

Disability History Association Podcast
Interview with David Gerber & Bruce Dierenfield
November 2020

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Caroline Lieffers: Hello and welcome to another episode of the Disability History Association Podcast. My name is Caroline Lieffers, and it's my pleasure to be talking today with Dr. David Gerber and Dr. Bruce Dierenfield, who recently published a book together entitled *Disability Rights and Religious Liberty: The Story Behind Zobrest v. Catalina Foothills School District*. It's a pleasure to be speaking to both of you today.

Bruce Dierenfield: Thanks for having us.

David Gerber: Indeed, thank you.

Caroline: Would you mind each introducing yourselves to our audience? Bruce, could you please start us off?

Bruce: Sure. I'm a Professor Emeritus of Modern American History at Canisius College in Buffalo, New York. And I have spent a lot of my life studying our political system and in particular religion and public education, and I'm currently quite involved in studying the Civil Rights Movement, writing about that.

David: I'm a Professor Emeritus of American History at the State University of New York, Buffalo. I've spent most of my career as a scholar writing about personal and social identity in a wide variety of instances, including disability. And while, unlike Bruce, I haven't dealt with law in my scholarship extensively, I have taught a course on the First Amendment, both the religious clauses and the free expression clauses for about 25 years. So I'm very familiar with a lot of Supreme Court cases because I teach them regularly.

Caroline: Excellent, well, thank you so much. Now, is this book your first collaboration? I'm curious about the origins of this particular project.

Bruce: It is our first collaboration, and the way it happened is that David gave me a call and wanted to know if I'd join him. I had known David for quite a long time as we were both involved in the separationist movement - that is keeping religion, church and state separate. And so I thought it would be a wonderful opportunity to work with David.

David: I value very much the opportunity to work with Bruce because of his extensive scholarship in regard to the religion clause of the First Amendment, and his extensive knowledge of how to go about investigating the stories and creating narratives out of the stories of Supreme Court cases.

Caroline: That makes sense. So, David, had you stumbled across this case at some point during your research? Is that what happened?

David: Well, I stumbled across the case in my teaching because it was in the textbook I regularly use. As I got more involved in disability, I thought to myself, it's a wonderful opportunity to teach both my First Amendment subject, but also to think about disability in the context of the First Amendment, two things that don't normally get juxtaposed with one another. There was another thing about the case that attracted me to it. Usually these cases, the decisions in the cases, are far removed from the story of the people involved. Mostly

sometimes you just get a name of the litigants, but in this decision, in the very first paragraph, James Zobrest is mentioned, his age is mentioned, his high school is mentioned, and it suggested to me that there was a backstory that might be worth investigating. And it mattered too that I did part of my growing up, to the extent you could speak of Tucson, Arizona, as having any suburbs, in a community almost adjacent to where the Zobrests lived.

Caroline: So the story had immediate appeal to you.

David: Yes, in a variety of imaginative ways.

Caroline: Now, why did the two of you think that really from the outset it was important to share this story?

Bruce: Well I'll just speak a little personally here. I have a disability myself, and it's along the lines of what Jim Zobrest had, although I don't have it as severely. But I do know what it is to be treated dismissively, or people pass you by, or don't want to engage you, or don't want to repeat, and the kind of negative feelings that people have about your intellect, even though I've had a successful career - more than most in my area. And so that's tough to take because you know you have ability, but people won't give you a chance. So it was a personal thing, and I thought the story was worth telling on its own.

David: I think that what Bruce has said is very material to whatever success we were able to achieve in our collaboration. When we began our collaboration, I had no idea that Bruce had a hearing impairment, and watching him warm to the subject as he thought about Jim Zobrest's life in the context of his own life, added all kinds of energies to what we were doing. That was really both sort of inspirational and very informative to me.

I would add to what Bruce said about disability my own ongoing interest in a very general problem of why people file lawsuits. Lawsuits are tedious, expensive, involve all kinds of heartache and inconvenience, and the Supreme Court of course only accepts 3% to 5% of the cases that petition to be heard by it. I had a colleague at Buffalo—I participated in law school colloquia for years—who made a career based in large part on the disability law in education, of asking the question why do people who file lawsuits when so much is stacked against them succeeding? And I was always interested in this question. And you know, Americans live with a lot of myths about ourselves, one of which is somehow prevailing against the odds and somehow getting justice in spite of all the disincentives involved in doing it. It's a very American story, you know, and immortalized in a lot of films, and I was sort of enthused by the prospect of following this Zobrests down this long, expensive, and difficult path of seeking justice.

Bruce: It was also possible to learn a great deal from the participants. So many of them are still alive, so that presented an unusually attractive opportunity to tell the history as fully and as accurately as we could.

Caroline: Actually, speaking on the subject of the participants, why don't we start introducing our audience to this cast of characters. So, who are the Zobrests?

David: Well, the Zobrests, Larry and Sandi Zobrest—the parents—were a couple who, both of whom were from Western Pennsylvania, working class, ethnic backgrounds. They met while they were attending different colleges in Erie, Pennsylvania, and got married and had their first child was Jim, who was born—Bruce, 1974 was Jim's birthday?

Bruce: I think that's right.

David: Right. Jim was their first child, and Jim was determined at some point during the first

year of his life to be profoundly hearing impaired. In pursuit of Jim's education, the Zobrests made all kinds of choices and all kinds of calculations, one of which ultimately involved their moving to Arizona to enroll Jim in a state institution in what was then I believe suburban Tucson for part of his early education. That was part of the long and twisty road that led to their decision ultimately to place him outside public schools and into a Catholic high school. And we follow them through these decisions and different places in which they lived and made the decision.

