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DISABILITY RIGHTS: PAST, PRESENT, AND FUTURE:

A ROADMAP FOR DISABILITY RIGHTS¹

Marcy Karin,* Lara Bollinger,** and UDC Law Staff

INTRODUCTION

The Americans with Disabilities Act (“ADA”)² “was and is all about civil rights.”³ Enacted in 1990, its goal was to prohibit discrimination based on disability across society, from employment to places of public accommodation and government services. As the byproduct of bipartisan support and significant advocacy and leadership by members and allies of the disability community, there were high hopes that the ADA would live up to its goal. Unfortunately, that reality never came to pass for many individuals with disabilities. Instead, a line of Supreme Court decisions in 1999 and 2002 imposed increasingly narrow interpretations of the law’s core provisions that removed many individuals from the scope of the ADA’s protections.⁴ The Court found that disabled individuals either “mitigated” their condition through treatment or failed to demonstrate that their condition “substantially limits” major life activities within the meaning of the statute. These decisions removed much of the steam from the ADA’s engine by narrowly interpreting the definition of “disability” to cover only those individuals who

¹ *Keynote Remarks*, THE ADA PROJECT, at 2, <https://adalawproject.org/s/Keynote.pdf> (quoting Chai Feldblum) (“I actually believe that what has happened here today could become one of the most important roadmaps for disability rights going forward.”) (last visited Apr. 12, 2020).

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** Lara Bollinger is a third-year student at UDC Law School. She is the current Managing Editor of the UDC Law Review and was a student attorney in the Legislation and Juvenile and Special Education Clinics. She has a passion for creating laws to better the lives of marginalized individuals, particularly individuals with disabilities. Before law school, Bollinger was a special educator, and enjoyed watching her students learn and grow and helping families advocate for their children’s unique needs. She looks forward to using her law degree to support disability justice.

² Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2018).

³ *The ADAAA Negotiations: Some Reflections From the Field-10 Years Later*, THE ADA PROJECT 2, <http://www.adalawproject.org/s/ADAAA-Launch-Event-Stories.pdf> (last visited Apr. 11, 2020) [hereinafter “Launch Event Stories”] (quoting Chai Feldblum).

⁴ See e.g., *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184 (2002); *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555 (1999). These cases, frequently referred to as the *Sutton* Trilogy, significantly narrowed the ADA’s definition of disability, resulting in many courts dismissing cases before holding a hearing on the merits.

were severely limited by their impairments. This left many individuals without the anti-discrimination protections that Congress had originally intended to provide.

In 2008, again with bipartisan support and significant advocacy by members and allies of the disability community, Congress tried to right this wrong by passing the ADA Amendments Act of 2008 (“ADAAA”).⁵ The ADAAA, which took effect in 2009, affirmatively rejected the Supreme Court’s decisions and brought important changes to the meaning and interpretation of disability under the ADA and other federal antidiscrimination laws. But it did so in a somewhat convoluted way. It did not entirely change the ADA’s core definition of “disability.” Rather, Congress restored the broad-based application originally intended by enacting a series of statutory rules of construction that commanded future courts to construe the definition broadly.⁶ These rules directed courts to focus on whether a covered entity engaged in discrimination, rather than whether a given plaintiff meets the technical definition of disability. The ADAAA also broadened the definition of “major life activities” to include “major bodily functions,” and lowered the threshold of the “regarded as” disability test.⁷ Subsequently, the Equal Employment Opportunity Commission (“EEOC”) and the Department of Justice revised their regulations to conform to this broad scope,⁸ and there is now over a decade of judicial decisions interpreting this law.

With the ADAAA’s expansion of the definition of disability, the hope was that courts and legislatures would finally address other questions at the heart of the ADA’s disability discrimination protections and disability issues beyond the ADA. Indeed, in the decade after the enactment of the ADAAA, dozens of bills were introduced in Congress to amend the ADA.⁹ On behalf of the disability community, among other things, bills were designed to expand coverage of Title I of the ADA and improve utilization and enforcement of various discrimination laws, including Title I of the ADA.¹⁰ Advocates also turned to the courts with open ADA interpretation questions regarding a range of issues, such as whether an individual with a disability is “qualified” to perform a specific job or receive a service; what makes an accommodation “reasonable” or imposes an “undue hardship;” determinations about if discrimination was actually based on disability; and if discrimination was defensible because the person with a disability is a “direct threat.” Further, for years, disability rights advocates have objected to proposals and defended cases that tried to narrow the remedies available to successful ADA litigants, expand defenses to discrimination under the ADA, and/or limit the reach of the ADA’s reasonable accommodation mandate.

Conversely, members of the business community have long objected to the ADA’s authorization of private lawsuits against inaccessible businesses without prior notification to

⁵ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. See Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187 (2008).

⁶ § 6, 122 Stat. at 3557-58.

⁷ See generally Kevin Barry, Brian East & Marcy Karin, *Pleading Disability After the ADAAA*, 31 HOFSTRA LAB. & EMP. L.J. 1 (2013).

⁸ *The ADA’s Regulatory History*, THE ADA PROJECT, <http://www.adalawproject.org/the-adas-regulatory-history> (last visited Apr. 12, 2020) (containing information about the referenced proposed and final rules).

⁹ *Emerging Trends - Calls to Reform the ADA*, <http://www.adalawproject.org/s/Leg-Proposals> (last visited Apr. 11, 2020).

¹⁰ *Id.*

business owners and have supported an ADA Notification Act.¹¹ For example, in 2018, the House of Representatives passed the ADA Education and Reform Act.¹² This bill would have removed the incentives for businesses to proactively provide accessible spaces for individuals with disabilities. Instead, it would have required individuals facing barriers to accessibility to file a letter with the place of public accommodations and provide 120 days to make needed change(s), before filing a lawsuit.¹³

Other public accommodation bills that examined accessibility and proposed changes to Title III of the ADA were introduced, including bills that purport to address compliance through notification requirements and bills related to travel, tourism, transportation, and accessibility (including service animals) for individuals with disabilities.¹⁴ The overwhelming majority of these bills died in Congress, and existing laws are not being robustly enforced,¹⁵ which is a reality that is further complicated by the judicial reluctance to enforce disability rights in the same manner that other civil rights are enforced.¹⁶

Outside of the ADA, many challenges remain for the future of disability rights, including widespread obstacles that individuals with disabilities face working within and across the various systems with which they interact. For example, in the workplace, those that care for individuals with disabilities need clarity about the complicated patchwork of eligibility and reimbursement requirements involved in family responsibilities and association discrimination protection, the caregiving provisions of paid leave laws, and others. These laws also need to be expanded and more rigorously enforced.

Beyond the workplace, in recent years, Medicare funding and the Affordable Care Act have come under siege, causing funding cuts that have a disparate impact on the disability community.¹⁷ Individuals in the military and those in the criminal justice system may face disabilities that came from the systems they are a part of and not have access to the disability-informed supports they need to survive or re-integrate into society. Individuals with disabilities who have been abused also need to receive care that takes their disability into account.

Moreover, in January 2019, the Departments of Justice and Education rescinded a “Dear Colleague” letter that reminded schools about fair discipline procedures for minority students

¹¹ *Id.* (the chart’s first row contains information about multiple versions of this bill).

¹² ADA Education and Reform Act, H.R. 620, 115th Cong. (2018).

¹³ *See id.*; Mike DeBonis, *House Passes Changes to Americans With Disabilities Act Over Activists’ Objections*, WASH. POST (Feb. 15, 2018), https://www.washingtonpost.com/powerpost/house-passes-changes-to-americans-with-disabilities-act-over-activists-objections/2018/02/15/c812c9ea-125b-11e8-9065-e55346f6de81_story.html. The disability rights activists were strongly opposed to this legislation, but the House passed the bill over the objections.

¹⁴ See Emerging Trends - Calls to Reform the ADA, *supra* note 9.

¹⁵ For example, the Department of Justice has stopped enforcing accessible access to websites and medical equipment. Jarrett Cummings, *ADA Web Accessibility Regulatory Process Now “Inactive”*, EDUCAUSE REV. (EDUCAUSE, Louisville, CO) (July 27, 2017), <https://er.educause.edu/blogs/2017/7/ada-web-accessibility-regulatory-processes-now-inactive>.

¹⁶ David Pettinichio, *Why Disabled Americans Remain Second-Class Citizens*, WASH. POST (July 23, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/07/23/why-disabled-americans-remain-second-class-citizens/>.

