origin.<sup>39</sup> Its target was ghettoization, for example, the role in maintaining segregation played by refusals to rent or

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37. 42 U.S.C. § 3607(b)(2) (2009).

38. The Fair Housing Act, 42 U.S.C. §§ 3601-3619 (2009).

39. Sex was added as a category protected against discrimination in 1974. Housing and Community Development Act, Ch. 42, sec. 1490g, § 527(b)(2), 88 Stat. 633, 729 (1947).

sell to people of color.<sup>40</sup> Decisions interpreting the statute treated it as a civil rights statute in the sense of removing barriers; early cases did not even extend it to practices that operated to make it more difficult to achieve integration in housing, such as “red-lining.”<sup>41</sup> Only after Congress gave the Department of Housing and Urban Development rule-making authority to carry out the provisions of the FHAct<sup>42</sup> was redlining brought clearly under the ambit of prohibited discriminatory practices.<sup>43</sup>

Discrimination based on disability and on familial status was brought within the FHAct in 1988.<sup>44</sup> At the same time, the FHAct was amended to provide enforcement mechanisms that have been judged to be significantly stronger than the enforcement mechanisms available under the public accommodations title of the Americans with Disabilities Act.<sup>45</sup> The prohibition on disability discrimination sought to address both physical inaccessibility and exclusionary practices that made it difficult for people with disabilities, especially people with mental disabilities, to find places to live in the community.<sup>46</sup> With these goals in mind, the 1988 amendments required reasonable accommodations for people with

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40. United States Department of Justice, Civil Rights Division, Housing and Civil Enforcement Section, [http://www.usdoj.gov/crt/housing/housing\\_coverage.php](http://www.usdoj.gov/crt/housing/housing_coverage.php) (last visited Aug. 31, 2009); see John Hugh Gilmore, *Insurance Redlining & The Fair Housing Act: The Lost Opportunity of Mackey v. Nationwide Insurance Companies*, 34 CATH. U. L. REV. 563, 565 (1985).

41. Redlining is the practice of giving less favorable credit terms based on the characteristics of the neighborhood. Its existence was widespread in the mortgage and homeowners' insurance markets. *Id.* at 578-79. The Fourth Circuit, however, refused to permit a challenge to redlining in home insurance under the Fair Housing Act. See *Mackey v. Nationwide Ins.*, 724 F.2d 419 (4th Cir. 1984).

42. See 42 U.S.C.A. § 3614a (2009).

43. See *Fuller v. Tchrs. Ins.*, 2007 WL 2746861 (E.D. N.C. 2007) (distinguishing *Mackey*).

44. The Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-619 (1988).

45. Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 391 (2000).

46. Arlene S. Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U.L. REV. 925, 949 (1994).

disabilities.<sup>47</sup> For physical accessibility, the amendments required that tenants be permitted to make reasonable modifications, albeit at their own expense and, if the landlord requested, with the requirement that the premises be returned in their original condition.<sup>48</sup> Importantly, high costs of modifications continue to prove a significant barrier to people with disabilities on limited incomes.<sup>49</sup> New multifamily premises over a specified number of units were required to be constructed to meet a limited set of accessibility requirements,<sup>50</sup> but failure to meet required construction standards remains a continuing problem.<sup>51</sup> No accessibility requirements apply to privately owned dwellings, and much of the nation's single-family housing stock remains inaccessible to people with physical disabilities.<sup>52</sup> Notably, such inaccessibility for people with physical disabilities is a significant obstacle for many of the elderly who seek to age "in place," in their homes, with their friends and families, and in their communities.<sup>53</sup>

Reasonable accommodations for people with mental disabilities have proved distressingly elusive under the FHAct. Despite reminders from the Supreme Court that the purposes of the FHAct are to be construed liberally,<sup>54</sup> outright discrimination against people with mental illness or substance abuse diagnoses remains a problem, and reasonable accommodations are difficult

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47. The Fair Housing Amendments Act of 1988, *supra* note 44.

