Richard L. Wiener
Steven L. Willborn
Editors

Disability and Aging Discrimination

Perspectives in Law and Psychology

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Chapter 1
Finding the Assumptions in the Law: Social Analytic Jurisprudence, Disability, and Aging Workers

Richard L. Wiener and Stacie Nichols Keller

Analysis of the current state of research in disability and age discrimination in the workplace shows a field that is lacking in theoretical organization. The literature remains scattered and therefore lacking in solid conclusions about the presence or effect of discrimination in the workplace because of these factors. This discussion encourages the use of social analytic jurisprudence to guide future research in these areas and to serve better those who can use the research findings to effect change in the workplace. After reviewing recent changes in the law in areas of age and disability discrimination, the authors identify gaps in legal assumptions and recommend empirical research that would help replace these holes with knowledge about how people react to older and disabled workers.

This chapter serves as an introduction to this volume, and standing by itself looks at the problems of aging and disability at work from a unique point of view. The chapter and, indeed, the remainder of the volume do not focus on the general literatures on aging and disability but instead examine these issues from the lens of legal discrimination and, particularly, discrimination in employment law. The current chapter offers a perspective on the psychology of discrimination toward the aged and disabled that first examines some of the existing empirical work, ultimately fitting it into a framework that takes its structure from the law of discrimination. More importantly, it goes on to make some recommendations for new research that will address more directly some of the controversies that are active and current in the law. The perspective is one of action research in which the goal of both social science and legal analysis is to clarify what does and does not constitute discrimination at work and whether the result is consistent with the empirical reality of aging and discrimination.

Therefore, this essay and all the papers in this volume selectively consider areas of research with an eye toward determining what those literatures currently say about legal discrimination or what they might say in the future with additional data collection. The current chapter begins with a description of the research on aging

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and disability at work as an effort to document real and imagined limitations of age and disability that have implications for that environment. It then goes on to describe social analytic jurisprudence (Wiener & Hurt, 1999; Wiener, 1993), which is an approach to integrating social science and legal doctrine in a way that tests assumptions that the law makes about human behavior. We have used this approach to apply social science (especially psychology) to legal issues in a number of other areas including sexual harassment (Wiener, Cantone, Holtje, & Block-Lieb, 2009; Wiener et al., 2002; Wiener & Hurt, 2000; Wiener & Winter, 2007; Wiener, Winter, Rogers, & Arnot, 2004), criminal law (Wiener & Richter, 2008; Wiener, Arnot, Winter, & Redmond, 2006; Wiener et al., 2004), and most recently consumer bankruptcy (Block-Lieb, Wiener, Cantone, & Holtje, 2009; Wiener, Block-Lieb, Gross, & Baron-Donovan, 2005; Wiener et al., 2006, 2007).

The chapter applies the model of social analytic jurisprudence to age and disability discrimination in the workplace focusing on disparate treatment or intentional theories of legal discrimination, thereby pointing out the ways in which empirical analysis can add to shaping and clarifying the law. This analysis includes some cases that illustrate the issues that the social analytic framework helps to identify. Each of the chapters in this volume that follows this one attempt to integrate social scientific analysis and theory with the legal issues related to age and disability discrimination. Each chapter stands alone but each also adds a piece to the final mosaic that we hope paints an innovative view of how social science and law intersect to help us to understand problems of discrimination at work that are likely to become even more prevalent as workers grow older and ultimately (and unfortunately) experience more disability.

Empirical Documentation of Existing Biases and Limitations

Age and the Workforce

In general, research into prejudice and bias due to race, ethnicity, and gender has produced a vast literature, which covers many different types of bias against diverse populations in a variety of contexts. It is therefore surprising to find that studies of the experiences, attitudes, and behaviors of aging and disabled individuals at work are much less developed. While there are studies that examine these issues, this modest literature is not as organized or driven in a strong theoretical manner as is the research literature in many of the other areas of bias, prejudice, and discrimination. With respect to ageism more generally, the extant literature documents that many Americans hold inaccurate and negative stereotypes against older people (Falk & Falk, 1997; Hendricks, 2005; Nelson, 2002; Palmore, 1999; Palmore, Branch, & Harris, 2005) viewing them as senile, sad, lonely, poor, sexless, ill, dependent, demented, and disabled (McGuire, Klein, & Chen, 2008). Furthermore, many workers come to internalize these stereotypes so that they expect that these attributes will describe them during their own aging (Harris, 2005).

While the research literatures in this area scatter across a large number of domains, some themes emerge in the separate bodies of empirical findings that focus independently on aging and disability limitations in the workforce. For example, recent studies have examined some of the limitations that older workers may face when they need to master new technology. There appear to be some specific barriers in this regard (Lee, Czaja, & Sharit, 2009) including some findings which show the negative impact of continually changing equipments and tools on the stress levels that older workers experience (Fischer et al., 2002; Morris & Vankatesh, 2000). These findings seem to suggest that the negative stereotypes that many hold against the aged are at least somewhat justified when applied to the constantly changing workplace because the rapidly changing technology likely produces high levels of stress for older Americans.

Yet, the relationship between age and measured performance at work shows inconsistent results with at least one review demonstrating a positive relationship between age and performance (Waldman & Avolio, 1986), another showing no relationship (McEvoy & Cascio, 1989), and yet another reporting an inverted U-shaped function between the factors (Sturman, 2003). Most importantly, a recent and exhaustive meta-analysis (Ng & Feldman, 2008) found no relationship between age and core job task performance or job related creativity; however, there was a negative relationship between age and performance in training programs. While older people appear to perform as well as younger people on the job, they do show lower scores in mastering new procedures. On the other hand, older workers show higher ratings on organizational citizenship behaviors than younger workers do. More specifically, older workers relative to younger ones engage in less workplace aggression, substance abuse, and tardiness (Ng & Feldman, 2008). In a study conducted after this most recent meta-analysis was completed, older workers showed higher levels of compliance with safety policies resulting in fewer accidents than was the case for younger workers (Gyeke & Salminen, 2009). In fact, Ng and Feldman's meta-analysis (2008) found a positive relationship between aging and safety performance and a negative relationship between accidents and age.

Despite the fact that the picture that emerges shows few, if any, consistent performance decrements for aging workers, and that the positive attributes of older worker offset those decrements that do exist, the research literature suggests that older people have specific problems related to their age that may require some workplace accommodations. For example, shift work may be more difficult for older workers because of the changes in the circadian system that occurs with age (Costa & Di Milia, 2008). Further, the phenomenological experience of aging may present some special problems for workers in as much as those who see themselves as older tend to develop negative attitudes toward work, while those who believe that the workplace does not respond negatively to the age of the workers maintain positive attitudes toward work (Desmette & Gaillard, 2008). Furthermore, older workers who are satisfied with their coworkers, especially coworkers who are over 55 and similar to them, show greater engagement at work than do those that are dissatisfied with similar age coworkers (Avery, McKay, & Wilson, 2007). This relationship holds for younger workers but is stronger for older ones.

The need for accommodations to offset problems, such as difficulty in adjusting to circadian rhythm for shift work and inability to quickly master the changing technology, is particularly important because the age of workers in the American labor force has increased from a median of 35 in 1980, to 37 in 1990, to 39 in 2000, and to 41 in 2006 (Bureau of Labor Statistics). Because the cutoff for protection under the Age Discrimination in Employment Act (ADEA) is 40 years, the law now protects more workers against age discrimination than it leaves unprotected. Moreover, this trend is likely to continue. In fact, worldwide the largest segment of the working public falls into the age category of 40–44 according to the International Labor Organization (2005). Thus, while the number of older workers continues to grow and the work performance of older workers shows few consistent deficits, efforts to engage older workers and fit them to their current environments are not as frequent or consistently sustained as one might expect (Head, Baker, Bagwell, & Moon, 2006). Contrary to what one might expect, even the presence of unions in the workplace does not necessarily assure that organizations will better adapt to the aging workforce (Pitt-Catsouphes, Sano, & Matz-Costa, 2009).

There are simple interventions that can increase the fit between age and work because, as some studies show, there are specific features that predict job satisfaction and engagement among older workers (Robson, Hansson, Abalos, & Booth, 2006). For example, Robson and Hansson (2007) analyzed interview data from a small sample of workers to develop a survey instrument and then administered that instrument to over 200 older workers (age 40 or above). Factor analysis of these data produced seven strategies for successful aging at work each of which related positively to perceived success in the workplace. These factors were (1) relationship development at work, (2) job security, (3) continuous learning of new job skills, (4) relief from work related stress, (5) skill extension, (6) career management, and (7) job conscientiousness. Furthermore, hierarchical regression analyses controlling for demographic and individual difference factors found that security, relationship development, continuous learning, and career management were the best predictors of workplace success in this sample of older workers. At the same time, using a similar methodology, Stevens-Roseman (2007) found four additional correlates that go beyond the workplace to predict overall life satisfaction for older people. Among these factors, self-perceived health, sense of usefulness, and ongoing respect, the last one, the ability to meet one's own expectations for this time of life uniquely predicted life satisfaction among older workers in a regression analysis. While not all of these factors are under the control of the organization (i.e., meeting one's own expectations and relationship development), others such as continual learning, relief from work related stress, skill extension, career management, and respect in the workplace are under the direct or indirect control of the organization. Management efforts designed to resolve these concerns can bring about better adjustment of older workers.

In summary, there are empirical data that support the value and functionality of older workers and there are studies that suggest specific ways in which employers can adopt accommodations to increase the satisfaction and engagement of an aging workforce. The accommodations are not difficult or necessarily costly and the contributions that older workers can make to the workplace appear to offset the effort and burden of the accommodations. Nonetheless, ageism at work flourishes and there are some situations in which older workers suffer adverse impacts at the hands of managers who do not value enough the contributions that older people can and do make to their workplaces (see, Rupp, Vodanovich, & Credé, 2006).

Disability and the Workforce

The findings in the disability literature are similar but even less organized and less theoretically based. The research generally shows that people view others with disabilities in a negative light, that they try to avoid them, and that they are prejudiced against them (Caldwell, 2007; Finkelstein, 1980; Louvet, Rohmer, & Dubois, 2009; Oliver, 1990; Union of the Physically Impaired, 1976). However, the studies tend to focus on different types of disabilities (e.g., physical disabilities, intellectual disabilities, mental illness, and disease), measure diverse stigma defining attitude constructs, and offer little in the way of generalized organizational or theoretical structure. As a result, it is difficult to make any general statements about people's attitudes toward the disabled. Nonetheless, researchers have used two published scales to measure general attitudes toward the disabled. They are first, The Attitudes Toward Disabled People (ATDP) scale with 26 items, which measure people's beliefs that the disabled are different from themselves (Yuker & Block, 1986; Yuker & Hurley, 1987). Second, the Scale of Attitudes Toward Disabled Persons (SADP), (Antonak, 1982, 1985; Antonak & Livney, 2000) a 24-item instrument that measures valence (positive versus negative) attitudes toward disabled people on three dimensions: optimism – human rights, behavioral misconceptions, and pessimism – hopelessness. For example, in one recent study Tervo, Palmer, and Redinius (2004) administered both measures to samples of nursing students, medical students, and allied health students and found that on the ATDP, the health students displayed more positive attitudes than did the general sample of college students upon whom the original authors compiled test data norms. However, these same health students scored lower on the SADP compared to the college students who provided norms for that scale. Further, nursing students held views that were more positive as measured on the SAPD scales compared to the other groups. Unsurprisingly, the more experience health students had with disabilities the more positive were their attitudes on both the ATDP and SADP measures. Thus, among those who have less experience with the disabled there appear to be some consistent biases against individuals with disabilities even among students training for the healing professions.

In an attempt to develop a more theoretical structure for attitudes toward people with disabilities, especially physical disabilities, Findler, Vilchinsky, and Werner (2007) collected 36 emotional reaction Likert scale items toward people with disabilities. These included 29 cognitive items that measured valence (positive and negative) along with focus of attention toward the disabled and 14 items that measured approach behavior toward the disabled. They administered the instrument to an Israeli sample asking participants to evaluate their emotions, beliefs, and behaviors toward an individual who the authors described as wheel chair bound. Factor analysis supported a three-factor structure (emotions, beliefs, and approach behaviors). Further results showed that older participants reacted with more positive affect toward individuals in wheelchairs, and showed stronger behavioral tendencies toward approaching them. In addition, adult women showed less behavioral avoidance than did men, but men, and not women, with higher self-esteem demonstrated less negative cognitions toward the disabled. While the instrument that emerged from this research, the Multidimensional Attitudes Scale Toward Persons with Disabilities (MAS), shows great promise in offering a theoretical model based upon reliable measures of emotions, cognitions, and behavior, it is too early to tell if this type of effort will become more common in the literature. In the current literature, we found too many studies that compare views that different types of people hold toward individuals with different types of disabilities on a variety of unique variables, often operationally defined differently in each specific study.

For example, there is evidence that people hold stronger negative stereotypes against those with intellectual disabilities compared to those with physical disabilities. In a study of social relationships among adults in Great Britain, Lippold and Burns (2009) found that compared to adults with physical disabilities, those with intellectual disabilities had restricted social relationships and the social support that the latter did enjoy came primarily from family members. The intellectually disabled had few social contacts with non-disabled others. Antonak and Harth (1994) together with Krajewski and Flaherty (2000) found similar results documenting increased bias against those with intellectual disabilities. With respect to gender, most work finds that men view people with intellectual disabilities more negatively than do women (McConkey, McCormack, & Naughton, 1984; Panek & Smith, 2005; Werner & Davidson, 2004; but see Ahlborn, Panek, & Jungers, 2008 for a study with no gender differences). Furthermore, in a study of college students, Ahlborn et al. (2008) report that the older the individual with the intellectual disability, the lower were respondents' perceptions of their activity level, suggesting that as people with intellectual disabilities grow older they experience even more stigma than do their younger counterparts. Importantly, negative attitudes toward individuals with intellectual abilities express themselves even in samples of professionals, as Caldwell (2007) demonstrated with juvenile justice workers, whose jobs required them to work and make judgments about children, many of whom suffered from one type of disability or another. Caldwell reported that even in this specialized population, attitudes toward people who suffered from intellectual and psychiatric disabilities were more negative than they were toward individuals with physical disabilities, especially when it came to including the disabled in community life.

Consistent with Caldwell's (2007) findings, the literature examining people's attitudes toward those with mental illness shows substantial stigma is associated with mental disorders such as schizophrenia, depression, and social anxiety. Research in the last several years (Crisp, Gelder, Rix, Meltzer, & Rowlands, 2000; Link, Phelan, Bresnahan, Steuve, & Pescosolido, 1999; Phelan & Link, 1998;

Phelan & Link, 2004) has shown that people without mental illness perceive those with mental illness to be strange, frightening, unpredictable, aggressive, and possessing less self-control than "normal" people, especially when the targets suffer from schizophrenia (Björkman, Angelman, & Jönsson, 2008). Interestingly, gender of the participant interacts with the type of illness to determine the level and type of negative attitudes that people assign to those with mental illness (Wirth & Bodenhausen, 2009). Employing web-based technology to obtain data from a national sample of respondents, Wirth and Bodenhausen found that when men evaluated a male-typical disorder and when women evaluated a female-typical disorder they felt more negative affect, less sympathy, and less inclination to help, compared to when they evaluated gender-atypical disorders. The authors interpreted these findings by suggesting that respondents may view gender-typical disorders more as true mental illnesses and they may blame these victims for their own problems.

Most disturbing is current research which finds that even those who work with the mentally ill such as nursing staff in psychiatric hospitals endorse some of the same negative attitudes and stereotypes as do people in the general public (Björkman et al., 2008). For example, Rao et al. (2009) administered an attitude toward mental illness questionnaire to health professionals along with descriptions of fictitious patients and found that participants displayed more negative attitudes toward forensic patients (especially those with schizophrenia) and those with active substance abuse problems, compared to substance abuse disordered patients in remission or those without severe mental illnesses. Furthermore, other data suggest that people in the general population perceive people with substance abuse to be more dangerous and blameworthy compared to those with severe mental illness (Corrigan, Kuwabara, & O'Shaughnessy, 2009).

