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The ADA--A Phenomenal Victory for Civil Rights (Closing Remarks)

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CLOSING REMARKS: THE ADA— A PHENOMENAL VICTORY FOR CIVIL RIGHTS

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The topic of civil rights is a topic that I have thought about for a long time and written about and feel very committed to, and I thank the editors of the *St. John's Journal of Legal Commentary* for inviting me to give the closing remarks. I am heartened by the commitment of our students at St. John's University School of Law in recognizing the importance of the rights of the disabled and civil rights in general.

First, I would like to place my summation in the context of civil rights, which is what I know most about. Some of our speakers today have taken us back historically; Judge Re to Roman law,[1] another speaker to Ancient Greece,[2] and yet another to the Thirteenth Century.[3] What I am going to do is move us closer in time to 1954 and the Supreme Court's landmark decision in *Brown v. Board of Education*.[4] Now you might ask, "What does *Brown* have to do with employment rights of the disabled? Wasn't it a case about race and education?" Technically, yes but philosophically and politically it was not.[5] In fact, *Brown*'s central statement was about the right to be free from state action implying inferiority.[6] In other words, for the Court in *Brown*, the Equal Protection

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[1] *See* Edward D. Re, *Introductory Remarks*, 10 ST. JOHN'S J. LEGAL COMMENT. 477, 479 (1994).

[2] *See* Deborah A. Calloway, *Dealing with Diversity: Changing Theories of Discrimination*, 10 ST. JOHN'S J. LEGAL COMMENT. 481, 481-83 (1994).

[3] *See* David Popiel, *Americans with Disabilities Act: A Question of Economics or Justice*, 10 ST. JOHN'S J. LEGAL COMMENT. 527, 529 (1994).

[4] 347 U.S. 483, 493 (1954).

[5] *Id.* at 495 (concluding that in field of public education, "separate but equal" doctrine has no place, and separate educational facilities are inherently unequal).

[6] *Id.* at 493. The court described education as the most important function of state and local governments. *Id.* Therefore, where a state has undertaken to provide education, it must make education available to all on equal terms. *Id.*

Clause of the Fourteenth Amendment guarantees each of us the right to equal dignity and respect at the hands of government.

Now, despite all of the debate about judicial activism and judicial restraint, we know that courts actually frame their decisions within the cultural paradigms of the accepted social values of the day.[7] In that sense, *Brown* can be viewed as reflecting what were the emerging understandings, sensibilities, and perspectives captured in the timeframe of 1954.

As we now realize four decades later, *Brown* was a bold and dramatic decision with bold and dramatic consequences that far exceeded the facts of the case. In fact, *Brown* set in motion a political and social revolution that would heighten our awareness of a broad spectrum of individuals and groups historically forgotten, including women, linguistic minorities, racial minorities, and the disabled.

Throughout the 1960s and 1970s, Congress breathed life into *Brown*'s mandate by enacting a series of laws protecting the rights of racial and linguistic minorities,[8] women,[9] handicapped children,[10] and disabled adults,[11] by providing them with a wide range of public services. Even though *Brown* was decided under

[7] *See, e.g.*, Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 134-35 (1991) (standing for proposition that Supreme Court in *Edwards v. Arizona* understood importance of social tolerance, mobility, and social change); Mary A. Glendon, Symposium, *General Report*, 1993 B.Y.U. L. REV. 385, 406-07; Daniel Gordon, *California Retreats to the Past: The Paradox of Unenforceable Immigration Law and* Edwards v. California, *the Depression, and Earl Warren*, 24 SW. U. L. REV. 319, 347 (1995); Curtis E. Harris, *An Undue Burden: Balancing in an Age of Relativism*, 18 OKLA. CITY U. L. REV. 363, 368-70 (1993) (explaining importance of Supreme Court Justices' social values because it will color his or her decisions); Robert Holland, *Women Could Be the Biggest Loser If VMI Falls*, RICHMOND TIMES-DISPATCH, Sept. 28, 1994, at A3 (quoting justice Department release that VMI should allow female students in "spirit of the *Brown* decision").

[8] 42 U.S.C. § 2000 (Supp. V 1993) (prohibiting discrimination on basis of race, color, or national origin in federally funded programs or activities).

[9] Education Amendments of 1972, 20 U.S.C. § 1681 (Supp. V 1993) (prohibiting discrimination on basis of sex in federally funded educational programs or activities).

[10] Rehabilitation Act of 1973, 29 U.S.C. § 701 (Supp. V 1993) (providing that "[n]o otherwise qualified handicapped individual . . . shall solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance"); Education for All Handicapped Children Act, 20 U.S.C. § 1401 (Supp. V 1993) (requiring states to provide all handicapped children between ages of 3 and 21 with "free appropriate education" in "least restrictive environment").

[11] Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1988 & Supp. V 1993) (prohibiting federal employers from discriminating against handicapped persons); Section 503 prohibits employers holding contracts with federal government in excess of $2500 from discriminating against handicapped persons. *Id.* § 793. Section 504 prohibits recipients of federal financial assistance from discriminating against handicapped persons. *Id.* § 794.

the Fourteenth Amendment, which only reaches state action, laws prohibiting discrimination were also applied to private actors. For those protected, these laws transformed group membership from a negative to a positive factor.

The history of employment for the disabled has been one of insensitivity, misunderstanding and exclusion. It was not until 1968, in fact, that federal law manifested a changed mindset in a relatively modest law aimed to promote fuller participation in the mainstream for people with disabilities.[12] The Architectural Barriers Act[13] required that newly renovated federal buildings be accessible to those with disabilities. The law was only one page in length and contained no enforcement provision. Nevertheless, it represented a step toward changing the national perspective on people with disabilities.