48. 42 U.S.C. § 3604(f)(3)(A) (2009).

49. Christina Kubiak, *Everyone Deserves a Decent Place to Live: Why the Disabled are Systematically Denied Fair Housing Despite Federal Legislation*, 5 RUTGERS J.L. & PUB. POL'Y 561, 570 (2008).

50. 42 U.S.C. § 3604(f)(3)(C) (2009).

51. See Laura Rothstein, *Strategic Advocacy in Fulfilling the Goals of Disability Policy: Is the Only Question How Full the Glass Is?*, 13 TEX. J. ON C.L. & C.R. 403, 406 (2008).

52. See Robin Paul Malloy, *Accessible Housing and Mobility Impairment*, 60 HASTINGS L.J. 699 (2009).

53. Jon Pynoos et al., *Aging in Place, Housing, and the Law*, 16 ELDER L.J. 77 (2008).

54. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731, 738 (1995) (holding that a zoning restriction defining "family" for the purpose of restricting a neighborhood to single family dwellings is not a maximum occupancy limit exempt from FHAct regulation).

to achieve for these populations.<sup>55</sup> The accommodations needed by people with mental disabilities may include help in dealing with landlords or in responding to complaints about allegedly aberrant behavior, yet many courts are reluctant to require interactive processes between landlords and tenants of the kind employers must follow when requests for accommodations are made, even though such processes may ease conflict and generate new solutions to problems.<sup>56</sup> Ironically, and critically to our point in this article, one of the leading cases rejecting an interactive process to achieve accommodation involved a request for a zoning variance for a bed care facility for the elderly.<sup>57</sup> Similar difficulties of exclusion dog efforts to enforce the *Olmstead* mandate<sup>58</sup> of placement in the most integrated community setting as a requirement for public services under the ADA.<sup>59</sup>

To date, age has not been among the categories listed for protection against discrimination in housing, although to the extent that seniors experience increased risks of disability, they do receive the protections accorded people with disabilities, as well any other protections that are applicable under the FHAct.<sup>60</sup> Instead, the addition of familial status as a protected category in the 1988 amendments to the FHAct extends a quite different kind of protection for seniors: exemption from the prohibition of discrimination based on familial status. This exemption applies to senior housing, defined as housing which is occupied solely

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55. Kubiak, *supra* note 49, at 570; see Kanter, *supra* note 46, at 949.

56. Gretchen M. Widmer, *We Can Work It Out: Reasonable Accommodation and the Interactive Process Under the Fair Housing Amendments Act*, 2007 U. ILL. L. Rev. 761, 772 (2007).

57. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 445-46 (3d Cir. 2002).

58. *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999).

59. See, e.g., Victoria Stirling, Case Note: *M.A.C. v. Williams: Utah's Disabled Citizens Challenge Frustrating Waiting Lists for Home and Community-Based Services*, 9 J.L. FAM. STUD. 361, 361, 363 (2007); Meris Bergquist, *No Exit for Patients Confined at the Vermont State Hospital*, 32 VT. B. J. 34 (2006) (compiling cases permitting exclusionary practices against group homes).

60. Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 IOWA L. REV. 121, 145, 177-78, 216 (2004).



by persons who are sixty-two or older, or houses where at least one person who is fifty-five or older resides in at least eighty percent of the occupied units and adheres to a policy that demonstrates intent to house persons who are fifty-five or older.<sup>61</sup> Attendants needed for the reasonable accommodation of persons with disabilities are not included for purposes of these calculations,<sup>62</sup> and adult disabled children of seniors may be exempt as well.<sup>63</sup> Seniors, in short, can discriminate against the young, as long as their housing arrangements impose sufficient age uniformity.

