ROUGH DRAFT

**2015 Jacobus tenBroek Disability Law Symposium**

**“The ADA at 50: The Future of Disability Law and the Right to Live in the World”**

Held at:

The National Federation of the Blind

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"Disability Rights for an Aging Population: Community Integration throughout the Life Span"

NFB of Utah Auditorium

8:30 a.m.

JULIE NEPVEU: Okay, all ten people.

KELLY BAGBY: More than ten.

JULIE NEPVEU: Okay. Well, you do the counting. I'll start.

All right. So we're going to go ahead and get started.

Hi, everyone. I'm Julie Nepveu with AARP Foundation and I'm here with my colleagues Kelly Bagby, Susan Ann Silverstein, and Dan Kohrman right next to me here. We're going to be talking about the aging population and community integration throughout the life span, because the problem with aging of course is that there's so many correlations with disability.

As everybody knows, of course -- well, let me back up one step. I'm going to talk about the basics of the aging population, and then also a little bit about transportation. Kelly will talk about Olmstead issues. Susan will talk about housing issues, and Dan will talk about employment issues. When we work together, we actually are working on four separate teams doing four separate groups of things but we all try to back each other up and we all love talking about disabilities and getting involved in disability issues. So what we want to do is encourage you guys to both call us when you have questions about disabilities, because we each have our separate areas of expertise in this realm, and we also like to work on cases with people. So if you get a case that you would like to have some help with or just, you know, are considering whether to bring this, would be a good time to give us a call and we could talk about whether we could provide you any resources. But really these are going to be like four separate different presentations because we all work so separately on these issues.

Okay. So the aging population. Everybody knows that everybody is living longer than they used to. Everybody used to die when they were 30 and then 60 and now of course a lot of folks are living past their 80s and in some cases even into their hundreds. There's been like a 66% increase in people living over 100 years old since the '60s. It's just incredible.

What that means is that in another 15 years, approximately 20% of the population will be over age 65, including almost everybody in the room. I see a few stragglers.

And by the year 2040, 25 years, we're going to have 14 million people over the age of 85. That's a huge change, because people over 85 of course start to have a lot more disabilities and a lot more severe disabilities. Approximately half of the people who are going to be over 85 will have a severe disability. And the people who are over 65, about one in four of them will have a disability that is considered severe. And of course any time you start getting up into older age groups, you're going to start seeing more and more disabilities.

Of course the old people don't like to call them disabilities, but that's what they are. They are protected by all the disability rights laws. You won't necessarily hear them talking about disabilities or come to disability conferences because they are not embracing the way the rest of us are, but nevertheless, we do try to encourage people to think about the issues that older people are having as disability issues because the laws don't protect you for aging; they do protect you for disability.

We also have not just physical disabilities but also cognitive disabilities. About 20% of people over age 55 currently have some sort of a mental health or -- well, mostly a mental health concern. In addition to that, we've got about four and a half million people with Alzheimer's and of course by 2050 they're expecting to have 16 million people with Alzheimer's. That's a huge number of people. It's mind boggling. Every time I think about that, it freaks me out.

Mild cognitive impairment, about 25% of the people over age 65 will have some sort of mild cognitive impairment without dementia. And of course they won't know it. We won't know it. We start to lose our functioning when we're about 50. So if you haven't done your will or your estate planning, you better hop to it. So it is time to start thinking about that before you don't know that you don't know.

So what are we going to talk about today? Mostly we're talking about the ADA, but also the Rehabilitation Act and the Fair Housing Act. They all prohibit discrimination that is relevant to an aging population. And the basic purpose is individuality and integration. People have the right to live in the community. People have the right to be treated as individuals, not based on stereotypes, not based on what the characteristics of the group are. You know, a lot of people think of old people as disabled or they're regarded as having disabilities, but a lot of old people, you know, as I said, about 25% will have mental impairment. Only about half of the people over 80 will have a severe disability. But everyone will think, oh, those old people that have disabilities. So where are they going to have trouble? Getting a place to rent because landlords don't want to deal with accommodations and people who need special treatment. Where are they going to get a job? Employers don't want to deal with people who need accommodations. Where are they going to live in the community? Good question. People who are start -- I think you mentioned at your thing, you know, people think you don't live there anymore because they don't see you.

ANITA SILVERS: Because I'm at work.

JULIE NEPVEU: People make assumptions. Oh, she's dead in her bed. We're not dead yet, folks. We're going to be there but not yet. We have a good 20 or 30 years more than we used to, so let's start preparing the world. Because a lot of times there are different community agencies, the police, nobody knows that people are living longer. They have not started to plan for it. They have not started to think about what does that mean for infrastructure, what does that mean for building housing that can accommodate an aging population, fixing the sidewalks so that people can get around safely. They haven't started thinking about that. And of course as I said, in about 15 years 20% of the population is over 65. I don't know who they think will do that construction work. So let's get people thinking about this. You have to push it and let people know this is happening.

So that's my spiel on what's going on. Everybody knows that integration is a mandate of the ADA. It's also a basic tenet of the Fair Housing Act, the Fair Housing Amendments Act when they added disabilities that Susan will talk about. We know it prohibits separate accommodations. You can't just push people with disabilities off into the senior housing or off into, you know, segregated living facilities. You just can't do that anymore. You can't provide the benefits. You can't make people live in one section of the neighborhood versus another. You can't only build housing in one occasion of the community and not another.

But now I'm going to talk about transportation. We only have about 10 minutes each and I'm pretty halfway through mine, I think.

So transportation. One of the most basic -- Congress when it passed the ADA recognized that one of the most basic rights under the ADA was the right to transportation and equal access to both regular transportation and to paratransit because if you can't use the regular public transportation, you don't have access to transportation. The reason they recognize it is because it facilitates so many other rights. If you can't get where you're trying to go, you can't go shopping or get a job or visit with your friend or go to healthcare appointments if you don't have transportation. Of course with an aging population, the big problem is they're all used to driving everywhere. We all are, right? And one day we won't be able to. And then we're going to be like all freaked out. We won't know about public transportation or how to use it and of course we won't want to learn when we're 80 years old how to use public transportation. So it's scary. And of course half of us will have severe disabilities. So a lot of folks will have to rely on paratransit. Paratransit is a service available for a three quarter mile radius around every fixed route public transportation stop. And in some corridors where things are kind of close, it covers everything. So it's not a universal service. It won't take you from Annapolis to Baltimore, but it is going to make sure you can get around in the city. If you live in the right place. So you have to make sure you're living next to a transit stop or that a transit stop is coming to your neighborhood soon. All of us folk who live out in the suburbs will rue the day that we decided we didn't want public transportation, right?

The three quarter mile radius, that's just where they pick up and drop off. That doesn't mean you have to live there. If you can get to three quarter miles from a transit stop, they have to come and pick you up from there. They have to provide the service. If you call the day before, they have to provide the ride the next day, and they have to provide it within about a one-hour time frame around when you want to be picked up. And they're supposed to drop you off on time too. We're see about that. A lot of problems with paratransit right now. I'm involved with some litigation with Kate here at Maryland Disability Law Center. We're suing the state for denying eligibility, their wait times, people waiting an hour on the phone to make a ride. You know, imagine if we all -- who can stand waiting 3 minutes on the phone? I can't. Everybody, if you need a ride, you have to call every day and get a ride, and you have to wait an hour every day. And if you need to cancel and change your plans, forget it, that's another hour. So that's a violation of the law and that's why we're suing MTA. But if you have transit in your neighborhood, I guarantee you have problems too. It's a very vital service.

Now, we also, I said something about safe sidewalks earlier. Sidewalks are a mess, right? They have huge holes in them, the curb ramps, you get down with your wheelchair and then you can't get back up because the angle is too steep or there's a big pothole at the bottom. Lot of problems with sidewalks and curb cuts, with people not clearing the sidewalks of ice and snow. All kinds of problems like that. And those things can be fixed with happy litigation under the ADA. So if those are the problems you're seeing, and if you're not, it's because you're not looking. Every time I go out, I'm like, oh, my God. Every time they pave the roads in your neighborhood, they're supposed to fix the roads and sidewalks and they don't. So every time you see them paving the roads, give them a call and see whether you can get some action. Because if they don't do it with that budget, what budget are they going to use to fix that? They're not. They have to include it in the project.

Now, a really important thing happened a couple of days ago. March 13. DOT, Department of Transportation, came out with a new final rule that clears up a problem that started with the fifth circuit in the Mel ton versus Dallas area rapid transit. They said that the DOT regulations do not have a provision for making a reasonable modification, reasonable accommodations. That's because the DOT regs said and you're also required to follow the DOJ's regulations that include a reasonable modification, but the court said, well, it doesn't have the same language so it's not required. And then the ninth circuit followed and the second circuit followed. So nine years after this problem started, DOT finally came out with its final rule saying, yes, you're supposed to provide -- if you're a transit provider, you must provide a reasonable accommodation, reasonable modification. And this does not just apply to public, but this is private transportation providers too. Taxi services. You know, shuttles from the airport. Those kinds of folk, they already had the obligation, but now this reaffirms it.

So what does it do for us? It is really cool because if you've ever been on a bus in the snow, you would be like, can't you just let me off like closer to the edge of the -- so two Fridays ago, it snowed in D.C. and I couldn't come back from New York until the next day because they hadn't plowed our streets. So I came home the next day, my phone was dead, I couldn't call my husband, so I had the bus drop me off closest to where I lived. By lo and behold, the bus stop is not at the intersection. It is 200 feet away from the intersection. And what was in the middle? Six inches of snow on a sidewalk that's under construction, and the guy would not drop me off closer to the intersection instead. So here I am, carrying two suitcases, you know, my briefcase full of binders and litigation stuff and my overnight bag. And so I'm like, this sucks. And he's like, no, they won't let me drop you off closer to the thing. Well, then a week later, this thing comes out and I'm like, man, one week and I could have got dropped off. It would have been great!

So now, everybody, if you have a disability and you need to get off and there's something like construction or snow or something like that blocking your way, you have now got the right to say to the bus driver, no, you must drop me off a little further away so I don't have to drudge through the snow. Or if you are a person in a wheelchair and you are trying to get off the bus but there's a car parked in the bus zone, they must move you to a little further up the street so that you can get off the bus. They must. Before, they didn't have to, and now they must. So there's about 27 things in this new reg. I urge if you guys work on any kind of transportation or have disabilities and ever use public transit, I urge you to read it. It's pretty important stuff.

The only exceptions for them doing this is if it would cause a fundamental alteration. So that means the bus driver doesn't have to reach into your pocket to get the change out to help you pay the fare, but the bus driver must now help you pay the fare if you can't pay the fare. So like if you've got a smart card and can you hold it but you can't reach the fare thing, they must help you with that now. As long as it's not a fundamental alteration.

If they have to move you a little further up the street to get off of the bus, they have to do that so long as it's not a direct threat, not going to cause a huge accident for them to do that.

And if you could use the service without the modification, without the accommodation, they also don't have to do it.

But the only place where there's undue financial and administrative burden where they're not required to do that, that's for Title II public entities receiving federal funds. Private providers of service do not have a fundamental -- I'm sorry. Private folks do not have a financial and administrative burden exception. That's only for the Title II entities. So that's really important. Because they changed both the ADA regs and the Rehab Act regs. So I see people are getting nervous over there. So if you want more information about these new regs, there's 27 examples of things you can and can't do, which is really great. Common things are things like getting off the bus and you can do it at any time and they have to have a complaint process. So feel free to ask me more questions.

Kelly, take it away.

KELLY BAGBY: So we're in stage two of speed dating through the Americans with Disabilities Act. I'm going to talk about Olmstead cases and Olmstead work, particularly around nursing homes. That is the area, getting people out of nursing homes and preventing them from unnecessarily having to go into nursing homes. That's a lot of work that I work on.

And we are blessed to have worked with protection and advocacy programs around the country in about six different class actions that we've brought in California, Louisiana, Florida, Arizona, and D.C. So I'm going to talk a little bit about these at risk cases.

Title II of the Americans with Disabilities Act requires, as Julie was referring to, for public entities to administer their programs in a way that allows for people to live their most independent lives, to live integrated lives in the community. The Supreme Court has interpreted that and the justices' regulations decreed a mandate. It's actually mandated that states administer their Medicaid programs in a way that really allow people to live independently. So that means if a state is administering its programs in a way that sort of creates incentives for nursing facility placements, that's illegal. And if those people could otherwise live in the community and are eligible for the community and don't oppose moving to the community, then the state has a mandate to move people to the community.

Unfortunately, states disregard mandates all the time for civil rights purposes and particularly for discriminatory reasons, but the Supreme Court has defined that as discrimination. If you do not do what this mandate requires, it is discrimination based on your disability. So that creates a great incentive for doing class actions around these populations of people who, for whatever reason, either at risk of going into nursing homes or actually in nursing homes and want to get out.

So I'm going to talk a little bit about the at risk cases. There were quite a lot of these actually during the great recession, where states were making kind of bone head decisions about how they were going to administer the Medicaid programs, and they were just randomly cut things without regard to whether it caused people to end up in nursing homes or other institutions.

So in California we have a class of 38,000 people who were at risk of going into nursing homes because the state had decided to wipe out an entire program that helped people during the day to prevent having to go into institutional care. And so it was a great case in so many different ways, not just because we were successful, but because it was such a great education about what the lives of people with disabilities looked like. The class involved a lot of older people but also a lot of people with intellectual disabilities. And I urge any of you that are ever thinking about doing an Olmstead case to personalize your plaintiffs as much as physically possible. We had a declaration about every aspect of the person's life. From their family, from them, from their physicians, from their program providers, all of which talked about, without this service, they will be dead or in an institution. So you have to prove they're at risk for institutionalization and the natural consequences if they can't get into that situation, they're going to die. So those are really compelling stories, and the best way to do those cases is seeking preliminary injunctive relief. If that's not an emergency, I don't know what is. This person will lose this service on this date and they're going to end up in a terrible situation and they will end up losing their independence which they may never regain which is a tremendous deprivation of their liberty as well as their independence.

