

UNCONSCIOUSLY REGARDED AS DISABLED: IMPLICIT BIAS AND THE REGARDED-AS PRONG OF THE AMERICANS WITH DISABILITIES ACT

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Much scholarly work has been written detailing the shift away from the original congressional intent behind the Americans with Disabilities Act (ADA), starting with the landmark U.S. Supreme Court decision in Sutton v. United Air Lines. While the U.S. Congress intended the protections under the ADA to be broad, courts have interpreted the act very narrowly, denying protections for many whom Congress intended to protect.

Missing from this scholarship, however, is an examination of how the shift has been particularly harmful for potential plaintiffs in light of recent findings in behavioral science. More discrimination than once thought is the result not of explicit and conscious attitudes, but of unconscious implicit bias. The specific ways in which the Court narrowed the ADA resulted in a lack of protection for victims of implicit bias discrimination. Further, evidence shows that implicit bias against individuals with disabilities is particularly pronounced in American society. It is primarily this kind of discrimination that courts have been unable to protect against after Sutton.

The ADA Amendments Act of 2008 goes a long way towards reinstating protections for those whom are discriminated against as the result of implicit bias. This Comment cautiously endorses the Amendments and calls for increased research into how implicit bias affects individuals with disabilities. The fact that the Amendments are not a perfect solution to the prevalence of implicit bias discrimination may be a sign that this particular type of discrimination is not adequately well known and deserves further research and attention.

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INTRODUCTION

On September 25, 2008, President George W. Bush signed into law the Americans with Disabilities Amendments Act of 2008 (Amendments).¹ The new law states that its primary purpose is to return the comprehensive coverage envisioned by the American with Disabilities Act² (ADA) before a series of U.S. Supreme Court holdings “narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals

1. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. The Amendments are to go into effect January 1, 2009. *Id.* sec. 8. This act was previously known as the ADA Restoration Act. See American Association of People With Disabilities, ADA Amendments Act of 2008 (Formerly Known as the ADA Restoration Act), http://www.aapd-dc.org/News/adainthe/indexada_restore.php (last visited Oct. 5, 2008).

2. 42 U.S.C. §§ 12101–12213 (2000).

whom [the U.S.] Congress intended to protect.”³ It is quite clear that the ADA’s application in courts has narrowed since the lofty beginnings of the Act, but it is less clear that the Amendments are enough to reinstate the broad coverage that the ADA’s drafters envisioned.

One example of the shortcomings of the ADA’s application before the Amendments had been its treatment of burn victims. When the ADA was signed into law, lawmakers specifically noted that burn victims were among those protected from discrimination under the act,⁴ but in order to bring a claim under the pre-Amendments ADA, a burn victim had to show a “substantial impairment” on a “major life activity” such as “hearing, seeing, speaking, breathing, performing manual tasks, walking, caring for oneself, learning or working,”⁵ or that the burn victim’s employer regarded the victim as being substantially limited in a major life activity.⁶ The former is a difficult showing to make; the latter, nearly impossible.⁷ The problem with the former is that it is generally difficult for a burn victim to point to a specific major life activity that has been substantially limited in cases where the disability is primarily cosmetic in nature. The problem with the latter is that it requires a showing that in the employer’s mind, the employee or applicant had a substantial limitation to a specific and recognized major life activity. That is, it requires evidentiary proof of the mindset of the employer—an inherently difficult task. Similar promises of relief have proven fruitless in light of obstacles to qualify for legal remedies for the hearing impaired, those living with cancer, victims of heart disease, and those with hypertension.⁸

3. ADA Amendments Act of 2008, sec. 2(a)(4).

4. S. REP. NO. 101-16, at 24 (1989).

5. THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *THE ADA: YOUR RESPONSIBILITIES AS AN EMPLOYER* (2005), available at <http://www.eeoc.gov/facts/ada17.html>.

6. For ease of expression, I will refer to this as the “regarded-as” definition of disability under the Americans with Disabilities Act (ADA). The ADA originally defined a disability as:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such impairment.

Americans With Disabilities Act, 42 U.S.C. § 12102 (1990). Pursuant to provision (B), the plaintiff could also attempt to show a “record of” such an impairment, but these claims are rarely raised or successful. These claims are also not addressed in this Comment.

7. During a search of combined federal cases, I was unable to locate a single successful burn victim case. Most writings on the topic assumed that a burn victim would in fact be protected, and the U.S. Equal Employment Opportunity Commission (EEOC) guidelines are consistent with that assumption. However, neither literature on the subject nor the guidelines attempt to reconcile this assumption with pre-Amendments jurisprudence applying the regarded-as definition of disability. See THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 5.

8. Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 127–30 (2000).

Much has been written examining courts' reluctance to uphold the stated goals of the ADA. This literature has largely focused on jurisprudential analysis,⁹ and it seems likely that the same kind of analysis will be employed to examine the short- and long-term effects of the Amendments. Very little, however, has been written applying important recent findings from behavioral and cognitive science to examine whether the ADA has been effective, or whether the Amendments will be effective in achieving its stated goals. This Comment fills this gap in the literature, and argues that the particular ways in which ADA jurisprudence has drifted from congressional intent are particularly harmful because ADA jurisprudence fails to protect against discrimination caused by implicit bias, a particularly prevalent form of disability discrimination. This Comment then briefly analyzes the Amendments in light of recent scientific developments, and attempts to determine whether the Amendments will prove to be a positive step toward meeting the original goals of the ADA and accounting for discrimination resulting from implicit bias.

Part I of this Comment provides an overview of the legislative and jurisprudential history of the definition of a disability under the ADA. Focusing specifically on the ADA's regarded-as prong, I explain why pre-Amendments ADA jurisprudence is incompatible with Congress's original intent in passing the ADA. To qualify as disabled under the ADA, a claimant had to show that she had an impairment substantially limiting a major life activity, had a record of such impairment, or was subjectively regarded as having such impairment.¹⁰ This was not always the case: Originally, a plaintiff was considered disabled under the regarded-as prong of the definition of disability if an employer had *treated* the plaintiff as disabled in any way. The regarded-as prong was intended to be a broad catch-all category to protect against the "myths, fears,

9. See generally NAT'L COUNCIL ON DISABILITY, POLICY BRIEF SERIES: RIGHTING THE ADA NO. 15, THE SUPREME COURT'S DECISIONS DISCUSSING THE "REGARDED AS" PRONG OF THE ADA DEFINITION OF DISABILITY 8–11 (2003) [hereinafter NCD, RIGHTING THE ADA]; Cheryl L. Anderson, "Deserving Disabilities": Why the Definition of Disability Under the Americans With Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement, 65 MO. L. REV. 83 (2000) [hereinafter Anderson, *Deserving Disabilities*]; Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans With Disabilities Act*, 117 YALE L.J. 992 (2008) [hereinafter Anderson, *Just Semantics*]; Ruth Colker, *The Mythic 43 Million Americans With Disabilities*, 49 WM. & MARY L. REV. 1 (2007); Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans With Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1434–47 (1999); Feldblum, *supra* note 8, at 129–60; Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587 (1997); Michelle T. Friedland, Note, *Not Disabled Enough: The ADA's "Major Life Activity" Definition of Disability*, 52 STAN. L. REV. 171, 194–97, 201–02 (1999); Michael Selmi, *Interpreting the Americans With Disabilities Act: A Case Study in Pragmatic Judicial Reconstruction* (GWU Legal Studies Research Paper No. 247, 2007), available at <http://ssrn.com/abstract=968723>.

10. Americans With Disabilities Act, 42 U.S.C. § 12102(2) (2000).

and stereotypes”¹¹ prevalent in our society about individuals with disabilities. Discriminatory treatment was seen under the law as a *cause* of a disabling situation for a worker, and thus was prohibited under the ADA.¹²

In 1999, the Supreme Court changed the face of disability law with its decision in *Sutton v. United Air Lines*.¹³ The *Sutton* Court shifted the focus away from the treatment by the employer and placed it on the *mindset* of the employer, requiring a plaintiff to show an employer’s perception or misperception of the plaintiff as having a particular impairment that substantially limited a specific major life activity.¹⁴ The effect was to focus analysis essentially on whether the plaintiff was a qualified individual to bring a claim at all rather than on the existence of discrimination, reading the ADA in an arguably literal yet certainly narrow way that was not intended by its drafters.¹⁵

Part II of this Comment introduces behavioral realism, the notion that the law should be consistent with the current understanding of behavioral science. The Part goes on to highlight the potential benefits from applying behavioral realism to the ADA, arguing that the act’s language and application should strive to be consistent with the realities of human behavior. A wealth of recent research strongly suggests that much of our behavior and decisionmaking is the result not of conscious thought, but of implicit attitudes and stereotypes. Implicit bias is pervasive, deviates from our explicitly held beliefs and values, results in ingroup and socially privileged group preferences, and ultimately has the ability to affect our behavior in devastating ways.¹⁶ Implicit bias may, however, be malleable or reducible. Early research has shown that bias against individuals with disabilities is one of the strongest in our culture. Further, while we are largely unaware of our implicit bias generally, this lack of awareness seems to be especially pronounced in the case of bias against individuals with disabilities, thus likely contributing to discriminatory behavior.¹⁷

Part III applies contemporary science to the regarded-as prong of the ADA and analyzes the likely impact of the Amendments on instances of disability discrimination under this prong. After discussing the improvements of the

11. H.R. REP. NO. 101-485, pt. 3, at 30 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 451–53.

12. See *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 283–84 (1987).

13. 527 U.S. 471 (1999).

14. See *Sutton*, 527 U.S. at 493–94.

15. Many meritoriously argue that the U.S. Supreme Court cannot be blamed for this literal reading and drift from congressional intent, and that any fault should be placed on the drafters for using imprecise language in the act. See, e.g., Anderson, *Just Semantics*, *supra* note 9, at 995–96.

16. See generally Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. LAW & SOC. SCI. 427 (2007).

17. See Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36, 53–54 (2007).

Amendments over the original ADA from the perspective of behavioral science, I turn to the shortcomings of the Amendments. This discussion focuses on the lack of both remedial measures to mitigate the harmful effects of implicit bias and the use of debiasing agents¹⁸ in an attempt to reduce or to eliminate implicit bias against those with disabilities.

