UNEDITED TRANSCRIPT

**2019 Jacobus tenBroek Disability Law Symposium**

**“Barriers to Justice: Helping Your Deaf Client Navigate the Legal System”**

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The National Federation of the Blind

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Members Hall

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8:30 a.m.

"Valuation of the Disabled Life"

MARC MAURER: So perhaps we could get underway here. We have some housekeeping announcements. Get your bottles and cans and paper into the recycling areas, please.

And second, after the law symposium today, we move to the Disability Rights Bar Association. For members of the bar association, there's lunch. If you are not a member, for you there is no lunch. But if you want to join DRBA, you have got to apply at the table over by the registration table. And that way, if you get accepted in your application, and I presume there's lunch, I will ask the President of the bar association if there's lunch.

SCOTT LaBARRE: Yeah.

MARC MAURER: Okay.

Okay. Our panel this morning is entitled "Valuation of the Disabled Life." It is a very brief title and covers an enormously significant area.

We have people to present for today, a person who has been with us for many years and made many presentations. Many people have commented about how we manage this, and Matt Dietz is the litigation director of Disability Independence Group, and he has often said that I would cut him off at the appropriate moment except he would usually say at some other moment.

And then we have Catherine Kudlick, who is a director of the Paul Longmore Institute on Disability and also a professor of history at San Francisco State University.

Now, we were going to be hearing from a third person, Elizabeth Barnes, who is a professor at University of Virginia Corcoran Department of Philosophy, but she has been directed by her medical professionals not to be with us.

So we're going to have a presentation of her part of it, but her presenter is a colleague who is Teresa Blankmeyer-Burke, who has agreed to act as her proxy. She is from Gallaudet University and a philosophy professor there.

I would like to make it as beneficial as we can for the people who present. I sometimes preside standing, and they say, yeah, but professors stand and the students sit down, so if you would please sit down, that would be better.

So I apologize to all of you who I've heard twice or three times so far about how this seems strange, so I will be off my feet except when I want attention. So if I think we're running out of time, I'll let you know.

And I gather we're starting with Matt.

Are you starting, Matt?

MATTHEW DIETZ: Yes, I am.

MARC MAURER: Okay. So here's Matthew Dietz.

[Applause]

MATTHEW DIETZ: I'm always so glad to be here, and please feel free to take pictures and tweet them because if you're not on social media, you're not actually here.

[Laughter]

The name of our seminar is the valuation of disabled life, but for the past three weeks, I sat through a trial in the State versus Aledda, which was the criminal trial of an autistic young man who was 27 years old, sitting in the middle of the street playing with a toy, and police came in and they shot his caretaker.

At the end of the trial, they found a mistrial on three of the four counts and acquitted on one of the counts of culpable negligence. Two counts of manslaughter and two for culpable negligence.

The interesting thing was how they portrayed disability and race in the context of the trial. It was more of what the valuation is of a disabled person's death. So the question is, in order to justify the shooting, in order to get Aledda acquitted, they have to say that this person with a disability was too dangerous, that he was almost like a rabid dog that had to be shot in the street, which is exactly what happened. He sat down in the street, and a man who was half a football field away shot at him and said he was justified in doing so.

Now, as you can imagine, as a person who is used to sitting at the trial bench wanting to get up and cross examine and do direct examination and do all things, I sort of was like itching in my seat in the section where all the spectators sit, saying, oh, my God, I want to do this, I want to scream, I just want to object.

But it was interesting sitting there and listening to the themes of implicit bias, and when you're talking about police, actual pro police bias, and when you're talking about people with disabilities, you're talking about an actual bias. It's not implicit bias.

So when Arnaldo Rios Soto was introduced, the prosecutor made a point of saying, this is Arnaldo, he lives in the community, he is a human being.

But on the other part, the defense said he acted like he was crazy. He was doing things that were crazy. He was suicidal. They didn't name him. "The Hispanic man." The whole concept that he was dangerous, just by virtue of him being out in the street.

At the end of the trial, one of the jurors came out, went to the defendant, shook his hand, and said, "From the moment I saw you, from the moment you got on the stand, I knew you weren't guilty."

So at the end of it, you got the perception that what was this man's life worth? What are the ways in which to say that he is a human being and that his life is worth something, and that he's like anybody else, that he has the right to be, to walk in the street, to run in the street, to sit down and play with his truck in the street, without thinking that he was going to be suicidal, without thinking that he was going to be dangerous, without thinking he was going to shoot somebody.

Now, one thing that I would love to do is I would love to get all five days of the trial on video and then show them. It would actually almost be a lab of looking at the biases both ways and how they play off the bias, how they tried to play that he was too dangerous, how there was no way possible that he had a right to even be on the street. Why didn't you stop him from leaving his home?

Now, the problem that you get is, the jurors have more bias than the police do. You're not going to get any jury that even understands folks with developmental or intellectual disabilities, and it's hard enough to pick a jury with a person who has any understanding. So not only are you dealing with the implicit bias of the police and the court system; you're dealing with the actual bias of the jurors who saying you know, what would I do in that situation? And I just thank Mr. Policeman for his service.

So it was more towards -- being in the trial for six days, you were dealing with a disability trial with intersectionality between race and disability. You were dealing with more of disability actual bias than implicit bias for race.

Now, the one big race thing for the trial that came out, which really bugged me, and will bug some of you too, is the officer said, "You know, I didn't understand why Charles was sitting in the street with his arms up saying don't shoot. He doesn't have a gun. Because if there were five policemen there, I thought he was being held hostage by the guy with the truck. Because I couldn't understand why he just wouldn't walk away from the guy with the truck when he had all the police protecting him."

It was one of those things where you go, huh? Really?

So that was the racial issue. But the rest of the trial was disability, the implicit and explicit biases in dealing with the fear that comes for a person with a disability to be in the neighborhood, which is shocking to sit there and see.

Now, in the civil case, it's going to be a lot harder because in the criminal case, none of his behavioral issues came into play. That was all barred by a motion in limine. That was barred from evidence of the jury because at the time of the incident, he was just saying "Minnie Mouse, Mickey Mouse" after the shooting and he was purely compliant.

But in the civil case, his behavioral issues are going to come out.

How I do deal with that? What is it worth?

Now, the good thing is my other panelists could talk more about the philosophy and the history towards valuation of human life, of a disabled person's life, which is the goal. But when I look at it and I look at it as a trial lawyer, with how to evaluate it for what is it worth, what I'm doing in the Rios case, the most important thing for me to do once I got the case was to get Arnaldo the services that he should have always received. He was moved from group home to group home after every time he had a meltdown, because they never provided him with adequate services in his group homes so that was the first goal.

And to get him the additional services because of the trauma that he faces.

And the question is, the humanity that he faces is he cannot express himself. He has an intellectual disability, he has autism, he repeats, he plays the movie of the shooting in his head endlessly and gets anxious and acts out.

What is that worth? How do you deal with that?

And part of our job is to explain humanity to a jury and say, this is what he goes through. This is what any human would go through after being through a traumatic situation, but there is such a dearth of training and expertise for trauma-informed care for folks with disabilities, because the assumption is that there is no further psychological trauma, that there is no psychological trauma that you could address and fix. The main way that I determine my psychological problem in my case is I got his care plan up from $71,000 to $642,000, and I said, that's how Medicaid evaluates his damages and that's what his emotional damages are.

But on the same way, I went to a trial conference for plaintiff lawyers and they said, you know what? I have this case in which a kid in a group home was sprayed with pepper spray, but I didn't take the case. I didn't see what it was worth.

Because of the valuation of a disabled person's life.

Now, when we're talking about explicit and implicit bias, it ranges from disability to disability. I still have cases in which my Deaf clients are called deaf and dumb. And that's still a major issue of explicit bias. You have to explain to a jury why that apparent bias is still there.

But many times like racial bias, a lot of the discrimination is more implicit than explicit. And unfortunately we're still in the position that where we are in society now unfortunately, where we have to point out this explicit bias. It would have been my preference in the Rios trial if they said, this isn't crazy. He has a disability. He has behavioral issues because of his disability. This is a manifestation of his disability. He is not crazy. And the officers are trained to know that.

It would have been a good way to educate the jury, but again, we are not prosecutors, which is a problem. A lot of prosecutors don't have training in saying, this is what things are like.

So I try to work with prosecution in my case, but it's still difficult to say it's not crazy. This is just the way that he acts. This is how he plays with his toys. You should know the difference between manifestation of a psychiatric illness and a developmental disability.

Now, the problem with police departments is they don't. And they're not trained to tell the difference between the two and that's why a lot of folks with developmental disabilities get placed in psychiatric facilities if there's a meltdown and the only way they're treated is with psychotropic medications and not with any behavioral therapy because nobody does behavioral therapy in a psychiatric facility.

So group therapy, which really doesn't help many of my clients, or it is being in seclusion until the meltdown goes down, and then they're transferred into a group home and then pulled again into a psychiatric facility. And I talked about that last year when I talked about Olmstead.

But the issue for more of this year is the valuation of life and death, especially when it comes to police misconduct issues, when it comes to institutionalization issues and community integration issues, and to say that there's still a lot of education that needs to be done, but these are concepts that we should think about, which is the apparent bias when dealing with folks that are not sitting in this room but the community at large. And that is always going to be the biggest hurdle.

Now, I'll pass the mic over.

[Applause]

TERESA BLANKMEYER-BURKE: Good morning. I am Teresa Blankmeyer-Burke, and I'm speaking on behalf of Elizabeth Barnes. I am reading her words that she has sent.

So first of all, I would like to apologize for not being on this panel in person. Due to some unexpected medical circumstances, I've been unable to make the trip to Baltimore.

Secondly, I would like to thank my copanellists and the conference organizers for their patience and understanding in dealing with this unexpected turn of events.

And finally, I would like to thank my wonderful friend, Teresa Blankmeyer-Burke, for acting as my proxy. Please trust me when I say you lose nothing and gain much in swapping me for her. And you should absolutely ignore whatever self-deprecating thing she will try to interject at this point.

Now my words.

So what I said was I would refrain from self-deprecation but add that I'm sorry you won't be receiving Elizabeth's words from her. I'll do my best to channel her, but I am a poor substitute.

Okay. Back to Elizabeth's words.

I thought given the circumstances that this would be an opportune time to discuss the complex and at times vexed relationship between disability and health. Much of my work focuses on giving philosophical arguments with a claim that having a disability is not something that intrinsically makes you worse off or automatically reduces your quality of life. Disabled lives can often be just as good, just as rich, just as rewarding, just as full as nondisabled ones. And this is not in virtue of disabled people finding ways to overcome their disabilities or gaining instrumental good like perseverance or strength of character; rather, it's the simple though to some radical thought that being disabled can often be a perfectly good and rewarding way to live.

Invariably when I argue for claims like this, the subject turns to health. Are you saying that health doesn't matter? Are you saying we shouldn't care about health? Isn't this a politically disastrous thing to say since it could give governments an excuse to ignore health inequalities and just say instead that they value physical difference and diversity? And so on.

The conversation takes this turn of course because people equate disability with loss of health. We are often taught to view health as a linear spectrum, ranging from the most healthy, the young, fit athlete who drinks kale smoothies and meditates perhaps, to the typical office worker who may not be the fittest person in the world but who has nothing "wrong" with them per se, to the unhealthy, which includes both people with acute diseases and people with disabilities.

Sometimes this view of the connection between disability and health is tacit. We say, for example, she has 10 fingers and 10 toes, to communicate that a newborn baby is healthy. But often the connection is more explicit. The health utilities index, for example, which is one of the most widely used and influential measures of health status, and the so-called health related quality of life defines a range of health states beginning with full health, moving through a range of functional impairments, and ending in death.

And the philosophy of biology, whose normal function theory of health underwrites many contemporary measures like the HUI, describes a picture of health which moves from normal through a spectrum of disease and disability to death. Death, he says, can be thought of as the ultimate disability.

It's understandable given this context that many scholars working on disability have wanted to distance discussions of disability from discussions of health. Disability, it is often argued, is a matter of social prejudice and social discrimination enacted against bodies with impairments. Some impairments may have implications for health, but disability itself is fundamentally not a health issue. Disability is a matter of unjustly imposed social disadvantage, and the imposition of such disadvantage is about how people are treated, not about the state, healthy or otherwise, of their bodies.

This is a powerful idea, and it has been extraordinarily politically useful for disabled people, but I also think it can, at least in its simplest form, belie the often complex and intimate relationship that disability bears to health. If we define disability according to standard social model parameters, disability becomes a somewhat disembodied thing. Disability is something that's imposed on you by unjust treatment. It's not about the biological condition of your body.

For some of us, though, the lived experience of disability is at least partly a matter of the biological condition of the body. I am not present at the conference today, not because of any failure of accessibility on behalf of the organizers, but simply because my body sometimes requires complex medical treatment at unexpected times. The organizers, in making their conference accessible, did everything right in response to this, but I'm still not there and there isn't a change in social arrangements that could alter that.

This unpredictability is part of my experience of living with a medically complex disability. Social norms and stigmas make it harder and more frustrating to live with, sure, but they don't fully constitute its limiting effects. We could of course say this is simply the difference between the effective disability and the effective impairment, but I think for many people, people whose conditions require ongoing aggressive medical care, people whose conditions are degenerative, people whose conditions are painful or affect energy levels, this distinction quickly feels artificial.

In reality, there's just the messy complexity. Some of it due to prejudice, some not, of living with an atypical body. We can screen part of that off and call it impairment rather than disability, if we like, but it's all part of the social experience of having a body that functions differently than most bodies do.

More significantly, though, I think it's politically important to emphasize the connection between disability and health. There is quite obviously a reason why access to healthcare, access to health related goods and services, access to help workers and so on is a fundamental part of the disability rights platform. And there's a reason why, as we once again face efforts to overturn the ACA, disabled people will be on the forefront of the fight, and that's because disabled people are disproportionately likely to need access to healthcare and health related good and disproportionately likely to suffer when they are withheld.