So we had a number of those, and they were -- those are actually fast paced cases because they're done at the preliminary junction level and at that point you settle those cases. So they're very fast, you need to have good strong teams to do those cases because there's a lot of work up front and then you're fighting and trying to sort out what is the best remedy. Those cases are you great cases for the DOJ to help you as well because they are deeply engaged in them. And they're short cases. So they're unlike the deinstitutionalization cases which I'll talk about now, they move pretty quickly and they resolve pretty quickly. So justices like those cases more.

So now I'll talk a little bit about the cases where you're actually moving people. This is to me what Olmstead is really about. People are in institutions and they want to get out. You have to help them. For those of you who work with folks who have ever been in institutions, there's a lot of help and assistance they need because they've been cut off from their families, their communities, they don't have the documentation, they don't have social security cards. I mean, a lot of the things they need to even apply for services they don't have access to. So there's a whole series of what we call transition services that are needed to really happen them facilitate their reintegration into the community, and that can take some time. But it also creates a lot of incentives for states to create additional barriers.

We have a case in D.C., working with James and people at university legal services and the D.C. P and A. We've been fighting that case for five years, and I have to tell you, we're not a lot closer to settlement than we were when we started. We just have to keep plugging away. We win everything, but we just have to keep pushing and pushing, because it's such a steep rock to push up a hill when you're really asking them to change the way they look at using nursing homes. You know, Julie started out by saying you're not allowed to just push people into nursing facilities, but that happens every single day. People come out of hospitals and they go into nursing facilities, and that's usually where they go if they have a complicated medical condition. The question is, how long do they stay. And so for a lot of older people, particularly a lot of poor people and people of color, they get stuck in those nursing homes and they don't come out very easily at all. So there are a lot of people, 1.5 million people in nursing homes right now. It's not a significant drop even though there's this whole creation of home and community based services. There's still a lot of people stuck in nursing homes and it's big business so there are many incentives for legislatures to be pushed to not make it so easy to get out because we want to keep these beds filled because it is very profitable. Very profitable. Even though it's a lot cheaper for states to serve people in communities.

So the cases around deinstitutionalization are fabulous and if you have one that you're considered, or you have a place that you have a state where you're really wanting to think about helping clients do that, by all means, call me. Even if we can't cocounsel with you, we would love to help guide you through the process. We've done a lot of these cases in our office with some of the strongest advocates around the country, and we've had really great success. I have to caution, though, that the more narrow you can bring these cases, the more successful. You won't spend five years and still not be close to settlement like I am. So I think the more narrow the claims, the barriers you're trying to remove, the more success you will have in a deinstitutionalization case around nursing facilities. We're still going to win, but it will just take a lot of time.

One of the other key things to think about is creating systems to help transition people. That you can do without litigation. So what are the services people need to move out of a nursing facility or DD center or psych hospital? There's a certain amount of case management, a certain amount of information and education that the state is required to provide to people so they even know that they have a choice of moving into a community setting. But it's also vital that there be some serious amount of individualization looking at what does this person need, how do we actually move them from seven, eight, ten years in an institution to a full integrated life where they have even simple things, furniture, rent subsidies. Who will be their service provider and make sure they have all the medical services they need?

I will finish by saying I have never met a client of mine or of anybody's in a nursing home who can't live in the community. There's not a single person you can show me that with appropriate services wrapped around them couldn't be successful in a community setting. The question is, can you create the momentum to really facilitate that transition for them so that they are successful.

So I urge you to think broadly about how you can use Olmstead, because it's a great tool. There are a lot of ways to use it.

Step three of speed dating through the ADA.

SUSAN ANN SILVERSTEIN: You know, I was the weird kid in middle school and elementary school and probably high school and probably law school, and I'm the weird kid at the conference too because I'm not going to talk about the ADA, I'm going to talk about the Fair Housing Act. But it really is the best law in the world.

I do housing. So I do everything from rental housing to discrimination in home ownership to assisted living, long term residential care to CCRC, Continuing Care Community...

>> Retirement Community.

SUSAN ANN SILVERSTEIN: Yeah. Yesterday you had all those As. Today it's Cs.

Today I want to start with a couple of overarching thoughts. First of all, it's thanks to the disability community, although there was, if you think back to the Gray Panthers and all, there was an aging movement at some point. There's an entire paradigm shift going on in the aging community in terms of how we're looking at how we see aging and where aging takes place and how aging takes place. So we owe an enormous debt of thanks to the disability community in terms of how we look at community integration and that's why the name of this session starts with community integration. So a lot of what we're talking about is following themes of community integration that the disability community has worked on and you'll see that a lot of attorneys in our unit at the AARP are disability attorneys that AARP has snatched up from other organizations to work on aging issues.

One of the things, as I talk a little bit more about some of the housing stuff, is some of the models that we use for how we will provide services to people as they age and where they will live were invented or developed before the ADA was passed in 1990 and before the Fair Housing Amendments Act which was added to the Fair Housing Act to include disability, which was before the ADA. It's not like it's a competition or anything... And these models were like assisted living and CCRCs and nursing homes. Those are older models. And sometimes when I am in litigation or I am on calls with people, and the defense, when you start to talk about discrimination or reasonable accommodations, and people will say things like, well, it's a fundamental alteration or it's an undue blah, blah, blah. And at a certain point, after 30 years of litigation, I've come to a point of saying, you know, I woke up one morning and I said, wait, it's not about fundamental alteration; it's about the fact that these models are illegal because they were invented before these laws were passed and maybe we just have to burn down some of the parts of the old models. So I just want to say that from the beginning, that sometimes pieces of old models that are invented before new civil rights laws, I mean, I think it sort of turned out that Jim Crow didn't work after the civil rights law and nobody sat around and said, well, like how are we going to work accommodations into Jim Crow. So I just wanted to put that out there.

So housing and the Fair Housing Act. The last time AARP polled on this, 94% of the people they polled said they wanted to age in place in their community. Nobody wants to leave the place that they're living in now. And one of the things that we find is that a lot of people as they age start to get told stupid reasons for why they should be evicted. It's like I don't know what happens to landlords when they look at old people, but people start to get notices that say things like, you are too old and frail to live here, please look for assisted living. Or you've violated your lease because your house is starting to not look neat even though you've been a neat freak for your whole life and therefore we think you should go to a nursing home. I don't know when that became a lease violation. So we've done all kinds of cases about that sort of thing.

But let me tell you a little bit about the Fair Housing Act because I bet everybody here is familiar with the ADA. How many people have done Fair Housing Act cases? Okay. You are my new best friend. And the reason I want to tell you about the Fair Housing Act is because once you do a Fair Housing Act case, you will love it. The Fair Housing Act can be found at 42USC Section 36 and on. But I'm going to mostly be talking about 42USC46OF which is where the disability section is. You can all look up the citations. They're all around the same place.

Like the ADA or parallel to the ADA, the Fair Housing Act makes it illegal to deny housing through denial of the sale and rental of housing based on protective classes which are probably a lot of the protective classes you could guess, race, national origin, sex, religion. Some of the ones that are more interesting that were added in 1988 are family status, and the one you'll find most interesting, in 1988 they said handicapped but now we say persons with disabilities. But the Act itself uses "handicap." That's the way it was back then.

And also no discrimination in terms of condition. So that's all pretty familiar, and if you're used to litigating, you know about disparate treatment cases. As it turns out, there's a case pending in the Supreme Court called Texas versus Inclusive Communities Project in which the Supreme Court has taken up the specific question of whether there is disparate impact under the Fair Housing Act. If you're on social media, look for the hashtag keephousingfair. I won't talk more about that because I'll get very upset.

Some of the -- and one of the other points I want to make is that we look at all kinds of discrimination in senior housing or housing as it relates to people with disabilities. So we have also looked at race discrimination, national origin discrimination, limited English discrimination in housing for people with special needs or aging housing. So that's sort of the unique take that we have on that. One of the things that we've looked at, I have an active case against the state of Illinois which used one of its Medicaid waivers. I never thought I would have to learn about Medicaid waivers being a housing attorney, but apparently I did. Because again it's all about community integration. So they took a Medicaid waiver which on paper looks great for supported housing, it meets all those great criteria, people can come in and out whenever they want, they get their supports. They targeted in the waiver people with physical disabilities, which was allowed under the Medicaid rules, and then they said that no one who also had a mental diagnosis or disability could use that waiver and be housed in the supported housing.

No, that's not how it works. We talked a lot about that in an employment session yesterday about how you needed to look at can you otherwise be qualified for the job. Well, here, it's the same thing. Are you qualified for the housing. If that mental diagnosis is not going to interfere with your use of the services or that housing, they can't discriminate against you because of an additional diagnosis. This was one of those chicken and egg things. If we had only sued the specifics of housing and settled with them, they were pointing to the state and even if we had settled with them, we wouldn't have changed the practice in the state. And the state was insisting, we're not subject to the Fair Housing Act; we're a Medicaid provider.

That brings me to another point in the Fair Housing Act, how broad the coverage is. You don't have to be the person in the protected class to bring a Fair Housing Act case. And again, this isn't a Fair Housing Act training so I won't go into exactly how you get standing. But if you are the aunt of a person with an intellectual disability who goes to apply for housing and that person is discriminated against, you can file your own fair housing complaint on the basis of the emotional harm and indignity that you had to suffer when you found out that the housing provider misrepresented to your niece that that apartment was not available. You have an independent cause of action. Because the broad purpose of the Fair Housing Act to integrate society and bring us into one integrated place, to accomplish that purpose, all the badges of segregation and discrimination need to be removed from the public sphere. This is not just work. This is our world that we live and function in. So all of these things are very important.

There are provisions in the Fair Housing Act that make it a non-intent violation of the Fair Housing Act to advertise, have statements, and this is where I was going to say, wait, there's more, to have notices is the technical term that a reasonable person would interpret as discriminatory. I'm not using the technical legal language. That applies to advertising images. So if a leisure community or a 55 plus community or any community open to anybody, if all the pictures in the advertising are all of people running and doing Cirque du Soleil poses or doing pole dancing or, I don't know, sing Gregorian chants, and not one picture is of somebody with a white cane or in a wheelchair, you know, and again, there's cases that talk about, well, how many pictures? If they only have one picture over the course of a year, that's a different case than if this is a large advertiser and they have 30 pictures and not one has this.

The last thing I want to say is, some of the really, really important themes that have come up is the theme of when people need -- well, we all need assistance to live. But when people need particular types of assistance and they're going into housing that also provides assistance, who is allowed to provide which kind of assistance? Like if you go into assisted living but you've always had somebody come to help you on Fridays with something particular, can you still have that person come and help you with that. If it's not something that the facility is providing. And also, I'm just going to say a couple of things because they may be of interest to you. I had asked if you were at the employment thing, I had asked Brian about this in the context of employment. I am very interested in the state rules that regulate supported housing and assisted living that have rules about you have to be able to ambulate, to get out of the building in order to live there, you have to be able to play hopscotch or you can't be eligible, whatever the rules are. And I have friends who I litigate with who will not be -- I mean, if Ken dies, I happen to be married to him. If he dies and I fall in love with somebody else and I marry them and they have been disabled their whole lives in a wheelchair, they won't be able to get into the same assisted living facility that I might be able to get into. I mean, assuming I won the lottery and could afford it.

That seems wrong to me. How can somebody who has lived their whole lives then be told they're not independent enough to go into assisted living. Makes no sense to me.

So I need to turn this over to Dan. I love talking about this stuff. Grab me at any time. I think this is critical to integration. If we get people out of nursing homes and they can't integrate into the community because there's nowhere for them to live, what have we done?

DAN KOHRMAN: All right. Well, what you need are a whole raft of additional issues to consider. I'm here to provide you just a few more. I am one of three employment discrimination lawyers at our legal unit, and I'm the one, actually, who has the responsibility for developing a disability discrimination and employment docket. And so I'm always wearing multiple hats. And I wanted to just say a few words about some things that maybe you haven't thought about as deeply as you have about disability data and issues that show why the general population data that my colleagues have talked about, about the aging population in the United States, also is true of the aging workforce. And then I want to tell you about a couple cases we get involved in at AARP, and the message really that you've heard from all my colleagues, you'll hear from me as well, that we love to partner and we're always looking for good partners, lawyers and others, to work on cases or for referrals of cases that don't seem to fit your criteria or haven't landed in the lap of a fabulous disability lawyer.

Okay. Well, you've heard about the aging population. There are really just a few messages I wanted to share with you about the workforce. Everyone has heard that older workers are a growing share of the U.S. labor force.

Why?

Well, it's partly because the population of older workers is increasing, and also, younger workers in terms of percentages and numbers are barely increasing and even decreasing when you get to workers in the age group below 25.

There's also a growing participation of older workers in the workforce. Over many years, workers over 50, 55, any kind of measure, more and more, just as we've seen probably the most important trend in the workforce over the last 20, 30, 40, 50 years is the growth of women participation in the workforce. It's also true of older workers.

There's also this very big difference in terms of men and women. So the U.S. labor force in 1988 was about 12% over age 55. It's going to be about double that. It's about a quarter in 2018. Participation at all age levels is gradually increasing, but what's remarkable is that men in the last 60 years, since about 1950, have gone down from about 87% participation to only about 70 now, whereas women have gone up from about a quarter, 27%, up to about 60 as well.