¹⁷ *Id.*

and those with disabilities.¹⁸ Rates of suspension, expulsion, and school discipline are higher for marginalized students, and the removal of the previous guidance eliminated part of the protection for students.¹⁹ The existing legal frameworks offer promises in some spaces and gaps and disappointment in others²⁰—and these are just a sampling of contemporary issues in disability law and policy beyond the ADA.

The *UDC Law Review* Editorial Board selected *Disability Rights: Past, Present, and Future* as the 2019 symposium topic to celebrate the 10th anniversary of the ADAAA and to reflect on the progress towards disability justice since its enactment. This topic also felt like a natural fit for the University of the District of Columbia David A. Clarke School of Law (“UDC Law”) given its long history of integrating disability rights into its community. For example, Professor Emeriti Robert Burgdorf, the founding Director of the UDC Law Legislation Clinic, was a chief architect of the ADA.²¹ Additionally, Professor Emeriti Joseph Tulman pioneered the use of special education and disability rights advocacy in combination with delinquency defense of children in UDC Law’s Juvenile and Special Education Clinic.²² Also, the UDC Law Clinical Program had one of the first HIV Law Clinics in the country, and has supported individuals with disabilities in a range of issues from immigration to housing and estate planning.²³ Moreover, disability rights are centered in non-clinical courses,²⁴ faculty research,²⁵ alumni work,²⁶ and

¹⁸ Lilly Constance, *Trump Administration Rescinds Key Federal Guidance for Students with Disabilities*, ADDITUDE (Jan. 17, 2019), <https://www.additudemag.com/federal-guidance-for-students-with-disabilities-rescinded/>.

¹⁹ *Id.*

²⁰ The United States also has failed to ratify the United Nations Convention on the Rights of Persons with Disabilities. See Convention on the Rights of People with Disabilities, *opened for signature* Mar. 30, 2007, 2515 U.N.T.S. 3 (entered into force May 3, 2008), <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html>.

²¹ Professor Burgdorf has long been an important voice in the movement, is a prolific disability rights scholar, and under his leadership, UDC Law students made significant contributions to the field, including by providing research and other support to the National Council on Disability. See *Publications of Robert L. Burgdorf Jr.*, UDC LAW, <https://www.law.udc.edu/page/RBurgdorfPubs> (last visited Apr. 11, 2020).

²² This work continued under the supervision of Visiting Professors and Directors of the Juvenile and Special Education Law Clinic Lauren Onkeles-Klein (2017-2019) and Nicole Tuchinda (2019-2020)—both of whom supervised work to protect children living with disabilities from the school-to-prison pipeline.

²³ Shelley Broderick, *The Nation’s Urban Land-Grant Law School: Ensuring Justice in the 21st Century*, 40 U. TOL. L. REV. 305, 315 (2009). The UDC Law clinical program has continually represented people with disabilities, in what we hope is a trauma-informed and inclusive way. For example, the General Practice Clinic engages in estate planning and guardianship work for clients; the Housing and Consumer Law Clinic helps people with disabilities to retain their independent living and access to homes; and the Immigration and Human Rights Clinic helps people with disabilities fleeing persecution in their home country seek legal status.

²⁴ Disability rights are taught in a range of courses at UDC Law, including Disability Law, Labor & Employment Law, Employment Discrimination, Education Law, Gender & Sexual Orientation Under the Law, and Veterans Benefits Law. We hope the school continues to offer these courses as regularly as feasible. We also hope to see these and other courses offered at more schools moving forward. See Nicole Buonocore Porter, *A Proposal to Improve the Workplace Law Curriculum from a Corporate Compliance Perspective*, 58 ST. LOUIS U. L.J. 155, 157 (2013) (cataloguing of law schools that have disability-specific and other courses that may include disability rights).

²⁵ See e.g., Nicole Tuchinda, *The Imperative for Trauma-Responsive Special Education*, 95 N.Y.U. L. REV (forthcoming 2020); Chris Payne-Tsoupros, *Lessons from the LEAD-K Campaign for Language Equality for Deaf and Hard of Hearing Children*, 51 LOY. U. CHI. L.J. 107 (2019).

²⁶ See e.g., ADVOCATES FOR JUSTICE AND EDUCATION, <http://www.aje-dc.org/> (last visited Apr. 11, 2020) (non-profit organization with a mission of empowering youth, including those with special needs, to advocate for needed health care and education, which was founded by and currently led by UDC Law alumni); *Baltimore Sun Story on the Inspirational Joshua Basile*, '13, UDC LAW (Nov. 22, 2019), <https://www.law.udc.edu/news/479229/2013->

volunteer experiences for our first-year law and social justice and upper-level Rauh fellowship programs.²⁷ Just as importantly, this community tries to find ways to support our students with disabilities on their quest to become lawyers, including through a newly energized Law Students for Disability Rights student organization.

Building on this legacy, on March 29, 2019, over 200 people gathered at UDC Law for this multidisciplinary symposium.²⁸ The symposium was intentionally designed to acknowledge and amplify ways in which disability intersected with multiple and various other identities such as race, national origin, sex, gender identity, immigration, incarceration, and military status. The *UDC Law Review* also worked hard to squarely situate disability matters in other contemporary subjects such as employment, access to public benefits, education, housing, and voting. In different ways, the symposium discussed the history of the movement (or movements depending on one's perspective), the present status of disability laws, and hopes for the (uncertain) future of the disability rights movement.

We are honored to join the forty-five speakers and twelve authors that have contributed to this symposium by writing the introduction to the *Disability Rights: Past, Present, and Future* issue. This essay incorporates the thoughtful post written by UDC Law staff immediately after the event.²⁹ We thought it was important to integrate this story as it captures the voices and perspectives that were shared in person by academics as well as by other participants, including many who self-identified as having one or more disabilities and who are traditionally underrepresented in law review scholarship. We appreciated participants' willingness to share successes, challenges, and legal and other strategies to address various problems in person and wanted their names, ideas, and perspectives to be included in academic literature, with attribution.

Finally, this essay seeks to capture, amplify, and contextualize some of the central themes, storytelling, and takeaways from the symposium's speakers and the scholarship submitted in response to the competitive call for papers. This essay is organized by the symposium panel topics. It concludes with a call to action and acknowledgments.

graduate-Joshua-Basiles-story-of-coping-with-quadriplegia-continues-to-inspire.htm; Tammy Seltzer, '97 in the *W. Post on Prisoner Mental Health Treatment*, UDC LAW (Nov. 27, 2018), <https://www.law.udc.edu/news/428236/>; Christie Thompson and Taylor Elizabeth Eldridge, 'No One to Talk You Down', WASH. POST (Nov. 21, 2018), <https://www.washingtonpost.com/news/national/wp/2018/11/21/feature/federal-prisons-were-told-to-improve-inmates-access-to-mental-health-care-theyve-failed-miserably/>.

²⁷ See e.g., *Summer Public Interest Fellowships*, UDC LAW, <https://www.law.udc.edu/page/Fellowships> (last visited Apr. 12, 2020) (noting student summer placements with the Legal Counsel for the Elderly and Quality Trust for Individuals with Disabilities); *Community Service*, UDC LAW, <https://www.law.udc.edu/page/CommunityService> (last visited Apr. 12, 2020) (listing student community service with AARP Nursing Home Ombudsman Program among others).

²⁸ Attendees included people with disabilities and allies who are: disability rights advocates; practitioners; law professors; law students; government staff; legislators; and other academics, students, and community members.

²⁹ UDC Law Staff, *A Roadmap for Disability Rights: UDC Law Review Convenes Disability Rights Law Review Symposium*, UNIVERSITY OF THE DISTRICT OF COLUMBIA DAVID A. CLARKE SCHOOL OF LAW (May 7, 2019), <https://www.law.udc.edu/news/450295/A-Roadmap-for-Disability-Rights-UDC-Law-Review-Convenes-Disability-Rights-Law-Symposium-.htm>.

I.

THE ADA: 10+ YEARS LATER

“The arc of history is long, but it bends towards justice, and every single one of us in this room is part of that.”—Chai Feldblum concluded her remarks at the symposium’s March 28, 2019 launch event by adapting this famous saying to the disability movement.³⁰ In so doing, she acknowledged that there is still room for the ADA, as amended by the ADA, to be improved, but the foundation on which this movement is building is strong and heading in the right direction. Feldblum was one of the nine individuals involved in the negotiations that led to the ADA, representing either the business or disability rights communities, who shared reflections about the bill’s passage and takeaways for other systemic reform campaigns.³¹

At the launch event, speakers reminisced about the impact of the ADA and how they hoped the ADA would solve many of the problems with the original law’s narrow judicial interpretations. They also shared how the ADA negotiations impacted their own lives and their take on key points and strategies in the legislative process. For example, Mike Eastman, who worked at the U.S. Chamber of Commerce at the time of the negotiations, helpfully reflected on the importance of people’s willingness to look at alternative solutions, even if it led to non-direct fixes to a problem.³² Further, many of the speakers highlighted how important trust, evolving relationships, and bipartisanship were to the negotiation process. These themes continued with the symposium’s opening plenary the next morning.

