

INTENT IN DISABILITY DISCRIMINATION LAW: SOCIAL SCIENCE INSIGHTS AND COMPARISONS TO RACE AND SEX DISCRIMINATION

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This Essay is part of an extensive research project concerning the intent that must be shown in order to obtain judicial relief under the American disability discrimination laws. This Essay focuses on social science research about intent and its relation to the law, comparing disability to race and sex discrimination. It describes research about race and sex and notes that evidence of pervasive but unacknowledged discriminatory thinking is significant. Although the law could bar race and sex discrimination that is not intentional, it has not been interpreted to do so, particularly in contexts other than employment.

Social science research indicates that people hold unacknowledged attitudes that foster discriminatory treatment of people with disabilities as well. Much more clearly than the race and sex discrimination statutes, the disability discrimination laws take these attitudes into account and forbid unintentional discrimination in a broad range of cases. Many courts have failed to interpret the disability statutes in a manner that is true to their terms, however. One way of assessing that development is to note that it is a doctrinal failure, one in which the lower courts have disregarded congressional commands. But viewed in a different way, the courts are doing precisely what one might expect them to do, given that they share the same habits of mind and hidden attitudes as those against whom they are supposed to be enforcing disability discrimination laws.

This Essay advances the scholarly discussion of implicit discrimination by comparing evidence of discriminatory attitudes on race and sex with the law that applies to those areas, then making a further comparison to attitudes about disability and the disability discrimination laws. In addition, it assesses what courts have done in disability cases against social science findings and considers whether targeted social interventions might promote the anti-discrimination ideal.

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I. INTRODUCTION

Thirty years ago, the Supreme Court declared that in enacting section 504 of the Rehabilitation Act¹ Congress recognized that disability discrimination was “often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.”² Relying on this understanding of congressional purpose, the Court said that intent need not be shown for many kinds of disability discrimination claims.³ Although an across-the-board Medicaid benefits cutback did not violate section 504 absent a discriminatory motive,⁴ allegations of disparate impacts in education and the neglect to install ramps or make other accommodations to promote accessibility could state a valid claim under the law.⁵ Congress built on this interpretation a few years later when it adopted the Americans with Disabilities Act of 1990 (ADA), most nota-

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1. 29 U.S.C. § 794 (2012) (“No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.”).

2. *Alexander v. Choate*, 469 U.S. 287, 295 (1985).

3. *Id.* at 294.

4. *Id.* at 309.

5. The Court stated: “[M]uch of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent. For example, elimination of architectural barriers was one of the central aims of the Act, yet such barriers were clearly not erected with the aim or intent of excluding the handicapped. Similarly, Senator Williams, the chairman of the Labor and Public Welfare Committee that reported out § 504, asserted that the handicapped were the victims of ‘[d]iscrimination in access to public transportation’ and ‘[d]iscrimination because they do not have the simplest forms of special educational and rehabilitation services they need’ And Senator Humphrey, again in introducing the proposal that later became § 504, listed, among the instances of discrimination that the section would prohibit, the use of ‘transportation and architectural barriers,’ the ‘discriminatory effect of job qualification . . . procedures,’ and the denial of ‘special educational assistance’ for handicapped children. These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design.” *Id.* at 296–97 (citations omitted).

bly when it defined the unadorned failure to provide reasonable accommodations as discrimination.⁶

But in drafting the ADA Congress also built on the legacy of statutes forbidding race and sex discrimination, and there has been unending controversy about what forms of discriminatory intent are needed to support claims and remedies under those laws. It is not surprising that issues of intent have surfaced in disability discrimination cases as well, and that courts have frequently drawn analogies to race and sex discrimination. Particularly in non-employment cases, and most frequently in those involving education, courts have imposed intent requirements drawn from the race and sex caselaw that do not appear anywhere in the ADA or section 504.⁷ Yet education is among the areas where the Supreme Court declared that Congress meant to address indifference and thoughtlessness, and said that a showing of intent to discriminate would be unnecessary to prove a violation of the law.⁸

This Essay is part of a broader research project concerning the intent that must be shown in order to obtain judicial relief under American disability discrimination laws.⁹ This Essay focuses on social science research concerning intent and its relation to disability discrimination law, drawing comparisons between race and sex discrimination and disability discrimination. A companion paper focuses on doctrinal issues.¹⁰ The present Essay observes that there is significant evidence of unacknowledged discriminatory social attitudes regarding race and sex discrimination. Although the Civil Rights Act could be read to bar all unintended race and sex discrimination that stems from these attitudes, it has not been interpreted to do so. Social science research also demonstrates that people hold unacknowledged attitudes of mind that lead to unequal treatment of people with disabilities.¹¹ Much more clearly than the race and sex discrimination statutes, the disability discrimination laws take the reality of these attitudes into account and forbid unintentional discrimination across the board. Many courts have not interpreted the disability statutes in a manner that is true to their terms, however. One way of as-

6. 42 U.S.C. § 12112(b)(5) (2012).

7. See *infra* text accompanying notes 76–84.

8. *Alexander*, 469 U.S. at 306–07.

9. Despite the importance of this topic to the courts and to a society that over the past generation has begun to address barriers to full equality for people with disabilities, there is surprisingly little scholarly discussion of disability discrimination and intent. The most directly applicable work is Sande Buhai & Nina Golden, *Adding Insult to Injury: Discriminatory Intent as a Prerequisite to Damages Under the ADA*, 52 RUTGERS L. REV. 1121, 1135, 1145–46 (2000), which considers the caselaw as of the time of writing and challenges interpretations that require a showing of animus to support damages relief in ADA government services cases. For an illuminating discussion of one important aspect of the topic, see Paul M. Secunda, *Overcoming Deliberate Indifference: Reconsidering Effective Legal Protections for Bullied Special Education Students*, 2015 U. ILL. L. REV. 175, 200–09 (challenging imposition of standard exceeding that of gross-mismanagement in cases that allege failures to make reasonable modifications in practices in order to prevent bullying on account of disability).

10. See Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417 (2015).

11. See *infra* text accompanying notes 52–61.

sessing that development is to conclude that it is a doctrinal failure, one in which the lower courts have ignored some Supreme Court precedents, misapplied others, and disobeyed congressional commands.¹² But viewed in a different way, courts are doing precisely what one might expect them to do, given that they share the same habits of mind and hidden attitudes as those to whom they are supposed to be applying the disability discrimination laws. This Essay makes that observation and considers what might be done in response to it.

Part I of this Essay discusses what intent means for purposes of the law. Part II takes up issues of intent in race and sex discrimination and evaluates the law's intent requirements in relation to social science information about discriminatory racial and sexual attitudes. Part III considers attitudes about disability and their relation to mental states of defendants in disability discrimination claims, particularly in cases regarding government services. Part IV takes up the social science regarding attitudes about disability, suggesting that the legal doctrine should be simple to align with the reality of unconscious disability discrimination, but the prevalence of negative attitudes—handicapping attitudes, one might say—will prevent that from happening anytime soon. Finally, it considers the prospect that encouraging the use of conscious compensating strategies, relying on the increased presence of people with disabilities in integrated social settings, and advancing renewed social movement initiatives on disability may promote attitudinal change in society and strengthen judicial responses to disability discrimination.

II. UNPACKING INTENT

Social science insights on individuals' mental states should have something to contribute on the question of which mental states of defendants justify a legal remedy for conduct alleged to be discriminatory. Although a number of researchers deny the existence of any mental states that relate to conventional notions of conscious intent or willful conduct,¹³ the sources that are more likely to be useful for understanding

12. See Weber, *supra* note 10, at 1450–64.

13. See, e.g., DANIEL M. WEGNER, *THE ILLUSION OF CONSCIOUS WILL* (2002); see also UNINTENDED THOUGHT (James S. Uleman & John A. Bargh eds., 1989) (collecting papers questioning conventional notions of conscious intent). To some degree, the argument is simply that there is no way to verify what an individual reports he or she is thinking and whether there is in fact a causal link between what the person says she thinks and the person's conduct. Indeed, there is no way to know whether individuals' own perceptions that they have conscious intentions are real or illusory. Some authorities make much of psychological research indicating that physical preparation for muscular movement precedes subjects' reported intentions to make the movements, though there are others who doubt whether that research actually undermines a meaningful concept of conscious intentionality. See Alexander Batthyany, *Mental Causation and Free Will After Libet and Soon: Reclaiming Conscious Agency*, in *IRREDUCIBLY CONSCIOUS: SELECTED PAPERS ON CONSCIOUSNESS* (Alexander Batthyany & Avshalom Elitzur eds.) (Winter 2009), available at <http://philpapers.org/rec/BATMCA> (summarizing psychological research on topic and challenging whether it contradicts existence of conscious will); see also Markus E. Schlosser, *Causally Efficacious Intentions and the Sense of Agency: In Defense of Real Mental Causation*, 32 J. THEORETICAL & PHIL. PSYCHOL. 135 (2012), available at <http://philpapers.org/rec/SCHTNS> (contending that model of real mental causation accounts for evi-

the law as it exists are those that unpack intent, defining states of mind with greater precision than ordinary speakers employ.¹⁴

