

ADA 30 SYMPOSIUM ISSUE

During September 2020, the NYU Disability Allied Law Students Association (DALSA) held a series of events in commemoration of the 30th anniversary of the Americans with Disabilities Act. The ADA prohibits discrimination against people with disabilities in employment, government programs, and public accommodations. It was unprecedented in its reach--the Rehabilitation Act of 1973 only applied to entities that received federal funding--and marked a revolutionary shift in surfacing the rights of people with disabilities for society at large. Thirty years after its passage, though, its promise of equality leaves much to be desired. Based on interest from our members, we looked in depth at the intersections of disability with criminal justice, poverty, and higher education to examine how the ADA can be used for positive change and what frontiers remain.

Below you will find links to recordings of each of the panels and our keynote address, as well as summaries of each of the panels and a transcript of the keynote. Please note that the recordings are not approved for CLE credit; only the live sessions were.

I. PANEL 1: DISABILITY & CRIMINAL JUSTICE¹

Speakers:

- Jamelia N. Morgan, abolition and disability scholar, Associate Professor at University of Connecticut School of Law
- West Resendes, Skadden Fellow at the ACLU Disability Rights Program
- Stefen R. Short, Supervising Attorney, The Legal Aid Society Prisoner’s Rights Project
- Moderator: Deborah Archer, NYU Associate Professor of Clinical Law; Co-Faculty Director, NYU Center on Race, Inequality, and the Law

Panelists discussed the ways in which disabled people are disproportionately harmed at different stages of the criminal legal system--in the school-to-prison pipeline; in policing encounters in the community; and in jails, prisons, and other institutions. At each of these stages, the panelists discussed innovative ways to use the Americans with Disabilities Act (ADA) to force policy change, including moves toward decarceration and abolition, particularly because of the ADA’s affirmative mandate to accommodate and to provide community integration for people with disabilities.

¹ Recording available at <https://youtu.be/BEiVS8y3zrE>. Please note: Due to a technological error, the recording of this panel shows ASL interpreters on screen instead of panelist West Resendes. Please learn more about West’s work at <https://www.aclu.org/news/by/west-resendes>.

A. Policing

Between twenty and more than fifty percent of people killed by law enforcement have a diagnosable disability, Morgan said, although data is difficult to obtain. Even outside of police brutality, disabled people also experience “ordinary” policing at higher rates, just for existing in public.

“Disabled people, particularly those with untreated psychiatric disabilities or physical disabilities, are vulnerable to policing in medical facilities, in many cases in the very sites that they seek to access care. In many cases, individuals are arrested for conduct related to or stemming from public manifestations of disabilities or untreated disabilities,” Morgan said.

To address this, Morgan’s upcoming paper explores using Title II of the ADA, which applies to government entities, to hold police departments accountable when they 1) wrongfully arrest someone based on conduct that is part of their disability and 2) fail to accommodate people with disabilities during arrest or other parts of an investigation.

“One way of thinking about it is that a policy that disproportionately targets disabled people, either through a failure to accommodate or a failure to recognize the risk that disability-related behaviors will be criminalized, would violate the Title II regulations in that it’s screening out disabled people from “equitable” policing. That’s at least the legal argument,” Morgan said. “Now a more radical view is that there is no such thing as creating equitable policing and that what is in fact happening is police are a part of a social response and a sort of racial technology, if you will, for responding to negatively racialized and disabled people. . . . The radical conception of the ADA as recognizing criminalization and policing in the legislative history as a basis for disability discrimination might call for departments with a history of excessive force that disproportionately targets disabled people to create diversionary programs, such that they’re not subjecting disabled people to this particular form of discrimination.”

Morgan also discussed how this work is necessarily informed by the disability justice framework, drawing from Patty Berne and other activists, which “recognizes that ableism pervades society and creates conditions whereby non normative bodies and minds are assigned particular values based on what they can produce in society,” Morgan said. She added that the disability justice approach must recognize “the various ways in which race, gender, legacies of settler colonialism and chattel slavery, have constructed value into racialized bodies and minds, and have rendered them vulnerable to things like institutionalization and criminalization and poverty.”

In the context of the criminal legal system, this approach recognizes that the disproportionate impact on disabled people “comes from a failure to invest in affordable and accessible housing and mental health treatment and counseling and communities and jobs that provide a living wage,” Morgan said.