Similar in negativity but perhaps even stronger in intensity is the bias against individuals living with HIV/AIDS, which is due, in part, to the correlates of the HIV epidemic that include factors that carry their own prejudice and bias (Swendeman, Rotheram-Borus, Comulada, Weiss, & Ramos, 2006). For example, people who engage in socially disapproved conduct such as male–male sex, injection drug use, and promiscuity are more likely to suffer from HIV/AIDS (Crawford, 1996; Díaz & Ayala, 1999; Novick, 1997). Furthermore, people with the disease can be the source of others' infections and those without AIDS overestimate the likelihood that they will contract the disease (Herek, Widaman, & Capitanio, 2005). Herek et al. (2005) argue that there is a synergy between the stigma of AIDS/HIV disease and the bias against the groups that are linked to the disease (i.e., gay men, intravenous drug users, and promiscuous lower SES individuals). This symbolic stigma inflates the bias against individuals with HIV/AIDS. Demonstrating how prevalent the experience of bias is among people with HIV/AIDS, Swendeman et al. (2006) administered measures of enacted and perceived stigma to a sample of young people with HIV/AIDS. The former construct included yes/no indicators of whether the respondents experienced negative reactions such as being hassled, threatened, or physically abused, and the latter consisted of how often the respondent felt blamed, ashamed, or avoided during the prior 3 months because they were HIV positive. Results for perceived stigma showed that in the 3 months prior to the study 31%

reported that others had enacted stigma related behavior against them and 89% of respondents felt perceived stigma from their peers. Further, in a lifetime measure 64% complained of enacted stigma related to their HIV/AIDS status.

In summary, the evidence supports the conclusion that people hold a variety of negative attitudes toward individuals with physical, intellectual, emotional, and disease-based disabilities. However, the literature is silent on the question, “To what extent do these concerns about the physical and mental disabilities of others translate into discrimination against them in the workplace?” We were unable to find systematic and published data to support or to refute the argument that disabled people are unable to complete their assignments at work in a timely and effective manner. The lack of systematic data in this area is not that surprising given the disjointed nature of the disability literature and the lack of any well-accepted organized theory of workplace disability. Furthermore, while there is ample evidence to show that people hold some, albeit, disorganized negative stereotypes against older workers and the disabled, there are few direct comparisons to determine to what extent these stereotypes describe reality and to what extent they are biases without real justification. Thus, the impact of aging and disability on work performance is unclear as is the extent to which negative attitudes toward the older and disabled workers translate into discrimination at work. Somewhat more organized is employment discrimination law in its response to aging and disability discrimination against American workers. However, as we shall shortly see in a review of the Americans with Disabilities Act, industry efforts to address the problems that many supervisors and fellow non-disabled workers perceive as real among those with alleged performance decrements is also somewhat disjointed. The next section of this chapter introduces social analytic jurisprudence as an approach for integrating existing empirical evidence in the law of discrimination and as a tool to point out the direction that future research should take to address issues of aging and disability discrimination.

The Role of Research in Policy Development

Wiener (1993) first introduced social analytic jurisprudence in an analysis of tort law, specifically showing how theories and research findings in social cognitive psychology can inform the way in which people come to understand negligence doctrine, as well as how people come to make judgments about medical malpractice. Wiener, his students and colleagues have applied this approach to studying law and psychology in the years since this article in areas as diverse as how jurors decide punishment in capital murder trials (Wiener et al., 2004), the way in which disclosure rules in bankruptcy law influence consumer use of credit cards (Wiener et al., 2007, 2009; Block-Lieb & Wiener, 2008), and the role of generic prejudice in jury decision making (Wiener et al., 2006). In a series of studies (Wiener & Hurt, 1999; Wiener & Hurt, 2000; Wiener et al., 2002, 2004; Wiener et al., 2007) the application of social analytic jurisprudence has assisted research on the manner in which the employment discrimination law shapes workers’ evaluations of allegations of sexual harassment in the workplace. The model makes three important assumptions about the role of psychology in law and public policy. First, psychology as it relates to law is an empirical science and psycholegal scholars conducting work in this area constitute a scientific paradigm, which shares a common commitment to a set of scientific beliefs and values (Wiener, 1993; Wiener et al., 2006). The results of the empirical studies test the assumptions that the law makes about human behavior and the findings can and should influence both law and public policy. Second, psycholegal scholars apply the theory and the empiricism of science to produce relationships that shed light on specific issues of law and policy. Legal psychologists operating out of this model base their conclusions on their data and not on their shared social or political ideologies. Third, psycholegal scholars adopt the roles of consultants and not advocates (Wrightsman, 1991). Psycholegal scholars refrain from the use of research findings simply to support one side of a policy debate; instead, they search findings for results that disconfirm their hypotheses. In this manner, psycholegal scholars advance the science of psychological jurisprudence. While we are not so naïve as to suggest that psycholegal research is value free, social analytic jurisprudence advocates a thorough search of research findings to locate evidence that supports plausible rival explanations and alternative accounts of research results. Researchers who ignore alternative interpretations for their work risk disconfirmation through peer review, which encourages other scientists to test an author's conclusions with alternative explanations.

Social analytic jurisprudence follows a three-stage process. It begins with a careful analysis of the legal doctrine or policy rules and procedures to determine psychological and behavioral assumptions that underlie the particular policy in any given area. Wiener (1993, p. 511) states, "If psycholegal research is to be useful for adjudicative or legislative decision-making it must begin with an accurate depiction of substantive legal doctrine." The language that makes up statutory and common law principles, which are often comprised of legal tests to be decided based upon the social facts that make up specific cases frequently invite a social scientific analysis and perhaps a psychological analysis. The principles represent assumptions that legislators, judges, and executive officers make about human behavior in the context of the law. In the second stage of social analytic jurisprudence, psycholegal researchers review the social science literature to identify theories, research results, and methodologies that speak to the validity of these assumptions. This psycholegal analysis is likely to point out gaps in our understanding of the psychological and social realities supporting legal and policy assumptions. Accordingly, psycholegal scholars set in motion the final stage of social analytic jurisprudence, which consists of researchers conducting carefully designed studies to probe, evaluate, and indeed, test the psychological models that others have not already applied to the problems at hand in prior research.

In prior work, we have applied this approach to isolate assumptions of employment discrimination law in hostile work environment sexual harassment. Here we apply the empiricist lens to issues related to other types of employment discrimination theory in order to identify assumptions that the law makes about aging and disability. These assumptions reflect many of the biases and attitudes toward older and disabled persons that we outlined in the first sections of this manuscript.

Application of Social Analytic Jurisprudence to Age Discrimination

Disparate Treatment of an Individual Claimant

For some legal theories of discrimination, the plaintiff has the burden of showing that the defendant employer intentionally made a decision about an employee based, at least in part, upon a protected status of the worker (i.e. race, gender, religion, ethnicity, or age). Thereafter, the outcome of that intentional discrimination must have an adverse impact upon the plaintiff or a class of plaintiffs. Disparate treatment or intentional discrimination because of age is one type of age discrimination that is prohibited by the Age Discrimination in Employment Act (ADEA),[1] which states "It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.[2] ADEA § 623(a)(1).

In *Reeves v. Sanderson Plumbing Products, Inc*. (2000), the United States Supreme Court adopted the *McDonnell Douglas Corporation v. Green* (1973) order and allocation of proof in a private non-class action suit following the Title VII precedent based upon section 703(a)(1) of the Civil Rights Act of 1964 as amended in 1991. In a disparate treatment case involving a positive work benefit, the plaintiff has the initial burden to show membership in a class protected by law (e.g., age), that he or she applied for a job (or other benefit) for which he or she was qualified, that the employer rejected the plaintiff, and the employer continued to seek other qualified candidates that were not of the same protected class category as the plaintiff. In a case involving a sanctioned action (e.g., demoting or firing a worker), the worker must show protected group membership and show that the employer sanctioned the employee but not others outside of that category for the same or similar conduct. If the plaintiff is able to produce evidence to support this prima facie case, the burden of proof shifts back to the employer to articulate a legitimate non-discriminatory reason for the adverse treatment. Once the employer produces a legitimate reason, the burden shifts again back to the plaintiff to show that that reason was pretext and not the actual reason for the adverse treatment. The successful plaintiff will proffer evidence to show a pattern of discrimination at the employers' place of business, perhaps by identifying other employees or candidates younger than the plaintiff

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[1] Disparate treatment is prohibited under all of the major discrimination statutes.

[2] The ADEA considers individuals 40 years or older members of the protected class.

whom the employer treated more fairly than the older worker was treated, or perhaps by showing through a pattern of statistics that the employer regularly engages in discriminatory conduct against older employees or candidates.

In *St. Mary's Honor Center v. Hicks* (1993) the Supreme Court held in a race-based case under Title VII that even after the plaintiff's showing of pretext, the jury must find that there was some discriminatory reason for the employer's action. In other words, a legal judgment of intention in this model must point to a factor that shows that the employer, in fact, did intend to discriminate based upon the plaintiff's protected status. It is not sufficient simply to defend the prima facie case; instead, the plaintiff's attorney must convince the judge or jury of the discriminatory intent of the employer.

In *Reeves* (2000) the employer fired Roger Reeves, a 57-year-old supervisor, ostensibly because he had failed to maintain accurate attendance and tardiness records on his shift. Reeves claimed that the company terminated him because of his age and proffered evidence at trial that made a substantial showing that he had kept accurate records. The jury found in favor of the plaintiff and awarded him damages accordingly. The Fifth Circuit Court of Appeals reversed, concluding that even though Reeves may have successfully produced a prima facie case and may have successfully shown that the employer's claims of poor record-keeping were pretext, Reeves had failed to introduce additional evidence that the company's motivation to fire the plaintiff was his age. The United States Supreme Court considered whether additional evidence that the jury could have used to conclude that Reeves's age motivated at least one of the decision makers responsible for his dismissal was required. The Court held that evidence beyond the production of a prima facie case of discrimination and a showing of pretext was not necessary to win an individual disparate impact case, providing that the jury could have determined by the preponderance of the evidence that the plaintiff was a victim of intentional discrimination. While Justice Ginsburg in her concurring opinion noted that in some cases there might be a need for additional circumstantial evidence (beyond the prima facie case and the proof of pretext), those situations would be uncommon. Thus, while the *McDonnell Douglas* scheme for finding discrimination under either Title VII or the ADEA does require the plaintiff to carry the burden of showing intentional discrimination, the manner in which the plaintiff carries that burden beyond producing a prima facie case and demonstrating pretext is largely a matter of the discretion and judgment of the trier of fact, jury or judge.

Given the research literature (reviewed above), which shows that people in general hold negative attitudes toward the elderly and expect that they are unlikely to perform as well as younger workers, it is not surprising to find that some employers may, in fact, act upon their perhaps faulty beliefs about the ways in which age limits worker productivity and make adverse judgments based upon age and its associated stereotypes. Upon first glance the order and allocation of proof in a disparate treatment case seems to indicate that the courts assume that when employers make adverse decisions against older workers that they are acting on their biases and negative attitudes. That is, once a worker establishes a prima facie case, the burden falls back upon the employer to show a legitimate reason that the employer made its decision, one not based upon age. However, then the burden shifts back to the plaintiff who must show that the legitimate reason was not the real reason for the adverse judgment, but was merely pretext for an age biased judgment against the older worker. Still, the law begins with the assumption that the employer who acts against an older worker is doing so because of illegitimate reasons, unfounded biases against the worker, unless the employer is able to show that unfounded bias or negative attitude was not the real reason. This would suggest that the law does assume that there are many wrongful beliefs and attitudes about older people, which can form the basis for discrimination and the empirical literature seems to support that assumption.

One might argue that in 2000, when the Supreme Court in *Reeves* adopted the *St. Mary's* rule holding that the ultimate burden, proving intent to discriminate, always stays with the plaintiff, it shifted not only the burden of proof but also the law's assumptions about the way in which employers view age in the workplace. Requiring an older plaintiff to show that he or she was the victim of intentional discrimination beyond showing that the legitimate reason for the adverse impact was pretext would seem to support the assumption that the negative attitudes and beliefs that employers harbor against older workers may, in fact, be valid and that they tend to be poorer workers than their younger counterparts. The burden is placed upon the older worker to show that such beliefs were in play and not legitimate in the case at bar. However, the recent meta-analysis performed by Ng and Feldman (2008) found no relationship between age and core job task performance or job related creativity except for a slight decrease in performance in training programs. Thus, the existing data, while verifying that there are sizeable biases against older workers, fail to verify the validity of the beliefs upon which those biases are based. The conclusion of this social analytic analysis would point to a questionable perception in the law, upholding more strongly than it should the presumption that older workers are less able to perform.

Admittedly there might be other reasons unrelated to age upon which employers rely to make adverse employment decision judgments, but the *McDonnell Douglas* paradigm requires the workers to show that one of these is not the reason that the defendant acted against the older plaintiff. The courts seem to assume that employers have other legitimate reasons beside age for adverse judgments against older workers and require the plaintiffs to show that these other reasons were not dispositive. So, what happens if an employer takes an adverse employment action against an employee who belongs to a protected class, but the employer has at least some good cause for the decision? The answer is different for age as opposed other protected class factors (e.g., race, gender, ethnicity, and religion).

For example, in *Price Waterhouse v. Hopkins* (1989), a watershed case involving gender discrimination, a plaintiff who showed that her employer considered gender, an illegal factor, in reaching an adverse impact judgment received some Title VII protection. Hopkins was an accountant at Price Waterhouse for 5 years and had procured a contract for the company valued at about 25 million dollars just prior to going up for partnership. As was the standard procedure at Price Waterhouse, the partners wrote comments about the candidate and submitted them to a review committee for evaluations. The partners' comments included many strong statements endorsing Hopkins' character, accomplishments, independence, and integrity. However, some commented that Hopkins was overly aggressive and even abrasive and appeared as a woman overcompensating for her gender. One comment read, "She needs to walk, talk, and dress more femininely." Price Waterhouse turned down Hopkins' application and she brought a suit under Title VII. Social psychologist, Susan Fiske, testified at trial that the Price Waterhouse work environment was rife with stereotype-invoking language, behavior, and cues that were capable of triggering strong gender stereotyping (Fiske, Bersoff, Borgida, Deaux, & Heilman, 1991). Although the Supreme Court's decision did not rely overtly on Fiske's testimony, the court did adopt a sex-role stereotype theory of discrimination that other plaintiffs have used in subsequent cases.

The Court held that in this type of "mixed motive" case in which there were both legitimate reasons and illegitimate reasons for an adverse judgment, an employer must be able to show that it would have reached the same conclusion even if that employer had not taken the illegitimate reason into account, to avoid a violation of Title VII. Following Congress's amendment of the Civil Rights Act in 1991, the plaintiff who proves that a mixed motive played a role in the adverse decision is entitled to injunctive relief (a declaratory order requiring the employer to cease relying on the factor in its decisions), attorney fees, and costs, but not necessarily other monetary damages. After the Civil Rights Act of 1991, the employer may show as an affirmative defense by a preponderance of the evidence that even without the use of the prohibited factor the employer would have reached the same decision. If the employer fails at this defense, it is also liable for damages and back pay.

From the point of view of social analytic jurisprudence, the law in these cases assumes that even when employers create adverse impacts for employees because of legitimate reasons at least some, perhaps a controlling proportion, of the judgment could still be based in an illegitimate bias, belief, or negative attitude toward the employee. As Kelley (1967) showed more than 30 years ago, people may use causal schemas with multiple sufficient factors to make attributions of causality for social events. That is, the law that underlies a mixed motive case does assume that even if an employer created an adverse impact based upon a legitimate reason, some of the decision model could still be based upon bias, faulty beliefs, or unfounded negative attitudes.

One might consider the so-called mixed motive case under Title VII to be an escape clause that seems to grow out of the law's recognition that an assumption of legitimacy is not always warranted. Even if there is evidence that part of an adverse decision comes from a legitimate concern, it is still possible that a prohibited factor motivated part of the decision.

Of course, the best way to take advantage of the available defense is for the employer to show that it made similar decisions for other employees when the discriminatory factor was absent. Substantively, the arguments in a mixed motive case, the evidence of inclusion of a prohibited factor in the employer's decision strategy, will likely come from direct testimony, documents, or witness observations. However, from a decision-making perspective, the trier of fact makes the decision about the contribution of the illegal motivation to the thought process of the employer by engaging in counterfactual thinking, asking “if only” questions. If only the company had not considered the prohibited factor, would it have reached the same decision? Psychologists have long studied counterfactual thinking and have shown that it is related to a number of psychological variables including the emotional state of the decision maker (especially regret; see Mannetti, Pierro, & Kruglanski, 2007; Zeelenberg et al., 1998; Yoon & Vargas, 2005) and the closeness in time of the antecedents and outcomes (Byrne, Segura, Culhane, Gasso, & Berrocal, 2000; Haynes et al., 2007; Sanna, Carter, & Small, 2006; Walsh & Byrne, 2004).