The bulk of this work relates to criminal law. Thus, in their effort to align criminal law with current ideas of social psychology and philosophy, the authors of the Model Penal Code distinguished four mental states: (1) acting purposely with a conscious objective; (2) acting with knowledge to a practical certainty that the conduct will harm the victim; (3) acting recklessly in light of a known substantial and unjustifiable risk; and (4) acting negligently.¹⁵ Unless the offense is defined otherwise, the Code draws no distinction between acting purposely, acting with knowledge, or acting recklessly; the defendant is guilty if any of those states of mind is present.¹⁶ Moreover, as a general rule, the Model Penal Code does not require an underlying motive that would be classed as evil for criminal liability to apply.¹⁷ Nevertheless, its requirement of purposiveness entails criminal motive in the sense of pursuit of a result that is forbidden by the law.¹⁸ Thus, *mens rea*—be it purpose in the sense of desire to harm, knowledge, recklessness, or negligence—constitutes an additional requirement beyond “purpose” in the more limited sense of voluntarily engaging in the conduct that constitutes the crime.¹⁹

dence relied on by proponents of argument that conscious intentions are illusory, and that other evidence supports conscious intentionality).

14. See, e.g., Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON 1775 (2004), available at <http://scholar.harvard.edu/joshuagreen/files/4greenecohenphiltrans-04.pdf> (contending that existing legal principles of criminal law will accommodate neuroscience advances but that advances will gradually reshape popular ideas about justice and lead to change in legal principles); Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397, 405 (2006) (“The criteria for responsibility are behavioral and normative, not empirically demonstrable states of the brain. Even if there were a perfect correlation between brain states and the behavioral criteria for responsibility, the brain states would be nothing more than evidence of the behavioral states. Such a correlation is a fantasy based on present knowledge and probably always will be when we are considering complex human actions. If the person meets the behavioral criteria for responsibility, the person should be held responsible, whatever the brain evidence may indicate, such as the presence of an abnormality.”). See generally Adam J. Kolber, *Will There Be a Neurolaw Revolution?*, 89 IND. L.J. 807, 808–30 (2014) (comparing views of Greene and Cohen with those of Morse and criticizing both).

15. MODEL PENAL CODE § 2.02(2) (1962).

16. *Id.* § 2.02(3).

17. Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 684.

18. See Walter Wheeler Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L.J. 645, 646–61 (1917) (early Legal Realist work distinguishing between intention and motive); see also RESTATEMENT (SECOND) OF TORTS § 8A (1965) (defining intent “to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”).

19. Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545 (2013) (discussing criminal liability and categorizing voluntariness of action as part of *actus reus* rather than *mens rea*); cf. *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011) (interpreting law prohibiting discrimination against military service members, stating “Intentional torts such as this, ‘as distinguished from negligent or reckless torts, . . . generally require that the actor intend ‘the consequences’ of an act,’ not simply ‘the act itself.’”) (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 61–62 (1998))). Matters are, of course, further complicated by the fact that the defendant in the typical discrimination case is not a single human individual, but rather a corporation or governmental body. There is no reason to believe that any collection of individuals, much less an organization, has a “mind” analogous to that of

Social science studies indicate that test subjects have a difficult time drawing a distinction between the categories of knowing conduct and recklessness.²⁰ Research also suggests that people are not consistent in attributing intent to actors when asked about conduct that an actor engages in with knowledge that the result will happen but when the result is not specifically desired. They are more prone to find harmful side effects to be intentional than beneficial ones.²¹ By designating purpose, knowledge, and recklessness all as mental states that support conviction for criminal prohibitions that otherwise do not specify mens rea, the Model Penal Code avoids some of the problems with drawing distinctions that the social science research identifies. As will be developed below, Supreme Court interpretations of civil rights law nevertheless require finders of fact to make these difficult distinctions.

III. INTENT IN RACE AND SEX DISCRIMINATION

For a generation, scholars have contended that discrimination on the basis of race and sex often stems from unacknowledged attitudes that affect how individuals perceive others and others' behavior, and that race and sex discrimination law has not caught up to that reality.²² The scholarship relies on evidence of unconscious stereotyping as revealed by results on the Implicit Association Test, as well as other evidence that categorizing by race and sex is part of ordinary social cognition.²³ Thus people are quicker to associate words that have negative or unpleasant meanings with members of out-groups than with members of mainstream groups, and are slower to associate words with positive or pleasant mean-

a single person. Cf. KARL MANNHEIM, *IDEOLOGY AND UTOPIA* 52 (Louis Wirth & Edward Shils trans., Harcourt, Brace & Co. 1954) (1929–31) (noting that mental worlds of social groups do not correspond to single individual's mental world nor to integration of individual experiences of members of group). In Title VII employment discrimination cases, courts have either ignored the corporate-consciousness problem completely or solved it by ascribing intent to the corporate body when its agents have the requisite intent. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754–55 (1998). This approach mirrors that of the criminal law. George R. Skupski, Note, *The Senior Management Mens Rea: Another Stab at a Workable Integration of Organizational Culpability into Corporate Criminal Liability*, 62 CASE W. RES. L. REV. 263, 263 (2011).

20. See Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306 (2011) (discussing ability of decision makers to apply distinctions between purposive conduct and conduct with knowledge of results in consistent fashion).

21. This is referred to as the Knobe Effect. See Joshua Knobe, *The Concept of Intentional Action: A Case Study in the Uses of Folk Psychology*, 130 PHIL. STUD. 203, 205 (2006). See generally Adam Feltz, *The Knobe Effect: A Brief Overview*, 28 J. MIND & BEHAVIOR, Summer-Autumn 2007, No. 3–4, at 265 (noting inconsistencies in research subjects' attributions of intent to side effects of actions); Richard Holton, *Norms and the Knobe Effect*, 70 ANALYSIS 417 (2010) (suggesting that differences in attributions of intent for side-effects of actions are not in fact inconsistencies).

22. A prominent early work suggested a psychoanalytic approach, see Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 331–36 (1987), but also explored cognitive approaches, see *id.* at 336–39. More recent work has stressed social cognition. See, e.g., Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006).

23. Krieger & Fiske, *supra* note 22, at 1032.

ings with people of the out-groups.²⁴ Unconscious associations of this type may lead to decisions that are less favorable for members of one group than they would be for those of another,²⁵ at least unless the decision maker consciously uses compensatory strategies.²⁶ Social science experimentation also shows that people tend to evaluate similar profiles identified as those of members of the opposite sex less favorably than those identified as being of their own sex.²⁷ These cognition disparities apply to both ordinary members of the public and legal professionals such as judges.²⁸

An animus-based, rather than an unconscious attitude-based, interpretation of what counts as discrimination nevertheless reflects popular sentiment about the nature of discriminatory conduct that merits a legal remedy. The public condemns discrimination that is based on evil motive.²⁹ The problem is that even those who fail to display any evil motive

24. *Id.* at 1032–34.