Bruce: I would add that Jim Zobrest was a fun-loving guy who had a number of passions, including movies and basketball, and he really wanted to be part of the hearing world. Now, whether that was something that he was led to believe by his parents or it is something Jim always had is, I guess, impossible to sort out. But in the period we're studying he wanted to be part of that world. Sandi, the mother, Sandi Zobrest impressed me constantly with her incredible energy, drive. David has already mentioned the family picked up and moved across country to try to help their son get a better start in his education, and her willingness, vision to create organizations, to mobilize people, to question, to seek out help for her son is just, it's admirable and it's impressive all at the same time. I would add that, one more thing about the family. I would emphasize the younger brother Sam Zobrest. I think Sam from the earliest get-go learned some basic sign language and often helped Jim, worked with Jim, was Jim's—not alter ego—but someone that he could rely on. He knew his language and would help him in social situations.

David: We conducted almost 30 oral history interviews, some of them quite extensive. These were as much as it was possible, the lawyers on both sides of the case, both for the school district and for the Zobrests. We interviewed some of Jim's teachers at Salpointe Catholic , Roman Catholic High School. We interviewed people involved in his education in public school prior to the decision to send him to Salpointe Catholic High School. And we interviewed classmates of his, where we could find them, including one fellow who was...was he in Abu Dhabi?

Bruce: Yeah, I guess so.

David: Yeah, so we did a lot of extensive interviewing with a lot of people who were directly and sort of indirectly involved in the lawsuit, and could fill us in on the history of the Zobrest family and on Jim's own history as an adolescent.

Bruce: And some of the close friends of Sandi Zobrest, who were quite candid.

Caroline: That's excellent. I'll be asking you more about the interviews in a moment. Now, you've already mentioned, of course, that Jim would go to Salpointe, a Catholic high school—a private Catholic high school, in fact—and from my understanding, the Zobrests felt this was important for both his moral and his academic development, if you will. But this decision to move him to a private school for high school would put him, in a way, on a collision course, with the question of how the Education for All Handicapped Children Act ought to be interpreted. So can you give us a little bit of background on what first is the Education for All Handicapped Children Act, and why would it come to be at the center of the story?

Bruce: Well, that law, which was enacted in 1975, enshrined the basic principle of FAPE, the Free Appropriate Public Education, so that children with disabilities would be entitled to education, to mainstreaming in effect. And that is the basis on which the Zobrests believed that they had a right to an interpreter, a sign interpreter, wherever they took their child, because the government said it was for helping children with disabilities. It wasn't quite that simple, but that's what they believed.

David: There was an ambiguity in the law about the appropriate, the law being appropriate to

private education, let alone religious private education. So a question mark hung over that instance of education in the law as it was written and interpreted prior to the Zobrest case.

Caroline: So effectively—we'll just clarify this for our audience—they needed to challenge the Catalina Foothills School District in this case, correct? Because it was the Catalina Foothills School District that would be effectively providing the interpreter, although the interpreter would be working in a private Catholic school alongside Jim, is that correct?

Bruce: Yes.

Caroline: Okay, good, good. So we'll obviously get to more of the legal details of how they had to pursue this case through the courts, but in the meantime, Jim is of course going to high school. As we well know, the US court system moves quite slowly, the legal system. So in the meantime, talk me through what Jim's high school experience was like.

Bruce: I think it was a mixed bag. If you , when we talked to some teachers, librarians, and coaches, they would describe Jim as fitting in very well, that he could be the life of the group that he was hanging around with. And we do know that he would eat out with friends, and he was on the basketball team, and from a distance it appeared that mainstreaming in that school was working well. But I think it's very telling that Jim Zobrest told the editor of the school yearbook that he really didn't have close friends, because most people with full hearing did not want to take the time to communicate with him beyond, "Hi, how are you" and you know wave. And that kind of shallow interaction was very frustrating for him. Even when he pinned his hopes on the basketball team—that was really his first love in school, the reason he went to school, Salpointe offered a better athletic program—he didn't have friends on the team. So, and then gradually, he was not, although he had played quite a bit in his freshman year and some as a sophomore, as he graduated to the varsity team he just did not play very much, which was deeply disappointing and alienated him from the school environment.

David: I would add to that that in an oral history interview with Jim in 2015 and in our follow-ups, what Jim remembers about high school isn't close friendships and hanging out with his friends, but rather the awkwardness of his relations with his classmates and how reserved they were in approaching him because of the difficulties they anticipated in communicating with him. One of the things I think that provides a context for thinking about Jim's experience, is that Jim's parents, and by extension Jim, began to face the questions of his education at a time, sort of the crest of the Disability Civil Rights Movement and Independent Living Movement, in which we conjured the belief that we could make disability disappear and mainstreaming was not only desirable but absolutely possible to the extent that disability wouldn't be a factor in people's lives. With people who are profoundly hearing impaired, because of communications issues, that's a much more complicated issue. And I think that one of the problems that Jim ran into consistently was the difference between expectations that the Zobrests began his education with, and the reality of the problems that he faced in communicating with peers during a crucial point of his growing up. You know, Deaf adolescents and little kids may be among all disabled people those who profit most from being together and learning to communicate first by being together. That's what's often said about the foundation of ASL in language. That was not Jim's foundation though. So some of Jim's experience was an ongoing revelation of difficulty rather than an open path to opportunity. And I'm not sure the Zobrests were completely prepared for those bumps in the road, although they accommodated themselves by learning from experience of course.

Bruce: One could say that Jim was happier in junior high, that is the public school before he went to Salpointe. I'm not commenting on whether that happiness or unhappiness was connected to being in a public school or a religious school, but maybe just the age. He did have a very close friend in junior high who did not come with him to senior high, and a lot of the students went in different directions, they did not go to a religious school. The other thing

that I might add here is that when Jim thought back on his high school career, he said his happiest day was graduation day, when he was leaving. Now, he also said that if he had to do it all over again, he would, he would go back to Salpointe. But I had the feeling it was kind of a close call.

