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Foreword to the Symposium: Current Issues in Disability Rights Law

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SYMPOSIUM
CURRENT ISSUES IN DISABILITY RIGHTS LAW

FOREWORD

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Over the past few decades, the American legal system has made substantial progress in recognizing and protecting the rights of individuals with disabilities. Nevertheless, much work remains to be done, within the legal system and, more generally, within American society, to promote awareness, acceptance, and inclusion of individuals with disabilities. The articles in this Symposium Issue of the *Touro Law Review*, dedicated to exploring current issues in disability rights law, present a compelling sampling of the scholarship and advocacy undertaken by leaders in the field, reflecting, at once, both the success that has been achieved and the sense of frustration that more has not been accomplished.

For example, a number of contributors to this Issue focus on the Individuals with Disabilities Education Act ("IDEA"), which was the subject of two important cases decided in the 2016-2017 Supreme Court term, *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*,[1] and *Fry v. Napoleon Community Schools*.[2] Terrye

* Professor of Law & Director of the Jewish Law Institute, Touro Law Center; Symposium Organizer. This Symposium Issue is part of a larger project, initiated by the Jewish Law Institute, dedicated to exploring disability rights and promoting awareness, acceptance, and inclusion, within Jewish communities and beyond. Other components of the project include events and presentations addressing these issues, as well as the recent publication of SAMUEL J. LEVINE, WAS YOSEF ON THE SPECTRUM? UNDERSTANDING JOSEPH THROUGH TORAH, MIDRASH, AND CLASSICAL JEWISH SOURCES (2018). We thank the administration, faculty, staff, and students at Touro Law Center for their participation in these events and their support of these efforts.

[1] 137 S. Ct. 988 (2017). In addition to the Symposium articles, this Issue of the *Touro Law Review* includes a student Note on *Endrew F.*: Alyssa Iuliano, Endrew F. v. Douglas County School District*: The Supreme Court's Elusive Attempt to Close the Gap Between Some Educational Benefit and Meaningful Educational Benefit*, 35 TOURO L. REV. 261 (2019).

[2] 137 S. Ct. 743 (2017).

Conroy and Mitchell Yell provide background material on the development of the IDEA and its application in cases prior to *Endrew F.*, followed by a consideration of the *Endrew F.* decision and subsequent lower court cases, which they document through an extensive Appendix to their article.[3] Although they acknowledge that "[i]t will take time and future decisions to determine exactly how courts will interpret the *Endrew* standard,"[4] the authors close on a cautiously optimistic note: "It would appear, nonetheless, that the *Endrew* ruling was a victory for students with disabilities and their parents."[5]

Notably, many of the authors in this Issue identify limitations of the effects and effectiveness of the Supreme Court's favorable—and unanimous—decisions in *Endrew F.* and *Fry*. Analyzing *Endrew F.*, Randy Lee reminds us that

> Law does not inherently do all we want it to do merely because it is law. . . . Law is too easily manipulated, and people are too easily tempted in a world with far too much temptation for us to think otherwise. Law will work in our lives only under the circumstances it worked in [*Endrew F.*]: the law must be an instrument of love.[6]

Mark Weber critiques an assertion by the United States Court of Appeals for the Second Circuit stating that "[p]rior decisions of this Court are consistent with the Supreme Court's decision in *Endrew F.*"[7] According to Professor Weber, "the court of appeals and district courts in the Second Circuit should acknowledge the inconsistency of those former cases with *Endrew F.* and overrule them or restrict their application. At the very least, the court of appeals should not make a blanket assertion that the cases are all reliable precedent."[8] On a somewhat similar note, Rebecca Huss observes that "[a]s courts grapple with applying the Supreme Court's decision in *Fry* . . .,

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[3] Terrye Conroy & Mitchell L. Yell, *Free Appropriate Public Education After* Endrew F. v. Douglas County School District *(2017)*, 35 TOURO L. REV. 101 (2019).

[4] *Id.* at 137.

[5] *Id.*

[6] Randy Lee, *Endrew F.'s Journey to a Free Appropriate Public Education: What Can We Learn from Love*, 35 TOURO L. REV. 379 (2019).

[7] Mark C. Weber, *Endrew F. Clairvoyance*, 35 TOURO L. REV. 591 (2019) (alteration in original) (quoting Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 757 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 322 (2018)).