25. Or may not. See Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006) (challenging views of scholars relying on social cognition experiments as proof of discriminatory actions). As Professor Bagenstos points out, the dispute is less over whether people tend to use modes of cognition that disadvantage members of out-groups and more over whether behavior that may be linked to the cognition constitutes discrimination that the law ought to remedy. Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477, 479–80 (2007) (collecting sources). Recent work by Mitchell, Tetlock, and co-authors charts IAT results against other measures of implicit and explicit bias, concluding that many individuals whose IAT scores suggest negative associations with African-Americans demonstrate equal treatment for black and whites in the other measures. Hart Blanton et al., *Toward a Meaningful Metric of Implicit Prejudice*, J. APPLIED PSYCHOL. (forthcoming) (Jan. 19, 2015), <http://dx.doi.org/10.1037/a0038379>. One aspect of the dispute centers on the nature, size, and social importance of the relation between IAT results and scores on various tests thought to measure discriminatory behavior. Compare *id.* at 10 (“The discrepancies we found between the IAT zero point and behavioral zero points highlight the arbitrary nature of the metric generated by conventional IAT scoring algorithms. It thereby questions many of the suggested real-world, applied implications of the IAT distribution.”) and Frederick L. Oswald et al., *Using the IAT to Predict Ethnic and Racial Discrimination: Small Effect Sizes of Unknown Societal Significance*, at 12, <http://ssrn.com/abstract=2559188> (last visited Feb. 15, 2015) (“Given the dearth of studies utilizing real-world conditions, we believe that it is reasonable to be cautious about asserting consequential real-world effects of associations measured by the IAT.”) with Anthony G. Greenwald et al., *Statistically Small Effects of the Implicit Association Test can Have Societally Large Effects* (Sept. 2, 2014), at 17, http://faculty.washington.edu/agg/pdf/GB&N.Consequential%20small%20IAT%20effects.JPSP_final.2Sep2014.pdf (“[B]oth [Oswald et al.’s and our] meta-analyses estimated aggregate correlational effect sizes that are large enough to justify concluding that IAT measures predict societally important discrimination.”).

26. The behavior of others can reduce the effects of stereotyping on a person’s attitudes and conduct, as can the establishment of clear rules and education in the rules. Erik J. Girvan & Grace Deason, *Social Science in Law: A Psychological Case for Abandoning the ‘Discriminatory Motive’ Under Title VII*, 60 CLEV. ST. L. REV. 1057, 1077–78 (2013) (collecting authorities); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1208 (2009) (stating that mental strategies reduce implicit bias at least in laboratory settings); see also sources cited *infra* notes 91–94 (discussing studies concerning conscious compensation for stereotyping).

27. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1194 (1995) (describing experiment regarding law school applications).

28. Rachlinski, *supra* note 26, at 1197. Professor Secunda has applied social cognition insights to judicial determinations in labor and employment law cases. See Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107 (2010).

29. Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1300 (2012) (“[T]he intent of the perpetrator is a critical determinant of observers’ willingness to make attributions to discrimination . . . [P]eople are extremely

or hostility nevertheless hold habits of mind, as evidenced by association testing or other measures, that affect their perceptions of the people with whom they interact.

Turn now to the law of race and sex discrimination. With regard to employment, the law makes remedies available for some race and sex discrimination that is not intentional. Practices with disparate impacts violate Title VII³⁰ and support injunctive and backpay relief unless the employer shows they are consistent with business necessity and no satisfactory alternative exists, irrespective of the employer's intent.³¹ Moreover, non-animus based discrimination supports even broader relief if it involves the explicit use of a race or sex category,³² or is based on a stereotype;³³ these might be called near-animus cases. Nevertheless, even in the field of employment discrimination, the typical disparate treatment case entails a search for animus—for a discriminatory motive.³⁴ Animus or near-animus is always needed if the employment plaintiff is to obtain compensatory or punitive damages in addition to back pay, reinstatement, or similar remedies.³⁵

Except in some categories of voting,³⁶ housing,³⁷ and employment cases,³⁸ American courts do not award plaintiffs any relief when a defendant's conduct simply has disparate race and sex impacts, whether the

reluctant to make findings of discrimination in what might be thought of as classic 'disparate impact' contexts.").

30. 42 U.S.C. §§ 2000e to 2000e-16 (2012).

31. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *see* 42 U.S.C. § 2000e-2(k) (2012) (setting out current standards for disparate impact liability).

32. *E.g.*, *Int'l Union v. Johnson Controls*, 499 U.S. 187 (1991) (exclusion of potentially fertile females from some jobs); *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) (sex-differentiated pension contributions).

33. *Price-Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (plurality op.).

34. *See, e.g.*, 42 U.S.C. § 2000e-2(m) (2012) (premising liability on race, color, religion or sex as "motivating factor"). The motive may be uncovered through circumstantial evidence. *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). *See generally* Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 912 (2005) (noting "the obsession of the legal academy and the plaintiffs' bar with disparate treatment cases"). Professor Sullivan suggests that by using "intent" rather than "motive" language, courts have narrowed the grounds for liability, because "motive" may include unconscious motives. *Id.* at 920-21. The Supreme Court, however, frequently uses the term motive in Title VII and comparable cases, without encompassing unconscious motives. *See, e.g.*, *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1191-95 (2011) (relying on concept of motive and applying Title VII principles).

35. 42 U.S.C. § 1981a(a)(1) (2012) ("In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) . . . and provided that the complaining party cannot recover under section 1977 of the Revised Statutes, the complaining party may recover compensatory and punitive damages . . .").

36. *See Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (construing 42 U.S.C. § 1973, declaring: "Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone . . .").

37. The Supreme Court approved the application of the Fair Housing Act, 42 U.S.C. §§ 3604-3617 (2012), to disparate impacts in *Inclusive Communities Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. 2507, 2518-25 (2016) (also noting limits on application of doctrine).

38. Federal grantees using practices with disparate impacts remain vulnerable to administrative action with regard to Title VI (race and related discrimination by federal grantees) and Title IX (sex discrimination in education).

practices are justified by business necessity or not. Unlike the criminal law or the law of intentional torts,³⁹ where voluntary action and knowledge to a substantial certainty that the harm will result suffices for liability, in non-Title VII cases the Supreme Court has found no liability even though that form of mens rea is present. American civil rights law generally demands a discriminatory motive,⁴⁰ rather than unconscious use of mental categories that influence action without the knowledge of the actor. Thus in *Personnel Administrator v. Feeney*, the Court rejected an equal protection challenge to a veterans' preference for state employment that state lawmakers certainly knew had a devastating effect on women's employment but retained anyway.⁴¹ The Court said that the intent needed for an equal protection violation was more than "intent as awareness of consequences."⁴² Similarly, the District of Columbia officials in *Washington v. Davis*⁴³ knew that the employment test had a negative effect on African-Americans and used it anyway,⁴⁴ but the Supreme Court found that giving the test knowing the results would be racially skewed was not the kind of intent needed to sustain an equal protection claim.⁴⁵ What mattered to the Court was that there was no showing of animus—actual hostility or discriminatory motive—in those cases.⁴⁶

The Court applied a similar interpretation to Title VI of the Civil Rights Act, which, among other things, prohibits discrimination on the basis of race in programs that receive federal financial assistance.⁴⁷ The Court said that the statute's reach is not greater than that of the Equal Protection Clause as applied to governmental actors.⁴⁸ It relied on that premise in barring private causes of action to challenge disparate impacts, which are forbidden by regulations promulgated to enforce the

39. RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965) (deeming knowledge to be equivalent to intent for intentional tort liability).

40. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2526 (2013) (equating "animus" with "discriminatory motive").

41. 442 U.S. 256, 278–79 (1979) ("[I]t cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable. 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences.").

42. *Id.* at 279.

43. 426 U.S. 229 (1976).

44. The city officials originally acknowledged the disparity of impact and defended their practice on the basis of Title VII standards, which permit impacts justified by business necessity. See *id.* at 238 n.8.

45. *Id.* at 240 (citing school desegregation cases for "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").

46. The Supreme Court also requires intent to make out a violation of 42 U.S.C. § 1981, which prohibits race discrimination. *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 382–83 (1982).

47. 42 U.S.C. §§ 2000d to 2000d-7 (2012).

48. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (lead opinion of Powell, J.) ("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.").

statute but not by the statute itself.⁴⁹ The Court similarly limited the reach of private sex discrimination suits under Title IX of the Education Amendments, although at least in the context of sex harassment, it has permitted liability upon a showing of actual knowledge and deliberate indifference on the part of an official with the authority to remedy conduct that denies educational opportunity.⁵⁰ Even in that context, the Court stressed that it was specifically adopting the deliberate indifference standard to prevent liability from attaching on the basis of conduct that is not intentional.⁵¹

IV. INTENT AND DISABILITY DISCRIMINATION

Against this background on the social science and law of race and sex discrimination, consider disability discrimination. Popular attitudes about disability are paradoxical. Although many sources use historical⁵² and anecdotal⁵³ evidence to document pervasive attitudes of fear and hostility towards people with disabilities, it is undeniable that disability also evokes expressions of sympathy and support. But these positive expressions conceal negative attitudes.⁵⁴ Implicit association testing with

49. *Alexander v. Sandoval*, 532 U.S. 275 (2001). The Supreme Court recognized an implied cause of action under Title IX in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and the Court's holding extended readily to Title VI.

50. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (construing 20 U.S.C. § 901).

51. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642 (1999) (“[In *Gebser*.] we concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge.”). Professor Black proposes a standard of deliberate difference for civil rights violations that is not the same as that used in *Davis* and *Gebser*, and would be an easier one for plaintiffs to satisfy than either that standard or animus. See Derek W. Black, *The Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533, 575–77 (2006).

52. See MARK C. WEBER, *DISABILITY HARASSMENT* 16–20 (2007); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 461–63 (1985) (Marshall, J., concurring in part and dissenting in part) (“[T]he mentally retarded have been subject to a lengthy and tragic history . . . of segregation and discrimination that can only be called grotesque . . . Fueled by the rising tide of Social Darwinism, the ‘science’ of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the ‘feeble-minded’ as a ‘menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems.’ A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and ‘nearly extinguish their race.’ Retarded children were categorically excluded from public schools, based on the false stereotype that all were educable and on the purported need to protect nonretarded children from them. State laws deemed the retarded ‘unfit for citizenship.’”) (footnotes omitted).

53. See, e.g., Mark C. Weber, *Exile and the Kingdom: Integration, Harassment, and the Americans with Disabilities Act*, 63 MD. L. REV. 162, 170–73, 179–82 (2004). Empirical research includes Jerome Holzbauer & Clifton F. Conrad, *A Typology of Disability Harassment in Secondary Schools*, 33 CAREER DEV. FOR EXCEPTIONAL INDIVIDUALS 143 (2010). For a survey of the social science literature on the effects of disability harassment, see Jerome Holzbauer, *Disability Harassment: A New Term for a Long-Standing Problem*, J. COUNSELING & DEV., Dec. 2011, at 48.

54. People with disabilities routinely describe facing precisely this problem. One particularly telling account is that of a well-dressed business traveler sitting in her wheelchair in an airport with a Styrofoam cup of coffee in her hand; another traveler smiles at her and drops some change into the cup. JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* 19 (1993). The Shapiro book contains many additional instances of seemingly well-

regard to disabilities shows that subjects have quicker responses to pairings of pictures of persons without disabilities with terms embodying pleasant things than pairings of pictures of comparable persons with visible disabilities and pleasant terms (and vice versa).⁵⁵ Summarizing a wide range of survey research of employers, one source notes that employers report doubts about the abilities of people with disabilities to work while, at the same time, saying that disability is not a factor in their hiring decisions.⁵⁶ The authors explain the denial that disability affects hiring decisions as an example of “public perception bias,” in which people say what they think should be the appropriate answer rather than the true one.⁵⁷ The authors further report that research subjects’ attitudes depend heavily on the nature and origin of the disability; if the individual is viewed as having caused his or her own condition, the accommodations they need are viewed as less fair or reasonable.⁵⁸ Mental disabilities and certain congenital disabilities are strongly associated with stigmatic and other attitudinal obstacles to obtaining employment.⁵⁹

meaning actions revealing attitudes that work to the disadvantage of people with disabilities. Its title expresses the strongly felt need to replace approaches based on sympathy with those based on rights.

55. See Michael J. White et al., *Implicit and Explicit Attitudes toward Athletes with Disabilities*, J. REHABILITATION, No. 3, 2006, at 33, 38 (discussing results of implicit association testing done on group of college students, concluding: “When compared to able-bodied athletes, implicit attitudes toward athletes with disabilities were consistently negative. Further, the size of this effect was large.”). On the other hand, explicit expression of general attitudes towards people with disabilities among the same group showed scores roughly similar to those of control groups. *Id.* Attitudes towards athletes with disabilities were chosen for study because of the supposition that athletes with disabilities would enjoy strongly positive associations. *Id.*

56. Sarah Parker Harris et al., ADA Systematic Review: Rapid Evidence Review Technical Report, Dep’t of Disability and Human Dev., Univ. Ill. at Chi., June 2014, at 19, https://adata.org/sites/adata.org/files/files/ADA-KT%20Rapid%20Evidence%20Review_final%20report.pdf.

57. *Id.* at 19–20; see also Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1399–1400 (collecting sources describing hidden and overt attitudes concerning disability that are negative from the perspective of persons with disabilities).

58. Harris, *supra* note 56, at 22.

59. See Marjorie L. Baldwin & William G. Johnson, *Dispelling the Myths About Work Disability*, in NEW APPROACHES TO DISABILITY IN THE WORKPLACE 39, 46–7 (Terry Thomason et al. eds., 1998) (discussing employment of persons with blindness, cerebral palsy, deafness, and intellectual disability); *id.* at 56 (stating that “persons with illnesses or injuries that occur at birth or early in life [such as] [m]ental or emotional conditions, sensory, and mobility limitations are . . . [the] group likely to face the most severe prejudice and discrimination in the labor market” compared with people whose disabilities occur later in life); *Sickness, Disability and Work: Keeping on Track in the Economic Downturn*, ORG. FOR ECON. CO-OPERATION & DEV., 10 (2009), <http://www.oecd.org/els/emp/42699911.pdf> (“People suffering from mental conditions are typically 30-50% less likely to be employed than those with other health problems or disability.”); see also Mollie Weighner Marti & Peter David Blanck, *Attitudes, Behavior, and ADA Title I*, in EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT 356, 358 (Peter David Blanck ed., 2000) (“Across broad categories of disabilities, studies have established a fairly uniform hierarchy of reactions to different types of disabilities. Addictive conditions (e.g., alcoholism, drug use), psychological conditions (e.g., mental retardation, mental illness), and neurological conditions (e.g., epilepsy, cerebral palsy) are viewed most negatively . . .”) (citations omitted); Wendy Wilkinson & Lex Frieden, *Glass-Ceiling Issues in Employment of People with Disabilities*, in EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT 68, 74 (Peter David Blanck ed., 2000) (“The hierarchy of acceptance depends on the particular type of disability. Individuals with hidden, unfamiliar, or more stigmatized disabilities face greater barriers in the workplace and in society. The unemployment rate among people with psychiatric disabilities is estimated to be 85 percent, significantly higher than the rate for individuals with physical disabilities.”) (citations omitted).

After canvassing the empirical research on disability-related attitudes one authority concludes:

The biggest obstacle for disability law continues to be attitudes toward disability—attitudes of discomfort (“Ick!”), existential anxiety (“Could that happen to me?”), costliness (“Hiring or accommodating this person will be expensive!”), and triviality (“Not many disabled people will really come to my restaurant, store, or workplace, so why should I make these changes?”).⁶⁰

Discriminatory attitudes are surely an obstacle to the achievement of equality for persons with disabilities, but the attitudes do not manifest themselves in overt hostility—animus—so much as in avoidance, hidden stereotyping, and implicit assumptions of inadequacy or neediness.⁶¹

The law of disability discrimination bears comparison to race and sex discrimination law just as the findings on hidden attitudes about race and sex may be compared to those regarding disability.⁶² As for employment, Title I of the Americans with Disabilities Act (“ADA”) forbids limiting, segregating, and classifying employees and applicants in a way that impairs employment opportunities or status because of disability,⁶³ all of which appear to be forms of intentional discrimination of the animus or near-animus variety.⁶⁴ ADA Title I also forbids using standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability, a classic disparate impact standard, which means no intent requirement applies.⁶⁵

The ADA further requires employers to make reasonable accommodations to known physical or mental limitations of otherwise qualified individual with disabilities unless the employer demonstrates undue

60. Emens, *supra* note 57, at 1389.

61. As I have sought to make clear in other work, even the reasonable accommodation standard treats disability as deviant from a norm of non-disability and to that extent stigmatizes the person with a disability; it also reinforces the limits on how far society will go to adapt to its members' differences. See Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889, 904–05. Harlan Hahn, a prominent writer on disability, quotes an urban planner as describing the built environment as designed “for the average person, plus or minus half a standard deviation.” Harlan Hahn, *Equality and the Environment: The Interpretation of “Reasonable Accommodations” in the Americans with Disabilities Act*, 17 J. REHABILITATION ADMIN. 101, 103 (1993). In her writing, Dean Minow has stressed the importance of moving away from such norms and instead identifying social relationships and acting to improve them. See, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 223–24 (1990).

62. For further development of the points in this paragraph and the remainder of this section, see Weber, *supra* note 10, at 14–36.

63. 42 U.S.C. § 12112(b)(1) (2012).