The symposium’s first plenary panel—The ADA: 10+ Years Later³³—reflected on the state of disability law and policy ten years after the ADA’s passage. Kevin Barry, Professor of Law and Co-Director of the Civil Justice Clinic at Quinnipiac University School of Law, moderated the panel. Professor Barry was a member of the team of disability rights advocates that successfully negotiated and drafted legislative language resulting in the ADA’s passage.

Professor Barry led the panelists in an overview of the ADA’s key provisions and referenced remarks shared at the symposium’s launch event about the coalitional lobbying campaign and negotiation process that led to the law’s enactment. Samuel Bagenstos, Frank G. Millard Professor of Law at University of Michigan Law School, stressed the powerful role of the disability community in the law’s successful passage. He remarked that the disability community’s exceptional emphasis on solidarity throughout the campaign is what, in the final analysis, secured the ADA’s broad and inclusive definition of disability. He also stressed the disability community’s central role today in safeguarding federal protections and social services for vulnerable people under the Affordable Care Act, and many other national programs.

³⁰ *Launch Event Stories*, *supra* note 3 at 3; *The Past, Present, and Future of ADA*, THE ADA PROJECT, <http://www.adalawproject.org/s/ADA-Feldblum-Conversation.pdf> (last visited Apr. 12, 2020). Feldblum was a key player in the fight to pass both the ADA and ADA. During the ADA negotiations, she worked for the ACLU. She was a law professor and director of the Georgetown Federal Legislation Clinic when she represented Epilepsy Foundation of America during the ADA’s negotiations. She later served as a Commissioner of the U.S. Equal Employment Opportunity Commission. She is currently the director of Workplace Culture Consulting at Morgan Lewis.

³¹ Other speakers included Kevin Barry, Mike Eastman, Sandy Finucane, Andy Imparato, Randy Johnson, Larry Lorber, and Allison Nichol. *Launch Event Stories*, *supra* note 3, at 1.

³² *Id.* at 4, 5.

³³ The transcript for this panel is available at: *The ADA: 10+ Years Later*, THE ADA PROJECT, <http://adalawproject.org/s/ADA.pdf> (last visited Apr. 12, 2020).

In *The ADA Amendments Act and the Projects of the American Disability Rights Movement*,³⁴ Professor Bagenstos supplements his panel remarks by further examining the tensions between two interconnected projects of the American disability rights movement: (1) forging a single disability identity across all groups of individuals who considered themselves individuals with disabilities (the “pan-disability” project); and (2) universalizing the definition of disability to show that everyone has characteristics of an individual with a disability at some point(s) and/or in some circumstance(s) (the “universalizing project”). His article distinguishes “edge cases,” the type of cases where plaintiffs had a condition that stretched the common definition of disability, and “core cases,” involving plaintiffs who were “truly disabled.” Under the original ADA, courts dismissed early edge cases, finding that plaintiffs with conditions that did not fit society’s definition of disability did not have a disability under the law. These decisions began to bleed over into other cases, where a plaintiff had an intellectual disability, missing limbs, epilepsy, or other disability. The ADAAA was enacted to change this reality and integrate both the edge and core cases into the definition of disability. Moreover, Bagenstos applies an “edge versus core disability” distinction to post-ADAAA research. He speculates that we may be seeing a renewed backlash against the ADA, with individuals with disabilities that fall into the edge being denied statutory protections against disability discrimination again.

Dr. Rabia Belt, a legal historian and Assistant Professor of Law at Stanford Law School, compared the federal courts’ longstanding fixation on defining disability to other civil rights statutes, in which the courts focus on the act of discrimination itself rather than subjecting plaintiffs to a definitional threshold of race, sex, or other protected categories. In her pending book, *Disabling Democracy in America: Disability, Citizenship, Suffrage and the Law, 1819-1920*, Professor Belt documents how judges and lawmakers in the United States used a “common sense” disability model to exclude primarily African Americans and women from the right to vote based on alleged mental disabilities. Professor Belt urged courts to abandon their obsessive reliance on definitions as a metric for who is and is not disabled – and, in the civil rights law context, the siloed approach courts apply to people with identities that overlap multiple protected categories – in favor of an analytical framework that looks to “equity and access across intersecting identities.”

Applying an intersectional lens, Syracuse University College of Law Professor Dr. Peter Blanck spoke to the importance of using social scientific studies not only to advance disability rights litigation and advocacy, but also to address diversity and bias affecting people with disabilities in the legal profession. Professor Blanck, Chairperson of the Burton Blatt Institute at Syracuse,³⁵ described the Institute’s recent collaboration with the American Bar Association on a nationwide, longitudinal study of implicit, explicit, and structural bias in the legal profession. The first-of-its-kind study examines bias in the legal profession using an intersectional lens spanning disability, race, sex, sexuality, gender identity, and class. Professor Blanck also shared the study’s preliminary insights for increasing opportunity and reducing bias in the legal profession. *Diversity and Inclusion in the American Legal Profession: First Phase Findings from*

³⁴ Samuel Bagenstos, *The ADA Amendments Act and the Projects of the American Disability Rights Movement*, 23 U.D.C. L. REV. 139 (2020).

³⁵ *Burton Blatt Institute*, SYRACUSE UNIV., <http://bbi.syr.edu/> (last visited Apr. 27, 2020).

a *National Study of Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+* contains a description of the survey methodology and captures these preliminary findings in more detail.³⁶

The panelists also discussed developments in disability rights litigation in the years since the ADAAA's passage. Nicole Buonocore Porter, University of Toledo College of Law Associate Dean for Faculty Research and Development and Professor of Law, presented the results of her searching analysis of 2014-2018 federal court decisions in which the claimant was found "not disabled."³⁷ She identified 210 cases in which the plaintiff was erroneously classified as "not disabled" despite plainly debilitating conditions such as multiple sclerosis, seizure disorder, and lupus. Among the 210 "not disabled" cases, Dean Porter identified a shocking fifty-four cases where the court failed to cite to applicable ADAAA provisions, such as the new major life activities and "regarded as" rules. Dean Porter linked the wrongly decided cases to "ignorance, incompetence, and possibly animus" of both attorneys and judges, and she called for advocates to ramp up judicial and attorney education on the ADAAA.

Legal Director of the National Women's Law Center Sunu P. Chandy walked the audience through changes in disability rights litigation since the ADAAA's passage. Chandy has litigated numerous disability cases, both before and after the ADAAA, including as an attorney with the EEOC for fifteen years. She noted the marked increase in successful litigation (and settlements) since the ADAAA's enactment. Chandy also stressed the importance of increasing representation and awareness of people with disabilities in civil rights organizations, which "still today lack meaningful representation of individuals with disabilities," as critical "for strategy, for legal claims, and for building the movement."

II. DISABILITY, LEAVE, AND CAREGIVING³⁸

Following the opening plenary, the audience split up for two breakout discussions. The first session, "Disability, Leave, and Caregiving," was moderated by Robin R. Runge, Acting Director of the Equality and Inclusion Department, Solidarity Center and Professorial Lecturer in Law at the George Washington University Law School. Runge highlighted the importance of "thinking intersectionally as lawyers" before introducing each panelist.

The National Partnership for Women & Families' Jessica Mason started off the conversation by comparing the Family Medical Leave Act ("FMLA"),³⁹ which guarantees only unpaid leave, with federal proposals designed to address the law's significant limitations. Mason, who is The National Partnership's Senior Policy Analyst and Engagement Manager, argued that the FMLA's weak provisions disproportionately harm individuals with disabilities. The FMLA is only enforceable against employers with fifty or more employees.⁴⁰ Additionally, an employee must

³⁶ Peter Blanck, Ynesse Abdul-Malak, Meera Adya, Fitore Hyseni, Mary Killeen & Fatma Altunkol Wise, *Diversity and Inclusion in the American Legal Profession: First Phase Findings from a National Study of Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 23 U.D.C. L. REV. 23 (2020).

