DISABILITY RIGHTS: THE NEXT 10 YEARS

This is a verbatim transcript of the March 29, 2019 symposium panel. The video of the panel is available at: http://bit.ly/Next_10_ADAAA.

Speaker names are in bold, followed by the minute and second marks in parenthesis to indicate the location at which the remarks begin on the corresponding video.

Laurie Morin[1] (moderator) (00:00)

All right. Good afternoon everybody. We are running late so we are going to get started right away. We have another stellar panel in a day of riches. I am not going to waste any of our time doing introductions because we really want to get onto the content. So, I'm going to turn it over first to Jennifer Mathis who's going to start us off. If you don't know, you're in "disability: the next 10 years" and we're going to be thinking about what still needs to be done and where we might want to go. Thank you for being here.

Jennifer Mathis[2] (00:36)

Hi. So, is this on? Oh it's. OK. Red is on. Let's go.

Hi. I'm Jennifer Mathis, the Bazelon Center for Mental Health Law, national nonprofit. We do policy advocacy, as well as litigation, around the country on mental health and sometimes intellectual disability rights, and disability rights more generally.

So, I would say for thinking about the future and, really, where we have not moved the needle after all of these years and 20 plus years after. Well, I'm coming up on 30 years after the ADA and many, many more years after the Rehabilitation Act, Section 504. I would say some of the key areas that I would highlight for where we have not yet moved the needle or where we have only just begun to move the needle and have not gotten very far are things that I would consider maybe part of *Olmstead* 2.0, *Olmstead* 3.0, *Olmstead* 4.0 and you know what I mean by that is for one thing employment and, you know, Senator Harkin always used to say that of all of the different core goals of the ADA really the sort of self-sufficiency and employment is

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really the place where we have not made progress or where we have made the least progress.

It is odd, sort of why we haven't done it in a way you know certainly has not been that the ADA Title I is ineffective. The law has not been I would say overall, particularly bad for people with disabilities under Title I. Why we haven't moved the needle? I think in part is because certainly a lot of people with disabilities aren't even getting to the front door of a workplace. So EEO is sort of not always even relevant to folks who, you know, are sitting in a day treatment program all day or sheltered workshop or what have you. And so, they don't have a job to get fired from or they're not at the door to get hired. So that is certainly part of the issue and you know certainly hiring discrimination is a hard thing to get at whatever context you're in, it's hard to prove.

So, for assorted reasons we have not moved the needle.

There are certainly tools, you know, segregated settings that are sort of day settings has been a significant focus of many of us in our advocacy. We sort of feel like, for sort of *Olmstead* 1.0, we've started getting people with disabilities an integrated place to live or an integrated bed to sleep in at night. That doesn't really get you, you know, anything during the day. And so, you know, certainly there's been some effort and private litigation and DOJ have been involved in *Olmstead* 2.0 to get sort of employment services supported employment in an integrated setting to get people real jobs, competitive, integrated employment. There has been a little bit of progress made. I feel like this is where we're at the very, very beginning with IDD, Intellectual and Developmental Disability Services. We are still at zero mental health services and, you know, folks in the mental health world often will be stuck in not even sheltered workshops, but just day treatment settings where you sit in a room all day and learn that you have an illness. You have an illness, a serious illness, and you need to be on meds your whole life and you know you need to understand that and so we have offered people in public mental health systems supported employment almost none of the time. It's really less than 2% of people in public mental health systems get supported employment services. So, you know if you look at things from 30 years ago about supported employment to people with disabilities you see the same things that people are saying today.

So, we haven't, we haven't gotten very far. And there are other tools besides *Olmstead* 2.0 for addressing employment. I mean some of that is employment services. I think besides the ADA, we have 501 and 503 affirmative action requirements for the federal government to employ people with disabilities under Section 501 and affirmative action requirements for federal contractors to employ people with disabilities under Section 503 of the Rehab Act and those are powerful tools. Part of, I think the challenge in advocacy in the community is that those are not in our hands. Right? There's not private enforcement of Section 503. So, I saw Naomi Levin here earlier from OFCCP. You know certainly we can communicate with the Labor Department. We can communicate with the EEOC about Section 501. In Section 501 there is, for the affirmative action requirements, it's not clear yet whether this private right of action; EEOC initially said that there wasn't, when they did their proposed rulemaking on

section 503 and then 501, and then turn around and said, well maybe there is but it is, regardless, it's a challenge for us from the outside to really have a handle on what is even happening. And you know there's not a lot of data that gets reported, there's not enough public information, and I think so we really need to kind of do public information requests, dig into the weeds to try to make an impact there.

Then *Olmstead* 2.0, or 3.0 I guess, segregated education this many years after *Brown v. Board of Ed*. I think it is striking how many kids with disabilities get educated still in segregated schools and segregated classrooms and we have only just begun to move the needle on that. The Justice Department did file the GNETS case in Georgia. There is private litigation. We have a number of cases at the Bazelon Center, pressing these issues trying to get kids with disabilities the services they need in school, to be educated in mainstream schools alongside their peers, mainstream classrooms and not be shunted to kind of inferior, mostly punitive settings or where there are basically very low expectations and people are treated, kids are treated as throwaway kids. So that's my second thing.

Olmstead 3.0 or 4.0--I would say criminal justice. This has also been a hard one to move the needle on. I think there's been a lot of focus on reforming criminal justice systems in this country in the last few years, a lot of attention to a kind of a right-left alliance. But most of the focus has been on sentencing reform. Very little of the focus I think on a national level has been around people with disabilities in the justice system, except up to the extent that people have focused on "the jails being the largest mental health facilities in the country." And unfortunately, I think the way that people have run with that narrative is that, you know, where people need to be is psychiatric hospitals instead of jails, which I don't think is the solution. And there's been sort of less than robust narrative around the community based mental health services that people would need and DD services in order to prevent people from getting in the situations where they're encountering law enforcement and ending up incarcerated.