[8] *Id.* at 592.

parents and school districts must continue to determine under what circumstances students are allowed to be accompanied by their service dogs in a primary and secondary school environment."[9] Therefore, Professor Huss offers guidance for both advocates and school districts, emphasizing that "school districts need to ensure that they do not run afoul of the ADA [Americans With Disabilities Act] by applying policies or procedures that do not reflect current legal standards."[10]

Applying the IDEA within the context of the Flint Water Crisis, Karen Czapanskiy finds that the IDEA "fail[s] to force school systems to provide systemic educational changes when that is what will help the students more than individualized educational plans."[11] In response, Professor Czapanskiy proposes changes to the IDEA focused on "helping as many affected children as possible as early as possible."[12] Dustin Rynders looks at the IDEA in the context of "systematic problems of implicit bias for African Americans in the juvenile justice and child welfare systems[,]" which "translate to implicit bias problems and disproportionality in the special education system."[13] Mr. Rynders considers the federal government's reaction to these problems through the application of the IDEA, while offering additional suggestions of methods through which practicing lawyers can combat implicit bias.[14] Donald Stone addresses another aspect of the IDEA, the basic principle of educating children with disabilities in the least restrictive environment ("LRE").[15] Through a careful analysis of "the various uses of the least restrictive environment in civil commitment laws, special education, group homes and community based treatment, guardianships, and architectural accessibility,"[16] Professor Stone recommends a number of guidelines for the application of the least restrictive environment principle, with the goal

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[9] Rebecca J. Huss, *Canines in the Classroom Redux: Applying the ADA or the IDEA to Determine Whether a Student Should be Allowed to be Accompanied by a Service Animal at a Primary or Secondary Educational Institution*, 35 TOURO L. REV. 235 (2019).

[10] *Id.* at 260.

[11] Karen Syma Czapanskiy, *Preschool and Lead Exposed Kids: The IDEA Just Isn't Good Enough*, 35 TOURO L. REV. 171 (2019).

[12] *Id.* at 193.

[13] Dustin Rynders, *Battling Implicit Bias in the IDEA to Advocate for African American Students with Disabilities*, 35 TOURO L. REV. 461 (2019).

[14] *See generally id*.

[15] *See* Donald H. Stone, *The Least Restrictive Environment for Providing Education, Treatment, and Community Services for Persons with Disabilities: Rethinking the Concept*, 35 TOURO L. REV. 523 (2019).

[16] *Id.* at 524.

of "mak[ing] the LRE more than an empty mandate by removing frustrations and opening up the dialogue to the endless possibilities a society that steeps in the LRE concept can bring about."[17]

Turning to other aspects of education law, Laura Greene strikes a decidedly disappointed note over the No Child Left Behind ("NCLB") and the Every Student Success Act ("ESSA"), concluding that "NCLB, ESSA and other future reauthorizations share the common trend of politicians and policymakers failing to meet their obligations to students due to a lack of knowledge and understanding of the issues that students, advocates and teachers face on a daily basis."[18] Ms. Greene further finds that "[t]his is the reality of the past couple of decades. Elected representatives have and continue to underrepresent the most vulnerable of their constituents. Neither NCLB, ESSA nor any other future reauthorizations will be able to help the nation's students until the reality of their situations are realized by those who govern."[19] Looking at yet another area of education law, Adam Kleinberg and Alex Eleftherakis analyze the New York State Dignity for All Students Act ("DASA"), designed "to provide students with an educational environment free of discrimination, harassment, and bullying through the implementation of proactive and preventative policies and procedures."[20] According to the authors, although courts have held that DASA does not provide a private cause of action, parents may still bring other statutory claims against a school district and may file a complaint with the New York State Commissioner of Education.[21]

Other articles in this Symposium Issue address the rights of children with disabilities in other contexts. Joshua Kay identities and "attempts to fill the legal advocacy void in the literature on children with disabilities in child protection proceedings."[22] As Professor Kay explains, "children with disabilities are even more vulnerable than other foster children to significant threats to their health, development,

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[17] *Id.* at 560.

[18] Laura Adler-Greene, *Every Student Succeeds Act: Are Schools Making Sure Every Student Succeeds?*, 35 TOURO L. REV. 11, 22 (2019).

[19] *Id.* at 23.

[20] Adam I. Kleinberg & Alex Eleftherakis, *I'll See You in Court, But Not Pursuant to DASA*, 35 TOURO L. REV. 367 (2019).

[21] *Id.* at 377.