Okay. So what makes one think that older workers are worse off? Well, the two things we usually cite are that length of time that older workers are out of work. Shockingly, we just got into the legislative history of the Age Discrimination and Employment Act of 1967 which is the statute that we frequently work under, and the trends are remarkably unchanged from the 1960s. Older workers, people over 50, 55, are at about 50% longer to find a new job than younger workers, and their percentage -- the percentage that older workers who are unemployed are out particularly long periods of time is higher.

The one embarrassing statistic in a way for us that we don't like to talk about is that the overall unemployment rate for older workers is lower than overall unemployment rate for workers generally.

But the reason for that is largely that in this country we do so poorly by our very most younger workers, 18-25. The unemployment data are just horrifying. So that drags the differential between older and younger workers into a place that makes older workers look better off than they are.

All right. So you probably have an instinct based on cases or situations that you know that most disabilities skew old. I was going to give you some data about heart disease, hearing loss, diabetes. Those are a couple of good examples. The age 75 cohort have about 37% of them have heart disease. Age 18-44 have 4%. So there's about a 10 time differential. Hearing loss has about a 3 time differential old and young. Diabetes is between 4-6. And there's so many of those situations.

And the bottom line is that we have been able to make the case at our organization that workplace disability discrimination is an older worker issue. And so I have been campaigning for many years, mostly successfully, to eliminate from our priorities age discrimination. What we now talk about is older workers. So whereas I came 15 years ago, and whether AARP should be a disability discrimination in employment organization was controversial and now is not. We work for older workers, not for people who are victims of age discrimination.

So what are some examples between the overlap of age and disability? You probably have some examples that you can think of. And by the way, we're out of time, but we started about 5-10 minutes late so I'm just going to assume that our session goes until 9:35, and if you want to leave, it's a free country. But hopefully you can stand to make it for a few more minutes.

Okay. A few examples, just to fix in your mind what are the kinds of things that it might be logical to partner with us or refer to us. There was a heart disease case back in 2004 in the second circuit, Adams versus master carvers of Jamestown. This was a knife company. Made knives. Ironically, as you'll see. But the lesson here was, don't go on a trip with your boss if they're going to be able to see something in the bathroom or in the suite you're sharing that might get you in trouble with the job.

So the boss sees a subordinate's huge heart surgery scar and completely flips out and says, oh, man, this guy is damaged goods, he's someone we ought to move toward retirement, and the employee is fired. We got that turned around and summary judgment reversed.

But it's the situation where age and disability stereotypes converge.

Another example is a case I understand was discussed yesterday that disability rights associates worked on which is the New York City police department case, where after decades and decades of veteran police officers using hearing aids, suddenly all those folks who were the subject of all the TV shows and movies we watch were no longer qualified to do the job.

Hearing loss really is one of those areas where workers between 50-65 have hearing issues but are incredibly reluctant to use assistive technology because it marks them as something that is the subject of employment discrimination. And it's not just disability. It's disability and age, in our experience.

Okay. So another case I really loved, another summary judgment we got reversed back in 2004 as well in the seventh circuit, Flannery versus Recording Industry Association of America. Worker who had sleep apnea and a heart rhythm disorder, and his employer told him he would have to leave because his health was bad and he was getting older. Well, so there you have it in the same sentence. You know, which was it? Or what was the linkage between the two? The fact was that his performance was just fine and it was hard actually to litigate the case at the district court in part because of the confluence of these two different legal theories, and in the end, I think our amicus helped to clear up that it was the same problem with both claims.

Another kind of situation is sort of the reverse. Which is instead of ADA cases where there's an age element, we work on age cases with a disability element. There are two fascinating cases, one we settled successfully and one we're investigating. This has to do with big companies who lay off lots of older workers ostensibly because of performance problems. They usually defend them on the grounds that the employees had poor performance. But what we found is that the vast majority of the people affected have high medical costs, serious medical conditions, or use of medical leave, which is really troubling.

Another example are FMLA cases. We have been interested in that statute for a long time and have been looking very hard to contribute by working on the many cases that have to do with kids taking care of their parents. And it's sort of the older caregiving issue. There's one case in 2012 that had to do with, you know, adequate notice and a child who was taking care of their parent in the hospital was ultimately terminated and the employer said, but they never told us they were an only child and they really needed medical leave, and they never told us that they wanted to take care of their parent in the hospital as well as after they left the hospital.

All right. The last thing I'm just going to mention, and I won't discuss, it's also a dangerous legal issue that I'm fascinated with, but it's another example of age and disability becoming confused. There's a case in the Supreme Court, Hazen Paper versus Biggins from 1993. It's the case that said an employee was fired because they were about to vest in terms of their pension, which they vested after 10 years and they were of course an older worker, and they were fired for that reason. That didn't constitute age discrimination because pension status is not the same as age. They're analytically distinct. They're correlated; they're not the same.

In a recent case in the eighth circuit, an employer said to its health insurer, we just got rid of our oldest and sickest employees; can't you reduce our health insurance premium? The court said, they were worried about costs, not age or disability. We argued that in the employer's mind, age, disability, and cost were the same thing.

So those are examples of the things we do. Hopefully we can find some work to do together.

KELLY BAGBY: Does anybody have any questions? Or do you just want to go run and get cookies?

SUSAN ANN SILVERSTEIN: I just want to say one thing. Although we keep focusing on age, you can contact us even if the people in your case are not 50 plus or not "old." What we care about, especially at our first discussions with you, is what is the outcome of the case that you're looking for and will the policy change be something that affects older people. That's what our first discussions care about. We would rather have you call us and talk to us and see where it's going to go. Don't prejudge like, oh, the person I'm discussing this with is only 35. If it's something that its greater implications may have something to do with an aging population, we care about it.

>> Do you guys have business cards?

KELLY BAGBY: Sure.

>> Can you put them out for us?

KELLY BAGBY: You want them now?

>> If you put them out on the table...

KELLY BAGBY: One other thing we didn't deal with is you should contact us for amicus help on your cases. If you think having the voice of AARP would be helpful, let us know.

SUSAN ANN SILVERSTEIN: It doesn't matter whose card you pick up. We'll get you to the right person.

>> I'm Charlie Brown. I wrote a resolution which we got past the ABA. We last summer on voting rights for people with disabilities. I urge you to take a look at it because it's largely becoming an age issue, and, in fact, it was tied together in the last ABA resolution back in '07, cited in the report that we did. What I would say to you is if you look at the report that the President's commission on election and the National Council on Disability's analysis of the 2012 election cycle, I think you're going to see that this is -- we're facing a crisis in the election day or the election process in this country. It is very clearly laid out, and I just hope that you guys are thinking about it. It is a situation in which disability, it's viewed as a disability issue, but because of the projections, especially made in the Bauer-Ginsberg Report, and the same projections you're making, it's likely to be an age issue as much as it is a disability issue.

DAN KOHRMAN: Just a quick comment on that. We just filed a brief in the Texas voter right E law case in the fifth circuit, and we filed a lot of brief inside voter I.D. cases, mostly unfortunately have lost those cases. As a result, our unit is very interested in working on some other voting cases. So if you have ideas --

>> Well, take a look at resolution 113B of the ABA because we didn't even talk about voter I.D. We talked about the technology crisis, these machines we're using today that will be gone by the '20 election because they're wearing out. We have huge litigation in various cases. We're talking just the nuts and bolts of the election day process and the other things associated with it, which for example absentee voting which is becoming impossible in some states, this is a big issue and I urge you guys to look at it. And other people in the room.

>> Some people feel they really need to leave, so...

KELLY BAGBY: There are cards up here.

>> Steve Mendelson. I would like to talk about Olmstead. I think that the fundamental problem lies in the statute. The reason that states work so reflexively, are able to cut their home and community base expenditures is partly of course due to political reasons. The problem with the Olmstead decision itself is when you look at it, it's very reminiscent of the all due deliberate speed decision that basically said community integration all have to be equal.

KELLY BAGBY: And that's why we're starting to pull together the legacy of Olmstead, and the legacy of Olmstead is far better than Olmstead. Our case in D.C. is up in the D.C. circuit right now. So there are a very small number of circuit court cases that are coming out that are usually all going in the right direction with Olmstead. So I think that I urge you, there are great repositories of information on Olmstead cases. So yeah, I agree. Case law developed after Olmstead is far better than what Olmstead actually says.

SUSAN ANN SILVERSTEIN: I also just want to add on Olmstead, I think Olmstead and housing attorneys need to get to know each other better because the fair housing act also has an affirmative furthering fair housing requirement that goes to every recipient of federal funds. Well, states are recipients of federal funds and so they are required to affirmatively further federal housing and people with disabilities are a protected class. So on a statewide basis, they are required to have a state plan that demonstrates how they are overcoming discrimination against people with disabilities, how they are integrating people with disabilities, how they are affirmatively furthering fair housing for people with disabilities, and that goes to how they're allocating low income housing tax credits, how they are distributing all of their housing funds. It's like Mars and Venus, two different planets, but a state is one entity. So to further fair housing, they should be looking at their Medicaid waiver money as well. So this is a fertile area for housing people and Olmstead people to be working together to achieve the same outcomes and goals.

Thank you guys.

(Applause.)

(Break.)

"Improving and Augmenting the ADA, Rehabilitation Act, and IDEA: A Vision for the Next 25 Years"

10:00 a.m.

MARC MAURER: All right. We're going to get underway. Give me your attention, please.

This morning we have the final two hours and 15 minutes shown as a single session but having two panels. This one is entitled, "Improving and Augmenting the ADA, the Rehabilitation Act, and IDEA or the Individuals with Disabilities Education Act, a Vision for the Next 25 Years."

There are seven people to make presentations. That means we have 10-12 minutes apiece or something like that. And we have Robert Dinerstein, American University Washington College of Law. And I am presenting on that panel. I'm Marc Maurer, immediate past president of the National Federation of the Blind. We have Laurence Paradis, executive director and codirector of litigation, disability rights advocates, and we also show that Arlene Kanter is coming, but she was unable to come. So we will try to carry the message effectively for her.

I will begin by offering a comment or two. In contemplating disability law in the future, two forces are primary. One of these is the attitude within society regarding the importance of people who possess disabilities. This attitude will inevitably be reflected within the statutes adopted by legislative bodies.

The second is the attitude of those who have disabilities with respect to society and the decision making which arises from this attitude. If this decision making is sufficiently bold, the attitude of society will change, and the laws will be modified accordingly. People who have disabilities must be prepared to assume positions of leadership in shaping the law of the future. In other words, contemplation of the nature of the law in the future is more a matter for decision than prediction.

A principle of American law is that it applies equally to all people all of the time. The famous statement of John Adams is that "Ours is a government of laws, not of men." However, one of the characteristics of law is that it classifies and categorizes the people to whom it applies. If we know the classification to which you belong, we know what rights you have and how you may be treated. One of the classifications is poverty. Beginning in the 1500s, during the reign of Henry VIII, the British government, which gave the United States its form of jurisprudence, there were laws for the relief of the poor. In 1601 during the reign of Elizabeth I, parliament enacted the act for the relief of the poor, a compilation of many of the statements regarding the poor adopted earlier and a provision to institute a tax for the poor. The ostensible purpose of the act, as its title suggests, was to provide relief for the poor, but the mechanism of the law was to establish institutions in which those who might otherwise have been beggars on the streets or vagrants could be required to work, often at menial trades. Some writers have declared that the jail and the work house were the same place.

Under Elizabethan law, those that could not work could be punished for not doing so.

In 1966, Dr. Jacobus tenBroek wrote, "Not all who are poor are physically handicapped. Not all who are handicapped are poor. However, the coincidence of poverty and unemployment of the blind is enormous." To illustrate this coincidence, Dr. tenBroek stated that under 10% of blind Americans receiving aid to the blind were employed.

Furthermore, Dr. tenBroek also asserted that there are two forms of law: One for the wealthy and one for the poor. The law that applies to people with disabilities is shaped in part by the categorization arising from the law of the poor. The Rehabilitation Act, the Individuals with Disabilities Education Act, and the Americans with Disabilities Act are not based upon identical legal theories, but they have characteristics in common. Consider for example the Rehabilitation Act. The poor law adopted during the time of Queen Elizabeth I established the principle that poor relief would be based upon individual needs individually determined by a parish official. Relief could be granted only if an official believed the persons receiving it deserved to get it. The statute did not offer an entitlement to the poor. The Rehabilitation Act takes the same approach. Each client is offered the opportunity to create an individualized plan for employment, but the practice in most jurisdictions is to limit this plan by arguments that demand of each client that money be saved on every aspect of rehabilitation. Only the least expensive access technology can be provided. Only the junior college can be made available because the expense will be less than that associated with a four-year institution. Freedom of choice offers the opportunity to receive orientation and adjustment training at any center of the client's choice, but the least expensive state run training program must be used to save funds. The test is not what will work best for the client but what will be cheapest for the administration.

The Rehabilitation Act authorizes the provision of many services but guarantees none of them. Clients do not have the right to training. Rather, they have the right to complain if the training program is inadequate, requiring this process of the clients ensures not a successful rehabilitation outcome but a continuance of the client in poverty.

The Individuals with Disabilities Education Act has a similar philosophy. Each student is guaranteed an individualized education plan, which offers the student a free appropriate public education. Although the language of the act suggests that this plan is to be tailored to the individual needs of the student, convenience for the administration is more often the standard employed than success for the student. Decisions interpreting the act declare that specific services are not guaranteed. Students get appropriate educational benefits. No standard of excellence is required. The law does not guarantee service. Rather, it guarantees the right to complain if the services wanted are not available.