And then finally I would just say something, I talk more a little bit about later after other folks remarks I think, because there is a theme that I think will resonate among all of us, is sort of disability rights as civil rights. And this is sort of overall our progress that we have not yet, we've not yet achieved. There are many, many ways in which certainly thinking about things that happen in Congress, things that happen in the administrative agencies, disability is so often not understood still to this day as a civil right. Disability rights is not understood as civil rights and things like the ADA and access to buildings that are seen as sort of a business, regulation issue, or often actually disability rights very deliberately spun as sort of antithetical to, or pitted against other civil rights. When in fact that is not often true but it's a, it's sort of been a strategy to weaken disability rights to persuade people that other people's civil rights are somehow being weakened by advancing disability rights. So those are my top highlights.

Laurie Morin (10:15)

Thank you, Jennifer. We're going to pass the mic to Bob Dinerstein who's going to follow up with some other areas in which we still need improvement. And I know

we're throwing a lot of information at you; we will leave time for your questions at the end.

Robert Dinerstein[3] (10:29)

Thank you, Laurie. It's, it's great to be on this panel with some old friends and some new friends. I've been on panels with Jennifer. I've never, I'm not sure if I've ever heard you speak that quickly. So, we're all under, we are somewhat under the gun here, so we can only really touch the surface, but we'll try to do that.

So, we've been asked to really look at what, what is our projection over the next 10 years and the disability rights area, and we were not provided with a crystal ball. So, you can take these suggestions or thoughts with a very large grain of salt. I want to just pick, start off, just picking up on a couple of themes that Jennifer mentioned and then I'll move on to some other things.

One, employment remains I think the huge issue for people with disabilities, and I really should say underemployment. Partly, its, I think because of some of the limitations of how the ADA Title I has been interpreted, but a lot of it is factors that really go beyond the ADA. And just to give you, you probably know some of these statistics, but just to give you a bit of a sense of it from the Bureau of Labor statistics for 2018, the last available, 19.1% of people with disabilities are employed. That's compared to 65.9% of people without disabilities. And that 19.1 is actually a bit of an increase over the previous year, which was 18.7. For ages, for people ages 16 to 64, prime working years, there's a 30.4% employment rate for people with disabilities. That's compared to 74% for people without disabilities. So, there is a lot of gap between the employment of people with disabilities and the employment of people who don't. Within the group of people with disabilities, the rate of unemployment for black and Latino people with disabilities is higher than it is for whites and for Asians. So, as we've been talking about at this conference already when we think about disability we have to also think about disability and other protected categories and how those intersect. So, it's not surprising that some people of color will be even further disadvantaged.

I will say that, you know if you look at what the Supreme Court has done in interpreting the ADA over the years, there's been some good decisions, there have been some bad decisions. The decisions about employment are almost always have been bad at least from a standpoint of disability rights whether you talk about the *Sutton* Trilogy or *Toyota v. Williams* or *Echazaba*l or *Barnett*. They've mostly been restricted and I think to my mind that's consistent with the view of the Roberts court, which is as a very pro-business court whether it's in the area of disability or not. So, when we look at some of the good cases, *Olmstead* being a primary one, *Bracken v. Abbott*, *Atkins v.*

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Virginia and some others, they don't relate to employment situations generally, *PGA v. Martin*, another one.

So all which is to say I wouldn't look to Supreme Court as a savior here, I wouldn't look to the court as a savior for anything, but I certainly wouldn't look at that for a disability rights perspective. And I think for those of us who've been at this for a long time that's always a little bit hard to swallow because we do think of going to the courts as places where justice can be done when it's not otherwise done. So I wouldn't say give up, but I would say be careful of the cases that you bring and make sure they're really watertight. And that does actually give me a chance to say something about that came up this morning that I thought was so interesting that Nicole Porter found, and which is how many cases of plaintiffs with disabilities in the employment sector context lose because the plaintiffs in deposition talk about how they can do the job and they're not limited, and then they get knocked out for supposedly not being substantially limited in a major life activity. I view that as really a, at least if the people are represented by counsel, as a lawyering a failure. Because the lawyer absolutely needs to sit down with the clients and distinguish between the pride someone may feel in being able to do a job or the ability to do a job when provided with proper reasonable accommodations versus the exclusion from, often, from jobs. So, it's just something where we have to be very careful, as we always should be in our lawyering.

So, what are the items the sort of that are either just emerging or that needs to continue? *Olmstead* is obviously one place where there's a lot of interesting movement. Andy Imparato in the last session talked about the Disability Integration Act that's an effort, bipartisan at least technically, there is at least one Republican senator who co-sponsored it, but which is really to really, extend the *Olmstead* principle to give it a little bit more, you know, to address long term services and supports, which is a critical part. And it's certainly something that is needed. And again if we think about employment why are people with disabilities underemployed? There is a range of reasons. Stigma is part of it, but poor transportation, inadequate support, inadequate family care leave, things like that are all there; lack of flexibility in the workplace. These are all issues that are there and have to be, have to be addressed.