Allowed to impose these protective familial status conditions, seniors with sufficient resources thus may gather in insulated enclaves—apart from the rest of the world, if they so wish. Some of these “adult” communities arguably foster attitudes of resentment about contributing to the support of the larger community’s children or other community needs.<sup>64</sup> In some states, non-profit senior living communities attract relatively well-off residents yet benefit from tax exemptions at the expense of other community organizations.<sup>65</sup> There are more than fifty Sun City communities in twenty states.<sup>66</sup> Policies that protect these communities, as well as other protective policies such as tax relief for seniors, may—whatever their importance to the elderly—have problematic social consequences such as

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61. 42 U.S.C. §§ 3607(b)(2)(B)-(C) (2009).

62. *Questions and Answers Concerning the Final Rule Implementing the Housing for Older Persons Act of 1995 (HOPA)*, <http://www.hud.gov/offices/ftheo/library/hopa95.pdf> (last visited Oct. 30, 2009).

63. State of California Office of the Attorney General, *Chapter 4—Housing*, <http://www.ag.ca.gov/publications/womansrights/ch4.php> (last visited Sept. 4, 2009).

64. For example, Sun City defeated seventeen school bond measures in the years after its establishment in 1962. ANDREW BLECHMAN, *LEISUREVILLE: ADVENTURES IN AMERICA’S RETIREMENT UTOPIAS* 133 (New York: Grove/Atlantic, 2008).

65. Andrew Jaynes, Comment, *What is Benevolence? Clarifying Wisconsin’s Real Property Tax Exemption for Benevolent Organizations and the Argument for the “Retirement” of the Exemption for High-End Senior-Housing Complexes*, 2006 WIS. L. REV. 1433, 1437, 1453-54 (2006).

66. About Del Webb, [http://www.pulte.com/delwebb/value-of-delwebb/About\\_DelWebb.aspx](http://www.pulte.com/delwebb/value-of-delwebb/About_DelWebb.aspx) (last visited Sept. 8, 2009).

deleterious impacts on school financing or impacts on the ability of new residents to move into communities.<sup>67</sup>

Nor is it clear that it would be desirable to generalize the senior enclave community as a model for independent living in the community. Communities such as Sun Cities are often built on less expensive land, located in exurbs relatively distant from the amenities of cities. They are constructed for car-dependent external transportation and may feature golf-cart lanes as a form of internal transportation. They offer seniors relief from many aspects of home or yard maintenance, but many offer no or limited support for transportation of the kind that may be important if residents are no longer able to drive and are not near to readily-available public transportation. Amenities—clubhouse-style restaurants, golf courses, tennis courts, and extensive fitness facilities—are aimed at retirees who are physically active. They replicate a suburban country-club-like life—but of course without the children in the swimming pool.<sup>68</sup>

As Sun Cities and other similar communities have been multiplying across the United States, far less construction has been devoted towards independent living options that do not reflect the isolationism of a Sun City. The lack of independent living options for lower income seniors has been well known.<sup>69</sup> For better off seniors, too, housing options that offer increased services but that are also integrated into the community are comparatively rare. “Congregate housing,” an independent living option where some shared services such as meals are available, can be found in some communities but reportedly has long waiting lists nationwide.<sup>70</sup> Choices are more likely to be

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67. Robert C. Christopherson, *Missing the Forest for the Trees: The Illusory Half-Policy of Senior Citizen Property Tax Relief*, 13 *ELDER L.J.* 195, 197, 212-13 (2005). For a general discussion of the inequities of such “localism,” see Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 *WASH. L. REV.* 93, 94 (2003).

68. See, e.g., Sun City Specialist, <http://awarebuyers.com/sun-city-anthem/> (last visited Sept. 11, 2009).

69. See, e.g., Congregate Housing for Seniors, [http://www.helpguide.org/elder/congregate\\_housing\\_seniors\\_residential.htm](http://www.helpguide.org/elder/congregate_housing_seniors_residential.htm) (last visited Sept. 9, 2009).