Throughout the 1970s, advocates for the disabled made additional gains in state legislatures and in Congress, through laws aimed at promoting the equal participation of the disabled, in such areas as education, transportation, health care, housing, voting accessibility and employment. As a matter of public policy, the approach was piecemeal and the scope was limited.[14] The Rehabilitation Act of 1973,[15] for example, was the major piece of legislation protecting the rights of disabled adults at that time. This tersely worded statute applied a non-discrimination strategy only to federally funded programs.

It was not until 1990, through the Americans with Disabilities Act,[16] that we finally see a dramatic broad-based shift in public policy toward inclusion of the disabled in the area of employment. For the first time, federal law explicitly noted that, "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency."[17]

[12] *See* Architectural Barriers Act, 42 U.S.C. §§ 4151-57 (1988).

[13] *Id.*

[14] *See, e.g.*, Rehabilitation Act of 1973, 29 U.S.C. §§ 701-96 (1988 & Supp. V 1993).

[15] *Id.*

[16] 42 U.S.C. §§ 12101-213 (Supp. V 1993).

[17] 42 U.S.C. § 12101(a)(8) (Supp. V 1993) (describing Congressional findings and purposes of Americans with Disabilities Act of 1990); *see also* Elizabeth C. Morin, *Americans with Disabilities Act 1990: Social Integration Through Employment*, 40 CATH. U. L. REV. 189, 201-02 (1990) (comparing ADA with prior legislation).

Similar to earlier rights-based movements promoting equality for racial minorities and women,[18] the Americans with Disabilities Act ("ADA") encompasses two basic principles. The first is a non-discrimination principle whereby differences based on disability are, in some circumstances, irrelevant to the distribution of society's resources.[19] Here, equal treatment is required. The second principle is one of affirmative accommodation whereby formal equality, or equal treatment, may not be appropriate.[20] In other words, for certain members of our society to live with dignity and respect and to fully participate, equal opportunity does not mean merely "same" treatment, but rather "different" treatment.

For some, this concept of equality may demand a redistribution of society's resources to provide more goods or benefits based on group characteristics. In a world of finite and shrinking resources, this latter principle which is embedded in the ADA pits the needs of the protected minority against the interests of the majority. After all, we do not operate behind John Rawls' "veil of ignorance,"[21] and so self-interest inevitably comes into play. While Rawls would warn us not to plug the rights of the disabled into a utilitarian calculus, there is always the temptation to do so.[22] This is where we find the most intractable implementation problems, and the most political controversy.[23]

Similar to other rights-based movements, full equality of opportunity for the disabled, despite its initial promise, has not occurred magically, with the stroke of a legislative or administrative

[18] *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000a (1988).

[19] *See generally* 42 U.S.C. §§ 12111-165 (Supp. V 1993).

[20] *See* 42 U.S.C. §§ 12181-89 (Supp. V 1993).

[21] JOHN RAWLS, A THEORY OF JUSTICE 12 (Belknap Press of Harvard University Press, 1971).

[22] *Id.* Rawls stated that "[a]mong the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his future in the distribution of natural assets and abilities, his intelligence, strength, and the like. . . . The principles of justice are chosen behind a veil of ignorance." *Id.* Rawls also proclaimed that "[s]ince all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain." *Id.* Lastly, Rawls declared that:

> Justice denies that loss of freedom for some is made right by a greater good shared by others. The reasoning which balances the gains and losses of different persons as if they were one person is excluded. Therefore in a just society, the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the calculus of social interests.

Id. at 28.

[23] *See* ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW 15-37, 193-203 (St. Martin's Press 1986) (discussing equality mandate of *Brown* and problems inherent in operationalizing mandate into sound public policy).

pen. A 1994 Harris survey of Americans with disabilities, sponsored by the National Organization on Disability, reported an increase in the unemployment rate of working age adults with disabilities, from sixty-six percent in 1986 to sixty-eight percent in 1994.[24] Social institutions are resistant to change. Even where they demonstrate the will, they often lack the resources and the technical know-how. Even where initial gains are made at the margins, second generation problems arise at the core.

As the experience of thirty years of civil rights statutes has proven, controversial laws of this nature emerge from the policy-making process with much left unsaid. As a result, they inevitably get caught in a web of litigation. Agencies fill in some details, but we know that regulations are subject to court challenge. Sometimes agencies also misread legislative intent on scope and remedies. The agencies do not always foresee the intricate problems that might arise in the implementation. Some issues are so indeterminable or evolving that they just do not fit neatly into rigid rules.

What the political forces cannot determine by consensus or foresight, courts are called upon to decipher through artful statutory interpretation. In recent years, however, the federal courts have resisted this charge, throwing the "hard cases" back into the political arena. While this legislative and judicial tug-of-war goes on, the promise of inclusion remains an empty one for many. Alternative Dispute Resolution may obviate the necessity, at least in some cases, for resorting to lengthy and costly litigation.

The Americans with Disabilities Act[25] was a phenomenal victory for civil rights, and for the disabled in particular, despite implementation problems. As a result of this comprehensive piece of legislation, more Americans than ever are moving towards full participation, independent living, and economic self-sufficiency.

These goals, while seemingly ambitious, go beyond the rights of the disabled, and look toward the economic well being of the nation. We should not lose sight of this fact as we struggle to strike an equitable balance between the interests of those protected under the ADA, and those of the larger society. Nor should we

[24] Peter D. Blanck, *Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from 1990-1993*, 79 IOWA L. REV. 853, 873 n.95 (1994).

[25] 42 U.S.C. §§ 12101-213 (Supp. V 1993).

forget that not all interests fit neatly into a cost benefit analysis. Justice cannot always be quantified. At times as a nation, we must choose to take the moral "high road", simply because it's the right thing to do.