Beyond employment, certainly an area that is where there's quite a lot of litigation, not much of it actually which is as yet gone to decision but many cases that are brought, settled or otherwise resolved, is in the area of website accessibility. So, this is something that, you know, in 1990 when the ADA was enacted Al Gore had not yet invented the Internet. So when Congress wrote Title III, which was equivalent to a similar title in Title II of the '64 Civil Rights Act, it was focused on public places. Physical places of accommodation, which are public places or private places open to the public and so a laundry list of places that go well beyond the ones that the '64 Civil Rights Act mentioned. You know the lunch counters, no lie, as good as that was that it didn't address, you know entities like the Internet that don't have a physical presence to them and so there's been this ongoing question, does/is the internet covered by Title III? In the last administration there were efforts to, by regulation to put that out there, but those regulations did not get finalized and is, this will not shock you, under the Trump

administration those have been put on hold. So, I don't expect any immediate regulatory work.

The Department of Justice has consistently taken the position in its statements of interest and in its technical manuals and guidance's that Title III does cover the web and there's been, there's now a case on appeal in the 11th Circuit on that matter and the 9th Circuit issued an excellent opinion in the *Domino's* case recently. So, there is beginning to be some understanding and not to get too technical about that, but basically the notion is even if the internet is not a physical place insofar as you are trying to get services from an entity that has a physical presence, like a Domino's Pizza store, or places that encourage you and sometimes really require you to go to the web to get their services, then that is a strong enough nexus to cover, to cover the internet. So I think I'm actually moderately hopeful that, that's going to go that way although as we said earlier, you know, when you're talking about web accessibility. And you're talking to judges of a certain age, their understanding, that you just have to hope, you know, that they've got young children or grandchildren who can explain, you know, the internet tubes to them because otherwise that's going to be tough.

I think a very big issue and we've alluded to it a couple of times today that's really on the horizon and it's one that I've spent a lot of time on is, alternatives to guardianship and in particular, versions of supported decision making, which is which has arisen now as the, as a, really significant alternative to guardianship. If you look about this at this issue in the long sweep of history, we didn't really worry about guardianship for people with disabilities so much when they were institutionalized because there were no decisions they were being asked to make anyway. And if there was a guardian involved it might be in/on a more of a plantation model. The superintendent of the facility who was guardian for all people. Well, as people have come out of institutions or many have, and as people have avoided them, they're living in the world. And in living in the world, they are facing decisions about their finances, about where to live, about the medical care they want, and too frequently, and it's we're still fight, we're very much fighting this fight, the answer to a how do you help people make decisions when there might be a question of whether they can, has been well, they need a guardian. Let's appoint a guardian and the guardianship substitutes somebody else, the guardian, for the individual with a disability.

The move now in support of decision making, given a very big boost by the UN Convention on the Rights of Persons with Disabilities--which of course the U.S. has not ratified--is to say, "No. The person with a disability has capacity." Might need support as we all often do in decisions we have to make, when we choose to get support. And that's, that really ought to be the norm. That ought to be the standard and we should only vary from that either never, which is what the Committee on the Rights of Persons with Disabilities says, or at best only after truly exhausting alternatives to a substitution. There are four states in the United States including, I'm happy to say, the District of Columbia that have recognized, by statute, supported decision making is a legitimate alternative. D.C. also actually preferences, prefers supportive decision making in the educational context for young people in the special ed system transitioning at age 18, which is great. But there's clearly a lot more work to do there and there's a lot of need

for additional understanding as well as, the Grim Reaper is on my shoulder, a way to convince people who don't have disabilities in interacting with people with disabilities why this is OK to do.

We can write great laws we can have wonderful discussions at conferences. If we don't persuade the doctors when they are about to do a medical procedure that a person with an intellectual disability can consent to a procedure with the help of family and friends without having a guardian, they're not going to put their license on the line. They're not going to risk it, and so we have to bring in those people. Who you know we call the gatekeepers, the people who can really say, I don't care what that says. Nobody can make me do it. So, I think we've got a lot of education work to do on that but the bottom line about it, and this is where I'll end, is a recognition of the importance of autonomy and self-determination for people with disabilities. Peter Blanck and colleagues just have come out of it with a new book about supporting decision making. But recognizing also that autonomy doesn't have to mean isolated individualized decision making. We all, again, use family and friends to help us make important decisions when we choose to go to them, and people with disabilities are no different from that. Where we need to move is to get out of the system where the only people in the lives of people disabilities are family members and people paid to be there, to really be living as part of the community not just in the community. Thank you.

Laurie Morin (21:18)

Thank you, Bob. We're going to shift gears a little bit now and talk about an area where the ADA is actually being used on a new frontier. So, Ma'ayan Anafi is going to speak, and I need to get the power back.

Ma'ayan Anafi[4] (21:33)

Can people hear me?

[Yeah]

OK. Awesome. And my name is Ma'ayan. I am a researcher and policy counsel with the National Center for Transgender Equality. And once we are ready to go, I will talk about a more discreet area of emerging law under the ADA and that is anti-transgender discrimination under the ADA and ways that the ADA is being used to advance that.

And while we're setting up, I'll just note that Kevin Barry is in the back there and he is one of the leading lawyers in this area. So I'm just more like a mere shadow trying to channel his brilliance. [*Laughter*] But I will, I will try my best.

OK. So, when we're talking about trends, and I'm sorry I'll get up a bit, I'm autistic so you might see me moving around or sitting a little and that just helps me take in all

[4] Policy Counsel, National Center for Transgender Equality.

your wonderful faces. So, when we're talking about trans people under the ADA we're talking about a couple of different issues, and I'm only gonna talk about one of them because we just don't have time. So, the one I'm not going to talk about. Yup. That works. Yes. OK. The one I'm not going to talk about is the needs of trans people with disabilities, so, trans people like myself are disproportionately likely to have various disabilities and trans people with disabilities have a lot of--OK. There we go. Oh, I see. This is a very complicated contraption--they have some very unique needs. I'm just putting this up here for people who have photographic memories and just can look at this very quickly. But very high levels of poverty, higher levels of unemployment, that both trans people overall and disabled people overall. High levels of experiences of violence and some very unique barriers that are specific to trans people with disabilities around things like access to health care. Access to legal autonomy and general social acceptance.