In pushing back against the medicalization of Deaf people's lives and bodies, we are quite right to emphasize that disability is not merely a health issue and cannot be understood in biomedical terms. We might rightly attempt to understand disease and illness through a biomedical framework, but disability and illness are not the same thing, and we will fail to understand the complexity and richness of disability and of disabled people's lives if we ignore that difference.

At the same time, however, in pushing back against the biomedicalization of disability, it's important not to make disability too disembodied or too removed from health. Disability is not merely a health issue, but it is intimately connected to health in a way that other social kinds might not be.

People of color, for example, face striking health disparities compared to their white counter parts, but this is plausibly due entirely to issues such as socioeconomic disadvantage, stigma and healthcare, and so on.

If we could make the world a more just place for people of color, the relevant health inequalities would disappear.

If, in contrast, we could make the world a more just place for disabled people, disabled people would likely still, on average, have more complex health issues than their nondisabled peers. This is not to say that all disabled people are less healthy than nondisabled people simply in virtue of being disabled; it is just to say that the inequalities we see in health status when we compare a randomly selected group of disabled people to a demographically similar group of nondisabled people are not entirely due to the social disadvantage that disabled people face. Because of the complexity of impairments they live with, disabled people would still have, on average, more and more complex health issues than your average group of nondisabled people, even in the absence of unjust social arrangements.

So disabled people and their allies are often put in a strange kind of double bind when it comes to talking about the relationship between disability and health. We want to celebrate the richness, joy, and vibrancy of disabled lives. In order to do this, we have had to fight and fight hard to demedicalize disability and to emphasize the cultural rather than medical and health related aspects of disability. But at the same time, we want to highlight the precarious position that disabled people often find themselves in when it comes to health and healthcare. If the ACA is overturned, disabled people will suffer, and some of them will die. To say this, and to say it with the force and the expediency with which it needs to be said, we often need to emphasize the suffering of disabled people and the harms that their various health conditions can bring them. But the more we say this, the harder it is to emphasize at the same time that many disabled people are flourishing and happy and would not prefer to be nondisabled.

I suggest that two key ideas, both of them false, underwrite this double bind that disabled people so often encounter. The first is that the value of health should be understood primarily in terms of the effect it has on overall quality of life. The second is that health is a linear spectrum according to which people are easily classifiable as more or less healthy.

In discussions of health economics, public policy, public health programs and so on, it's often taken as something close to a data point that health matters and that we have reason to value health only insofar as it impacts our overall quality of life. The basic ideas that health is valuable because health increases overall quality of life and health problems are especially bad because they reduce overall quality of life, and it's not just academics and policy wonks who make this assumption. Our everyday conversations assume the connection as well. We use the word "healthy" as a synonym for good or flourishing. We say it to perk up the person down on her luck. "At least you still have your health." We lift our glasses and toast health, and so on.

We have very little conceptual space for understanding the person who is flourishing, who is happy, thriving, living a good and rewarding life but who has complex health problems. And we especially struggle to articulate the idea that their health matters, even if it isn't directly correlated to their overall well-being.

I have a degenerative health condition. In the last decade, my health issues have become worse, and I will continue to experience this as I age.

At the same time, my life has not gotten worse. Indeed, my life is much better now than it was a decade ago, and I consider myself a very happy person living a very good life.

But this is of course compatible with the fact that I have lost things of value. In the course of having health issues get worse, I have lost things that are important, that are valuable, the loss of which I still grieve.

None of this can be articulated in terms of overall reduction in my quality of life. I still have a great life, and I wouldn't change it.

Many disabled people learn how to flourish with and alongside substantial health problems. In fact, substantial empirical research shows that both that disabled people often report high quality of life and that quality of life reports in the context of long-term health conditions are poorly correlated to what we might describe as the objective severity of those health conditions. In short, the health problems disabled people often experience don't negate their ability to experience good quality of life. But neither should their high quality of life negate the value of their health, the importance of their health problems, the significance of what they have lost, and the significance of what they stand to lose.

Health economics, health policy, medical practice, and ordinary discourse also regularly assume that health is a linear spectrum. For any two people, we can meaningfully ask which is healthier. And if you experience significant health problems, they mean an automatic net reduction in your health and move you down the healthy spectrum.

This idea is overly simplistic. Thinking about the health experiences of disabled people can illuminate why.

For many disabled people, asking whether they are healthy or whether they are less healthy than average might only admit of the answer, it's complicated. You might go to the doctor more than most. You might take more meds. You might have a body that's unpredictable or that can't do what most other people's bodies can do, but at the same time, you may be very involved in adaptive sports, you may be a major nerd about nutrition, you might have a great work-life balance and low stress levels, you might have extremely low risk for many of the major causes of death for modern Americans such as heart disease and stroke. Are you unhealthy? Are you less healthy than average? Is that even a good question?

Many disabled people value their health. They value health-promoting behaviors like exercise, nutrition, and sleep. They go to physical therapy and occupational therapy and so many other kinds of therapy all to promote their health. And they do this because their health matters to them and they want to prioritize and promote it. Valuing and promoting their health, however, is not the same thing as trying to be less disabled or trying to be nondisabled. Rather, it's trying to be healthy and disabled. Health can exist in the context of disability, and lots of the values we associate with health: Fitness, a sense of ease in one's own body, lower risk of heart attack or stroke, and so on can be present even when there are substantial health problems.

Obviously there's so much to be said about both these issues. This is my plea for the start of the conversation rather than any attempt at an authoritative take on the matter. But I think to be truly able to do justice to the value of disabled life, we need to tackle the difficult intimate relationship that disability has with health and the difficult intimate relationship that health has with well-being and quality of life. In both cases, the two things are not the same but are often conflated and treated as one. Yet in both cases, while emphasizing that they are different things, it is important likewise to emphasize that they are deeply and closely connected.

[Applause]

CATHERINE KUDLICK: Okay. I would just as a historian add that definitions of health depend in time periods and have changed over time and have also changed by culture. So that's another piece to throw in.

I'm Catherine Kudlick, and I often start my talks, which you may know if you've heard me speak before, I often hold a little figure. And it's a pirate. It's a little tiny plastic pirate. And I ask people to think about it. It's got the hooked arm, the eye patch, peg leg. Probably invisible disabilities too. You know, you just don't know. They can't portray those in a doll. And I ask people to ask themselves, have you ever thought of pirates as disability action figures?

[Laughter]

I want you to take a minute and sit with the laughter and your own, whoa, never thought about that, and ask why that's so.

And also ask what could make that sort of flip happen for other people around you and for yourself.

What I'm going to focus on today is some of the stuff that I've been doing to introduce culture into the equation of rethinking disability in order to make a case that culture is essential. It's the top priority we should be focusing on, not the feel good thing at the end.

So culture really is what shapes people's attitudes, it's what fights stigma. When you walk into a room as a lawyer, you have been shaped by culture, your juries have been shaped by culture, your judges have been shaped by culture, your clients have been shaped by culture. Everything is shaped by culture around disability and all the messages we do and don't get.

And imagine walking into a trial setting where people understood implicitly that disability could be equated with action figures that were pirates and that were familiar ideas that people have already integrated into themselves.

Now, we really do accept implicitly that culture matters, but it's really easy I think for people to brush it off and say, oh, well, we've got to fight for healthcare, we've got to fight for employment, for rights, all of these things, and I won't disparage those at all. I think it's super important for all of us to be doing that work.

However, don't underestimate the power of culture to help in those crusades because it's really culture that's going to change those crusades from the gut level at the bottom and it's going to be this amazing tool if you let it. It will help you fight all of these battles.

Culture also for those of you that are fighting these battles as human beings and your clients and everybody else, once you introduce culture into the equation, there's going to be a place of respite for people to kind of collect their energies, to collect their strengths, strength in number, strength in, you know, kind of knowing something positive is going on in the world and to just let your hair down and say, oh, good, we can laugh or something, or we can all get angry in a room with people about something, and have it be this moment where we're all together to experience this and to enjoy it.

So at the Paul Longmore institute where I'm director, we have been working to kind of push out this cultural message in a number of ways. And we do it to our students or for our students, I shouldn't say to our students, but that's kind of true too.

[Laughter]

Students come to us and they're really nervous and they kind of are not sure if they want to identify as somebody with a disability, it's kind of uncool, very big stigma, and they come in and they're in a space where other people have kind of fought with this and struggled with this and made peace with it just in a really fun and fundamental way.

And the way we kind of work with our students to change some of these ideas, one of the areas is the super fest international film festival which I know a number of you came to the other night. We show them with open audio descriptions so that everybody gets the audio descriptions, not the poor little blind people off in the corner with their earbuds in trying to figure out like if we're making a disturbance or not by listening. Everybody heard it. And the big cool thing about that is that it's this wonderful opportunity for the entire audience to experience films differently. So it's not just "helping" the disabled people, but it's meeting disabled people's needs, getting people to think about this experience of movie going and what's going on in the film differently.

And we've had directors actually say to us that they would only show audio description live with their films from now on because it just added so much.

It's a work in progress. It's a culture in progress. There's some audio descriptions better than others. But there's some really great movements now within audio description to change thinking about it. In fact, Georgina Kleege at University of Berkeley is teaching a creative writing class on audio description, to really get people to think about, what do you notice? What do you call out? Do you call out race? Do you call out the purple dress? The weird sign on the wall behind? It makes everything implicit explicit and it's totally a great thing.

So stay tuned. I think there's some great developments on that front.

In addition to super fest, oh, just one other thing about super fest. The films are submitted from around the world. This year we got 180 something entries. Some are better than others. But we sit with the students and work with them to kind of understand, you know, okay, what makes something a good portrayal of disability versus a dreary portrayal. And what bumps it up to another level, oh, not that people with disabilities are people too but actually people with disabilities are leading the charge on thinking about critical issues or reframing big important conversations around race and, you know, LGBTQ issues, and all these things. And people with disabilities are at a really interesting intersection to start raising the questions and all of that. So we try to up the ante and really get some very exciting things going on with that.

The judges are all people with disabilities at every phase of it. So indeed this isn't one of these ideas it's not nothing about us without us, but it's actually nothing without us, period.

The second thing that we have done is we created this exhibit call the "Patient no More," people with disabilities securing civil rights. It's a history exhibit of the 504 occupation of the federal building in San Francisco in 1977 and just a brief refresher for those not familiar with that story or forgot, in 1977, more than 150 people with disabilities occupied the federal building in San Francisco to demand that the regulations behind Section 504 be signed. They waited 4 years for these to be signed, it had not happened, and people with disabilities organized and managed to succeed.

And the reason they succeeded, they occupied or tried 10 other federal buildings across the country, but in San Francisco, they succeeded because of the strong community relationships with other organizations, including the Black Panther party which came in every single day and fed people with hot meals. Because there was a Panther in the building neighbored Bradley Lomax and his attendant Chuck Jackson. And they were in there. The Panthers said, one person needs us, we're going to feed everybody. It was a great home. They had buy in from the community, from politicians, everything.

So we have a traveling version of the exhibit now and an accessible online version. It's PatientNoMore, all one word. If you go online, you can see this incredible story. We share it with students and students will come up to us and say, wow, I have a 504 accommodation and I just thought it was some weird government number. And they're there like, oh, my God! People actually occupied a building so that I could get rights.

Suddenly anybody that's felt like tiny and stigmatized and whatever, you know this history and you think, wow, I can hold my head high. They engage, and it's wonderful.

This third thing that we've been involved in, in part because of our reputation around these other two, is we were hired by the city of San Francisco to plan the nation's first city-run disability cultural center. And the idea there is to create a place where the people in the disability community with intersecting identities can gather and really, again, recharge their batteries, push out the idea of culture to nondisabled people, foster conversation, all of that. And it's super exciting for us.

There's a number of disability cultural centers at universities, but none run by a city. And the center is funded, it's supported by city officials, and we have the wonderful job of actually asking people about their dreams, what they want, how they want them, and then we hand it off and say, okay, good luck. Somebody else has to actually implement this, but it's a really great thing.

We're especially proud to be serving people on the margins of the margins. We've deliberately woven in where we could people with disabilities that have intersecting identities, people of color, homeless people, veterans, LGBTQ people, transition age youth, and through all of this we've been weaving in people with intellectual disabilities, people with psychiatric disabilities, people with chemical sensitivities and all the invisible disabilities. We really want all of that to be part of this cultural conversation, the idea being that culture matters and culture can shape everything.

So there's a few things that are at the core of what we do. First of all, disabled people's expertise is central to absolutely everything. And again, nothing without us. And the assumption begins with people with disabilities have something to teach everyone, including each other, but also society as a whole.

And really disability and disabled people become sources of innovation and expertise for everyone. Think about it. I mean, people with disabilities are amazing problem solvers. You know, you got a problem? We deal with problems every day. All of us are different flavored whatever. We know how to fix it. Call in the disabled people.

[Laughter]

And I do have an example where, you know, a blind person has been hired or was hired at one point to be the emergency preparedness coordinator of an organization, and the thing is, some people freaked out. They said like how could a blind person be the emergency preparedness person.

We said, well, we're not carrying everybody out of the building. That's not our job. We know where all the exits are and we know what the plan is, we know how to use computers and all of that stuff. So it's a really interesting idea of expertise where people with disabilities because somebody is troubleshooting so much about so many things, they know what's where and how to fix it.

Another piece of this is disability justice is super key to all of this. And disability justice is not a synonym for social justice. Just disability justice has a very particular meaning where you bring in ideas of people of color to actually infuse conversations around disability and really try to understand that you want to advance everybody together, that the idea is not just you have to all speed and keep up, but that you actually bring everybody along with you and you want to go as fast as the slowest person because that is what is just and that is what is right.

And there's a whole framework on that. I urge people to Google the terms "disability justice" and use it really appropriately because it's not just another synonym for social justice.