David: The socialization experience, I think from his point of view, was not, was disappointing, certainly, and Bruce has described it exactly how that played out for him over those four years.

Caroline: At this point, the Catalina Foothills School District was effectively refusing to pay for Jim's interpreter, so I understand that the family was essentially spending their own money, and soliciting donations, and basically scraping together what funds they could in order to provide the interpreter.

Bruce: They were desperate. And the expense was, oh at least 8000 dollars and upward a year.

David: For the interpreter.

Bruce: For the interpreter, yes, excuse me. They were people of middle-class status and they wanted—this experience certainly testifies to how much the Zobrest family wanted to send him to Salpointe and pay the tuition and pay for the interpreter on top of it, when they were having business problems, and it wasn't easy at all. In fact, the school itself, the principal got involved in trying to raise money for them. So it was a very difficult thing, but it shows you the kind of commitment of the family had to this sort of educational experience.

David: And then on top of the money that the interpreter cost, of course, there were the legal expenses that they faced, ever-escalating as they got further up the judicial system. Justice in the United States, particularly at the levels that they came to want to pursue it, could be very expensive, and intimidatingly so, of course. And that was another factor in some of the desperate moments they had between filing suit in 1988 and getting to the Supreme Court in 1993.

Caroline: Yeah, let's actually pursue that question, that's an important one. So tell me about the initiation of legal proceedings, I guess I could say. You know, did they recognize that this answer of "no" from the Catalina Foothills School District was sort of not good enough, and that they had a chance of pursuing some sort of legal mechanism to change it? And what got them really down this road?

David: Well, it was kind of serendipity. It happened that Sandi was making a telephone call to Jim's first teacher back in Erie, Pennsylvania. And during the course of it, Sandi told her friend Ginny Ball Duncan that she was being given the run around, that she was very frustrated that she was having this difficulty. And the other woman, Ginny, Ginny Ball Duncan, said "well have you talked to my dad?" And Sandi knew Ginny's father, "but why would I wanna do that?" And Ginny explained that her father, and in fact she didn't use these words, but one of the top constitutional lawyers in America with a special interest in safeguarding the rights of those students who were going into religious education—getting an education in a religious school. And so this fit William Bentley Ball—the father's—plan to continue to try to protect Catholics in particular, although he did work with other groups as well to protect their religious liberty, as he called it. And so he became involved in the case. There was a local part too. I should mention that this particular case in order to be handled was going to have to be handled in the federal court system because they were making the argument that their constitutional rights, their American constitutional rights, were being impinged upon, that is for religious freedom.

And so Sandi also went to the local legal aid society to try to get some support there. And the

man who handled the disability section of that society was a man called Tom Burning, and Mr. Burning was sympathetic, he was very sympathetic to the Zobrests, but when he went to the board of the society they thought, "What are you talking about? We're not on this side, we're on the side of separation, and Tom Burning made some convincing arguments and the society joined him. So the Zobrests were going to have to go into federal district court and the Court operated in Tucson. The case would be heard in Tucson initially, and then when they lost, that case had to go up the line to the Ninth Circuit Court of Appeals in San Francisco, and then from there, if you lose, then either party could appeal to the Supreme Court. That's kind of the trajectory of the legal process.

David: It's important to sort of add the element of forceful personality and willfulness to the story. Sandi Zobrest had a number of encounters with the Catalina Foothills school system, asking for a decision and asking for them to rethink their decision on not cooperating in paying for Jim's interpreter in a Catholic high school. Their counsels told the school district that this was constitutionally impossible because of the Establishment Clause of the Constitution requiring a degree of separation or a complete separation between church and state. Sandi came to feel that not only was that a wrong interpretation of the Constitution, but she also came to feel that she wasn't being taken seriously, and that she was being patronized. And Sandi Zobrest would not put up with that at all. She had one encounter with the completely benign, decent Superintendent of the Catalina Foothills school district on an evening where they were going to hammer out once and for all what was going to happen. And in his, what I think was probably a calm, meditative, reassuring voice, he said to her, "We have many fine public high schools here, let us help you to find the one that is appropriate for Jim." And she threw - the tone of voice and what she took to be patronizing got her disgusted, and she threw, in her own telling and I believe it's probably true, she threw down her papers on the table. She had a friend with her, and she told the friend, "I'll be in the parking lot, you can meet me there." And the friend came out in a few minutes and said to her, "You know what he said? He said I don't care how mad she has as long as she doesn't sue us." Now this is Sandi's memory, but it's a symbolic sort of reference point for her emotions. And she is said to have said to her friend, "He doesn't know me." And that, too, in her mind, and I believe along with the familiarity we gained about her, that there might be a strong element of truth about that moment. It's a cinematic moment really, that probably, that sort of inspired her against the odds that she probably had begun to feel would militate against succeeding. It probably inspired her to carry on with that.

Bruce: Yes, and she, of course she had surmounted so many obstacles of different kinds all along the way, this was just one more, albeit the biggest one.

David: It's important to add, and I think the audience for the podcast probably would be listening for this, and they'd be quite right to, it's often the case in these families that the mothers run interference in these situations between children and the bureaucracies that stand in the way of kids with disabilities getting the assistances as they might need. And Sandi was very much the spokesperson for their family, and very much the one who was in control of the decision-making process of how they would proceed, and if they would proceed.

Bruce: One thing that we should mention before going further is Sandi's commitment to her son was so great that she became a college instructor of sign language. The father never really got very, very far into this. He could do some finger spelling, we understood, but the mother became an expert of the kind of sign language she practiced.