When the ADA was passed, it was heralded as the “‘emancipation proclamation’ for 43 million disabled Americans”¹⁹ and labeled by President George H.W. Bush as a “Declaration of Independence” for “future generations around the world.”²⁰ Prior to the Amendments in 2008, a plaintiff had a difficult time even getting “in the door,”²¹ unable to show that she was an individual with a disability under the ADA’s narrowly interpreted definition, despite facing discrimination for impairments that Congress had intended to protect as liabilities. While the verdict is still out on the Amendments, the changes embodied in the act are more consistent with implicit bias and protecting individuals from the ways that implicit bias operates in a disability discrimination context.

I. THE ADA’S HISTORY OF PROMISE AND DISILLUSIONMENT

The history of the regarded-as prong of the definition of a disability under the ADA details a conceptual shift from an expansive interpretation, focused on the actions of the employer, to a narrow and technical interpretation, focused of the mindset of the employer and legal status of the employee. A look at the legislative record, however, reveals that the original intent for the regarded-as prong was for it to be both expansive and focused on the actions of the employer.

A. The Rehabilitation Act of 1973 Created an Expansive Set of Protections for Employees

In 1973, the Rehabilitation Act was passed into law.²² Section 504 of the act codified protections for those with disabilities “under any program or activity

18. A debiasing agent is a counterexample brought to an environment, either as an individual or as some physical feature, designed to positively alter the implicit bias of those who work in that environment. See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CAL. L. REV. 1063, 1109 (2006) (“A debiasing agent is an individual with characteristics that run counter to the attitudes and/or the stereotypes associated with the category to which the agent belongs.”).

19. Edmund Newton, *Disabled: The Battle Goes On*, L.A. TIMES, Aug. 16, 1990, at E1.

20. Statement on Signing the Americans With Disabilities Act of 1990, 2 PUB. PAPERS 1071 (July 26, 1990).

21. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 504 (1999) (Stevens, J., dissenting).

22. See Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 361 (codified at 29 U.S.C. § 701-796 (2000)).

receiving Federal financial assistance.”²³ The act defined a person with a disability—which it called a “handicapped individual”—as “any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services”²⁴

Congress found this definition to be “troublesome” and “far too narrow and constricting,”²⁵ and implemented two fundamental changes with the Rehabilitation Act Amendments of 1974. The first change was to require a substantial limitation on a major life activity. The second was to separate the definition of an individual with a disability into three distinct prongs. The resulting definition of an individual with a disability after the 1974 amendments was “any person who (A) has a physical or mental impairment which substantially limits one or more major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.”²⁶

The Senate Committee compared the regarded-as prong to the Civil Rights Act, which focused on the actual discrimination:

[T]he new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority.²⁷

The legislative history associated with an affirmative action provision in the act reveals that lawmakers intended the expansive definition to benefit employees.²⁸ Acknowledging the broad scope of the new regarded-as prong, and worried that employers could use that breadth to its advantage to fulfill the affirmative action obligations established in the act, the Committee wrote that “the affirmative action obligation cannot be fulfilled by . . . persons ‘regarded as’ handicapped.”²⁹ Thus, the Committee intended for the regarded-as prong to be expansive, but in such a way that benefited employees and not employers.

23. 29 U.S.C. § 794; *see also* Pub. L. No. 93-112, § 504, 87 Stat. 355, 393 (1973).

24. § 7(6), 87 Stat. 355, 361. After the 1974 amendments, this definition remained in the Rehabilitation Act as the criterion for eligibility for vocational rehabilitation services. 29 U.S.C. § 706(6) (1973). *See* NCD, RIGHTING THE ADA, *supra* note 9, at 2 & n.2.

25. S. REP. NO. 93-1297, at 37–38, 63 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6388, 6413.

26. Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(a)(6), 89 Stat. 1617, 1619 (1974) (codified at 29 U.S.C. § 706(6)).

27. S. REP. NO. 93-1297, at 39; *see also* 120 CONG. REC. 30,531, 30,534 (1974) (statement of Sen. Cranston).

28. S. REP. NO. 93-1297, at 39.

29. *Id.*

Initially, few courts applied the regarded-as prong of the definition. When it was applied, however, courts interpreted the prong expansively and kept an eye on the actions of the defendant employers. In the 1976 case *Sites v. McKenzie*,³⁰ a district court in West Virginia held that a prisoner who had been transferred between prison and a mental hospital four times during his forty-five years of incarceration “certainly [had] been regarded as [being mentally impaired]”³¹ without any further analysis.³²

In 1977, the Department of Health, Education, and Welfare (HEW) issued the first regulations implementing Section 504 of the Rehabilitation Act.³³ The regulations, “drafted with the oversight and approval of Congress,”³⁴ defined the regarded-as prong in specific terms:

Is regarded as having an impairment means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined [in the “actual impairment” paragraph] but is treated by a recipient as having such an impairment.³⁵

As the National Council on Disability notes, “[t]he three elements of this formulation focus on how individuals are treated rather than upon technical distinctions about how much impairment makes a person disabled, *i.e.*, it focuses on the existence of discrimination, not upon the characteristics of the person upon whom discrimination is visited.”³⁶ Other government agencies, including the Department of Justice, have adopted this three-part definition of the regarded-as prong.³⁷

The Supreme Court first interpreted the regarded-as prong in the 1987 case *School Board of Nassau County v. Arline*.³⁸ The Court found the plaintiff to be disabled under the Rehabilitation Act, having both an actual disability and a “record of” a disability.³⁹ The Court opined on the meaning of the regarded-as

30. 423 F. Supp. 1190 (N.D.W. Va. 1976).

31. *Id.* at 1197.

32. It is worth noting that the court did not look to determine whether the prisoner was regarded as having a substantial limitation of a specific major life activity.

33. NCD, RIGHTING THE ADA, *supra* note 9, at 4.

34. See *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 279 (1987) (citing *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 634–35 & nn.14–16 (1984)).

35. 45 C.F.R. § 84.3(j)(2)(iv) (2007).

36. NCD, RIGHTING THE ADA, *supra* note 9, at 4.

37. *Id.*

38. 480 U.S. 273.

39. *Id.* at 281.

prong as well, and its understanding of the intent of the regarded-as prong was consistent with the congressional committee reports:

Congress extended coverage . . . to those individuals who are simply “regarded as having” a physical or mental impairment. The Senate Report provides as an example of a person who would be covered under this subsection “a person with some kind of visible physical impairment which in fact does not substantially limit that person’s functioning.” Such an impairment might not diminish a person’s physical or mental capabilities, but could nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment.⁴⁰

The Court’s decision in *Arline* “emphasized that the ‘basic purpose . . .’ was ‘to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others.’”⁴¹ The Court also noted that with the ADA,

Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. . . . The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments⁴²

Again, the focus here is on the actions—more specifically, on the “reflexive reactions”—of the employer when determining whether an employee is disabled under the Rehabilitation Act. In fact, it is by virtue of the discriminatory reactions of the employer that the employee becomes truly disabled in a claim brought under the regarded-as prong.

Following the Supreme Court’s guidance in *Arline*, lower courts interpreted the regarded-as prong in a similarly expansive way. In 1990, the Fifth Circuit ruled in favor of an HIV-positive plaintiff asserting rights under the ADA, stating that “[t]he phrase ‘is regarded as having such an impairment’ means, inter alia, ‘is treated . . . as having such an impairment.’ . . . For purposes of this appeal, we assume that seropositivity to HIV antibodies is an impairment protected under section 504 and that [the employer] treated [the employee] as though he had such an impairment.”⁴³ As in *Arline*, the court asked whether the employee was treated a certain way to determine whether a disability existed.

40. *Id.* at 282–83 (quoting S. REP. NO. 93-1297, at 64 (1974), reprinted in 1974 U.S.C.A.N. 6414).

41. NCD, RIGHTING THE ADA, *supra* note 9, at 6 (quoting *Arline*, 480 U.S. at 284).

42. *Arline*, 480 U.S. at 284–85.

43. *Leckelt v. Bd. of Comm’rs of Hosp. Dist. No. 1*, 909 F.2d 820, 825 (5th Cir. 1990) (quoting 45 C.F.R. § 84.3(j)(2)(iv)(C) (2007); *Carter v. Orleans Parish Pub. Sch.*, 725 F.2d 261, 262–63 (5th Cir. 1984) (per curiam)).

A district court in Pennsylvania interpreted Pennsylvania state law that was derived from the Rehabilitation Act in a similar way.⁴⁴ The court cited to the Pennsylvania Human Relations Committee's statutory scheme and determined that the treatment by the employer was paramount:

One "is regarded as having such an impairment" if one possesses a physical impairment "that does not substantially limit major life activities but that is treated by an employer . . . as constituting such a limitation" or one "that substantially limits major life activities only as a result of the attitudes of others toward the impairment."⁴⁵

Once more, the focus was on how an employee was "treated by an employer" and on "the attitudes of others."⁴⁶

B. The ADA Legislative History and Subsequent EEOC Regulations Were Consistent With the Rehabilitation Act

When Congress adopted the ADA in 1990, it incorporated the language from the Rehabilitation Act to define an individual with a disability. As noted above, the climate in which the act was drafted was one in which the regarded-as prong was interpreted expansively in such a way that benefited the employee—focusing on the actions or "negative attitudes" of the employer rather than on the mindset of the employer and the actual or perceived existence of a specific impairment of a particular major life activity. Comments made by the Senate Committee prior to passage of the act are emblematic of the general understanding of the period: "A person who is . . . discriminated against because of a covered entity's negative attitudes towards disability is being treated as having a disability which affects a major life activity."⁴⁷ This remark highlights the same cause-and-effect formula where the employee's disability originates from the employer's discrimination. The Senate provided illustrative examples of the people whom the ADA was intended to protect:

For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person's physical appearance, that person would be covered under the third prong of the definition. . . . This third prong is particularly important for individuals with stigmatic conditions that are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity.

44. Cain v. Hyatt, 734 F. Supp. 671 (E.D. Pa. 1990).

45. *Id.* at 678 (quoting 16 PA. CODE § 44.4(4)(ii)(D)).

46. Thornhill v. Marsh, 866 F.2d 1182 (9th Cir. 1989); Doe v. Centinela Hosp., No. CV87-2514 PAR (PX), 1988 WL 81776, at *6 (C.D. Cal. June 30, 1988).