And we did this a lot of this work through focus groups and kind of making sure that every team included a certain number of people of color, but we still can skew pretty wide. I mean, a lot of the conversations around disability and access and all of that have been framed largely by leaders of organizations that are white people, but I think there's a lot of expertise. When we look at the statistics and figures and all of that out there in the world, the vast majority of people that are affected by disability are often people of color. And we need to really enter that into the conversation and center it and really draw on that expertise as something exciting. We've been trying to do that. It means long term building relationships. It means really working carefully with groups and being willing to kind of mess up and make mistakes and all of that and learn and be humble, because we have a ton to learn, all of us, and just as we expect the greater world to learn about things we know about wherever we are, we each can stand to learn too, and that's huge.

For lawyers, I would like to give a shout out to the amazing work of disability racial justice activists. TL Lewis -- anybody familiar with TL? If you are, shout out.

[Applause]

Yeah. TL Lewis gave the Longmore lecture this year. We have a yearly lecture around social justice issues, and TL's website for those of you who aren't familiar, describes someone who is a social justice engineer, educator, organizer, attorney, artist.

We brought TL, as I said, for this year's lecture that was called "Stolen bodies, criminalized minds, and diagnosed descent, the racist, classist ableist trappings of the prison industrial complex." I will give you a tiny URL that you can find. It's https://tinyurl.com/yydwg4hu. That brought it down from 40 something characters to 20.

So anyway, I leave you with the pirate. It's a messed up image for lots of reasons that I could explain to you for history and whatever, especially once you scratch the surface. But at least it's one that's complex and powerful, and it gives you that moment of like, whoa, wow, I didn't think of that. And we don't have many of those. We should all be looking for them in what we do.

So the question I will leave you with, my little last uh-oh, why didn't I think of that question is: Maybe it should be a question that we should be asking is not how can we help disabled people but how can people with disabilities help the world.

Thank you very much.

[Applause]

MARC MAURER: Thank you to all of you.

Let's turn to questions. If you'll state your name, please.

>> I'm from Miami. I wanted to ask my colleague Matt, it's definitely thank you to all the speakers because it's a good topic, but it's almost like the kind of topic that makes your head spin.

I was curious to ask you two aspects of disability that I think are going to play out negatively is the concept, the employment model, that if you are disabled, are you not eligible to work and that would cut off your damage claim. And then dealing with the inevitable analysis in a personal injury case when you're looking at what is I guess by societal norms a whole plaintiff and then you start taking pieces away from them and diminishing their value of life on the basis of the disability, to then value the claim. It's almost like the opposite. It almost sounds like, after thinking about it, I mean, can they even mention this disability? Is that something that you can even exclude? I mean, why is it an issue in your case that the person's life is worth less or more because of the disability? It almost sounds like counterintuitive to everything else that we're doing, which is trying to create some level of equality. It almost feels like you start off the argument at a disadvantage.

MARC MAURER: Let's turn Matt's mic on here.

MATTHEW DIETZ: The issue is to dispel societal bias. And that's the goal, because when you have a jury and they're going to come in with that bias, they're going to come in with the fact that a person with a disability is less than a whole person and you have to redefine it as the disability is part of the whole person. And that's part of our jobs and part of our difficulties.

So when you do, let's say, as a trial lawyer choose a jury, you try to find people who have experiences with people with disabilities in the past. Whether it's schoolteachers, folks that work for big corporations. And those are issues that you use.

With regard to dealing with -- not dealing with. To having a client that is like Arnaldo, his whole being is his whole. What he likes to do. How he likes to do it. When he likes to go outside. The movies that he likes. And that is the whole.

So you don't compare his whole or his life with somebody else. And those are issues you need to focus on when you're dealing with an argument to a jury and saying, the valuation that you have to do is the valuation of that individual, and you have to explain what that individual is.

Do you follow?

>> I do. I just wonder if -- and again, I'm not familiar with the intricacies or the facts because at times you use the analysis of the disability to play up, so to speak, the value of a case because the care, the level of care that's going to be. So you can use those types of arguments, but it just seems like, depending on the facts, and I'm just wrapping my head around this as the topic comes up because I think it's a great topic. I personally lost a case in employment law because the defense was able to establish that my client was taken out of work and by definition was disabled so you either give him back wages, and they got rid of all of it because he was disabled, he couldn't work.

So I know how to get caught up in that end of the disability analysis. And I'm wondering how the body of law even exists in this. I mean, it's a great issue, and very difficult, I'll tell you, to deal with in the context of a jury, trying to pass that all along.

MATTHEW DIETZ: The issue is focused on defining the whole. So a person is able to do something and lives a normal life. So if you define the whole as an able bodied person, then you're starting out with the wrong measure and that's what the courts are starting out with.

>> Yeah. That's it. You start off half full.

MATTHEW DIETZ: No. You start off totally full because the life is totally full. You don't take the conception of being half full.

>> Totally. But I'm saying that that message, no, to the jury is very elusive. These are great points.

MARC MAURER: I would like to know if the other panel members have anything to add to the answer to this question.

TERESA BLANKMEYER-BURKE: I'm not sure if this will muddy the point because philosophy will often do that.

[Laughter]

But I was thinking about the difference between someone who is in a transitional state and sometimes when you're in a transitional state, going from point A to point B, there is a sense of loss. And by transitional, it can also be transformational. So what I'm wondering about with this particular framing of wholeness or fullness, whether it would be helpful to conceive of this as going from one state of being into another state. So perhaps you start off as able bodied, you acquire a disability, and there is a loss there, but it doesn't necessarily have to be codified as a loss always and becomes something else. You become a person with a disability who has the fullness and wholeness of your life as that person with a disability.

MARC MAURER: Professor Kudlick, I notice you are anxious here.

CATHERINE KUDLICK: I'm anxious. I think Elizabeth's paper really captured this so well about the notions of health and what it means to be healthy. I think that's the lead in point to a jury or to convincing people about the whole versus the half and all of that, is to really raise questions about how we come to define what health is and how we think about it.

I know that's a little bit abstract in a jury situation, but I know each of you probably have tools in your tool kit and examples where you could actually do that. And I think cultural, again, to weave in my paper too, that culture actually gives us a pretty wide range. The problem is that Hollywood and all the mainstream media and all that stuff give us pretty limited options, but I think if you could somehow come up with ways through film or through reading of blogs even, that you can cite in your cases to kind of show that health has a different definition for a lot of people.

MARC MAURER: Other questions?

MATTHEW DIETZ: There's one thing that I want to address because I have my Twitter feed in front of me and I like to address any questions that pop out there.

There's a concern that even though many of these organizations are led by white people despite most people affected being people of color, speaker on an all-white panel, the diversity of panel and who we deal with and what we deal with. And I think that disability is too white and I think it should be dealt with.

What I try to do is on my cases, and on my issues, I try to get as many attorneys of color involved as I possibly can. It's something that I've noticed with regards to my clients that are automatically placed in psychiatric facilities or do not get the appropriate care because of the fact that they are persons of color. And it happens all the time.

There needs to be more attorneys of color who do what we do, and it's something that we try to work on every day.

So to the extent that there are attorneys of color that want to work with me on my cases and do my things, my door is always open.

So to that extent, any criticisms that are provided, we are more than welcome. More than welcoming to any attorney of color who wants to do this work for persons with disabilities, because it is overwhelmingly needed.

MARC MAURER: Okay.

CATHERINE KUDLICK: So I think what's really interesting is it's a structural issue that's linked with, you know, law schools, who gets into law schools, what people are taught at law schools. Again, I didn't go to law school, but I can guess based on what happens in history.

And the issue needs to happen not just with attorneys recruiting more people of color, but it needs to reach down into the lower grades, at the undergraduates and even high schools, to encourage people of color. And then to provide not just one person gets in to one law school somewhere, but you actually have really great sort of programs that work with cohorts and really try to, you know, mentoring and all of those things. It's a structural thing.

I know everybody here is very busy with doing litigation and cases and all of that, but those of us that are in universities have a little bit of -- you know, we have a lot of the luxury to hold back a little bit and think in terms of the structures and recruitment and programs and all of those things. And I think it's part of a giant piece. It's not just like one thing where you bring one person or it fixes something. And it's linked to representations too. Like, okay, this year maybe we have an all-white panel talking about people of color, at least bringing it in sometimes when we can. Next year you have one, two, whatever. But you don't, you know, stop there. It's just one of these things that just is a force that needs to happen. And it kind of builds on itself eventually.

TERESA BLANKMEYER-BURKE: I would like to add something as well. So while Elizabeth identifies as a white person, I do not. I'm Arab American. So while I'm here as Elizabeth's proxy and philosophy as a discipline is very much overwhelmingly white, there are those of us who are people of color working on these issues in philosophy. I just wanted to add that point. Thank you.

MARC MAURER: Let me only say that I didn't know what color any of you are.

[Laughter]

Didn't ask and I wouldn't.

I have some assumptions about what gender you are, but this is becoming less clear as times develop; which is to say I have made assumptions based largely on people's first names, but I think these are no longer relevant. They're certainly no longer as easy to make as they used to be.

Consequently, if you want me to know, tell me, but otherwise I won't.

Other questions?

>> This is Cath from San Francisco. For Professor Kudlick: As we talk about stories of the disabled, particularly in Hollywood, are you aware of any fellowships or scholarships of writing screenplays about disabled? Because there's tons of those for other groups but I'm not aware of any for the disabled.

CATHERINE KUDLICK: I'm not aware of any currently. However, there's a group of people that are starting to get more -- and I'm part of it a little bit, but starting to get more vocal about this and I think it's a great opportunity.

If anybody, lawyers included, would like to get involved in creating such a scholarship, that would be fantastic. I mean, there's some really great things.

There's a few sources on the web where they are supporting disability writing more fully but it's not always paid and we can talk about that. But I think we need people to come in and actually fund such fellowships and that would be fantastic if anybody is up for it.

But thanks for that. And I'm definitely trying to make it happen.

MARC MAURER: I would also recommend that we work on putting together disability clinics at law schools around the country. I have made some efforts in this, but I have met with resistance. On the other hand, there must be places where there wouldn't be resistance. It would be desirable to have more disability elements in the educational system.

Other questions?

>> Yes. Anthony Goldsmith from Los Angeles. In connection with intersection with other communities, it's not just something we should be doing to serve the disability community and people of color who are disproportionately impacted by disability, but also is politically incredibly important to the disability community. I do a lot of work with the California legislature, usually dodging fast balls for the disability community, but sometimes getting to pitch one back. And there is unfortunately not a lot of connectivity between other groups, some of whom have had far more success, both legislatively and judicially from the disability community in moving the law forward and defending against attacks.

And when the disability community hasn't made those connections, with those other people, it not only harms our clients who are people of color or people who aren't our clients who are people of color and impacted by disability, but politically isolates the disability community. So I think there is a double imperative of moving that ball forward as quickly as we can. It's going to help everybody.

I just wanted to add that in.

CATHERINE KUDLICK: Thank you for that. And that's a really great point.

The only thing I would add is that it's a two-way street in some ways too. Because I know that from anecdotal conversations and whatnot that a lot of people that are in these marginal communities don't feel that the marginal communities themselves always understand disability. So it's a complicated set of relationships that really have huge impacts for the individuals involved.

MARC MAURER: Other questions?

>> Yes. Larry Berger. I have two questions for Matt. One about the criminal case and one about the civil case.

The criminal case, and I think I know the answer from what you've already presented, but am I correct in assuming that there was no testimony in the criminal case about what Arnaldo was like and presenting him as a person? The prosecutor, you said, made some effort in his opening remarks, but was there anything beyond that?

MATTHEW DIETZ: Yes. They were able to say what he likes, what he doesn't like, what he's interested in, how he spends his day, but none of the behavioral issues that were in the aftereffects podcast about other incidents that he had. That was blocked in a motion in limine. There was the opening of the door with Charles Kinsey, who was a phenomenal witness and did not open the door for that.

>> And for the civil case, just thinking about personal injury cases, I think a classic thing that you might view in a more typical personal injury case would be to bring a family member or close friend of the person who is hurt and have that person testify about what the injured person was like before this event and how the event changed him or her. Are there people who can do that for Arnaldo?

MATTHEW DIETZ: It's really difficult when you have a client that has lived in a group home for almost their entire life. So you don't really have that.

But for a jury in these circumstances, unfortunately -- well, fortunately and unfortunately, there's records for everything when you deal with some agencies of every time a person goes to the doctor, behavioral notifications, so you're dealing with reams and reams of paper of notes.

So if you are able to digest what's happening and be able to increase the healthcare and get an evaluation and using benchmarks from plan of care to plan of care, that helps.

But it's also difficult to use parents or family members in a group home situation.

>> Has there been any continuity in terms of healthcare professionals that he had seen?

MATTHEW DIETZ: No. And that's part of the problem.

MARC MAURER: Gentlemen, I make assumptions that both of you are male here. So gentlemen, we are done with this colloquy because it's time for the coffee break.

I want to thank the panel members.

[Applause]

And we have a coffee break. Then we have workshops until 11:00. Then we have another one and then we come back here at 11:15. So I appreciate it very much.

[Break]

10:00 a.m.

"Barriers to Justice: Helping Your Deaf Client Navigate the Legal System"

CAROLINE JACKSON: Okay. We're going to go ahead and get started.

Welcome to our workshop hosted by the National Association of the Deaf talking about barriers for justice.

Again, we had a little bit of a change in topic, but again, we wanted to do the most beneficial topic for your Deaf clients.

So the title of this has changed. It is no longer "helping your Deaf client"; it is "empowering your Deaf client through the legal system."

Again, the format will be a little bit different. We have a mock interview to show several different examples. And then we'll have a professional discussion afterwards and we'll go ahead and proceed first with an explanation of what we're doing here, our background, provide a little bit of context, and then we'll go ahead with our mock interview, and then we'll have a discussion afterwards.

I would like everyone here to introduce themselves and provide their role.

Myself, my name is Caroline Jackson. I'm a lawyer for NAD. My role during the mock interview will be as the interpreter.

ANNA BITENCOURT: My name is Anna Bitencourt, also an attorney for NAD, and my role will be as the Deaf client for this mock interview.

MARC CHARMATZ: My name is Marc Charmatz and I'm the hearing attorney who has never interviewed a Deaf client.