³⁷ See Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383 (2019); see also Barry, East & Karin, *supra* note 7 (containing results of an analysis of how disability was pled in ADA Title I cases in 2012).

³⁸ The transcript for this panel is available at: *Disability, Leave, and Caregiving*, THE ADA PROJECT, <http://adalawproject.org/s/Caregiving.pdf> (last visited Apr. 12, 2020).

³⁹ Family and Medical Leave Act, 29 U.S.C. § 2601-2654 (2018).

⁴⁰ § 2611(2)(B)(ii).

have worked for an employer for more than one year and over 1,000 hours in the year prior to an FMLA claim.⁴¹ Even then, the FMLA’s medical leave provision only covers “serious health conditions.”⁴² Mason also spoke to the groundswell of support and successful passage of legislation on the local level, establishing a new baseline of paid family leave insurance and paid sick and safe time.⁴³

Joanna Blotner, Paid Family Leave Campaign Manager for Jews United for Justice (“JUFJ”), challenged the assumption that most people have access to leave from work, and spoke to the role of local legislation in strengthening leave protections. Blotner described the District of Columbia’s (“District’s”) new Universal Paid Leave Amendment Act of 2016, which creates a paid family and medical leave insurance program that offers partial wage replacement for up to eight weeks of parental leave, six weeks to care for an ill relative, and two weeks personal medical leave to care for an employee’s illness.⁴⁴ Starting July 1, 2020, the program guarantees progressive payments for low-income workers, offering up to 90% of a worker’s wages during leave time.⁴⁵ It also complements the District’s Family and Medical Leave Act, which offers job protection for up to sixteen weeks of leave, and is far more protective of employees than its federal counterpart, with a lower size and hours-worked threshold for eligibility. Blotner concluded by encouraging attendees to actively participate in the District’s ongoing implementation process to ensure a successful program launch.⁴⁶

Vivian Nava-Schellinger, Associate Director of Strategic Partnerships and External Affairs for the National Council on Aging (“NCOA”), highlighted the fact that minimal legal attention to caregiving fails to live up to the crucial role it plays in the lives of elders and individuals with disabilities. “Caregiving isn’t a burden, it’s how we show love,” said Nava-Schellinger, adding that the mission for lawyers and advocates in the field is to “eliminate stressors on caregivers” created as the result of insufficient legal protection. After noting that the narrative matters, Nava-Schellinger pointed out that while “caregiving is everyone’s issue and inherent in that issue is aging,” society has neglected the role aging plays in caregiving and care receiving. She also lamented the lasting endurance of gender disparities, noting that roughly 75% of caregivers are women. Nava-Schellinger observed that lawyers need to understand how aging, disability, and employment intersect, using the example of being “too experienced” as potential code for discrimination under the ADA and Age Discrimination in Employment Act.⁴⁷

Tina Smith Nelson, Managing Attorney for AARP Legal Counsel for the Elderly, described a local crisis in the District related to the lack of at-home or community-based medical care for

⁴¹ § 2611(2)(A).

⁴² § 2612(a)(1)(C).

⁴³ See *Paid Sick Days*, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, <https://www.nationalpartnership.org/our-work/economic-justice/paid-sick-days.html> (last visited Apr. 12, 2020); *Interactive Overview of Paid Sick Time Laws in the United States*, A BETTER BALANCE, <https://www.abetterbalance.org/paid-sick-time-laws/> (last visited Apr. 12, 2020); *Paid Leave*, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, <https://www.nationalpartnership.org/our-work/economic-justice/paid-leave.html> (last visited Apr. 12, 2020); *Comparative Chart of Paid Family and Medical Leave Laws in the United States*, A BETTER BALANCE (Jan. 27, 2020), <https://www.abetterbalance.org/resources/paid-family-leave-laws-chart/>.

⁴⁴ D.C. Code § 32-541 (2017).

⁴⁵ § 32-541.04(g)(1).

⁴⁶ D.C. Code § 32-501-517; see generally DC OFFICE OF PAID FAMILY LEAVE, <https://dcpaidfamilyleave.dc.gov> (last visited Apr. 12, 2020).

⁴⁷ Age Discrimination in Employment Act, 29 U.S.C. § 621-634 (2018).

individuals with disabilities. Smith Nelson spoke to the outsized impact of recent budget cuts in D.C.'s Medicaid Program on beneficiaries and caregivers. The District's State Plan Program provides for up to eight hours per day of in-home care.⁴⁸ By contrast, its Elderly Person with Physical Disability Waiver Program offers a home and community-based services model to provide elderly persons and individuals with physical disabilities a pathway to round-the-clock medical care in the comfort of their own home.⁴⁹ She also warned that the dearth of available nursing home beds is causing District residents to move to neighboring jurisdictions.

III. DISABILITY, POLICE INTERACTIONS, AND THE CRIMINAL JUSTICE SYSTEM⁵⁰

"Race, disability, gender, they all intersect in the criminal justice system," said moderator and Instructor in the UDC Law Legislation Clinic, Chris Hill, adding that the panel would attend to strategies for reform focusing on precisely these intersections. The conversation began by examining how the criminal justice system may be particularly difficult for individuals with "hidden" disabilities.

Jonathan M. Smith, Executive Director of the Washington Lawyers' Committee for Civil Rights and Urban Affairs, attacked the problem at the point of entry saying that "police are the wrong people, in most circumstances, to respond" to people in crisis in the first place. Smith stressed the importance of decoupling crisis response from punitive and law enforcement approaches. Smith added that the criminalization and segregation of people with disabilities is reinforced in jails and prisons. Individuals with disabilities are also disproportionately placed in solitary confinement and denied good time credit or admission to programs that could result in early release. He added that "at every stage of their interaction with the criminal legal system, people with disabilities face negative outcomes because of disability discrimination."

The roots of the overrepresentation of people with disabilities in the criminal justice system extend beyond the boundaries of the system itself, noted Claudia Center, Senior Staff Attorney at the ACLU's Disability Rights Program. Center pointed to the dearth of community-based services for people with disabilities as a key driver of state and local efforts to "warehouse" individuals with disabilities in psychiatric facilities and prisons. Center also described the efforts of disability rights litigators to develop new approaches to combat this based on the logic of *Olmstead v. L.C.*, in which the U.S. Supreme Court applied the ADA's reasonable accommodation requirement to people with disabilities in institutional care.⁵¹ The *Olmstead* decision held that individuals with mental disabilities who are confined in congregate care are entitled to receive appropriate treatment and services in a less restrictive setting.

Najma Johnson, Executive Director of DAWN, noted that police approaching people who are Deaf, Hard of Hearing, or Deaf-Blind often accuse the victims of "faking it" and routinely resort to summary arrest rather than waiting for sign-language-capable interpreters or other supports to arrive on the scene. "The systematic belief that hearing is better impacts Deaf victims in the criminal justice system every day," Johnson observed, going on to argue that the failure of the disability rights movement to confront disability discrimination in policing and confinement is

⁴⁸ See D.C. Mun. Regs. tit. 29, § 1916.12 (2020).

⁴⁹ *Id.* at 4238.1.

⁵⁰ The transcript for this panel is available at: *Disability, Police Interactions & Criminal Justice*, THE ADA PROJECT, <http://www.adalawproject.org/s/Criminal-Justice.pdf> (last visited Apr. 12, 2020).

⁵¹ *Olmstead v. L.C.*, 527 U.S. 581 (1999).

rooted in white privilege. “Understanding disability rights through white privilege does not mean that it is understood through the Black experience,” noted Johnson. “Prison is disabling the Black community and destroying us through trauma and pain.”

Johnson also stressed the critical importance of ensuring equity and accessibility at every phase of the criminal enforcement process, from crisis intervention to prison facilities to reentry services. “What breaks my heart is, the deaf victims, do they matter to you? Are they important to you?” asked Johnson. Reentry and social services programs that do not ensure accessibility are fueling the disproportionate representation of people with disabilities in the criminal justice system and failing Deaf survivors of domestic violence, sexual abuse, and stalking, remarked Johnson.

Friends of Guest House Executive Director Kari Galloway and former resident Heidi Christiansen articulated the unique challenges faced by women with disabilities seeking to reenter the community after incarceration. Based in Alexandria, Virginia, Guest House provides residential housing and social services to women reentering the community, having served more than 3,000 women since the program’s founding in 1974. Christiansen praised the program’s peer-based model of reentry and recovery services, which recognizes the resilience and strength of formerly incarcerated women. “Necessity is the mother of invention,” said Christiansen, “and women in reentry and recovery” have the capacity to succeed with the right supports. For her part, Galloway described the enduring consequences of the violence and trauma that women with disabilities face in confinement, which stay with women “even after release,” just as “many women may come out of confinement with disabilities they did not enter with.”