The Americans with Disabilities Act does guarantee something, at least in theory. Although it does not prohibit paying disabled workers less than the federal minimum wage, this act says that discrimination based on disability is prohibited and it offers a method for challenging discrimination. However, the Supreme Court has declared that the protections of this act do not extend to compensation in the form of money damages paid by states. People who possess disabilities are not classified among those who may expect payment from state governments when discrimination occurs. Furthermore, the special classification of the disabled includes a heavy emphasis on safety. A person possessing a disability may be refused employment if there is a perception that the environment of the job will be a threat to that person's safety. Disabled people do not have the same rights of participation that others possess.

I think the law must adopt the fundamental principle that when you pay for something, you are entitled to get it. This principle should apply whether the individual pays directly or has somebody else make the payment. I think the law should abandon the practice of adopting rights for disabled people without creating a corresponding set of remedies.

When I was in law school, I learned of the concept of rights without remedies, and I was shocked. What value is a right that cannot be enforced, I wondered? We are paying for rehabilitation. It seems to me that we have a right to get it. We are paying for education. I think we have the right to get that also. The educational experiences offered to disabled people in the United States are severely restricted. This is a form of discrimination. The Americans with Disabilities Act should apply, and the remedies should offer enough revenue to pay for an equal education. These remedies should apply not just to private entities but also to programs within government.

The law of the rich stands for the proposition that those who do not provide the goods and services for which payment has been made face substantial damages or go to jail. The law should be at least as useful to the poor as it is to the rich. We know that those who misrepresent in the securities industry, in banking, and in selling property must pay reparation for the damage they do. We need a change in classification for disabled people so that the law of the rich applies. Those with disabilities have talent, and we should have as much right to use it as anybody else. These are the objectives we must seek to have incorporated in the law within the next 25 years.

(Applause.)

At least, that's my opinion.

(Laughter.)

We now are going to hear from Laurence Paradis, executive director and codirector of litigation, disability rights advocates.

LAURENCE PARADIS: Thank you.

MARC MAURER: You have to turn his mic on, will you, Will?

LAURENCE PARADIS: I look out, I know that's a visual term, but I see an audience of people who are fighting every day to make disability rights a reality. People who are so instrumental in transforming our society. I think it's wonderful to have the theme of this conference be ADA in 50, because for 25 years now, we have fought in the trenches, and we're still in the trenches. We have made much progress, but we have far to go. ADA in 50, I want to at least see the summit.

So I want to touch on a few areas where I think we have made progress but so much more is needed. And also talk about some of the jurisprudence that we need to work on. And legislation we need to work on.

This is really an exciting area for us all because our movement is the current successor to the civil rights movement of the 1960s, and we are at that moment where African-Americans were 40 years ago. And what we do today will have transformative impact.

So a few examples of areas where progress has been made but so much more is needed. Let me just start with transportation. Dr. Silvers talked about how she was on a bus 30, 40 years ago. Buses have been transformed for physical access. People put their bodies on the line and lay down in the streets and protested and went to jail. We had our Selma movements and we're still having them, and they have had real world impact.

However, there is so much of the transportation work that remains virtually inaccessible. For example, sidewalk access. The curb cut is the universal symbol for access. And we have achieved a world where, in most cities, there are a good number of curb cuts. However, in almost every city, county, and state, there are tens of thousands of inaccessible sidewalks in every part of their system. I was just in New York two days ago. In southern Manhattan, I could not in a wheelchair go two blocks without risking my life and limb, because at every corner, the curb cuts that existed were crumbling and were impossible to use without somebody steadying my chair and pushing me. That should not be. That cannot be permitted to continue.

To fix this is going to require concerted effort. You DOJ folks out there, it's been too long for curb cut regulation and sidewalk regulations. I feel like we are waiting for Giddeaux. In San Francisco, a plaintiff lost on a sidewalk case and the judge said, there are no regulations from DOJ on this yet. Please, do your job so we can do our job and make this world more accessible.

The light rail and heavy rail systems, we're still stuck in a model called the key station concept that the ADA accepted 25 years ago that said a little bit of access was good enough. Well, it's not good enough. Key stations don't really make the system accessible. And we need to see in 25 years universal access to all major transportation systems. And that requires some legislative change. And we want to work with you on that.

The air travel system. There's no access if you are in a wheelchair. It is abysmal. Coming across the country is extremely difficult. There are many wheelchair users who cannot do it at all. The Air Carrier Access Act is not really an access act; it's a disaccess act that says we're --

(Applause.)

-- we should not expect access. That has to change.

What's icing on the cake is that what little standards it has are not enforceable, which does bring back a joke from Annie Hall. I know Woody Allen is in trouble but it's still a funny movie. One of his jokes is an old joke, two elderly women at a cat skill mount resort and one of them says, boy, the food here is terrible. The other one says, yeah, I know, and such small portions.

(Laughter.)

That's how I feel about Air Carrier Access Act.

Taxis. Just another example. Where did we agree that an entire form of mass transit could be completely inaccessible forever? That is what ADA accepted as a compromise, that taxis don't have to be accessible even if they're new, unless they are in what's called a van, and most taxis are not in vans. So the entire taxi system continues to be inaccessible. We did have one bright moment of victory in New York City last year where we were able to argue that the new taxis in that city were vans, and as a result, we were able to get half of the 10,000 taxis in that fleet will be made accessible within seven years.

(Applause.)

That's one city. And every other city in the country, the taxi system is abysmal for physical access.

And then the same Annie Hall joke. What little access there is, at least for blind people, they don't need to transform the taxis; they just need to transform driver conduct so they stop for the blind person with a guide dog and pick them up. We've made a little bit of progress on there, and it's being undercut by new disruptive technologies such as Uber that come in and replace the taxi systems and don't require even 1% of access for physical access. And don't enforce the civil rights laws that require drivers to stop and pick up blind people with guide dogs. That cannot be tolerated.

New technologies need to have access as a minimum requirement before they are allowed to transform our economy.

I am quickly going to run out of time for my examples. And it's interesting, because every aspect of society, every key area, it's symptomatic. It follows the same rule. The regulators have done part of their job. They are often slow in finishing the job. The judges get the idea, but oftentimes don't really enforce it. And procedurally, whatever rights we have often are stripped from us through judicial decisions that undercut enforcement.

There's been a lot of talk about the Scribd case. It's exciting because it's so new. The court in that case got the whole point of the ADA. One of the quotes from the decision is, "The ADA was the most sweeping civil rights legislation since the Civil Rights Act of 1964. When it was enacted, Congress had no conception of how the internet would change global commerce. Now that the internet plays such a critical role in the person and professional lives of Americans, excluding disabled persons from access to covered entities, they use it as their principal means of reaching the public, would defeat the purpose of this important civil rights legislation." That's a judge who gets the ADA.

(Applause.)

And then we have the rest of society. So yesterday, Forbes Magazine, not one of our favorite reporters, commenting on this decision, noted, quote, "The court's conclusion seems to apply equally to all other online content retailers, the universe of tens of thousands of sites and could extend to every online retailer. That makes the opinions' reach breathtaking with enormous implications. Many websites do not comply with the ADA today and the ADA is murky about what compliance requires. As a result, many thousands of websites may have to incur substantial remediation expenses to comply with the ADA. In the interim, this opinion could produce a litigation tsunami against sites that aren't in compliance."

(Applause.)

We want that tsunami!

But it's what happens when access is not built in to the new technologies that are coming to change our world today and will continue to change our world every year up through ADA 50. If we don't get access built in at the beginning, we will always be fighting against this argument that it's too costly. That's the battle we need to overcome. And this kind of conference, where we share ideas and strategies, is just critical in that fight.

There's so many other fights where we are in the trenches. In education. Access to textbooks. It's just boggling that every year we're still fighting for whether students with sensory disabilities should have the same right to have their course materials at the same time in accessible formats as other students. The University of Pennsylvania settlement with the DOJ was a good start. That's one university out of thousands. And the rest are not doing so well.

Prejudice against students who are blind or deaf. It's just continuing to be rampant. And other disabilities. We had a case against Boston University where the head of that university said, well, if you have a learning disability, there's a community college down the road that should be just fine for you. The judge in that case issued a finding that that was blatant discrimination. That was 10-15 years ago.

Today we have a school arguing that a deaf person who has dedicated his life could not be a safe doctor. Inexcusable. The Cannon v Palmer College that Scott LaBarre had a wonderful victory on, that college argued that a blind student could not be a safe chiropractor.

Just two months ago in New York City, we settled a trial against the police department. It had adopted a policy that no police officer could be employed if they used a hearing aid to mitigate their hearing loss. They agreed to drop that policy, but only after we sued them. Literally, the jury was in the hall waiting, and they had a come to Jesus moment.

(Laughter.)

(Applause.)

So housing. So much needs to be done. Again, where did we decide that 99% of all housing in this country could be completely inaccessible to anyone in a wheelchair? That is the norm today. And there's nobody fighting, virtually nobody fighting, to overcome that. There is a movement slowly beginning for visitability, which says that new housing should at least allow a wheelchair user to get in the door and use the bathroom. It's a fight we have to fight.

The criminal justice system continues to basically warehouse so many people with mental and developmental disabilities. The Sheehans in the world are going to continue to die unless we do something about that.

Use of solitary confinement against youth with disabilities continues to be rampant. The school to prison pipeline has to be stopped. There are people here working on that, and it's so critical.

Universal design. We talk about it. We need to make it the law.

Changing the paradigm. The common mainstream culture continues to look at us in views of either pity or heroics. And we shouldn't have to be heroes in order to get on a bus, get on a train, go to work, be treated the same as everyone else.

The disability culture. It's exciting because we're at the forefront, trying to challenge some of these mainstream myths and stereotypes. The word "disability pride" is becoming a notion where we're starting to say, I'm disabled and I'm proud. I'm not a hero, but I'm dealing with it, and I just want to be treated the same.

There's been a lot of work on access to sports, but we need to have access to art, music, fashion, to all aspects of society.

There's so many other cutting edge issues that we don't have time for. Genetic discrimination. Enforcement of the rights that are on paper. Dr. Maurer, you talked about that. What good is a right without enforcement. Five judges on our Supreme Court to not believe that we should be able to enforce many of our civil rights laws and they have undercut enforcement mechanisms left and right.

Pregnancy discrimination. I think we're going to win that battle in the next five years. We have good allies there. Pregnancy is a temporary disability, and it shouldn't mean that you have to weigh your job versus being able to take a few months off to take care of your child.

The issue of affordability of new technologies is something I feel passionate about. Technology has transformed us in so many ways in terms of adaptive technologies, wheelchairs, and so forth. It's really liberating, but what good is it if you can't afford it? Right now there's a campaign called Users First, fighting to make sure people can get insurers to cover a wheelchair that will actually work and get them mobile. I know so many disabled people trapped in their homes because their wheelchairs simply are not meeting basic reliable standards and they can't get them repaired. You know, if we are trapped in our homes, it's just another form of civil confinement.

Rights of veterans. Veterans, you know, we often look to veterans because society supports veteran lights. Disabled veterans in particular. But when the rubber hits the road and you want to say, judge, we would like to enforce the right of veterans with PTSD to get suicide prevention care, we went to trial on that issue, and the ninth circuit Court of Appeals threw out our victory and said veterans have no right to go to court to enforce their due process rights under the constitution to life, liberty. That is the law of the land right now because of the Supreme Court.

Two minutes. Okay.

Final point. Jurisprudence. You know, Dr. Maurer, you talked about how the states are free to discriminate without being held to pay monetary damages. That is because we have been trapped in the world of what's called rational basis minimum scrutiny. Ever since the Supreme Court in the Cleburne case in 1985 said that disabled people in that case, the mentally retarded, that's the term they used, should only be entitled to what's called rational basis scrutiny. Meaning essentially that the constitution did not protect such people from discrimination. That case then was followed by so many others, including the board of trustees of the University of Alabama v Garrett in 2001 where a woman who took time off to be treated for breast cancer was denied her job when she returned to work. And another 5-4 decision, Judge Rehnquist in that case, held that the state was free to discriminate. And noted, this is his words, that "State entities could quite hard headedly and perhaps hard heartedly hold to job requirements which do not make allowance for the disabled." That's the kind of attitudes and outright discrimination that we are still fighting day-to-day.

I hope ADA in 50 we won't be fighting those fights but we'll be a true model for the rest of the world, sign on to the convention, and we'll have a world where disability is just truly a form, one aspect of the continuum of our world. Thank you so much.

(Applause.)

MARC MAURER: Robert Dinerstein is a professor of law at American University, Washington College of Law. Here is Robert Dinerstein.

(Applause.)

ROBERT DINERSTEIN: Thank you, Dr. Maurer.

I am really pleased to be here at the eighth tenBroek symposium. I and many others have been here through all of them. Amazingly, I have not grown any older.

(Laughter.)

So it's really always an honor to be here, particularly because I think this is the largest symposium we've had, which I think is terrific, and Dr. Maurer and others obviously are mainly responsible for the way this conference has become so important.

As the great legal theorist Lawrence Peter Berra said, "It's tough to make predictions, mostly about the future." I don't know that he once said that because he denies much of what he's said, but I like to think that he did.

To look ahead, I need to look back. No matter how good we think we are of predicting the future, it's really hard to do well. If we think about, for example, what life was like in 1990 and try to imagine what the 25 years from 1990 to now would be, it's interesting to think about all of the things we assume have been around for a while. Since I know a lot of my students are here, for you, it has been. But just to remind ourselves some of the things we now take for granted didn't exist back in 1990 when the ADA was enacted let alone in 1975 for Individuals with Disabilities Education Act. For example, Facebook was not created until 2004. Wikipedia wasn't created until 2001. Google not created until 1998. It used to be like a really big number with lots of zeros after. It cell phones weren't popular until 1997 and didn't get into the market until much after that. Smartphones really around 1995. You ever watch the old Seinfeld shows, you see the huge phones they used, it dates that show.

Al Gore didn't invent the internet until the 1990s.

(Laughter.)