64. Compare *id.* with *id.* § 2000e-2(a)(2) (2012) (similar Title VII provision).

65. See *id.* § 12112(b)(3)(A). A separate disparate impact provision bans qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual or class of individuals with a disability. *Id.* § 12112(b)(6); see also *id.* § 12112(b)(7) (requiring that tests accurately reflect skill, aptitude or other quality being tested, rather than reflect disabilities not relevant to the measurement). The two disparate impact clauses may be met with a defense if the employer shows that the standard, test, selection criterion, or other practice is job-related and consistent with business necessity. *Id.* § 12113(a). The existence of defenses does not alter the reality of a strict-liability, no-intent-needed character of the disparate impact provisions. Cf. 42 U.S.C. § 2000e-2(k) (2012) (Title VII provision codifying disparate impact liability and not imposing intent requirement).

hardship on the operation of its business.⁶⁶ This accommodation requirement differs from anything found in Title VII with regard to race and sex.⁶⁷ It is the ADA's major innovation in anti-discrimination law,⁶⁸ and is the way in which the anti-discrimination mandate becomes effective for people with disabilities.⁶⁹ A reasonable accommodation claim under Title I of the ADA does not require any showing of discriminatory intent on the part of the employer. Instead, the liability is strict.⁷⁰

Similar provisions forbidding disparate impacts and requiring accommodations as to non-employment activities are found in the regulations mandated by the title of the ADA that governs state and local government services ("ADA Title II");⁷¹ these regulations parallel the

66. *Id.* § 12112(b)(5)(A) (2012). Correlatively, it forbids denying employment opportunities to otherwise qualified individuals with disabilities if the denial is based on the need to reasonably accommodate. *Id.* § 12112(b)(5)(B).

67. Title VII requires "reasonable accommodation" of religious needs of employees. *Id.* § 2000e(j); 29 C.F.R. § 1605(c) (2014); see *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 66 (1977). Congress, however, stressed that the ADA provision demands much more than the minimal duties described in *Hardison*. H.R. REP. NO. 101-485, pt. 2, at 68 (1990) ("The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison* . . . are not applicable to this legislation."); S. REP. NO. 101-116, at 36 (1990) (same).

68. See Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 311 (2001) ("In the ADA context, by contrast [with Title VII], the overwhelming sweep of cases concern not discrimination simpliciter, but a claimed failure to redistribute in the form of accommodation.") (footnotes omitted); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 4-5 (1996); see also SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 1* (2009) ("Importantly, the statute takes the concept of forbidden discrimination beyond intentional and overt exclusion; it also treats as discrimination the failure to provide 'reasonable accommodations' to people with disabilities."); Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1121 (2010) ("This accommodation duty is the defining characteristic of modern disability discrimination statutes . . .").

69. See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) ("By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach. Were that not so, the 'reasonable accommodation' provision could not accomplish its intended objective.").

70. *Lenker v. Methodist Hosp.*, 210 F.3d 792, 799 (7th Cir. 2000) ("[I]f the plaintiff demonstrated that the employer should have reasonably accommodated the plaintiff's disability and did not, the employer has discriminated under the ADA and is liable."); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999) ("[A]n employer who knows of a disability yet fails to make reasonable accommodations violates the statute, no matter what its intent, unless it can show that the proposed accommodations would create undue hardship for its business."); *Scalera v. Electrograph Sys., Inc.* 848 F. Supp. 2d 352, 362 (E.D.N.Y. 2012) ("[T]here is no burden on Plaintiff to show that her disability played any motivating role in Electrograph's failure to provide the requested accommodation."); Jacqueline Rau, Note, *No Fault Discrimination? Using the Americans with Disabilities Act as a Model for "Norm Advocating" Mediation in Title VII Disputes*, 27 OHIO ST. J. ON DISP. RESOL. 241, 265 (2012) ("The ADA . . . focuses on reasonable accommodation without discussion of the intent of the employer."). Professor Bagenstos attributes at least some of the backlash against the ADA to the fact that it departs from intent principles in imposing liability. Bagenstos, *supra* note 25, at 491. As with Title VII, compensatory damages remedies, but not backpay, are limited in ADA Title I cases that are based on disparate impact, 42 U.S.C. § 1981a(a)(2) (2012), though the limits do not apply to reasonable accommodations cases unless the defendant demonstrates good faith efforts in consultation with the claimant to identify and make reasonable accommodations, *id.* § 1981a(a)(3). Punitive damages are not available under the ADA public services provision. *Barnes v. Gorman*, 536 U.S. 181, 189 (2002).

71. Title II of the ADA bans disability discrimination by state and local government entities, 42 U.S.C. § 12132 (2012), defines reasonable modifications—the equivalent of Title I's reasonable ac-

statutory terms of the ADA with regard to employment.⁷² A number of courts have taken a page from the ADA employment cases and enforced these public services provisions without demanding any showing of intent. Nevertheless, other courts have imposed animus requirements despite the existence of ample authority that the law imposes no mental state requirement. This practice parallels the imposition of intent requirements in race and sex cases other than those involving disparate impacts in employment; indeed the race and sex cases are the wedge by which intent requirements have entered into disability discrimination cases regarding public services.⁷³

The first category of cases comprises those not imposing any intent requirement. For example, in *Henrietta D. v. Giuliani*, which alleged that a local government failed to provide modifications to establish adequate access to public benefits and services for persons with HIV-related illness, the court entered judgment for the plaintiffs, holding that the government's motive or intent was irrelevant to the violation.⁷⁴ The *Henrietta D.* court relied on cases such as *Helen L. v. DiDario*, a case that held that failure to modify rules requiring services to a person with a disability be provided only if she was in a nursing home, in which the court declared: "Because the ADA evolved from an attempt to remedy the effects of 'benign neglect' resulting from the 'invisibility' of the disabled, Congress could not have intended to limit the Act's protections and prohibitions to circumstances involving deliberate discrimination."⁷⁵ Other courts have granted relief saying that "[t]he prohibition of Title II applies to action that carries a discriminatory effect, regardless of the City's motive or intent,"⁷⁶ or they have refused to dismiss allegations of statutory violations, stating that "a plaintiff need not prove that defendants' discrimination was intentional" in order to make out a section 504 claim.⁷⁷ The cases making these statements stand in good company. In *Olmstead v. L.C.*, the most prominent case the Supreme Court has decided interpreting the

commodations, *id.* § 12131(2), and orders the attorney general to promulgate regulations to control those entities consistent with the regulations originally promulgated by the Department of Health, Education, and Welfare under section 504 governing recipients of federal financial assistance, *id.* § 12134(a)-(b).

72. See 28 C.F.R. §§ 35.101–178 (2014).

73. See Weber, *supra* note 10, at 37–42 (collecting cases).

74. *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 206–07 (E.D.N.Y. 2000), *aff'd sub nom.* *Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003) (rejecting contention that plaintiffs relying on failure to make reasonable modifications must also establish disparate impact).

75. *Helen L. v. DiDario*, 46 F.3d 325, 335 (3d Cir. 1995) (quoted in *Henrietta D.*, 119 F. Supp. 2d at 206).

76. *Tyler v. City of Manhattan*, 857 F. Supp. 800, 817 (D. Kan. 1994) (granting relief in case alleging failure to provide curb ramps and other accessible facilities).

77. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999), *superseded as to statute of limitations as stated in P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 737 (3d Cir. 2009); see, e.g., *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 574–75 (2d Cir. 2003) (separating analysis of claim of intentional discrimination from claim of failure to accommodate in application of fire code to group home, and upholding grant of relief); *Benavides v. Laredo Med. Ctr.*, No. L-08-105, 2009 WL 1755004 (S.D. Tex. June 18, 2009) (in case alleging failure to provide sign language interpreter to hospital patient, rejecting animus requirement, and saying willful failure to provide advantage is discrimination; denying motion to dismiss claim for damages under section 504).

requirements of ADA Title II, the Court did not impose any state of mind requirement when it compelled a defendant state agency to modify its practices to provide services for people with mental disabilities in settings less restrictive than a state institution.⁷⁸

The second category is cases that do demand intent, typically either animus or deliberate indifference, or sometimes, especially in cases involving elementary or secondary education, a hybrid requirement of bad faith or gross misjudgment.⁷⁹ Some decisions involve entities subject to section 504 or ADA Title II that failed to provide reasonable modifications or auxiliary aids to enable individuals to benefit from the services offered. In *Ferguson v. City of Phoenix*, deaf individuals alleged that the city's 911 emergency system was not accessible to them and requested damages for harms caused by inability to use the system. The court affirmed summary judgment against the plaintiffs on the ground that they did not establish that the inaccessibility was due to discriminatory animus or deliberate indifference.⁸⁰ In *Wood v. President and Trustees of Spring Hill College*, the court upheld a jury verdict against a student who sued for damages under section 504 for the college's decision to exclude her on the ground that she was schizophrenic.⁸¹ The court said that section 504 plaintiffs "must prove intentional discrimination or bad faith in order to recover compensatory damages."⁸² Some courts have upheld the claims brought by people with disabilities for failure to provide auxiliary aids or other reasonable modifications in hospital⁸³ or other settings,⁸⁴ but have nonetheless demanded proof of animus.