What I am going to talk about once I figure this thing out. Come on. There we go. [I'm assisting you.] Oh. OK. Sorry. Oh all right. Thank you.

What I am going to talk about is this separate question of whether discrimination based on being trans, or based on conditions related to being trans, should be covered under the ADA. That is, whether conditions that are related to being trans, should be considered to be a disability under the ADA. Now, a growing number of courts say yes, and this is really an emerging area. So, this is something that's just been happening in the past little while. As I'll talk about it in a second, there is this broad exclusion of the ADA and so litigation has had to overcome that. There is really no consensus yet. If this happens and I'll talk about this more in a second, but if this happens it can open up a lot of different avenues for many--but not all--trans people who face discrimination.

So, first stop, what is a condition related to being transgender? Right? Because there's being transgender itself, which is identifying with a gender that's different from the gender you are thought to be at birth. But that in itself is not a, not a medical condition and there is consensus among that in the medical community that being trans itself is not a disability.

But there is a medical condition that's very closely related to being trans and that is called gender dysphoria. That is the distress that is associated with this mismatch between your gender identity and the gender you were thought to be at birth. So not the mismatch itself, but the distress that comes out of it. And that can be a very serious disability that impacts all aspects, or many aspects of your life. Not all transgender people have gender dysphoria. Not all transgender people experience this distress, but many do, and many who do, do not have a formal diagnosis as well. That's really important to consider.

OK. So, I mentioned, sorry I'm moving here really quickly, but I mentioned that under the ADA there is this really broad exclusion. And it was added at the last minute by Jesse Helms in particular. And this was sort of like a, sort of a moral disapproval kind of thing, that tries to exclude conditions that, that are seen as stigmatizing or in some cases as involving criminal activities from the definition of disability. So, as you see

here, I'll read this out loud. Under this chapter, the term disability should not include transvestism and trans-sexuality, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments as well as other conditions that are commonly seen as very stigmatized. So, this looks like a really broad exclusion and that means that for 25 years since the ADA was passed, transgender people didn't really try to get our recourse under the ADA or when they did, they were kind of very quickly rejected because of this exclusion.

But recently there have been a number of cases that have tried to challenge this exclusion. And they've tried to challenge it on two types of arguments. One is a constitutional argument; the argument that this exclusion is unconstitutional. So, the argument is that excluding trans people, or excluding conditions related to gender identity disorder disorders, or however your phrasing it, that violates the equal protection clause. It is an exclusion that is simply driven by a bare congressional desire to harm trans people, to single them out, to stigmatize them. It serves no purpose other than that.

In addition to that, there is a statutory argument that's being used. And that is that the exclusion itself should be read narrowly so that gender dysphoria itself is not actually covered as a disability. Now I know that you're probably saying, going back to this, this exclusion here, you're probably saying, this is a pretty broad and straightforward exclusion. How are you possibly going to get around that and read that in a narrow way Well, I don't know how ?many law school students are here but, a lot of times when I was 1L, I was I used to think like, you know, why are so, why are all these things I'm learning as a 1L, how are they ever going to help me? This is why. [*Laughter*]

So, there are a couple of principles that are really important when we're thinking about how this statute gets interpreted. One is constitutional avoidance. The courts are going to try to find, an interpretation of this statute that allows them to avoid talking about the constitutional question. And then under the, the ADA Amendments Act, Congress also clarified disability should be broadly construed. The statute should be, should be applied as broadly as possible to serve its remedial purpose. And so those principles help courts look at this, this, this statute, this exclusion and say all right maybe on the face of it at first blush kind of looks like it, like gender dysphoria, out. But I might find ways to read between the lines in a way that allows gender dysphoria to be covered and there are a couple of different ways that the statutory argument has been framed.

One is that there is a difference between discrimination based on being trans and discrimination based on gender dysphoria, right? As I mentioned before there's a distinction between the two. And what this exclusion does is say if you face discrimination because you are trans that is that, that's excluded. If you face, if you faced discrimination because you have gender dysphoria, that's a different matter. That is not what's excluded here.

Another argument that has been used or that courts have entertained at least, is the idea that the words that are used here--transsexualism, gender identity disorders--those are really different from what we understand today to mean gender dysphoria. The diagnosis of gender dysphoria is different from what gender identity disorders were from what was back when the ADA was passed. The medical understanding of what's involved has evolved dramatically. And so, these two things should be considered separately.

And, a final variation of this, is looking specifically at the, oh I don't have a little laser, but looking specifically at the language at the end there, gender identity disorder is not resulting from physical impairments. One argument is that gender dysphoria may in fact result from physical impairments. There is some emerging research that suggests that there is some kind of biological root to it, the exact biological root is not totally fleshed out right now. But there is some emerging evidence about that.

This is actually, this last one here, that's actually the route that the Department of Justice took when it was weighing in on some of the cases I'll mention briefly. It said to the court, you should read this, this exclusion narrowly because gender dysphoria might result from physical impairments. And so, it is not covered. Ok hopefully, I have a little bit more time. So. Oh OK. I do not. So, we've seen a couple of cases moving along in really, really the past two, three years. So, one of the major ones is *Blatt*. That was a case where a woman named Caitlin Blatt was discriminated against in her workplace. And, and she challenged the exclusion. She tried to sue under the ADA and challenged the exclusion and the court eventually said, yeah gender dysphoria is not categorically excluded. I'm going to use the theory there that gender dysphoria and being trans are two separate things.