47. S. REP. NO. 101-116, at 24 (1989).

For example, severe burn victims often face discrimination. . . . [The third prong should also] ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation. . . . [Also protected are people] rejected for a particular job solely because they wear hearing aids, even though such people may compensate substantially for their hearing impairments by using their aids, speech reading, and a variety of other strategies.⁴⁸

The House Committee on Education and Labor also listed the example of a person with severe burns,⁴⁹ and reiterated the same cause-and-effect formula: “A person who is excluded from any basic life activity, or is otherwise discriminated against, because of a covered entity’s negative attitudes toward that person’s impairment is treated as having a disability.”⁵⁰ The House Committee on the Judiciary added that the third prong “is intended to cover persons who are treated . . . as having a physical or mental impairment that substantially limits a major life activity,”⁵¹ and declared that “a person who is rejected from a job because of myths, fears, and stereotypes associated with disabilities would be covered under this third [regarded-as] test . . . whether or not the person’s physical or mental condition would be considered a disability under the first or second part of the definition.”⁵²

President George H.W. Bush wrote:

The Administration worked closely with the Congress to ensure that, wherever possible, existing language and standards from the Rehabilitation Act were incorporated into the ADA. . . . Because the Rehabilitation Act was enacted 17 years ago, there is already an extensive body of law interpreting the requirements of that Act.⁵³

More than just the legislative branch felt as though the intent of the ADA’s language should follow “the existing language and standards” of the Rehabilitation Act.

48. *Id.* (citing *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987); *Thornhill*, 866 F.2d 1182; *Centinela Hosp.*, 1988 WL 81776).

49. NCD, RIGHTING THE ADA, *supra* note 9, at 7.

50. *Id.* (citing H.R. REP. NO. 101-485, pt. 2, at 53 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 335).

51. *Id.* at 8 (citing H.R. REP. NO. 101-485, pt. 3, at 29, *reprinted in* 1990 U.S.C.C.A.N. 445, 451–53).

52. *Id.* (citing H.R. REP. NO. 101-485, pt. 3, at 30, *reprinted in* 1990 U.S.C.C.A.N. 445, 453).

53. Statement on Signing the Americans With Disabilities Act of 1990, 2 PUB. PAPERS 1070 (July 26, 1990).

In July of 1991, the Equal Employment Opportunity Commission (EEOC) published its regulations pertaining to the ADA. First, it adopted the same three-part definition of the regarded-as prong that HEW used with the Rehabilitation Act.⁵⁴ Second, the EEOC stressed the importance of “myths, fears, and stereotypes” on the part of the employer in an analysis of the regarded-as prong: “An individual rejected from a job because of the ‘myths, fears and stereotypes’ associated with disabilities would be covered under [the regarded-as] part of the definition of disability”⁵⁵

These EEOC regulations and the legislative history associated with the ADA both indicate that the ADA was intended to be interpreted expansively and consistently with the Rehabilitation Act. The Supreme Court, however, soon offered a sharp departure from this expansive view.

C. *Sutton v. United Air Lines* Narrowed the Application of the Regarded-As Prong and Was Therefore Inconsistent With Congressional Intent

In 1999, the Supreme Court simultaneously issued three decisions interpreting the provision in the ADA that severely diminished the scope of the act for employees.⁵⁶ In *Sutton v. United Air Lines, Inc.*,⁵⁷ the Court issued the first interpretation of the regarded-as prong under the ADA, and this decision has remained its only holding on this issue since it interpreted the Rehabilitation Act’s regarded-as prong in *Arline* twelve years prior. In *Sutton*, the Court shifted the focus away from treatment by the employer to a belief or “misperception” by the employer.⁵⁸ The new *Sutton* standard was triggered by “mistaken beliefs”:

There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major

54. NCD, RIGHTING THE ADA, *supra* note 9, at 4. This definition was also adopted in regulations by the Department of Justice and by the Department of Transportation. *Id.* at 5.

55. 29 C.F.R. app. § 1630.2(1) (2007).

56. See *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (holding that a monocular individual had not shown that his vision was substantially impaired, and that he was, therefore, not disabled under the ADA); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999) (holding that a petitioner with medically controllable high blood pressure was not substantially impaired in any major life activity and was not regarded as disabled by his employer); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (holding that mitigating or corrective measures should be taken into account when determining the existence of an impairment, and that the twin sisters with severe myopia were not regarded as disabled when denied positions as global airline pilots).

57. 527 U.S. 471.

58. NCD, RIGHTING THE ADA, *supra* note 9, at 9.

life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.⁵⁹

The plaintiffs in *Sutton*, twin sisters with severe but correctable myopia, a vision impairment, had been denied employment as pilots for United Air Lines. The sisters brought a claim for discrimination under the ADA.⁶⁰ The Court ruled that the sisters did not have actual disabilities because their impairments must be considered in tandem with any possible mitigating measures.⁶¹ This ruling presents a bit of a conundrum for plaintiffs: You can be denied a position because of an impairment (such as myopia), but are not protected from that denial if the condition can be mitigated. It would seem that a solution to this legal puzzle would be use of the regarded-as prong. Staying with the example of the sisters' impairments in *Sutton*, even if their impairments did not rise to the level of a disability under the ADA—as the Court held—the employer's denial of employment on the basis of the impairment meant that the sisters were nonetheless treated as though they had disabilities. Surely they were regarded as being disabled. Justice Stevens would certainly agree with this conclusion:

59. 527 U.S. at 489. Compare the Court's language with the language previously laid out in the Department of Health, Education, and Welfare (HEW) and EEOC regulations, noted earlier in this Comment:

Is regarded as having an impairment means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined [in the "actual impairment" paragraph] but is treated by a recipient as having such an impairment.

45 C.F.R. § 84.3(j)(2)(iv) (2007).

60. *Sutton*, 527 U.S. at 458.

61. See *id.* at 482 ("Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act.").

This holding was a major shift from the original intent of the act in which lawmakers made it clear that mitigating measures were not to be considered. In fact, Justice Stevens argued in his dissent that the legislative history of the ADA stood for the proposition that individuals should be examined in their uncorrected state, arguing that the second "record of" prong makes no sense if courts are only to look at an individual's present condition:

If the Court is correct that "[a] 'disability' exists only where" a person's "present" or "actual" condition is substantially impaired, . . . there would be no reason to include in the protected class those who were once disabled but who are now fully recovered. Subsection (B) of the Act's definition, however, plainly covers a person who previously had a serious hearing impairment that has since been completely cured.

Id. at 498–99 (Stevens, J., dissenting).

“In my view, when an employer refuses to hire the individual ‘because of’ his prosthesis, and the prosthesis in no way affects his ability to do the job, that employer has unquestionably discriminated against the individual in violation of the Act.”⁶² Unfortunately for the plaintiffs, his view was not the majority’s.

The majority in the case came to, as Justice Stevens described it, “the counterintuitive conclusion that the ADA’s safeguards vanish when individuals make themselves more employable by ascertaining ways to overcome their physical or mental limitations.”⁶³ With regard to the major life activity involved in the case—working—the Court held that the plaintiffs needed to show that the employer regarded the plaintiffs as substantially limited “in the ability to perform either a class of jobs or a broad range of jobs in various classes.”⁶⁴ The Court held that the plaintiff could only show that United Air Lines regarded the plaintiffs’ poor vision as precluding them from holding positions as “global airline pilot[s].”⁶⁵ The Court concluded that “[b]ecause the position of global airline pilot is a single job, this allegation does not support the claim that respondent regards petitioners as having a *substantially limiting* impairment.”⁶⁶ As noted by the National Council on Disabilities, “this approach virtually eliminates the chance to assert most ‘failure-to-hire’ claims . . . so long as employers are able to convince courts that they only regarded the applicant as unable to perform a single job.”⁶⁷

It is worth repeating that the approach established by the Supreme Court directly contradicted the regulatory language and the Senate Committee report that approved the ADA, which established that “[a] person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity’s negative attitudes towards the disability is being treated as having a disability which affects a major life activity.”⁶⁸ In fact, the cause-and-effect formula established prior to *Sutton*, in which discrimination

62. *Id.* at 498 (Stevens, J., dissenting). Justice Stevens went on to question the “bizarre result” of the Court’s holding that “one who *continues to wear* a hearing aid that she has worn all her life might not be covered—fully cured impairments are covered, but merely treatable ones are not.” *Id.* at 499.

63. *Id.*

64. *Id.* at 491 (majority opinion) (quoting 29 C.F.R. § 1630.2(j)(3)(i) (1998)). This class-of-jobs approach was the accepted way to analyze whether an applicant was substantially limited in the major life activity of working under the actual-disability prong of the definition. This was the first time that it was extended to the regarded-as prong as well.

65. *Id.* at 493.

66. *Id.* The Court added, “[i]ndeed, there are a number of other positions utilizing petitioners’ skills, such as regional pilot and pilot instructor to name a few, that are available to them.” *Id.*

67. NCD, RIGHTING THE ADA, *supra* note 9, at 10.

68. S. REP. NO. 101-116, at 24 (1989); *see also* H.R. REP. NO. 101-485, pt. 2, at 53 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 335 (“A person who is excluded from any basic life activity, or is otherwise discriminated against, because of a covered entity’s negative attitudes toward that person’s impairment is treated as having a disability.”).

on the part of the employer effectively creates a disability, had been eradicated. After *Sutton*, the issue of discrimination never played into the initial equation. First, plaintiffs had to show that they were qualified to even bring a claim, and if the plaintiff wished to use the regarded-as prong, this required a showing of the employer's mental state—an inherently difficult task. The new interpretation was dangerous because it barred access to the courts before the courts could even consider the question of discrimination. Justice Stevens eloquently explained the danger by tying the behavior to irrational fear and stereotypes:

The case just raises the threshold question whether petitioners are members of the ADA's protected class. It simply asks whether the ADA lets petitioners in the door in the same way as the Age Discrimination in Employment Act of 1967 does for every person who is at least 40 years old, and as Title VII of the Civil Rights Act of 1964 does for every single individual in the work force. Inside that door lies nothing more than basic protection from irrational and unjustified discrimination because of a characteristic that is beyond a person's control. Hence, this particular case, at its core, is about whether, assuming that petitioners can prove that they are "qualified," the airline has any duty to come forward with some legitimate explanation for refusing to hire them because of their uncorrected eyesight, or whether the ADA leaves the airline free to decline to hire petitioners on this basis even if it is acting purely on the basis of irrational fear and stereotype.⁶⁹

Since 1999, courts had been held to this narrow interpretation, making it difficult for plaintiffs to bring successful claims in court notwithstanding the fact that Congress had intended that they be protected broadly under the ADA. This result called a number of lawmakers to action and brought about the ADA Amendments Act of 2008.