In the closing portion of the panel, attorney and organizer Talila A. Lewis spoke to the importance of taking a disability justice approach in criminal justice reform and public defense work. Reflecting on the enduring race-ableism in public defense work, Lewis urged the audience to go beyond the mere provision of an interpreter by recruiting lawyers in the Deaf community and employing sign-language-capable attorneys. Lewis described the importance of a disability justice lens in litigation strategy as well, noting that litigators who are “in a court and not talking about disability, you’re making a mistake, you need to incorporate disability into the defense.” Lewis also made clear the limits of the law in achieving disability justice. “Litigation can’t save us. The systems that abuse us can’t save us,” said Lewis.

IV. DISABILITY AND THE MILITARY COMMUNITY⁵²

Moderator Dr. Nicole Tuchinda, a Clinical Teaching Fellow and Supervising Attorney in the Health Justice Alliance Clinic at Georgetown University Law Center, focused the panel on how military service often leads to or exacerbates disabilities in military-connected families. Professor Tuchinda mentioned how her own military family experienced the toll of multiple deployments and virtually unlimited service requirements of the U.S. Navy. Professor Tuchinda shared how her husband’s deployments promoted anxiety in her children and how her husband was required to be “on call,” working and ready to operate, 24 hours a day for over 200 consecutive days at a time. The mental health toll on her husband and family members has been significant.

⁵² The transcript for this panel is available at: *Disability and the Military Community*, THE ADA PROJECT, <http://www.adalawproject.org/s/Military.pdf> (last visited Apr. 12, 2020).

David E. Boelzner, a Clinical Assistant Professor of Law at the William & Mary Law School, opened the panel with an overview of the intricate veterans benefits system, including benefits compensation schemes, the evolution of various veterans benefits, and recent changes to the appeals process. Professor Boelzner explained the historical context for the existing benefits system, noting that veterans benefits were initially envisioned as pension payments – cash paid as a reward for service in the military. However, due to widespread corruption during the Civil War, Congress began restricting these payments to military personnel. Professor Boelzner went on to describe the three-step claim process in existence today. First, a claimant must file with a regional office. Second, the regional office must gather evidence to support the filer’s claim. Lastly, the regional office must grant a final decision based on the evidence collected.

Brandy Disbennett-Albrecht, Training Manager for the Benefits Service Line of the Virginia Department of Veterans Services, described the “frustrating process” that stymies veterans with disabilities from accessing the few benefits that remain today. Disbennett-Albrecht explained the various gaps in the system’s design that leave many veterans unable to obtain benefits. Among other things, the evaluating doctor regularly fails to review a patient’s file prior to the exam, and appointments are often limited to fifteen to twenty minutes. Without adequate time to review a patient’s file, access the claimant’s condition, and render a diagnosis, many service members are summarily denied the benefits they have earned. To improve the hearing process, Disbennett-Albrecht recommended that examiners accept brief statements from witnesses present at the time of the event relied on by the claimant.

Aniela Szymanski, Civil Affairs Officer for the U.S. Marine Corps Reserves and Director of Government Relations at the Military Officers Association of America, focused on emerging policy trends during her remarks. She highlighted the dangers of toxic exposure to recent service members, particularly in combat zones and family housing. Given the increasing frequency of deployment and reassignment for many service members, pinpointing the exact moment of exposure can be difficult, and the delayed onset of symptoms compounds the issue. She also addressed the impact of service on the mental health, fertility, and neurocognitive processing of women veterans, including the need to change policy responses to better address the intersection of service, disability, and sex. Finally, she mentioned the confusion caused by having different statutory definitions of disability to separate or retire from the military and access VA benefits or Social Security Disability Insurance.

Aniela Szymanski and Heather Ansley jointly weigh in on proposals to change the requirements for disability compensation in *Should Veterans Disability Compensation be Conditioned upon Veterans Working Towards Rehabilitation and Return to Employment*.⁵³ Budget cuts paired with an increase in disability claims have led some to consider requiring disabled veterans to return to work to access their disability benefits. In their article, Ansley & Szymanski examine the constitutionality and practicality of this proposal and one that would require individuals to comply with medical treatment to access benefits. After concluding that individuals have a due process right to refuse treatment, and that requiring treatment would increase rather than decrease expenditures, the authors compare the proposed work requirements to states that have required work to access other public benefits, concluding that a work requirement is not the answer to the VA disability system. The authors end with proposals to encourage, but not mandate, veterans to seek treatment and enter the workforce.

⁵³ Heather Ansley & Aniela Szymanski, *Should Veterans Disability Compensation be Conditioned upon Veterans Working Towards Rehabilitation and Return to Employment*, 23 U.D.C. L. REV. 151 (2020).

Vernecia Smith, Program Manager for Veterans Workforce Development at Melwood Veterans Services, spoke to the need for reintegrating service members into civilian positions after service. According to Smith, military personnel frequently need assistance translating military experience into civilian job skills to successfully transition back to work after service. She discussed several programs designed to better reintegrate service members in civilian employment, particularly apprenticeship-based models.

Peter Romer-Friedman, Counsel at Outten & Golden LLP, spoke about the importance of The Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”), which offers job protection to guard and reserve members, as well as protections against discrimination based on military service in civilian employment.⁵⁴ Romer-Friedman observed that “without USERRA there is no guard and reserve” in the first place, adding that the law “is like ADA on steroids,” as it requires employers to find any job that the person can do, with or without accommodations, when someone returns to civilian employment. Despite its promise, Romer-Friedman noted several needed changes to the law, including the shifting of the burden of finding a suitable job to the employer rather than the returning service member. Romer-Friedman also pointed out the need to address arbitration provisions and mentioned some of his successful class action litigation for veterans with disabilities under both USERRA and the Rehabilitation Act.

David Boyer also weighs in on the area of disabled veterans in *What Can the Protection and Advocacy Network Offer to our Veterans?*⁵⁵ Boyer looks at the Veterans Health Administration (“VHA”), including its failures in providing care. He examines issues from long wait times to abuse and neglect of veterans to show that the VHA needs to change in order to meet the demands of care for disabled veterans. Boyer proposes a solution in the Protection and Advocacy Network (“P&A”) to assist with oversight. The P&A was created after cases of abuse and neglect in state institutions came to light in the 1960’s and 1970’s. State P&As have the authority to oversee programs and investigations related to a variety of disabilities such as mental health and developmental disabilities. While P&As work with veterans at times, they are currently not given the authority to oversee the VHA. A proposal to do a demonstration project where P&As will be given oversight authority of the VHA has been brought to Congress.⁵⁶ Boyer suggests that this oversight, which has been successful for other agencies, would be a huge step forward toward correcting the abuse and neglect that occurs in the VHA.

V. DISABILITY BEYOND THE WORKPLACE⁵⁷

Moderated by UDC Law Associate Professor of Law Rafael Cox Alomar, the second breakout session featured disability rights attorneys working toward equity and accessibility in underexplored areas such as housing, voting rights, disaster planning, public benefits, and local government.

⁵⁴ Employment and Reemployment Rights of Members of the Uniformed Services, 38 U.S.C. § 4301-4335 (2018); see generally Brian Clauss & Marcy Karin, *Rights Under the Uniformed Services Employment Rights and Reemployment Act (USERRA)* in *SERVICEMEMBER AND VETERANS RIGHTS* §§ 2.01-2.05 & appendix (2016).

⁵⁵ David Boyer, *What Can the Protection and Advocacy Network Offer to our Veterans?*, 23 U.D.C. L. REV. 88 (2020).

⁵⁶ Protection and Advocacy for Veterans Act, H.R. 1712, 115th Cong. (2017).

⁵⁷ The transcript for this panel is available at: *Disability Beyond the Workplace*, THE ADA PROJECT, <http://www.adalawproject.org/s/Beyond-Workplace.pdf> (last visited Apr. 12, 2020).

Karla Gilbride, Public Justice’s Cartwright-Baron Senior Attorney, identified housing as a surprisingly neglected area in disability rights litigation and advocacy. “There are still a lot of barriers and lots to be done to make housing accessible and integrative in the community,” said Gilbride, adding that individuals with disabilities face “not only physical barriers in rental housing but also widespread discrimination by rental housing providers.” Disaster response and relief is another critical area for disability rights advocates, explained Gilbride, and litigators are increasingly bringing suit to ensure that municipalities consider the needs of people with disabilities before catastrophe strikes. She gave an overview of the many gaps remaining in local emergency plans, including planning for fully accessible and ADA-compliant communications, medical support, and shelter sites. She also pointed to the promise of *Olmstead* for addressing institutionalization, isolation, and abuse of individuals with disabilities in the disaster relief setting.