We've also seen it applied in other areas like challenges to changes in birth certificates. And also, to prisons, to discrimination, to the mistreatment in prisons. What this means and I think I'm closing off here, what this means is that on, if this area of litigation develops further, then this can give a trans people or at least some trans people on--because remember not all trans people have gender dysphoria and not all trans people have a diagnosis of gender dysphoria--but it can give some trans people a new way to try to assert their rights in addition to sex discrimination laws. And the ADA, really importantly covers area of, areas that are not covered by all federal sex discrimination, sex discrimination laws at the moment and that includes public services and businesses of public accommodations, government services, prisons, jails. I mentioned the case a second ago that tried to challenge mistreatment in jails, using the ADA as well as government funded programs via the Rehabilitation Act so it can give them broader, broader protections. And finally, unlike sex discrimination laws, which kind of work on the theory of you know you have to all be treated equally in the same way the ADA requires reasonable accommodations and that can come into play in a number of different areas where people need additional supports to allow them to thrive in the workplace or schools or whatever area. And. Yes that is it. [*Applause*]

Leslie Francis[5] (33:21)

On. Yeah. Great. So. I'm pretty sure it isn't on. Okay.

There we go. OK. So, I'm Leslie Francis. I'm from the University of Utah where I direct a Center on Law and Biomedical Sciences. And also I sometimes represent people who are the subject of guardianship. So, we might want to talk more in the Q and A about that. I'm, I was asked to sort of do this as a bit of a wrap up. So, what I'm going to do is try to think about what are some of the ways, are to think about the ADA. To try to, I know this sounds a little bit like a downer, but to try to avoid backlash. And I think, I remain worried, that the politics of resentment if you read books like Arlie Russell Hochschild's, Strangers in Their Own Land, that looks at why people voted for Trump significantly against their own interests.

The sense that some people are getting ahead, butting in line, resentment of people claiming independence when, well really you know, they should recognize that they need to be taken care of specifically, for disability. If you think about some of the fights about service animals, the sense that people are claiming to be disabled when they're really not. That people are responsible for their conditions, you see this in discussions of the opioid epidemic. That disability rights are special privileges and that, even worse, they might impose costs on others. Those are all themes that you hear in backlash. So, I think that there are three important ways of seeing the ADA that can help address backlash. The first you've heard is a theme in a number of the discussions, and I know the last panel today, that the ADA is a civil rights statute. It's not a welfare statute. A second, which I think is a little harder, is understanding disability rights non-categorically, rather than as directed only for a special group. And the third is distinguishing between modifications and accommodation in a way I'll talk about in a minute.

So, I'm going to explain briefly what I mean by each of these themes and give you an example of each. So, first of all, the ADA is a civil rights statute. That civil rights are rights to receive equal treatment in the sense of being free from discrimination in important aspects of life. The ADA, as a civil rights statute, guarantees meaningful access to employment, public services, public transportation, and public accommodation. What the IDEA does it for education. What that means isn't special benefits. But it means access to the important aspects of life such as education, singled out by the statutes that are enjoyed by others, on terms like others can enjoy them, despite the fact that accommodations or modifications may be needed for differences.

So, take the, one of the more encouraging cases of recent years the *Endrew F.* decision in which a student with autism sought reimbursement for private school tuition after the school district, his parents removed him from the school because he was not receiving an adequate IEP required for a free and appropriate public education. What the school district said was, "all we need is minimal progress." The Supreme Court said

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that, no, this was the question that was left open after the decision many, many, many, years ago. What the court said was that a school must offer an IEP reasonably calculated to enable a child to make progress, appropriate in light of the child's circumstances. So, a standard with teeth. This means a child's IEP, need not aim for grade level advancement, if that's not reasonable, but that child's educational program, must be appropriately ambitious in light of his circumstances just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

So, second, disability rights is non-categorical. So, what's the problem with seeing rights as categorical. It focuses them I think. Bob's example is a good one, it also ties right in the same kind of theme here. It focuses on whether somebody can meet the qualification and gave the court all the rope it needed for the *Sutton* trilogy, *Toyota v. Williams*. If you see the ADA as non-categorical, what it's up against or what it's trying to remedy, is a kind of discrimination. Discrimination on the basis of disability rather than providing particular benefits for members of a group that is narrowly defined. Now, in fact, what would be true is that folks who experienced this kind of discrimination will be people with disabilities. And I grant this is the most controversial of a lot of people see the ADA as categorical, you've got to have a disability in order to come in and the ADAAA didn't change that. But I just want to give you a case to think about why it might be helpful to think about the ADA non-categorically.

So, *Bush v. Donahoe*. This is a 2013 case, District Court decision in which a Postal Service employee with an ankle injury needed to wear an open toed boot for about five months. Ankle injury was going to resolve. The court said rather nicely, I guess, that the ADA and the regulations the ADAAA, the Amendments Act, saying that we need to understand disability broadly, made clear that the primary focus in cases brought pursuant to the ADA and the Rehab Act should be whether the employer has complied with its obligations and not whether the individual meets the definition of disability. That was great language. Unfortunately, the court ignored this point saying that the plaintiff wasn't actually disabled, because the injury was temporary non-chronic. Thus, didn't substantially limit a major life activity. Thereby reading the language that was put into that "regarded as" prong into that actual disability language. And then also said the plaintiff wasn't regarded as disabled because whatever the employer thought her employment could, I mean her impairment couldn't be expected to last for more than six months. So, it came within the transitory and minor exception. When really the focus should have been in a case like this on whether this was discrimination on the basis of disability, not whether the employee was a person with a disability.