D. The ADA Amendments Act of 2008 Helps Restore Congressional Intent to the Regarded-As Prong

The ADA Amendments Act was signed into law by President George W. Bush on September 25, 2008:

[T]o reject the Supreme Court's reasoning in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third [regarded-as] prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), which set forth a broad view of the third

69. 527 U.S. at 504 (Stevens, J., dissenting) (citation omitted).

prong of the definition of handicap under the Rehabilitation Act of 1973.⁷⁰

Both the U.S. Senate and the House found that in enacting the ADA, they intended to “provide broad coverage.”⁷¹ The Senate added that “decisions and opinions of the Supreme Court have unduly narrowed the broad scope of protection afforded by the [ADA], eliminating protection for a broad range of individuals whom Congress intended to protect.”⁷² The Senate pointed to *School Board of Nassau County v. Arline* as an embodiment of how the ADA’s language was interpreted at the time of the ADA’s adoption, and that the case “acknowledged that society’s myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”⁷³ Both houses of Congress wrote that one purpose of the Amendment was to “reinstate the original congressional intent regarding the definition of disability in the [ADA] by clarifying that the protection of that Act is available for all individuals who are . . . adversely affected . . . by prejudiced attitudes, such as myths, fears, ignorance, or stereotypes concerning disability”⁷⁴

Under the Amendments, a disability is:

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment⁷⁵

The Amendments proceed to define an individual whom is “regarded as having such an impairment” as one who “establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”⁷⁶ However, this definition does not apply to “impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.”⁷⁷

Under the regarded-as prong of the definition of an individual with a disability, individuals who have been “subjected to an action” for an “actual or perceived physical or mental impairment” are protected.⁷⁸ The Amendments also state that “[t]he definition of disability in this Act shall be construed in

70. ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 2(b)(3), 122 Stat. 3553, 3554 (2008).

71. *Id.* § 2(a)(1).

72. S. 1881, 110th Cong. § 2(a)(1)–(2) (2007).

73. *Id.* § 2(a)(4)(B) (quoting *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987)).

74. *Id.* § 2(b)(3); see also H.R. 3195, 110th Cong. (2008).

75. ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(a), § 3(1), 122 Stat. 3553, 3555.

76. *Id.* sec. 4(a), § 3(3)(A).

77. *Id.* sec. 4(a), § 3(3)(B).

78. *Id.* sec. 4(a), § 3(3)(A).

favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”⁷⁹ Such straightforward language returns the focus to the external actions of the employer and could go a long way toward reinstating Congress’s cause-and-effect concept of disability—that is, that discrimination by an employer is in itself debilitating.

II. IMPLICIT BIAS AGAINST INDIVIDUALS WITH DISABILITIES IS REAL AND SHOULD BE CONSIDERED BY LEGISLATORS AND COURTS

The Amendments, aside from being more consistent with congressional intent,⁸⁰ are largely consistent with how we as humans operate in terms of cognitive decisionmaking. The post-*Sutton* application of the ADA’s regarded-as prong was not.

When we apply behavioral realism—the notion that lawmaking and jurisprudence should strive to be consistent with current understandings of behavioral science—to an analysis of the courts’ treatment of the regarded-as prong under the ADA, it becomes evident that recent findings in behavioral science are largely inconsistent with assumptions supporting the pre-Amendments ADA regime.

Applying behavioral realism can be conceptualized as a three-step process. The first step is to “identify advances in the mind and behavioral sciences that provide a more accurate model of human cognition and behavior.”⁸¹ The second step is to “compare th[e] new model with the latent theories of human behavior and decision making embedded within the law”; these generally “reflect common sense based on naïve psychological theories.”⁸² Finally, where there is a discrepancy between the new model and the latent theories, “law makers and legal institutions” should be asked to “account for this disparity.”⁸³

When we apply this three-step process to the regarded-as prong of the ADA, the result before the Amendments is a large discrepancy needing

79. *Id.* sec. 4(a), § 4(A).

80. The argument that pre-Amendments ADA jurisprudence, and specifically that which related to the regarded-as prong, has drifted from Congressional intent is not a novel one. See generally NCD, RIGHTING THE ADA, *supra* note 9, at 8–11; Anderson, *Deserving Disabilities*, *supra* note 9; Anderson, *Just Semantics*, *supra* note 9; Colker, *supra* note 9, at 50–62; Eichhorn, *supra* note 9, at 1461–77; Feldblum, *supra* note 8, at 157–60; Mayerson, *supra* note 9; Friedland, *supra* note 9; Selmi, *supra* note 9, at 28–29. Many of these sources advocate for adoption of the Amendments for various reasons.

81. Lane, Kang & Banaji, *supra* note 16, at 440.

82. *Id.*

83. *Id.*

attention. There are two scientific findings that should be taken under consideration in reaching this conclusion. First, modern developments in behavioral psychology indicate that human behavior is based more on implicit bias and stereotypes than once thought.⁸⁴ Second, empirical data show that in the United States, implicit bias and stereotypes are especially strong against people with disabilities, and that implicit bias varies greatly from explicitly held attitudes.⁸⁵

A. Behavioral Realism Is a Valuable Jurisprudential Corrective

Although behavioral realism seems like a logical approach towards lawmaking, it is not without its detractors. Some argue that only “normative legal principles and traditional tools of statutory and constitutional interpretation” should guide lawmaking.⁸⁶ According to this argument, because empirical propositions sometimes change, judges should not base decisions on the basis of those propositions.⁸⁷ There are two prevailing counterarguments to this assertion. First, whether or not judges endorse the use of empirical social science, they nearly always apply social psychology in their decisions. However, the psychology actually applied is generally based on intuitive or common sense theories.⁸⁸ The problem with this approach is that common sense theories “often turn out to be wrong” in behavioral science.⁸⁹ If it is true that judges employ psychological theories in coming to decisions,⁹⁰ it would be prudent to ensure that the theories used are the correct ones. Behavioral realism’s goal is to do just that: “Behavioral realism is not a jurisprudential innovation; it is a jurisprudential corrective.”⁹¹

A second counterargument is that a normative theory of law based on faulty premises cannot realistically perform much normative work anyway. Even if we were to concede that normative work must supply the fundamental principles of lawmaking and legal interpretation, specified normative goals

84. *Id.* at 435–37.

85. Nosek et al., *supra* note 17, at 18–19.

86. Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1005 (2006).

87. *See id.* at 1005–06.

88. *See id.* at 1006.

89. *Id.*

90. Attempting to prove this proposition is beyond the scope of this Comment. For a persuasive argument regarding this proposition, see Linda Hamilton Krieger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 J. SOC. ISSUES 835 (2004).

91. Krieger & Fiske, *supra* note 86, at 1006. “In discrimination law, there already is, and there has long been, an ‘intuitive psychologist behind the bench.’” *Id.* (quoting Krieger, *supra* note 90, at 337).

must be operationalized through legal doctrine and policies.⁹² “When those doctrines and policies are based on faulty models of relevant social phenomena, the law’s ability to advance its normative agenda will be compromised.”⁹³

This is not to say that jurisprudential norms have no place in lawmaking and legal interpretation. On the contrary, the use of empirical behavioral science still must generally yield to the use of precedent or statutory interpretation.⁹⁴ Because of the need to maintain predictability and stability in a common law system, the use of empirical behavioral science may be best suited in the lawmaking process—as opposed to legal interpretation. Ideally, it should play some role in both.

Another critique of the use of behavioral science in lawmaking is that “[p]sychological science is basic research, often conducted in the laboratory. Meanwhile, legal disputes concern events in the real world.”⁹⁵ One counterargument to this is that “psychological science provides effective mechanisms not only for testing the laboratory validity of psychological theories, but also for determining whether those theories accurately represent effects that occur with meaningful frequency in the real world.”⁹⁶ Another is that even where there are minimal studies to demonstrate field validity, psychological theories that have been vetted in the laboratory are still superior to a “judge’s *a priori* psychological intuitions, which have no demonstrated validity at all”⁹⁷

There has been a great deal of work done over the past few years in the area of cognitive psychology, supported by a wealth of laboratory- and field-based empirical evidence.⁹⁸ To ignore these new findings and to rely on unproven common sense theories of behavior does nothing to support or advance a common law system based on norms. The legal theories used should be as based in reality as the facts to which the theories are applied.

B. Decisionmaking Is Influenced By Implicit Bias Much More Than Once Thought

After much research, the scientific community has recently come to the consensus that human behavior is under unconscious control much more than initially thought. Two leading experts in the field have written that the assault

92. Krieger & Fiske, *supra* note 86, at 1007.

93. *Id.* at 1007.

94. *See id.* at 1006.

95. *Id.* at 1022.

96. *Id.* at 1023.

97. *Id.* at 1023–24.

98. *See* Lane, Kang & Banaji, *supra* note 16.

on the assumption that human behavior is largely under conscious control “resembles the previous century’s Freudian revolution,” but that this movement is likely to prove longer lasting than Freudian theories because it—unlike Freud’s work—is “being constructed from an evolving, accumulating body of reproducible research findings.”⁹⁹

The reality is that behavior, including decisionmaking, is driven largely by implicit preferences (or attitudes) and beliefs (or stereotypes), which together constitute implicit bias.¹⁰⁰ Professor Anthony G. Greenwald, a leading psychologist in the field of implicit bias, defines an attitude as “an evaluative disposition—that is, the tendency to like or dislike, or to act favorably or unfavorably toward, someone or something.”¹⁰¹ A stereotype is “a mental association between a social group or category and a trait.”¹⁰² “Stereotypes can involve associations that are either favorable or unfavorable”; the content of the associated traits is of central importance, regardless of the trait’s favorable or unfavorable associations, also known as its evaluative valence.¹⁰³ For attitudes, the opposite is true: An attitude is an evaluative preference, or an association between someone or something and its evaluative valence.¹⁰⁴ Implicit attitudes and stereotypes are those that are triggered automatically at an unconscious level.¹⁰⁵ Attitudinal activation occurs “more rapidly unconsciously than can be mediated by conscious activity” and is initiated by subliminal stimuli.¹⁰⁶

A bias is defined as “a displacement of people’s responses along a continuum of possible judgments,”¹⁰⁷ and can be conceptualized as the real-world application of one’s attitudes and stereotypes. In an employment context, for example, attitudinal bias is shown if “one favors members of one race over those of another.”¹⁰⁸ It follows that implicit bias is bias based on implicit attitudes or implicit stereotypes. This bias can be either favorable or unfavorable.¹⁰⁹

Considerable research has explored why we have implicit attitudes and stereotypes. Most of this research concludes that implicit attitudes and stereotypes are the product of categorization that our brains must utilize in order to process information. For example, Professor Linda Krieger argues that our brains are

99. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006).