Counterfactual thinking can trigger intense feelings of regret in decision makers producing more firmly held beliefs especially if the sequence of events, which decision makers undo, occurs in one of several favored temporal orders. However, counterfactual thinking arguments need to take into consideration the intervening factors in the causal chain that transpire between the triggering events and the outcomes of the action (Seelau, Seelau, Wells, & Windschitl, 1995; Wells, Taylor, & Turtle, 1987). Sometimes it is easier to mentally mutate actions that occur early in the sequence and sometimes it is easier to do so when the events come before the “to be mutated” action. It is always easier to undo and make judgments about causal sequences when the events that the evaluator tries to mentally simulate are near misses, that is, events that almost were different (Gavanski & Wells, 1989; Kahneman & Miller, 1986; Miller & McFarland, 1986; Wells & Gavanski, 1989; Wiener et al., 1994; Wiener & Pritchard, 2004).

How do triers of fact make judgments about what caused an employer to reach an adverse impact decision? The issue is largely one about how people draw inferences about the causal chain that connects antecedents (legal and illegal factors) to employer judgments, and this inference is largely a product of counterfactual thought. How might this play out in an age discrimination case? How might a so-called mixed motive case act as an escape clause in an age discrimination case supporting the law’s recognition that an assumption of legitimacy is not always warranted, and in fact some employers can and sometimes do make decisions based more on age than on other legitimate factors?

Consider *Gross v. FBL Financial Services* (2009) in which a 54-year-old claims administrator working for FBL Financial Services relied on a mixed motive theory in an age discrimination case that he brought under the Age Discrimination and Employment Act (ADEA) of 1967. FBL demoted the older worker assigning his responsibilities to another who was ostensibly more capable of carrying out his duties. The new worker was younger than the complainant was and prior to this action, the complainant had supervised his replacement. Although there was no loss of wages for the plaintiff, his job involved less responsibility and status. A jury receiving a mixed motive instruction concluded that the plaintiff showed that the employer took an illegal factor (i.e., age) into consideration when making its decision, even if it also considered other legitimate reasons (superior ability) when relieving the older worker of his job responsibility and accompanying status. The jury returned a verdict for the plaintiff.

The company's appeals eventually reached the US Supreme Court, which took the case in 2009 and relied on the action that Congress took when it amended the Civil Rights Act of 1991. Although statutory amendments preserved the burden-switching model of mixed motive cases for Title VII litigation, the amendments to the ADEA did not include similar language. The Court held that because the language in the ADEA still reads, "[i]t shall be unlawful for an employer… to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age" (italics included by the Court), the ADEA does not provide for the switching burdens that Title VII allows in a mixed motive case (*Gross v. FBL Financial Services*, 2009, p. 2353). Absent any intervention from Congress, the ADEA as currently written and interpreted by the US Supreme Court considers causality in age-based disparate treatment cases to be "but for causality," and therefore requires that the plaintiff show that age was the cause in fact of the adverse impact and not simply a contributing factor. In summary, the mixed motive model and jury instruction is currently not available in age discrimination suits but is still a viable theory in sex, race, ethnicity, and religion cases.

The Court seems to define legitimacy solely with reference to the judgments that employers make based on legally acceptable factors. The assumption is that when the cause of the judgment is a legitimate factor, employers are not discriminating even if they also consider an illegal factor, namely the age of the employee. Is this a reasonable assumption given the nature of human decision making? Maybe so, maybe not. Similarly, do triers of fact make decisions differently when they try to verify a multiple causal schema (presumably relying on counterfactual thinking – if only thinking – to establish causal chains) to explain defendant decisions as compared to when they attempt to verify a single factor causal model? Again, maybe the outcome is the same, but maybe it is different. No researchers have explored these empirical questions but the answers to them could have a potential influence in the development of law. One untested assumption that the law seems to make is that given specific facts, jurors make similar judgments about the role of age in intentional age discrimination decisions regardless of whether they consider other causal factors or not.

Testing Assumptions of Intentional Age Discrimination

The inference process in intentional age discrimination cases can take the form of several causal chains that involve both explicit and implicit cognition.[3] Explicit cognition entails attitudes or beliefs that are available to the conscious mind, those that

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[3] There are other models of intentional age discrimination including systemic disparate treatment models in which the plaintiff must begin with a showing that the distribution of adverse impacts or benefits at work among a class of workers is unlikely to occur unless the process was intentionally biased (*Teamsters v. U.S.*, 1977 and Hazelwood School District v. U.S., 1977). The scope of this

people are aware of and which they actively consider when reaching a decision. Implicit cognitions include attitudes or beliefs that are unavailable to the conscious mind even when individuals try to access those perspectives. Implicit attitudes result from leftovers of past experience which guided prior behavior but about which people no longer have direct access in conscious awareness (Nosek, Greenwald, & Banaji, 2007; Wilson, Lindsey, & Schooler, 2000). Each of the different causal chains has different implications for the assumptions about human behavior that are evident in discrimination doctrine.

For example, in the *Gross* case the elements in the decision maker's inference model could include an explicit attitude (available in the boss's conscious awareness) that older workers perform poorly (Age E), an implicit bias against older workers not available in conscious memory (Age I), knowledge that Gross was not performing at the level that he had previously performed (a performance deficit or Perf D), and the decision to demote Gross (Decision to Demote). Figure 1.1 shows a causal chaining model in which the decision maker decided to demote Gross because of a performance deficit, which would produce no liability under either a *McDonnell Douglas* theory or a mixed model theory. The causal path (indicated by bold lines) predicting the decision rises only from knowledge that Gross's performance was deficient. The weight attached to the line (0.80) indicates that the decision to demote Gross was determined largely as a result of his performance deficit and the dotted lines indicate that explicit and implicit bias played no role in the judgment.

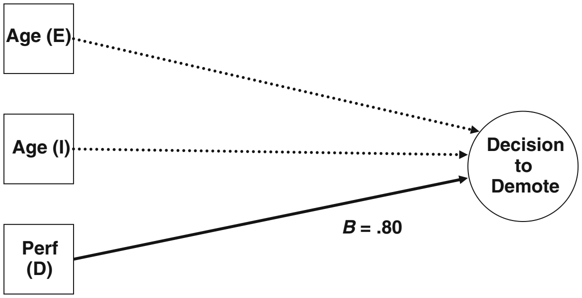

Fig. 1.1 Demotion because of performance deficits

On the other hand, Fig. 1.2 shows a causal chaining model in which the decision to demote Gross was predicated solely on the basis of an explicit attitude that disfavors older workers compared to younger workers, which would produce a liability judgment against the employer under either a *McDonnell Douglas* theory or a mixed model theory. The causal path (indicated by bold lines) predicting the decision rises only from an explicit bias against older workers independent of any knowledge that Gross's performance was deficient. The weight attached to the line (0.80) indicates

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review does not allow discussion of this issue but Wiener and Willborn (in press) discuss this type of discrimination in light of social science approaches to the law.

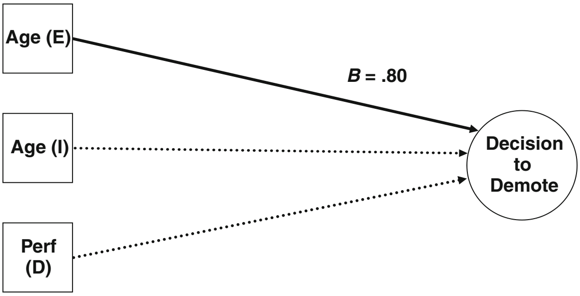


Fig. 1.2 Demotion because of explicit age discrimination

that the decision to demote Gross was determined largely because of explicit bias, which under any interpretation of the ADEA is prohibited when it is the sole cause of the adverse employment decision.

These two outcomes are uncontroversial and either would produce the same legal outcome regardless of the interpretation of the ADEA's construct of causality. However, Fig. 1.3 displays a situation in which both legal and illegal factors are implied in the causal chain, each weighted at the same level. Here, the employer decided to demote Gross not only because of a performance deficit but also because the employer harbors negative attitudes toward older workers. The Supreme Court in *Gross* (2009) determined that the intention of Congress when it passed the ADEA was to outlaw only the decision making path in Fig. 1.2 and not in Fig. 1.3. In Fig. 1.3 there is full liability under the CRA (1991) but no liability under the *Gross* approach. However, one could make the case that Fig. 1.3 involves discrimination based upon age, in part, because there are so few documented work performance deficits based upon age in the empirical literature. The rule that evidence of a defendant's performance deficit eliminates the need for protection against ageism seems to support a stronger belief in age related deficits than the empirical literature currently supports.

Figures 1.4, 1.5, and 1.6 show more complicated causal chains in decision-making processes that involve not only explicit attitudes against older workers but also implicit bias. In Fig. 1.4 there is no indication that the bias was conscious

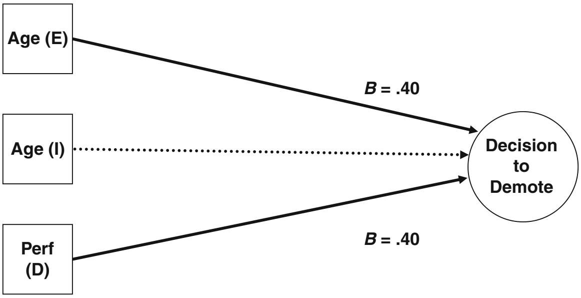


Fig. 1.3 Demotion because of explicit age bias and a performance deficit

Fig. 1.4 Demotion because of implicit age bias

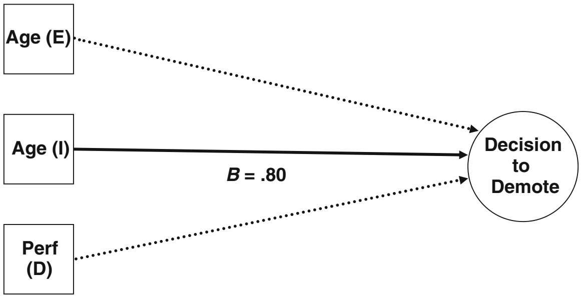


Fig. 1.5 Demotion because of explicit age bias, implicit age bias, and performance deficits

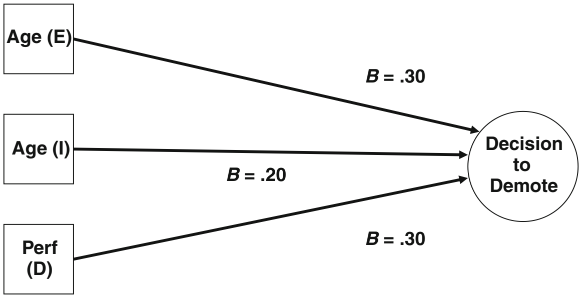
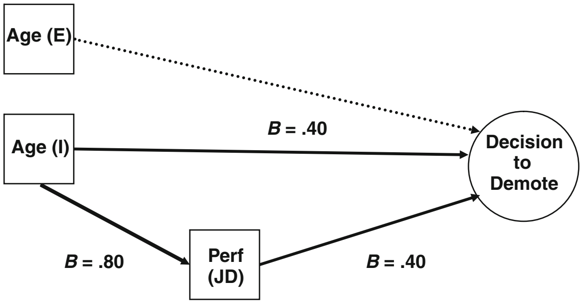


Fig. 1.6 Demotion because of performance deficits and implicit attitudes against older workers



but rather that it was based on a negative association between age and worker status, which was unavailable to the conscious awareness of the decision maker. Two questions that are open for discussion are as follows: Did Congress intend to outlaw this type of causal chain? and Should implicit bias be considered in the law? Analyses for both questions first require an empirical demonstration that the model describes real world decisions that employers make about older workers. Empirical data to study employer decisions at an implicit level are absent from the literature and the absence of these data constitute a wide gap in the discrimination literature. After researchers offer an empirical demonstration of implicit bias in decisions about older workers, then the legal debate regarding the need for a remedy against such implicit bias will take on new and important meaning.

Figure 1.5 shows a different model of a decision process in which explicit bias and implicit bias along with knowledge of a performance deficit produced a decision to demote Gross. In this theoretical model, the decision largely turned on implicit and explicit attitudes but it was justified by some employer knowledge of performance deficits. This causal chain might involve pretext, but a plaintiff would have a difficult time carrying the burden of proof to show that the employer acted because of bias against the older employee rather than because of some form of intentional discrimination. Yet, the assumption that there is a legitimate reason for the demotion in the absence of evidence that it was intentional draws weak support in this causal chain. In as much as the influence of explicit and implicit age bias together were more influential in producing the decision to demote, the conclusion that a slight performance deficit was pretext is viable. However, the plaintiff would have a difficult time demonstrating pretext when a large part of the negative attitudes toward older workers was implicit and outside of the conscious awareness of the decision maker. Arguably, Fig. 1.5 could imply liability under CRA 1991 but it implies no liability at all under *Gross*. Furthermore, the lower the explicit age bias weight and the larger the implicit age bias weight, the less strong is the discrimination claim and the more difficult it becomes for the plaintiff to make the case for illegal discrimination. Empirical results demonstrating this type of a decision process would have important implications for the current formulation of the law.

Finally, Fig. 1.6 considers the fact that knowledge of a performance deficit is itself a judgment that may be predicated on other judgments so that the conclusion that Gross was performing more poorly than he had in the past could have been the result of implicit attitudes against older workers in and of itself. Such a model might be more realistic in light of the evidence that the role of implicit factors in judgments and behaviors centers mostly on spontaneous judgments (Chapter 9). In Fig. 1.6, the fact that the decision maker holds negative associations against older workers plays only a small direct role in a demotion decision but it does play a larger, more important role in the decision maker's finding that Gross was performing at a deficient level when the facts may not support such a conclusion. Under current law, this decision-making process would likely result in an inference that there was no liability on the part of the employer because the decision maker's judgment would appear to result not from explicit bias against older workers but rather as the product of performance deficits, especially if there were some evidence of those deficits.

Following *Gross v. FBL* (2009), the law not only assumes that Figs. 1.1 and 1.2 capture all the possibilities of the decision-maker's judgment strategy but also that the triers of fact (jurors or judges) in discrimination cases are able to distinguish between Figs. 1.1 and 1.2 to determine liability under the *McDonnell Douglas* paradigm. However, without the mixed motive case and consideration of the role of implicit attitudes Figs. 1.1 and 1.2 might be easily confused for Fig. 1.3 or even Figs. 1.4, 1.5, or 1.6. The law, as the Supreme Court currently interprets it, leaves little room for distinguishing between multiple causal schemata models and more simple models of sufficient and necessary causality. Furthermore, it does not consider at all the role of implicit bias in age discrimination cases.

From the perspective of social analytic jurisprudence, social scientists who conduct research to examine the role of causal chaining and implicit attitudes in judgments about adverse employment decisions that involve aging could add significantly to our understanding of age discrimination at work. Researchers presenting scenarios that vary the reasons for performance deficits and modeling judgment processes of supervisors about the suitability of various aged workers for different types of work could begin to estimate the casual paths and weights for those paths using regression statistics and structural equation modeling. Furthermore, mock jury decision-making research using the same methods would be very helpful in learning whether or not individuals sitting as jurors are able to distinguish these different causal chains from one another. Answers to questions such as the following would have important implications for how the law ought to treat age discrimination cases: (1) How difficult is it to accurately infer whether a protected factor motivated at least in part a defendant's decision in an adverse treatment case? (2) What kinds of evidence would allow such a conclusion? (3) Is it possible to make a valid inference regarding the factors that motivated a defendant's judgment without experimental data? (4) Can implicit bias against the aged be the chief motivating factor in a mixed motive case? (5) If an implicit bias is the cause of the defendant's decision outcome, should the law consider that motivation in allocating liability? (6) How should the law treat implicit bias that gives rise to explicit legitimate judgments that in turn determine adverse judgments? Can the law deter such conduct? Should it?

Currently, the Supreme Court has ruled that mixed motive theories of disparate treatment are not available under the ADEA for age discrimination. The court made this decision without the benefit of research data that answers the types of questions raised in this social analytic review. It is within the power of Congress to revisit the ADEA and amend it to rehabilitate the mixed motive model, making it once again a viable theory for age discrimination. Psychologists could play a pivotal role in such a process by gathering evidence to support or refute the need for a mixed motive theory of age discrimination in order to base the law on more defendable assumptions of adverse impact judgments and juror inferences about those judgments.

Certainly, empirical evidence can inform the law about age discrimination in ways that pertain to issues other than those involving the role of causal chaining and several authors in the current volume consider these issues, advancing a social analytic approach to ageism at work. In a general review of the topic, Todd Nelson (Chapter 2) shows that age prejudice exists and comes in many different forms, which stem, in part, from our culture's views and fears about death. Such ageism is part of the basic institutions of American culture and unfortunately often finds expression in the derogation of older people at work and in other contexts. Professor Nelson shows that ageism is so pervasive that even those whose jobs are about helping the elderly are prejudiced against older people. Finally, he shows that ageism has its biggest impact on older people who function at a higher physical and mental level.