78. 527 U.S. 581 (1999).

79. Not every source identifies this standard as one of intent, though many do. See *M.Y. ex rel. J.Y. v. Special Sch. Dist. No. 1*, 544 F.3d 885, 890 (8th Cir. 2008) ("There is no evidence in the record that District possessed the requisite bad faith or gross misjudgment in denying M.Y. special education transportation. District's decision fully complied with the terms of M.Y.'s IEP [Individualized Education Program] which stated that M.Y. was not eligible for ESY [Extended School Year] and related services such as transportation. Accordingly, we affirm the district court's decision granting summary judgment in favor of District on the basis that District did not possess the requisite intent in order to be liable under section 504."); see also *D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 455 (5th Cir. 2010) ("We concur that facts creating an inference of professional bad faith or gross misjudgment are necessary to substantiate a cause of action for intentional discrimination under § 504 or ADA against a school district predicated on a disagreement over compliance with IDEA."); *Baker v. S. York Cnty. Sch. Dist.*, No. 1:08-CV-1741, 2012 WL 6561434 (M.D. Pa. Dec. 17, 2012) ("The Third Circuit has not articulated the level of intent necessary for a showing of intentional discrimination [for a section 504 damages claim]. Several circuit courts have adopted a 'deliberate indifference' standard. Other circuits require a more stringent showing of 'bad faith or gross misjudgment.'") (citations omitted).

80. 157 F.3d 668, 675 (9th Cir. 1998). See generally Nina Golden, *Compounding the Error: "Deliberate Indifference" vs. "Discriminatory Animus" Under Title II of the ADA*, 23 N. ILL. U. L. REV. 227, 233-54 (2003) (discussing and criticizing *Ferguson* and cases relying on it).

81. 978 F.2d 1214 (11th Cir. 1992).

82. *Id.* at 1219.

83. *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 342 (11th Cir. 2012) (reversing summary judgment for hospital in claim over failure to provide sign language interpreter, requiring showing of discriminatory intent through animus or deliberate indifference); *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 275-76 (2d Cir. 2009) (vacating summary judgment for defendant in claim over failure to provide sign language interpreter at hospital, applying deliberate indifference standard).

A large number of section 504 and Title II cases requiring intent are ones involving children with disabilities whose parents allege that the public schools discriminated against them by failing to provide appropriate special education services, in violation of section 504 and Title II of the ADA. In a typical case, *Sellers v. School Board of Manassas*, the court affirmed dismissal of a section 504 claim brought by parents of a child who alleged that his learning disability and emotional disturbance were ignored until the very end of his public education even though testing in fourth grade demonstrated the disability.⁸⁵ The court said that in order to recover, the plaintiffs had to show either bad faith or gross misjudgment; anything less would permit liability based on negligence.⁸⁶ Other examples abound.⁸⁷

V. AN ASSESSMENT REFLECTING SOCIAL SCIENCE

In the companion paper to this Essay, I argue that the cases rejecting strict liability for failure to provide reasonable accommodations are simply wrong on the law, and that is so even if the race and sex cases demanding intent are deemed to be decided correctly.⁸⁸ Nevertheless, the doctrinal analysis misses something. The disability discrimination statutes take into account unintentional, thoughtless, and inadvertent denials of accommodations or applications of discriminatory rules, but they have not changed the attitudes of the judiciary about that misconduct. The law of race and sex discrimination is a beat behind the social science research; the law of disability discrimination is in tempo, but the judiciary, which is charged with its application, is not.⁸⁹ Perhaps the law will lead

84. *Delano-Pyle v. Victoria Cnty., Tex.*, 302 F.3d 567, 575 (5th Cir. 2002) (affirming judgment in favor of arrestee not provided accommodations for his deafness, stating, “There is no ‘deliberate indifference’ standard applicable to public entities for purposes of the ADA or [section 504]. However, in order to receive compensatory damages for violations of the Acts, a plaintiff must show intentional discrimination.”); *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001) (overturning summary judgment against plaintiff in action over failure to provide real-time transcription at divorce proceedings, stating: “To recover monetary damages under Title II of the ADA or the Rehabilitation Act, a plaintiff must prove intentional discrimination on the part of the defendant . . . the deliberate indifference standard applies.”); *Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 405 (D. Md. 2011) (“[Defendant] intentionally denied plaintiff the reasonable accommodation of an [American Sign Language] interpreter at the . . . victim impact panel. Accordingly, plaintiff is entitled to summary judgment with respect to the matter of the victim impact panel.”).

85. 141 F.3d 524 (4th Cir. 1998).

86. *Id.* at 528–29.

87. *E.g.*, *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 840 (2d Cir. 2014); *B.M. ex rel. Miller v. S. Callaway R-II Sch. Dist.*, 732 F.3d 882 (8th Cir. 2013) (requiring bad faith or gross misjudgment); *G.C. v. Owensboro Pub. Sch.*, 711 F.3d 623, 635 (6th Cir. 2013); *Stewart v. Waco Indep. Sch. Dist.*, 711 F.3d 513, 523–26 (5th Cir. 2013), *vacated & superseded on reh’g*, No. 11-51067, 2013 WL 2398860 (5th Cir. June 3, 2013); *D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 454–55 (5th Cir. 2010); *M.Y. ex rel. J.Y. v. Special Sch. Dist. No. 1*, 544 F.3d 885, 889–90 (8th Cir. 2008).

88. Weber, *supra* note 10, at 37–42.

89. See Emens, *supra* note 57, at 1385 (“[A]ttitudes toward disability trail behind the law.”). As I have indicated in other work, the public may in fact be well ahead of the judiciary as indicated by jury verdicts that courts overturn in disability discrimination cases. See Weber, *supra* note 68, at 1173–75 (collecting cases). Professor Porter has amassed persuasive support for her position that the judiciary is actively hostile to the ADA in cases where judges view the claimants as undeserving. Nicole Buono-

forward the thinking of judges and other legal actors, but work remains to be done before that will happen, and the results in the reported cases only emphasize the gap.⁹⁰

One might react to the research showing the pervasiveness of negative stereotypes about people with disabilities and the legal obstacles to enforcement of disability discrimination law by despairing about the prospects for change, or by despairing specifically about the prospects of change through judicial enforcement of rights-based claims. Many of those expressing views of this type write on race or sex inequality.⁹¹ The contrast of race and sex discrimination law with disability discrimination law may suggest that this criticism of civil rights litigation approaches is based to some degree on limits of the race and sex law that do not apply to the disability discrimination law, at least as written.⁹² In any instance, this Essay places the rights-skeptical view to one side and relies instead on the idea that discrimination litigation will open opportunities to individual claimants and provide deterrence that will cause potential defendants to offer accommodations and integrated services more broadly.⁹³

core Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1 (2014); see also Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 326–29 (2008) (discussing impact of judicial attitudes in accounting for low win rates in ADA employment litigation).

90. See generally Emens, *supra* note 57, at 1407–41 (discussing use of framing rules to affect popular attitudes towards disability and discriminatory conduct).

91. See, e.g., Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2203 (2013) (stating with respect to criminal procedure rights, “Advocates for the poor, for racial minorities, and for criminal defendants should abandon rights discourse and rather focus on reducing the number of poor people overall, and African Americans specifically, who are incarcerated.”); Darren Lenard Hutchinson, “Continually Reminded of Their Inferior Position”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL’Y 23, 32, 114–15 (2015) (discussing social dominance theory and challenging utility of legal remedies focused on conduct of individual discriminators); see also Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 148 (2003) (questioning usual approaches to employment discrimination litigation and proposing holding employers liable for organizational choices and workplace dynamics); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 103 COLUM. L. REV. 458, 556–64 (2001) (proposing judicial approach that rewards employers’ efforts to address structures that disadvantage women and minorities).

92. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 16 (2006) (noting that ADA’s reasonable accommodation requirement responds to concerns about unconscious or subtle bias). But see *id.* at 4 (“[C]ourts resist interpreting the ADA to hold employers liable for inequalities that are not readily perceived as the employer’s responsibility—even if the employer failed to exercise available opportunities to alleviate those problems . . . [A] similar dynamic is likely to undercut a structural approach to other areas of employment discrimination law.”) (footnote omitted).

93. See Mark C. Weber, *Comments on Casper*, 17 J. REHABILITATION ADMIN. 135 (1993) (“The premise of the Americans with Disabilities Act is that the threat of liability, combined with modest governmental awareness efforts, will induce employers to train themselves in the ways of nondiscrimination and reasonable accommodation.”); see also Jeb Barnes & Thomas F. Burke, *Making Way: Legal Mobilization, Organizational Response, and Wheelchair Access*, 46 LAW & SOC’Y REV. 167, 188 (2012) (discussing study of ADA compliance and concluding: “[M]easures that are grudgingly adopted can produce meaningful results [for physical accessibility] . . . as the rational-choice approach to regulation emphasizes, the threat of punishment works.”). In any case, even critics of rights and litigation-based approaches might agree that conscious mental compensation, improved social contact, and a revitalized social movement, as explored *infra*, have the potential to reduce discrimination irrespective of any more direct role in altering judicial decision making.

A reason to rely on law and legal deterrence is that social science supports somewhat more optimistic assessments than those of the skeptics of judicially enforceable rights, again at least with respect to disability. Three considerations seem relevant. First, there may be opportunities to persuade the public at large and, in particular, members of the public with legal and political power, of the virtue of consciously compensating for their unconscious attitudes. The research on race and sex shows that decision makers who are committed to norms of equality are more prone to treat members of different races equally when the race of the actors is identified prominently and the decision maker is aware that his or her attitudes are subject to scrutiny.⁹⁴ The same phenomenon occurs among test subjects when gender is identified prominently.⁹⁵ Heightened self-focus (forcing oneself to look in the mirror, for example) and being reminded of one's egalitarian ideals also diminishes application of stereotypes.⁹⁶ Lawyers may be in a position to encourage judges and juries to consider their own attitudes before reaching decisions.⁹⁷ Their efforts may be even more effective in disability than in race or sex cases, for they will be operating against a background in which people at least profess sympathy for those with disabilities.

Second, even if no one undertakes a focused campaign for compensatory thinking strategies, the collective unconscious may move more in line with the letter and aspirations of the disability discrimination laws simply through greater social contact over time. A well-supported hypothesis is that increasing interactions of people without disabilities and people with disabilities will inevitably lead to greater acceptance of those who have disabilities and diminished perception of differences as stigmatic.⁹⁸ The legendary disability advocate Jacobus tenBroek stressed that over time society has moved from forced segregation of people with dis-

94. See Rachlinski et al., *supra* note 26, at 1223–24. The authors note that “[c]ontrol of implicit bias requires active, conscious control,” *id.* at 1225, and they suggest that judges might benefit from being exposed to stereotype-challenging models, being given testing and training, being subject to audit of decisions, and altering courtroom practices, *id.* at 1226.

95. See Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 760 (1995) (collecting studies regarding race and sex stereotyping; stating: “There is considerable empirical evidence supporting the dissociation model's assumption that responses based on automatic processes can be inhibited and replaced by responses based on controlled processes.”).

96. See Ann C. McGinley, *¡Viva la Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 430–31 (2000) (collecting studies).

97. See Armour, *supra* note 95, at 762–66 (discussing historical cases involving race prejudice).

98. See Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 441 (1991) (collecting studies; stating, “The research data shows, without doubt, what should be obvious, that prejudice is lessened through integration. When individuals, especially young people, associate with one another, learn one another's attributes, and are able to use those perceptions and facts, prejudice is lessened. This effect is increased the longer and greater the interaction between persons who are and are not disabled is.”) (footnotes omitted). The point has been made with regard to race discrimination that those who lack contact with members of a racial minority tend to consider members of the group inferior, whereas closer contact, particularly in collaborative activities, leads to enhanced regard. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 264–78 (25th Anniversary ed. 1979).

abilities toward greater integration into society on a plane of equality.⁹⁹ Some progress is obvious: People have been freed from state institutions.¹⁰⁰ The motorized wheelchair is a common sight on city sidewalks.¹⁰¹ Schools are less likely to relegate children with disabling conditions to special schools or exclude them from education altogether.¹⁰² The hiding away of people with disabilities reinforced the attitude that disability means inferiority; emergence into open society can promote attitudes that liberate.

This hypothesis is not trouble-free. Casual contact can reinforce negative mental impressions that already exist.¹⁰³ Individuals may indulge their sense of superiority by engaging in harassment or otherwise acting to reinforce exclusion.¹⁰⁴ But there are good reasons to believe that contact promotes attitudes of acceptance, particularly when the contact consists of working together on joint projects, as with employment or community activities.¹⁰⁵ Integration breeds integration.

99. Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 814–16 (1966).

100. See Mark C. Weber, *Home and Community-Based Services, Olmstead, and Positive Rights: A Preliminary Discussion*, 39 WAKE FOREST L. REV. 269, 282–87 (2004) (discussing potential role of ADA in guaranteeing services for people with disabilities in community settings).

101. Cf. Motorized Wheelchairs, GOOGLE IMAGES, https://www.google.com/search?hl=en&site=img&tbm=isch&source=hp&biw=1280&bih=929&q=motorized+wheelchair&oq=motorized+wh&gs_l=img.1.0.0i10.2828.5047.0.7968.12.9.0.3.3.0.74.429.9.9.0....0...1ac.1.52.img.0.12.439.lnxYK1kTGao (last visited Sept. 14, 2015) (depicting the prevalence of motorized wheelchairs).

102. Citing data from the United States Department of Education's National Center for Education Statistics, one authority concluded: "[M]ore students with disabilities are being integrated into general education classrooms. For instance, in 1989, less than 32% of special education students between the ages of six and twenty-one spent 20% or less of their class time in segregated special education classrooms. In contrast, by 2008, 58% of special education students spent 20% or less in segregated classrooms. Furthermore, in 1989, nearly 25% of special education students spent more than 60% of the school day in segregated classrooms; in 2008, only 15% of special education students spent more than 60% of their day in segregated classrooms or facilities." Mark T. Keaney, *Examining Teacher Attitudes Toward Integration: Important Considerations for Legislatures, Courts, and Schools*, 56 ST. LOUIS U. L.J. 827, 830 (2012).

103. See ALLPORT, *supra* note 98, at 263.

104. This topic has been a focus of my work. See WEBER, *supra* note 52, at 44 (stating that verbal and physical harassment works to intimidate people with disabilities from exercising rights to participate in integrated settings).

105. See Emens, *supra* note 57, at 1407–08 (collecting studies; stating: "'Contact' through integration—in schools, workplaces, public accommodations, civic activities, and other—probably offers the most promise for changing nondisabled people's beliefs about the capacities of people with disabilities. Contact (with particular features) has the strongest empirical support as a means of changing minds and hearts across identity categories, including disability.") (footnotes omitted); see also ALLPORT, *supra* note 98, at 276–78 (discussing significance of co-engagement in activities towards common goals); Paul Harpur, *Combating Prejudice in the Workplace with Contact Theory: The Lived Experiences of Professionals with Disabilities*, 34 DISABILITY STUD. Q. No. 1 (2014), <http://dsq-sds.org/article/view/4011/3544> ("The experiences of the interviewees in the study demonstrate that applying contact theory can assist in altering the soft bigotry of low expectations. Through proactive strategies interviewees explained how they have reduced prejudice of potential employers in job interviews and work colleagues once they obtained employment. Though applying contact theory assisted interviewees to obtain work and to have more positive experiences at work, the application of contact theory had less success in motivating employers to embrace universal design."). Professor Emens suggests that contact should be supplemented with other mechanisms, in particular, ones that would influence the framing of decisions, making disability considerations more prominent and making the decisions better in-

A third avenue for progress towards legal and social equality relies on the hypothesis that attitudinal change will not necessarily occur automatically or merely by the increased public presence of a disadvantaged group, but can be pushed along by the continual pressure of a social movement.¹⁰⁶ In a comprehensive review of the literature concerning organizational theory, social movement theory, and law, Professor Edelman and co-authors observe that events in one of those fields may lead to ideas from that field causing change to practices in the others.¹⁰⁷ They note the general recognition among scholars of law and society that social movements may lend “rhetorical force and political clout to particular legal arguments.”¹⁰⁸ They also point out that counter-movements led by organized forces may impede implementation of legal reforms, and they suggest that development may have occurred with regard to disability rights.¹⁰⁹ Moreover, social movements affect individuals’ own perceptions of when their rights have been violated and may induce them to assert the rights in legal forums.¹¹⁰

Some authorities have argued that the implementation of disability discrimination law lags because of the lack of a true social movement for disability rights.¹¹¹ Their view gives insufficient recognition to the history

formed by the reality of disability in society as experienced by people with disabilities rather than preexisting attitudes. *See* Emens, *supra* note 57, at 1410.