70. See *id.* (“Unfortunately though, there has been a shortage of such housing,

limited to assisted living facilities that increasingly resemble nursing homes, or to nursing homes themselves. Ironically, the paternalistic assumptions about the need for “care” and concomitant medicalization have long been the bane of people with disabilities.<sup>71</sup>

Market activity in this area has surely been affected by Medicare and Medicaid funding policies, which we will discuss more fully later. Medicare does not cover long-term care and has a limited benefit for skilled nursing care required after a hospitalization.<sup>72</sup> Medicaid covers nursing home care, but in its standard form does not cover assisted living services or independent living options.<sup>73</sup> Recognizing that these limits were driving some seniors who could not afford to pay for independent living options on their own away from these preferred options into more expensive, and more medicalized, nursing home options paid for by Medicaid, a number of states now operate Medicaid waiver programs that offer some coverage for assisted living.<sup>74</sup> There are at present forty-one different waiver programs operating in twenty-six states—indicative of states’ interest in continuing to explore independent housing options for the elderly.<sup>75</sup> Despite the number of waiver programs, enrollment in them is limited and there are large geographical gaps in coverage.<sup>76</sup> Medicaid

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and a lack of funding for new projects.”)

71. See, e.g., Harriet McBryde Johnson, *The Disability Gulag*, N.Y. TIMES, Nov. 23, 2003, 59; see generally The Disability Rights and Independent Living Movement, <http://bancroft.berkeley.edu/collections/drilm/index.html> (last visited Sept. 9, 2009).

72. Medicare, *Longterm Care*, <http://www.medicare.gov/longTermCare/static/home.asp> (last visited Nov. 8, 2009).

73. Jon Pynoos et al., *Aging in Place, Housing, and the Law*, 16 ELDER L. J. 77, 85 (2008).

74. See, e.g., Area Agency on Aging of Pasco Pinellas, Inc., *Assisted Living Medicaid Waiver*, <http://www.agingcarefl.org/services/funding/sources/elderlyWaiver> (last visited Nov. 8, 2009) (explaining that the purpose of the waiver is to avoid nursing home placement).

75. Medicaid Waivers and Demonstration List, <http://www.cms.hhs.gov/MedicaidStWaivProgDemoPGI/MWDL/list.asp?sortByDID=2&submit=Go&filterType=dual%2C+keyword&filterValue=assisted+living&filterByDID=0&sortOrder=ascending&intNumPerPage=10&listpage=5> (last visited Sept. 9, 2009).

76. Jon Pynoos et al., *supra* note 73, at 85.

programs in twenty-nine states are also experimenting with home care as an alternative to nursing home placement; although the experiments are praised as a way of enabling people to remain in the community, concerns have been voiced about displacement of responsibilities onto families.<sup>77</sup>

To summarize the argument of this section, the FHAct has importantly affected barriers in the built environment: people with disabilities have the right to modify existing premises, and new buildings must meet certain accessibility requirements. These are significant steps, but they are also limited in crucial ways. The FHAct specifically exempts the type of senior housing that has significant political and social effects, privileging even in tax policy an isolated, “active senior” lifestyle. At the same time, the FHAct does not cover much of the housing stock in the United States, single-family homes, even when they are newly constructed. For many, when the barriers in private home design become too much—or even when the isolation or care responsibilities are no longer optimal—options are limited to assisted living facilities that may increasingly resemble nursing homes, or to nursing homes themselves. These choices do not, we fear, represent a full set of meaningful options for independent living in the community. On these matters, the concerns of the elderly and people with disabilities surely coincide, although the FHAct’s senior community exemption may have in part functioned to misleadingly drive them apart.

## SENIOR DISCOUNTS

From movie theaters to museums to the “Golden Age” passport to the National Park system, discounts for seniors are familiar and widespread. One legal challenge to age-based discounts for both seniors and children, brought under California’s Unruh

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77. John Leland, *Helping Aged Leave Nursing Homes for a Home*, NEW YORK TIMES, Sept. 19, 2009, at A10.