Caroline: So given that the issue of church and state is, of course, old one, and there had already been some major cases that had wound their way through the courts - actually on this issue of state funding for aspects of religious education. Do you think that the Zobrests initially had much hope of success?

Bruce: Well, there's always hope that your case is going to be the one that cracks open the wall of separation, right? But there were some signs that they might get a favorable hearing. There had been several cases in which the court said that states are permitted to share textbooks, to loan textbooks between public school districts and what we used to call parochial schools or religious schools. And then after World War II, the courts, the US Supreme Court, said that it's perfectly alright for a public school district to provide bussing of parochial school children to their religious school, and over time, there came to be more and more benefits. For one thing, the Supreme Court said it was possible to have testing, diagnostic testing for speech and hearing, maybe any psychological condition that you might have, even a scholarship. It might be possible, it was possible, for a person with vision problems to get a state scholarship to go to a Bible college. So, and the court had enunciated certain theories which could be used in other contexts, such as the child benefit theory or the equal treatment theory.

And then Ball was, William Bentley Ball the attorney was, I think, ever the optimist. You know, he didn't win all the time, but he was willing to carry the fight in the hope of getting additional openings for support for religious people in religious schools. There were, on the other hand, a series of cases in the 70s in particular, and also the mid-80s, which suggested that they were still going to have a very tough time. One of these was the "Lemon test," which created a three-part test that made it very difficult. You might satisfy two of the three prongs of this test, but in doing so, you'd violate the third prong and therefore the aid to students in a religious school might be invalidated. So it was, it was not obvious that they were going to win at all, I would say.

David: I think what Bruce has said is really the background that you need to know to understand the law. But, you know, to take an example of the kind of question that might come before the court in understanding how to rule in the *Zobrest* case, Jim wanted to take an interpreter, paid for with public funds, into a Roman Catholic high school. In a Roman Catholic high school, the day starts with Mass, and there are subjects having to do with religion. Everybody has to take Theology. So here, you would have the case of someone who would be implicitly a public employee, although the money would have gone to the *Zobrests* to pay the interpreter. The interpreter wouldn't have been paid directly by a government entity. Here you would have had the case of somebody who was implicitly a public employee interpreting Catholic theology, and in the jurisprudence that then existed, it was very hard to imagine how anything resembling this could be anything other than an impossibility for the Supreme Court.

Bruce: And there had never been a case where a public employee in a religious institution had been paid.

Caroline: That's very interesting. Yeah, they're seeing their interpreter more as an employee, and less as a neutral tool.

Bruce: Well, that was the view of the justices and judges who opposed this arrangement.

David: You talk to interpreters, with their strong sense of professional ethics and their expansive sense of how they function in the classroom, and they don't like the drift of that argument, and I don't blame them. Interpreting is interpreting; the interpreter isn't a translation machine. There are concepts in Catholic theology which don't lend themselves easily to explanation in oral language, let alone in sign language. This was a highly sort of fraught and complicated subject for the court to encounter.

Caroline: There's a lot of nuance there. And how was their case treated in the first couple of levels of the court system, if you will? The district and the circuit courts?

Bruce: Well, it was tough sledding, let's say that. At the federal district court, the judge

Richard Bilby thought that the matter was rather easily resolved because the interpreter did not provide the kind of service that the Supreme Court had said was permissible. That is, the interpreter was neither, did not provide diagnostic or therapeutic help. And so that was forbidden at a parochial school; it seemed open and shut. And then the other part was that the interpreter was in a parochial school where he would invariably promote religion by translating prayers and Catholic theology. And then Bilby offer this kind of remark, which was kind of dismissive. He said he had a childhood friend who was deaf and therefore he knew all about deafness. He was also Episcopalian and claimed he knew all about what Catholic theology required. So, he was not the most open-minded judge in the case. So he decided against the Zobrests, who then took the case up to the Ninth Circuit Court, usually regarded as the most liberal of the circuit courts.

There, there were two very liberal judges, Betty Binns Fletcher and Stephen Reinhardt, and they argued that the interpreter would create a symbolic union, that was a phrase the court had forbidden. You cannot have this, an action that creates a symbolic union between church and state, so that violates the Lemon test and the Establishment Clause of the First Amendment. There was a dissenter, however, who kind of pointed the way to the future and the Supreme Court would pick up on this dissenter. So let me spend a few moments talking about him.

Thomas Tang, he pointed out that the assistance, the state assistance, went to the student with a disability, not to the parochial school itself. So it wasn't that the parochial school was really benefiting other than tangentially. It didn't need Jim Zobrest's tuition money. There would be someone else who would have filled that position. So that was one thing. In other words, it's the recipient, we've got to focus on who's actually getting the benefit: it's the student with a disability, secondly, not the religious institution. So he didn't see a violation of the First Amendment. Secondly, Tang pointed out that the interpreter is not creating religious content. That's what the school did, or what the teacher did, but the interpreter simply passed along the information that he was given. It may have had a religious message, but it didn't mean that the interpreter was an instrument to promote it. So those findings would be picked up later on.

The Zobrests were very frustrated by how long all this took, and they wrote a rather curt letter to the judges telling them to get with it, and then their attorney William Bentley Ball, he sent along a little message himself. "This is not complicated, this is not General Motors, it's, you know, what in the world is taking you folks so long?" And eventually, they did decide and it was, you know, a couple of more years before the Supreme Court got it.