Ok, last point is going to be distinguishing accommodation and modification. So, sometimes discrimination takes the form of a failure to accommodate particular individual's differences in ways that they need to perform jobs capably, experience public services or public accommodations. Sometimes, discrimination takes the form of more general failures. The way work hours are arranged. The built room with lots of stairs. Things like that. Now, an accommodation might be auxiliary aides and services for a particular individual. But a modification is a change to the policies or structures.

Now, when accommodations are construed as modifications, the result may be as in *Southeastern Community College v. Davis*, that the person is seen as requesting an inappropriate change in an entire program when what's really being requested is a change in policy, but that's perceived as an accod-, a request for an accommodation. You may get the idea that what's being asked for is a special privilege.

So let me just, look a little bit quickly at *Southeastern Community College v. Davis,* which was litigated at the trial court only on the question of whether Davis's qualifications for admission to the program should consider her, what she could do with her hearing impairment or her qualifications apart from her hearing impairment. So she never put on any evidence of what her capabilities would be with an accommodation and the College just said, we're unwilling to grant the accommodation. So, it was never litigated on whether the accommodation would have been a reasonable accommodation and the court then just credited everything that the college said. And instead never looked at whether she might have been, with required auxiliary aides and services, able to participate in the clinical part of the program. But just said look what she's asking for is to become a nurse without ever participating in clinical training and that's an unreasonable modification. OK.

Now if you look at, if I can do one thing in the next few years, I want to get rid of *Alexander v. Choate*, which is a horrible decision. I don't think I, I'm going to be able to do that but, I would love to be able to do it. Because I think if you go back, actually it was at the same time when affirmative action cases were being decided. And the court misperceived what was a request for a modification in a 14-day cut off as a request for special individual privileges. And criticized that, actually using the same kind of criticism of affirmative action that it had used in other cases that were percolating up in the mid-1980s. So, the words of the court of Section 504 does not require the state to alter its definition of the benefit being offered simply to meet the reality that the handicapped had greater medical needs, to conclude otherwise we need to find that the Rehabilitation Act requires states to view certain illnesses as more important than others and more worthy of cure.

OK. So, to summarize. I think we need to keep doing really serious theoretical work on what it means to see disability rights as civil rights. To focus on remedying discrimination, not who is disabled, and carefully consider whether in particular circumstances the non-discrimination requirement is an accommodation requirement for the need for modifications. And I would be remiss if I didn't acknowledge at this point the memory of Anita Silvers, who died a couple of weeks ago and with whom I was working on much of this. So, there were citations and I'm happy to send anybody my slides.

Laurie Morin (48:12)

Thank you so much. We started a little bit late. [*Applause*] We're not done yet. We started a little bit late, so we're going to take about 20 more minutes and we're going to spend a few minutes for the panelists to respond to one another about some of these larger things and then we're going to open it up for your questions. When we do,

we'll bring a mic around because we need to use a mic to make sure that everybody is able to hear the questions. And if there's a student in the room who would love to run around the room with the mic, please come up during this part of the conversation. So, I'll throw it open to you whether you want to respond to one another's comments.

Robert Dinerstein (49:02)

Just one thing. I think the categorical point, I think it's a really interesting one. Because, as you may know or if you think about it, you don't have to have a race to ring a case under the '64 Civil Rights Act. You don't have to have a gender, everyone with whatever level of complexity. Now some of those questions have that, they maybe didn't, or weren't thought of to have back then. It's just you, the claim, the focus is specifically on, are you being discriminated against on the basis that is protected by the statute. The ADA could have gone that way. The ADA could have just gotten rid of the definitions altogether to say anybody who claims they are discriminated against on the basis of disability, if you can prove that, you can prevail. When we alluded earlier about Bob Burgdorf, who used to teach here, who was one of those involved in the original drafting the ADA, the thought at the time was well, we already have Section 504. In Section 504, not in the statute, but in the regulations, does establish these various categories about influencing major life activities.

This would be less controversial to build upon that and I think you know in hindsight, I mean I can't say that was a wrong choice at the time, but I think there were things that, that were unfortunate both the increasing conservatism of the court and frankly by bringing in private defense attorneys to represent businesses in the private sector, who had much more incentive to try to put every defense out there they could. They went very aggressively after the definition of who has a disability and so again as we've said before, before the 2008 amendments, cases were getting knocked out left and right that never got to the merits. We never got, and I think that's actually contributed to the frankly less robust, case law you would have expected from a statute that's as old as the ADA, because so many cases just got knocked out before we even got to the merits. *Sutton* being a very prime example of that.

In 2008, again, I think strategically and maybe Chai could speak to this later. The thought was well rather than get rid of this big problem of substantial limitation in what's a major life activity, let's explicitly overrule the *Sutton* trilogy and *Toyota,* which they did. Let's make it really clear that we don't like, you know, strict definitions of what's a substantial limitation, that the court should not spend a lot of time on the definition. We want to get to the merits. Again, I'm not going to say that was a wrong choice. I think it was a choice that was needed to get the support of the business community, which was important in making the 2008 amendments go through. But as a consequence, this is a very long way of saying, while I love the idea of not thinking of disability as a categorical thing, I think it's hard to do that given the way the statute is structured. I don't know what your answer to that is.

Leslie Francis (51:50)

Yeah, well I would just add to the ammunition on your side, which is no reverse discrimination litigation.

Robert Dinerstein (51:58)

Right.

Leslie Francis (52:01)

So, here's my answer. That, first of all the language to construe broadly, I'm really suggesting a change of emphasis. Get the law to focus on what's non-discrimination as much as we can, rather than who. And maybe it will shake out, but my great worry is that as long as the statute is perceived as a categorical statute as only for a few. And you can see cases I mean, I've actually got a database of all the case law, and you can see cases where the *Sutton*-ish-ness is reemerging. And it's dangerous. And that's, that's what I can change the frame. Even if you can't fully change the statute, change how the cases are framed. This is discrimination on the basis of disability.