Civil Rights Act, has been rejected.<sup>78</sup> In rejecting the challenge, the California court cited the various benefits to seniors, children, and the community of such discounts.<sup>79</sup> Although this example may seem of merely symbolic importance in comparison to housing or health care, it is worthwhile considering as a simple model for more inclusive policies.

There are surely justifications for age-based discounts to public services such as museums or parks, but these justifications are both over-inclusive and under-inclusive if they are applied to single out the elderly, or even the elderly and children, as the only groups warranting protection. Need-based justifications do not track older age particularly well—and some surely might as easily apply to people with disabilities. Moreover, at least among the elderly but among the general population too, there may be better surrogates for need that are as simple to administer as age per se, such as the museum discounts based on pension status (rather than age) observed by one of the authors in Germany. In the United States, simple proxies for need could include eligibility for Medicaid or for SSI. The likelihood that seniors have contributed to public services through payment of tax dollars is a possible justification for the discounts, but residency requirements would be a far better measure of such contributions. The usefulness of attracting attendance by people who are likely not to be working during “off peak” hours would justify reducing off-peak costs for everyone rather than limiting the incentive to seniors. One justification—that discounts encourage seniors to enjoy community amenities—is a powerful one, but one that appropriately applies to the community more generally and,

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78. *Starkman v. Mann Theatres Corp.*, 278 Cal. Rptr. 543, 545, 549 (Cal. Ct. App. 1991); see *Pizarro v. Lamb's Players Theatre*, 37 Cal. Rptr. 3d 859, 860, 863 (Cal. Ct. App. 2006) (involving a challenge to a different age-related theatre discount: a theatre performing a play about baby boomers offered Wednesday night half-price tickets to members of the baby boom generation (those born between 1946 and 1964) as well as to children. The theatre's refusal to grant similar discounts to other adults was challenged under California's Unruh Civil Rights Act. The court upheld the discount as a reasonable classification given the theme of the play).

79. *Starkman*, 278 Cal. Rptr. at 548.

notably, is often used as a justification for discounts for school children, children under a certain age, and families.

Title II of the ADA protects against exclusion from participation in public services based on disability and ADA Title III protects against discrimination in public accommodations. In this context, comparable discount programs for people with disabilities are less widespread. In the experience of one of the authors, some purported disability discount programs are a compromise to compensate for inferior services offered to people with disabilities: for example, wheelchair seating with occluded sight lines in theaters and stadiums, or subway systems in which only a few stations offer elevator access. Nor would reduced prices appear to be required when equal access is provided for people with disabilities; as the Technical Assistance Manual for ADA compliance indicates, there is no requirement that extra services be provided people with disabilities.<sup>80</sup>

The National Park Service pass system exemplifies a far more inclusive model for extending discounts. The current system, created in 2004, offers a set of options.<sup>81</sup> The Senior Pass, which costs \$10 and lasts for life, admits the person over sixty-two—together with a car and up to three other adults—for free.<sup>82</sup> The Access Pass provides the same access to people with disabilities and is free, reflecting that despite improvements in accessibility most parks offer less than full opportunity for participation to people with various disabilities.<sup>83</sup> There are also somewhat inexpensive (\$80) annual passes available for people who anticipate extended park use, parallel to the family memberships available at many museums or other attractions

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80. The Americans with Disabilities Act Title II Technical Assistance Manual, II-3.3000, <http://www.ada.gov/taman2.html> (last visited Mar. 30, 2009).

81. National Park Service, America the Beautiful-National Parks and Federal Recreational Lands Pass, [http://www.nps.gov/fees\\_passes.htm](http://www.nps.gov/fees_passes.htm) (last visited Sept. 12, 2009).