Next, Peter Blanck (Chapter 3) offers an historic account of discrimination against the elderly and disabled in American culture and offers some lessons that help us understand how and where the current law of age and disability developed. His work gives us some insights into the types of questions we need to ask about ageism in the workplace. Professor Blanck's discussion adds the need to include complexity and realistic context to our research efforts, which we too fail often to include. Professsor Gillian Lester (Chapter 4) takes a much more pragmatic view of the problem of the aging workforce and makes a plea for paid leave for elderly workers who experience work absences that are beyond a few days in length. Professor Lester argues that workers have limited access to wage replacement programs and that there is a public policy need for such programs to maintain the aging workforce. In a sense, she shows how current public policy discriminates against elderly workers. In the end, she turns to research in social cognitive psychology to show how the mutability of perspectives about the elderly can be used to muster support for policy changes to accompany the social reality of aging workers.

Disabilities and Reasonable Accommodations

As the workforce gets older, it is more likely that it will show increases in disabilities among employees that are based in physical and mental illness. Federal law makes it illegal for employers to discriminate against individuals with physical and mental illnesses. The Americans with Disabilities Act, 42 U.S.C. § 12101–12213, prohibits covered agencies (including private employers, public entities, and government agencies) from denying an accommodation for persons who suffer from a disability, within the meaning of the act. The individual must be qualified for a position with accommodations, the accommodations must be reasonable, and they may not impose an undue hardship upon the covered agency. Unfortunately, the statute provides little definition of central concepts such as *disability* and *reasonable accommodation* so that the case law that originally applied to the act has had a great deal of discretion in defining those critical terms. Thus, the lack of clarity in the research literature on the actual workplace outcomes of disability parallels the law, which suffers from a similar problem in defining what actually constitutes a disability.

Despite this difficulty, some may view the ADA as a best effort so far to prohibit invalid bias against those with disability. Still, because of this lack of definition and theory in either law or in social sciences, it is difficult to apply the statute, especially to cases of mental illness where, as we show above, considerable stigma exists. However, in its 2008 session, Congress passed amendments to the ADA that filled in some of the absences in definition that caused problems in administration of the Act. A social analytic analysis begins with the case law that helped give meaning to the statute and then returns to the 2008 amendment that resolved some (though not all) of the courts' contradictory interpretations of the law.

In the lead case that gives meaning to the law, *Sutton v. United Airlines* (1999), the United States Supreme Court heard the appeal of two twin sisters with myopia who saw with 20/20 vision with corrective lenses. The sisters filed applications to serve as commercial airline pilots and were disqualified because they failed their visual acuity tests at the time of their interviews. Under the ADA, a disability is a physical or mental impairment that substantially limits one or more major life activities. The plaintiff must show that there was a record of such impairment *or* show that the defendant regarded the plaintiff as suffering from such impairment. An impairment that has the potential to alter a major life activity includes,

(1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
(2) any mental or psychological disorder, such as mental retardation organic brain syndrome, emotional or mental illness, and specific learning disabilities (Americans with Disabilities Act 2008 29 C.F.R. § 1630.2(h)(1,2))

At the time, EEOC regulations required the impairment to substantially limit one's ability to perform a major life activity that a person in the general population could perform, including caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. (Note that the Amendments of 2008 codified this EEOC regulation, identifying major life activities to be those that "... include but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, breathing, learning, reading, concentrating, thinking, communicating, and working.") (Americans with Disabilities Act of 1990 as amended in 2008, 42 U.S.C. § 12102(2)(A).

In *Sutton*, the Supreme Court held that Congress meant the ADA to determine disability with reference to mitigating or corrective measures, taking into account the positive and negative affects of those measures. The Court reasoned that if Congress was referring to the uncorrected state, then the ADA would have covered many more than the estimated 43 million people that it covered in 1999 when the statute was originally passed. Under the ADA, the Sutton twins did not have a disability because with mitigating measures (eyeglasses) their impairments did not limit a major life activity. Therefore, the airlines did not violate the ADA in turning down their applications.

The 2008 Amendments overturned the mitigating measures with language stating that "The determination of whether an impairment substantially limits a major life activity shall be made *without* regard to the ameliorative effects of mitigating measures ..." Ironically, the Amendments directed the courts to take into consideration a number of medical devices and technologies when examining major life activity limitations including "ordinary eyeglasses or contact lenses..." 42 U.S.C. § 12102(4)(E)(ii), so that *Sutton* was not actually overturned. Nonetheless, removing the mitigating measures qualification from most impairments under the ADA extends its reach.

However, the law makes no assumptions about the impact of impairments on limiting life activities, but instead requires the plaintiff to show the connection between specific mental or physical impairments and limitations in the enumerated life activities. Therefore, with the extended application of the ADA there is a continued and unfulfilled need to collect empirical research to fill in the absence of an assumption to show whether specific types of impairments influence life activities as the 2008 amendments describe them. For some types of physical activities (e.g., paraplegia or quadriplegia), the likelihood of the impairment to substantially limit one's ability to perform a major life activity that a person in the general population (without the impairment) could perform is obvious and requires little support. However, for mental illness impairments and some diseases the connection between the impairment and the limitation is equivocal so that empirical research documenting the link could be influential in establishing disability policy.

Further delineating the meaning of the ADA, the Third Circuit Court of Appeals considered whether a nurse who, after an injury caused by lifting a patient, could not lift more than 15 or 20 pounds, was qualified to perform her nursing duties (*Deane v. Pocono Medical Center*, 1998). The court held that a worker is qualified for a job if, with or without reasonable accommodations, the individual possesses the skill, experience, education, and other job related requirements and can perform the essential features of the job. But what are the essential features of any specific job? The legal definition depends upon the employer's judgment of essential features, pre-existing written job descriptions prepared for advertising, or interviewing for the position. One important use of empirical evidence in this type of case is a formal job analyses as might be completed by a social scientist expert in job performance (*Deane*, 1998).

The ADA does little better in defining the issue of reasonable accommodations than it did in defining mitigating circumstances. Following the lead of the Supreme Court in *Sutton*, the lower courts decide which accommodations are reasonable on a case-by-case basis. The emergent rule seems to be that a reasonable accommodation is one that allows an individual with a disability to perform the essential features of the job without imposing an undue hardship upon the defendant (*US Airways, Inc. v. Barnett*, 2002). An undue hardship is not one that is defined solely in terms of financial cost but instead must limit the ability of the employer to operate its business or disallow the rights of other workers, such as disallowing other workers with greater seniority, but without a disability, equal access to remuneration or other desirable conditions of employment.

Although the research literature reviewed above documents the reliable existence of bias against those with mental illness, discrimination against individuals with mental illness continues to fall through holes in the law. Even though the original language in the ADA defined a "disability" as "a physical *or* mental impairment that substantially limits one or more of the major life activities of such individual" 42 U.S.C. § 12012 (1)(A), plaintiffs have had a difficult time convincing trial courts that mental illness is a life activity-limiting impairment [italics added by the current authors]. Perhaps because of the relative invisibility of the characteristics of the mentally disabled as compared to those of physically disabled, or perhaps because the courts and legislatures are uninformed about the connection between mental illness and substantial limitations, making successful claims of mental illness under the ADA is challenging.

The law seems to assume that there is, at best, an ambiguous causal connection between mental illness and limitations in major life activities. As reviewed above there is an absence of research showing causal links between different mental illness syndromes and deficits in the ability to function in the workplace or for that matter in other life activities defined in the law (e.g., "... caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, breathing, learning, reading, concentrating, thinking, communicating, and working.") (Americans with Disabilities Act of 1990 as amended in 2008, 42 U.S.C. § 12102(2)(A). While there is research that documents specific debilitating effects of mental illness on self-care, sleeping, learning, concentrating, and communicating among other activities, research linking specific diagnosed mental illnesses (e.g., depression, anxiety disorders, and bipolar illness) and long-term ongoing disruptions in life activities remains illusive.

For illustrative purposes, consider a recent judgment in *Dilbeck v. Whirlpool Corporation* (2008), in which the plaintiff brought suit under the older version of the ADA before the 2008 amendments. Anne Dilbeck went to work for Whirlpool as a tubing production worker but applied for and was accepted into the company's apprenticeship program to become a millwright. Millwrights install and maintain industrial machinery, a job that takes a great deal more training and earns a great deal more money than tubing production work. The apprenticeship required Dilbeck to complete 8,000 hours of on-the-job training in a 4-year period, which she was unable to complete because she suffered from irritable bowel syndrome and depression, both diagnosed by medical doctors. Dilbeck took advantage of the Family Medical Leave Act and took some time off; however, as a result she could not finish her apprenticeship hours in the 4-year period. Although the company knew that Dilbeck was suffering from two illnesses, which triggered reciprocal attacks, the CEO removed her from the program, resulting in a substantial loss of salary because the millwright program paid considerably more than did the tubing position.

Dilbeck brought an ADA suit in district court, which concluded that she indeed had met the burden of establishing a prima facie case showing first that she suffered from impairments recognized under the ADA (Irritable Bowel Syndrome and Depression). However, the court was not so agreeable to the plaintiff when it turned its attention to whether the illnesses substantially limited a major life activity. The court held that the recurring and severe IBS episodes are not curable and that this illness did limit Dilbeck's ability to take care of herself and her ability to eliminate body wastes. However, the court rejected Dilbeck's claim that her depressive disorder substantially limited her ability to sleep or take care of herself because the severity and frequency of the depressive episodes were undocumented and the mechanism that could give rise to an inference of sleep disruption (other than getting up frequently to use the bathroom) were absent from the record. The court appears to have applied different standards to IBS and depression, requiring much more stringent causal connections to major life activities for the latter than the former. The court was willing to assume a causal connection between IBS and ongoing disruptions in a major life activity but seemed to require more evidence to draw a connection between a type of mental illness (depression) and a similar disruption. In other words, the court was unwilling to make that same assumption for mental illness without specific documentation or empirical research showing a mechanism by which depression reliably produced a disruption in Dilbeck's life activities in a regular and continuous manner. In the absence of evidence to the contrary, the court assumed that there was no connection between suffering from depression and ongoing disruptions in Dilbeck's major life activities. Would it make the same assumption for IBS?

Although a final answer awaits litigation under the new provisions, the 2008 Amendments to the Americans with Disability Act seem to broaden the protection that the law offers to those who suffer from mental illness. Under the amendments the terms "substantially limits" and being regarded are no longer limited to chronic conditions. The statute states, "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity *when active*." 42 U.S.C. § 12102(4)(D) (2008). Although no plaintiff has tested this in the courts yet, the 2008 amendments seem to suggest that the ADA covers impairments that occur intermittently like depression, bipolar disorder, or anxiety disorder if they would have debilitative effects on a major life activity when not in remission. Under this new definition, the ADA may consider mental illness disorders as a covered impairment, at least under some conditions. The qualifying condition would consist of at least some period of time when the plaintiff suffered a debilitative effect on a major life activity resulting from some mental illness even if the sufferer is currently in remission. Psychologists could contribute to resolving this issue by conducting longitudinal research examining the ability of people with different types of mental illness to complete major life activities: caring for themselves, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, breathing, learning, reading, concentrating, thinking, communicating, and working over time. If specific types of mental illness limit one or more of these major life activities when not in remission, the law ought to consider them covered impairments even if they do not compromise the life activity when in remission. Important will be longitudinal research that documents the reoccurring cycles of debilitation that is most likely the characteristic of different types of illness. While information about the generality of the debilitative effects of mental illness would be useful, the plaintiff would still need to show suffering in the specific case. However, data that shows the general potential for decrements in major life activities as a result of specific illnesses would be very helpful, maybe necessary, to persuade the courts that the mental disability is real.

In addition, the 2008 amendments broaden ADA coverage of individuals who are regarded as having an impairment 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." 42 U.S.C. § 12102(3)(A) (2008). However, the impairment may not be transitory and minor; and "A transitory impairment is an impairment with an actual or expected duration of 6 months or less." *Id.* at § 12102(3)(B). Once again, the new language awaits tests in the courts. However, it would seem to suggest that if an employee like Dilbeck is regarded as having a mental disorder, (e.g., depression) and that disorder is expected to be chronic and will last longer than 6 months, that the ADA prohibits discrimination against that employee, regardless of whether the mental illness limits or is perceived to limit a major life activity.

There is a need for research data to test whether mental illnesses such as depression, bipolar disorder, or even anxiety disorder carry their own stigma in the workplace. More specifically, the empirical question of interest is whether bosses and fellow workers regard individuals with mental illness as having a chronic impairment that is reoccurring, long lasting, and debilitating. One can imagine that these data, which are as of yet uncollected, could show specific stigma for some illnesses (e.g., depression) but perhaps not others (social anxiety). They might also show that some types of stigma (against those with depression) can produce discrimination in the form of denying job benefits such as hiring, promotions, or special training (e.g., like programs in *Dilbeck v. Whirlpool*) or if they show adverse actions such as layoffs, terminations, or demotions. On the other hand, if bias against those with mental illness is not connected to discrimination in adverse impact or benefit accrual, then being regarded as having one of these illnesses may not be as debilitative as being regarded by bosses and fellow workers as having another type of illness with discriminatory impact.

Thus from a social analytic jurisprudence perspective, a list of issues that might yield to empirical investigations in ADA cases include: (1) What empirical evidence is there that specific disabilities tend to substantially impair major life activities? Which major life activities are or are not implicated? (2) What empirical evidence is available to document the qualifications for specific jobs and identify the essential functions of specific jobs? (3) Are there data that speak to the effectiveness of various reasonable and perhaps not so reasonable accommodations on job performance? (4) What constitutes undue hardship from both the perspective of the employer and the employees? (5) What evidence is there for stigma in the workplace that shows that supervisors and fellow workers regard people as impaired and that the bias results in discrimination? Each of these issues has relevance both for specific cases and for the ADA in general, so that they are ripe for psychologists to consider as topics of applied and indeed, more basic research. Finally, we should ask what reasonable and unreasonable accommodations are. Are there studies that can demonstrate who can perform what types of jobs with or without accommodations? The 2008 amendments to the ADA along with the current case law almost seem to invite these types of social scientific investigations.

Perhaps, the lack of social science research pertaining to disability at work is the result of the absence of clarity in the original ADA. If that is the case, then we can expect more work at the intersection of social science and law following the 2008 Amendments, which in accordance with the Social Analytic model will help define the need for even more empirical research in the area of disability at work. Toward that end, this volume contains a liberal sampling of chapters that target this increasingly important area of research. First, Michael Selmi (Chapter 7) begins with an analysis of the ADA that identifies as its purposes providing more jobs for people with disabilities, integrating them into the workplace, and breaking the stigma associated with those disabilities. Professor Selmi reviews the law and to a limited extent the social science in the area to conclude that the statute has accomplished neither purpose. In his analysis, he provides a discussion of the policy inadequacies that are at the basis for the failure. Perhaps, part of the reason why the ADA has not been as successful as Congress originally intended is the fact that it is so difficult to define exactly what we mean by disability. Professor Stewart Schwab and Garth Glissman (Chapter 8) consider a taxonomy for the types of discrimination that civil law prohibits and conclude that among the "top four," that is, age, sex, race, and disability, disability is the most difficult category to define. Their analysis gives us some insightful perspectives and direction for further consideration for ways to think about and articulate disability distinctions. These considerations will assist researchers in designing studies that will be useful to policy makers and the courts. Professor John Dovidio, Lisa Pagotto, and Michelle Hebl (Chapter 9) go a step further to consider the psychological underpinnings of discrimination against people with disabilities and come to the conclusion that the source of discrimination exists above and below conscious awareness. This chapter nicely probes some of the subtleties of discrimination against the disabled and considers the limitations of law and policy in alleviating some of these issues. In the end these authors advocate for a social model of disability to replace the medical model that they argue is the dominant view in the law. Finally, Larry Heuer (Chapter 11) provides a fresh look at the problem of workplace disability and discrimination by separating out concerns about distributive outcomes and procedural fairness in the attitudes and behaviors of employers and employees who encounter workplace discrimination against those with disabilities. Professor Heuer reviews the procedural justice literature and shows how fair procedures contribute to the satisfaction of disabled workers who complain about prejudice and discrimination. Rounding out this discussion, Steven Willborn (co-editor of this volume) presents his own analysis of the structure of age and disability laws in light of the social science constructions of procedural justice and group influence on perceptions of fairness. Professor Willborn examines important differences in group influences in both age and disability discrimination law and issues a call for empirical research to help us understand the impact of the law on the satisfaction of those complaining about discrimination at work. Dispersed throughout the book are commentary chapters that discuss the intersections of the law of aging discrimination and social science (Eve Brank), disability and social science (Sarah Gervais), and more general notions of social context and discrimination related to economics (John Burton) and cultural perspectives on stigma especially discrimination targeted against Native Americans (Cynthia Willis Esqueda).