BRITTANY SHRADER: And I'm Brittany Shrader, also an attorney with the NAD. I will be your narrator today. So we will be interrupting the interview as we go along to try to help out Marc and to figure out exactly what's going on when issues pop up.

So I'm going to give you a little bit of context for our interview today. Anna, our Deaf client here, has had a little bit of trouble with the legal system. She's had some issues with experiencing some discrimination in the jail setting. And she contacted our attorney, Marc, to come in and speak to him about that issue.

So Marc is expecting Anna to come in and talk about something that happened to her while she was in jail. After he got that phone call from Anna, he reached out to an interpreting agency with whom he had worked previously, and he set up an interpreter a couple of weeks in advance. He knew that they needed at least 2 weeks' notice. He scheduled the appointment with Anna to come into his office, and now Anna is here.

So let's see what happens.

MARC CHARMATZ: Hello, Anna. My name is Marc Charmatz. We have an interpreter here today, and I want to make sure --

BRITTANY SHRADER: Okay, stop. Anna, why do you look so confused?

ANNA BITENCOURT: Well, I see Marc commenting and talking, but the interpreter hasn't yet signed anything. There's quite a bit of a delay for my communication, and I was wondering what was going on.

BRITTANY SHRADER: Caroline, can you explain what's going on?

CAROLINE JACKSON: Yes. I am using an interpreting style call the consecutive interpreting. Most people are probably used to simultaneous interpreting, wherein there tend to be more mistakes.

I will now switch to simultaneous interpreting and maybe you can catch my errors. But with consecutive interpreting, it typically lends itself to be more accurate and is a better match for interpreting in legal settings.

BRITTANY SHRADER: Caroline or Marc, what could have been done to prepare Anna so she wasn't so confused when this interview started and Caroline wasn't signing while Marc was speaking?

CAROLINE JACKSON: Well, Anna wasn't the only one that was confused. Marc was as well. It was most important for the interpreter to explain which process would be used during the interview and let them know that we would be using not simultaneous but consecutive interpreting.

MARC CHARMATZ: Anna, I would like to introduce our interpreter today, and I want to make sure that you have effective communication between you and the interpreter. So if you need a few minutes to have a conversation with the interpreter, to make sure that you're comfortable with the interpreter or the interpreter is comfortable with you, that's fine with me.

BRITTANY SHRADER: Okay. Stop. Marc, why did you offer Anna the opportunity to have a conversation with the interpreter before continuing her conversation with you?

MARC CHARMATZ: I wanted to make sure that there was effective communication. I'm the person who doesn't know sign language. So I want the two people to be comfortable with each other so that to avoid any miscommunication during our conversation.

BRITTANY SHRADER: Anna, is that something that you found helpful?

ANNA BITENCOURT: Absolutely. It is very helpful. It's very beneficial for the Deaf individual to have a little chitchat time with the interpreter to make sure communication is clear and that we understand each other. And communication always goes both ways, so it's very beneficial to have that opportunity to talk with your interpreter before we go into a conference.

You also may have noticed that I asked if the interpreter is certified. Very often in legal situations, we want to make sure we have a certified interpreter, especially if it's a confusing context.

CAROLINE JACKSON: There is a national organization that provides certification, but in general, certification is for interpreters who have experienced certification in any setting. Medical fields or various other fields.

There is a specialized interpreter certification called an SC:L, but unfortunately it is no longer provided. It ended about 5 years ago. So we no longer require an SC:L for certified interpreters. We do suggest one but do not suggest that you require it any longer because it's very hard to find them. The pool has quite diminished. But you can prefer an SC:L interpreter, but you should require an interpreter who has a legal background and training.

BRITTANY SHRADER: And just to clarify, the SC:L is certified interpreter legal. I don't know if that was said.

MARC CHARMATZ: Before we get started with our conversation, I want to make three things clear:

First, my legal services today are not no cost to you. They are free. So we're going to have a conversation about --

ANNA BITENCOURT: Free? You're free? A free lawyer? Tremendous.

MARC CHARMATZ: That's free. I'm not going to send you a bill or say you owe any money for today's meeting.

Secondly, I hired an interpreter. The interpreter services are also free to you so that you're not going to be paying for the interpreter, I'm not going to second you a bill for the interpreter. The interpreter won't send you a bill.

Our purpose today is to have a good conversation for both of us to understand what happened.

Third point: We're going to keep it confidential. That means that as a lawyer, I'm going to keep it confidential, you're going to keep it confidential, and the interpreter is going to keep it confidential. So no one will know outside of this room what's happened. I'm not going to go home to my family and explain what I did in your meeting, and the interpreter is not going to do that, and we don't want you to do it.

Do you understand those three points?

ANNA BITENCOURT: Oh, yes, I understand. I'm not paying for the interpreter, right?

MARC CHARMATZ: That's correct. That's correct. We're clear.

Good. Okay.

ANNA BITENCOURT: Very clear, thank you.

MARC CHARMATZ: So with that as the background, let's go to what happened to you. Why don't you give me a short summary of what happened, and then I'm sure I will have some questions.

ANNA BITENCOURT: Yeah, well, so my grandmother loves Paris, so I was going out shopping and I realized that there were all these different cute --

MARC CHARMATZ: Excuse me. Do you mean pears as in fruit?

ANNA BITENCOURT: No. No. Pearls. Jewelry.

BRITTANY SHRADER: Stop. Caroline, what just happened?

CAROLINE JACKSON: As I mentioned before, when you're interpreting simultaneously, errors can occur more often than consecutive interpreting. So that was an error on the interpreter's part. Even with qualified interpreters, mistakes can happen. So as I was interpreting, I wasn't sure what she was going to say so very often I'm guessing until I have the full story and full comprehension. So when she finger spelled something, I assumed it was pears and I missed the L and it was supposed to be pearls.

ANNA BITENCOURT: That's another reason why it's important to have the conversation with the interpreter beforehand as well, so let her know the conversation is about jewelry and not fruit.

MARC CHARMATZ: I understand you like pearls and may have went to a jewelry store. Is that correct? Continue.

ANNA BITENCOURT: Yes, that's correct. I went to the store and I was looking around at the different pearls, and I picked out a few, and I was carrying them with me and I was walking along and then I ran into a friend of mine from Gallaudet I hadn't seen in so long and I --

BRITTANY SHRADER: Okay. Stop. Anna, I thought we were here to talk about something that happened in the jail. Why are we talking about pearls in a jewelry store?

ANNA BITENCOURT: Well, that's right. But again, in Deaf culture, we like to provide a lot of context and background story before we get to the actual point of the question. So very often a Deaf individual will provide you with a lot of contextual clues or other information and they give you the large picture. They will eventually get to the point of your question.

MARC CHARMATZ: Lawyers have done many interviews. This is not new for us. Clients, first time. They're nervous. You have to give them the opportunity to get some of their nervousness out. And one of the ways is to give them a few minutes to explain what happened. Not all of it will be relevant, but so what. It's a couple of minutes. Give that client an opportunity to get comfortable and express what he or she wants to tell you. So that's why I didn't interrupt that part, and I know that it's not going to be the most important part, but I didn't want to interrupt; I wanted to give her a chance.

ANNA BITENCOURT: So I ran into my friend, best friend from Gallaudet, I hadn't seen in so long. So we were chatting away, and I realized that I needed both of my hands free to communicate in sign language, so I tucked the jewelry under my arm and I continued chatting with my friend. Then we just decided to have coffee to continue the conversation, and we just kept walking and we ended up walking out of the store.

And right away, this guard came over and tapped me very roughly, and it happened to be the store security guard, and they were just talking at me, and I had no idea, I tried to gesture that I was Deaf, but they just kept talking, and they seemed to mean. And then the police showed up and the police officer came right up to me and I tried to explain I was Deaf. They were just talking away. And then they arrested me and took me to the police station and put me in jail!

MARC CHARMATZ: Okay. Let's go back and review what you just told me. The security guard was a hearing person?

ANNA BITENCOURT: Yeah, yeah, hearing.

MARC CHARMATZ: Did he give you a piece of paper or did you have a piece of paper to write down anything to him?

ANNA BITENCOURT: No. I didn't! I tried to show that I needed writing, I tried to say I was Deaf, but he ignored me.

MARC CHARMATZ: And you had a friend there, right?

ANNA BITENCOURT: Yes.

MARC CHARMATZ: At some point may I contact your friend to ask your friend some questions?

ANNA BITENCOURT: Certainly, yeah, my friend is Deaf, just like me.

MARC CHARMATZ: Okay. And maybe we'll set up an interview with your friend.

Okay. The police come, right? Did you have any opportunity to have a conversation with the police, writing back and forth?

ANNA BITENCOURT: No! They wouldn't give me a paper. I tried to show that I needed a pen and paper and they wouldn't give it to me.

MARC CHARMATZ: Did the police handcuff you?

ANNA BITENCOURT: Yeah, they arrested me and they handcuffed me behind my back. I couldn't communicate at all.

MARC CHARMATZ: So you had no opportunity to write if you're handcuffed from the back.

ANNA BITENCOURT: Exactly.

MARC CHARMATZ: Okay. And then you were taken to the police station?

ANNA BITENCOURT: Yes.

MARC CHARMATZ: Did you make a request for interpreter services at the police station?

ANNA BITENCOURT: Yes, I did. Finally they gave me a paper, and I was able to write. I am not great at spelling, but I wrote letters that I thought meant I needed an interpreter. They sort of looked at me funny but then they saw it and they gestured at me to wait. They left the room, they called in a person who also appeared to be a police officer by their uniform and they sort of started spelling.

I got upset so I took the paper back and I wrote "professional certified!" and I gave it back to them.

MARC CHARMATZ: And they did not provide an interpreter at the police station. Or did they?

BRITTANY SHRADER: Stop. Anna, I noticed that during Marc's entire question, you were nodding your head yes, but the answer to his question was no. Could you explain that?

ANNA BITENCOURT: Sure. Certainly. So in Deaf culture, we typically have what we call a Deaf head nod, which means, again, I'm understanding the conversation but not necessarily agreeing with it. So yes, that slight head nod I was using could mean no, but it just means that I'm following the conversation with the interpreter.

MARC CHARMATZ: So you're at the police station. Did you want to make a telephone call to a lawyer or a friend or a family member?

ANNA BITENCOURT: Yeah, I wanted to call my grandmother. So I told them I wanted a VP. They didn't seem to know what that was. So they went away and they brought me this strange piece of machinery that they told me was a TTY, and honestly last time I saw something like that was my grandmother's attic. I never used those things.

MARC CHARMATZ: So were you able to make a telephone call from the police station?

ANNA BITENCOURT: No, I couldn't. The thing they gave me wasn't even plugged in! I couldn't even see where.

MARC CHARMATZ: Were you released to go home from the police station, or did you stay overnight?

ANNA BITENCOURT: Oh, they made me stay overnight, and then I went to jail.

MARC CHARMATZ: Remember, this is confidential communication. But did you take any medications that you were not able to take because you were in jail?

ANNA BITENCOURT: No, no medications.

MARC CHARMATZ: Okay. That's good. That's important to know. That's why I asked.

So the next day, the next day you're in jail. You've been in jail for that night. What happened the next day?

ANNA BITENCOURT: I went to court.

MARC CHARMATZ: Was there an interpreter at the court?

ANNA BITENCOURT: No! There was no interpreter. Just this judge sitting so far away I could barely even see them, tried again to show that I was Deaf, and again, my hands were cuffed behind my back and I couldn't communicate.

MARC CHARMATZ: Was there a lawyer present?

ANNA BITENCOURT: No. No one. There were so many people around, but nobody was a lawyer, nobody who could talk to me.

MARC CHARMATZ: What happened at court that you understood?

ANNA BITENCOURT: I didn't understand. They just put me back in jail.

MARC CHARMATZ: All right. Let's summarize what we have so far. You correct me if I'm wrong, if I have made a mistake. I think I understood what you said.

You were at the jewelry store. You met a friend. You put the jewelry by your arm to go out with your friend. The security guard stops you, treats you roughly. You can't communicate with the security guard, no paper and pencil, no interpreter.

Police come. Police arrest you. Handcuff you behind your back.

ANNA BITENCOURT: Oh, and they were rough. They were very rough.

MARC CHARMATZ: Thanks.

Handcuff you behind your back. Transport you to the police station. You request interpreter services in writing. No interpreter you request to use a VP, no VP, video phone. They bring out a TTY that no one has used for many, many years.

You spent overnight in jail. You go the next day to court. Again, no interpreter. And you go back to the jail.

ANNA BITENCOURT: Yeah, back to the jail for a week!

MARC CHARMATZ: So far what you said to me I understood. Do you have any corrections? Did I make any mistakes?

BRITTANY SHRADER: Okay. Stop.

Marc, why is it that you're summarizing at this point everything that you have understood from the interview so far?

MARC CHARMATZ: Well, the answer I think people want to have me say is that when you deal with a Deaf person, you want to summarize the conversation to make sure it's correct. And I agree with that.

But I've done that my whole life. I've done it with hearing people, I do it with everybody. I repeat and repeat and repeat again just to make sure I have it in my head.

So this is the way I do it with every interview. But I of course do it with this interview as well. I want to make sure that I have the story right, and if I say it and the client has said it, that should be enough to get it in my head correctly.

CAROLINE JACKSON: We always do suggest this technique, that you repeat back what you've heard. Because sometimes there are interpreter mistakes, there's a misunderstanding that occurs. So that way you're making sure that you've heard clearly the message, and that way the interpretation was accurate at that point in time.

ANNA BITENCOURT: And again, as a Deaf individual, that gives me the confidence that the interpreter is doing a good job in facilitating communication.

MARC CHARMATZ: Okay. This must have been a terrible situation for you. I understand that you were in jail for another week.

During that time, interpreting services? VP?

ANNA BITENCOURT: Nothing. Nothing. I kept asking for an interpreter and they would say no.

MARC CHARMATZ: Any of these written things or requests that you've made, do you have any of those?