100. See Lane, Kang & Banaji, *supra* note 16, at 429.

101. Greenwald & Krieger, *supra* note 99, at 948.

102. *Id.* at 949.

103. *Id.*

104. See *id.*

105. *Id.* at 946, 948–50.

106. *Id.* at 948.

107. *Id.* at 950.

108. *Id.* at 951.

109. See *id.*

forced to construct stereotypes to simplify the task of perceiving, processing, and retaining information and that stereotyping is therefore an essential and normative process.¹¹⁰ Stereotypes, which operate without intent at the unconscious level, in turn “bias intergroup judgment and decisionmaking.”¹¹¹

Professor Jerry Kang argues similarly, asserting that we all create schemas, which are “cognitive structure[s] that represent[] knowledge about a concept or type of stimulus, including its attributes and the relations among those attributes.”¹¹² When deployed in a racial context, for example, we create racial schemas. This occurs through the application of mapping rules, which operate to map individuals into distinct categories that activate distinct meanings. In turn, the particular meaning activated by associating an individual with a category alters our interaction with the individual.¹¹³ Use of such schemas inevitably result in bias and are triggered merely by a target’s appearance, even if that appearance is fleeting and subliminal.¹¹⁴ It is postulated that this process of categorization and schema creation starts early in our development.¹¹⁵ “[E]arly (even preverbal) experiences, affective experiences, cultural bias, and cognitive consistency principles” all likely have a causal influence on the creation of attitudes and stereotypes.¹¹⁶

One of the primary reasons for the considerable amount of research and debate on implicit bias in recent years is the development of the Implicit Association Test (IAT). The IAT is a web-based tool¹¹⁷ developed in 1998 that can be used to test either implicit attitudes or implicit bias by measuring automatic group-valence (implicit attitudes) and group-trait (implicit stereotypes) associations. While other tests have been used to measure implicit attitudes and stereotypes, the IAT has become the preeminent test and the source of an overwhelming percentage of scholarship and debate on implicit bias due to its accessibility, real-time feedback, and reliability.¹¹⁸

For example, an IAT configured to measure automatic associations between white or black faces and positive or negative concepts is measuring race-based

110. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995).

111. See *id.* at 1190.

112. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1498 (2005) (quoting SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 98 (2d ed. 1991)).

113. *Id.* at 1504.

114. *Id.* at 1503.

115. See Krieger, *supra* note 110, at 1163–64.

116. See Greenwald & Krieger, *supra* note 99, at 959 (quoting Laurie A. Rudman, *Sources of Implicit Attitudes*, 13 CURRENT DIRECTIONS IN PSYCHOL. SCI. 79, 79 (2004)).

117. A less accurate paper-based version is also available.

118. See Nosek et al., *supra* note 17, at 43.

implicit attitudinal preference.¹¹⁹ The test works by asking the examinee to pair two concepts, such as “a black face and good,” or “a white face and good,” and by measuring the speed at which the examinee is able to make the pairings.¹²⁰ The test relies on response time because faster responses equate to pairings that are more strongly associated in memory. In other words, if an examinee associates white faces with positive words more quickly than black faces, then that examinee likely has a closer implicit association between whites and positive thoughts than blacks and positive thoughts, thus indicating an implicit bias in favor of whites.¹²¹ Primarily because of the centrality of attitude as a concept in psychology since the 1930s, considerably more attention has been given to investigating implicit attitudes than implicit stereotypes.¹²²

Four common themes have arisen from the study of implicit bias: (1) implicit bias is pervasive; (2) implicit bias diverges from the consciously reported preferences and beliefs of the same individual; (3) implicit bias predicts consequential behavior; and (4) implicit bias is malleable and its effect on behavior might be mitigated through motivation.¹²³

1. Implicit Bias Is Pervasive

Assuming the science about categorization and schema creation is correct, it should not be a surprise if implicit bias were found to be widespread and a large factor in disability discrimination. In fact, IAT data confirm this notion.¹²⁴ Approximately three in four individuals who take the race IAT online show some degree of race-based bias.¹²⁵

2. Implicit Bias Diverges From Consciously Reported Preferences

An individual’s implicit bias diverges from her consciously reported preferences and beliefs. This bias tends to favor ingroups and socially valued groups.¹²⁶ Overwhelming evidence suggests that implicit bias measures are

119. Kang, *supra* note 112, at 1509–10.

120. *Id.* at 1509–12.

121. A series of IAT tests can be taken online at Project Implicit, <http://www.projectimplicit.org> (last visited Oct. 5, 2008).

122. See Krieger, *supra* note 110, at 1174–77.

123. See Lane, Kang & Banaji, *supra* note 16, at 429.

124. See Nosek et al., *supra* note 17, at 46.

125. *Id.*

126. As persuasive—though embarrassing—anecdotal evidence, I admit that the IAT revealed that I have moderate implicit biases against individuals with disabilities. Certainly, my academic and intellectual pursuit of stronger legal protections for such individuals reflects a quite different explicit

dissociated from explicit bias measures,¹²⁷ and that bias operates absent any intent to favor or disfavor members of a particular social group.¹²⁸ Professors Lane, Kang, and Banaji note that “implicit and explicit measures provide distinct, although sometimes related, assessments of biases.”¹²⁹ After performing a meta-analysis of 126 individual studies, Lane, Kang, and Banaji found substantial variability in the strength of the relationship between implicit and explicit cognitions, and that statistical analysis of both measures shows that implicit and explicit measures rely on separate processes.¹³⁰

Implicit bias shows much more ingroup and socially valued group favoritism than explicit measures.¹³¹ Nearly one hundred studies have documented “people’s tendency to automatically associate positive characteristics with their ingroups more easily than outgroups,”—a phenomenon known as “ingroup favoritism.”¹³² The studies also documented the reverse phenomenon, known as outgroup derogation: people tend to “associate negative characteristics with outgroups more easily than ingroups.”¹³³ These ingroup preferences permeate both explicit and implicit biases, and ingroup favoritism is so strong that people report a preference to a group even when randomly assigned to that group.¹³⁴ However, when it comes to favoritism for socially privileged groups, attitudes are much stronger at the implicit level than at the explicit level.¹³⁵

3. Implicit Bias Predicts Consequential Behavior

The third theme arising from empirical studies, and perhaps the one with the strongest implications in this analysis, is that implicit bias predicts consequential behavior. Professors Greenwald and Krieger note that both implicit and explicit measures “were significantly correlated with measures of

attitude. Curious readers can test themselves online with a series of IAT tests at Project Implicit, *supra* note 121.

127. Kang, *supra* note 112, at 1512.

128. Krieger, *supra* note 110, at 1188.

129. Lane, Kang & Banaji, *supra* note 16, at 431–32.

130. *Id.* For a detailed scientific explanation of dissociation, see Brian A. Nosek, *Moderators of the Relationship Between Implicit and Explicit Evaluation*, 134 J. EXPERIMENTAL PSYCHOL. 565 (2005).

131. Lane, Kang, and Banaji note that “[t]he pattern of stronger ingroup preference among members of socially privileged groups is predicted by system justification theory.” Lane, Kang & Banaji, *supra* note 16, at 433–35. For more on system justification theory, see Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119 (2006).

132. Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004).

133. *Id.*

134. Lane, Kang & Banaji, *supra* note 16, at 431–33.

135. *Id.* at 433–35.

behavior,” but that when it comes to prejudicial attitudes and stereotypes, predictive validity was significantly greater for the IAT measures than for explicit measures.¹³⁶ Following Professor Kang’s schemas model, “implicit bias against a social category predicts disparate behavior towards individuals mapped to that category,” regardless of contrary “explicit commitments in favor of cross-category equality.”¹³⁷ Kang argues that implicit bias affects how we interpret social situations, perform on objectively measured tests, and interact with others.¹³⁸

Multiple studies have shown a particularly grave consequence of the behavior-altering nature of implicit bias: shooter bias. Shooter bias is a phenomenon where individuals are more likely to assume that blacks holding an object have a gun, rather than something that is not dangerous, than whites who also have an object.¹³⁹ Some have pointed to the real life consequences of shooter bias in the New York City police shootings of Amadou Diallo¹⁴⁰ and Sean Bell,¹⁴¹ noting that even if the police officers who did the shooting lacked any explicit animus towards blacks, they still likely behaved based on implicit stereotypes, purely by virtue of exposure to stereotypes that blacks are more likely to be violent or carry guns.¹⁴²

4. Implicit Bias Is Malleable

The final important theme, and one that provides hope, is that implicit bias is malleable and its effect on behavior might be mitigated through motivation.¹⁴³ However, some have argued that motivation could have only a minimal effect on behavior.¹⁴⁴ The most common solution researchers have

136. Greenwald & Krieger, *supra* note 99, at 954.

137. See Kang, *supra* note 112, at 1514.

138. *Id.* at 1515–25.

139. *Id.* at 1525–28.

140. Amadou Diallo was an unarmed Guinean immigrant who was shot at 41 times and killed by four New York City police officers. See Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shootings Are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, at A14.

141. Sean Bell was a twenty-three-year-old black man shot and killed by police while leaving his bachelor party in Queens, New York. See Robert D. McFadden, *Police Kill Man After a Queens Bachelor Party*, N.Y. TIMES, Nov. 26, 2006, at 1.

142. Lane, Kang & Banaji, *supra* note 16, at 429–30.

143. *Id.* at 437–38 (“[W]hen people are motivated to behave in a nonprejudiced manner, they may be able to override the effects of implicit bias on behavior. People are most likely to be able to perform this correction when they can recognize the potential for social group membership to influence their behavior and to control the behavior itself.”).