Summary and Conclusion

While there is a great deal of research examining ageism in the general community and less describing its impact at work, studies seem to suggest that negative attitudes toward older workers are for the most part, unfounded. That is, older workers show few, if any, systematic decrements in core job functionality. Furthermore, accommodations to make older workers even more comfortable and productive may require simple and inexpensive accommodations. Despite these findings, a review of the law in this area would point to assumptions in the law that legitimate reasons (unless demonstrated to the contrary) are the basis for adverse judgments involving older workers. We identified a number of areas in which empirical research can test the appropriateness of different causal models that describe both adverse impact and benefit judgments along with the ability of triers of fact (judges or jurors) to distinguish between some of the common models involving both explicit and implicit bias. While we limited our discussion to issues related to disparate treatment (intentional discrimination) there are a host of other factors to which the social analytic jurisprudence perspective could be useful for including systematic disparate treatment, disparate impact, and state law theories of employment discrimination against older workers. We will leave these discussions to future efforts.

The simple truth is that the workforce is growing older and as a result covarying physical and mental impairments are likely to increase with the aging of the American workforce. From our review of the empirical research, we found no systematic theories that distinguish types of disability or the outcomes of different types of disability on major life activities. There are isolated studies of ability limitations associated with different types of disabilities, a hodgepodge literature that documents bias against the disabled especially the mentally and intellectually disabled, but almost no literature that shows causal connections between specific disabilities (especially mental disabilities) and ongoing disruptions in major life activities. From a social analytic jurisprudence the need for these types of studies especially defining the impact of mental illness on specific domains of major life activities is significant. The chapters in this volume examine each of these issues in more detail from a variety of perspectives, all with the goal of inviting different types of social science research to address a number of different empirical issues in the law. Research informed by the law of aging and disability can make and will make important contributions to the policy debates of the future about elderly and disabled workers.

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Part I
Aging and Discrimination

Chapter 2
Ageism: The Strange Case of Prejudice Against the Older You

Todd D. Nelson

In a field that has only been in existence for about 36 years,[1] research on age prejudice has revealed many robust findings, a few counterintuitive results, and it has left open a number of unanswered questions. Today I would like to highlight the major findings in ageism research, the unexpected discoveries, and to point future researchers to issues that still require investigation. The field is growing, as more and more researchers are sensing the theoretical and practical need for empirical attention devoted to a problem that affects millions of older adults. As we begin to shed light on the causes and consequences of age prejudice, we can start to devise ways to reduce age stereotyping, thereby enhancing the quality of life for all older adults. My remarks today will explore the state of the literature on ageism and address the following questions: How does ageism manifest itself, who is most likely to be ageist, and how can we reduce ageism?

Mountains or Molehills?

Is there really such a thing as "ageism?" Isn't most of what we think about older people true? For example, they're slower at pretty much everything, they don't change their ways, they are grumpy, and they can't or don't want to learn new things. Where is the stereotype or prejudice in stating those "truths" about the elderly? While those characteristics may be true for a number of older people, it is also true they don't apply to many older adults. Anytime one assumes that a group shares a common behavioral or personality characteristic, they are engaging in stereotyping. All stereotypes are incorrect by their very nature, because they erroneously assume

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Portions of this talk are taken from Nelson (2007).

[1] I mark the beginning of research on ageism with the coining of the term "age-ism" by Butler (1969).

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a homogeny that simply does not exist. So, the seemingly innocuous statement "old people don't like change" is and always will be incorrect because there will always be many of older adults for whom that isn't true. Coming back now to the more basic question: Is there such a thing as ageism? Do those simple stereotypes translate into negative feelings (prejudice) against older persons?

The answer is that, ever since researchers have asked people about their attitudes toward elders, back in the 1950s, and continuing today, whether you get a response that sounds rife with prejudice depends on how you ask the question (Tuckman & Lorge, 1953). If you ask someone, "Do you have negative feelings about your grandmother, or your older boss, or the elderly woman who works at the flower store?" They would likely reply, "Of course not! Those people are dear, dear people in my life. I have nothing but affection for them." If that same person is asked "Do you think all old people are poor drivers, or that, generally, older people are grumpy?" you are more likely to get answers that endorse the aging stereotypes you just expressed. When people are asked about their attitudes toward "older people," the image that is evoked is a negative stereotype about an older person. However, when one is asked to evaluate a specific older person (co-worker, boss, friend, for example), fewer examples of old-age related stereotypes come to mind, and the attitude is much more likely to be positive (Crockett & Hummert, 1987). Ageism does indeed exist, and later I will talk about (1) why it is so hard to identify, and (2) how it translates into discrimination against the elderly. Before we do that, let's discuss for a moment where ageist attitudes come from.

Planting the Seed of Ageism

History

Younger people didn't use to have prejudice toward older people. In fact, being old was regarded as a privilege, and older persons were often the most powerful, most respected persons in a village/community/group, due to their more extensive knowledge base and greater memory for the history of the group. In biblical times, older people were regarded as given a long life by God to fulfill a divine purpose (Branco & Williamson, 1982). However, two events led to the downturn in how older people were viewed. The advent of the printing press took away the elders' unique status as the sole repository of information. The other event, the industrial revolution, required families to be more mobile, and able to adapt to changes in the market quickly, and older persons living in an extended family structure were often ejected by the younger relatives in favor of increasing the mobility of the family.

Cultural Views

Anyone who has been exposed to US culture, even peripherally, quickly learns that the USA has a cultural bias in favor of youth. Movies, television, magazines, and advertisers who support those media all cater to the youngest demographic in our population. Why this focus on youth? Largely, I will argue, it stems from our fear of aging. In the USA, we have a tremendous anxiety about the aging process and death (Nelson, 2002). Old age is stereotypically perceived as a negative time, whereupon the older person suffers declines in physical attributes, mental acuity, loss of identity (retirement from job), loss of respect from society, and increasing dependence on others (Kite & Wagner, 2002). Americans enjoy their individuality and feelings of control over what happens with their own bodies. Aging and death are seen as out of our control and that produces feelings of fear and anxiety. Along with no perceived control over the aging process (and eventual death), many Americans also view death as the end of their self. The belief that one's self has a fixed ending is also quite anxiety-provoking. Contrast that with those who believe that they have a spirit that lives on (either in Heaven, Nirvana, or some other spiritual place, or via reincarnation), and these individuals tend to have a different view on their life. Life is just one phase of an eternal journey that they have been on. They believe that they will continue this journey indefinitely. These individuals view aging in much the same way as those in traditional Eastern cultures. In Eastern cultures, the self, life, and death are all interconnected within the person. Death, in this view, is not something that is feared. Rather, it is seen as a welcome relief from life's travails. Death is seen as a passage to a different spiritual existence, where one can join his/her elders (Butler, Lewis, & Sunderland, 1991). Traditional Eastern cultures, as a result, have had little or no anxiety about death and aging (Levy & Langer, 1994). In fact, they viewed older adults with much reverence. Older persons were given special status and power in their society.

Times are changing in Eastern cultures, however, and so are attitudes toward older persons. As these cultures become more modernized, and feel the influence of Western cultures, capitalism, and individualistic values, they begin to feel less obligated to maintain traditions of filial piety (motivation, emotion, and intergenerational reciprocity in support of one's elderly parents) (Ng, 2002; Williams et al., 1997). Ng (2002) suggests that it is an exaggeration to say that Eastern cultures revere their elders, while Western cultures abandon them. Rather, research indicates that there is quite a degree of variability in Eastern attitudes toward older adults (Williams et al, 1997). Williams et al. (1997) found that Koreans had the most positive attitudes toward their elders, while Chinese persons surveyed expressed a much more negative attitude toward older persons. Japanese people appear to be experts at masking their derision for older persons. Naito and Gielen (1992) found a big distinction between "tatemae" (how one ought to behave and feel) and "hone" (how one actually behaves and feels). On the surface, for many Japanese, is a mask of respecting and honoring elders, while just below the mask lies a dismissal of elders as silly.

The Root of Ageism Is Fear of Death

Terror Management Theory

An interesting theory that parsimoniously explains one way that ageism can arise is "terror management theory" (TMT; Greenberg, Pyszczynski, & Solomon, 1986;

Pyszczynski, Greenberg, Solomon, Arndt, & Shimel, 2004; Solomon, Greenberg, & Pyszczynski, 1991). According to TMT, culture and religion are creations that give order and meaning to our existence, and this protects us from frightening thoughts of one's own mortality and the seeming random nature of life. Self-esteem is derived from believing that one has a place and purpose in the world. Thus, according to TMT, self-esteem serves as a buffer against anxiety associated with thoughts of one's mortality.

According to TMT, because older people are a reminder of our impending mortality, people in the USA tend to associate negative feelings with (and ascribe negative qualities to) older adults. The anxiety and fear that are associated with death lead young people to blame older people for their plight – getting older. In so doing, they can deny the thought that they too will grow old (and die). By blaming the older person, stereotyping him/her, and treating elders with pity, anger, irritation, or patronizing speech, younger people are able to trick themselves into believing that they will not eventually die. This derogation of older people only serves to create a perpetual cycle of ever-increasing prejudice against older persons. The more negatively younger people treat older persons, the weaker and more negatively older people are perceived, and the increasingly negative way older people appear, in turn only increases the anxiety young people have about death, and this amplifies their tendency to act in ageist ways toward older people (Martens, Goldenberg, & Greenberg, 2005). Much empirical (Martens et al., 2005; Martens, Greenberg, Schimel, & Landau, 2004) and theoretical (Greenberg, Schimel, & Mertens, 2002) evidence supports the utility of this theory as it is applied toward our understanding of the origins of ageism.

Ageism Is Institutionalized

The main reason why most people in the USA never think of ageism in the same way they think of sexism or racism (that is, one of the "major" types of prejudice, and as such, one to be aware of and avoid) is that it is quite institutionalized in America (Nelson, 2002, 2006). If you think about it, there is no other group like the elderly about which we feel free to openly express stereotypes and even subtle hostility. This is because most of us, as I mentioned at the outset of my remarks today, believe that we aren't really expressing negative stereotypes or prejudice, but merely expressing true statements about older people when we utter our stereotypes. We also take our cues from society as to the acceptability and benign nature of our "truths" about aging. Television shows depict older persons along stereotypic lines (Bell, 1992), children's books depict classic fairy tales in which the villain is usually an older person (Ansello, 1978), and even greeting cards perpetuate ageism. Greeting cards? Yes. Think about it for a moment. In any greeting card store, particularly the "birthday" greeting cards section, one common message is communicated, no matter which card you pick up: sorry to hear you are another year older. Birthdays are seen as a slide downward, toward failing health, failing mental acumen, and death, and they certainly are not occasions to celebrate. As an interesting, yet stark contrast to illustrate how incredibly open yet pernicious this ageism is in birthday cards, think about the outrage that would ensue if there was a section of cards that communicated the message "sorry to hear you're Black" or "ha ha ha too bad you're Jewish" – yeah, it wouldn't go over so well. So why does society allow, and even condone the same message directed against older persons?

A popular line of birthday "gag" gifts has a theme of "over the hill" attached to various items, from black balloons, to a plastic gravestone (!). The message is clear: aging is bad, and we make fun of people who are getting older. Let's stop to think about that for a moment. You have a store peddling items which are not-so subtly telling you "here is how society views aging, and YOU as an older person" – and it isn't very pretty. How would that make you feel if you were an older adult? We'll explore that a bit further in a few minutes. For younger persons, this is just one more message from society saying "society at large condones the open expression of negative views of aging and older people" and as such, the younger person may feel more comfortable openly expressing such prejudice against older adults, feeling perfectly fine about doing so, because he/she likely wouldn't recognize it as a "bad" type of prejudice, condemned by society.

Another indicator of how entrenched ageism is in US culture can be found in the drive to hide physical signs of aging. A recent survey by the National Consumer's League (2004) found that 90 million Americans each year (and that is likely a conservative estimate) purchase products or undergo medical procedures to hide the physical indicators of their age. People buy creams or makeup to hide age spots, to eliminate wrinkles in their skin, and hair dye to change their hair color from grey to a more "youthful-looking" color (anything but grey). Plastic surgery is increasingly popular, as a way to attempt to stay looking younger. As men age, a very common physical sign of aging is the loss of hair on their head. Men, it appears are just as afraid of looking older as women are, as evidenced by the popularity of toupees, wigs, plugs, implants, and even the illusion of a fuller head of hair via a spray-on substance (!). Why are people willing to spend so much money, and undergo unnecessary risky medical procedures to hide physical signs of aging? Society tells us that aging is bad. And people believe it rather unquestioningly.

Younger People Speak Differently to Elderly Persons

Interesting research has found that even people with very positive attitudes toward the elderly often seem to speak to older adults in very different ways from how they communicate with their peers. One type of speech, called "overaccommodation," entails the younger person becoming overly polite, speaking louder and slower, exaggerating their intonation, and talking in simple sentences (Giles, Fox, Harwood, & Williams, 1994). This also manifests itself in the downplaying of serious thoughts or concerns, or shielding elders from "confusing" or "upsetting" information (Grainger, Atkinson, & Coupland, 1990). Kemper (1994) found overaccommodation quite rampant in his study of nursing home workers. Another type of speech is called "baby talk (Caporael & Culbertson, 1986)." Those using this type of speech tend to speak with a high pitch, exaggerated intonation, much like the overaccommodation style, but this type of speech is distinguished in how it is virtually identical to the style used when speaking to babies. In fact, when Caporael (1981) filtered out the content of the speech of one speaking to an elderly with baby talk, and another person speaking to a baby, she found that the two speech styles were virtually identical. These speech styles derive from our stereotypes about older persons as almost child-like in their level of cognitive functioning and dependency on younger adults.

One interesting thing about this is that not all older people dislike being spoken to in this fashion. Research shows that those who are in worse physical or mental health find such speech styles (baby talk and overaccommodation) *comforting* because it communicates to the older adult that the younger person is aware of the dependency relationship there, and that they will be taken care of by the younger adult (Caporael, Lukaszewski, & Culbertson, 1983).

Some more light may be shed on these interesting findings with data I obtained (Nelson, 2004). I sent surveys to over 3, 300 older adults in California, which asked them whether they had ever experienced age prejudice or discrimination, and how they reacted to it. Data from the 852 returned surveys indicated a major difference in the way older adults responded to the survey, depending on their age. Neugarten (1974) said that those adults from 55 to 74 really view themselves differently, as younger, than those 75 and older. Neugarten found that many of these “young-old” adults still had older parents living, and they tended to view “old age” (and stereotypes, and health and mental failings associated with age) as something associated with their parent’s generation. Those older than 75 (who Neugarten called the “old-old”) were less likely to have this perspective (because no one was older than them, so the term “old people” *must* therefore be in reference to them). My data indicated that the old-old individuals did not perceive any age discrimination or prejudice in their daily lives. They also reported that if they were victim of ageist behavior, it would not bother them. However, the “young-old” reported that they *had* experienced ageism, and that when it occurs, it makes them *very upset*. These results may reflect a desire of the old-old to protect their self-esteem by denying that they are part of a stigmatized group. The reaction of the young-old to ageism (of being upset) also may suggest that the young-old want to delay as much as possible their entry into the old-old group, because they fear how they’ll be treated (as stigmatized persons).

But . . . Our Brains Can’t Help Being Ageist

Ageist attitudes are activated automatically in social perception, much like any other stereotype about other stigmatized groups. For example, Perdue and Gurtman (1990) found that when younger persons are primed with the word “old” they are faster to subsequently recognize negative trait words, and slower to recognize positive trait words. Conversely, when they are primed with the word “young”, they are faster to later recognize positive trait words, and slower to recognize negative trait words.

In another study, Nosek, Banaji, and Greenwald (2002) reported data collected from the Implicit Association Test (IAT; Greenwald, McGhee, & Schwartz, 1998) on what can be referred to as "implicit ageism." The IAT measures implicit attitudes (like ageist beliefs, or stereotypical associations between category and characteristics). Implicit attitudes are "introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or un-favorable feeling, thought, or action toward social objects" (Greenwald & Banaji, 1995, p. 5).

Nosek and his colleagues found that regardless of the age of the respondent, all respondents had significantly negative implicit attitudes toward older persons. These data, coupled with the priming study by Perdue and Gurtman (1990), provide support for the notion that people have strong negative beliefs associated with older persons, and these attitudes operate without conscious awareness to influence our conscious thought, behavior, and feelings toward older people.