David: One of the things, I think is suggested by what Bruce has said very strongly is, at the center of this case is hearing impairment and a profoundly hearing impaired adolescent. And at the center of the case is interpretation and language. And the legal authorities, those who were dismissive of complexity and those who seemed willing to embrace it, really did not know a lot. And that was present through the majority decision in the Zobrests' behalf. They didn't spend a lot of time asking themselves questions like, "What do interpreters actually do? Is an interpreter, a human being, a machine? Is that possible? What does sign accomplish in regard to the expression of very complicated concepts that might emerge in the teaching of theology?" These things were not deeply inquired into by the courts. Bruce, would you -

Bruce: Let me just say one thing at that point, David. The court seemed to have no interest -

David: Yes.

Bruce: They didn't understand it, they didn't care to find out about it. So this case involved far more religious establishment questions, religious liberty questions, than it did disability.

David: After the Zobrests won their case, a professor at Gallaudet University wrote an article saying "what they don't know might...what they didn't know might profit us." There was some title of that sort...

Bruce: "Help us."

David: "Help us." And it was really emblematic of exactly how it was that the court had reached a decision that did indeed help people with hearing impairments in this limited context of public-private religious school contentions. But there was, as Bruce said, not only was there little knowledge, but there didn't seem to be a great deal of motivation to develop that knowledge. Jim was a vessel for reaching conclusions that had to do with constitutional questions outside the reach of his parents and his own aspirations.

Bruce: And indeed the school district, and I would argue even William Bentley Ball, for the petitioners, they were much more interested in religious establishment questions than they were disability. At least is how they argued the case.

Caroline: It seems like the court's relative lack of familiarity with disability issues became clear when they arrived at the Supreme Court. And you describe in your book some dramatic moments. And so what happened there?

Bruce: Well, when the, when their day came in court, in Washington, there was a case before the Zobrest case. The Lamb's Chapel case.

Caroline: Another case about schools and religious freedom, yeah, the Lamb's Chapel vs. Moriches Union case.

Bruce: And, but everybody is gathered, you know, before. Even if you're there for the Zobrest case, you've got to be there for the Lamb's Chapel. And so it appeared that the interpreter that William Bentley Ball had arranged for was late, and so the proceedings are going on, and yet there are several people in the audience who simply have no idea what's going on. So William Bentley Ball's daughter, Jim Zobrest's first teacher, swiveled in her chair to turn around to the people who needed interpretation, and she began to interpret for them. And the authorities said, "What the heck are you doing, you know? Get back in line. You're creating a disturbance. We can't have that here." And then when the interpreter that had been arranged for finally arrived, that interpreter was off to the side, the opposite side, and so the people who needed that service could not really see well. So Sandi Zobrest at this point, starts motioning the person to move over to their side, and the police jump in and say, "What are you doing, sit down." And there was a real feeling that they were going to be kicked out of the proceedings for disturbing the Lamb's Chapel case. There weren't that many people who needed the interpretation, but of course, even one person deserves to have that sort of accommodation, especially when you have people there who can do it.

Caroline: And how did things go for the Zobrests at the Supreme Court? I mean, I suppose we're giving away the ending here, but how did the Supreme Court ultimately rule?

Bruce: Well, let me just say one thing about the oral argument. William Bentley Ball decided to crack a joke in his argument, and that's a risky venture, because typically this is a very solemn proceeding. No one's amused. You know, the Queen used to say "We are not amused." Well the justices were kind of that way, too, generally.

David: They never get really beyond a little sarcasm.

Bruce: So Ball tried this joke in which he suggested that it was farcical to think that students with full hearing would be upset to see this interpreter in chemistry lab.

Caroline: Ball kind of tries to play down the possibility that the interpreter is bringing together church and state, if you will, by kind of jokingly pretending to be Jim's classmates and saying, "Guys, guys, you see this fellow who is making those signs? Well, it's awesome, right here in chem lab, we're seeing a violation of the Establishment clause of the First Amendment."

Bruce: And the justices apparently, I guess everybody else was laughing by the absurdity of this notion that constitutional questions would accompany the mere presence of the interpreter there. As to what the court decide - oh and the court decided that this was really a question of religious establishment. Because, they argued, that the interpreter was like a human hearing aid, that he served a mechanical function. And I already discussed what Thomas Tang, the judge in the Ninth Circuit court, argued. Well those ideas were picked up by William Rehnquist, the author of the opinion, the chief justice. He pointed out, Rehnquist pointed out, that any government program that assists a broad class of citizens without reference to religion is legal. And in this case, it wasn't the government that decided where Jim Zobrest should go to school. Jim Zobrest and his parents decided that. Further, the religious school did - Salpointe - did not materially benefit from the Zobrest decision. And because the interpreter was viewed as a kind of a machine, the interpreter did not materially advance the school's religious agenda. So that was kind of it in a nutshell.

Caroline: Did this case attract a lot of media attention and public conversation at the time, and if so, I'm curious about to what extent the conversation was about the religious freedom question, or about the disability question. You mentioned that the courts were much more concerned with the issue of the Establishment Clause, right, and relatively ignorant on matters of disability and Deafness, and I'm curious about the public conversation about this.

Bruce: Well, both *The Washington Post* and *The New York Times*, to mention two, gave it quite a bit of coverage just before and just after, because they saw this as a potential - well, maybe game changer, potentially a game changer. If the wall of separation was taken down or destroyed, in any case, had the potential for doing that. As it happened, it didn't do that, you know, in one fell swoop. But it was part of an ongoing effort to accommodate students attending religious schools, and in this case, a person who needed support or accommodation for his disability. So, but after the case, I don't see much media attention.