B. School-to-prison Pipeline

In schools, students with disabilities were almost three times as likely to be arrested and have police called than other students; black boys with disabilities are five times as likely to have police called compared with other students, according to Resendes.

“What makes a child most likely to be targeted by a police officer while in school is simply having a disability,” Resendes said.

These students are also more likely to attend schools that have inadequate support staff, or inadequately trained support staff, increasing the likelihood that staff will call police when they do not know how to respond to a child’s behavior. Resendes’s work tries to move toward a world where schools have sufficient staffing of mental health professionals, nurses, teachers, tutors, all of whom are trained to provide proper supports and use disciplinary approaches that do not involve calling law enforcement on students with disabilities. Resendes said he has been working on legislative efforts for instance to disinvest from school resource officers (SROs)-police in schools--and fund mental health staff instead.

The case of Cameron McCadden, a 10-year-old boy in Flint, Michigan, demonstrates how the ADA can be used successfully to change practices. The ACLU sued on behalf of Cameron and his mother after he was handcuffed behind his back for an hour for knocking over a supply cart in an afterschool program, a manifestation of his disability. The way the school and police treated Cameron flouted ADA regulations that require “reasonable modifications,” which “include positive behavioral interventions and support, redirection, de-escalation, crisis intervention, patience and waiting,” Resendes said.

The ACLU settled that case after a judge denied the city’s motion to dismiss, agreeing there were allegations that could show the city had failed to train its officers on how to appropriately interact with students with disabilities.

“In addition to damages, we were able to get injunctive relief in that the afterschool programs will not call SROs unless there is an imminent danger; no use of physical restraints, unless the staff use it as a last result; documentation of physical restraint and notice to parents; and disability training for staff,” Resendes said. “We also got the Flint Police Department to revise their juvenile offender policy, among other changes, to encourage police officers to limit police involvement at schools to criminal offenses and not become involved in school discipline issues; deescalate whenever appropriate; participate in training related to implicit bias, de-escalation, special education, and positive behavior intervention.”

In Cameron’s case, the ADA was able to provide the impetus for positive policy changes.

C. Prisons and Carceral Settings

In its Prisoners’ Rights Project, the Legal Aid Society of New York City has been thinking about how to use the ADA to work toward decarceration and deinstitutionalization, rather than just improving conditions inside prisons,

according to Short. That work is helped by the affirmative obligations the ADA imposes on government entities, including the integration mandate affirmed in the Supreme Court case *Olmstead v. L.C.*

“What the integration mandate does is that it shifts the conversation away from the carceral environment as an appropriate environment where people can be accommodated toward a conversation of the carceral environment being always inappropriate for people with disabilities and more broadly for people generally,” Short said.

Short discussed a recent ongoing case, *MG v. Cuomo*, which Legal Aid brought against the city’s practice of keeping people in prison past their release dates even when they have been approved for community-based mental health housing, because the state had not funded enough of that housing to release them yet.

“We’ve uncovered through our litigation that the state, rather than funding community based mental health housing and services for people, has chosen to fund what it calls DOCCS parole beds, which are facilities that are funded through the Department of Corrections and Community Supervision budget to house people who are on parole and post-release supervision. And many of the people who end up in DOCCS parole beds are eligible for community-based mental health housing. But instead they’re languishing in institutions that are essentially a continuation of the prison environment,” Short said.

Short and his team are hopeful that the ADA’s integration mandate and promise of affirmative obligations on states will be successful in New York and other jurisdictions in the future, to move away from the “carceral framework.”

II. PANEL 2: DISABILITY & POVERTY²

Speakers:

- Rebecca Cokley, founding director of the Center for American Progress’ Disability Justice Initiative
- Matthew Cortland, disability advocate
- Dr. Rupa Valdez, president of the Blue Trunk Foundation and Associate Professor at UVA
- Britney Wilson, staff attorney at the National Center for Law and Economic Justice
- Moderator: Deepa Goraya, Public Rights Fellow at Delaware Attorney General’s Office

Panelists from a wide range of disciplines came together to discuss the many facets of the intersections between disability and poverty, including how that intersection manifests itself during COVID and in general when people try to access healthcare through public benefits programs, technology, and in community-based

² Recording available at <https://www.youtube.com/watch?v=16boql3wb4s>.

versus institutional settings. Although the ADA and the current court leaves much to be desired in addressing these issues, panelists also looked to the future with some spots of hopefulness.

Wilson pointed out how the ADA only provides post-hoc enforcement, and that can be useless when people do not know about, or have access, to information to vindicate their rights.