Jessica Hunt, Attorney Advisor for the D.C. Mayor’s Office of Disability Rights (“ODR”), spoke to D.C.’s recent efforts to address the needs of people with disabilities in emergency planning for the greater D.C. area, saying that planners are “working hard to develop an accessible transportation framework, mass medical care plans, and facilities.” Hunt described ODR’s involvement in recent emergency planning evaluation efforts by the District, in which city planners staged mock drills at emergency shelter sites and tested evacuation routes. Hunt went on to exhort the audience to raise awareness about local agencies and legal protections focusing on disability and human rights that offer an important alternative to federal disability rights litigation, which can be costly and time-intensive.

The Lawyers’ Committee for Civil Rights Under Law’s Julie Houk, who is Managing Counsel for Election Protection at the organization, drew the audience’s attention to the intersection of disaster planning and voting access for individuals with disabilities. Houk highlighted recent litigation brought against state and local governments on the Eastern seaboard in the wake of hurricanes and floods, as government planners worked to restore infrastructure and hold timely elections without accounting for how the system would accommodate voters with disabilities, and with often disproportionate results to voters of color. While online voter registration is often described as a kind of panacea by voting rights advocates, Houk said “the problem with online voter registration is that it’s often not accessible for people with disabilities.” After providing background on the U.S. Supreme Court’s rollback of the Voting Rights Act in *Shelby County v. Holder*,⁵⁸ Houk spoke to the need for advocates to push state and local legislation to ensure equity and accessibility in voting systems.

Andrew Imparato, Executive Director of the Association of University Centers on Disabilities, and a member of the legal team that negotiated for the ADAAA’s passage, decried recent efforts by the Trump administration to impose so-called work incentives on public benefits recipients. Proving a disability exemption from “workfare” requirements is a time-intensive and uncertain process, said Imparato, threatening many individuals with disabilities with the termination of public benefits. Imparato argued that such changes pose real consequences to people with disabilities, as big-dollar programs like Medicare already fail to live up to the ADA mandate given the dearth of long-term disability services and supports.

⁵⁸ *Shelby Co. v. Holder*, 570 U.S. 529 (2013) (holding that the provision of the Voting Rights Act that required some jurisdictions to gain approval of proposed changes to voting procedures was unconstitutional because it relied on a forty-year-old formula with no relation to current needs).

VI.

DISABILITY AND EDUCATION⁵⁹

Lauren Onkeles-Klein, UDC Law Visiting Assistant Professor of Law and Director of the Juvenile and Special Education Law Clinic, moderated the discussion, taking an intersectional lens to the discussion of how educational systems often fail students with disabilities.

Practitioner-In-Residence in the Disability Rights Law Clinic at American University Washington College of Law Adrián Alvarez opened the panel with a focus on the “medical model” of disability, particularly its focus on deficiencies and impairment rather than a child’s capabilities. Professor Alvarez highlighted the *Flores* settlement for particular mention,⁶⁰ explaining that *Flores* was designed to ensure that children who have immigrated to this country without documentation receive education while in detention, while also expediting children’s transition out of confinement. Unfortunately, as Professor Alvarez pointed out, *Flores* does not include an express guarantee of special education services to children who are detained. Additionally, Professor Alvarez discussed the unique challenges that immigrant children with disabilities face, including a history of violence in their home countries, traveling long journeys with interrupted education, and schools in the United States that may, contrary to the law, fail to evaluate a child with suspected disabilities.

Lydia X. Z. Brown, Justice Catalyst Fellow at the Judge David L. Bazelon Center for Mental Health Law, spoke next. Brown identifies as multiply disabled and has consistently confronted assumptions that “disabled people cannot be at the forefront” of disability-rights advocacy. “The work I am doing is literally for my own survival, and the survival of people I care about who are living alongside me,” Brown said. “We will die if we sit and wait for privileged people to help the disability community. We must take the initiative and speak up for ourselves.” Brown identified a number of fundamental flaws in our educational system and discussed some of the work they are doing to upend the violence inherent in an educational system that was not designed to educate students with disabilities and intersecting marginalized identities.

Tara J. Miles, Family Educator at Kendall Demonstration School, opened with a discussion of her personal experience as a Deaf child growing up with a family of hearing people as well as an educator working in a quasi-public-school setting with children who come from both majority-deaf and majority-hearing families. Miles is now an educator with an elementary school associated with the Laurent Clerc National Deaf Education Center at Gallaudet University. Miles shared how her personal experiences shape her current work with families and identified the many ways in which race and ableism play a major role in whether or not students with disabilities are supported in their communities and educational environments. Acknowledging that neither the medical nor the educational communities have taken the steps to dismantle the structures, policies, and procedures that entrench this differentiated approach, Miles emphasized the importance of cultivating a generation of students with disabilities that advocate for themselves.

Katherine Pérez, Director of the Coelho Center for Disability Law, Policy, and Innovation at Loyola Law School, challenged the medical model of disability that frames disability as an

⁵⁹ The transcript for this panel is available at: *Disability and Education*, THE ADA PROJECT, <http://www.adalawproject.org/s/Education.pdf> (last visited Apr. 12, 2020).

⁶⁰ *Reno v. Flores*, 507 U.S. 292 (1993).

“illness” that can or should be “cured.” Pérez herself grew up with a psychiatric disability, but she did not identify as someone with a disability until law school. According to Pérez, her sense of disability justice took hold based on her relationship with her younger sister, who has an intellectual disability, and it deepened once she embraced her own disability. She went on to discuss the harm that ableism has on all people with disabilities and how it divides those with disabilities from each other, diluting their advocacy power. Pérez also discussed her work to develop a new framework of looking at disability and its intersection with critical race studies to create a new base of power and understanding for disability rights advocates. Her goal is to bridge the gap between the portion of the disability-rights movement that has been centered on a more white, privileged experience of disability with the experiences of people of color with disabilities.

After the panel, Brown noted that ableism was “front and center in the conversation at UDC” – an approach that is sadly unusual for other conferences on disability rights. Brown identified the importance of ensuring representation of individuals with disabilities on panels to meaningfully discuss “disability oppression as violence” that is “structural [and] pervasive throughout culture and society.”

VII. DISABILITY RIGHTS: THE NEXT 10 YEARS⁶¹

The second breakout session, “The Next 10 Years,” brought lawyers and advocates together to think through next steps in disability rights law and policy. Laurie Morin, UDC Law Professor and Director of the Gender Justice Project, set the stage with a forward-looking perspective, asking the panelists to describe “how we move the needle” over the next decade.

The Bazelon Center for Mental Health Law’s Jennifer Mathis targeted the false distinction between disability rights and civil rights for special attention, saying “still today, disability rights are not seen as civil rights.” Instead, disability continues to be viewed as a government entitlement or special privilege according to Mathis. Disability rights opponents rely on this frame to argue that rights for individuals with disabilities are somehow “harmful to other people,” said Mathis, who is Deputy Legal Director and Director of Policy and Legal Advocacy of the Bazelon Center. Mathis urged the disability community to attack this distinction, saying that “to move the needle, going forward this has to change.”

Ma’ayan Anafi, Policy Counsel at the National Center for Transgender Equality, identified the ADA’s express exclusion of “gender identity disorders” as a current point of challenge for advocates and litigators seeking to expand the ADA’s protections to transgender people. Anafi traced the statutory interpretation and equal protection arguments that led to several successful challenges to the ADA’s exclusionary provision in the federal courts, in cases seeking accommodations for trans individuals in identification documents, prison facilities, and other government-administered programs. Anafi also problematized the unstated assumption that trans individuals do not have independent or co-occurring disabilities outside of the “gender dysphoria” label, when in fact trans people are much more likely to have a disability and trans people with disabilities face higher rates of poverty, unemployment, and sexual assault.

⁶¹ The transcript for this panel is available at: *Disability Rights: The Next 10 Years*, THE ADA PROJECT, <http://www.adalawproject.org/s/Next-10-Years.pdf> (last visited Apr. 12, 2020).