Email, which I know now for this generation is already something you don't use anymore, that wasn't even around until the early 1990s.

Hybrid cars, 1999.

Kindle, 2007.

And this is a tricky one. Starbucks did not make its first profit in any of its work outside of Seattle until the 1989-1990 period. Just think of a world without Starbucks.

(Laughter.)

That was, for those of you who didn't live in Seattle, what the world was in 1990.

I also tried to look for inspiration for thinking about the future to my own history in which for me is usually either about sports teams in the '60s or rock-n-roll. And I came up with that wonderful one hit wonder from Zager and Evans, in the year 2525. Thank you all for clapping, the six of you who were actually around.

(Laughter.)

So in the year 2525. And I will read you some of the lines because the poetry is exquisite.

In the year 2525, if man is still alive, if woman can survive, they may find.

In the year 3535, ain't going to need to tell the truth, tell no lie. Everything you think, do, and say is in the pill you took today.

In the year 4545, you ain't gonna need your teeth. Won't need your eyes. Won't find a thing to chew. Nobody will look at you.

5555, your legs got nothing to do. Some machine is doing that for you.

You kind of get the idea.

(Laughter.)

Some thought about --

>> Sing it, Bob.

ROBERT DINERSTEIN: Maybe tonight at the dinner.

(Laughter.)

Luckily, I am not being asked to identify what might happen in the next 556 years, which is the math from when they wrote the song. But I am really mindful in a serious way of how wrong predictions can be. For example, I'm guessing in 2003 Justice O'Connor said, "In 25 years we will not need to have any kind of racially based preferences in our system." Well, we can't know until 2028 whether that's true, but I would say our history so far, not looking good for that one.

And what about in this period of anniversaries. Last year, the 50th anniversary of the 1964 Civil Rights Act. This year the 50th anniversary of the Voting Rights Act. IDEA. In 2013, 40th anniversary of 504. Makes you think about that for example, 25 years ago in thinking about the Voting Rights Act, would we have known that we would have the Supreme Court that would gut that act in the Shelby case? Some might have feared that there are things that happened that we can't predict.

By looking at that, I think we have to be mindful about what do we think will happen and recognize that anything we say here is undoubtedly going to be wrong in some ways, and we hope. If it's wrong it's wrong in that it happens sooner for the good things. But I do want to do what I was asked to do here, so I am going to come up with some speculation about some changes that might happen over the next 25 years to give an indication of maybe the things we should do.

One thing I think, and this came up yesterday, was that it turned out that in 2020, so I didn't do anything before the first five years because that would make it too easy to immediately say I was wrong.

So in 2020, there was an interesting legislative development. One of the many times where people decided that an act's name needed to change. So the Individuals with Disabilities Education Act, as many of you know, was originally the Education for the Handicapped Children Act. In 2020, Congress changed the name of the act to the Full and Meaningful Universal Educational Inclusion Act, which unfortunately doesn't have a really good acronym.

(Laughter.)

But interestingly enough, that act did two things that were important. One, it said that no longer will we be referring to the education of children with disabilities as special education.

(Applause.)

And we will also no longer use the term "children with special needs" because we will just talk about people who need help, assistance, or whatever they want. So that was a really nice thing that happened.

Another provision of that act, by the way, was that the school districts were unable to argue going forward that they would do so much in inclusion in education if they only had the right training. So that's gone. And we feel good about that in 2020.

In 2025, it was time for another legislative enactment. This was the Daniel Goldstein-Scott LaBarre Technical Accessibility Act. That act provided that no technology could be distributed in any situation anywhere in the country unless it was completely and fully accessible to people with any level of disability. Dan and Scott led a vibrant coalition of advocates and others to say, the time has come for this, and they succeeded in that.

SCOTT LaBARRE: I hope it doesn't require our death.

ROBERT DINERSTEIN: It was not the memorial act, no.

Now, in 2028, something else happened as we think about the criminal justice system. A good thing happened. The Supreme Court decided to ban the death penalty for everybody.

(Applause.)

Consequently bringing in under the ban people with severe mental illness and anybody else. So no death penalty after 2028. And that was during the presidential administration of George P. Bush.

(Laughter.)

In 2030, an important development in litigation. The Supreme Court acknowledged that no more would there be any institution for people with intellectual disabilities larger than four people. That was decided in 2030. Very important time as well.

In 2032, the Senator Eve Hill introduced a bill which was passed called the Give Me No More Shelter law.

(Laughter.)

Which got rid of the last sheltered workshop available which was well celebrated at the 25th tenBroek symposium. There was a lot of frivolity at that one, I think.

In 2035 during the President Chelsea Clinton Administration, the last state statute, getting rid of guardianship, was passed in Virginia sponsored by Senator Jenny Hatch.

(Applause.)

2037, the name of the statute changed just most recently. The Laurence Paradis Visitability Access Act was passed so that no new or even existing housing could exist if it didn't provide for the ability of people in wheelchairs to visit people as they wanted to. So that was passed in 2037.

In 2038, Senator Lou Ann Blake introduced an amendment to the Help America Vote Act called the Fully Accessible Voting Act and it passed unanimously, which was really quite striking.

In 2039, Senator Peter Blanck introduced the Anti-Acronym Amendments Act.

(Laughter.)

Which I would point out was inspired by his presentation at the 2015 tenBroek symposium because he was so confused by the number of As he had to come up with.

In 2039, The New York Times published its last printed edition, and the headline on the front page that day was, "We admit we could have stopped using the term 'disabled' years ago, and we finally decided to do it." This has been a longstanding concern of mine, as you know.

Also in 2039, this was not a legislative or a court development but just something that happened this, was during the administration of President Kim Kardashian, and that was that the level of employment of people with disabilities finally reached the same level of people without disabilities of similar background, experience, and training. This was a major, major achievement of people at that time.

(Applause.)

And lastly, the Americans with Disabilities Act underwent its own name change in 2040, to focus on the concepts of universal design, equality, and the social model views of disability. So the Americans with Disabilities Act was amended to be now called the Right to Live and Thrive in the World Act of 2040.

Thank you very much.

(Applause.)

MARC MAURER: Subtitled the Jacobus tenBroek Act.

Thanks, Bob, I appreciate that. Somehow, you bring more humor to the whole thing than I do.

(Laughter.)

We're going to have time for questions. So tell me who you are and we'll go forward. I do have a note here that says anyone interested in a tour of the Jernigan Institute should meet with Lou Ann Blake in front of the stage at the conclusion of this morning's session.

Any questions?

Any comments?

Should we move to the next panel?

>> I had a question for Bob. You focused on the future of accessibility in this country and I wondered if you had any thoughts of accessibility internationally.

ROBERT DINERSTEIN: Yes, actually, I was thinking about when I could include in my history the ratification of the CRPD. And I kind of put it at about maybe during the Chelsea Clinton Administration as a possibility.

You know, it's really interesting, and I think that one thing I would hope, and I don't know if this will happen. As we know, one of the challenges that I think developing societies face, with all the structures built without universal design concepts, that in other parts of the world, particularly those with more challenges economically, I think we really have to work with folks on is as they develop those technologies to get in really at the beginning and say, look, you have an opportunity to do it in a universe wall way and not do the retrofitting after the fact which is more expensive and also excludes people during the time they're there. There's an analogy that what some folks have seen, and I'm thinking in particular of Eric Rosenthal and Disability Rights International and the work that his group has done, is that in some places where there have been conflicts, like in Kosovo and otherwise, and sometimes where institutions have been burned down or otherwise broken down because of war, instead of using that as an opportunity to actually create community-based services and whether you would have chosen that reason for it or not, instead, often aided and abetted by U.S. financial aid, other institutions have been rebuilt.

So what I would hope would happen, for those in this room who have opportunities to work with people internationally, to keep pressing this point about access. It is a place, and we've said this before, to me, the irony and maybe the challenge of technology is technology has the opportunity to open up so many avenues that have been foreclosed to people with disabilities, and yet we continue to replicate the exclusionary model that we have. So I think we have to force ourselves just to say that we will not do it anymore and we will be out there working with others internationally to make that happen too.

MARC MAURER: Okay. Other questions?

>> Eve Hill, civil rights division, Justice Department.

MARC MAURER: I've heard of you.

>> Senator Hill!

MARC MAURER: Go ahead, Senator.

>> My comment is, I want to get a copy of your remarks, Bob, because we're going to keep track of this.

(Laughter.)

Because I want to be able to talk to the young lawyers and others with disabilities who will be around at that time to point out to them the way things used to be. Because Dan is going to be a big downer coming up.

(Laughter.)

And as an antidote to that, I want to point out that this has happened to me twice just in the last year or so that some young civil rights lawyer has said to me, curb cut, what's a curb cut. And I explained to them what that is and they go, really, those were not there before? And so I think I want to be able to point to them to show, yeah, we used to do that.

ROBERT DINERSTEIN: And I've had the same experience. I've taught every year a disability class on torts and I talk about curb cuts. I think two years ago, a student raised her hand and said, excuse me, can you explain what a curb cut is? Of course we know this happens. You understand the world when you understand it and it's easy to think that everything that you see there was there.

>> Georgetown law school. Thank you for your comments. I was wondering why you stopped at the abolition of the death penalty and instead called for the abolition of the prison period.

ROBERT DINERSTEIN: Well, that's interesting. I thought I was being hopeful, but I would say, if we can get rid of prisons altogether, I would owe you a beer at least.

(Laughter.)

I guess I was thinking, you know, okay, what's at least possibly plausible. But it's a good point. It would be nice if we could get there as well.

MARC MAURER: Other questions?

I appreciate the speculation --

>> One other question. I just want to mention, I'm an attorney in New York and Connecticut. I think one of the big issues we need to address in terms of moving things forward is having more disabled lawyers and judges. Because unfortunately, it does depend who the judges are. You know, who the elected officials are. That's how you end up with people saying people in wheelchairs should be on the first floor or no money should be spent to help people with disabilities.

So one thing we've been doing, we have the DRBA for disability rights attorneys. We've been also trying to start a bar association for attorneys with disabilities because not everybody who practices disability law is disabled and not everybody who has is a lawyer with a disability practices disability law so there's overlap but they're not exclusive. Myself and Katie Carol over there are all on the board and we've been trying to get more members and have more attorneys with disabilities to address these issues on the ground floor.

>> When you say "on the ground floor..."

(Laughter.)

>> So Katie, people, if you would just waive so people know who you are.

MARC MAURER: It's a good point. I have urged certain lawyers with disabilities to seek judgeships myself, and we need to get more people. I know that our scholarship program thinks it's only for lawyers, but on the other hand, we need more lawyers, right, Scott?

SCOTT LaBARRE: Absolutely.

MARC MAURER: All right. Well, thank you very much for the members of this first panel.

(Applause.)

If the members of the second panel would come up, that would be great.

I would like to reiterate that anyone interested in a tour of the National Federation of the Blind Jernigan Institute should meet with Lou Ann here in front of the stage after this panel.

Very well. We've had the first panel this morning, and as I was saying earlier, we have improving and augmenting the ADA, Rehabilitation Act, and IDEA, a vision of the next 25 years. We start with the second panel now after brief discussion up here, taking these in the order that they're presented.

David Ferleger is from the law offices of David Ferleger. He's been in these seminars I think from the beginning and has been a sponsor for at least most of the time and maybe all of the time we've had them. It's gait to welcome you back, David.

Here's David Ferleger.

(Applause.)

DAVID FERLEGER: Thank you, Dr. Maurer. This is not my computer, so hopefully we can get it to work. Space bar works.

The prophet Amos said to the king: "I am no prophet. Neither am I a prophet's son. But I am a herdsman and a grower of sycamore figs." I am not a grower of figs, but like Bob, I am really aware of the difficulty of prophesying, but it turns out that Amos believed in social justice and he is responsible for the famous line by MLK in the "I have a dream" speech saying, "No, no, we are not satisfied and will not be satisfied until justice rolls down like water and righteousness like a mighty stream."

But predictions are pretty impossible to make. Ben Franklin could not have predicted when he was carried in a sedan chair to the constitutional convention that eventually there would be Segways and motorized vehicles and wheelchairs.

Stephen Hopkins, one of the signers of the Declaration of Independence had cerebral palsy.

Governor Morris who helped draft the Constitution and became a senator for New York eventually wore what they called a rough stick to replace the left leg that he lost in a carriage accident in 1790. He would not have been able to predict or dream about prosthetics.

There are other things that are hard to predict. In the 1800s, many states enacted the ugly laws. One of these from Chicago said this:

(Reading slide.)

That sounds pretty strange and old, but these ugly laws were not repealed in many places until the 1970s, the last one in Chicago in 1974.

So what I tried to do is imagine more than one possible future. Some of my comments echo or overlap with those of people who just presented. And I'm not as optimistic as Bob Dinerstein about the possibilities, but let me go through several possible futures that could help move things forward.

One involves the constitution. These conferences, we often forget about the constitution in some ways, but I think it is possible when the Supreme Court changes, which it will, that there will be a constitutional prohibition of discrimination against people with disabilities. I wrote a law review article advocating this a few years ago. Justice Ginsburg referred to the Cleburne case, maybe using that a different way a couple years ago. And especially people, maybe only for people, who are confined in institutions. I think there's an argument under the Constitution to prohibit the use of institutions.

The other Larry referred to, which would be finally for the U.S. adopting the Convention on the Rights of People with Disabilities. And maybe there's a way for President Obama and the Congress to do that during this period of time, but that U.N. convention was trumpeted in the U.S. by the Obama Administration, and then it seems forgotten.

So along constitutional issues to explain a little of my thinking, a lot of folks here know about the famous footnote four in U.S. versus Carolene Products which said there should be a heightened scrutiny under the constitution for particular minorities, whether prejudice against a special condition which may call for correspondingly more searching judicial inquiry. Some people interpret an earlier case as being a rational basis with bite, with some extra power, and I think that we need to think about whether or not we can put some more power into that kind of thinking.

