

Remedial Legislation: Sword or Shield? (Introductory Remarks for the First Panel)

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REMEDIAL LEGISLATION: SWORD OR SHIELD?

JUDGE EDWARD D. RE*

This first panel affords us the opportunity to see how far we have progressed as a nation in attaining the ideals so beautifully expressed in our founding documents.

The founders, in the Declaration of Independence, declared "that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these, life, liberty and the pursuit of happiness."¹ The very next sentence states that governments are instituted "to secure these rights." Those ideals, however, did not represent or depict the America of 1776. The goals of forming "a more perfect union" and establishing "justice,"² as set forth in the opening paragraph of the Constitution, are also occasionally forgotten.

Our symposium will deal with a particular aspect of giving legal effect to ideals of liberty and justice. In general terms, our subject will cover and explore an aspect of civil rights. The specific title of our symposium is "Evolution of Employment Discrimination Under the Americans with Disabilities Act."

The brochure, prepared by the sponsors, that describes our symposium, states:

"The Civil Rights Movement of the 1960s has undoubtedly advanced the causes of many different people. Due in part to the movement, discrimination on the basis of race, religion,

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¹ See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

² See U.S. CONST.

and gender is no longer accepted. It was not until 1990, however, that Congress finally addressed discrimination against the disabled. In that year, the Americans with Disabilities Act ("ADA") was signed into law, giving a boost to a vast number of disabled persons who have struggled so hard for equal opportunity."³

Our speakers will discuss and evaluate the remedial legislation designed to bring us closer to the attainment of those ideals.

The effort to give legal effect to moral norms, and make goals and ideals a reality, brought two thoughts to my mind. First, I thought of a speech by Roscoe Pound. In an address entitled "The Limits of Effective Legal Action,"⁴ delivered the year that he commenced his illustrious career as Dean of the Harvard Law School, Dean Pound summarized the various stages of law. He began with "primitive law," which is followed by a second stage of legal development which may be called "strict law." This period is followed by a third stage of development when an attempt is made to identify the legal order with the moral order. In this third period of development, the individual human being, as the crucial moral unit, also becomes the legal unit. Slowly, but finally, a period is reached which tests the limits of effective legal action when, once again, the legal system enters upon the stage influenced by morals. Gradually, the attempt or effort is to *enforce* ethical standards, and to transfer or convert moral norms into legal duties.

This fourth period of legal development approaches the maturity of law when the moral worth of the individual claims full legal recognition. In the words of Pound, this occurs when the law seeks "ambitiously to cover the whole field of social control."

Pound, of course, also reminded us that laws are not self-enforcing, and that "[h]uman beings must execute them, and there must be some motive setting the individual in motion to do this above and beyond the abstract content of the rule and its conformity to an ideal justice or an ideal of social interest."⁵

³ See Civil Rights for the Next Millennium: Evolution of Employment Discrimination Under the Americans with Disabilities Act 2 (Apr. 7, 1995) (unpublished booklet, on file with the *St. John's Journal of Legal Commentary*).

⁴ See Roscoe Pound, *The Limits of Effective Legal Action, Address Before the Pennsylvania Bar Association*, 3 A.B.A. J. 55, 64 (1917), reprinted in *The Lawyer's Treasury* 223, 232 (Eugene C. Gerhart ed., 1956); see also Edward D. Re, *Human Rights and Effective Legal Action*, 67 ST. JOHN'S L. REV. 465, 467 (1993).

⁵ Pound, *supra* note 4, at 64.

Second, since our subject does not deal merely with abstract ideals but with legally enforceable norms, I recalled the notion of the great Roman jurist Ulpian. Noting the distinction between rights as ideals, and rights to be realized, Ulpian asserted that the law is the true "philosophy."⁶ In his view, since law was based on reason and served the ideal of justice for all, it is the lawyer who pursues the calling of the true "philosopher." In his view, therefore, the study of law was the highest form of "philosophy because it is the law that gives to notions of right and wrong a concrete and practical form."⁷

Since, as lawyers, we are concerned with legally enforceable rights and remedies, the reference to the Civil Rights Movement of the 1960s is most appropriate because it brought us closer to achieving our stated ideals, in the 1960s and beyond.⁸ Dramatic examples are the accomplishments of the 89th Congress which made some of these ideals a reality. The remedial legislation of that era made the promise of America a reality for the largest number of persons ever. Examples are the Social Security Act of 1965;⁹ the Elementary and Secondary Education Act of 1965;¹⁰ the Higher Education Act of 1965;¹¹ the Voting Rights Act of 1965;¹² and the Housing and Urban Development Act of 1965.¹³

The Americans with Disabilities Act,¹⁴ the subject of today's symposium, asks: to what extent does equality and justice, literally mean, "for all?" And to what extent are those notions or ideals a reality? The discussion will examine the age-old questions of the effective limits of legal action. Some might say this statute has gone too far; others will insist that it ought to be enforced more rigorously. These questions deserve examination because statutes are never neutral; statutes either foster and promote, or

⁶ See TONY HONORE, *ULPIAN* 30-31 (1982).

⁷ *Id.*; see also Edward D. Re, *Judicial Enforcement of International Human Rights*, 27 AKRON L. REV. 281, 282 (1994).

⁸ See John M. Husband & Jude Biggs, *Civil Rights Act of 1991: Expanding Remedies in Employment Discrimination Cases*, 21 COLO. LAW. 881, 881-82 (1992).

⁹ Social Security Act of 1965 § 1901 *et seq.* (codified as amended at 42 U.S.C. § 1396 *et seq.* (1988)).

¹⁰ Elementary and Secondary Education Act of 1965 § 101 (codified as amended at 20 U.S.C. § 2701 *et seq.* (1988)).

¹¹ Higher Education Act of 1965, 20 U.S.C. § 1070 *et seq.* (1988).

¹² Voting Rights Act of 1965 § 2 (codified as amended at 42 U.S.C. § 1973 (1988)).

¹³ Housing and Urban Development Act of 1965, 79 Stat. 478 (codified as amended at 42 U.S.C. § 1468 (1990 & Supp. V 1993)).

¹⁴ Americans with Disabilities Act of 1990 (codified as amended in scattered sections of 42 U.S.C.).

restrict and retard goals or ideals. After their enactment, the key words are interpretation, application and enforcement.

The Act that is the subject of our symposium was intended to promote the goal of equality. Our panel will examine whether the ADA furthers the national goal of justice and equality for all, and what amendments, if any, are necessary to achieve these goals.