In his article, *Challenging Transition Related Care Exclusions through Disability Rights Law*, Kevin Barry discusses the high levels of discrimination that transgender individuals face in health care, often resulting in the denial of transition related care.⁶² Barry begins by discussing gender dysphoria and why it is considered a disability after the ADAAA. Barry goes on to say that a transgender individual with gender dysphoria may be a qualified individual with a disability and, therefore, denial of transition related care is a violation of the ADA, as amended by the ADAAA. Barry suggests strategies for plaintiffs to bring claims under the ADA, Section 504 of the Rehabilitation Act,⁶³ and Section 1557 of the Affordable Care Act.⁶⁴ Barry concludes by saying that, although exclusions of transition related care are in decline, it is important to continue pushing forward until all transition related care is covered by insurance.

Next, American University Washington College of Law Professor Robert Dinerstein spoke to the need for litigators and advocates to explore workable alternatives to guardianship proceedings. Dinerstein – who is the Director of the law school’s Disability Rights Law Clinic – explained the problematic nature of guardianship determinations, which compromise autonomy of decision making for individuals with disabilities deemed “incompetent” by substituting granting such decisions to a legal “guardian.” Dinerstein called for further development and implementation of alternatives such as the supportive decision-making model. Dinerstein singled out the lack of workable alternatives to guardianship proceedings as significant obstacles to the movement toward deinstitutionalization and community integration of individuals with disabilities. He also flagged employment and internet accessibility as two other areas that need improvement in the next decade, noting that people with disabilities remain substantially less likely to be employed than individuals without disabilities and that much remains to be done to increase internet accessibility under Title III of the ADA.

Dr. Leslie Francis, Alfred C. Emery Professor of Law and Professor of Philosophy at the University of Utah, spoke to the importance of thinking through the potential “backlash” to disability rights measures to inform legal and movement strategy going forward. Professor Francis articulated three themes for neutralizing potential opposition. First, attack the perception of disability rights legislation as protecting entitlements or special privileges as opposed to civil rights and antidiscrimination protections. Second, double down on the “non-categorical” nature of the ADA’s definition of disability, as reinforced by the ADAAA, to refocus the public and the courts on discrimination that must be remedied rather than imposing a technical definition of disability as a threshold. Third, carefully distinguish whether in particular circumstances nondiscrimination requires accommodations (adjustments to individual differences) or modifications (changes in structures or policies that are generally applicable). Professor Francis closed by urging a focus on remedying discrimination, not on who may qualify for statutory coverage.

Building on her insights about accommodations versus modifications, Professor Francis reviews the continuing effects of an early Supreme Court decision in her article, *Debilitating*

⁶² Kevin Barry, *Challenging Transition Related Care Exclusions through Disability Rights Law*, 23 U.D.C. L. REV. 97 (2020).

⁶³ Rehabilitation Act of 1973, 29 U.S.C. § 794 (2018) (this provision is commonly referred to as “Section 504 of Rehabilitation Act”).

⁶⁴ Quality Affordable Healthcare for All Americans, 42 U.S.C. § 18116 (2018) (this provision is commonly referred to as “Section 1557 of ACA”).

*Southeastern Community College v. Davis: Achieving the Promise of Disability Civil Rights.*⁶⁵ In this article, Professor Francis discusses the confusion that the 1979 *Davis* case caused over the definitions of accommodation and modification, including effects that continue today.⁶⁶ Courts frequently confuse these two definitions and reject a request for a reasonable accommodation by calling it an unnecessary modification to the way a company does business to help a plaintiff get a job for which they are not qualified. The ADA, however, is intended to ensure that reasonable accommodations are provided to individuals with disabilities to access employment. When plaintiffs ask for an accommodation and it is misconstrued as a request for a modification, the plaintiff may be denied a simple change to their work schedule, access to additional breaks, or access to an interpreter that would allow the plaintiff to do the job. The article concludes by observing that this confusion continues to result in an otherwise qualified individual being denied access to an opportunity to do the work that they enjoy and prevents the ADA from living up to its anti-discrimination mandate.

VIII. DISABILITY AND THE #METOO MOVEMENT⁶⁷

“Disability and the #MeToo Movement” was the symposium’s closing plenary session. L. Dara Baldwin, Director of National Policy for the Center for Disability Rights (“CDR”), began by describing CDR’s unique fusion of advocacy, supportive services, and effectiveness of peer-based approaches to movement organizing against sexual violence committed against people with disabilities. Baldwin drew a sharp contrast between “disability rights” frameworks that tend to individualize people with disabilities, and “disability justice” frameworks, saying that “disability justice aims for collective liberation” of the disability community in all its diversity rather than incremental remedies. Baldwin also weighed in on the failed promise of the Prison Rape Elimination Act (“PREA”) for individuals with disabilities who are incarcerated,⁶⁸ urging PREA advocates to reset strategy to incorporate a disability justice lens going forward.

Co-Director of Legal Programs at the Network for Victim Recovery of DC (“NVRDC”), Kristin Eliason spoke to the urgent need for victims’ advocates to build out greater access and supports for people with disabilities who are victims of assault. Eliason – who oversees NVRDC’s representation of crime victims in criminal prosecutions, Civil Protection Order cases, and Title IX⁶⁹ campus grievance procedures – stressed the responsibility of service providers to make services accessible. Eliason went on to explain the importance of honoring survivors’ right to self-determination, as many victims’ services agencies still struggle with problematic assumptions about the capacity of individuals with disabilities to make their own choices about what steps to take in response to an assault. “Our staff always pushes itself to address and meet the needs of survivors themselves,” said Eliason, noting the importance of honoring the wishes of people who have suffered sexual assault and intimate partner violence. Eliason also spoke to the need to contest the decisions of legal “guardians” of adults and minors living with disabilities if the decision conflicts with the victim’s own choice.

⁶⁵ Leslie Francis, *Debilitating Southeastern Community College v. Davis: Achieving the Promise of Disability Civil Rights*, 23 U.D.C. L. REV. 183 (2020).

⁶⁶ *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 (1979).

⁶⁷ The transcript for this panel is available at: *Disability and the #MeToo Movement*, THE ADA PROJECT, <http://www.adalawproject.org/s/MeToo.pdf> (last visited Apr. 12, 2020).

⁶⁸ 42 U.S.C. § 15601-15609 (2018).

⁶⁹ Education Amendments of 1972, 20 U.S.C. § 1681 (2018).

In an investigative series last year, NPR’s Joe Shapiro chronicled the epidemic of sexual assaults against individuals with intellectual and developmental disabilities.⁷⁰ Shapiro played audio clips from several interviews in the series – titled *Abused and Betrayed* – in which organizers in the disability community recounted sexual assault and its aftermath, as many survivors are confronted with disbelief and stereotyping. Yet women with intellectual disabilities are assaulted at rates seven times higher than others, and perpetrators are more likely to be people known to the victim.

Mia Ives-Rublee, Founder and Coordinator of the Women’s March Disability Caucus, detailed the importance of making movement organizing both physically and emotionally accessible for individuals with disabilities, particularly in the #MeToo movement. “Disabled women are often silenced not only in the disability community, but in women’s spaces as well,” said Ives-Rublee. She then pointed to the fact that women with disabilities are organizing toward bodily autonomy and reproductive justice as well. Going forward, Ives-Rublee urged advocates to implement support systems in advance of organizing events and to ensure accessibility and support services are in place for women with disabilities before, during, and after the event.

IX. A ROADMAP FOR DISABILITY RIGHTS: KEYNOTE ADDRESS⁷¹

In her culminating address, longtime disability rights lawyer, scholar, and activist Chai Feldblum declared that she was “awestruck by both the breadth of the issues that” the symposium covered “and the incredible depth of knowledge and experience represented on the panels.” Weaving in many of the themes from the symposium, she commented on the past, present, and future of disability rights.

She reflected on the rallying cry adopted by the disability community at the time of the ADA’s passage in 1990, “We don’t want your pity, we want our rights!” While the ADA and ADAAA made great strides toward greater equity and accessibility for people with disabilities, Feldblum pointed out that nominal legal rights often leave people behind and stressed the importance of community integration to the ADA. She called for increased efforts to fulfill the promise of federal disability law to ensure the safety, dignity, and integrity of individuals with disabilities.

“When characteristics are demeaned by society, we must reclaim them. Our characteristics are essential aspects of our identity, but they do not define us. Being proud and open about these aspects of ourselves is what allows us to live with dignity,” said Feldblum. “This is our present and it is our future if we proceed in an intentional and strategic way.”