[22] Joshua B. Kay, *Advocating for Children With Disabilities in Child Protection Cases*, 35 TOURO L. REV. 345 (2019).

and future."[23] Accordingly, "[i]t is critical that their lawyers and other advocates explore the nature of their clients' disabilities and demand appropriate evaluation and services."[24] In short, "[s]pecialized services do exist—lawyers for children with disabilities must ensure that their clients have access to them."[25] Julia Epstein and Stephen Rosenbaum reassess the case of Ashley X, to "examine how similarly situated families manage to raise children with significant disabilities and what questions must be raised about consent, autonomy, sexuality, and bodily integrity."[26] Drawing upon interviews with a number of families raising children with significant disabilities, the authors analyze these families' experiences to "ask how, as a society, we should support families like Ashley's in ways that respect their children's dignity and autonomy and do not require reconfiguring their children's bodies or predetermining their physical, social or sexual capabilities."[27]

Other contributors to this Issue address additional failures to provide adequate protection to individuals with disabilities in relation to sexual autonomy and identity. Michael Perlin, Alison Lynch, and Valerie McClain observe that "[t]he idea that persons with mental disabilities have the same right as all others to sexual autonomy . . . is still 'beyond the last frontier' for most of society."[28] In response, the authors "hope [] that this article inspires lawyers, mental health professionals, expert witnesses, and policy makers to take seriously the ways that we deprive persons with mental disabilities of their right to sexual autonomy, presuming, in violation of the law, science and common sense, that they are incompetent to do so."[29] Kevin Barry notes that the ADA and its predecessors "protect people from discrimination based on disability, but not if that disability happens to

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[23] *Id.* at 365.

[24] *Id.*

[25] *Id.* at 366.

[26] Julia Epstein & Stephen A. Rosenbaum, *Revisiting Ashley X: An Essay on Disabled Bodily Integrity, Sexuality, Dignity, and Family Caregiving*, 35 TOURO L. REV. 197, 201 (2019).

[27] *Id.*

[28] Michael L. Perlin, Alison J. Lynch & Valerie R. McClain, *"Some Things are Too Hot to Touch": Competency, the Right to Sexual Autonomy, and the Roles of Lawyers and Expert Witnesses*, 35 TOURO L. REV. 405, 408 (2019) (quoting Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. REV. L. & SOC. CHANGE 517 (1993-94); MICHAEL L. PERLIN & ALISON J. LYNCH, SEXUALITY, DISABILITY, AND THE LAW: BEYOND THE LAST FRONTIER? 1-2 (2016)).

[29] Perlin et al., *supra* note 28, at 434.

be one of three archaic medical conditions closely associated with transgender people: 'transvestism,' 'transsexualism,' and 'gender identity disorders not resulting from physical impairments.'"[30] Professor Barry's article "tells the story of how this transgender exclusion came to be, why a growing number of federal courts say it does not to apply gender dysphoria, a new and distinct medical diagnosis, and the future of disability rights protection for transgender people."[31]

A number of authors identify other areas in which disability rights have not been adequately protected. William Brooks explores the question of whether a litigant may file an employment discrimination claim against a state or local government pursuant to Title II of the ADA, which bars state and local governments from discriminating against individuals with disabilities, or whether the ADA limits an aggrieved individual's remedy to Title I only, which prohibits employment discrimination.[32] Professor Brooks finds that "[c]ourts that have concluded that a litigant may not bring an employment discrimination claim against a public entity under Title II of the ADA have erred."[33] According to Professor Brooks,

> [a] reading of the legislative history of Title II and rules for statutory construction applicable to Title II establishes that if the Supreme Court was to address this issue *de novo*, a conclusion that Congress intended to subject employment discrimination by state and local governments to Title II is more warranted than a finding that Congress did not.[34]

Along similar lines, looking to the future, Nicole Porter aims to "determine whether we can expect a disability-friendly Supreme Court or whether the Court will once again narrowly construe individuals with disabilities' rights under the ADA."[35] Professor

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[30] Kevin M. Barry & Jennifer L. Levi, *The Future of Disability Rights Protections for Transgender People*, 35 TOURO L. REV. 25, 25 (2019).

[31] *Id.*

[32] William Brooks, *The Application of Title II of the Americans With Disabilities Act to Employment Discrimination: Why the Circuits Have Gotten It Wrong*, 35 TOURO L. REV. 73 (2019).

[33] *Id.* at 99.

[34] *Id.* at 100.