ANNA BITENCOURT: No. They took it.

MARC CHARMATZ: I understand that. I was asking. I thought the understanding was that you wouldn't.

To let you know, I'm going to write to the police department to get a copy of the police report and any written documents that they might have. They may have thrown them away. I don't know. They will have a police report, and I'm going to get that and I'm going to show it to you so that we can prepare what you've said today with what the police said in their report.

So you have been in jail for a week. What happens after that?

ANNA BITENCOURT: I went to court again and finally they had an interpreter. Finally. I was so happy.

But the interpreter wasn't very good. I had a lot of trouble understanding the interpreter. Plus my lawyer, I finally had a lawyer, I had never seen this person before, and they told me they were my lawyer but I didn't know I was communicating with them either. We tried to write back and forth, but my English is not so great. I couldn't understand anything, I couldn't understand the court proceedings because the interpreter was so bad.

MARC CHARMATZ: So for this appearance in court, you did have a lawyer but you couldn't communicate well with the lawyer. There was a judge, but the interpreter that the court hired was not qualified in your view.

ANNA BITENCOURT: One interpreter! Just one!

BRITTANY SHRADER: Okay. Stop. Anna, why is that important, that there was only one interpreter?

ANNA BITENCOURT: For court, for complicated legal proceedings, one interpreter is not sufficient. It's not the best. Best practice is to have two interpreters or more very often.

The other problem is for conversation between me and my public defender. There was no interpreter to interpret that table top conversation. The interpreter for the court was only for the court proceedings and for the judge. So it is often beneficial to include a CDI, a certified Deaf interpreter, who can work with the hearing interpreter as a team to make sure that the message is accurate and that the Deaf individual has full comprehension of the message and the court proceedings. So that provides that clarity. The CDI is Deaf themselves and they have great Deaf culture, better fluency in sign language, and they can better interpret the message from the Deaf consumer, to the hearing interpreter, to the judge, and vice versa. And that message is fully conveyed.

CAROLINE JACKSON: Very often there needs to be two interpreters working as a team. And if I see one interpreter in court, I'm very often shocked because the court itself is official proceedings. And if there's a mistake on the interpreter's part, there is no second interpreter to error correct and then the court proceedings themselves and the documentation is wrong.

So again, there needs to be a team of interpreters and a certified Deaf interpreter. You often need four interpreters for clear communication.

BRITTANY SHRADER: As the lawyer for the Deaf person, it is your responsibility to protect your record. So if you see that, you need to make sure that you're flagging that as an issue for the court.

MARC CHARMATZ: So Anna, what happened in court that day when there was a lawyer, an interpreter, and the judge?

ANNA BITENCOURT: Well, the lawyer explained to me that -- I wanted to say I was guilty, so I told him I was --

MARC CHARMATZ: Excuse me. What are you -- what is --

BRITTANY SHRADER: Okay. Stop. What's happening?

CAROLINE JACKSON: So sometimes the interpreter has a misunderstanding or doesn't fully understand what the Deaf individual is saying. So I saw her sign that she told the court she was not innocent. And for me, I wanted to make a choice. It's either you're guilty or not guilty. So not innocent, those signs, I wanted to clarify her intent before I fully interpreted it to the lawyer.

MARC CHARMATZ: And as the lawyer, I don't like it when I don't understand what's going on. I want 100%. I don't want 90%. I don't want some conversation that I don't get. So that's why I interrupted, to make sure that I would find out what happened.

Once I've learned it, fine. But when I don't know it, I'm uncomfortable.

So again, Anna, explain what happened in court that day.

ANNA BITENCOURT: So I had my lawyer with me. We had a conversation. And then I told the judge I was not guilty. I said I was innocent.

MARC CHARMATZ: And did you go home that day or did you go back to jail?

ANNA BITENCOURT: I went home.

MARC CHARMATZ: And do you have a date to go to court again in the future?

ANNA BITENCOURT: Yes. I have to go back to court. Are you my lawyer? Will you be my lawyer for my second appearance?

MARC CHARMATZ: That's what I wanted to explain to you. You came to see me regarding what I'll call a discrimination complaint. But I don't do criminal cases. So you will need a lawyer to do the criminal case.

I can call that lawyer to make sure that that lawyer provides interpreter services.

ANNA BITENCOURT: Please do.

MARC CHARMATZ: But -- app Ann I tried contacting that lawyer but they didn't answer the phone.

MARC CHARMATZ: I can do that, but that's a conversation you need to have with your lawyer for the criminal case.

Let's review what discrimination complaints you may have. And maybe you don't have all of them. But you have the security guard --

BRITTANY SHRADER: Okay. Stop. I think we wanted to open it up to the audience at this point to ask what issues you all saw with regards to potential discrimination claims that Anna might have.

>> So the first claim would probably be against the police first for handcuffing her behind her back, because traditionally Deaf people would need to be handcuffed in the front so they can sign.

And the second corollary to that would be at the police station where she requested an interpreter by the written note but they didn't provide one or they provided a bad one.

MARC CHARMATZ: That's two.

>> Okay. And then the third one would be at the court hearing or the court date where there was only the one interpreter, it was pretty clear that the client did not understand what was going on in that proceeding and no one really made an effort to make sure that the defendant I guess didn't know what was going on.

>> There's also the claim at the police department for not providing a VP and providing a TTY that was not functional.

And then at the jail, at least in Minnesota, a police department that handles arrests, sheriff's department is responsible for the jail. Those are two different defendants. The police department at some point hands the defendant over to the jail. The jail has responsibility of providing an interpreter for significant communications that happen at the jail. Certainly orientation and booking, in my experience, 90% of the time they simply hand a booklet to the prisoner with no explanation. And if someone does not read English, that's not very helpful.

There may be medical situations in the jail where there should be interpreters.

In court, the public defender also has responsibility to provide an interpreter. This can sometimes get complicated. In Minnesota, they tend to use the same, the court and the public defender, use the same interpreter. But the court will often let the public defender and the defendant go into a separate room and have a private conversation, but during the court proceeding, there's no table interpreter.

And then the problem since Anna was released from jail, again, the public defender has an obligation to provide an interpreter for communication before the next hearing. The challenge there is, as people I'm sure know, public defenders are totally overbooked. They often don't even meet with hearing defendants before court. That's a challenge to deal with.

Those are the potential claims that I saw.

BRITTANY SHRADER: Did anyone else see any other claims that we missed?

>> I'm not sure if it would actually be a claim, but I'm wondering about going all the way back to the origin of the problem. If there wasn't some obligation on behalf of the jewelry store to at least once they recognized Anna was Deaf do something to try to communicate to avoid a miscommunication and a misunderstanding. The security guard obviously got the idea that she was trying to run out with the pearls, and she couldn't explain that it was an accident. Whereas a hearing person would have been able to say, oh, I'm very sorry, hand the pearls back, and that would be the end of it. I think that would be a Title III obligation, but I'm not sure if it would qualify since it wasn't part of the sales transaction. So I think there would be an argument to be made, I'm not sure how it would work, depending on who the judge was.

BRITTANY SHRADER: Anyone else?

Did anyone notice that the first time that Anna went to court, there was no interpreter present? She was not arraigned and instead she spent a week in jail before she could come back for her arraignment simply because there was no interpreter.

Anything else, NAD staff, that we missed?

Kelby?

KELBY BRICK: I find it a little bit odd. I would love more analysis on the discrimination by the unqualified interpreter. There's not enough cases out there, but I think that's something that scenario we could explore. Again, the accountability piece. And is that involved with the discrimination part of it.

BRITTANY SHRADER: Right. So we have an interpreter accepting an assignment in court, legal setting, who is not qualified.

CAROLINE JACKSON: And just to add quickly to the thing about the extra week in jail without an interpreter -- or sorry, extra week in jail due to no interpreter at the arraignment, definitely discrimination but I think there's a case out of the 9th circuit that said it wasn't discrimination because it just takes that long to get an interpreter, so do watch the case law.

>> In Minnesota, there would be a different outcome. In part because the court has a policy of providing interpreters. So if that didn't happen, you would have the additional evidence of the policy that the judge and court administrator didn't do.

Just as an aside, I think about that for a moment. Who do you sue? And where? Think about suing a state court. Do you sue in another state court? What are the chances that that court is going to find the first court did something wrong? Do you go to federal court? Is the federal judge willing to take action against the state court?

I've had those kind of cases, and it's very complicated.

The countervailing piece is, at least in Minnesota, the court was very embarrassed and did not want the publicity that it wasn't providing interpreters and has been willing to settle those kinds of cases to avoid going to court.

>> Hi. I just wanted to make a couple comments and also a question.

I think you didn't go over these because in some ways they were so obvious problems that people can have communicating using a sign language interpreter with a client, but I've observed a few times in one of our cases Armstrong where we will sometimes go observe initial interviews after clients who are Deaf are released on parole, and seeing the parole agents explaining procedure is a critical due process moment. And I've observed a parole agent who does not talk to the person, they just turn to the interpreter and say ask him this. Ask him that. And the interpreter, I would jump in and explain, that's not -- talk to him.

And the interpreter was also trying to give some clues, just like, why don't you ask him that.

But it was tough for people who don't have that experience, sometimes they just need to have a conversation if you've never worked with an interpreter, how do we go about this, I haven't done this before.

And the other thing related that I saw the agent repeatedly doing is talking to someone while giving them papers to read. Please read this, and then kept talking. As soon as you think about it, it's obvious that you can't be reading and also be communicating via sign language. But those are just two other things I saw.

I also just wanted to ask because I haven't actually, when I've interviewed clients, it's always been the simultaneous interpretation. And I realize probably we should be using the consecutive. Do you have any tips on, in that context, like when to pause, how long to go, for an interpreter to be able to capture everything you're saying rather than just talking like as long as I'm doing right now?

CAROLINE JACKSON: I'll take the question. I should add as a caveat, as I respond, is that I haven't actually been trained in how to do consecutive interpreting specifically. So in general, I wouldn't require that of an interpreter who hasn't done it and isn't comfortable. But an interpreter who has done it and is comfortable, they would personally moderate that. So I would expect to just wait until a point and be like, hold on a moment, and then give the translation.

BRITTANY SHRADER: And just to piggyback on your original comment, we tried to throw in as many issues as we could, but obviously there were time constraints and we weren't able to throw in all of them. But that's a great point that you raised. People who have never interacted through an interpreter before may not be aware that you talk directly to the client. So that's a great point to bring up.

And the issue with regards to talking while you're handing a paper to the client to read, there's an additional issue there, that you need to be culturally sensitive and ask the client if they feel comfortable reading the paper, or it may be best practice to have the interpreter read the paper to them using sign language so it's in a language that is their primary language if that's their preference.

>> Let me make a comment based on my experience and the mistakes that I've made and learned about over time.

Okay. You are an attorney. You're interviewing the client. There's a limited period of time. They have a lot of things to tell you. It's easy to start getting a little impatient and moving the story along. And I've learned over time, you really have to be willing to wait.

The other piece that goes along with that is, and this would happen sometimes with hearing clients as well. The client is telling you a story, and in your own brain, you make assumptions. Oh, this happened, this happened, this must have happened right away or whatever.

Part of the benefit of doing this review summary is it can help catch the assumptions that you're making that might be wrong.

I'll just leave it at that.

CAROLINE JACKSON: I actually want to add very quickly to that. The interpreter is also making assumptions. So those also might be an error and can get caught when you repeat back.

>> I just wanted to ask two questions before we run out of time here, throw it out to whoever wants to answer. I have lots of experience with interpreters of foreign languages, Spanish, Chinese, Polish, you name it. And I'm wondering how if I find myself in the position of representing a Deaf client in either a criminal or civil manner, how I explain to the judge the difference between having a second interpreter being necessary, a CDI being necessary, versus any language interpreter situation where one interpreter is the standard.

I see the argument and I see what you say about culture, but you could make the same argument about Spanish culture or Polish culture or Chinese culture especially. How do you address that for a judge who doesn't understand, is dealing with difficult budgetary issues and court resources and says, look, you're lucky you have one interpreter, so stop asking for two.

BRITTANY SHRADER: There are a couple of really great resources that you can refer to and bring to the judge's attention. One of them is a publication that NAD cosponsored that's on the ABA's website, and it deals with interpreters in the courtroom setting. And it does go through the need for different types of interpreters and why.

Another great resource is the best practices for courtroom interpreting. It's actually put out by and for interpreters. And that resource goes through why team interpreting is important in this context and it talks about how after 30 minutes, we're talking about the mental toll that it takes on the interpreter, trying to essentially take in one language, output another, monitoring two completely different languages, not just the physical exhaustion that comes but the mental exhaustion that comes from the work that they are doing. And that the accuracy rate declines after 20-30 minutes of solo work. And that's one of the benefits or necessities for having a team of interpreters. Another being that the second interpreter is able to check the first interpreter. If there's something that the first interpreter missed and the second caught, they can confer. If there's a disagreement about what something the client said, they can confer with one another, confer with the client, and make sure that there is accuracy in the interpretation.

So it's for the benefit of your record, the benefit of the accuracy of the proceedings, the benefit of the interpreters themselves.

And that guide also goes through why Deaf interpreters are necessary and the benefit they provide.

Again, this is really about the accuracy of the record, which everyone wants. Your judge is going to want an accurate record, and they may just have no background or familiarity with deafness. They may have never encountered a Deaf person in their courtroom and may have no familiarity with why these things are necessary. So bringing to them, you know, this guide that is put out as best practices for legal interpreting, it's neutral, it's nonbiased, and by and for the interpreters themselves, might help to educate the courts.

CAROLINE JACKSON: Also requesting the Deaf interpreter in addition to the hearing interpreter, sometimes you can just phrase that as a specialized interpreter. My client uses a unique dialect and that is not a dialect that hearing interpreters are trained on ever, so we need an additional interpreter who knows that dialect.

ANNA BITENCOURT: In addition, I just wanted to add, in regards to resources, if appropriate communication is provided from the beginning, the court will save money in the long run. Again, because of miscommunications, that hearing will have to be rescheduled and then another interpreter provided for that. So effective communication from the get go is the best way to go.