Robert Dinerstein (53:23)

I quickly just add one thing, and then we will take a question, which is you know for those of you who think about this in disability studies terms or, or do work on the international level, there is a big focus on the social model of disability. Getting away from a medicalized model, which has been more common here and I've always felt that the, that's the categorical part of the ADA makes that hard. The best part of, you know, talking about the interactive process in Title I or the "regarded as" definition, are really helpful about thinking that something we know, which is the physical or mental impairment that an individual has is much less significant in terms of limitation in society than society's response or lack of response to it, both attitudinally and in the built environment. So, it is it is a place where I think I agree with you. I think we should try as hard as we can to make those kinds of arguments, get away from the way the physical quality is limiting what you can do and get to the core discriminatory step.

Leslie Francis (54:20)

And just one other addition to that, a prop--,I think a huge problem that, that was not seen with the ADAAA was eliminating the reasonable accommodation requirement for "regarded as."

Jennifer Mathis (54:43)

Yeah, well, I would say it wasn't that it wasn't seen it was that.

Leslie Francis (54:47)

Oh yeah.

Jennifer Mathis (54:49)

Well I know a lot of.

Leslie Francis (54:51)

Yeah, well Congress alleged to.

Jennifer Mathis (54:53)

Getting to the bill that passed, yeah. It was, got us to different place and I think where things started out and getting a negotiated compromise that was the only way that, you know, anything could move forward. That was the first place that the business community went given that you know we had started with, well, actually it's not worth getting into. But I just I, I would push back a little bit on the notion that it's all just about the structure of the ADA. And I'm not sure, I mean I think you know there were changes in the ADA Amendments Act, to kind of, how Title I, was structured to try to take the focus, some off, of you know person with a disability being there kind of twice and, you know, there was an effort as you said with the language to say the main focus should be on whether discrimination occurred and not on whether you fit in the box or whether you have a disability. But I think it is hard to get away from it being categorical even if you just said, you know, the statute says on the basis of disability.

I think it hasn't been the same type of problem under Title II and Title III of the ADA, to focus on the categorical nature of it and who fits in the box, the way it has in employment. It really has been I think very different and you still have that same on the basis of disability. So I'm not, I'm not sure that it's all about, sort of you know, that it's a categorical statute and the way the structure of the statute is, if you have problems under Title III of the ADA particularly, with still disability not being seen as a civil rights issue. With still this notion that you're seeking special rights and that you know you're seeking something that other people aren't entitled to, and you're a burden. And all of this that I, I'm not sure that it's about the structure of the statute because I think that, you know, even under Title II and Title III, you don't have the same focus, the same laser focus on who's in the box, but you still have the problem of how disability is seen.

Leslie Francis (57:56)

So, something for those of you in the audience to recognize is that when the ADA was originally passed the Rehabilitation Act regs had different, I mean the Rehab Act, the trigger was federal funding. And then when the titles got divided up, Title I, Title III, Title III and so on. They're actually quite different with respect to many kinds of things like whether or not there can be a hardship defense and things like that; and that tracked the Rehabilitation Act. So, sometimes you'll see people say well because the ADA and the Rehab Act are supposed to be in sync, that sort of looks like Title I, Title II,

and Title III should be the same. That's a terrible mistake. I was meaning to pick up on your point John.

Audience Member #1 (58:38)

First of all. Okay good. I couldn't hear everything. So, I don't want to directly respond to any one person's remarks because I'm not sure I caught all the language. But I do think it's, and I would do also a gentle push back to the extent that this notion was put forward that, that everybody should be covered under the Americans with Disabilities Act. Civil rights laws historically are predicated on a, and constitutionally predicated more importantly on a notion that there's been a very long history of discrimination. So, people who broke their toe or broke their ankle, they weren't institutionalized. They have not been denied education. They haven't been denied transportation. They haven't historically been excluded in large numbers from employment or shunted into special programs and separated from society.

So, I think it's important to make sure that the only people who really are at the forefront of benefiting from this civil rights law is the people who have and are in categories who have historically experienced discrimination. Now the Amendments Act opened that up some. I think that's good to the extent that it closed off the legal questions. My own view as someone who's litigated these cases for a long time is one of the things that went wrong under the original ADA was that lawyers fell in love with summary judgment motions and out of love with trying cases to juries. I think if you had tried a lot of these cases to juries, where they were disposed of summary judgment, you would have gotten different outcomes and had much less really bad precedent. So, I have to, I have to be in favor of limitations. If we're gonna call this a civil rights law, if we're gonna call it a social service law, then that's fine and I'm not opposed to that, but it's not a civil rights law.

Laurie Morin (01:00:40)

Would anybody on the panel like to respond? I didn't hear a question there, so we could move on to the next question?

Leslie Francis (01:00:50)

I can, I can say two things quickly. First of all, it was, I mean the summary judgments happened because employer's counsel brought the motions for summary judgment and then they were granted. On the, on the broken toe person, I think the question is whether that's discrimination on the basis of disability and it's possible that it is under "regarded as" prong if the employer thinks that people with broken toes can't have sub--have conditions that mean they can't work.

Audience Member #1 (01:01:34)

Yeah. I understand your position on this. I don't think you ever intended to…

Laurie Morin (01:01:46)

Okay. Yeah, I've been given the signal that we have five more minutes, so we'd like to fit in a couple more questions.