The Olmstead case, as people know, dealt with discrimination under the ADA and avoided at all talking about when constitutional rights may be involved. So that's still an open question.

Another future goes a little bit to Bob's presentation, which is to deal with all these statutes that we now have. We have a plethora of statutes, and we have to think about how many we need. Bob would add to them and maybe take away some. A few years ago I talked about abolishing the ADA because of the inadequacies. Bob stood up in the audience and condemned me for suggesting that.

But right now I think we have to think about what we need and what they should look like. I think we have to agree there's too many right now. Figuring out which law applies in which circumstance to which people just shows how disorganized our conceptualization is of law and disabilities. The ADA, Air Carrier Access Act.

(Reading slide.)

It goes on and on and on. Not to mention the regulations.

So I think we have to think about over the next 25 years what we need and how to be sure that people have what they need, have the access they need, without 10, 20, 30 statutes.

Universal design. A couple folks have mentioned that. The universal design, as we know, are creating products, buildings, environments accessible to everyone with or without disabilities. The mandate of universal design itself would solve a lot of the issues that we discuss here today.

So the next kind of future, aspect of the future involves our culture. Larry mentioned disability pride and disability culture. Are we talking about accommodation? Inclusion? Assimilation? What exactly is our goal? I think we civil rights disability rights advocates have maybe not paid enough attention to exactly what the aim is in a larger sense for what we do. Somebody wrote this.

(Reading slide.)

I think we should start thinking about exactly what we intend when we bring the litigation that we've been discussing here.

So what are the futures? I think there are futures, because like the Robert Frost poem about roads not taken, we don't know any moment when we take one path versus another exactly where we will end up. But I think we have to choose carefully and try to choose in accordance with our values. The constitution, the U. Y. convention, the consolidation of statutes, universal design, culture, and the most important controller of the future will be what's unpredictable. But the ultimate function of prophesy is not to tell the future but to make it, because our successful past will block your visions of the future. So I think we need to not look to the past to think about how to proceed to the future, but really try to unlock the secrets of the future.

And in line with Larry's comments, the little image that I project here is of what a curb cut looks like in terms of some regulations, because it is true, and I think about this every time I go through the Philadelphia airport, which purports to be accessible but has poles and bars and weird sidewalk curb cuts that don't go anywhere. I think about the fact that that piece of access that was pointed out we all now take for granted is still not in force in so much of the country. I was fortunate to be involved in a case that went up to the circuit court called Frame versus city of Arlington.

(Applause.)

Which we managed to get the city of Arlington to agree after a cert was denied to agree to redo the bad curb cuts they've made even while the ADA was in effect and to expand those curb cuts and to agree to put in a curb cut whenever anyone requests one. And the good part of the story, the positive part of the story, is that they've actually been implementing that without the need for any endorsement.

So I wish to see you again here next year and the year after and when Bob's predictions come into effect, we'll see where we are. Thank you very much.

(Applause.)

MARC MAURER: We next have Daniel Goldstein to offer comments. I've known Dan for more than a quarter of a century now. And he was a younger man then.

(Laughter.)

I have a slight bone to pick with him. In as much as the Scribd case came out, and it is our case, but he's been getting all the criticism on the internet. So share the wealth, Dan.

(Laughter.)

A principle of Brown, Goldstein & Levy that's been a fellow traveler and a person and a firm that has joined with us and all the efforts to change the nature of disability in America, here is Dan Goldstein.

(Applause.)

DANIEL GOLDSTEIN: Thank you. As Robert Dinerstein noted, and by the way, I want to live in Bob's future, it's truly a strange and funny place and I would like to be there, as Bob noted, this is now the eighth annual tenBroek conference. And it is hard to imagine how we did without it before we had it. I think it is extraordinary that the National Federation of the Blind has kept this and made this just one solid year after another of great presentations and by far and away the credit, because they don't just happen by themselves, the credit for all this goes to Lou Ann Blake, and thank you once again.

(Applause.)

The other thing I love about these conferences is it's like a high school reunion without the insecurity.

(Laughter.)

I mean, there's just so much love and different kind of important things happen in the hallways away from the meetings. But in any event.

A couple weeks ago, Marc Charmatz and I were invited by the Journal of Race, Religion, Gender, and Class to give a talk. And I thought, this will be nice. Somebody is thinking about disability as part of diversity, which happens occasionally as an afterthought but is certainly not normally the case that disability is thought of and diversity except among disability rights advocates.

My excitement was tempered somewhat by the fact that the invitation came from one of the editors who has been working for us as a paralegal for four years.

(Laughter.)

I was a little embarrassed to get up after Marc and say, well, you know, if you look at where employment was 25 years ago for people with disabilities and you look at where it is now, I mean, there's been some progress in physical access, although already pointed out earlier, all the areas that there hasn't been, but I just wasn't able to point to some landmark victory.

So I thought, well, that's okay. I'm going to talk about the next 25 years at tenBroek and that is my chance to do a Daniel Goldstein version of "I have a dream" and I can do it with Disney blue birds singing as the sun rises, and then I started thinking about what I truly think about the 25 years, and as Eve indicated, I'm going to be a real downer.

(Laughter.)

Back when I was young, which is before I knew Dr. Maurer, there used to be an expression, "What if they held a war and nobody came." What if they had a civil rights movement and nobody noticed.

I don't think we've had our Selmas. Selma came into our home each night from Walter Cronkite, and whether we wanted to know or not know what was going on in Alabama and Mississippi, we were finding out because it was in our face to think about it and talk about it every night as we sat down to dinner.

I'm not sure that the world has yet noticed that there is a disability rights movement. And I thought Ari hit the nail on the head yesterday when he said that the law may be ahead of the culture change here, and it's really the implications of that that I want to talk about, because I don't think in the end you can win without the culture change.

The core problem of disability rights, and here I'm saying nothing that is new to anybody, the misperception of persons with disabilities when they are visible and the invisibility of persons with disabilities. I won't spend a lot of time on this because I think everybody here knows, but the most common response when we sue a business, an entity of some kind over discrimination, is, oh, you know, we weren't thinking about people with disabilities when we... Fill in the blank. Put in the curb cuts. Designed the inaccessible software. Didn't budget for ASL interpreters. Whatever. Like the Steve Martin SNL routine, I forgot that bank robbery was a crime.

The perception of people with disabilities when they're visible is the exclusion of people with disabilities because of a belief that they can't do something and so they're denied that opportunity. Recently we had a blind student at a community college barred from taking any college that had had a lab because of the belief that the student would be a fire hazard. And we all know the key to the misperception problem. It's the word "amazing." I saw this blind guy and he scratched his ear without even knowing where his ear was. Wow, he's amazing!

(Laughter.)

And if you look at how when we do make the news, right, 90% of the time it's disability porn. This wonderful person who did something you know, amazing and isn't that brave and heroic and so on.

So I think the symbol of a person using a wheelchair in the bathrooms and parking spaces has been the most ubiquitous reminder to the oblivious, that they share the planet with persons with disabilities who also have rights.

But we have to somehow solve these misperception and invisibility problems. And so I want to talk about one aspect of this going into the future, because right now we have among ourselves some sense of who are persons with disabilities, and is that going to change, and if so, is that going to change the perception of persons with disabilities. And a couple weeks ago, I shared my thinking with some of my fellow panelists, including Arlene, and she was kind enough to pass on some thoughts from Mary Lou Breslin that I'm just going to flat out plagiarize, because I think it's exactly what I'm thinking about here. Genetic testing, amnio interventions, gene manipulation, and early detection of conditions will most certainly reduce the number of people with what are thought of as the more traditional disabilities such as spinal bifida, dwarfism, certain kinds of deafness, autism, Down syndrome, etc. Replacement biotechnologies will also evolve and further mitigate conditions characterized by activity limitations if the implants and devices are affordable such as arthritic hips, shoulders, knees. You know, I'm at the age now where you meet with an old friend and we start the organ recital.

(Laughter.)

Smart technologies will radically reduce the impact of other limitations such as vision loss, etc., and chemical advances will generate new drugs for scores of physical and mental conditions that impair function and cognition if the current research trajectory continues.

But one of the things is, this will strengthen the medical narrative that is so antithetical to rights. I'm not saying it's a bad thing. I'm just saying it will strengthen the medical narrative.

And what happens if there are only 20% as many blind kids in the school system and we have all this technology? Are we really going to be able to insist on Braille literacy and succeed in getting people to understand why Braille is so important and has to be provided?

And what happens if the co-occurrence of disability and age increases? This is possible, although a lot of money is going in to research around this large population. But it will strengthen a perception of disability as associated with a general lessening of capabilities. Especially because the ability of many older people to learn new adaptive techniques to address any limitations from their disability that would mitigate the impact of the disability. It will strengthen the perception as that disability as limiting. If you see that great Aunt Josie can't do X, Y, Z anymore because of a particular disability, you're going to think that is characteristic of the disability rather than characteristic of great aunt Josie. Right?

If the general public sees few of us in job positions, and that certainly is the case so far, capably carrying on a normal life and more of us as great aunt Josie, we're going to have image problems.

I do think there will be areas in which we will see an increase in disabilities. Dr. Maurer talked about the connection between poverty and disability, and I predict sadly that as income inequality continues, we're going to see a closer and closer intimacy between poverty and disability. We may well see increases in PTSD, diabetes, respiratory conditions, behavioral and emotional disabilities in our poor neighborhoods because the triggers for those disabilities are right there in poverty.

And just as there exists many who believe that the poor are poor as a matter of personal failure, that belief can extend to things like obesity and diabetes. My partner Andy Levy told me that he learned that Bon Secours Hospital here in Baltimore which serves a poor population, the number one most frequent surgical procedure there is amputation relative to diabetes.

I also think it's likely we're going to see an increase in the incidence of disability in the developing world or at least less of a decrease compared to the demographics in U.S. and Europe. So the face of disability may be that of Sierra Leone or Haiti, very much strengthening the pity narratives that are so antithetical to rights.

All of which is to say I guess that if we look at disability rights as purely a matter of law, I think we're in big trouble. I think we have to focus very hard on communicating to the world who we are and what it means to be who we are, what it means to be disabled. This in huge part depends on what people believe that word means, and that meaning is going to change with or without us. It is not too soon to create a concerted effort to learn how we can guide the cultural conversation and make that part of what we think about as we do our work.

Thank you.

(Applause.)

MARC MAURER: The next person is Arlene Mayerson, who is directing attorney of the Disability Rights Education and Defense Fund. Here is Arlene Mayerson.

(Applause.)

ARLENE MAYERSON: I'm waiting for something to go up on the screen. But hello. Thank you very much for inviting me to share my thoughts on the future of disability rights. When I started in this field 36 years ago, there were a couple handfuls of us that I would identify ourselves as disability rights lawyers. And now look what we have here, and one thing I know in the future is because of tenBroek, because of NFB holding this conference, and because of DRBA, we're going to have more lawyers dedicated to securing equal rights for people with disabilities.

(Applause.)

I have spent I would say most of my waking hours in the last 35 years thinking and talking about disability rights. So I have lots and lots of ideas, and I would love to share so many of them with all of you. I have been thinking about models of equality, about formal equality, substantive equality it. I've been thinking about civil rights as a human right. How does economic equality fit in. Identity politics. Congressional politics. But, alas, I have 12 minutes.

(Laughter.)

So in those 12 minutes I've decided to focus my remarks on the education of disabled children, an area in tremendous crisis.

Many of the speakers today have focused on the future of ADA. I want to focus on IDEA. We're at a very, very critical moment in deciding whether the IDEA has been a success or a failure or whether it can continue as a model for the education of children with disabilities.

DREDF is very involved with the school to prison pipeline work, and I'm sure most of you know, it is a national crisis of huge dimensions. We have convened a meeting at NCD, National Council on Disabilities on this topic. We're writing a report for NCD for Congress on this topic. And we represent hundreds of parents who want something for their kids and what they're getting instead is failure in school and a ticket on the pipeline.

I'm sure you know that disabled kids are twice as likely to be suspended and that if you are a black disabled kid, you are four times as likely to be suspended from school. And 85% of incarcerated youth have disabilities, very few of which were identified at school.

The school to prison pipeline has attracted a lot of attention from the media, government, politicians, civil rights organizations, lawyers, etc. My Brother's Keeper issued a task force report which recommends various interventions. Primarily targeted at black boys. Disabled students are not addressed. Yet if you read the report, all of the educational strategies and interventions come from the special education play book. Everyone is abuzz now. All the civil rights lawyers who are doing this work are talking about PBIS, positive behavioral interventions and supports. But what isn't known is that all of that came from special education, and that special educators developed the idea and have been actually testing it for 20 years.

Interestingly, when criticism was made that the report didn't cover black girls, the assistant secretary in charge of the task force, Jim Sheldon, said this. "In special education, they have this thing called universal design for learning. It basically says that once you figure out how to design something well for a special needs population, you can actually take those design principles and do it in a way that actually benefits everyone. I very much believe this is a process like that. What are the specific needs of this population, boys and young men of color, but in doing so, identifying those needs, we are creating an infrastructure that actually will benefit everyone. That will allow you to identify vulnerable populations who are disproportionately young men of color, not exclusively young men of color, that will benefit girls of color, white boys, with issues causing them to be chronically absent and to be on the path of dropping out of school."