BRITTANY SHRADER: I think we have a few other take away points that we wanted to throw out before the end of the session.

Okay. Sorry. We're just conferring about who was going to talk when. I have been nominated to talk first about the retainer agreements, which makes sense because it's one of the first things we do. We meet with the clients, we decide this is a case we want to accept, what do we need to do? We need to go through the retainer agreement to make sure that the client understands our obligations, their responsibilities in the representation, who is paying for what. We can go on, right?

One huge consideration is making sure that these retainer agreements are in plain English. Plain language retainer agreements. Oftentimes we're seeing these long, complicated agreements that contain all of this legalese. First of all, that legalese isn't accessible to anyone who is a nonlawyer, let alone to a person whose first language may not be English. So we want to make sure that our retainer agreements are accessible.

You also want to make sure that you're meeting with your interpreter in advance to discuss the retainer agreement to make sure that the interpreter understands the retainer agreement. Because this is the person that you're relying on to help you explain it to the client, and if perhaps there's a word or a term of art in the retainer agreement that the interpreter thinks they understand but you actually meant something different by it, if they expand on that to explain it to the Deaf client, there may be a complete misunderstanding that you as the hearing attorney who doesn't know sign language may be completely unaware that this misunderstanding is happening simply because something in your retainer agreement that you thought was clear wasn't. So best practice is to meet with your interpreter in advance, go through areas of the retainer agreement that might need further explanation for the client. Make sure that you and the interpreter are on the same page about that. And when you're meeting with the client, give them the retainer agreement so that they have a copy if they want to -- if they feel like they are a Deaf person who likes to read English, so that they can read it.

Also go through where you're speaking to them, the interpreter is signing, and explaining it to them. Allow for questions. And use the teach-back method. When you are explaining something complicated in your agreement, ask them to repeat it back to you. And make sure they're not using the exact same language that you just told them because that indicates misunderstanding. If they just regurgitate exactly what you said, it means that they are able to reproduce the signs that the interpreter used but not that they had comprehension. So make sure that they are able to repeat it back to you in their own language.

Anything else that I missed?

ANNA BITENCOURT: And then after you've come to an agreement and the retainer has been signed, it's very important to be consistent with your check ins with the client to make sure that whatever communication or aid that you're providing is effective. And if they really like that interpreter, try to be consistent in your interpreter usage and find that interpreter again. They're familiar with the topic, and that really helps the process and the interpreter to do their job effectively.

Again, with communications between yourself and the clients, email can be tricky. So be careful with that. Some clients have fluency in English and some don't. If you're a lawyer who communicates through email, it may be a better use of your time to use video relay service to communicate with your client or provide an in-person meeting with the interpreter in person as well from time to time.

VRS interpreters, I have to give a caveat, they are random. It depends on who you get. When I make a phone call, they could be awesome. And they could not be. They could be not so qualified.

So again, it is a gamble who you will get on that screen when you call for an interpreter, so just be aware of that. But when you do make that initial phone call and you're connected to the operator, please let them know that this is a legal conversation. Don't just automatically jump into your conversation. Provide them some contextual clues to let that interpreter know the situation, and they can provide more effective communication. And if it's a very complicated scenario or complicated meeting, it's best to meet in person. It really is.

MARC CHARMATZ: I'm big on these representation agreements. I think they're really hard for clients. They're prepared by lawyers, for lawyers, and the client doesn't have a lawyer to review the representation agreement; they have you.

Almost no representation agreements have a provision in there that in case the Deaf person loses the case, who is going to pay the cost if they're entitled to costs? I don't see any agreement that has put that in there. We put it in. I mention it, I say it when the client is signing it, but it's not in our agreements. I think these representation agreements have all sorts of problems to them. I taught at a law school, I compare the law school one, private practice one, NAD one. To me they all are problematic. Some I've seen are 20 pages long. And Deaf person is, well, I'll sign it in 10 seconds. I say, you couldn't have read it. How do you know what it says in there?

Well, I trust you.

Well, that's nice, but that's not really what I want. We have them take it home sometimes. Or if an interpreter has to do it, some of them are 10-20 pages long. Literally. And they're complicated.

So I'm big on these representation agreements. I think there's all sorts of problems that come up with them.

BRITTANY SHRADER: Just one thing to throw in to Anna's comments about interpreters, just like we were talking about with our criminal defense attorney not providing interpreters, it is your obligation to provide interpreters. You cannot pass that cost along to your client.

And I think we are out of time. Thank you, everyone.

[Break]

11:15 a.m.

"Bullying, Harassment, and the Civil Rights of People with Disabilities"

MARC MAURER: We've come to the last part of the agenda for this symposium. Once again, we have a straightforward, simple title: "Bully willing, harassment, and the civil rights of people with disabilities."

Astonishing that you can get so much into so few words.

We have three people to present on this panel. The first is a senior parent educator advocate from the PACER Center in Minneapolis. The PACER Center is a training center for parents and educators and advocates. Here is Susan Einspar.

[Applause]

SUSAN EINSPAR: On the final day, love the enthusiasm. Thank you. This is great.

Thank you so much for inviting me. I am so impressed by everyone that I have met and every session that I have attended. It's really very different than most other conferences that I have attended in the sense that someone is not just up there talking about the law and the recent cases, but you're getting a lot of practical information. That's what I'm here for. But I also think that's an awesome -- I hate that word -- tremendous way of doing a conference because what we really need to know is not what the law says but how we can use the law to our advantage.

PACER Center is a parent training and information center. We are the largest I believe in the country and one of the oldest if not the oldest.

We have over 40 different programs ranging from our advocacy program to our assistive technology program, transition program. Count me in puppets. Children's mental health. We cover a wide range of issues related to primarily students with disabilities. So that's what I'm going to talk about today.

Approximately 5 million children are bullied every year, and two-thirds of all children who are bullied have a disability.

That's staggering. So let's talk about why that occurs and how we can address it practically.

First of all, what is bullying? Because a lot of times the parent will approach the school district, and the school will say, oh, that's teasing or that's this or particularly with children with autism, they'll say, oh, but he misunderstood.

Or I've had teachers actually say when Johnny comes up and says, "They said I'm bothering them."

"Well, you are kind of annoying, John."

That's not the response that we want. At all. And of course in that classroom, one person described it to me as a village. And it is. And who is the leader of that village that everyone follows? The teacher.

So really that's the person that you need to have on your side.

It's not always obvious, as I mentioned, that bullying is taking place. It's not always the person getting beat up, which is easy to identify. We have cyberbullying. We have now what we call shunning, which is the child who sits alone at the lunch table. That's a form of bullying. That's not just that that child is not welcome by their peer group.

Bullying, the difference between conflict and bullying is power. So when you look at a bullying situation, you have to look at, is there an imbalance of power.

An imbalance of power can be anything from size to social credibility and social power or intellect. And so that's what we're looking at, because we are looking at control issues. And when we expect children to address these issues themselves, like we typically did when we grew up, it gives that other individual typically more power.

If we say "Ignore them," then what we find is, ah, that's a reaction. They like that reaction. And frankly, if ignoring the other child was going to work, we wouldn't have a problem because that's the very first thing kids try to do is ignore it or stand up for themselves.

Some of the things we need to do are empower the child, not to take care of the problem but to help the child understand that this is the responsibility of the adults but we also want to empower them.

One other thing. It is not resolved by restorative justice. That's not the issue. So if anyone in this room thinks that getting children together to talk about their issues is the way to handle it, it's not. That's like asking an abused woman to go to marriage counseling with her abuser. It doesn't work. It actually typically increases the abuse.

It's also important for us as disability advocates to understand that it is important to address the needs of both the child who is engaging in bullying behavior and the child who is the recipient of it. There are many reasons why children bully. Some just for social power, some because they don't understand the consequences of it and they're mimicking someone else, or what I often see is reactive bullying. And that is, okay, I've had it, now I'm going after you because I learned this from you.

I always tell them, because I'm from Minnesota, I tell the child, "Well, you know when you play hockey and somebody fouls you, you get right back at them, right? Well, who goes into the penalty box? You do."

So it's important that children feel safe and are safe in school. And I've talked to groups and I've said, "Look, guys. Maybe you're right. Maybe this child who is on the spectrum is misinterpreting the social situation. But we need to first make them feel safe, validate that this hurts them, and that they are powerless to stop it." Then perhaps we can go on to teaching the social skills that they're misinterpreting, but the very first thing we need to do is help the child to feel welcome in the community.

So one of the things that we use is a student action plan. I have lots of handouts on the back table that you can help yourself to. The student action plan is really the parent or the teacher fills out this is what's happening and this is what I want to happen. Parents often call me, and of course they want the bully's head on a silver platter. They didn't expel him! They didn't suspend him! So one of the things I have to say is, "Well, first of all, we need to focus on your child. And I can't focus on that other child. I don't know that situation. But I want your child to feel safe and to be safe."

We as a policy at PACER avoid litigation and attorneys, especially with school districts. Sorry, guys.

[Laughter]

But we do everything to avoid that. We use every tool in our box to work with a school district so that we can resolve those issues at the district.

As you heard yesterday, when you go to a judge, you're going to a single individual that very often you have to educate. And if you fail in that education or somewhere else, as one federal judge once told me, "Well, we decide what we want the decision to be and then we tell our clerk to write it."

That's important to know, because as a naive attorney when I first came out, I thought the law ruled. I hear some laughter.

It doesn't. It does not. You need to be persuasive, and hopefully you can, through most of your toolboxes, which is mediation, go to mediation whenever possible.

I actually -- we have an advantage in Minnesota. We have, prior to going to due process, we have other tools. We have conciliation, mediation, and what we call a facilitated IEP meeting, which many states don't have. And those are wonderful tools to have.

When you go in to a meeting with the school district, one of the most important things to do is your preparation. Now, you may say, well, yeah, obviously. But by preparation, I mean preparing the parent and sometimes the child. I ask them to prepare a wish list. What if you could have anything you wanted? What's your wish list?

And then we work on that wish list. What's practical, what they're going to do, and let me tell you too, I've been surprised by school districts agreeing to do things that they're not obligated to do so long as the school district attorney isn't there.

[Laughter]

Because it's his job to earn his fee, and earning his fee, to many, not all school district attorneys, is being able to say no and justify it.

So we have our wish list. We have our examples before we go in. And then I don't bring case law, but I bring the "dear colleague" letter regarding bullying and harassment. I bring OCR decisions. But I don't like to bring case law because then they think attorney and they go back to their attorney.

You say, how do you get away with that, Susan, you're an attorney.

We are actually advocates, and I do not develop an attorney-client relationship. That's what we say and we are representing them as lay advocates. And we're getting away with it so far.

Now, in fact, school districts will say, well, you know, I know, Susan, I know you're admitted to practice, I know you've done this for many years, we want our attorney there.

And I'll say, well, then I can't be there, because I am not representing the parent as an attorney. That's a disadvantage to the parent.

And the school districts will typically say, oh, okay, then.

Sometimes when I know their attorney, they'll say, Susan, that's not going to work because you know more than the school district does and I don't want you there. So that works for me. But that's not very often.

So we use for children with disabilities 504 and the IEP to address bullying. You would be surprised. We do presentations around the country, and we do workshops throughout our state by the number of teachers and administrators who say, really. How do you do that through the IEP. Where does that go.

Well, with a child who is seeing miscues, it may be a goal and social work services. In addition to the accommodations and modifications. No child wants to be stuck with a para, even if their parents want it. They typically don't want it by their side. So we do recommend what we call shadowing. And shadowing is making sure that there is an adult within listening distance at all times who can intervene or at least report to administration.

In terms of litigation, we have found that OCR is very responsive. And one of the things I like about OCR is that they typically have an attorney who answers calls. Every day they assign a different attorney.

So I call them up, and I'm like, "Well, what do you think of this?"

You can't call the judge up and get a feel for where they're at, but you can call OCR up. And, in fact, I did on one case where I said "Well, you know, the DOJ has this opinion out there that says X..."

"Oh, yeah, that sounds like the Department of Justice all right. We're different. We get the issues."

So it's a helpful tool to use.

We always begin, as we discussed yesterday, by finding common ground. The common ground obviously is that especially in elementary school, but everywhere, every child needs to feel safe and be safe, and you don't want bullying going on in the school. So how can we problem solve this as a group. And engaging the school with the problem solving process. Often engaging the student in that as well.

I'll tell you a story about one precocious child on the spectrum. Johnny. Johnny came to his IEP meeting to address the fact that he was being shunned, that no one talked to him or played with him or ate lunch with him. And so the group engaged Johnny in the process, and Johnny said, "You know, how about you let me have a VIP table in the lunch room, and everybody I invite to the VIP table who sits with me and talks with me gets an extra dessert."

[Laughter]

The school said, "Oh, okay, that will work. You can try that."

The important thing is also to come back within a few weeks to see that things are working.

Came back within a few weeks, and Johnny said, "Yeah, things are working but I haven't had an opportunity to meet everybody in my class, so, mom, can you come to school?" And of course mom is like "Yeah, of course, what can I do for you."

"Well, bring McDonald's happy meals for kids at my VIP table."

And you know, this child really solved the issue for himself and made many friends within that classroom.

So it's surprising what individuals can do.

As I finish, I want to thank you very much for everything that you do every day. And I also want to remind you that as frustrating as it can be about where we are today, we've come a long way. And the quote I use in demonstrating that is the school district attorney in Brown versus Board of Education who said, "If we allow these children in our schools, next thing you know, they'll be asking us to let the disabled students in."

Thank you.

[Applause]

MARC MAURER: Thank you very much, Susan.

We now here from Victoria Rodriguez-Roldan, who is senior policy counsel director of the National LGBTQ Task Force. Here is Victoria Rodriguez-Roldan.

[Applause]

VICTORIA RODRIGUEZ-ROLDAN: It even works.

So thank you for the introduction and for having me here today.