82. *Id.*

83. *Id.*

aimed at people with children.<sup>84</sup> Some national parks also offer accessible tram or van service for travel within the park.<sup>85</sup> Such programs provide an illustration of what it might mean to expand inclusiveness in a way that age-based discounts alone do not. Nonetheless, it is worth noting that even these quite expansive discount programs fall short of extending access to many in meaningful ways. For example, there are no discounts for the poor comparable to subsidized housing or food stamps, and access to most national parks is primarily by either private car or tour bus.

### HEALTH CARE

Access to museums, theaters, or parks—while surely important to quality of life—is not a matter of life or death. Access to health care may be, and it is here that the contrast between age and disability is starkest. When Medicare was enacted in 1965, Medicaid, enacted at the same time, was largely viewed as an afterthought.<sup>86</sup> Since the addition of a pharmacy benefit to Medicare, long-term care remains the principal health care need that is not covered by the program. People without sufficient private resources to cover their long term care needs must rely on the Medicaid program; and a high percentage of long term care in the United States is paid for by state Medicaid budgets.<sup>87</sup>

Eligibility for Medicare is established by having paid into the Social Security system for forty quarters and attaining age

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84. *Id.*

85. See, e.g., Yosemite National Park Accessibility Guide, [www.nps.gov/yose/planyourvisit/upload/access.pdf](http://www.nps.gov/yose/planyourvisit/upload/access.pdf) (last visited Oct. 30, 2009); Zion National Park Accessibility, <http://www.nps.gov/zion/planyourvisit/accessibility.htm> (last visited Oct. 30, 2009).

86. See, e.g., Christine Cassell, M.D., *The Right to Health Care, the Social Contract, and Health Care Reform in the United States*, 39 ST. LOUIS U. L.J. 53, 57-8 (1994).

87. Estimates are that nearly half of long term care in the U.S. is paid for by Medicaid. See, e.g., Howard Gleckman, *Get Medicaid Out of the Long Term Care Business*, KAISER HEALTH NEWS, Aug. 3, 2009, <http://www.kaiserhealthnews.org/Columns/2009/August/080309Gleckman.aspx>; Medicaid: Impact on Longterm Care, <http://www.theceal.org/column.php?ID=25> (Mar. 2009).

sixty-five.<sup>88</sup> Over ninety-five percent of people over age sixty-five in the United States qualify for Medicare in this way.<sup>89</sup> People with long-term disabilities also qualify for Medicare if they have been entitled to Social Security Disability Income (SSDI) for twenty-four months.<sup>90</sup> People with end stage renal disease were added to the Medicare program in 1972,<sup>91</sup> and some critics contend that the expense of that program contributed to deter more sweeping health care reform in the United States.<sup>92</sup> This criticism is but one illustration of how people with disabilities have been held up as a problem for health care reform in the United States.

The connection between Medicare and a work history qualification has reinforced the view of Medicare as an “earned” benefit.<sup>93</sup> The commitment to Medicare remains clear despite current budgetary difficulties.<sup>94</sup> As enacted, Medicare required only that care within its coverage limits be “reasonable and necessary.”<sup>95</sup> Comparative cost-effectiveness is not generally an element in coverage determinations,<sup>96</sup> although a number of demonstration projects do incorporate such considerations.<sup>97</sup> The variety of proposals for health care reform now under

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88. 42 U.S.C. § 1395c(1) (2009).

89. The Kaiser Family Foundation estimates that approximately 600,000 of the elderly in the U.S. did not qualify for Medicare in 2008. Kaiser Family Foundation, *The Uninsured: A Primer* 1 (Oct. 2009), <http://www.kff.org/uninsured/upload/7451-05.pdf> (last visited Nov. 8, 2009).

90. 42 U.S.C. § 1395c(2) (2009).

91. 42 U.S.C. § 426(b) (2009).

92. See, e.g., Ezekiel J. Emanuel, *Where Civic Republicanism and Deliberative Democracy Meet*, HASTINGS CENTER REP., Nov.-Dec. 1996, at 12.

93. See, e.g., Philip Lee, M.D. et al., *Politics, Health Policy, and the American Character*, 17 STAN. L. & POL'Y REV. 7, 23 (2006).

