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THE DEBATE OVER THE AMERICANS WITH DISABILITIES ACT: A QUESTION OF ECONOMICS OR JUSTICE?

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The most common, and certainly the most publicized attacks on the Americans with Disabilities Act ("ADA")¹ amount to the assertion that its costs exceed its benefits.² Both costs and benefits are generally cast in economic terms, dollars and cents. Even when precise figures cannot be mustered, critics use anecdote and inference to the same end.

The most recent example is a study that purports to show the ADA's employment of persons with disabilities. In fact, the study concludes that employment of persons with disabilities is down since the Act's passage. As you might imagine, disability rights advocates are distressed, even to the point of unconscious denial. Many of us read newspaper reports of the study, but when I asked, none of my colleagues had obtained copies or could even recall who authored it. We all have struck the information from our minds. In six months it probably will take considerable prodding for us to remember the study at all.

The study is poured in the same mold as most previous critiques of the ADA. It weighs economic factors and figures that have implications in terms of dollars and cents. Critics of the ADA are not alone in taking this view of the Act's merits. Its supporters generally do the same. Supporters' most frequent focus is the low cost of accommodating persons' disabilities. Coincidentally, a study of this very topic appeared just days after the employment study. This second study confirmed earlier reports showing that accom-

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¹ 42 U.S.C. §§ 12101-213 (Supp. V 1995).

² See generally Ron A. Vassel, Note, *The Americans with Disabilities Act: The Cost, Uncertainty and Inefficiency*, 13 J.L. & Com. 397, 405 (1994) (providing an economic criticism of ADA).

modations are rarely burdensome. In defense of my colleagues, none had obtained this report or could recall its authors. Although, I suspect that in six months we will still remember it well.

But, my concern is not with the merits of the conflict. It is with the terms of the debate.³ Explicitly or implicitly, both sides invoke the judgment of a cost-benefit analysis, relying upon quantifiable measures of the ADA's success or failure.⁴ This framework for discussion has considerable value, but it is not the only possible framework. Much de-emphasized in the ADA wars is thought that bypasses the empirical and addresses attitudes, morals and philosophy. To evoke such thought, I will concede for the sake of argument, that the critique of the ADA is correct—that it is purely economic and has quantifiable benefits. Having dug this hole and jumped into it, I will attempt to scratch and claw my way out with two discussions, one dealing with the relations between law and societal attitudes⁵ and the other with the appropriate philosophical position from which to judge the ADA. I want to place the ADA within a framework apart from that of marketplace morality.

Having dug myself that hole and jumped into it, I'll try and scratch and claw my way out of it by, of all things, returning to that great era of philosophical analysis, the 13th century. Historian Carl Becker remarked that today no one would try to explain the quantum physics of the French Revolution by postulating, as a point of departure, the existence and goodness of God. However, that is precisely how a thirteenth-century European scholar would have begun. He then would have moved step by step with impeccable reason to a logically irrefutable conclusion. Little, if anything, of a factual nature would have impeded the scholar's pro-

³ See *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995) (discussing relevance of costs in determining whether to award accommodations under ADA).

⁴ See generally *Vassel*, *supra* note 2, at 397.

⁵ See, e.g., *Plessy v. Ferguson*, 163 U.S. 538, 538 (1896) (demonstrating that social attitudes can shape social actions). The case dealt with race but the court expressed the belief that law can change social attitudes. *Id.* at 551 *citing* *People v. Gallagher*, 93 N.Y. 438, 448 (1895). The Court stated:

If the two . . . are to meet on terms of social equality, it must be the result of social affinities, a mutual appreciation of each others merits and a voluntary consent of individuals . . . [T]his end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designated to operate.

Id.

gression from premise to conclusion. Thirteenth century Europe was a supremely rational time and place that could afford to ignore the factual experience of mankind since they were so well assured of its ultimate cause and significance.⁶ Everything confirmed God's existence and goodness.

How would a thirteenth century scholar react to the economic critique and defense of the ADA—the debate that is cast solely in quantifiable economic terms? I think he would say something like this: “Why, these arguments do not amount to a hill of beans. There is nothing solid here. Everything depends on the figures that you use. Plug in one set of figures and get one result, plug in another set of figures and get the opposite result. What you need here is a set of principles to guide you. It is principles, not what you call ‘empirical data,’ that will tell you what is right and what is wrong.” Our scholar friend from seven centuries ago would well understand the modern condemnation that there are three types of lies: lies, damnable lies and statistics.

There is something to be said for the thirteenth century approach to social analysis. After all, nobody knows for sure what the costs of reasonable accommodations will finally work out to be or what the dollar contribution of those accommodated will be. What if it turns out that the costs outweigh the contributions? Must we then throw up our hands and say that the ADA was a noble, but failed experiment? We must, if our analysis is purely empirical.

But, why give John Stuart Mills and his utilitarian progeny such power over us? It is justice that we are after, and justice is not always, or even often, amenable to precise measurement, or even to measurement at all. Fair trials for criminal defendants are enormously expensive.⁷ If one were to place a dollar value on the benefits of fairness, the balance might well tilt towards a ma-

⁶ Nicholas Wolfson, *Equality in First Amendment Theory*, 38 ST. LOUIS U. L.J. 379, 386-87 (1993) (noting that thirteenth century belief system sought answers through “pure” reason and that “facts” were confined only to sciences).