“The fact is that many people of color, many poor people of color, still don't have the same access to enforcement,” Wilson said. “I didn't know the things that I could have access to, the people around me didn't know about them, and so literally it's taking me going to law school and beginning to work in these spaces to figure that out.”

Cortland said he essentially was forced to law school in order to survive, and now uses that knowledge to help others navigate the system -- and that is a product of how the system is structured.

“[People needing benefits are] not supposed to figure out how to get access to the services,” Cortland said. “That's part of the point. It's the further furthering of a white supremacist ableist model of oppression that makes even knowledge of doing something like applying for SNAP benefits or Medicaid benefits or SSI benefits take a law degree, and you should not need to be a lawyer in this country to get food assistance.”

Many of those access issues have also become worse during COVID, many of the panelists said, as clients face additional forms due to COVID-specific benefits, longer wait times, and lack of access to technology or inaccessible online forms.

Increasing use of Telehealth during COVID--both virtual appointments and “asynchronous” interaction like emailing back and forth, has presented similar issues but also some opportunities to improve access to healthcare in the future, according to Rupa Valdez.

“I think for some in our community, myself included, you know, telehealth and kind of the wider-spread adoption of Telehealth has been a benefit. For those of us who might rely on public transportation, which has its own barriers, right, you kind of remove some of that to be able to access care in this way,” Valdez said. “That said, most Telehealth technologies are not fully accessible, right, and we might think about those in terms of people who are blind or people who have a low vision, people who are D/deaf or hard of hearing, . . . [and] people living with intellectual disabilities. We don't provide information in our patient portal in plain language, for example.”

Valdez said that she and others are working on how to improve collection of data on patients with disabilities in order to be able to monitor and improve health system outcomes for those patients. However, even that can be skewed due to inaccessibility issues--asking patients to self-report through a portal, for instance, relies on that patient having access to the Internet and computer hardware.

Rebecca Cokley added that a host of privacy problems can accompany increased data collection, especially given the likely increase in people with disabilities due to the pandemic.

“We actually saw in the Trump administration's 2020 budget -- and it ended up being pulled back -- but originally \$20 million dedicated to within the Social

Security Administration to monitor the social media of people with disabilities on benefits so they could sit there and watch you and say, ‘oh, hey you know what, you said you're disabled, but I saw that you took your kids to Disneyland on Tuesday. We're going to call you in for [review of] benefits,’” Cokley said. “As disabled people, we’re so used to the expectation of a lack of privacy in order to get services that we don't often think about how to protect our privacy. . . . But there really is a conversation that needs to be had at the nexus of health and privacy and disability and services that nobody frankly has the time for right now, but we're going to have to reconcile it at some point in the future.”

COVID has also made clear that workplaces and schools, for instance, can accommodate people with disabilities in ways they previously claimed was not possible—momentum Wilson and Cortland hope will carry forward to attack the “root of the issues,” as Wilson said, that stop people with disabilities in poverty from accessing education and jobs.

Cokley also pointed to women in Congress such as Senator Tammy Duckworth and Representative Katie Porter as reasons to be hopeful. “I really think that one of the things that gives me hope, frankly, is this new generation in Congress who - frankly the women who are fun to work with, don't treat us like inspiration porn or a photo op, and are frankly comfortable identifying as part of the disability community,” Cokley said.

Panelists also expressed concern about what budget cuts after COVID could mean for home- and community-based services. But at the same time, there is more legislative support than in the past for providing money across-the-board without cutting benefits, according to Cortland, “that would have mostly eliminated poverty in the United States for the duration of the benefit period.”

“Poverty is a political choice that we impose on marginalized people in this country and in some ways, that is tragic and infuriating. In some ways, it is actually deeply hopeful because it means we could choose different political choices that would result in different policies that wouldn't impose poverty on marginalized folks in this country,” Cortland said.

III. KEYNOTE³

Speaker:

– Dr. Peter Blanck, Chairman of the Burton Blatt Institute at Syracuse University.

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³ Recording available at <https://www.youtube.com/watch?v=iPbvWF22aJs>. An annotated transcript of Dr. Blanck’s keynote address is available at <https://socialchangenyu.com/harbinger/thirty-years-of-the-americans-with-disabilities-act>.

PREP; Latinx Law Students Association; Law Women; Mental Health Law and Justice Association; Middle Eastern Law Students Association; Public Interest Law Student Association; and Women of Color Collective.