We want to create an infrastructure to eventually help all children achieve their potential, and if this is a way to get there, let's do it. So how do you like that? Basically using the idea of education of disabled children, the principle of universal design, that if you properly educate disabled children, everyone benefits. And what's happening right now is that those skills that have been developed in that area are the skills needed in general education. For so long so many of us who advocate for children with disabilities both in courts and in the IEP meetings and in the legislature have been arguing for access to the general ed curriculum. And now there's something so interesting happening, because the general ed curriculum doesn't know how to deal with not only disabled kids, but most kids. And what they need are the skills that have been developed in special education and through a disability consciousness. Differentiation of curriculum. Positive behavioral supports. Adaptations in the way things are done. These are the things that are now being suggested as reforms in general education.

So general education is now looking to special education for its guide posts.

Now, if you read my brother's keeper, you won't see any reference to disabled children. And you won't see any background about how the various interventions that all come from that disability play book from special ed play book originated because that wasn't seen to strengthen the report. It was very important, I think, to kind of stay away from that to the drafters of the report.

Also there's a common misperception that somehow being black and being disabled are like two different things. It's not one person. We had an amazing example of that at DREDF where one of the school districts that we're working with has a summer school, developed a summer school because of my brother's keeper's initiative for black boys who were transitioning from junior high to high school. And so we were like, perfect, we have a client that would be perfect for that, that really needs that, that's facing a lot of suspensions and is making that move and has an IEP with behavioral supports in it. And the school said to us, oh, no, no, no, that summer school is for black boys transitioning to high school.

This is a black boy transitioning to high school. But no, no, not if the person has special needs because it's not a special ed program.

So this illustrates how destructive the us and them idea in education has been and also these silos. Special ed always exists in its own world and it's not a world that has a lot of influence on general ed. And I think that there's possibilities of that changing now that I think general ed knows it really can't survive unless it opens that special ed tool kit.

But what really misses the boat about the district's answer is that all of the kids in that academy, whether they have IEPs or not, would benefit from behavioral supports, academic supports, modifications and individualized attention. So now in the progressive education community, there's a really strong push towards getting rid of special ed as a separate silo and having universal design in education. And I recently spoke at a conference of TASH, a very progressive education for educators for disabled children. So I read all the literature coming out and the idea is, look, it's 40 years later, IDEA has failed and we need to have a unified system where everything is recognized as having, you know, unique needs because most students do.

And everything that was in that literature I agreed with. Except that along with that comes the idea of getting rid of the disability identification. And that concerns me and I'll get back to that in a minute.

I've also been reading in preparation for the National Council on Disability meeting all of the literature from the civil rights academic community. And on IDEA, it is very negative. Very negative in the idea that it's seen as instead of a solution to school to prison pipeline, a step into the prison school to prison pipeline. A case out of Philadelphia had a tag line in special ed case, just say no to special ed.

In fact, in the literature, it's even suggested that IDEA was kind of a sinister attempt to resegregate black kids after Brown. Now, I mean, I was really amazed by how much they just assumed that the last thing in the world you would ever have a black kid to have is a label of disability in the school. A lot of the articles talk about the stigma lasting a lifetime.

Now, very interesting area. Don't get me wrong. Special ed kind of deserves this reputation because of overclassification of black youth in special education classes that are dead ended. Poorer outcomes, extremely poor outcomes, and general segregation.

But we have to be very, very careful before we throw the baby out with the bath water.

At DREDF, we're confronted with the thorny issue every day, do we fight for black kids failing and being suspended, do we fight when their parents come to us and say, I know something's going on because they're not able to read as well as they should be, they're not able to do math, they're not able to sit in their seat, you know, there's issues but I can't get the school to pay attention to them. So the question is, given all this literature, do we fight for these kids to get special education and to be identified as disabled? And the answer is yes, we do. Every day. And the reason we do is because we think it's the best bet we have for those kids. It's the best thing out there currently to try to disrupt the pipeline. We get for these kids services in the general education classroom to support them to stay in the general education classroom. Academic supports, behavioral supports, counseling. Someone to like look over what's going on even with that kid and not to just keep on having them be invisible and one more suspended kid.

So right now, as I said, and this is the future, there's a lot of movement towards just get rid of IDEA, get rid of special ed, just have everyone have a unified universal education. And I think it's wonderful and I think there's great thinking in the area, but it really worries me that there's this idea that it kind of feels to me like giving in to the stigma instead of confronting the stigma. I mean, really? Is it best for school children to not be identified as disabled? Is that best? And in the education culture, I think what they're really missing, and this has come up so much in this conference today on the panels, is that there is a very, very vibrant disability culture. There's a lot of advantages to having an identity. And there's a lot of advantages to being identified as disabled. That's kind of the loss.

So everyone is talking about the stigma and how the kids get teased and ostracized and are isolated. You know, all of those things need to be confronted, but I don't think we can confront that unless a couple things happen in the future. A lot of coalition work with other civil rights organizations. Really infiltrating the leadership getting all these designs and getting funding to implement them, to get them more in touch with a disability movement. And to really confront the issue, like do we want a future where disability is not named in any of the statutes, like disability kind of disappears? Is that the world we're looking for?

Or are we looking for a world where disability is an identity that you don't, like in other minorities, get from your family. You get it from being part of a community. I think what's happening with disability culture is just off the charts so exciting. It's something to be a part of, and I'm just wondering to what extent we lose out when we just is a everyone on a spectrum has various issues and let's forget about the term disability.

Thank you.

(Applause.)

MARC MAURER: The fourth person who will be presenting, Michael Waterstone, a visiting professor of law at Northwestern University school of law and the J. Howard Ziemann fellow and professor of law at Loyola Law School in Los Angeles, here is Michael Waterstone.

(Applause.)

MICHAEL WATERSTONE: Thank you, Dr. Maurer. And thank you, NFB, for sponsoring this event and thank you, Lou Ann, for all her efforts at putting this altogether.

As someone who studies law and social movements, what is happening here is unique. It's an important movement moment. What's happening here, these conversations are necessary. Part of it is happening in this room but part of it is also happening in the hallways. So this conference is a huge and important part of where we are as an advocacy community, and it's just so wonderful that we're able to do this year in and year out.

So as many of you know, Passover is coming up next week. And I'll be celebrating Passover. I have a large family, which means I'm still at the kids' table. I'm 41 years old and I'm still at the kids' table.

(Laughter.)

Which is okay because it's generally more fun there. But this year I feel like that's okay, it's not a slight because at this conference on this panel, I get to sit with the grownups. This is a huge honor for me to share the podium with such leaders of the disability rights movement, people who I have admired throughout my professional career and learned so much from. So thank you for the opportunity to be a part of this conversation.

(Applause.)

I also want to note that one needs to be humble, have some humility, in going last. There is a huge challenge to say something new after two days of really stimulating and thoughtful conversation. I realize also, I'm the last thing standing between you and getting to leave or eat lunch, so I'll try to honor that responsibility.

The role of the future is tricky. We've been asked to think about the future in this panel. That's a hard thing to do. Bob went to music. I'm going to go to sports for my thinking about the future. Two ways to think about this.

Wayne Gretzky was perhaps the greatest hockey player of all time. When asked "What made you so good," he would say, "I don't go where the puck is; I think about where the puck is going to be and I go there."

Contrast that with Yogi Berra who said, "It's tough to make predictions, especially about the future." So hard to do. Let that sink in for a second.

As I'm doing this, I want to reflect on my own position. So the Americans with Disabilities Act was passed before I went to law school. For all intents and purposes, I've never known a world without it. And I think it's important for all of us to acknowledge that in doing the work that we all do, we truly stand on the shoulders of giants who went before us as we think about moving ahead.

These types of conversations make me think about my late grandfather, an immigrant to this country, fleeing religious persecution. He loved this country. But it never really entered his consciousness to object too hard to things like Jewish quotas because he was just so happy that no one wanted to kill him for being Jewish. He thought that was the most amazing thing on the planet.

My generation have the luxury of being greedy and continuing to fight for equality. So too it's like that with disability rights. In the next 25 years, we all have the real honor and the benefit of thinking aggressively about notions of disability equality, imagining what a better future will look like. And I talk about this from the vantage point of someone with the privilege and honor of teaching the next generation of advocates in this area. It's been so gratifying to see so many of them here.

As you all know, they're coming. Some of them are law students with disabilities, some without, but they are coming. They want to lend their talent, their idealism, their passion and energy this movement. They are going to learn from us but also challenge us. Things we've grown to accept drive them crazy, and they're willing to fight for.

I had an interesting conversation last week with my class. We're covering Title III of the ADA and we get to the oh, is the internet a place of public accommodation? It's not just that they don't agree or it's not just that they agree the internet is a place, they can't even understand a world where the internet is not a place. These are students who shop online, see movies online. The whole concept of bricks and mortar is dated to them. Of course the internet is a place. It's where they spend a lot of their time. So they're different.

So in this talk, I want to talk about several things. I think they are important. And then I want to offer some ideas not for immediate change but long term change, taking that 25-year view.

I want to start off with a series of uncomfortable conversations that we've begun this week. And one thing I know about Dr. tenBroek from my study of him is he never shied away from talking about uncomfortable topics.

The first topic that others have addressed is, most people don't think about the disability rights movement the way that we do. They don't think about disability rights the way we do. They don't think about it, as Dan suggested, as a civil rights movement.

Most of them don't think about it at all. When the Americans with Disabilities Act was passed, according to the Harris poll, only 18% of Americans were aware of it. 18%. That is very, very, very different than other civil rights movements, as Dan mentioned.

Despite the fact that disability is the one minority group we can all join at any time. Everyone has heard of Michael Brown and Eric Gardner. We're talking about them. But who has heard of Gilberto Powell and Jason Harrison outside of this room? The country is currently engaged in a painful discussion of about race and policing. Maybe nothing will happen as a result of that, but at least we're talking about it. And I think we have to acknowledge that there's no parallel conversation going on about disability. If we walked out on the street in any direction and asked who Teresa Sheehan was, nobody would know.

Now, this lower salience, lowered political salience, that disability is less of something that people vote on, are invested in, in some ways that's been a real strength of our movement. It has enabled us to get a lot of these laws passed.

But it also has costs. In thinking about the 25 year plan, we need to find ways to get people to care about our issues.

And related to how people think is the fact that judges don't see disability rights the way we do. Because it turns out that all judges are people.

(Laughter.)

And we have a federal judiciary problem. Several years ago I was fortunate enough to do a training for federal magistrate judges on the Americans with Disabilities Act, the amendments act. Huge room. It became clear to me within about 30 seconds, both from their body reactions and the way they cornered me after giving my talk, they hated this law. They do not see the law as a civil rights statute. They see it as some annoying thing that now is begrudgingly going to apply to a larger universe of people. "So I have a cousin with a backache and now he needs this and that." We saw that in Justice Alito's comments. Do we need to do reasonable accommodation under Title II? Yeah, we do! We all know that! But that is the background assumption that many people have.

What I have argued contributes to that is, as has been mentioned before, the state of constitutional law. Constitutional law is the highest law of the land. And it is still really, really bad on disability. Others talked about the Cleburne case. I wish Cleburne and disability cases had teeth. Other groups have leveraged Cleburne in positive directions, the gay rights movement. In disability, Cleburne is always Cleburne equals rational basis equals plaintiff with disability loses. This is despite the fact that Justice Marshall was right. He was right. Cleburne is wrong. And this still has long term effects. It limits what the ADA can do and it's just wrong.

So what can we do on these really hard issues? I have no easy answers. But I do offer up some suggestions on some longer term strategies for to us keep our eye on. And the idea is to balance the need to continue enforcing the laws that we have. That very hard work that all of you are engaged in on a day-to-day basis but also continuing to think about how the law is perceived by people outside of this room.

There are state laws that still discriminate expressly on their face against individuals with disabilities, usually those with intellectual or psychosocial disabilities. These laws are rampant in family law and voting. My home state of California has a statute that requires reunification services for parents and children but denies them to parents with mental disabilities. Based on these discriminatory laws, as we know, parents with disabilities face state proceedings to remove children from their care. All too often. The Kentucky constitution still has a provision that bars idiots and insane persons from voting. I think in targeting these laws that are still on the books, when we can, we should focus on state constitutions to challenge these laws, because oftentimes, not oftentimes, sometimes state constitutions are more fertile grounds to bring challenges on. Connecticut for example has a state constitution that provides that no person shall be denied the equal protection of the law nor be subjected to discrimination because of, with a long list of categories, including physical disability. In their constitutions.

So here we need to look at our friends in the gay rights community in using state constitutional legislation to move the needle on the federal constitution in terms of what is possible. Again, this is a 25-year plan, not a 5-year plan, but I think as a community we need to make some investment in that strategy.

The constitution may not give us everything that the ADA does. But I do think it's important to, over time, change constitutional understandings as they relate to disability. Taking those gains on the state level and moving them to the federal level.

For my students and for me, it's simply unacceptable that the highest law of our land, which is our highest aspiration of who we want to be as a people, is so bad in our area. And that needs to be on our 25-year list of things to do.

Now, when we talk about constitutional litigation, we need to acknowledge that that is not going to work for everyone that's covered by the ADA. It simply is not going to. Some people who are covered by the ADA realistically have no claim for any type of heightened scrutiny even under more liberal state laws. This relates to a conversation we had related to internet accessibility about cross-disability advocacy. I submit that constitutional litigation may work better for some groups than others. That's okay. There are absolutely moments for cross-disability advocacy, and this conference is a wonderful example. But we're at a point in the movement where we're unified enough to acknowledge difference and to face up to the fact that the ADA has worked better for some groups than for others. So all movements, they've all gone through this moment. So I think it's okay to acknowledge that we can have cross-disability advocacy but also still at times pursue individual results and strategies.

Related to this, I think when talking about the Individuals with Disabilities Education Act, or I forget what it's renamed in Bob's world, we need to constantly remember and push the idea that IDEA has its roots in Brown versus Board of Education. There is an argument that IDEA is constitutionally required, and we need to remember that that is what is behind that law.