[35] Nicole Buonocore Porter, *Mixed Signals: What Can We Expect From the Supreme Court in this Post-ADA Amendments Act Era?*, 35 TOURO L. REV. 435, 435 (2019).

Porter identifies "mixed signals regarding how the Supreme Court might decide these unresolved ADA issues, starting with the negative signal—Justice Gorsuch's disability law cases while he was sitting on the Tenth Circuit, before turning to the positive signal—the Supreme Court's plaintiff-friendly disability cases in 2017."[36] Suggesting that "these plaintiff-friendly cases are likely not indicative of a disability-friendly Supreme Court because they both involved questions of statutory interpretation under the IDEA, which is a very different statute from the ADA,"[37] Professor Porter concludes that "if and when any of the circuit splits [in ADA cases] are heard by the Supreme Court, they are not likely to lead to disability-friendly outcomes."[38]

On a broader scale, Arlene Kanter focuses on the failure—or refusal—of the United States to ratify the Convention on the Rights of Persons with Disabilities ("CRPD"), which had been signed by 161 countries and ratified by 177 countries.[39] As a result, Professor Kanter concludes, "the United States strengthens its position as an outlier in the international community, a position that in today's world, the United States may no longer afford."[40] In short, she finds that "although the CRPD includes some additional provisions not included in the ADAAA [Americans with Disabilities Act Amendments], ratification of the CRPD by the United States could vastly enhance the rights of Americans with disabilities by moving from the purely anti-discrimination mandate of the ADA to a more comprehensive view of substantive equality, as envisioned in the CPRD."[41] Based on a comparison of key provisions of the CRPD and the ADA/ADAAA, Professor Kanter argues that "the United States Senate should ratify the CRPD without any further delay."[42]

Taken together, the articles in this Symposium Issue of the *Touro Law Review* provide a wide-ranging study of the progress and success, as well as the failures and limitations, in the American legal system's efforts to protect the rights of individuals with disabilities. As Peter Blanck acknowledges in his response to the various concerns and critiques posed by many of the contributors to the Issue, "it may

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[36] *Id.* at 436.

[37] *Id.* at 458.

[38] *Id.* at 460.

[39] Arlene S. Kanter, *Let's Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities*, 35 TOURO L. REV. 301 (2019).

[40] *Id.* at 343

[41] *Id.* at 310.

[42] *Id.* at 302.

take generations to fulfill the aspirations of [the ADA and the IDEA], and to undo centuries of segregation, stigmatization, and discrimination on the basis of disability."[43] Accordingly, Professor Blanck emphasizes,

> [a]ctive engagement and advocacy by people with disabilities of all ages, and their family members and supporters, are needed to advance the evolving ADA and the IDEA. These laws are aspirational declarations for inclusion and not segregation, and for participation in society and not disempowerment from community. They are foundational elements of an American policy framework designed to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" in education, employment, health care, housing, governmental programs, and in access to the built and digital public environments.[44]

Ultimately, Professor Blanck expands upon a position articulated by former United States Attorney General Richard Thornburgh: "[T]hrough the ADA (and laws like the IDEA), America 'has taken an important—and long overdue—step toward bringing people with disabilities all over the world into the mainstream of the human rights movement.'"[45] Specifically, Professor Blanck concludes,

> [t]oday, the ADA and the IDEA touch the lives of a new generation of children with disabilities and their families. These individuals have not known America without the ADA and the IDEA, with their principles of inclusion, participation, and integration. America is better off because of the ADA and the IDEA. As guiding beacons, they offer hope towards a future in

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[43] Peter Blanck, *Why America is Better Off Because of the Americans with Disabilities Act and the Individuals with Disabilities Education Act*, 35 TOURO L. REV. 605 (2019).

[44] *Id.* at 617 (quoting 42 U.S.C. § 12101 (2018) (providing the ADA findings and purpose)).

[45] *Id.* at 618 (quoting DICK THORNBURGH, RESPECTING THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: BEFORE THE FOREIGN RELATIONS COMMITTEE OF THE U.S. SENATE HEARING 3 (2012), http://www.foreign.senate.gov/imo/media/doc/Dick_Thornburgh_Testimony.pdf.)

> which all people, regardless of difference, will be welcomed as full and equal members of society.[46]

Indeed, it may be hoped that the articles in this Symposium Issue will provide one more step in the progress toward such a future, for individuals with disabilities, the American legal system, and American society.

[46] *Id.*