⁷ See Ann Davis, *Cuba Suit Figures Spark a Spirited Debate*, NAT'L L.J., Aug. 28, 1995, at A14 (stating that civil court cases cost, on average, \$4500 whether they go to trial or not); Gary Taylor, *Texas Death Penalty Study Hit*, NAT'L L.J., Apr. 26, 1993, at 3. It costs an average of \$2.3 million to finance a capital punishment trial in Texas; Stuart M. Speiser, *Taxing Civil Court Awards*, NAT'L L.J., Jan. 13, 1992, at 13. The average cost to the community in tort cases is about \$550 and total legal fees for both sides are about \$12,000. *Id.*

for watering down of procedural protections: but, we retain those protections for reasons that are not empirical.

Other standards are more suited to taking the measure of a law. The one that I like was worked out about three decades ago by a legal philosopher named John Rawls. A law school professor forced one of my classes to read Rawls, and thereby earned my undying gratitude.

Like Rousseau, Rawls began with a hypothesis of a state of nature whose inhabitants enjoyed unbridled freedom and from which society emerges by agreeing to a social compact.⁸ But, Rawls added two twists to Rousseau. First, in Rawls' state of nature everyone starts out as part of an undifferentiated, basically, characterless, fungible mass of humanity. There are no distinctions of wealth, religion, race, or strength. Furthermore, and this is the critical point, no one knows what they will become as time passes.⁹ They may attain great wealth, or plunge into poverty. They may become Catholics, Protestants, Jews, Moslems, Hindus.¹⁰ Their skin might fall anywhere on the spectrum of human color tones. No one knows what their future holds.¹¹

Rules that would be adopted in this state of nature can be considered fair since they emanate from people unable to design them to favor their own condition. Thus, we are to judge society's rules, at least its basic ones, by asking ourselves whether they would be adopted by people in Rawls' state of nature.

And that leads us back to the thirteenth century and forward again to the ADA. Rawls' approach to social analysis has more in common with the reasoning processes of medieval Europe than it does with those of the twentieth-century West. He rejects the utilitarian principle. In this scheme of things, it is unlikely that "per-

⁸ JOHN RAWLS, A THEORY OF JUSTICE 11 (1971). Rawls refers to this state of nature as the "original contract," which is premised upon principles of justice. *Id.*

⁹ *Id.* at 12. Rawls theorizes:

Among 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 fortune in the distribution of assets and abilities, his intelligence, strength and the like. . . . The principles of justice are chosen behind a veil of ignorance.

Id.

¹⁰ *Id.*

¹¹ *Id.* "Since 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.* See also DAVID LEWIS SCHAEFER, JUSTICE OR TYRANNY 28 (1943). Individual ignorance is supplemented by collective ignorance to insure an impartiality among societies and generations in their choice of principles. *Id.*

sons who view themselves as equals . . . would agree to a principle which may require lesser life prospects from some simply for the sake of a greater sum of advantages enjoyed by others."¹² Rawls' judgment of society's rules is based solely on reference to a first principle followed by analysis-by-reason. He differs from thirteenth century analysis in that he starts from a different premise, a hypothetical state of nature, rather than the proposition that God is good, but like them, he relies on reason, not fact.

The ADA fares remarkably well under a Rawlsian analysis, for the reality of disability closely corresponds to the hypothetical Rawlsian state of nature. At any given moment the majority of human beings have no disability, at least not as the term is used in the ADA. However, nobody knows what the future holds for them. They may become disabled later today, next year, in the next decade, or not at all. With respect to disability, then, most of the world virtually replicates Rawls' state of nature.

Consequently, it is no mere coincidence that the ADA's provisions for accommodating persons with disabilities do indeed seem to be what persons wholly undifferentiated from one another would choose as rules to govern themselves. Such people would want to know if they are to become disabled, society will accommodate their needs. If they were to become employers, they would want to know that the accommodation would not destroy their business.¹³ While the ADA does not totally eschew utilitarian concerns, it is best seen as a "Rawlsian" rather a "Millsian" response to the fact of disability.

Thus, Rawls goes a long way towards freeing us of the fear that, on balance, the dollar costs of the ADA outweigh its dollar benefits. The fact based utilitarian balancing act does not define fundamental fairness. If the provisions of the ADA pass Rawls' rea-

¹² See RAWLS *supra* note 8, at 14.

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 at the calculus of social interests.

Id. at 28.

¹³ W. Robert Gray, *The Essential-Functions Limitations on the Civil Rights of People with Disabilities and John Rawls's Concept of Social Justice*, 22 N.M. L. Rev. 295, 351 (1992) (arguing that ADA's essential-functions standard "serves Rawlsian aims of justice . . . imperfectly").

son based state of nature test, they are just, and there is a strong argument for retaining them in spite of their cost.

Our society glorifies the economic marketplace; but, in thinking about the worth of laws, marketplace analysis has its limits. I have tried to demonstrate that alternative analyses have merits. In thinking about the ADA and other laws, one ought to go beyond economic considerations. I do not mean to say that economic analysis does not have its place in this and other debates. I do mean to preserve a place, a vital place, for other modes of analysis.