Feldblum turned next to the #MeToo movement. “We are at a moment now where a range of social actors are focusing on the issue of harassment, from nonprofits and religious groups to business and media,” said Feldblum. “Shame on us if we don’t use this opportunity” to make change. “We have to be both intentional and strategic as we move forward,” said Feldblum, adding that advocates must “channel the energy we have no to energize all people that have been left behind, those treated unfairly, and that means people with disabilities.”

⁷⁰ *Special Series: Abused and Betrayed*, NPR, <https://www.npr.org/series/575502633/abused-and-betrayed> (last visited Apr. 12, 2020).

⁷¹ *Keynote Remarks*, *supra* note 1 (containing a transcript of Chai Feldblum’s address).

X. ACKNOWLEDGEMENTS, THE ADA PROJECT, AND A CALL TO ACTION

We would like to thank—and capture for posterity—all those who worked so hard on this *Disability Rights* symposium. Without the tireless efforts of the 2019 executive board, including editor-in-chief Demetria Themistocles, managing editor Maria Suarez, symposium editor Rafael Sa’adah, publications editor Michele Steinmetz, articles editor Jennell Thomas, and notes editor Allison Rice, this symposium would not have been such a success. Similarly, the written issue would not have come together without the hard work of the 2020 law review team.

We are also thankful that the *UDC Law Review* invited the Legislation Clinic to partner and collaborate on this symposium. The symposium’s opening reception dovetailed with the launch of *The ADA Project*,⁷² a unique collaboration between the Quinnipiac University School of Law Civil Justice Clinic and the UDC Law Legislation Clinic. *The ADA Project* is an online portal for people with disabilities and others to learn about important aspects of the ADA. It contains materials to facilitate successful claims of disability discrimination, analysis of the definition of disability,⁷³ and information to stay up to date on emerging areas of the law.⁷⁴ It also serves as a public repository for legislative history materials related to the ADA and ADA^{AAA}.⁷⁵

In addition to the faculty that moderated panels, we appreciate the assistance in planning and executing the symposium from members of the broader UDC Law community, including John Brittan, Brendan Conner, Tamara Devieux-Adams, Andrew Ferguson, Osamuyimen Idehen, Erin Looney, Joe Marceda, Chris Payne-Tsouprous, Lewis Perry, Carla Wale, and many others.

Finally, we conclude by amplifying a call to action that was shared throughout the symposium by various panelists and participants: the need to center disability in all of our work and to do so in intersecting, inclusive ways that also lifts up other voices and perspectives. We must recognize and call out ableism. We must work to increase the representation of people with disabilities in leadership roles and in the ranks of lawyers. And we must integrate disability matters further into traditional civil rights work. Moreover, as Sunu Chandy urged, we have to look at the events we are holding, the work we are doing, and ask: Are we inclusive? Is there a way to be better?⁷⁶ Further, as Talila Lewis urged, we must attend to “the intersections of the intersections” in doing so.⁷⁷ This collective philosophy was highlighted throughout the day, by speakers, in participant questions, and in informal conversations.

These remarks were magnified in part due to an unfortunate scheduling conflict that was out of the law review’s control: the symposium overlapped with the 2019 Jacobus tenBroek

⁷² *The ADA Project*, THE ADA PROJECT, www.adalawproject.org (last visited Apr. 10, 2020).

⁷³ *The Definition of Disability*, THE ADA PROJECT, <http://www.adalawproject.org/americans-with-disabilities-act> (last visited Apr. 10, 2020).

⁷⁴ *Emerging Trends*, THE ADA PROJECT, <http://www.adalawproject.org/emergingtrends> (last visited Apr. 10, 2020).

⁷⁵ *The ADA Archive*, THE ADA PROJECT, <http://www.adalawproject.org/the-ada-archive-1> (last visited Apr. 10, 2020).

⁷⁶ *The ADA^{AAA}: 10+ Years Later*, *supra* note 33, at 6-7 (containing a transcription of Sunu Chandy’s remarks).

⁷⁷ *Disability, Police Interactions & Criminal Justice*, *supra* note 50, at 17-18 (containing a transcription with Talila A. Lewis’s remarks).

Disability Law Symposium.⁷⁸ One positive result of this scheduling conflict was that a number of out-of-town advocates and scholars were able to join at least part of the symposium. It also meant, however, that organizers and participants were acutely aware of the #disabilitytoowhite criticism of that event (and others).⁷⁹ In the hallways on campus during breaks, immediately before and after the symposium, and in real time on social media, we overheard and saw comparisons contrasting the *UDC Law Review* symposium with the 2019 tenBroek symposium.⁸⁰ This accidental convergence of events—and real-time critique—encouraged us to reflect further on our event.

Earlier, we mentioned that the law review team worked hard to ensure accessibility, representation, and inclusion in a variety of ways, including ensuring availability of the use of multiple forms of visual, audial, and other communication as well as inviting speakers and participants with multiple, intersecting visible and non-visible identities. As a Historically Black Law School with an explicit social justice mission,⁸¹ we were conscious of adhering as best we could to what Kevin Barry called the spirit of the disability community’s “radical inclusion.”⁸² Put simply, we believe that representation is important—as is amplifying the experiences and impacts of the reality that disability intersects with race, nationality, religion, sex, sexuality, gender identity, class, and other characteristics, often in nuanced and multiple ways. Having the perspectives of a wide range of panelists and participants was essential to our planning. On reflection, however, despite the students’ intentionality and consciousness on this point, the comparisons to tenBroek and other post-event self-reflections demonstrate that the symposium did not obtain “radical inclusion.” It could have done better, especially with speaker and author representation of people of color with disabilities.

Other lessons learned include the need to provide a trigger warning and a reminder of the availability of a reflection room throughout the day, rather than presuming attendees noticed the information in the program or were present for the opening remarks. The same lesson was learned about reminders to speak into the microphone to facilitate various accommodations, not to take flash photograph, and the location of gender-neutral bathrooms. The list of event lessons goes on. Similarly, with respect to the subsequent written symposium, the paper call and outreach conducted by student editors did not solicit responses from potential authors that offered the type of diversity and inclusion at the intersections for which we strive.

⁷⁸ *Jacobus tenBroek Disability Law Symposium*, NATIONAL FEDERATION OF THE BLIND, <https://www.nfb.org/programs-services/legal-program/jacobus-tenbroek-disability-law-symposium> (last visited Apr. 12, 2020). “The Jacobus tenBroek Disability Law Symposium is a space of great potential as an important gathering of disability rights lawyers, advocates, and other professionals to discuss matters pertaining to disability law.” *See also An Open Letter to the tenBroek Disability Law Symposium Steering Committee* (Apr. 5, 2019), https://docs.google.com/document/d/1EMURGDJ_TCYKw-Hb7DzKIRaa4iOg3CtqjehT7SIEasU/edit.

⁷⁹ *See e.g., Open Letter*, *supra* note 78. Of note, the announced theme for the 2020 tenBroek Symposium was “Race, Diversity, and Inclusion, and the Right to Live in the World.” *2020 Jacobus tenBroek Disability Law Symposium Agenda*, NATIONAL FEDERATION OF THE BLIND, <https://www.nfb.org/programs-services/legal-program/jacobus-tenbroek-disability-law-symposium/2020-agenda>.

⁸⁰ *See e.g., Disability and Education*, *supra* note 59, at 7 (transcribing Katherine Pérez’s remarks); Lydia X. Z. Brown, Esq. (@autistichoya), TWITTER (Mar. 29, 2019, 2:01 PM), <https://twitter.com/autistichoya/status/1111689953744953344>.

⁸¹ *See* D.C. Code § 38-1202.06(2)(c).

⁸² *Expanding Access to Rights Under the ADA: The History and Impact of the ADAAA – A Conversation with Kevin Barry*, THE ADA PROJECT, www.adalawproject.org/s/ADA-Barry-Conversation.pdf (last visited Apr. 9, 2020).

In response, we vow to be better. We will continue to be mindful and recognize the importance of the broadest forms of inclusion, diversity, and representation and to engage in how best to access multiple accommodations, without question, as a community moving forward. We also hope to foster and further support pipelines of people with disabilities and other intersecting identities who want to write, advocate, and practice in these spaces—and in disability justice spaces that have yet to be defined.

We ask all readers of this issue to join us on this quest. Further, we challenge other law school events to learn from our mistakes. We also challenge our colleagues in the academy, in practice, and in the community to join us in being better, supportive, and mindful on these issues moving forward.

With that call to action, we conclude by thanking you for joining the conversation and continuing to engage in the work that needs to be done to further advance disability justice.