Dr. Rabia Belt (01:01:53)

Hi. I was wondering in terms of the, sorry Rabia Belt, Stanford Law School. I was wondering in terms of this reframing for a couple of reasons. One is that I don't know if you can get away from the categories; if we do look at something like affirmative action, then we see all these cases being brought by folks who are not the intended beneficiaries. White people, as a way to destroy affirmative action because there's not, the reverse discrimination prong that the ADAAA has. And if you're going to avoid people using it in reverse discrimination ways, you have to figure out a way to distinguish those people from that would use it as way to sort of destroy disability rights versus those that would use it to facilitate it. But I think, sort of a more overarching question though is that if we're thinking in terms of universality, right? With respect to disability rights or we want to avoid a backlash it seems odd to not talk about race. Especially given that I think one of the big reasons why we have needed disability rights and benefits is because we're so parsimonious when it comes to social welfare in this country and that is all about race. So, it just, I mean in terms of carving out things like Social Security or sort of other things that are seen as sort of for special interests, that is often something that has race underneath it. So, in terms of that sort of thinking about disability as something that can be, sort of these benefits that can be allocated to everyone, just wonder how does race fit into the picture?

Laurie Morin (01:03:41)

Somebody on the panel like to pick up on that?

Robert Dinerstein (01:03:44)

Well, you know one of the things, again is going back to even the statistics about poverty and employment is, I think we, we have to recognize that, that these factors intersect in ways that are very complicated. And so the experience of an African-American woman with a disability is going to be different; who is heterosexual is going to be different from one who's a white male who's is not. Both of whom have disabilities. I think the question becomes how do you translate that into either doctrinally or otherwise to kind of target what, what you're talking about; some of it may depend on the particular kinds of settings in which people are challenging some of these things.

You know in the *Echezabal* case which, which the Supreme Court had the *Chevron* case at the oral argument, this is a case about whether somebody could work for a company that he was, he was, he was arguably, the toxic fumes from working in the plant were hurting his liver. There was an issue about that and at the oral argument, Justice Kennedy in particular kept saying, well we can't let people commit suicide and work for employers just because they need the money. I'm thinking this is a Latino guy who this is, as you know he's worked at this place for all these years, it seems to be the

way he's supporting his family, who are we to tell him that you know he shouldn't be able to work? And again, what really should happen is the workplace ought to be safer for everybody including for him. But unlike what the court did in *Johnson Controls* on sex discrimination, on disability discrimination they basically said this kind of paternalism is okay paternalism and not bad paternalism. So, I think there's often a failure to understand some of those kinds of underlying issues which may not be front and center in the claim, but which are clearly operating.

Leslie Francis (01:05:28)

One of the things I'm looking at is there are a lot of cases where there's not only an ADA claim but there's also a Title VII claim. And I haven't, this is anecdotal only, but because I haven't actually done the counting of the cases. But here's, here's the hypothesis I'm intending to test: that when there's a Title VII case, the case is more likely to lose. When it's both an ADA and a Title VII then when it's just an ADA case.

Laurie Morin (01:06:15)

We're gonna take . . .

Audience Member (01:06:15)

Can you talk more about the race part?

Leslie Francis (01:06:20)

Well. I mean that's by way of saying, I think discrimination on the basis of race and discrimination on the basis of disability are often intertwined in very damaging ways.

Laurie Morin (01:06:35)

I think this sounds like a longer conversation, maybe to be continued in a law review series of articles, but we'd like to take one more question before we break so that we can have 10 minutes before the plenary, which is going to start at 3:05.

Audience Member #2 (01:06:57)

So, my question is for Ma'ayan. So, lots of trans people with disabilities are denied gender affirming medical care on the basis of their disability, supposedly invalidating their gender. And the doctors often say that this treatment is classified as cosmetic and therefore voluntary. Does the voluntary nature actually allow for this kind of discrimination under the ADA? And does it say our doctors are allowed to discriminate against trans people with disabilities because the health care sought is classified as cosmetic?

Ma’ayan Anafi (01:07:36)

OK. I can answer that. I just want to acknowledge before we move on that I don’t think we fully addressed the previous question and I just want to name that and then, yeah, and then answer yours.

But. So, the medical community has, has, has gone really as made, has made huge strides in the past decade or so and uniformly universally recognizes that transition related care, care that assists people in their gender transition is not cosmetic. It is medically necessary, but we do see a lot of trans people with disabilities getting denied health care for a variety of reasons and among those are doctors who are not competent in treating both needs related to being transgender or transitioning, and a needs related to people with disabilities and also a lot of times trans people with disabilities, getting their, get getting their gender identity is questioned a lot. So, I mentioned I’m autistic, and for a lot of autistic people the response that we often get when, when we say that we are transgender, when we express gender nonconforming traits or anything like that, is that, you know, we can’t really understand our gender because we’re autistic. Or that, or that that, you know, we, we, we are coming out of a place where you know we are feeling excluded from society or we’re feeling like we don’t understand the concept of gender or, or you know sort of a variety of different things that, that use your disability, to then, then devalue or dismiss your experience as a trans person. And personally, when I was seeking transition-related care, that was a huge barrier for me to, to try to surmount. Doctors saying, well I mean until we cure this, you know, disability we, I don’t know if you’re really trans or if this is just your disability talking so that, that’s sort of one area where we’re seeing a lot of, a lot of, a lot of discrimination in that regard.

Laurie Morin (01:09:45)

So, before we conclude I just want to acknowledge and thank Ma’ayan. It is true that we did not fully address the race question and I did not mean to be dismissive. I was really trying to be cognizant of our time constraints. It’s an important point and its important conversation for us to be having here. So, thank you for bringing it up.

Thank you everybody for being here. Please join me in thanking the panelists.

[*Applause*]