144. Greenwald & Krieger, *supra* note 99, at 962 (alluding to T. Andrew Poehlman et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity* (2005) (unpublished manuscript) (on file with author)).

found for minimizing implicit bias is exposure to counterstereotypical outgroup members.¹⁴⁵ Others suggest that simple media exposure or even imagining counterstereotypical group members may influence implicit associations.¹⁴⁶ The combination of outgroup members and imagery can collectively be thought of as debiasing agents.¹⁴⁷ The consensus seems to be that efforts to eliminate implicit bias through the use of debiasing agents result in “reduction, but not elimination, of implicit biases.”¹⁴⁸

C. Implicit Bias Against Individuals With Disabilities Is One of the Strongest Types of Implicit Bias in Our Society

Much research has been done analyzing implicit bias relating to age, gender, race, and sexuality, but there are few studies looking at implicit bias against individuals with disabilities.¹⁴⁹ Fortunately, the IAT has provided us with a wealth of data to examine. The creators of the IAT recently examined massive amounts of data from those who completed IATs online between July 2000 and May 2006.¹⁵⁰ While acknowledging that this was a self-selecting sample of test takers,¹⁵¹ the authors of the study wrote that “because of their substantial size and much greater diversity than is available in most laboratory studies, the datasets are useful”¹⁵²

The IAT used to measure bias against individuals with disabilities measures response times of test takers in associating images and symbols associated with disabled persons and images and symbols associated with abled persons together with the positive and negative words “Joy, Love, Peace, Wonderful, Pleasure, Excellent,” and “Evil, Angry, Terrible, Rotten, Nasty,

145. Lane, Kang & Banaji, *supra* note 16, at 438.

146. Greenwald & Krieger, *supra* note 99, at 963.

147. See Kang & Banaji, *supra* note 18, at 1108–10.

148. Greenwald & Krieger, *supra* note 99, at 964.

149. See Nosek et al., *supra* note 17, at 53 (“Attitudes towards people with disabilities receive little attention in psychology compared to the dominant interest in race and gender attitudes.”); Andrea Stier & Stephen P. Hinshaw, *Explicit and Implicit Stigma Against Individuals With Mental Illness*, 42 AUSTL. PSYCHOL. 106, 112 (2007) (noting the “limitations of explicit measures” and the fact that research on mental illness has “to date overwhelmingly neglected any alternative methods of assessing stigma,” while calling for increased exploration of behavioral measures of bias against those with mental illnesses); Bethany A. Teachman et al., *Implicit and Explicit Stigma of Mental Illness in Diagnosed and Healthy Samples*, 25 J. SOC. & CLINICAL PSYCHOL. 75, 77 (2006) (“Although stigma of mental illness has been measured using a variety of self-report and behavioral indicators, there has been little investigation into the role that implicit, less strategic or unintentional, processes play in the expression of bias.”).

150. See Nosek et al., *supra* note 17, at 37.

151. Those who went to the website to take the tests.

152. See *id.* at 42.

Bomb.”¹⁵³ The symbols associated with disabled persons include a handicap wheelchair sign, a drawing of crutches, a drawing of a blind man with a walking cane, and a seeing-eye dog. Symbols associated with abled persons include a school crossing sign with a mother and child, a drawing of a man skiing, and a drawing of a man running. If a test taker makes more mistakes when associating positive words with images associated with disabled persons when asked to do so, or is slower in making those associations than when associating negative words with disabled persons, such results would indicate the existence of some implicit bias against, or automatic preference for, abled persons when compared to disabled persons.¹⁵⁴ While some might argue that the result does not measure bias or automatic preferences towards individuals themselves, but instead towards disabilities, the creators of the IAT argue strongly that the test does, in fact, measure automatic preferences towards the individuals and not the disabilities.¹⁵⁵ Either motivation, however, could cause the same ultimate result: discrimination.

When looking specifically at bias towards individuals with disabilities, the authors of the study found that “[p]reference for people without disabilities compared to people with disabilities was among the strongest implicit and explicit effects across the social group domains.”¹⁵⁶ In fact, only attitudes based on age—and not gender, political orientation, race, religion, sexuality, weight, or any other types of categorization—showed more implicit bias than attitudes towards those with disabilities. Seventy-six percent of the sample showed an implicit preference for those without disabilities, while 9 percent showed a prodisabled preference.¹⁵⁷ Furthermore, the negativity was consistent “across genders, ethnicities, age groups, and political orientations,” making it a particularly widespread and permeating bias.¹⁵⁸ Even among those with disabilities, there was a preference for abled people, though it was lower than among those without disabilities.¹⁵⁹ This shows that outgroup and socially privileged bias trumped ingroup bias, something that occurred only with age and obesity among

153. Project Implicit, *supra* note 121.

154. *Id.* After taking the test on Project Implicit’s website, the page that provides the individual’s score states, “The interpretation is described as ‘automatic preference for Abled Persons’ if you responded faster when *Abled Persons* images and *Good* words were classified with the same key than when *Disabled Persons* images and *Good* words were classified with the same key. Depending on the magnitude of your result, your automatic preference may be described as ‘slight’, ‘moderate’, ‘strong’, or ‘little to no preference.’” *Id.*

155. See generally Nosek et al., *supra* note 17, at 53–54.

156. *Id.* at 54.

157. *Id.*

158. *Id.*

159. *Id.*

other social categories.¹⁶⁰ Interestingly, the gender difference “was more pronounced for implicit disability attitudes” than for any other measure; men showed a much stronger proabled preference than did women.¹⁶¹ Older adults showed more bias than younger adults.¹⁶²

Perhaps most disturbing of all the study’s results, disability bias had the second weakest correlation between implicit and explicit attitudes,¹⁶³ meaning that people are particularly unwilling to admit—or more likely, are unaware of—their implicit bias against individuals with disabilities. One possible cause for this is that our culture casts less focus on individuals with disabilities than on other categories of discrimination such as race or gender. One possible consequence of this is that people, being less aware of the existence of, or repercussions of, negative views towards those with disabilities, will possess less motivation to avoid the destructive behavior that follows negative bias. If true, not only would there be a greater prevalence of implicit bias against those with disabilities, there would also be a greater amount of destructive behavior resulting from that bias. The data strongly suggest that the situation is bleak for those with disabilities in our society and that legal protections should be structured accordingly.¹⁶⁴

Other studies have documented the prevalence of implicit and explicit bias against individuals with disabilities through means other than the IAT. These studies have focused on the bias of children,¹⁶⁵ the prevalence of bias among individuals from different ethnic groups against those with disabilities,¹⁶⁶ the prevalence of bias among individuals from different genders against those

160. *Id.*

161. *Id.* at 63.

162. *Id.* at 67.

163. *Id.* at 60. Age was very slightly less correlated.

164. In addition to the data obtained through the public Project Implicit, Implicit Associations Test website, *supra* note 121, others have conducted controlled IAT studies finding that there was no significant direct correlation between implicit and explicit measures, and that negative implicit attitudes exist pervasively among individuals without disabilities towards individuals with disabilities. Steven R. Prueett & Fong Chan, *The Development and Psychometric Validation of the Disability Attitude Implicit Association Test*, 51 REHABILITATION PSYCHOL. 202, 207 (2006) (involving a study of 223 volunteer students). The authors of the study noted that the IAT does not differentiate between different types of disabilities.

165. See generally Laura A. Nabors & Eric R. Larson, *The Effects of Brief Interventions on Children’s Playmate Preferences for a Child Sitting in a Wheelchair*, 14 J. DEVELOPMENTAL & PHYSICAL DISABILITIES 403 (2002); E.A. Nowicki, *A Cross-Sectional Multivariate Analysis of Children’s Attitudes Towards Disabilities*, 50 J. INTELL. DISABILITY RES. 335, 345 (2005) (“Younger children’s attitudes towards children with intellectual disabilities were more negative than those of older children.”).

166. See generally Carrie L. Saetermoe et al., *Ethnicity and the Stigma of Disabilities*, 16 PSYCHOL. & HEALTH 699, 711 (2001) (“[T]his research confirms that mental illness and severe physical and mental disabilities are particularly stigmatized and require special measures of public education.”).

with disabilities,¹⁶⁷ and the particular salience of bias against individuals with intellectual disabilities.¹⁶⁸ A common thread through all of these studies was that bias, whether measured explicitly or implicitly, is generally strong against individuals with disabilities, especially in situations in which the disability is mental in nature.

In light of the limited but troubling data that have been published examining implicit bias and individuals with disabilities, this Comment strongly advocates for additional research in this area. This research should account for both the facts that the current IAT data available are from a self-selected sample and that IAT data related to individuals with disabilities arguably lack field validity.¹⁶⁹ It is important to note that the current studies only examine attitudinal preferences and not implicit stereotypes. Given that “stereotypes guide judgment and action to the extent that a person acts toward another as if the other possesses traits included in the stereotype,”¹⁷⁰ and that our society fosters many stereotypes relating to those with disabilities, it is likely that disability stereotypes play a strong role—possibly even stronger than the role of implicit attitudes—in real-world decisionmaking. The existing data are alarming, and the fact that a large source of our natural bias against individuals with disabilities has not been explored, should serve as a strong call to bring more scientific attention and research to this issue.

167. See generally Amatzia Weisel & Victor Florian, *Same- and Cross-Gender Attitudes Toward Persons With Physical Disabilities*, 35 REHABILITATION PSYCHOL. 229, 235 (1990) (“[B]oth boys and girls expressed more negative attitudes toward females with disabilities than toward males with disabilities.”).

168. See generally Nowicki, *supra* note 165, at 345 (“All children were most biased against the target children representing the intellectual and intellectual/physical disability conditions compared with the no disability and physical disability conditions.”); Stier & Hinshaw, *supra* note 149, at 107 (“Stigma against mental illness is a crucial phenomenon because it has persisted even as tolerance for other stigmatized groups has gradually grown.”). Stier and Hinshaw note the “limitations of explicit measures” and the fact that research on mental illness “to date has overwhelmingly neglected any alternative methods of assessing stigma” while calling for increased exploration of behavioral measures (“the hallmark of sound social psychological research”) of bias against those with mental illnesses. *Id.* at 112–13; Teachman et al., *supra* note 149, at 83 (noting that “there was strong evidence of an implicit bias against mental illness relative to physical illness”). The last study also noted an “absence of a protective in-group bias” among both individuals with mental illness and caretakers of those individuals, meaning that those who have mental illness had a bias for individuals without mental illness. *Id.* at 91.

