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HEALING THE SICK INSTITUTIONS

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Thank you, Judge Re. Thank you, St. John's University for inviting me to be here today.

I want to respond to two specific things in your opening remarks, Judge Re. One, your observation that law is the finest philosophy. It is the philosophy of action in the world that we live in. Every day we must decide if we are going to leave the world a little bit better or allow it to be a little bit worse.

The other point is that the Americans with Disabilities Act of 1990 ("ADA")[1] is an attempt by our society to make things a little bit better for people, for everybody. It is a glorious day of civilization when people acknowledge through their statutes, through the little scribblings of code on their primitive rocks, that this is a proper code of behavior. Because people have the same risks of becoming disabled for reasons that are beyond their control, we will answer the question who shall pay for removing the difficulties that are caused by acts of nature.

And we have stated that employers are, to some extent, going to share the costs in the workplace of removing barriers that prevent the full participation of people with disabilities. That's quite appropriate.[2]

The question at this point is how are we going to share in those responsibilities. Are we going to do it on an objective basis, a fair basis? I would like to use the image of people that are around the

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[1] Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-213 (Supp. V 1993)). *See* George C. Dolatly, *The Future of Reasonable Accommodation Duty in Employment Practices*, 26 COLUM. J.L. & SOC. PROBS. 523, 538 (1993) (noting that ADA applies to all public and private employers with 15 or more employees). The ADA was intended by Congress to expand existing prohibitions against discrimination. *Id.*

[2] *See* Bob Kievra, *Act Helping Disabled to Make Big Strides*, SUNDAY TEL., Worcester, Aug. 15, 1993, at B1. Reasonable accommodations can generally be made for under $100, as per Edward Burke, the acting Executive Director of the National Council on Disability. *Id.*

table. From Plato's *Republic* to the more recent philosophical approach of John Rawls, we have had the metaphor of people deliberating around a table and trying to come up with the principles of a just society.

Are we going to deliberate and come up with a just approach? I am a proponent of objectivity in the approach.

It is not enough to recognize, for example, that there are costs associated with providing reasonable accommodations. We have to understand that there are costs associated with not having a decent code of behavior. And I want to discuss that in a moment, from an objective point of view if I may.

First, I want to harken back to perhaps the third or fourth glimmerings of intelligence in human beings. In the beginning of civilization, man first found that he could use a rock as a tool, then came language, and then came the ability to count. The ability to count is what allowed us to engage in the scientific method.

Then came one of the laws of thermodynamics. I believe it is the third law of thermodynamics that says that as time moves forward the entropy of the universe increases. It takes energy to create a homogeneous situation. If you allow the entropic level to rise, that is to say the level of disorder, then energy is liberated. Right now, in our work forces, we have a homogeneous situation that is far more ordered than the population at large. There are more people with disabilities who are outside of the work force than in the work force—if you go by percentages of the relative populations.[3] In fact, the degree of separation of entropic levels is startling. For example, in New York City, less than one percent of the city government's work force are people with disabilities. More than ten percent of the population in New York City are people with disabilities. It takes a tremendous amount of energy to maintain that distinction. Granted that the kind of energy that we're talking about may not be as easily calculated in financial terms as one might otherwise approach the question—what does it cost to reasonably accommodate someone?[4] The kind of energy

[3] *See* Jeffrey O. Cooper, Note, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1423 (1991) (stating that two-thirds of disabled individuals between ages of 16 and 64 are unable to find employment).

[4] *See* Dick Thornburgh, *The Americans with Disabilities Act: What it Means to All Americans*, 64 TEMP. L. REV. 375, 378 (1991) (stating that hardships associated with costs are offset by corresponding gain to society).

we are talking about takes a different form. Perhaps fear. Fear that people have of people with disabilities. Fear that they have to live with all their lives, because they live in a world of people with disabilities.

A failure to utilize your most capable workers, that is another cost of maintaining that distinction—that degree of entropic separation.

I don't view affirmative action as justifiable, solely for the purpose of compensating for past historical injustices. And I do not even view it in terms of the values of diversity. I think that saying we should have affirmative action because it helps to diversify the work force is to at the same time ignore the fact of different levels of order of entropy in the work force, by a magnitude of ten. We need to be less homogeneous, because it takes energy to be more homogeneous in the work force. That is the angle we have to approach it from. At least, that is the angle that I approach it from.

And now, Judge Re, I want to respond to your question, what amendments do we need in the Americans With Disabilities Act?

We must approach this subject objectively. The main question I have on my mind is, okay, Title I[5] has been in effect for a number of years now. What do the statistics say about whether Title I has been effective in promoting employment amongst people with disabilities?

Well, Title I has not even made a blip on the screen. The New York Times reports that perhaps there has been a one or a two percent increase in the employment rates of people with disabilities since the advent of Title I. I am not here to celebrate that. I am here for progress. Something meaningful, something that I can measure, something that I can see, taste, feel and know that discrimination is on the wane for sure, finally, at last—because of what it does to all of us.