A lot of my work centers on the director of disability justice at the National LGBTQ Task Force, and our mission is to be the progressive voice of the LGBTQ movement and the voice of the progressive movement.

As such, the disability justice project was created trying to flip that in to the disability movement, trying to be the disability voice of the LGBT movement and the LGBT voice of the disability movement.

From a progressive intersectional perspective of the civil injustice and not just disability rights which can be a somewhat limiting perspective as many have pointed out in one of the sessions a few minutes ago by Lydia Brown.

I would point out a lot of the work on harassment and bullying that we have done centers around LGBTQ and trans issues. For example, 70% of transgender respondents within the U.S. trans survey in 2015 reported being a victim of harassment or bullying or other forms of assault and discrimination within a workplace.

In schools, the statistic is almost as high.

And many have been forced out of school and so forth.

Approximately a third of our respondents were identified as people with disability. More were identified because they didn't mark that they identified as having a disability but they marked questions such as visibly impaired and whatnot.

This number is probably underreporting, because it didn't really ask about mental health.

I wasn't a part of the drafting of that document, for the record. It would have those questions if I had drafted it.

It becomes essentially a major disability issue. And I would like to see it from an approach because what we see a lot is bullying and harassment in schools especially only really gets addressed when there is privilege involved, when it depends on the school district. It depends on the resources that the school wants to provide.

One thing we need to keep in mind, much like when we talk about police being responsible for a lot of the law enforcement problems that we have and militarization, the same thing happens to schools. A lot of this bullying is happening with the tacit or explicit protection of the school by not doing anything basically, by being part of it. And in some cases we have seen bullying committed by teachers or discrimination by teachers, and almost everyone who has practiced around the educational space and trying to achieve Olmstead integration and enforcement of IEP plans and nondiscrimination there should know this at this point, which is that oftentimes the school is the worst case. It creates, if I'm going to cite the comic Juvenal, the question of who watches the watchman essentially.

I really hope this crowd is nerdy enough to get that reference.

[Laughter]

If not, you know.

But that is one major problem. Likewise, when we move into harassment in the workplace and in other spaces, the same thing happens where the workplace will end up going forward in not protecting the person with the disability. It will either be part of the discrimination, much like in schools, often saying something along the lines of, if you were more normal, you wouldn't be facing this. And I've seen this happen in schools. In workplaces when it comes to sexual harassment, we see the punishing of employees for speaking out. They are the ones that end up getting fired or punished. We see this discrimination happen among LGBTQ people and we should start seeing there are many who are starting to use the ADA as a way to protect the trans community using the gender dysphoria diagnosis disability. Talk to me more if you want to be linked up with practitioners who are using that as a method. There was actually a decision on that in the central district of Pennsylvania recently.

But that's beside the point.

We have likewise I think a lot, for example, one case we saw is basically that the person felt being a disabled trans person felt compelled into trying to go on disability because of the amount of trouble that they felt getting into employment and sustaining it because of the harassment they were facing, both because of their mental health disability and because of their gender identity.

We need to see also this as a form -- I am going to go contrary to my prior speaker, with all the respect in the world for your work, which is that we do need to find alternatives regardless of whether we want to call it restorative justice or other forms of justice, we need to find alternatives that aren't punitive. We see too many police officers sent to schools and not enough counselors. We need to have a discussion that doesn't necessarily put bullies in prison but tries to reform and restore and change the situation that isn't punitive. Because what we see in schools that are predominantly students of color, what we see is criminalization because someone pushed someone because someone threw a snowball, and I don't know if you've seen children... They're some of the cruelest people on earth.

[Laughter]

Seriously.

[Laughter]

And in that sense, we need to start seeing justice measures that do well by the person who is being bullied. Try to correct the situation. But that do not try to derail anyone from it. We need to stop seeing, because far too often when it comes to disability, we have to stop seeing contained classrooms and shunting out persons with disability into individual settings or into segregated settings, which is the other thing we're seeing, as a way to, quote/unquote, protect them from the bullying.

No. That is victim blaming. That is the equivalent of saying, why were you wearing that. Or why were you out at that time of night. We wouldn't say that. I sincerely hope you wouldn't.

And that is the equivalent of that. We're far too often blaming the student for being different. The schools are expecting the student to try to conform in order to avoid the bullying. And oftentimes are being precisely shunted out by the school into that bullying situation. One situation I've seen is precisely where students start doing that bullying because the school essentially is outing them by the accommodations that they're getting, by not being confidential enough. And obviously this is illegal, but it happens. By being made more self-aware of their being behind in a grade and so forth.

And likewise, when we see LGBTQ students being outed because the professor or teacher will not use their preferred name or gender pronouns, and that in turn creates a safety issue within the school from other students likewise.

We need to start seeing bullying as the threat that it is. And in harassment cases, we need to start seeing it also as the barrier that it is for employment of people with disabilities as the form of discrimination that it is and so forth. We need to start seeing it as a major national problem that goes beyond disability, that intersects with race, with gender, with sexual orientation and gender identity, and so forth and so forth.

In that sense, we cannot see -- we far too often see disability, racial justice, prison reform, LGBTQ issues as these separate specific segregated different areas of advocacy, but in reality, they're more of a single big ball of wiggly wobbly activist stuff basically. Sentence got away from me there.

[Laughter]

But you get the point. We need to see the problem as an intersectional one. We need to keep cooperating with other advocates, and we need to stop isolating ourselves as disability advocates. We need to start working with others facing bullying and harassment. We need to keep working on that front and ensuring that kind of competency.

We need to stop seeing disability advocacy as something separate, as not a racial justice problem, not a problem that affects people of color. And frankly, the fact that yesterday there was only a single speaker of color in this conference says that we still have work to do on that front.

[Snapping]

You can clap more.

[Laughter]

[Applause]

Before I finish, that is essentially what we are seeing. We need to also blame the schools. We need to also see who is being the victim of bullying when it comes to disability and how it intersects with other identities, because we have to be all of us all the time, or just the latest slogan mind blowers.

So thank you.

[Applause]

MARC MAURER: Thank you very much, Victoria.

We will now hear from a professor of law at Suffolk University and the director of the workplace at the university. He is a globally recognized authority on workplace bullying and psychological abuse. Here is David Yamada.

[Applause]

DAVID YAMADA: Ah. I think I'm the last speaker too, so hopefully I won't encourage people to stampede to the exits and rather you'll want to hang around and listen to a little bit about what I would like to share with you.

First, I would like to say I got here late yesterday morning. This is my first opportunity to attend this conference. It has been very educational to me. Very informative. I have taken so many notes and thought about a lot of things that frankly I needed to think about and hadn't thought about before. So I want to thank people for sharing so much of your work and your insights, because it's just such valuable work that everyone is doing.

I want to talk about bullying in the workplace. So I'm going to talk about sort of the general dynamics of bullying in the workplace. What it does to people in organizations. The legal issues that surround workplace bullying. And attempts to create legal reform. And then to tie it back into some broader issues that have been raised at this conference and elsewhere in terms of just a broader frame on human dignity.

About 20 years ago I read an online interview with a social psychologist named Gary Namie. And he and his wife Ruth were in the process of starting something they called the campaign against workplace bullying. They were based in California at the time, and they had incorporated this term or imported this term from England, where a journalist named Andre Adams had identified just this cluster of behaviors. And the Brits are very fond of using that term "bullying" to describe aggressive behavior. So they just labeled it workplace bullying and said that's what we're going to use too, deciding to incorporate that term.

As Gary was talking in that interview, he decided to really sort of set out the basics of what workplace bullying is about. He said, "Look, it's repeated, it's health harming, it's mistreatment of one or more persons in the workplace by one or more perpetrators, and it is abusive conduct that is threatening, humiliating, or intimidating, and interferes and undermines the ability of people to do their jobs, and it is often a form of really severe targeted abuse."

Well, what are we talking about in terms of concrete behaviors? It's really a sort of a laundry list of direct and indirect or covert or overt behaviors such as false accusations of mistakes, the proverbial yelling and screaming boss, intimidating nonverbal behaviors, exclusion and silent treatment. Susan mentioned a little bit about ostracizing of kids. Same thing can happen in a workplace.

Sabotage of a reputation. The use of insults. The excessively harsh criticism. Unreasonably heavy work demands designed to ensure someone's failure on the job.

This is just sort of I guess the short list of some of the behaviors that we call bullying in the workplace. Maybe some of you have seen it. Maybe some of you have experienced it. If you have, then you know at a gut level what I'm talking about. Unfortunately, there's a lot of it in the legal profession, as some of you know.

Well, how frequent is this behavior? I would go so far as to say it is one of the most significant neglected problems in the American workplace. Survey data, reliable survey data, indicates that roughly 25-30% of the workforce will experience some form of targeted bullying during their work lives. We know that at least in the United States, workplace bullying tends to be a top down dynamic. It is usually from supervisor to subordinate. The perpetrators by roughly 6:4 margin are male. At times there are more than one bully involved in this. And sometimes we call that mobbing, where you see groups of coworkers ganging up on someone they don't like.

The term "workplace bullying" came to us from Europe. The term was drawn from scientists who had observed the behaviors of birds descending upon an unpopular member of the flock, and they said, we're seeing a lot of this in terms of how workers can treat one another.

Dr. Kudlick earlier talked about the importance of culture. And I submit to you that workplace bullying does not occur in a vacuum. It is enabled and sometimes perpetrated from the top. If you want to read a great paper, look up Dr. Linda Hartling who wrote a paper on relational and nonrelational workplace cultures. Relational are healthy cultures where people try to communicate, work through their differences, enable one another, treat each other with dignity and respect.

The nonrelational cultures are the types of cultures that stoke bullying at work. The dog eat dog zero sum type of workplace. Or, and this is the more interesting form of nonrelational culture, what they call the pseudo relational culture where everyone tries to be superficially nice to one another while the anger and disagreements and conflicts are just buried and usually get expressed in very passive aggressive ways.

If you want an analogy, just think of a very dysfunctional family sitting around the table at Thanksgiving and because they don't get along with each other, all they can talk about is whether they prefer cranberry sauce or dressing because if they get beyond that, bad stuff is going to start getting thrown around verbally or maybe food fights.

But in any event, both of those types of cultures, the more aggressive dog eat dog culture in that nonrelational or pseudo relational culture can really stoke the types of behaviors I'm talking about.

For those who are targeted by this behavior, we know that the effects can be significant. Especially those who are really under attack. Stress and anxiety. Depression. PTSD symptoms. Suicidal ideation. While we know that suicide is a very complicated topic, we also do know that there have been suicides associated with bullying-type behaviors at work.

And with that, obviously in a more, quote, practical way comes severe damage to one's career, prospects, and ability to pursue a livelihood.

Some people ask me, you know, how bad can it get? I've seen just the situations that are, first, sort of irrational because there's no reason why the targeted person has prompted something that would in any way invite these behaviors that are so bad. But I've seen these ongoing campaigns to basically eliminate someone from the workforce. And then sometimes even following them after they left the organization. It happened to a very dear friend of mine, a very successful person working for one of the major airlines in Boston, and she suddenly ran into this buzz saw of a couple of bosses who I think probably had sociopathic qualities to them.

She experienced repeated flat tires in the company parking lot. Things were stolen from her. Interference with some of her online work-related accounts. Forms of vandalism and things like that.

We had stored some of her personnel records in my office at the law school. One day I opened that drawer and that drawer was empty. Somebody went in and stole the stuff.

Because this was an airline, and I happen to fly that airline at the time -- no more -- once I was subjected to a full body patdown by TSA with my bags emptied and searched, and I said "What's going on here? What did I do to deserve this?"

After the search was over, the TSA guy went over and whispered in my ear, "You can thank XYZ airline for that one" and it was right after we had engaged in some advocacy on my friend's behalf.

So this is the kind of stuff that can get really bad.

Sometimes when people say my boss is a psychopath, there is actually some science to suggest that could be the case.

[Laughter]

Studies have shown that the higher up you go on the org chart, the more frequent you see qualities associated with psychopathy. And obviously the worst of those is a lack of conscience. Think how easy it is to do things to people if you don't have a conscience stopping you.

Well, what does this mean on the legal end? About 20 years ago I said, okay, I'm going to look into the protections for people who have been subjected to generic workplace bullying and I started looking into cases for intentional affliction of emotional stress and I was stunned by how reluctant the courts were to even let these cases go forward. So many were dismissed either through motions 12B6 or through summary judgment.

Generally speaking, unless you can tie the bullying behavior to discriminatory motivations or in some cases maybe retaliation for whistle blowing, there's not going to be a lot to stand on in terms of somebody trying to challenge that kind of behavior in a legal context.

So what I went and did is I drafted a model statute. We kind of put a happy name to it, "The healthy workplace bill." It has been introduced so far in various versions in 30 states. It has not been enacted in any state in its full version; however, 4 states, kind of an odd listing, California, Utah, Tennessee, and Minnesota has a little regulation as well, have taken parts of the template bill language to create obligations for certain types of employers to engage in training and education about workplace bullying.

We are making some progress, though. In my home state of Massachusetts, we have had this bill in with the state legislature for the last 4-5 sessions. There are 200 members of the Massachusetts state legislature, and for the first time, this current session, 2019-2020, we now have 103 legislators signed on as cosponsors, so we are, working hard to get that message sent and to say that this type of abuse has to have some type of legal safeguard.

Now, what's this bill about? It basically creates a civil legal claim for those who have been subjected to severe bullying in the workplace.

It also creates liability reducing incentives for employers to act preventively and responsibly to bullying. The language is modeled after the way in which the Supreme Court has described a hostile work environment for purposes of sexual harassment, obviously turning it into a more generic cause of action not tied to protected class status. And the employer defenses are very much how employers can avoid or minimize liability under Title VII by having training and education, by having policies that actually are followed.

Now, I'm not going to go into the whole thing about how inadequate some of that whole discrimination law framework is, but what we're trying to do with workplace bullying is at least get to the point where we're being treated like any other form of severe workplace mistreatment.