169. This argument does not necessarily apply to other IAT data, which has been validated through field testing. There are even some studies showing validity in a real-world setting for IATs dealing with mental health. See Anthony G. Greenwald, *IAT Studies Showing Validity With “Real-World” Subject Populations* (July 21, 2008), http://faculty.washington.edu/agg/IATmaterials/PDFs/Real-world_samples.pdf.

170. See Anthony G. Greenwald & Mazharin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 14 (1995).

D. The ADA Provides a Useful Example for Debating Current Scientific and Normative Questions About Implicit Bias and the IAT

The four conclusions described above, as well as the data gleaned from the IAT, are not without controversy.¹⁷¹ Critiques of implicit bias science and the IAT take two general forms: questions raised by psychologists about the science itself and questions raised by law and business professors about both the science and the normative implications of applying the findings to legal theory. Few experts disagree that implicit bias is real, but there is considerable debate as to whether the IAT measures it effectively, and whether that bias as measured by the IAT actually has real-world implications. As of April of 2006, over 250 IAT-related studies had been published, engendering a lively debate as to its full meaning.¹⁷² One observer noted that “[r]arely has a methodological tool garnered such strong adherents and detractors.”¹⁷³

Hart Blanton and James Jaccard argue that the “arbitrary metrics” used in the IAT render it meaningless to real-world application.¹⁷⁴ A metric is arbitrary “when it is not known where a given score locates an individual on the underlying psychological dimension or how a one-unit change on the observed score reflects the magnitude of change on the underlying dimension.”¹⁷⁵ The fact that the IAT relies on a fixed unit of measurement—the millisecond—is meaningless when the measurement of time is ultimately used as a measurement of “the magnitude of an attitudinal preference.”¹⁷⁶ Therefore, it is dangerous, argue Blanton and Jaccard, to examine a person’s IAT score and “imbue these values with meaning” about the individual’s implicit cognition.¹⁷⁷

Blanton and Jaccard underscore their argument by emphasizing that IAT advocates fail to identify a true zero point in the IAT’s bipolar scale.¹⁷⁸ In other words, little is done to show that what the IAT regards as zero, indicating a lack of any bias, actually corresponds to zero bias in reality. Blanton and Jaccard conclude with a warning: “We question whether any individual should

171. See generally Hart Blanton & James Jaccard, *Arbitrary Metrics in Psychology*, 61 AM. PSYCHOLOGIST 27 (2006); Bruce Bower, *The Bias Finders: A Test of Unconscious Attitudes Polarizes Psychologists*, 169 SCI. NEWS ONLINE 250 (2006); Klaus Rothermund & Dirk Wentura, *Underlying Processes in the Implicit Association Test: Dissociating Salience From Associations*, 133 J. EXPERIMENTAL PSYCHOL. 139 (2004); Anthony G. Greenwald, *Implicit Association Test: Validity Debates*, http://faculty.washington.edu/agg/iat_validity.htm#famil (last visited Oct. 6, 2008).

172. Bower, *supra* note 171, at 250.

173. *Id.*

174. Blanton & Jaccard, *supra* note 171, at 27.

175. *Id.* at 28.

176. *Id.* at 32.

177. *Id.*

178. *Id.* at 33.

ever be provided with the kind of feedback given daily to visitors of the IAT Web sites.”¹⁷⁹

IAT advocates respond to each of these critiques.¹⁸⁰ Regarding the use of an arbitrary metric, the advocates argue that their normalizing process makes the data metrically meaningful and have consequential validity.¹⁸¹ The advocates agreed that a true zero point cannot be calculated, but argue that studies have confirmed that the zero point used in the IAT is close enough to a true zero point to be scientifically useful.¹⁸² Furthermore, the advocates emphasize “the large body of published correlational findings” that show an accurate linkage between IAT scores and actual behavior, at least in a laboratory setting.¹⁸³ The advocates conclude by speculating that it is the “palpable and possibly unsettling” experience of taking the IAT that causes it to be the frequent target of skeptics.¹⁸⁴

Others endorse the concept of behavioral realism on a theoretical level and acknowledge that disparities in group outcomes persist despite the significant decline in overt racism, but nonetheless attack the science underlying implicit bias and the IAT. These critics argue that the IAT lacks construct validity, internal validity, statistical-conclusion validity, and external validity.¹⁸⁵ In specifically addressing the concerns of applying the science to legal theory, the critics claim that the “scientific rhetoric accompanying legal applications of this research is . . . more honorific than descriptive.”¹⁸⁶

The attack on the IAT’s construct validity is based on a dispute over what psychological processes the IAT actually measures. The authors suggest that rather than measuring “hidden reservoirs of unconscious positive and negative affect,” as IAT advocates suggest, it instead possibly measures familiarity with a certain group, empathy or sympathy towards a group, performance anxiety for “fear of being labeled a bigot,” awareness of stereotypes and socio-demographic

179. *Id.* at 39.

180. See Anthony G. Greenwald, Brian A. Nosek & N. Sriram, *Consequential Validity of the Implicit Association Test*, 61 AM. PSYCHOLOGIST 56 (2006).

181. *Id.* at 57.

182. *Id.* at 58–59.

183. *Id.* at 59. The authors also point to a recently published summary of predictive validity findings for the IAT in the form of a summary of eighty-six independent research samples as of May 2005. See Poehlman, *supra* note 144.

184. See Greenwald, Nosek & Sriram, *supra* note 180, at 60.

185. See Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006).

186. *Id.* at 1029.

facts, or “cognitive flexibility”—an ability to respond to compatible associations more quickly than incompatible ones.¹⁸⁷

The authors argue that the IAT lacks internal validity because IAT researchers rely entirely on correlational evidence to find a relationship between implicit bias and discriminatory behavior, while not controlling for other possible variables such as “discomfort or shame.”¹⁸⁸ The IAT lacks statistical-conclusion validity, the argument goes, because of “psychometric flaws and an alarmingly high false alarm rate,” indicating that many factors other than association strength can affect reaction time.¹⁸⁹ Finally, the IAT lacks external validity because researchers have not shown that correlations between IAT scores and discriminatory conduct observed in “laboratory settings reliably predict behavior in real-world [environments]” where “institutionalized layers of safeguards against the expression of prejudice” exist.¹⁹⁰ As examples of these safeguards, the authors point to “training workshops on how to make personnel decisions” and “written manuals and guidelines that place constraints on how they should perform their task.”¹⁹¹

These arguments are fundamental in the current academic debate over implicit bias and the IAT, but as Samuel Bagenstos points out, the arguments are inherently normative in nature, or at least dependent upon normative assumptions, and are not the scientific critiques they claim to be.¹⁹² A close look at each of the arguments shows that they rest on the assumptions that implicit bias should reflect explicit prejudicial attitudes, which is incorrect and misses the point of implicit bias research, and on the normative view that the law should only prohibit discrimination resulting from “self-conscious, irrational animus.”¹⁹³

187. *Id.* at 1031. Applying the schema theory of cognition, the authors argue that people store experiences together so that new and strange concepts stand out against routine or normal concepts. Slower associations, then, would reflect unfamiliarity rather than animus. *Id.* at 1072–73. The empathy theory is based on “neuropsychological research,” and the performance anxiety theory is supported by testing that shows that the more threatened people feel about the IAT, the worse they scored. *Id.* at 1079–83. The awareness theory is based on the fact that the scores people receive are simply a “rational reaction[] to existing socioeconomic conditions,” and that the more people know about inequalities, the more likely their scores will reflect the existence of implicit biases. *Id.* at 1085–86. Finally, the authors’ argument of cognitive flexibility is based on the theory that individuals can simply respond to compatible associations more quickly than incompatible ones. *Id.* at 1089.

188. *Id.* at 1032–33.

189. *Id.* at 1033.

190. *Id.*

191. *Id.* at 1110.

192. See generally Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477 (2007).

193. *Id.* at 479–82.

For example, even if one accepts the argument that some cause other than animus might explain implicit bias—despite compelling scientific arguments to the contrary¹⁹⁴—it ignores the fact that resulting bias, regardless of the particular cause, has real-world effects. If an individual is denied a position of employment based on a perceived disability, the individual has suffered regardless if the employer was motivated by animus. As Professor Bagenstos notes, “[i]f one cares about responding to conditions that operate as a systemic hindrance to the opportunities of members of minority groups . . . one should care about responding to that bias, even if implicit bias is not rooted in hostility.”¹⁹⁵ Clearly this raises questions about antidiscrimination law that are fundamental and normative, not scientific, and these questions are directly relevant in the context of disability discrimination.

The critics’ views about what kind of discrimination should be protected are also demonstrated in their argument that negative associations are inevitable, even rational, given existing socioeconomic conditions. However, these associations are not rational when applied to individuals who do not fit the stereotypes generated by existing socioeconomic conditions.¹⁹⁶ Further, even if they were rational, the “prohibition of rational discrimination is a central component of antidiscrimination doctrine.”¹⁹⁷ Finally, when implicit bias is a function of the surrounding stimuli, law and policy should strive to remove or reverse harmful surrounding stimuli through the use of debiasing agents.¹⁹⁸

The arguments based on external validity reflect the assumption by critics that implicit bias should always reflect explicit prejudices. When discriminatory conduct is the result of implicit bias, the individual is generally unaware of the harmful conduct. Therefore, it seems unlikely that the suggested safeguards such as training manuals and workshops—tools designed to influence explicit behavior—would be enough to offset the effects of unconscious and automatic bias.

This Comment does not attempt to answer these fundamental, normative questions, but instead notes three points that are particularly relevant within the specific context of the regarded-as prong of the ADA. First, to help answer Bagenstos’s fundamental question of “what kinds of harms are wrongful and

194. For a list of scientific studies and articles refuting all of the scientific critiques of the IAT, see Greenwald, *supra* note 169.

195. See Bagenstos, *supra* note 192, at 486.

196. *Id.*

197. *Id.* (quoting Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 V.A. L. REV. 825, 848 (2003)).