Does that mean that we are doomed to be prejudiced toward older people, because ageism seems to be automatic? No. As Devine showed in her famous 1989 paper, seeing or thinking about a stereotyped group does indeed automatically activate stereotype concepts and information related to that stigmatized group, in both people who believe in the truth of those negative attitudes (high-prejudiced persons) and those who do not believe in those negative attitudes (low-prejudiced persons). But, low-prejudiced persons, because they are so motivated, are able to override the influence of the automatic activation of the stereotypes and instead think of the stigmatized person on their own merits as an individual (for more on the malleability of implicit attitudes, see Dasgupta, 2009). High-prejudiced persons are not motivated to change their stereotype about the group, and therefore don't override the automatically activated negative attitude. So, while the activation of the ageist stereotypes may be automatic, the influence of those is certainly environmental in that the learning history, the kind of person the perceiver is (e.g. value system about equality, civil rights, etc.), and their motivation to override that automatic activation (Monteith, Zuwerink, & Devine, 1994).

Helper, Heal Thy Self

It is an unfortunate truth that ageism even persists among those whose job it is to help older persons (Troll & Schlossberg, 1971). Research has found that some physicians and other health care professionals tend to regard older patients through age stereotypes, such that the older patient is more likely to be viewed as "depressing, senile, untreatable, or rigid" (Reyes-Ortiz, 1997, p. 831). Working with older patients is not typically viewed as desirable, for some medical students, because older patients present with health concerns that are believed to be less amenable to treatment, though there is often little basis for that assumption other than a stereotype about aging and health issues (Madey & Gomez, 2003).

Mental health professionals are just as likely to harbor ageist beliefs as their physician counterparts (Atchley, 1982; Garfinkel, 1975). Kastenbaum (1964) refers to the "reluctant therapist" in addressing this issue. These therapists tend to shun older clients because they believe that older people often don't have any serious psychological issues that merit therapy, and that they are just lonely and want to exploit the therapist as a captive listening ear. Siegel (2004) affirms that psychiatrists also have an age bias when it comes to diagnosing problems for which older persons seek professional help. Siegel argues that psychiatrists need to take a new view of old age, appreciating the tremendous learning and personal growth that older adults have achieved. Psychiatrists should also be aware that older adults have many different losses that younger people do not face, and they are also confronted with the oppressive youth-focused society, which ubiquitously presents negative views of older persons.

Conclusion

Research on ageism has a short history, relative to the general field of prejudice research. However, the available data allow us to make several conclusions with a degree of confidence. First, age prejudice exists, and it is multi-faceted. People have multiple, often contradictory attitudes toward older individuals (Cuddy & Fiske, 2002; Cuddy, Norton, & Fiske, 2005; Fiske, Cuddy, Glick, & Xu, 2002). Second, ageism is tied in part to that culture's views of (or fears about) death. Ageism is also tied to the emphasis that a culture places on change, mobility, and speed in the workforce. The greater the emphasis on these things, the more likely society will perceive the older worker as not competitive, but rather he/she may be regarded as a burden on the resources of society.

Third, ageism is institutionalized in the USA. The focus on youth, mobility, change, coupled with the intense fear of death in American culture leads to derogation of older people, and anything associated with aging. Jokes about getting older, with the implicit message that it is bad or sad to get older, are regarded as benign humor. Americans believe that implicit message, however. Americans spend billions of dollars on products and surgeries designed to hide signs that they are growing older. Fourth, ageism is so pervasive that it is found even among those whose job is to help older persons. This of course has tremendous implications for the physical and mental health of the older patient, as age stereotypes can bias the treatment recommendations that the therapist or physician has for the older patient.

Finally, ageist behavior is only perceived as offensive by those older persons who are high functioning (physically and mentally). Older people who have physical and/or mental deficiencies tend to believe that ageist behavior actually communicates a helping relationship between the younger person and the older individual, and that communication (though it is ageist) is comforting to them.

There is much we have yet to understand about ageism, however. While we have a pretty good handle on how age prejudice starts, and what maintains it (same social-cognitive and motivational processes that maintain most other prejudices), most of what we don't yet know concerns how best to reduce or eliminate ageism. We need to further explore the nature of the fear of death in American society. If we can begin to understand the source of this fear, we may be able to design educational programs that can, from an early age, teach people to not fear death. Once this fear is abated (or eliminated), a great motivation to create stereotypes about the elderly (as predicted by Terror Management Theory) would be eliminated.

Efforts should be directed toward increasing the status of older adults in society. One way to do this is to create more opportunities for older adults to continue to have ties to the workforce, so that they may continue to contribute their wisdom and experience to society and to teach their younger co-workers the skills and information they have learned. This will have a tremendous positive effect on the mental and physical well-being of older adults, because research has shown that a major loss of one's identity occurs when one retires from work, and this is often a very traumatic adjustment for the older person (Nelson, 2002).

Finally, age stereotypes can begin to be eliminated with a concerted, comprehensive educational effort starting in preschool, and continuing throughout the school years, and beyond into other media, which communicates the fact that aging is nothing to fear, or be embarrassed about. Rather it is a normal part of life, and that being older is a positive thing. Wisdom, experience, and life perspective often accompany the aging process. Younger people should be taught that they can learn much from older persons. Elders should be respected, not pitied. Our efforts should be directed toward these and other methods of reducing or eliminating age stereotypes, and enhancing the status of elders in American society. Admittedly, reversing an institutionalized, entrenched ageism will take time. But age prejudice researchers can, through these efforts, enhance the current quality of life for millions of older Americans, and for future generations of older persons.

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Chapter 3
Disability and Aging: Historical and Contemporary Views

Peter Blanck

Introduction

Today's civil rights model of disability is set out in federal laws like the Rehabilitation Act of 1973, the Individuals with Disabilities Education Act, and the Americans with Disabilities Act (ADA) of 1990 and as amended in 2008. In a program of study, my colleagues and I, and others, examine the social and political forces underlying contemporary views about the rights of persons with disabilities particularly as they age (Blanck, 2001, 2008; Liachowitz, 1988; Scotch, 2001; tenBroek, 1966).

In the move toward disability rights, one primary period recognized in American history is when societal and medical views of disability evolved from the passage of the first civilian national Vocational Rehabilitation Act in 1920 to the signing of the ADA in 1990 (Milani, 1999; Obermann, 1965). During this period, policy innovations, notably the New Deal and the Social Security Act, won public support and sought to eradicate social problems associated with disability and aging (Blanck & Millender, 2000; Skocpol, 1993). Rehabilitation programs identified disabled beneficiaries as "deserving" individuals who, especially when war veterans, made sacrifices for the national interest (Gerber, 2001; tenBroek, 1966).

In this chapter, I offer that the seeds of modern disability and aging rights policy may be traced further to the overlooked legacy of the American Civil War and its expansive disability pension scheme. Though not a rehabilitation, aging, or needs-based welfare scheme per se, the Civil War pension laws set out America's first large-scale policy of compensation for select men and "worthy disabled," and led to an increasingly medicalized model of disability. By 1890, the pension laws further evolved into America's first comprehensive federal retirement program (Costa, 1998).

The post-Civil War shift toward the classification of disability laid the medical-socio-political groundwork for subsequent federal policies, such as the 1920

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Vocational Rehabilitation Act and the Social Security system, as well as for state workers' compensation laws (Baack & Ray, 1988; Crossley, 1999; Drimmer, 1993; Hickel, 2001; Orloff, 1993). This chapter uses as a starting point a period during the late 1800s when tens of thousands of soldiers from the north and south were returning to their homes with disabilities never before, and perhaps never since, seen by American society in number and scope.

These individuals and their families navigated a society before notions of disability rights and advocacy existed, and at the beginnings of the medical classification of disability. Union soldiers and their families confronted a new federal bureaucracy, housed in the massive Pension Bureau ("Bureau"), which itself was besieged by lawyers, lobbyists, and politicians. As never before, northern veterans came from all walks-of-life and included a wave of immigrants and African Americans who sought newly promised rights from their government and benefits for their service. My colleague historian Michael Millender and I elsewhere examine the pension system for former confederate soldiers, who faced different challenges and were not covered by the federal system (Blanck & Millender, 2000).

Part II of this chapter overviews the Union Army Pension Scheme from 1862 to 1907. Part III discusses our program of empirical study on the pension laws and veterans with disabilities as they aged. Among other forces, stigma, conceptions of malingering and feigning, and new industry players (i.e., lawyers and lobbyists, bureaucrats, and physicians) together influenced attitudes of disability after the Civil War in regard to veterans in particular, and public services in general. Part IV examines the implications of this historical study for analysis of contemporary attitudes and policy toward persons with disabilities, with emphasis on research and programs affecting the disabled as they age in workplaces, as today's veterans, and as global citizens.

Defining Disability and the Civil War Pension Scheme

The Civil War changed how Americans thought about disability. Attitudes were shaped about and by returning veterans and their families as they engaged the pension system. There were 860,000 disabled survivors from nearly 2.5 million members of the Union Army (Gould, 1869). The pension scheme for disabled Union veterans became, up to that time, this nation's largest and most medicalized welfare scheme (Klages, 1999; Oliver, 1917; Skocpol, 1992, 1993).

As part of a large investigation, my colleagues and I examine the lives – from "cradle to death" – of a sample of Union Army veterans and conceptions of disability in American society after the Civil War (Logue & Blanck, 2008, 2010). The random sample consists of almost 36,000 white males from the Union Army and 6,000 males from the US Colored Troops, with information on their military, pension, medical, and census records (Fogel et al., 2006). The information on returning veterans and their families was examined in the context of laws associated with Civil War pensions (Glasson, 1918; Oliver, 1917). I briefly review these laws next to illustrate how they set the stage for more current laws.

In 1862, the General Law (Curtis & Webster, 1885) set pension benefits for those with war disabilities and established a medical rating system for compensating disabilities (Fogel, 1996; Skocpol, 1993). A pension claimant was required to "show that his disability was incurred as the direct consequence of the performance of his military duty" (Glasson, p. 125). Under the law, claimants were rated in their "total disability" in the performance of labor (Fogel, p. 135; Skocpol). In addition, certain war-related conditions or diseases were compensated regardless of total inability to work (Blanck, 2001).

For instance, a Northern army private in 1862 received a maximum of $8 per month for being "totally disabled." A veteran whose disability was rated as less than "total" received a corresponding proportion of the $8. For purposes of compensation, therefore, the system defined fractional rates of total disability. A lost finger or small toe was compensated by a prescribed rating of 2/8 totally disabled, with a corresponding pension allotment of $2 per month. A lost eye or thumb, or a single hernia, resulted in a 4/8 rating of total disability with a corresponding award of $4 per month.

Today, the "inability to work" model of disability remains the dominant means for assessing compensation in pension, workers' compensation, and disability support programs (Fogel, 1996, pp. 135–136). Professor Dora Costa notes that, since the Civil War pension scheme, "inability to participate in the labor force became the standard means for compensation in subsequent American pension and support programs." (Costa, 1998, p. 36). Also, as in today's benefit schemes, the Civil War Pension Bureau hired physicians to rate claimants' disabilities, who categorized them by disease and severity.

In 1873, the Consolidation Act expanded the General Law to compensate veterans for service-related conditions or diseases that later caused disabilities, such as noise-induced hearing loss occurring later in life as a result of wartime gun fire (Blanck, 2001; Sewell, Song, Smith, Bauman, & Blanck, 2004). The 1873 Act created confusion as to how disability was to be defined and rated for pension compensation (Glasson, 1918). Increasingly, the definition and classification of disability was questioned and contested, as is still evidenced today (Stone, 1984; cf. Chapter 8 by Schwab & Glissman, this volume). The press sought to expose alleged pension fraud, with the view that the Bureau was a partisan machine and its funding paid for exaggerated and feigned disabilities ("Movement," 1875). Editorials described "bogus" disabilities contrived by pension claim agents and lawyers who stood to profit from successful claims ("Editorial," 1881, p. 4). Indeed, by the late 1880s, pensions granted under the General Law were greater for diseases claimed as a result of the war than for actual war injuries (Glasson).

In 1879, the pension law allowed the use of arrears – or back pension payments – to attract "deserving" veterans who had not applied for pensions, which added to pension growth and fueled controversy (Glasson, 1918, pp. 150–153). The Arrears Act enabled veterans to receive pensions the Bureau found should have been granted as a result of war service, and to be paid from the time of their discharge from the army (Glasson). The Arrears Act used the same classification scheme for awarding pensions on the basis of war-related disability (McConnell, 1992). Professor

Skocpol (1993) and earlier historians argue the Arrears Act was spurred by the pension attorneys, who collected a $10 fee for each application. Popular criticism at the time appeared in papers such as the New York Times in articles such as "The Plundering by Greedy Pensioners and Speculators Should Stop" ("Arrears," 1881, p. 4; "Time's Pension Articles," 1894, p. 4).

With a flood of new veterans applying for and receiving disability-based pensions (Dearing, 1952), the "soldier vote," and its political lobby through the Grand Army of the Republic (G.A.R.), was reinvigorated (Sanders, 1980, pp. 139–140). After the war, Union Army veterans had transformed their national G.A.R. organization into a political machine that kept the veterans' wartime sacrifices in public consciousness (Blanck & Song, 2002). These developments generated predictable resistance along partisan lines, with the G.A.R. and its Republican allies in favor of pension expansion, and the Democrats, comprised of large numbers of immigrants and southerners, generally opposed. But the G.A.R. was not a disability lobby. Its primary mission was to replace the General Law with pensions based solely on military service, regardless of disability origin (Glasson, 1918, pp. 204–205).

The 1890 Disability Pension Act accomplished this goal and expanded pensions to include physical and mental disabilities not related to wartime experience (Fogel, 1996; Glasson, 1918). Although disability for pension eligibility continued to be defined by an individual's incapacity to perform labor, after 1890 it also covered those honorably discharged veterans "who are now or who may hereafter be suffering from a mental or physical disability of a permanent character, not the result of their own vicious habits" (Stone, 1984, pp. 90–110; see also Blanck & Song, 2002 noting vicious habits were associated with sexually transmitted conditions, alcoholism, and smoking). In earlier studies, Blanck (2001) finds that Union Army veterans whose examining physicians noted their alcohol and drug use, malingering behavior, or sexually transmitted disease were substantially more likely to receive a lower pension rating or to have their claims rejected outright.

With its expanded mandate, the 1890 Act became, up to that time, the most costly welfare and old age measure "ever passed by any legislative body in the world" (Glasson, p. 233; Skocpol, 1993, p. 214). Professor Deborah Stone articulated the link between ideas of legitimacy and deservingness of disabled persons in attitudes in the late nineteenth century medical community with the evolution of the concept of the "inability to work" as a means for developing the first comprehensive, scheduled, needs-based system of governmental compensation.

By 1893, pensioners numbered almost one million, consuming nearly half of the federal budget (Fogel, 1996; Skocpol, 1993; Vinovskis, 1990). Claims of excess, fraud, and corruption were widespread. Pensions were said to be windfalls to the "undeserving" disabled. Stigmatized and less understood disabilities, mostly mental and infectious conditions, were harshly criticized (Anderson & Anderson, 1984). Despite evidence to the contrary, disabled veterans and their attorneys were portrayed as scamming the system, bilking the public treasury and trust – stories appeared with titles such as "A Raid upon the Treasury," "Fraudulent Practices of the Pension Sharks: Uselessness of Pension Attorneys," "Pensions and Socialism," "Pensions: Time to Call a Halt," and "Half a Million Dollars a Day for Pensions."

(Bacon, 1889; Boynton, 1898; “Pension Arrears Bill,” 1878; Sloane, 1891; Slocum, 1892; Warner, 1893). Disabled pensioners were mocked and the legitimacy of their disabilities questioned (Glasson, 1918).

In 1904, progressive Republican President Theodore Roosevelt broadened the 1890 Act with Executive Order No. 78, which provided old-age itself was a “disability,” even if no disabling cause was claimed, and regardless of the claimant’s level of income provided the claimant showed 90 days service and an honorable discharge (Glasson, 1918). Roosevelt transformed the 1890 Act into a service-and-age pension law. In 1907, the 1890 Act was replaced formally by the Service and Age Pension system – referred to as old-age pensions – that granted pensions based on a veteran’s age and length of military service. The 1907 law provided that veterans over the age of 62 years were to receive pensions, with graduated increases in payments with age (Glasson). Most veterans pensioned under the 1890 Act transferred to the rolls under the 1907 Act to receive increased payments (Glasson). Congress passed subsequent legislation in 1908, 1912, 1917, 1918, and 1920 that increased the Civil War pension rates based on age and length of military service (Fogel, 1996; Glasson).

In 1907, it was estimated the 1890 Act had cost over $1 billion (Glasson, 1918). Between 1870 and 1910, the proportion of veterans receiving pensions rose from 5% to 93% (Orloff, 1993; Rubinow, 1913). By 1907, the General Law had been transformed from “a provision for compensation of combat injuries into a de facto system of old age, retirement, and disability protection” (Orloff, p. 134).