Two thirds of people with disabilities who are of working age and want to work are unemployed. This was so at the advent of Title I and is still so.[6] This is the highest unemployment rate of any demographic group. And Title I has not even made a dent in it. Why? I think that is the next question. Why has it not created

[5] 42 U.S.C. § 12111(2) (Supp. V 1993). Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability in regard to . . . terms, conditions and privileges of employment." *Id.*

[6] See Cooper, *supra* note 4, at 1423.

a dent? The answer is because our society does not have the will to do so. It is that simple. We do not own up to the fact that the average person with a disability who wants to enforce his or her explicitly stated rights under the ADA, does not have the means to do so. They cannot afford an attorney for the most part, because they're unemployed. And when they assess the viability of their claims, they have to deal with the question of intent. For example, if it is a failure to hire claim, they are going to have to go into court with the burden of proving what was the employer's intent; the employer's state of mind. Brothers and sisters, unless you have an employer who has admitted guilt, you've got problems of proof. So we have a myth that because we have a non-discrimination statute, discrimination is going to disappear. Because you have a statute which promises to make a victim whole again, you're going to be able to solve our problems.

Well the facts are not bearing that out. We have sick institutions in our society that are not responding to the call of the ADA. We have a failure of will to fund, for example, human rights agencies, so that they could deal with the cases in a matter of four weeks rather than four years. We have backlogs in state human rights agencies and in the Equal Employment Opportunity Commission ("EEOC").[7]

Why doesn't our society have punitive damages available for violations under the ADA? Don't get excited, I know about the Civil Rights Act of 1991. Do you know about the cap? There's a cap on the punitive damages that are available under the Civil Rights Act of 1991.[8] $300,000 is the most punitive damages you can get against a defendant.

Isn't that absurd? Look, you look in the law books and I guarantee you, you will find that the proper and true definition of punitive damages is that it is what a jury would find is necessary to deter similar conduct by others.[9]

Hey, if that is the definition of punitive damages you want to use in the civil rights law, fine, go ahead and use it. But just be-

[7] *See, e.g.*, Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories and Realities*, 46 ALA. L. REV. 375, 460 (1995). The EEOC had 92,000 pending charges as of June 1994, as compared with a backlog of 72,000 cases in June 1993. *Id.*

[8] 42 U.S.C. § 1981(a) (Supp. V 1993) (stating compensatory and punitive damages are capped under ADA and are based on size of employer).

[9] *See* BLACK'S LAW DICTIONARY 390 (6th ed. 1990) (stating that policy consideration behind punitive damages is to punish).

cause a certain kind of damages has a certain punishment effect do not try to fool the American public and call it punitive damages. That is deceitful.

Now, I want to talk about affirmative action. Because make whole relief has not done it and is not going to do it. The instances where you can actually meet the burdens of proof pale in comparison with the actual incidence of discriminatory action in the workplace. We all know that. Maybe not all of us are willing to own up to that—but we all know that.

We need to understand that affirmative action is simply an objective approach to eliminate discrimination. That's all it is. We have learned a long time ago how to count, and to make written notations about what we observed. So let us use that capacity to engage in the scientific method and let us count what is going on in the work place. Let us compare it with what is going on in the work place with what is existing now in the society at large. And let us work to remove statistically meaningful disparities and use what we observe. Let us use goals and timetables. Let us establish what our goals will be in a particular segment of the work place and let us say by when those disparities, those distinctions will be removed. And let us come up with ideas about how those distinctions can be removed.

Our society needs to understand that affirmative action is simply an objective approach to eliminating present discrimination and eliminating effects of past discrimination.

In New York City, the ADA has been a shield to protect discrimination. I do not know if you are aware of that. The City of New York has decided to use one part of the ADA that says that you cannot ask people to identify themselves as being disabled. You cannot inquire if they have a disability within the statute. And the City has said, "oh, that means we cannot observe the incidence of disability in our work force, so we cannot come up with goals and time tables for the removal of these class based distinctions."

The EEOC has come down and said, "well, no, that is not the intent of the ADA." Congress had different hearings on this question whether there is anything in the ADA which precludes the development of goals and timetables for people with disabilities and they decided that voluntary affirmative action programs are permitted under the ADA. And, in fact, there are over sixty mu-

nicipalities and states in our country which do have voluntary affirmative action plans in place.

Affirmative action is an important approach to ameliorating conditions of discrimination. If you have a person who comes into court and has proved that there is discrimination and that he or she has been personally victimized by discrimination on the basis of disability, I say, more often than not, other people working in that same environment are also being subjected to the same kind of discrimination.

We should have as a remedy, clearly stated under the ADA, that an employer found guilty of disparate treatment against an individual because of disability should be required to develop an affirmative action plan. They should analyze the internal work force in terms of percentages of people with disabilities in that work force. Then they should analyze the availability of people with appropriate skills in the surrounding environment. They should analyze ways of reducing those distinctions. And in short, heal the sick institutions.

Those are my remarks.