David: There was a strain of the journalism and went in a slightly different direction. The Zobrests were interesting people. The back story was interesting. It appealed to the element in American mythology of little people demanding their rights that's been immortalized in movies like Frank Capra's movies from the Depression era. And Jim was a compelling person. He was articulate, smart, very handsome, and very outgoing at the time. And when he was interviewed, he made a, he was a compelling presence in an interview. So the, unlike some of the cases that come before the court, for example, that involved maritime law or matters of corporate finagling, you know, the Zobrests were three-dimensional American people. And that, too, was part of the interest in the case that appeared in, I wouldn't say necessarily less serious publications - well, I would say that. *USA Today* is a popular daily newspaper that has less weighty content than the *New York Times* or the *Washington Post*. And it did have several articles on the Zobrests. I'd add, to the interest in the case, the vast number of Friend of the Court briefs that were filed in behalf of one side or another in the litigation, by people who wanted to influence the judges.

Bruce: I'll add one thing. One of the reasons I think there was interest, to the extent there was interest in the case by the media, is the obvious injustice. Here is someone who's capable, who wants an education, and the one thing that's keeping him from getting it is having an interpreter that the school district can afford. That, you know, when he was attending the school district in junior high and elementary school, he did have an interpreter that the school district paid for, so it seemed, you know - "Just let him have the interpreter." The injustice

seemed obvious to most people.

David: Sandi's point that she made in a variety of contexts, both during and afterwards was this is about one kid who wants to play basketball, right, and the separationist organizations whose interest in the case we followed knew that one of the weakest points, in their view of the case, wasn't the constitutional law, which had favored the school district at every level, the advisory level and, as Bruce has described, in the adjudication levels in the federal courts - it was the compelling figure of the one kid who wanted to go to high school to play basketball.

Bruce: And William Bentley Ball knew that, he knew he had an attractive litigant, and he was going to milk that for all he could, and at the same time, the separationists, like those at Americans United for the Separation of Church and State, they were very concerned, they told us the plaintiff is a very attractive person to put out in front of this matter, and we might lose, just for that reason.

Caroline: That's very, very interesting. This is an aside, but I found this utterly fascinating as a Canadian because of course, we have publicly, a whole publicly funded Catholic school system here in Alberta that operates alongside our secular school system, so I found this fascination with the separation of church and state and how that should be enforced to be really, really interesting.

David: Our societies in spite of all they have in common have a very different foundational histories. [**Caroline:** Indeed] And this manner was of the greatest importance to some of the founders of the American republic. The thing about Sandi was her feeling about the rights that she was due as a patriotic American, right, she made this point to us that she was patriotic - that her male kin had served in one more or another, I think her brother was in Vietnam. She just insisted on, on her rights. She felt that as an American, she was due these rights. And she wasn't gonna have anything other than a respectful hearing.

Caroline: Yeah, yeah, and of course, she's also paying tax money or her family's paying tax money, that is going to fund, if I'm correct about this, the Catalina Foothills School District, right? So there's that argument too, yeah.

David: Their property taxes, I mean Catholic parents have always claimed in the United States, that they were doubly taxed for education, they pay property taxes directly, or indirectly if they were renters, that went to finance public education and then they pay tuition for their children at Catholic schools. And this was a tension in the existence of what was used to be referred to as parochial education, really in religious schools, that pervaded the discussion of equity in the context of those who sent their children to religious schools.

Bruce: This is what William Bentley Ball, the attorney for the Zobrests, had been adamant about, and had spent most of his legal career trying to make sure that this kind of double taxation stopped.

Caroline: Tell me a little bit about the legacy of this case, in what ways has Zobrest, which was decided in 1993, has it come to matter for the legal world and particularly the lives of people with disabilities?

David: I know about a very important case in which Zobrest was material to the justices reaching another conclusion. I think the case has been influential on two levels. Sandi tells us that she has gotten over the course of many years, letters from people in the same situation that they were in in the 1980s, having to butt their heads against local school districts that were still arguing within the framework of the ambiguities of the law in spite of the case, of the resolution of their case. We saw some evidence of this in her archive, which she let us look at.

The Zobrest case has been mentioned as precedent in a variety of cases that the Supreme Court has heard, and there was one case in particular that I think was really quite important. It reached a large number of students in the New York City Public School system. The court had ruled in a case involving the following facts: poor kids enrolled with their parents paying tuition, sometimes getting some help with that in the form of scholarships, but putting out money to help pay for their kids to be enrolled in a Catholic, in Catholic schools - poor kids with learning disabilities, and I believe in some cases, developmental disabilities, were under a program begun with the best of reasons by the New York City Public School system that involved using - after school - public resources to help these kids with their educational deficits. The court ruled in the 1980s that this was an impossible thing under the Constitution, under the First Amendment, that it was an obvious case of establishment. And the City of New York had gone to all kinds of lengths to protect its program against that judgment, but they couldn't pass constitutional judgement on that.

Then in the aftermath of the decision against that program, they went to all kinds of lengths to find a way to help these kids after school. It cost a tremendous amount of money. They had kids individually riding the subway alone so that they wouldn't have to be on buses financed by the schools, you know, all kinds of parental nightmares. After Zobrest, with Zobrest in mind as a precedent, Justice O'Connor, the first woman appointed to the US Supreme Court, wrote a decision when the case reappeared, in, I think in the belief of the New York City school system, that now it had an opportunity to make a different argument, and more successful, Justice O'Connor, in I believe it was the first paragraph of the rehearing decision, said, "the decision that we reached in the 1980s is no longer good law." That's a paraphrase, maybe it's not the exact quote, but she came very close to saying it. Every once in a while, the court looks at what it's said after reaching a decision in another case and says, "wait a minute, in order to achieve consistency and justice, we've got to go on record as changing our minds," and in this New York City case involving, you know, tens of thousands of little, poor little kids whose parents were struggling to educate them in religious schools, the court changed its mind. And Zobrest was a foundation for changing its mind.