Over time, the identity and definition of disability also became tied in the public’s mind to the character and moral fiber of veterans (Katz, 1986; Matza & Miller, 1976). Disabled pensioners with “legitimate” war wounds were a “righteous core of a generation of men” (Skocpol, 1992, p. 149). The legitimately disabled and their families deserved public support and were not in need of charity (Skocpol, 1992). The aging and war-disabled were particularly worthy beneficiaries, as compared to those with mental or “nervous” disabilities (“Arrears,” 1976; Dean, 1997). All this labeling, classifying, and what historian Larry Logue has called “the moral economy of veterans benefits” (Logue & Blanck, 2010), was linked to “a morass of fraud, a bottomless pit of extravagance” embodied by the pension system (“Democrats,” 1898, p. 6; “Spoils,” 1894, pp. 1–2). Those blamed were veterans who feigned or exaggerated disability, with a supporting cast of pension examiners, certifying surgeons, claim agents, and lawyers (Oliver, 1917).

Disability and Aging, 150 Years Ago

The Civil War affected society’s views of a swath of disabled and aging men in American society, which also impacted their widows and children. Much like today, discrediting and stigmatizing attitudes about disability after the Civil War were shaped by prejudice and stigma, ethnicity and race, the medical model, as well as by bureaucratic factors, attorney advocacy and lobbying, and economics (Oliver, 1917).

Our findings suggest a relation between negative stigma toward certain disabilities such as mental illness and pension outcomes (Cf. Phelan, Link, & Dovidio, 2008). Pensioners with visible or “less obscure” injuries from gunshot wounds (i.e., the “War Worthy”), by contrast, comprised the greatest proportion of successful claims, especially early after the war.

Not surprisingly, bodily war wounds were subject to less attitudinal prejudice and less likely to be rejected by the Bureau. By comparison, veterans with less visible and less understood conditions were subject to particular prejudice and stigma, and were more likely to be denied pensions outright. This penalty was found for those with so-called nervous mental conditions, with strong distinctions drawn between physical and mental impairments (Blanck, 2005a; Waterstone & Stein, 2008).

Our historical studies examine the roots of attitudinal prejudice and stigma toward veterans with mental disabilities. As discussed later, contemporary investigations show that today’s young veterans with post-traumatic stress disorder (PTSD) and mental conditions, for instance, are among those with the highest war-related injuries and most stigmatized impairments (Blanck, 2008). We find even with the broadening of pension policy after 1890, which in effect created a welfare program for aging veterans, those with mental disabilities still were more likely to be rejected from the system. Others suggest as the pension system became more open, and as prodded by pension lawyers and the G.A.R., more veterans with stigmatized disabilities took the risk of rejection (see Blanck, 2001). In turn, this may have fed into the prevalent skepticism about disability worthiness and scamming the system, creating a self-fulfilling prophecy.

Cynicism, or at least skepticism, about a system that incentivized the unworthy aging and disabled was famously observed by Civil War General M. M. Trumbull:

> If pension laws are potent in the making of diseases, pensions themselves have the opposite effect – they cure them. There is nothing that promotes longevity like a pension. . . .
>
> Veteran diseases’ are those miraculous ailments, which rage unsuspected in the bodies of old soldiers until seductive pension laws bring them to the notice of the sufferers (Trumbull, 1889, p. 724).

No doubt, pension doctors’ classifications of veterans were affected by the developing attitudes and stigma toward disability and aging, normality and worthiness. Moreover, a contentious process existed between the pension bureaucrats and the examining physicians, who often had differing definitions and conceptions of disability (Logue & Blanck, 2010). During this period examining doctors were adapting to a new medical and scientific approach to illness and disability, driven in part by rising workplace injuries from industrialization. Historian Douglas Baynton finds that “the concept of normality” began in America in the mid-1800s and was quickly linked to beliefs of industrialization and social Darwinism (Baynton, 2000, p. 35).

Yet, despite negative attitudes and pressure from the bureaucrats to label those as medically worthy or unworthy, in relatively few cases did examining pension doctors question the legitimacy of veterans’ disabilities. Our initial analyses performed on examining surgeons’ medical notes for roughly 6,600 white pension claimants, searching for reference to the terms “malingerer,” “deadbeat,” “fake,” and “fraud,” yields these terms were used by surgeons in only six of the 6,596 cases studied, representing 0.09% of the sample (Blanck, 2001, pp. 165–166).

Larry Logue and I find that, although physicians were more skeptical of African Americans than of white pension applicants, they were more likely to give black veterans the “benefit of the doubt” than were Bureau officials; a notation of service in the US Colored Troops on an application was enough to set Bureau reviewers against the applicant (Logue & Blanck, 2008, p. 394). Thus, the meaning of disability and pension worthiness often were contested in the context of race (Logue & Blanck, 2010). One struggle involved the meaning of disability, working to black veterans’ disadvantage insofar as they declined to pursue pensions. A second tension involved perceptions of the inability “to earn a support.” Here, Bureau reviewers were disproportionately skeptical of black applicants’ claims that they were unable to support themselves.

Not surprisingly, our studies of Civil War pensions show discrimination on the basis of race. Logue and I examine such disparities facing African-American Civil War veterans (Logue & Blanck, 2008). Almost 200,000 African-Americans, most liberated from Southern states, joined the Union Army in the later years of the war. Similar to our findings for immigrants mentioned below and for those with stigmatized disabilities, black veterans increasingly applied and subjected themselves to the Bureau’s “moral cost containment” as the pension law became more inclusive (Logue & Blanck, 2008, pp. 397–398). Essentially, race offered a shortcut for Bureau reviewers to cope with increasing applications, resist spiraling payouts, and impose order, albeit a discriminatory ordering, on a massive social program (Logue & Blanck, 2010).

Thus, all else equal, black veterans were less than one-third as likely as white veterans to be approved for pensions during the General Law, and less than half as likely as they aged under the expanded 1890 law. Historian Donald Shaffer finds, among other barriers, the pension process disadvantaged poorer and less literate black veterans who had difficulty proving their claims (Shaffer, 2004). Black veterans often were subject to “special examinations” or supplementary investigations to prove their pension worthiness. At the same time, the Bureau complained of widespread fraud by pension lawyers against their African-American clients: “[d]ue to fear ... the negro hands over his whole money, and these agents help themselves to whatever they see fit” (Oliver, 1917, p. 34).

Whatever the cause, the end result of this discrimination was, compared to whites, lower pension payments were linked to a shorter life expectancy for African-American veterans. Veterans fortunate enough to receive pensions had their lives extended – after the immediate post-war years, generous pensions were related to improved chances of survival; and the more contact with physicians, the longer the veterans were likely to live (Baynton, 2000; Logue & Blanck, 2004).

Martin Salm finds this same outcome for increases in Civil War veteran life expectancy across socioeconomic status and for those living in urban and rural areas, but particularly for poorer individuals and those in rural areas with acute and chronic conditions (Salm, 2007). Salm concludes “government transfers such as veteran pensions can not only improve the quality of life for beneficiaries, but can also substantially extend their length of life" (Salm, p. 25).

Likewise, economist Dora Costa finds, especially for black as compared to white Union army veterans, pension incomes increased the chances of retirement and independent living for the elderly prior to the advent of the Social Security scheme (Costa, 2008). After Social Security was enacted, from 1930 to 1950, these differences in black-white retirement rates and living arrangements declined, with concordant rises over time (Costa).

Veterans' social status also affected disability pensions. Ethnicity was tied to views of deservingness and moral worth, which were linked to nativistic views after the Civil War (Baynton, 2000; Gerber, 2001). Although we uncover no apparent disparity associated with nativity when veterans were accepted to the pension system, foreign recruits with disabilities were significantly less likely to apply for a pension in the first place (Blanck & Song, 2001). Compared to the native born, non-native veterans and particularly Irish immigrants had a substantially lower likelihood of applying for pensions.

Besides attitudes, race, and ethnicity, other post-war social dynamics shaped (and were shaped by) conceptions of disability and aging, and undoubtedly affected longevity. One high profile element was the new attorney bar that represented veterans in their quest for pensions. Never before had attorney advocates been involved in a program of such social and political scale, ostensibly to help aging disabled veterans pursue monetary gain, public acceptance, and recognition (Blanck & Song, 2002).

Claim agents and their attorney partners lobbied Congress for expansion of the pension system (Glasson, 1918). They reached veterans through newspapers and pamphlets (DeWitt, 2003). However, a backlash came against pension lawyers' activities during the later part of the nineteenth century when partisan tides changed and critics denounced attorneys as parasites responsible for defrauding the government and their clients of hundreds of millions of dollars. Whether pension attorneys were dedicated advocates or shrewd businessmen, they helped America's first major disability retirement and welfare system to flourish.

With this complexity and dynamics in play, it is hardly surprising that Bureau officials saw themselves as the last line of defense for the public trust and treasury. Perhaps this is why, as Logue suggests, bureaucrats fell back on comfortable biases about disability worthiness, ethnicity, race, lawyers' and lobbyists' motivations, and other like views in reaching their ultimate decisions (Logue & Blanck, 2010 – for instance, discussing case of veteran Clay Ballard who insisted "I did not receive a fair and impartial examination," because no "colored ex-soldier can get justice from that board"; see also Oliver, 1917).

In our book, "Race, Ethnicity, and Disability: Veterans and Benefits in the Post Civil War America," Larry Logue and I pay attention to how veterans' experiences with the government extended beyond the pension system as they aged (Logue & Blanck, 2010). After the Civil War, partially motivated by the political potential of the "soldier vote," Congress set up a network of communal homes for older Union veterans, many of whom had war-related disabilities or were living in poverty. Thus, in 1865 Congress established the "National Asylum," which in 1873 became the "National Home for Disabled Volunteer Soldiers," also known as the "Old Soldiers Home" (Kelly, 1998, pp. 91–93). These homes were integrated into the community and distinguishable from stigmatized "asylums" and poorhouses of the day (Rockoff, 2001).

By 1900, the "Old Soldier" network assisted tens of thousands of veterans in finding communal homes. Historian Patrick Kelley notes "'cultural attitudes molded during this period permanently shaped the evolution of veterans' care in the United States.' . . . The Old Soldier Homes were the 'direct bureaucratic forbear of the vast medical system. . . operated today as the Department of Veterans Affairs.'" (Kelly, 1998, p. 2). The National Homes thus contributed to ideas about community integration and support for those deserving and aging veterans who made sacrifices for the country.

Nevertheless, in our studies we find relatively few aging black Union veterans lived in the soldier homes; black soldiers made up about 8% of the Union army but less than 3% of soldiers' home residents (Logue & Blanck, 2010). When they lived in the homes, blacks were sent to segregated quarters. By contrast, a high proportion of foreign-born veterans resided in Old Soldier Homes. Irish-born veterans outpaced other groups living in Soldiers Homes, while veterans least likely to live in the homes were the native-born African Americans and whites, though these patterns changed over time. By the 1900s, rather than providing for severely disabled veterans, elderly veterans predictably were the majority of residents.

Historian David Gerber suggests today's attitudes about disability and aging may be found in an examination of the social construction of veterans' pension programs historically: "The story of disabled veterans is not complete without analyzing the ways representation and discourse transform functional impairments into fixed handicaps or disabilities in various historical environments" (Gerber, 2001, p. 80). Study of evolving implicit and explicit attitudes about contemporary disability laws and policies may be enhanced by an appreciation of the experiences of disabled Americans historically.

The pension scheme with all its partisan faults provided a chance for disabled and elderly veterans "to make their political influence felt and [was] a unifying focus for the disability rights movement" (Dinerstein, 2008, pp. 21–22). Civil War veterans formed a unique and newly affiliated group, in which they accepted, to use sociologist Erving Goffman's approach, "special opportunities for in-group participation" (Goffman, 1963, p. 38). Disabled pensioners developed, as Professor McMurray suggests, a new and "distinct class consciousness" (McMurry, 1922, p. 21).

Disability and Aging Today and Tomorrow

The Civil War pension scheme evolved within a unique mix of attitudes about disability combined with partisan, economic, and social forces that in many ways parallel challenges and tensions in the world today (Finocchiaro, 2008). Stigma and discrimination against disability affected pensions even when the system was drafted as neutral. This attitudinal penalty was particularly strong against blacks and non-native veterans as they aged.

Political advantage made the disabled a target in calls for progressive reform. This occurred at a time when norms about disability had not developed and advocacy for disability and elders was non-existent (Burgdorf, 2008). Yet, this also was a time of new group affiliation and identity for the disabled, particularly for veterans, that transcended ethnicity, race, and socioeconomic status.

With this unprecedented array of factors, it is not surprising a political and social backlash to the Civil War pension system occurred that affected notions of disability worthiness and advocacy for decades to come, indeed perhaps until the beginnings of the rights-based approach embodied in the ADA. Professor Theda Skocpol's seminal analysis articulates the underlying partisan attacks and pushback to the credibility of disabled veterans, saying "[b]ecause the very successes of Civil War pensions were so closely tied to the workings of patronage democracy, these successes set the stage for negative feedbacks that profoundly affected the future direction of US social provision" (Skocpol, 1992, p. 59).

Still, it must not be overlooked that tens of thousands of disabled Civil War veterans – white and black, immigrants and natives, young and old, across the spectrum of physical and mental disability – and their families fought for their right to participate and to live in the world, albeit through striving for economic advantages from pensions. Professor Hubbard comments, "Advocacy by and on behalf of disabled veterans of the Union Army following the Civil War is, in large part, the genesis of the contemporary struggle of people with disabilities for social and economic recognition" (Hubbard, 2006, p. 979; see also Burgdorf, 2008; Hickel, 2001).

Through their advocacy, they contributed to the social and political understanding of what it means to be "disabled" as we age – a question that continues to spark controversy today (Burgdorf, 2008). As said, pensions increased the chances ex-soldiers would live independently in their homes as opposed to in Old Soldier Homes or institutions. There is, therefore, much to learn about disability and aging policy from history (Baack & Ray, 1988; Rockoff, 2001).

The Civil War pension scheme similarly influenced views of subsequent welfare and elder reform, in particular, the advent of the Social Security system. Indeed, early Social Security programs focused on retirement payments and insurance for "Old Age" (Costa, 1998, pp. 17–18). Professors Baack and Ray conclude "the prior legislative history and administrative experience with the veterans' pension program increased the likelihood that in the context of the Great Depression a coalition could be formed to enact a Social Security Act" (Baack & Ray, 1988, p. 701). In this and other ways, collective action and the social identity of disabled veterans and their families contributed to the evolution of the modern welfare, health insurance, and old age retirement system.

In this final part, I review areas for future examination related to disability and aging. The topics are linked to attitudes and ideas about employment, today's American disabled veterans, and global opportunities in human and economic rights. Professor Michael Perlin has written that to make progress in disability rights "[w]e must go beyond the law and focus also on the issues of attitudes" (Perlin, 2008, p. 416). I draw next on our projects at the Burton Blatt Institute (BBI), through which we are pursuing a global strategy to advance the economic, social, and civic empowerment of people with disabilities, in large part, by changing attitudes (Blanck, 2005b; Burton Blatt Institute, 2008).

Employment and Attitudinal Discrimination

Our historical and contemporary research illustrates the dynamics, or what Professor Colker (2005) calls the "pendulum," of disability identity and affiliation in society. Similar swings are found in early judicial interpretations of the ADA, as judges narrowed the law regarding the inclusion and equal rights of people with disabilities. Thereafter, in 2008, the ADA was amended to address these concerns by broadening the definition of disability for purposes of the law (Blanck, Hill, Siegal, & Waterstone, 2009). We also have seen judicial attitudes about disability law often combine with a "blame the victim" mindset, which condemns and patronizes disabled people on the basis of their status. Indeed, reports suggest that negative stigma toward people with disabilities in general, and with mental disabilities, in particular, is rising (Markin, 2005, p. 155).

Today's disabled leaders, again at the forefront of advocacy, often are cast as frivolous and serial litigators, supported by fee-driven attorneys (Blanck & Song, 2002). Whether at the height of the Civil War pension system or, for instance, in today's workplace, disability advocacy is not easily accepted and old tensions emerge: Are they active social participants or passive recipients of welfare and charity, rights-based advocates or prey to "parasite" lawyers? (Rothstein, 2008). Professor Sam Bagenstos examines so-called abusive and extortionate litigation under the ADA and contrary to popular belief concludes "judges have shown little concern for whether the defendants were violating the law" (Bagenstos, 2006, p. 3; Bagenstos, 2000, p. 397).