94. Obama's Health Care Speech to Congress, N. Y. TIMES, Sept. 10, 2009, available at [http://www.nytimes.com/2009/09/10/us/politics/10obama.text.html?\\_r=1](http://www.nytimes.com/2009/09/10/us/politics/10obama.text.html?_r=1) (full text of speech available online only).

95. 42 U.S.C. § 1395y(a)(1) (2009).

96. See Medicare Evidence Development and Coverage Advisory Committee, *Process for Evaluation of Effectiveness and Committee Operations* (Jan. 12, 2006), <http://www.cms.hhs.gov/FACA/Downloads/recommendations.pdf>.

97. An early example was a test of influenza vaccines. See *Medicare Influenza Vaccine Demonstration*, 41(09) MORBIDITY AND MORTALITY WEEKLY REV. 152, 152 (Mar. 6, 1992), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/00016232.htm>.



consideration include possibilities for introducing such cost effectiveness assessments into Medicare coverage generally, and these have been a target of critics of reform.

By contrast, Medicaid has been popularly viewed as a "welfare" program.<sup>98</sup> Limits on Medicaid coverage have been a chronic problem. When Medicaid recipients with disabilities challenged a limit on hospital days that affected them disproportionately, the United States Supreme Court rejected the challenge.<sup>99</sup> The Court's conclusion was based on the understanding that the limit reflected legitimate state fiscal concerns rather than discrimination against people with disabilities.<sup>100</sup> Both before and since the Court's decision, state Medicaid budgets have been a common target; with current budgetary deficits, cutbacks in these already strained Medicaid programs have intensified in some states.<sup>101</sup>

In another article, we have argued that it is a mistake to assume that disability-based challenges to Medicaid cutbacks were forever banished by *Alexander v. Choate*.<sup>102</sup> Instead, we contended, the plaintiffs in *Alexander* did not establish that the cutbacks at issue disproportionately affected people with disabilities.<sup>103</sup> Cutbacks that do bear disproportionately, we contended, may be subject to challenge as failing to afford meaningful access to public services for people with disabilities. Some legal challenges to the recent cutbacks are now under way.<sup>104</sup> Nonetheless, the practical realities of contrasts between the Medicaid and Medicare programs remain severe. Even when Medicaid coverage obtains, particularly low rates for provider reimbursement may severely limit patients' options to

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98. See, e.g., Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 572, 606 (1999).

99. *Alexander v. Choate*, 469 U.S. 287, 309 (1985).

100. *Id.* at 308-09.

101. *Id.*

102. Francis & Silvers, *supra* note 22, at 476-77.

103. *Id.* at 448-49.

104. Victoria Colliver, *Judge Blocks State Cuts to Adult Day Care*, SAN FRANCISCO CHRONICLE, Sept. 12, 2009, at A10, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2009/09/12/MNTR19LR7A.DTL>.

obtain care.<sup>105</sup> The unfortunate contrast between apparently more generous coverage for the elderly and far less generous coverage for the poor remains.

## CONCLUSION

Our goal in this article has been to challenge the supposed contrasts between discrimination based on disability and discrimination based on aged-ness. The idea that the “fair innings” argument divides the aged from the disabled, we have argued, is mistaken. Ironically, however, examples of apparent senior privilege—from housing policy to discounts to Medicare—may seem to fuel the idea that the two groups are divergent in the degree of justice they deserve. Instead, the goal should be to consider how designs of public services and public accommodations can serve the interests of both groups. Many of the disabled will become aged, and many of the aged are disabled. To ignore this intersectionality is to divert attention away from understanding and addressing the (similar) causes fueling discrimination against both groups and thereby to diminish protection for each.

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105. Cuts to Medi-Cal & Healthy Families Rates Mean More Children Will Go Without Needed Health Care, <http://www.aapca3.org/law/medical.pdf> (last visited Oct. 30, 2009).

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