Caroline: I promised I would come back to this issue, and it's the issue of interviewing people, so of course, you were able to interview the Zobrests as well as many other people for this story, which is a wonderful thing when a historian gets a chance to do that. Did doing these interviews change your perspective on this story or change your approach to this project?

Bruce: Well, I think it made us more aware of the motivations and the character of several key people, Sandi being one of them. And I think her husband also - it was, we began to realize that Larry Zobrest was a traditional father, and he really let his wife, or, his wife took charge, I don't know which way to describe it. But she did take charge and he focused more on traditional breadwinning responsibilities. I had hoped that we would get to know Jim Zobrest a little more, but I think we learned as much as we could upon seeing him, upon seeing him and talking to him, so to speak. So that, and then talking to the teammates, some of the teammates, and the real nature of what was going on there, because that was Jim's preferred area, we just sensed a kind of frustration. The fellow that we talked to from the Middle East, who was Jim's longtime friend, he gave us additional insight. So we did, I think, have a greater and deeper appreciation for the story that we were able to communicate.

David: We wrote two books and weave them together, one was a jurisprudential history of a lawsuit, and the other was the backstory from the compelling human point of view, and without those interviews, the latter of the two narratives would have been impossible. It was the oral history that allowed us to fill in the details of that back story, the emotional and intellectual and familial details of this over-story.

Bruce: Here's another thing: virtually everybody we wanted to speak to, we did speak to, but there were two groups that did not make themselves available to us. And one was some

players on the basketball team, including the coach's son, who was kind of a rival of Jim Zobrest, and prevented him from playing because he was a, you know, the coach's son, and also, I think a better player. But we couldn't get to very many people on the basketball team, nor could we get to as many teachers and administrators as we hoped. And we tried to think about why that was. And one thought that comes to us is that maybe some of them either didn't know Jim that well, didn't have that many things to say or were, perhaps were embarrassed by not working with him or befriending him, and for whatever reason, we couldn't reach some of those people. I'm very satisfied with what we did, but you always want to get as many as you can, you know?

Caroline: Were the Zobrests enthusiastic about the idea of having two professors writing their story? How did they feel about that?

Bruce: I think they were very...

David: Yes, they were very enthusiastic. I think one of the things that you need to know about them is that they were not strangers to dealing with the press, nor strangers to dealing with people who came to them years later, as we ultimately did, and were writing essays about the case. So they had been interviewed after the decision was rendered, I think by two other, by two people -- one a constitutional scholar, maybe both of them constitutional scholars. And they'd been interviewed by the, by TV and journalistic print media as well. Were they enthusiastic about us as academics doing a sort of conventional academic treatment? I don't think they could have imagined at the start when we made contact with them in 2014 or 15, how thorough we needed to be, the depths of analysis that we needed to plumb to satisfy ourselves. I think that was a surprise. But on the other hand, there was never a moment in our dealing with them in which they expressed impatience, Sandi in particular, and said, "aren't you guys done yet?" That moment never came.

Bruce: They opened up their letters and, you know, their material, personal material to us, they wanted us to have all the things we said we needed. Gratifying for sure.

Caroline: Yeah, of course. Now, Bruce, I want to ask you this question in particular: much of your research and teaching deals with the history of the Black struggle for justice. In what ways do you see the history of the Disability Rights Movement as akin to the more familiar, if you will, Civil Rights Movement? And in what ways is it different?

Bruce: There were quite a lot of similarities, but of necessity, there were some important differences as well. Let me just begin by noting that Disability Rights Movement did not start, you know, at the time of some of the laws we've been discussing in the late 60s and 70s. It didn't start them, but it certainly benefited from the Civil Rights Movement, as did a lot of other causes, such as the women's rights movement. And it was a time of social ferment, the anti-war movement, the free speech movement, the student movement. Change was in the air, and I think it certainly helped motivate and mobilize disability rights activists as well, because one of the goals of these other moments was the idea of inclusion, and certainly the Disability Rights Movement is about that. And then marrying that idea of inclusion with the American values of independence and participation.

Similarities: the issues, a lot of the issues were the same - access, integration, access to transportation, housing, public services, attending the school that you wanted to attend. Another similarity between these two moments, is that there was a wide base of supporters. For disability rights, the parents of disabled children, those who are disabled themselves, those on college campuses, progressives of one stripe or another, people who had been active in other movements like Judy Heumann or Ed Roberts or Gerald Baptiste, they had participated in the free speech movement, anti-war movement, Civil Rights movement themselves. The growth of organizations like the Civil Rights Movement had the Southern Christian Leadership

Conference, the NAACP, the Urban League, SNCC, you name it. And in the area of disability, Disabled in Action, the American Coalition of Citizens with Disabilities, which is a coalition of 65 different groups, National Association of the Deaf. Somebody has to provide money, someone has to have agendas, someone has to send out people, have lawyers at the ready, so those things were similar.

And then tactics: the Disability Rights Movement engaged in a lot of the same tactics as the Civil Rights Movement, such as lobbying legislative bodies or, and then some of the key laws like the Education for all Handicapped Children Act, or the Americans with Disabilities Act. Testifying before Congress. One of the reasons to go there is to educate the people who are going to decide whether a law would have basic protection, such as the Civil Rights Act of 1964, you know, addressed several different groups, but it did not address disability, so that was going to require further education. Lawsuits.

And there was direct action in the form of blocking traffic. You know, stop the usual procedures of life. There was a march on Washington in the Disability Rights movement. Several. There were sit-ins in federal buildings. The longest sit-ins were not done by the Civil Rights movement, but by the Disability Rights movement. There was even the media attention event, like the Capitol Crawl in 1990 to make sure that the Americans with Disabilities Act would get through. And there were a whole series of laws that came about, the Architectural Barriers Act, the Urban Mass Transit Act, the Rehabilitation Act, and so on. Air Carrier Access Act.