So in other words, I think we're sort of at the precipice right now of recognizing this, not only as a problem that has to be addressed in terms of human resources and labor relations, where there's a lot more understanding about this dynamic, but also at the level of law and policy.

So with that said, I want to sort of tie this back in to some bigger picture questions. In preparing for my remarks for this conference, I wanted to do a deeper dive into what kind of research is available on workplace bullying and individuals with disabilities, especially those who might be visually impaired. And so here's my invitation. There's not a lot out there yet, folks. There is a need for a lot better, deeper research on the effects of bullying on people with disabilities, including those who are blind and visually impaired. And for those of you who have any stories to share, I would be happy to hear them. My information is available. It's dyamada@suffolk.edu. If you have information or stories you would like to share with me, I would welcome them very much.

So we need to make I think some stronger ties to the disability community, because obviously this is a challenge that faces folks with disabilities, but we haven't conceptualized it well enough in order to have that piece of it as part of our advocacy.

I also think that we need to look at these forms of mistreatment and tie it into just the broader concept of human dignity for all. Sounds a little trite. It sounds a little sort of pie in the sky. But you know, if you start talking about dignity in the United States, people just kind of go, what are you talking about? This is the U.S.

And what I would like us to do is just say, you know, aren't we entitled to be treated with a baseline of dignity at the workplace? Shouldn't that be our starting place?

I am affiliated with an organization, a network called Human Dignity and Humiliation Studies, a global network of scholars, activists, writers, students, you name it, of folks who want to advance the cause of human dignity and reduce the experience of humiliation in our society.

In that group as well, I think we are underrepresented in terms of folks from the disability community, and if you have any interest in getting involved with that, please let me know.

On a legal end, I would also like to introduce to you if you haven't heard of it before, some of you might have, especially if you know my friend Michael Perlin on the NFB board, and that is the concept of therapeutic jurisprudence, which is a school of legal thought that posits that when we look at law, policy, and legal institutions, we should be promoting outcomes that are psychologically healthy and that advance individual and collective societal well-being. In other words, we know that there are a lot of political angles in which to look at law and policy. We know there are economic angles. Well, let's introduce the psychological and emotional angle and say that basically how we feel about things and how the law treats us in that realm counts for a lot.

So I invite you to consider joining a group that we've just started called the International Society for Therapeutic jurisprudence. The membership is only $25. Free for students. I'm the outgoing chair. One of the reasons why I discovered this therapeutic jurisprudence stuff is because it sort of pulled it all together to me. It said that for so often or so often in the law, we're talking about certain outcomes that just ignore how people feel after a legal event. Someone can win a lawsuit and still be in trauma after that result, in part because the litigation experience is just so damn horrific and often retraumatizing.

So what we're looking at is just in very holistic ways, you know, how can we make things better? How can we encourage judges, lawmakers, lawyers to affirm psychological well-being and outcomes as goals for the way in which we should be running our legal system?

And certainly that ties back in I hope very directly to the disability community, disability advocacy. It certainly speaks to me, someone who has been in this ongoing campaign to stop abuse at work.

I will close now just again with thanks for the opportunity to be part of this conference, with much gratitude to the NFB for this invitation. It's been a real pleasure to be here.

Thank you very much.

[Applause]

MARC MAURER: Thank you, David.

We began the symposium with a call for a recognition of the importance of therapeutic jurisprudence, and we end that way with the last person to present. Consequently, your insight to bring the beginning around to the end has worked very nicely. So I thank you very much for that.

And I also thank you for the definition, because I was a little unclear before you told me what it was.

And I thank the members of the panel.

Now, we've got to see if there are questions before we get done with this topic. Are there questions from the audience?

>> I have a question. I'm Caitlin Parton from the Massachusetts P&A. I have a question for Professor Yamada. I would love to hear more examples of therapeutic jurisprudence that could be incorporated into a settlement agreement, resolution, things that we should be considering incorporating for our clients, because I absolutely have clients where we finish the case and they have been retraumatized or going through the experience has been very deleterious to their personal health. I would love to hear ideas of things that could be done to improve well-being after resolution.

DAVID YAMADA: In a nutshell, obviously I think in fashioning relief for a client, look forward as to how to enable that relief to give them the financial and other resources they need to heal, to recover, to move forward is very important.

In terms of drafting things, I'll just sort of toss out a phrase to you because I know a lot of legal documents are sort of canned in some ways and then we adapt them and do a lot of plagiarism as lawyers. But within this movement, people are looking at reform to look at stock documents and looking at the language they use and the relationships they create and the obligations or rights they create in ways that we look prospectively for how to in some cases heal or at least try to minimize conflicts in the future.

So I know that's not a very specific answer to your question, but I would love to talk with you more about this. We're close. Perhaps back in Massachusetts. So please come up afterwards and get my card if you don't have any contact information. Thanks a lot for the question.

>> Yes. A question for the professor. I am Alio Duran. I dealt with bullying in the workplace, and I'm wondering if you have looked into the restatement to comment E which is probably the oldest statute that I could ever find, as an employment lawyer, dealing with not directly with bullying but defining bullying in a way specifically comment E which defines the outrageous level of the conduct for purposes of intentional affliction of emotional distress which quite frankly professors do a horrific job of teaching in law school and as a result most judges that I have ever encountered say, intentional affliction? Are you kidding me? Isn't that impossible to prove?

Wait, judge, there's comment E.

The reason I mention it is because comment E has paved the way to successfully argue intentional affliction of emotional distress which is really the only statute aside from the fact that when you bring these cases, usually every comment that you define, we convert it into retaliation. Because it's far easier to prove retaliation than intentional affliction of emotional distress. In the absence of a statute, it is a very serious problem for employment advocates.

So I ask you.

DAVID YAMADA: This is to the restatement of torts when you're talking about the restatements definition of intentional affliction of emotional distress.

>> Correct.

DAVID YAMADA: That was my initial thought. I said, IAED has to be the claim that opens the door for targets of workplace bullying to seek relief and that's when I looked at hundreds of cases from all over the country and saw a lot of reluctance of courts to allow that cause of action to go forward.

In addition, here's a huge block. In a lot of states including Massachusetts where I teach and work, worker's compensation preempts tort lawsuits against employers so there's an absolute ban in bringing those cases against the employer. And as plaintiff's lawyers here know, suing individual perpetrators has mixed results, especially in terms of recoverable judgments.

The tort law is a possible protection but it's a very, very limited one.

>> Thank you.

>> Good morning. This is Rebecca Rodgers. And I would like to add on to the discussion about race as addressed by Ms. Rodriguez-Roldan on this panel. It is not enough for my fellow white people especially, it is not enough for us to be expecting people of color to come to us and raise their issues. We need to be affirmatively reaching out. We need to be the ones who ask, what is needed, to get involved with the work that is already being done, offer our assistance, and participate in that work by providing our greater in many situations resources.

Thank you.

[Applause]

MARC MAURER: Inasmuch as I do not know where to reach, I invite you to join the group that determines so that we can find out where to reach and you can help us learn this.

Anybody else who wants to. As I said at the very beginning, we put on this agenda what we thought people wanted on it. Based upon what we've heard. And if we need different things on it, say so and we'll do it. And if we need to make different plans, bring us the notion and we're open to that.

Other questions? Let's find out first if these panel members want to react here. They may have suggests right off the bat. That would be nice.

VICTORIA RODRIGUEZ-ROLDAN: Let's take this one offline. But I would say that the conference needs more -- the movement needs more diversity as a whole. We need to have a greater line up of speakers of color than a republican conference.

[Laughter]

Because that's what it looks like at times.

And we need to also work on topics that are more intersectional and so on. The topics have a lot of potential, but we need to work on speakers. Younger speakers, under 35, speakers of color, speakers from more diverse organizations and so on. But we can take that offline in greater depth.

MARC MAURER: Okay.

>> Hi. My name is Abby. That topic just briefly, I do think it would be helpful to hear more about what the steering committee is doing. We've heard a lot of these comments raised from conferences past and the reaction from the dais is always, well, thank you, bring your friends, come to us, tell us what to do, and it's never, this is what we are affirmatively doing, and I think it would help to know what is affirmatively being done, if anything.

I'm sorry to continue my questions to Professor Yamada, but I have some concerns about the private right of action approach to workplace bullying because what it ultimately is doing, it seems to me, is placing the power to decide what is bullying in the hands of a group of people, namely judges who have not proven trustworthy in adjudicating for example what is discrimination over the past 40 years. The definition of discrimination has been narrowed significantly from the bench in a way that I think also narrows it culturally so that anything that isn't, I will not hire this person because he is black, is no longer sort of culturally considered discrimination.

And especially if the sort of bullying -- and of course judges being older, more white, more male, more successful, less likely to have actually experienced these issues themselves, I worry that going the private right of action route will narrow what we actually consider to be bullying to the point where it excludes almost everybody's lived experience.

DAVID YAMADA: Well, I think your point goes more to the composition of the judiciary than whether we should have legal protections that allow someone that has been mistreated to seek a legal claim.

The same concerns that you mentioned have also been documented, as you noted, in discrimination cases, but that doesn't mean we should remove the right to go to court under Title VII or the ADA or IDEA or any of the other types of protective statutes.

The reason why I wrote this particular model template in a way that doesn't go through agencies is because we just heard too many nightmare stories of cases sitting for 5 years in places like the EEOC and the state equivalents. And we decided that, like many attorneys prefer to go to court directly, that we would create a state law basically, a state law claim, basically the equivalent of a statutory tort claim rather than funneling it through the agencies.

But basically, you know, your point, I agree. On a pro bono basis I was just dealing with an employment discrimination case in a state where in a district that had one of the lowest rates of both EEOC proceedings finding reasonable cause and the district courts agreeing with plaintiffs.

The problem I think is more systemic. We don't have enough judges or enough people in the agencies who get it in terms of how people are being mistreated. And I think that's the bigger problem. Any cause of action will suffer, unfortunately, because of the lack of what I would call life diversity on behalf of those who are making decisions on legal claims.

MARC MAURER: All right. Further questions?

>> I'm Nancy Mayer. I'm out of Durham, North Carolina, but this is a form of higher life. When I worked as a union steward on disability issues. You have worked through any of the unions to find out what they're doing? Because we have grievance procedures and we would handle a lot of the harassment cases through that procedure. Our focus would be -- each client had a different focus that they wanted, but we would handle it through the grievance procedures. We found that much more productive than if we ever got to court. We tried to resolve it before it got to that level. And we usually did. But the same thing you're talking about, people's cars being keyed, we had seen it all and resolved it through the grievance process through the union. I'm just thinking you might find a richer set of data using that than the legal procedure.

DAVID YAMADA: A lot of the support we have for this legislation comes from unions. In Massachusetts, we're working with SEIU, one of the major employee unions. They not only took some of the bill language and negotiated a mutual respect clause that covers bullying behaviors, making it grievable but not arbitrable.

In addition, lobbyists have been put in the state house on this bill and we are working closely with them on state house advocacy. And without them, we would really be at a much more preliminary stage. So I consider the labor movement to be our friends to on this type of stuff.

MARC MAURER: Very good.

Other questions?

I want to thank the members of the panel for this topic on the subject of bullying and harassment. Especially with respect to disability. I think it is real and it's real in many, many places. And I appreciate all of that which you have brought to us and look forward to working in the area in the future.

We are coming now close to the end of this symposium. I know that Scott LaBarre has things for us to think about this afternoon regarding the Disability Rights Bar Association. So I invite you to approach the bench, as they say, Mr. LaBarre, if you wish to make any announcement.

Before we adjourn, however, I want to say this: We've talked about a lot of different laws and areas of law. Our effort has been to bring to the area of disability the rights that people have a meaningful chance to expect in our nation and the changes in law that are needed. One of you said today that you thought that the law applied, and then you found out that it wasn't always necessarily the law that applied, which has two aspects of course: Whether the law can be enforced and the other is whether or not the law should be changed.

We have been, working on changing the law for close to 80 years now in the NFB. The National Association of the Deaf is much older than we are and has been, working on opportunities for disabled people in the Deaf community for longer than even we. We have found ways to work together in the recent time, starting in the last dozen years or so, and that has brought much greater opportunity.

We do need more people in more areas of effort to join with us or us to join with them. Take your choice. There's always plenty of work to do, and I look forward to that.

The individual areas of law that we've covered are important, and I'm glad we've done it.

The fact that we think that we can make a difference is more important still. The notion that we will make change and things can become better than they are today brings us together, holds us together, makes us want to come together in the future, and makes us want to make plans to make the world a better place.

That is why I find joy in coming to these symposia and why I'm glad to meet with all of you I've met before, rekindled those friendships, and I've found some new ones this couple of days.

So thank you very much. It was a great symposium.

[Applause]

SCOTT LaBARRE: Thank you, Dr. Maurer.

And I agree, it's been a tremendous symposium. And in particular, I want to salute Lou Ann Blake for all the great work she does.

[Applause]

Behind the scenes.

And as a member of the steering committee, I really take to heart the comments about diversity and inclusion. It is, indeed, something that we've been thinking about.

One of the things we've realized in thinking about it is quite frankly the great dearth of people from diverse backgrounds in the law and those who are lawyers with disabilities. So some of the issue -- not all of it by any means -- but something that we really have to get cracking on is the pipeline and getting more people in the profession from all backgrounds.

I very recently attended the ABA's bar leadership institute in Chicago and met with the incoming Presidents of all the diverse bars that were there, the national bar association LGBTQ, and so on. And I intend to follow up on those relationships and really start working on that.

And maybe for next year's symposium get some of those people here. Whether they're conversant in the issue of disability or not, but get them here so they're exposed to us and we're exposed to them and really start working on some partnership.

So that's nothing about our meeting this afternoon, but I thought I would take advantage of having the mic here.

Our DRBA meeting will start at 1:45 in this room. Lunch will be starting in a few minutes for those who are registered for the conference. We will wrap up our meeting by 5:30.

At 5:45, there will be transportation from here through our Wells Street entrance or maybe through the garage, we'll find out, and then we'll go to the hotel for the reception between 6:00-9:00.

So thank you very much.

[Applause]