106. Thanks to Katharina Heyer for pointing out the relevance of research on this topic.

107. Lauren B. Edelman et al., *On Law, Organizations, and Social Movements*, 6 ANN. REV. L. & SOC. SCI. 653 (2010).

108. *Id.* at 657 (collecting sources).

109. *Id.* at 658; cf. Symposium, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000) (discussing reaction against implementation of disability rights in ADA by organized interest groups, courts, and others).

110. Edelman et al., *supra* note 107, at 659. Rights-claiming in the context of disability discrimination has been the subject of studies by Professors Engel and Munger and Professor Malhotra and Morgan Rowe. DAVID M. ENGEL & FRANK W. MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES* (2003); RAVI MALHOTRA & MORGAN ROWE, *EXPLORING DISABILITY IDENTITY AND DISABILITY RIGHTS THROUGH NARRATIVES: FINDING A VOICE OF THEIR OWN* (2013).

111. *See, e.g.,* Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 527–28 (2008) (“Without broad public support or a strong social movement pushing to expand our notion of disabilities, it was simply too much to expect the Supreme Court to interpret the ADA expansively, or even to construe the statute consistent with congressional intent so long as the statute provided interpretive room for judicial discretion, which it did.”). It is my belief that courts generally interfere with implementation of laws that seek to promote significant social change, even in the face of strong social movements (though that is not a reason to eschew judicially enforceable rights), and vital social movements can induce courts to be more faithful to the intent of the reform. *See* Weber, *supra* note 68, at 1147 n.121; Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 426–36 (1990). In a provocative new paper, Professor Waterstone contends that the lack of a public clash over disability rights legislation facilitated passage of the ADA but left the movement in a poorer position to transform society than if it had been forced to overcome stronger opposition. Michael E. Waterstone, *The Costs of Easy Victory*, WM. & MARY L. REV. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2588887 (Mar. 31, 2015) (further noting contrast with deinstitutionalization subset of larger disability rights movement) (cited with permission). My judgment is that the victory Professor Waterstone describes was harder than it looks and took place against significant negative reaction over a protracted period of time, although I agree that during the struggle for the ADA, some advocates thought the better strategy was for the movement to keep a low profile. *See generally infra* note 112

of disability rights organizing beginning in the 1930s, extending to the 1970s sit-in at the Department of Health, Education, and Welfare (HEW) to have the section 504 regulations promulgated, all the way to the push for adoption of the ADA.¹¹² Activism in the current era includes the popular campaigns that led to the ADA Amendments Act of 2008,¹¹³ which greatly expanded the range of individuals covered by the ADA, and the effort to have the United States ratify the United Nations Convention on the Rights of Persons with Disabilities.¹¹⁴ A consortium of more than 100 national disability rights organizations played a significant role in passage of health care reform in 2010.¹¹⁵

To the extent that the organized disability rights movement can increase its vitality and visibility, it can be expected to alter social attitudes and, over time, influence legal and non-legal decision makers to keep them true to the promise of the disability discrimination laws. An analysis by Professor Pettinicchio states that specific members of Congress and other governmental actors, often motivated by family connections with

(collecting sources describing disability rights agitation from 1930s to 2000s and forces it struggled against).

112. See Paul K. Longmore & David Goldberger, *The League of the Physically Handicapped and the Great Depression*, in *WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY* 53, 65–85 (Paul K. Longmore ed., 2003) (discussing demonstrations by League of the Physically Handicapped against exclusion of workers with disabilities from New Deal programs); see also DORIS ZAMES FLEISCHER & FRIEDA ZAMES, *THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION* 8–12 (2001) (describing organizational efforts in 1950s–1960s and consequent gradual changes in social attitudes towards disability); OLIVER SACKS, *SEEING VOICES: A JOURNEY INTO THE WORLD OF THE DEAF* 125–59 (1989) (describing protests over failure to appoint deaf president of Gallaudet University); SHAPIRO, *supra* note 54, at 41–53 (describing emergence of disability rights movement at University of California Berkeley in 1960s among students with disabilities); Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 *TEMP. L. REV.* 393, 394 (1991) (describing sit-in at HEW Secretary Joseph Califano's office); Ravi Malhotra, *The Politics of the Disability Rights Movement*, ZNET (July 1, 2001), <https://zcomm.org/znetarticle/the-politics-of-the-disability-rights-movement-by-ravi-malhotra/> (describing demonstrations in nine cities, including Washington, D.C., where 300 demonstrators sat in at HEW for twenty-eight hours and San Francisco, where disability advocates occupied HEW offices for twenty-five days). See generally Weber, *supra* note 68, at 1146 (discussing later organizational and protest efforts). For an extensive discussion of campaigns against disability rights, see MARY JOHNSON, *MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS* (2003).

113. Pub. L. No. 110-325, 122 Stat. 3553 (2008). See generally Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 *NW. U. L. REV. COLLOQUY* 217, 228–29 (2008) (describing expansion of coverage and other provisions in ADAAA).

114. Convention on the Rights of Persons with Disabilities, May 3, 2008, 2515 U.N.T.S. 3 (2007). See generally *NCD Statement on Failed CRPD Ratification Vote in the Senate*, NAT'L COUNCIL ON DISABILITY (2012), <http://www.ncd.gov/newsroom/2012/120512> (noting decade-long effort in United States in support of Convention).

115. See Jessica L. Roberts, *Health Law as Disability Rights Law*, 97 *MINN. L. REV.* 1963, 2018–19 (2013) (describing efforts of Consortium for Citizens with Disabilities in cooperation with state-level organizations, several specific disability advocacy groups, and coalition partners with other interests); see also *id.* at 1964 (“Although not yet widely recognized as such, the ACA [health care reform law] constitutes one of the most significant civil rights victories for the disability community in recent history.”). Even before the ACA, disability advocates labored hard to achieve legislation to enable individuals with disabilities to extend or reinstate Medicare and Medicaid benefits during periods of employment. See BAGENSTOS, *supra* note 68, at 140 (“[D]isability rights advocates in recent years have devoted substantial energy to lobbying for legislation that would extend eligibility for Medicare and Medicaid to a larger number of working people with disabilities.”).

disability, took up the cause in the 1950s to the early 1970s, and their activities, particularly their role in framing accessibility in terms of rights, allowed for a broader movement to flourish and produce greater policy changes.¹¹⁶ The upshot is that individual actors in government and elsewhere can stimulate change, but a popular movement must nourish and sustain it.

VI. CONCLUSION

The conclusion, then, is that the imposition of intent requirements in disability cases where they do not belong should be no surprise. Discriminatory attitudes are pervasive, and affect judges as they do members of the public. But the underlying law addresses unconscious discrimination, and efforts to change society's collective unconscious may promote a virtuous circle where positive attitudes lead to positive judicial decisions lead to further advances in popular attitudes.

116. David Pettinicchio, *Strategic Action Fields and the Context of Political Entrepreneurship: How Disability Rights Became Part of the Policy Agenda*, 36 RESEARCH IN SOCIAL MOVEMENTS, CONFLICTS AND CHANGE 79, 95–98 (2013). He summarizes: “[T]he implication of the theory and data I present here is that disability rights is a political innovation that had much more to do with entrepreneurship and institutional activism than outside mobilization or shifts in public opinion. Nevertheless, as the government became increasingly interested in rights, especially by enacting the Rehabilitation Act, it reshaped its interaction with the disability community The proliferation of advocacy organizations and the sustained use of direct action followed from the Rehabilitation Act; it did not precede it. And, the dissemination of a rights framework to activists, advocates, disabled constituents, and the general public occurred primarily when entrepreneurs, especially those in the OCR [Office for Civil Rights], appealed to “outsiders” to pressure the secretary of HEW [Health, Education, and Welfare] to pass Rehabilitation Act regulations.” *Id.* at 100. He states that organized groups’ activities often decline over time and put less pressure on government, and that occurred with regard to disability in the period immediately after the ADA. *See id.* at 101.