In terms of thinking about ways to get people outside this room to think about the issues that we do and care about them in the way that we do, certainly we want to continue doing what many advocates here have been so brilliant at, finding cases that capture the imagination of people outside the movement. Family law presents fertile ground for that. I want to suggest something that I'm not the first person to come up with. Employment testing. Employment testing. And it doesn't even need to be brought in the legal sense. We all know that someone who uses a chair, goes in and interviews, someone without a chair interviews, same qualifications, who will get that job? Maybe the person without the chair.

I showed a video in my civil rights class from like the late '80s in St. Louis, a housing case, not even a lawsuit, like a 2020 expose, where a black person went in to rent an apartment, okay, thank you very much; white person goes in, oh, yeah, of course, get the apartment. Caught it all on undercover cameras. Boy, is that powerful. You're able to capture what we all know happens and project that to people to show this is what is happening, that captures the imagination of people outside the movement.

Two more points. CRPD, the Convention on the Rights of People with Disabilities. I strongly believe that we should continue to push for ratification. I think it's the right thing for the United States to do, it's the right thing for the world. But we need to be very careful that ratification is not the end game in and of itself. The way ratification is being pushed politically is what we are doing is just exporting our laws and our rights and values to the rest of the world. And if that helps us get it passed, great.

But if it ends there, it's a huge missed opportunity. We need to continue to find ways to do what other countries are doing, which is to use the CRPD as a moment to reflect on our own laws and think about ways that we can improve what we do here and look for pressure points to pressure our government to the do that. So I reject the notion that we have nothing to learn from the rest of the world.

The last point I want to make comes back to students. Because ours is such a unique movement, it's at a great moment in time where people like you have Arlene Mayerson and law students in the same room. Like that is unique in terms of a movement. I think we have the ability and the obligation that the next 25 years of law students needs to learn from the people who came before them. I think that we're kind of at a moment where that can happen.

One thing I would like to do to help that along, and there are ways now to reach students where they are with technology. So I want to create a podcast series intended for law students taking disability courses, and I want to talk to you about what you've done in the movement, why, what you think the next 25 years could be, and we as law teachers have our students listen to you because they want to.

So with that, I thank you all very much. Again, thank you to the conference organizers. And thanks.

(Applause.)

MARC MAURER: I imagine there are questions. I know that some of the assertions that have been made, I have questions about them myself. So I thought maybe we could take a couple of questions for the panel members. This is the last panel, so get all the questions you've got out.

>> Thank you again for a wonderful panel.

My question is about intersectionality, because we know that the past and the present of the disability world has a black or brown face often. And there's no reason why the future of the disability world is also going to have a black or brown face. So how do we have connections so that other civil rights movements, especially with respect to race, understand that disability is an important component of what they're doing, but also that we understand that race, racial consciousness, is an important part of what we're doing? Because one of the striking things I think in terms of the future of disability studies is that the audience and the panelists in this symposium should look different than it does right now. So how do we get those people that aren't there into this room?

(Applause.)

ARLENE MAYERSON: I'll start. Thank you for that comment. It's a very important one. We're really trying to focus on that issue also. So the case that we just brought against a school district is DREDF, but I brought in Equal Justice Society which focuses on race. And we ended up not having to sue because we got a settlement. Even for the first time in a special ed case, we're representing black kids who have disabilities, who don't have disabilities, we're having an education expert, but we're also having for the first time I think in the country that a school district has agreed or it's been ordered an implicit bias expert. Because we need to recognize implicit bias in our own movement. And certainly in the schools.

So I think it's really important to, in everything we do, try to do it cross organization, cross movement, and recognize that no matter how good the education is, you know, the reform is, no matter how good our special ed expert is, there's going to be an issue of race. And so I'm really anxious to see what happens with the report of this expert, John Powell, in this case because I'm hoping it will open up this area for other school districts and nationwide.

MARC MAURER: All right. Did anybody else on the panel want to comment?

ROBERT DINERSTEIN: I also think this is a critical question that you have raised. And there's often an assumption that all the good guys are on the same side. I think that's always dangerous and a little bit smug. I think that we need to think about how to make the case for the disability community, to those people who are concerned with racial justice, that we're not merely a complicating factor and we are not merely a stigmatizing factor. We have a positive and complementary role to play, but that has to be an argument that is thoughtfully constructed and not just aren't we all great, wonderful progressives together. And I don't think that argument has been well laid out yet that I've seen.

ARLENE MAYERSON: I think that's one of our biggest challenges.

MARC MAURER: Michael?

DAVID FERLEGER: This is David. Quick comment and observation.

From the clients' points of view, I have been involved in representing people of color who distrust people like me with the white faces that we have because they know better than people like me the ways in which the racial components of society are implicit or explicit in the legal system. So I think it's really important for lawyers to be conscious of our role in relation to the clients who are people of color.

And another comment. Eve, correct me if I'm wrong, but I don't think I am, I think the Justice Department civil rights division has been really, I dent want to say adept, but I know that the folks who represent the civil rights division, including those folks working on disabilities, there is a wonderful diversity of folks who have done amazing work on behalf of people with disabilities and it's a great model for all of us.

MARC MAURER: I should say that in the National Federation of the Blind, we have used litigation as a strategy for a good many years. We started litigation in 1954. I was not around at the time. But I have used it extensively in the work that I've done in the presidency, and I wonder, I would be interested if anyone has an opinion, I have wondered whether it's better to have a blind lawyer or a sighted one. And I've wondered that because in the ordinary circumstance, if you're dealing with a case that has to do with blindness, having a competent blind person in the courtroom, it seems to me, should help.

On the other hand, I also suspect that people with disabilities get less respect even if nobody knows it. And consequently, do you win more with a sighted guy in the courtroom or a blind guy? I would be curious to know if anybody has an opinion. I've wondered that but I've never tried to find out.

>> Hi. Jasmine Harris from American University. So my question really builds on Dr. Maurer's point and it's about normative change. So when we think about normative change, and in this room there are several lawyers, I think it's safe to say. So think about how can the law change social norms of disability. And so one of the things that I look at in my research is how can procedures work in service of changing social norms. So specifically, I'm thinking, what is the tension between privacy and disability pride in the courtroom. So the rules of privacy around closed courts, the lack of public access, or for example guardianship proceedings really inhibits that disclosure. So going to Dr. Maurer's point, I think it's the lack of visibility of people with disabilities. And so I would encourage you all, and I would love to hear your thoughts as to whether you think that the proceedings with respect to disability that are not ADA in public courthouses, whether you think they should be opened so there could be greater discussion of disability and greater views on the spectrum of what disability means.

MARC MAURER: Anybody want to take it on? The panel is very quiet.

DAVID FERLEGER: I'll just give a short incident but this happened over time. In the very, very old Al Pender's case involving a large institution of people with developmental disabilities, the exhibits that were introduced at the trial had little white sticky dots on the faces of all the people in the institution who were depicted in the FBI photographs that were used at the trial. And the judge, republican judge, appointed to federal court, he ordered that happen.

Ten years later or so, when the question came up in some proceeding about whether we were going to only use initials, first names, how we were going to deal with that privacy question you mentioned, the judge said, I think it's time that we should stop thinking that anyone should be embarrassed or think their privacy is innovated by being identified as a person with disabilities.

So it took in that one case ten years for people to evolve that way. And a case I'm involved in now, where I use somebody's first name and last initial, I was actually criticized by some state officials because somehow the first name and initial could somehow identify who somebody was. So we have a long way to go before we change that.

MICHAEL WATERSTONE: I don't have any great insight into that. I think it's a great question and you point out a great point.

The only thing I know, that may move things in the direction of being more transparent, is my students have way different conceptions of privacy than I do or a lot of us do. It's just they live in a different world. Certain things that we expected to be private are very public. So I think that we as a society are drifting away from notions of privacy or to different conceptions of privacy anyway in a way that makes more personal things public. So it could that culture out paces legal change on this one.

>> Thank you.

MARC MAURER: Other questions? Hi, Jessie Weber from Brown, Goldstein & Levy. I have a question pushing back on Dan's gloomy speech.

DANIEL GOLDSTEIN: Normally this happens in my office. I lose.

>> So I do think with increasing confluence of disability and poverty, there are some perhaps positive results that could come from that. One I think is what Arlene was talking about, maybe sharing best practices, particularly in education. And we're starting to see that more and more, recognizing that so many kids have trauma that has to be dealt with in a therapeutic way.

And the second way I was just thinking in terms of identity politics versus rights based or equality models that depend less on the identity. Anti-poverty isn't really an identity move. While I think identity is very important in terms of visibility, I think in terms of getting people outside of this room to see our movement, there's a lot of possibility that could come from collaboration with groups like anti-poverty groups and framing all of our struggles together in an equality and rights based model. And that sort of leads to my question. I'm glad Michael brought up the parallel with the LGBT rights movement, which made more success by framing it marriage equality than same sex marriage, which had more sway with wider populations.

But in terms of getting more cultural shift, which everybody has talked about, the LGBT rights movement has been really successful in that by having a strong media strategy, by having an organization like GLAAD, whose whole job it is to look at television and movie scripts and write in characters and talk to the media. And this may have been addressed, but does the disability rights movement need its own GLAAD and how do we make that happen to really change the culture?

MARC MAURER: My opinion is that it needs a public relations effort much stronger than we've had and it has to be organized with internal members pursuing it. We have to put in more energy and money and effort into that. We could try to hire it out but I don't think the people outside the community know it enough to do it, so I think we have to develop our own and get at it soon. We're trying to figure out ways to do movies now, and we're doing a YouTube video every week, and I think we ought to do more of that.

I think the problem we have is that we're not valued. What would happen with a world without a lot of disabled people in it? It wouldn't be as interesting. It wouldn't be as commanding. It wouldn't be as exciting. And the reality is, lots of people don't believe it. So we have to find a way to spread that word.

ARLENE MAYERSON: What I was going to do my talk on today is disability as Zeitgeist. John Hockenberry, a disabled journalist and author and thinker, etc., he has a TED Talk on this. He talks about, if you want something done, if you can't figure out a problem, go to a disabled person, because disability requires you to be innovative. You're innovating every day of your life. You're figuring out what do I do if there's no curb cut. There's always innovation involved.

And if you look to technology, almost all of the technology that's in the mainstream today, almost all of it came from disability technology. And it's so ironic, because now we're fighting to get accessible technology. And I have a long list of those things.

There's a lot of, the special ed area, teaching all kids, for example. I think that the idea of this is a cool one, and I think it's really, really true.

MICHAEL WATERSTONE: I would just add that to the extent the planning and energy and ideas behind what you're talking about are going to happen, maybe not the execution, but those predicate steps, to quote a famous politician, we are the future we've been waiting for. That's going come from this group. Literally. So that type of thing will come from events and infrastructure like this. That's how it's happened in other movements.

ARLENE MAYERSON: I just want to say one more even though we have a long line.

MARC MAURER: There are lots of questions? We have two minutes.

ARLENE MAYERSON: Well, I just wanted to say about PTSD is an example that I think you just used, Jessie. That's a perfect example of where there's a lot of debate about whether it's better or worse to call that a disability. Particularly in the minority community. There's many neighborhoods where there's a lot of stress.

And also, this gives me an opportunity to say those people that we're having identified do have severe ADHD, PTSD, learning disabilities, so it's a very legit thing but a lot of people think those are soft and it's better for them not to be labeled disabled.

MARC MAURER: I note we have a minute to go and I think I will offer one comment, and then all of you who want to ask questions, you know, come on up here and ask them of these panelists.

I would like to take them publicly, but I think we're running out of the time.

I have a letter here from a mother who says that her son who is blind and has autism didn't get an education. She wants me to help. We're going to try do the best we can with that one. He's 18. He didn't get an education. What are we going to do.

Well, we've missed a lot of time. And yet we've got whatever time there is left. So we're going to start now.

Part of the letter says, I couldn't find a community that understood. And what I am hoping we can bring from this is a community. We, many of us, have a community that we've created. The National Federation of the Blind is one. And it takes people who are blind and it says we've got something for you and we'll show you what some of us have done, and if you have something to contribute, we want to know about it. And if you want to challenge us and make us better and more active than we've been in the past, come on and do it. Demand of us that we'll be better than we were.

This is what we do in our organization.

Now, blindness doesn't stop at the edge of where we are. And neither does other disability. And not all of the characteristics are the same, but that doesn't matter because the heart and the joy and the hope are still there, and we need to find a way to make a bigger community than the one we have. We have to find a place where people can come where there is understanding, and where there is a gathering of resources where we can offer the hope. Dr. tenBroek thought this. He built the kind of reputation for the law and for disability law that we have carried forward, and he had the temerity to say that in the United States we have policy that welcomes people with disabilities. There's a lot of argument that he may have overstated the case, but he pointed to a lot of statutes that had adopted pieces that said, we in the United States welcome people with disabilities.

Let us create this community and we can make what he has said come true. It seems to me that we've done a lot of that this week. I'm glad we've had eight of these. Let's look forward to the next one.

(Applause.)

Anybody who would like a tour, Lou Ann is coming up here and she's going to be right in front of the stage. If you want a tour, she can give it to you and she's ready.

And here I guess is Mehgan Sidhu.

>> Hi, everyone. If you are a member of the Disability Rights Bar Association, lunch will begin in the members’ hall this year, which is just in the same room directly behind us, but you must be a member of the DRBA to attend the lunch and the meeting. You should have a blue sticker on your name tag indicating such. If you are a member and don't have the sticker, please check in at the desk next to the tenBroek registration desk.

Lunch will begin now, and the meeting will begin in this room at 1:30. So please be back in this room at 1:30. Thank you.

(Symposium concluded at 12:18 p.m.)