198. *Id.* at 487. My suggestions incorporate debiasing agents discussed *infra* Part III.

should be prevented,”¹⁹⁹ this Comment places great weight and normative value in the language of the act and in the legislative history of the ADA. The act states that its primary purpose is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”²⁰⁰ The House Committee on the Judiciary wrote that “a person who is rejected from a job because of myths, fears and stereotypes associated with disabilities would be covered under this third [regarded-as] test.”²⁰¹ This legislative history indicates that the focus of the ADA should be on the victims of discrimination with an eye toward eradicating discrimination. While critics of the ADA make many strong arguments in support of the “perpetrator perspective,” focusing on the degree of fault of the perpetrator,²⁰² the ADA and its history indicate that courts should focus instead on victims. When the victims become the focus, many, if not all, of the critics’ arguments are rendered moot and the findings of implicit bias research including IAT results become much more relevant.²⁰³

Second, much is written in the legislative history about the regarded-as prong being a remedy against employers’ “negative attitudes.”²⁰⁴ If the theory that implicit bias is caused by something other than animus is true, one might ask whether these alternate explanations—such as sympathy and unfamiliarity—rise to the level of the “negative attitudes” against which the prong was designed to protect. Again, however, such an argument is contingent on the relative fault of the perpetrator rather than the harm done against the victim, and such a focus runs counter to the intent of the act.

Finally, if the theory that bias is rooted in an alternate source such as sympathy or unfamiliarity is accurate, one would guess that these two explanations would have even greater impact when the targets of the bias are individuals with disabilities. Much research has been done on the concept of aversive prejudice, which is a conflict between an individual’s explicit, egalitarian value system and implicit, unacknowledged bias against a group.²⁰⁵ The research shows that “sympathy, guilt, social awkwardness, and shame” actually have “a

199. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 36 (2006).

200. 42 U.S.C. § 12101(b)(1) (2000).

201. H.R. REP. NO. 101-485, pt. 3, at 30 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 453.

202. See Bagenstos, *supra* note 192, at 488 (quoting Alan David Freedman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–54 (1978)).

203. This point is admittedly a theoretical one, as courts have already shown a focus on the fault of the perpetrator and not on the victim within ADA jurisprudence.

204. See, e.g., S. REP. NO. 101-116, at 24 (1989); H.R. REP. NO. 101-485, pt. 2, at 51–53 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 333–35.

205. See Greenwald & Banaji, *supra* note 170, at 15.

major effect in reinforcing . . . discrimination.”²⁰⁶ Furthermore, implicit bias motivated by sympathy only underscores the long and documented history of paternalistic discrimination in our society.²⁰⁷ These potentially dangerous pitfalls of aversive prejudice and paternalistic discrimination seem to require that even more attention be given to implicit bias research in the context of disabilities than in contexts giving rise to discrimination.

* * *

Behavioral realism should serve as an important jurisprudential corrective. Applying behavioral realism in the context of antidiscrimination law requires an examination of implicit bias research. While this research and the IAT have received a large amount of criticism, most of that criticism is based on different normative theories about the role of antidiscrimination law. Even where legitimate scientific debate persists, the findings provide a strong argument that implicit bias results in discriminatory behavior. If one reads the clear language of the act and its legislative history faithfully, one should focus on the victim and the existence of discrimination, warranting a new approach to the application of the ADA.

III. THE ADA AMENDMENTS ACT OF 2008 IS A STEP TOWARDS RECONCILING THE ADA WITH BEHAVIORAL SCIENCE

The status of the ADA before the Amendments provides a perfect example of an area of the law where a stark disparity plays out between an explicitly adopted model, supported by compelling evidence and latent operative theories based on subjective experience and common sense. This Part examines the likely benefits of the Amendments in terms of curbing discrimination motivated by implicit bias and discusses the ways in which the Amendments fail to fully deliver. While there has been no indication that the Amendments were passed into law because of new understandings in behavioral science, or because of an increased awareness of implicit bias, the Amendments still serve to better the law to protect against discrimination that originates from implicit bias.

206. Bagenstos, *supra* note 192, at 485.

207. *Id.*

A. The Benefits of the Amendments

The biggest advantage of the amended definition of an individual with a disability under the ADA is its returned focus to the treatment by the employer.²⁰⁸ This change is fundamental and could be consistent with how bias seems to operate in an anti-discrimination law context. Because the Amendments are new, however, the actual effects of the Amendments will not be known until courts have had time to grapple with the new language.

Advocates should keep a close eye on how courts interpret the phrase “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”²⁰⁹ The question will be whether courts will require a showing by a plaintiff of being treated as having any impairment generally—as in many pre-*Sutton*²¹⁰ cases—or being treated as having a specific identified impairment. If the plaintiff must allege a specific impairment that the employer has perceived or treated the plaintiff as having, this will, at least indirectly, reintroduce the relevance of employer’s mindset. It is not clear how one could prove being treated as having a specific impairment without proving that the employer was contemplating that specific impairment. If the required showing is dependent upon the employer’s professed attitudes, unconscious discrimination by implicit bias may very well slip through the cracks of the ADA once again.

If, on the other hand, courts allow a plaintiff to show proof of the employer’s discriminatory actions rather than to focus on the actual or perceived impairment, then such an interpretation would likely catch all types of discrimination, including those motivated wholly by implicit bias without any explicit intent on the part of the employer. For example, if a plaintiff only has to show evidence that an employer did not hire an overwhelmingly qualified candidate because the candidate had a resume full of work with various disability rights organizations (leading the employer to believe that the applicant had some unknown disability) without having to prove that he was mistreated based on a misperception that he had a specific impairment to a particular major

208. The Amendments elaborate on the definition of the regarded-as prong by stating: An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been *subjected to an action* prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4, § 3(3)(A), 122 Stat. 3553, 3555 (2008) (emphasis added).

209. *Id.*

210. *Sutton v. United Air Lines*, 527 U.S. 471 (1999).

life activity, then this interpretation to the Amendments would be consistent with how implicit bias causes discrimination in practice.

It seems that in the overwhelming number of discrimination cases, it is generally clear what particular impairment is at issue. An impairment is broader than a diagnosed and medically defined disability, so broad showings of a perceived impairment would likely suffice, and the focus of the evidence could be on the discriminatory action of the employer. Based on current antidiscrimination law, however, it seems unlikely that courts would be willing to place so much evidentiary weight on an action absent a showing of intent, regardless of the new language of the Amendments.

The Amendments are not a perfect solution because they potentially could still be interpreted by the courts not to protect against discrimination that stems from implicit bias. This Comment, however, endorses the Amendments as a significant step forward in refocusing courts on treatment of disabled persons and by removing the overly technical hurdle of providing a perceived substantial limitation on a major life activity.²¹¹

B. The Shortcomings of the Amendments

Proposals for alternate legal theories aimed at moving other areas of the law towards harmony with behavioral realism generally fall into two categories: (1) restrictions designed to reduce the harmful effects of implicit bias; and (2) the use of debiasing agents designed to minimize or eliminate the existence of implicit bias.²¹² Both of these can be difficult to implement practically, and as we have seen above in Part II.B.4, the latter may not even be theoretically possible. However, the Amendments would better account for discrimination caused by implicit bias if they included provisions thoughtfully crafted to achieve these goals.

To limit the effects of implicit bias, the Amendments should have incorporated stricter and broader affirmative action programs.²¹³ Adopting this approach concedes that implicit bias exists and inevitably results in discriminatory behavior; an affirmative action plan would be a remedial step designed to offset that discrimination.²¹⁴ Of course, this would not remove discrimination,

211. It should be noted that this Comment is concerned with reworking the ADA to minimize the amount of discrimination in the workplace against those with disabilities. Therefore, a careful analysis of other benefits and shortcomings of the Amendments, such as financial effects on employers, is beyond the scope of this discussion.

212. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 976–91 (2006).

213. This approach is also advocated by Jolls & Sunstein. *See id.* at 984–85.

214. In support of this idea, see generally Kang & Banaji, *supra* note 18.

but would serve as a type of reparation for disabled persons due to the existence of discrimination in our society.

In order to reduce or eliminate the existence of implicit bias, there are a number of approaches that the Amendments could have taken, but did not. First, the Amendments could have incorporated debiasing agents. The importance of debiasing agents would provide a separate and distinct justification for implementing stricter affirmative action programs.²¹⁵ In addition to serving as a remedial device, then, affirmative action would also be deployed with the goal of filling workplaces with more individuals with disabilities, thereby increasing interaction between those with disabilities and those without in the hopes that the increased interaction would decrease existing implicit bias. Of course, it would take time before a reduction in discrimination would be noticeable.

The Amendments also could have implemented tighter restrictions against hostile workplace environments.²¹⁶ Having hostile or stereotypical imagery in the workplace will likely strengthen existing implicit bias, so if it is limited, the negative associations will no longer be reinforced. The Amendment could have gone even a step further and required an increase in the presence of counterstereotypical imagery, which may have the effect of stemming or reversing bias.²¹⁷ This raises the valid argument that such changes would amount to government thought control or violations of the First Amendment, especially since the ADA covers private employers. Professors Jolls and Sunstein feel that these types of restrictions are inevitable in many areas of the law, and that any normative concerns raised here are weakened by the fact that many people are embarrassed of their implicit bias once they learn of them and want to be debiased when possible.²¹⁸

Finally, the Amendment should have called for, and possibly incorporated funding for, additional research in disability discrimination and how it operates. This research should add to existing studies examining implicit bias against individuals with disabilities, including studies designed to refute suggestions that the current research lacks field validity in an employment context.

These suggestions would all likely be expensive and controversial requirements to impose on employers. Even without them, however, the Amendments are a welcome step towards accounting for discrimination resulting from implicit bias.

215. Jolls & Sunstein, *supra* note 212, at 984–85.

216. *Id.* at 982–83.

217. *Id.* at 983–84. Jolls and Sunstein suggest that photographs of Tiger Woods, for example, might perform debiasing work in a racial context.

218. *Id.* at 992–94.

CONCLUSION

The ADA Amendments Act of 2008 was both a welcome and long overdue endeavor to restore the original intent of the ADA. Perhaps more importantly, it also may serve as a significant step towards protecting against discrimination resulting from implicit bias, especially in light of the fact that scientific findings indicate that more discrimination than was once thought is the result of implicit bias. By returning the focus of claims brought under the ADA to the discriminatory actions by the employer rather than the employer's subjective mindset, courts are more likely to account for situations where implicit bias results in discriminatory behavior without intent on the part of the employer. While the jury is still out as to whether the Amendments will be interpreted this way by courts, the act at a minimum provides practitioners with language to push courts in that direction.