There was also dissimilarity. Some activists from the Disability Rights Movement came to the realization that focusing on Washington or federal agencies like HEW—Health, Education, and Welfare -- was not enough, and that in putting so much energy into that form of organizing, neglected necessary grassroots organizing on the local level. Differences: one of the major differences with the Disability Rights Movement is that disability is such a broad category encompassing so many different kinds of conditions and requiring so many different and sometimes subtle accommodations, whereas racism involves one factor, skin color, and one solution. Other differences: it's much more difficult to organize. The Disability Rights Movement has been much more difficult because each disability tends to have its own coterie of supporters, well, you're going to have to, in order to have an entire movement, you're going to have to convince people who don't have these specific disabilities that people with disabilities are a group, and therefore they deserve rights as a group. And a lot of the effort in Washington was to convince Congress that people with disabilities are a class, and eventually that did happen.

Another problem flowing from that is that it was very difficult to get the necessary financial resources, because each sub-category of disability had only support for itself, but in order to run a reform, you're going to require much more.

And a third major difference in the area of organizing is that it was almost impossible for people with disabilities, the Disabilities Rights movement to use a hammer at the voting booth. In other words, people with disabilities did not vote as a voting bloc, whereas, as we've seen with the recent election, that Black people, African-Americans usually vote as a voting bloc, and there can be consequences if you don't vote a certain way. Another difference is that the disability movement has had to focus much more on education to show that those who don't have disabilities, that those who do deserve equal access and equal treatment. Over time, it was somehow easier to think that those with racial differences were skin deep -- in other words, we're the same, we're all the same, except for the skin color. That took time, certainly it took time. But I think it's taken longer, and some people still do not really see those with physical and mental disabilities as being discriminated against, so that continues to be a problem that has to be addressed. But those are some of the similarities and differences that occur.

Caroline: Yeah. Since you've now both done so much thinking on this legal history of disability justice, do you have thoughts about current day, present-day laws that should be passed or are likely to be passed to ensure equity? Or that you hope or expect will be challenged or amended? I'm wondering if you see the legal system and the making of laws itself as an important venue through which the disability community will continue to be working toward justice?

David: It does seem to be - I thought about this question that in anticipation of our interview, that does seem to me from conversations with people with disabilities that I regularly encounter and work with in a variety of contexts in the community, that the protections in regard to employment really need to be strengthened enormously. The unemployment rate among people with disabilities is really often alarming, and of course, they're very vulnerable in times like this of economic contraction. So I would think that high on the agenda has to be strengthening guarantees of struggles against discrimination in employment.

Bruce: And I would expand that actually - there should be affirmative action for employment, and this is one of the issues that Jim Zobrest himself has had getting a, having a career, a meaningful career. So, you know, government has singled out certain groups for, trying to help them get going in effect in our society, economically speaking. One could argue, one could see that affirmative action for those with disabilities would be another area.

Another concern that might be addressed is the habit American society has of putting people with certain kinds of disabilities and custodial institutions rather than making it easy for them to live with, in their own home or with family. And then, incarceration is a problem. In fact, a lot of the people who are in prison, 15% of the men and 30% of the women, have mental illness. It's really that that they are guilty of rather than crime. And then still we are not where we should be in terms of accessibility, whether it's architecture or transportation, or the physical environment. So those are four areas that need to be addressed.

Caroline: Thank you for that. This is a large question, but I hope you'll indulge me nonetheless. Now that you've finished your book and it's out in the world, what do you hope the field of disability history or the larger American public will take from this story?

David: My own feeling about the book in the context of how it might influence a rating in history, I'm a social historian by practice, and I've done what we began to call in the mid-20th century history from the bottom up. What I'm proudest of about our book and what I think I would offer as a, by way of sort of advice on going forward with the history of disability is the vitality you can achieve by tying events and processes that exist at the highest level of society or politics or culture with a movement from below of real three-dimensional people involved in daily life. I think our, whatever success we might have achieved in the book, in tying together the narrative of the jurisprudential development with the narrative of the Zobrests' everyday life and trying to achieve the goals that they had, the aspirations they have is the thing that I would be proudest of. But I would offer it also as a way of writing history with real vitality that not only tells a good and important and truthful story, but it also in its way is inspirational, because whatever one feels about the Zobrests' pursuit of what we might call the normalization, which is not a word that's very compelling, for most people in disability studies, they were people with great courage and determination, and there's a lot to be, there's a lot to be considered in watching people like that function to change the world, right? And by watching, I mean writing their histories from below, as well as from above.

Bruce: It's very American to think that progress is inevitable, but I would want readers to take this idea also from our work, and that is - where you get in life is often depend on the moment in which you seek justice, that you seek opportunity. Because often times the effort to obtain those desirable ends depends on the time in which you seek it. And it was by pure happenstance that the Zobrests won, because their case was delayed. If they had come up

when they were supposed to come up, they would have lost that case. So the composition of the court changed. So we tend in America think, "Well the law is the law, and you know, originalism, and the Constitution is frozen in time," so it's important to realize that this Zobrests weren't foreordained to win. They could have lost and so we think we're always getting better as a society in America, but it's not always so. As the case of race alone illustrates, we're still fighting these old battles.

Caroline: That's very thought-provoking. Thank you both for your comments, for your time. I have so appreciated this conversation.

Bruce: A pleasure to be with you today, Caroline.

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Caroline: Thanks to everyone out there for listening or reading the transcript. Please join us again next time. Bye bye!