One area in which attitude change is accelerating is in the private employment sector, particularly reflected in corporate attitudes, though overall employment rates for persons with disabilities remain low (Burkhauser & Stapleton, 2003; Schwochau & Blanck, 2003). Professors Lisa Schur, Doug Kruse, Joe Blasi, and I are conducting a series of studies examining corporate practices and collective attitudes in the employment of persons with disabilities (Schur, Kruse, Blasi, & Blanck, 2009). We conducted the first large-scale exploration of the experiences and attitudes of thirty thousand employees with disabilities. We find people with disabilities face important disparities at work, including lower pay and benefits, and less job security. These "disability gaps" contribute to negative evaluations of treatment by workers with disabilities, and their higher turnover and lower levels of job satisfaction (Schur et al.). A self-fulfilling prophecy is thereby established.

But also our studies suggest disability gaps vary substantially across companies and worksites, showing that attitudes play an important role in employment outcomes. In workplaces where employees report high levels of company fairness and responsiveness, there are no significant differences between employees with and without disabilities on measures of job satisfaction, company loyalty, willingness to work hard, and turnover intention. By contrast, in worksites where employees perceive lower levels of attitudinal fairness and responsiveness, employees with disabilities have especially low levels of job satisfaction, loyalty, and willingness to work hard, and express greater turnover intentions. The findings point to attitudes and culture having a large influence on the employment of persons with disabilities.

There is a need for future investigation given the limitations of any single sample, however large. Samples of companies should be further broadened and the surveys tailored to study disability issues and information on type (e.g., mental or physical) and severity of disability. Schur et al. (2009) note there may be interactions between disability and demographic characteristics – such as with race, ethnicity, and gender, which would parallel our historical findings described earlier – that explain a more complex and nuanced picture. Also, it will be valuable to assess whether a disability's onset occurred before or after the employee joined the company (or from other causes such as incurred in the Armed Services). This is because employers treat employees who acquire a disability differently from job applicants with other disabilities, for instance in the provision of workplace accommodations (Gunderson & Hyatt, 1996; Schartz, Hendricks, & Blanck, 2006; Schartz, Schartz, Hendricks, & Blanck, 2006).

A next step in the corporate culture program of research is underway at BBI. Supported by the US Department of Labor's Office of Disability Employment Policy (ODEP), our research consortium is developing standardized case studies of disability, corporate culture, and best practices. The ODEP study is the first to help companies systematically benchmark culture, and promotion and hiring programs that benefit people with disabilities and the companies themselves.

A further challenge today is to ensure the federal government acts as a model employer for persons with disabilities, promoting values for community and economic participation, and the dignity of independence and recognition. Since the revolutionary war and through the Civil War, disabled veterans were given preferences in federal employment (Logue & Blanck, 2010). In the late 1800s, many disabled Union veterans (and their widows) worked at the Bureau or for the customs service (Dearing, 1952; Glasson, 1918). Yet, federal jobs after the Civil War were hard to come by as veterans with and without disabilities were able to apply (Kelly, 1998).

Unfortunately, the federal government still faces challenges in employment of persons with disabilities and must address aspects of its culture that leaves employees with severe disabilities vulnerable to bias and discrimination in career advancement and promotion opportunities. Whether in the private or public sector, organizations need to address discrimination toward persons with disabilities. As we have seen historically, out-group individuals, such as those with severe and mental disabilities face greater stereotyping, stronger negative attitudes, and fewer career opportunities. These attitudinal barriers will continue – as they have for many years – until there is meaningful accountability for change.

Foremost, it is the need to address the low employment of persons with disabilities, particularly as they age, as means to counter longstanding bias and stereotypes. Systemic change is needed to transcend paper or “minimal” compliance with the law (Edelman, 1992; Wooten & Jamesy, 2005, p. 135). Enhanced understanding of attitudes and the experiences of employees with disabilities may help to improve employment rates, working conditions, and, importantly, the acceptance of people with disabilities as capable contributors in the workplace.

One promising approach toward a broader understanding of attitudinal disability discrimination is proposed by Professor John Dovidio and his colleagues. These researchers isolate the underpinnings and overlap of stigma and prejudice in contemporary research models of race and disability (i.e., disease and deviant behavior) discrimination (Chapter 9 by Dovidio et al., this volume; Phelan et al., 2008). They identify dimensions of overlap between prejudice and stigma, which shed light on the evolution of disability as a social and legal construct: “exploitation and domination (keeping people down), norm enforcement (keeping people in), and disease avoidance (keeping people away).” (Phelan et al., p. 365). “Down, in, and away” aptly is shorthand for how historically and today, people with disabilities have been dominated, left out, and segregated.

Today’s Veterans of the Middle East Wars

Wars create a cohort of disabled veterans who on their return seek a measure of gratitude and inclusion in society. America now is engaged in another war, with casualties mounting. Since 2001, more than 1.6 million men and women have served in Iraq or Afghanistan (Veterans for Common Sense v. Peake, 2008). Within 1 year of their return, one-third of these veterans were treated for Post-Traumatic Stress Disorder (PTSD) as a mental health diagnosis (Veterans for Common Sense).

More than 50,000 soldiers have non-mortal war wounds (Bilmes, 2007). The social and economic issues associated with war stressors, and particularly subsequent physical and mental disability, are substantial (Markin, 2005). In addition, many veterans today survive traumatic brain injuries, which require substantial rehabilitation and mental health resources. In his study of Union Civil War veterans, Professor Chulhee Lee finds the economic costs of that War were much greater when adding the adverse effects over time of wartime on aging veterans’ subsequent physical and mental health (Lee, 2003), and the same likely is true today.

In a review from the Civil War to the Vietnam War, Eric Dean finds veterans’ claims for PTSD are disfavored by the Bureau and the Veterans Administration (VA) (Dean, 1997). As found in our Civil War studies, less visible and understood impairments, such as mental conditions, were subject to criticism in the press and by the public (Blanck, 2001). Mental illnesses and infectious diseases, for instance, are impairments especially subject to severe prejudice, while orthopedic injuries and visible conditions are subject to less prejudice in pension determinations. Dean similarly finds that although a Civil War veteran’s physical war injuries may produce mental health conditions, “a veteran who suffered no physical wounds or diseases and was anything short of stark, raving mad and yet complained of mental problems originating in the war would have been regarded as a malingerer in this era" (Dean, p. 159). Civil War veterans with "nervous disorders" or mental illness, what today we call PTSD, often were excluded from the Old Soldiers Homes.

Today's generation of disabled veterans, men and women, are navigating the challenges of return to society, work, housing, family life, and attitudinal stigma. Unfortunately, the Government Accountability Office (GAO) finds many government agencies such as the VA lack a modern concept of disability: "[F]ederal disability programs remained grounded in outmoded concepts that have not been updated to reflect the current state of science, medicine, technology, and labor market conditions." (GAO, 2008, p. 8).

Unlike prior wars where most disabilities and deaths resulted from disease, dysentery, and infection, advances in medicine and technology enable soldiers to survive battlefield injuries that in the past may have been fatal (Burton Blatt Institute, 2007a). The cohort of returning soldiers with disabilities from Iraq and Afghanistan has an average age of 25 years, a current life expectancy of 65 years, and limited education and employment experiences (Bilmes, 2007). With history as guide, disability will affect their long-term employment, health and social status, and life expectancy (Anderson & Anderson, 1984; Gerber, 2001). War-stressors are particularly hurtful to younger and less educated veterans (Anderson & Anderson). These studies suggest the link among war injuries, resultant PTSD, and shorter lives. In a study of Civil War veterans, Professors Costa and Kahn (2008) likewise show greater wartime stress associated with higher mortality rates at older ages.

New programs for veterans with disabilities must focus on return-to-work, social competences, independent living, and economic self-sufficiency. In 2007, in partnership with BBI the Syracuse University Whitman School of Management established the "Entrepreneurship Bootcamp for Veterans with Disabilities" to offer free programs to disabled veterans of Iraq and Afghanistan (Burton Blatt Institute, 2007a). The program involves online and onsite courses on entrepreneurship and asset accumulation. The venture was so successful that by 2009, its third year of operation, five other universities adopted the program at no cost to the veterans.

As mentioned, despite advances and demonstration projects like the disabled veterans entrepreneurship boot camp, SSA and VA "eligibility criteria fall short of fully incorporating a modern understanding of technology and labor market changes," as well as the rights-based approach to disability benefits and inclusion in society (GAO, 2008, p. 8). In light of the ADA and its Amendments Act of 2008, there is an opportunity to use disability rights principles to ensure full reintegration into society for today's veterans (Hubbard, 2006; Mor, 2006). Professor Hubbard suggests, "[T]hroughout our nation's history, veterans and civilian disability rights advocates alike have contributed to advances in medicine and disability policy and informed our collective understanding of disability" (Hubbard, p. 986). Even the Civil War Old Soldiers Homes symbolized for veterans and others, as Patrick Kelly found, "the role of family and community at the very center of American national life" (Kelly, 1998, p. 25).

Perhaps, as after World War II, a GI Bill of Rights is needed to aid veterans with disabilities, and their families, readjust and reintegrate into society. Syracuse University Chancellor Nancy Cantor observed that after World War II, the university enrolled 10,000 veterans, tripling enrollment (Cantor, 2008). Educational and employment opportunities are paramount for veterans and their families to accumulate assets and remain out of poverty.

There are more than two million American veterans now receiving disability benefits (Bilmes, 2007). As the case since the Civil War, while disability pensions tend to extend the lives of veterans, these benefits provide for "a reduction in quality of life due to service-connected disability" and "provide compensation for average impairment in earnings capacity" on the basis of disability severity (Bilmes, p. 7). Our challenge is to ensure for our veterans that the concepts of civil rights – economic empowerment and community integration, rather than "incapacity" or "impairment" to work or stigma toward mental disability – will be embraced.

Global Opportunities in Human and Economic Rights

The aspiration for all to live equally in the world is now global. The 2007 United Nations Convention on the Rights of Persons with Disabilities (CRPD) views a world of collective action and participatory justice for persons with disabilities. Particularly in developing countries, persons with disabilities are stigmatized, segregated, less educated, and poor (Braithwaite & Mont, 2008; Filmer, 2008). In developing countries, people with disabilities lack basic life-sustaining supports, which contributes to declines in overall health and life expectancy.

Deon Filmer finds "basic facts about disability, poverty, and schooling in developing countries are unknown or have not been systematically addressed" (Filmer, p. 142). Filmer finds disability associated with poverty, in large part, because children with disabilities are less likely to receive education that allows them to participate in the economy, earn incomes, and pursue economic self-sufficiency. World Bank researchers, Jeanine Braithwaite and Daniel Mont, find in India "poor prospects for education and employment among disabled people, and the intense stigma that they often face, are expected to drive them into poverty" (Braithwaite & Mont, 2008, p. 12).

One organization addressing these issues is the Global Partnership on Disability and Development (GPDD), which promotes inclusion of persons with disabilities and their families in their local communities and assists in poverty reduction strategies (Burton Blatt Institute, 2007b; GPDD, 2008). The GPDD was established by a task force with assistance from the World Bank. BBI hosts the GPDD's Secretariat and supports its development and promotion. The effort brings together global stakeholders to promote positive attitudes and action for the integration and economic empowerment of individuals with disabilities. It is developing programs for access to education, employment, transportation, technology, and communications. GPDD is seeking to change attitudes and stereotypes about people with disabilities around the world, in ways consistent with the CRPD (Reina, Adya, & Blanck, 2007).

As the CRPD and its human rights model of disability are adopted, other inclusive approaches to development strategies may result (Mont, 2007). A prominent leader, Professor Gerard Quinn, views economic development strategies and disability rights as part of a country's political process, and that one major goal of the CRPD is to spur this connection (Quinn, in press). Quinn believes the Convention's values of freedom from stigma and discrimination, independence in living, and economic self-sufficiency "frame disability issues as issues of justice" (Quinn, 2008). Quinn further sees a "deeper reason" for the Convention that addresses:

> a chronic failure of politics in the past. . . . a failure in the political process to frame disability as an issue of justice and rights. Its legacy has been a large volume of unjust and discriminatory laws and practices around the world which have yet to be undone. . . . [T]he convention [i]s a means – among others – of correcting for that failure – as something that not only helps roll back that legacy but that also points to a new practice of disability politics (Quinn, 2008).

It is apparent how far conceptions of disability have come when we reflect on the Civil War pension scheme, which did not frame disability as an issue of "justice and rights," to use Quinn's notions, but rather as one of charity, deservingness, and later, welfare, elder support, and rehabilitation (Quinn, 2008). Yet, as earlier advances have faced backlash and recoil, the CRPD is facing pushback and challenges in implementation (Quinn).

To further the goals of the Convention, along with the GPDD model for economic empowerment and social justice, BBI is working for the National Institute on Disability and Rehabilitation Research (NIDRR) on "Asset Accumulation and Economic Self-Sufficiency" (Burton Blatt Institute, 2007c). There perhaps is no other single global policy issue that captures the potential of civil and human rights as does the emerging field of asset-development policy, with its potential to enable social, civic, and economic participation for persons with disabilities as they age.

Economic empowerment policy transcends traditional "income maintenance" and charitable, medical, and welfare "inability to work measures" that have anchored disability policy since the Civil War era (Mendelsohn, 2006). The ability to own and accumulate assets through employment, entrepreneurship, and other means is a right of citizenship, which promotes community inclusion and social participation, education, self-esteem, and increases in health and later life functioning (Barr & Sherraden, 2005; Sherraden, 1991).

Yet, our studies and those of others reveal people with disabilities continue to be excluded from these opportunities (Ball, Morris, Hartnett, & Blanck, 2006). There is no simple solution to the global challenges facing individuals with disabilities to escape poverty and advance economic self-sufficiency and community participation. Our team is focusing on strategies for attitude change, educational support, economic policy reform, and government-aided savings and micro loan programs. But as long as disability is viewed as a problem to cure, or an incapacity to participate in the labor force, and not tied to rights and justice issues, the potential for individuals with disabilities to accumulate assets and their right to live equally in the world will be stymied. The longer term solution is to build links across education, economic development, community participation, and positive attitudes about disability in the United States and globally.

Closing

Yesterday and today, the world confronts prejudice, stigma, and ambivalence toward persons with disabilities. Conceptions of "worthiness" and "capacity" are tied to the social and policy definitions of disability and aging (Bagenstos, 2004; Stone, 1984). This is the state of affairs as the global population of persons with disabilities grows, ages, and lives longer. It is the case as we face global economic emergencies not seen since the Great Depression. But these challenges open opportunities for reform in economic, health care, disability, and aging policy. Importantly, such reform must be driven and accompanied by attitudinal change.

Today's children and young adults, many who are veterans, are the first generation who will not know a world without landmark laws like the ADA or the UN Convention on Disability Rights. What will be their self-image? What perceptions will others hold of them? Will the stubborn attitudinal legacies of exclusion, unworthiness, and incapacity continue to hold back millions? Or, will this generation move toward values of equal rights and inclusion? This is the challenge ahead.

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Chapter 4

The Aging Workforce and Paid Time Off

Gillian Lester

The workforce is getting older. This is not simply a matter of the workforce aging as the population ages. The *relative* workforce participation of older Americans has risen steadily over the past decade.[1] The Bureau of Labor Statistics projects that the workforce participation rate of workers in the over-55 age group will continue to increase, pushing back the retirement age.[2]

Several factors help explain this phenomenon. Health and education levels have improved among older Americans, enabling them to work longer, with the potential of exploiting higher human capital investments.[3] Also, changes in the nature and degree of health and retirement security have increased the necessity of working longer: a shift from defined benefit to defined contribution plans has transferred risks associated with retirement income from employers to workers, and the costs of health care and health insurance are rising relative to income.[4] The current economic downturn is likely only to further these trends as many older Americans confront dramatic reductions in their anticipated retirement savings.

In addition, the age at which individuals are eligible to collect old-age pension benefits under Social Security has increased.[5] Concern about the long-term

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[1] US Department of Labor, Bureau of Labor Statistics (2008) [hereinafter, Spotlight on Older Workers].

[2] Toossi (2007) (in 1986, workers over 55 made up just 12% of the workforce, by 2006 it had increased to 16.8%, and by 2016, it is expected to reach 22.7%).

[3] *Id.*, at 40.

[4] *Id.*

[5] The Social Security Amendments of 1983, PL 98-21, 1983 HR 1900, §201, increased the age at which full Social Security benefits are payable and increased the delayed retirement credit for those who work beyond full retirement age. The age for collecting full Social Security retirement benefits will gradually increase from 65 to 67 over a 22-year period which began in 2000 for those retiring at 62.

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solvency of Social Security has prompted recommendations to encourage workers to delay retirement further still.[6] Additional work years would increase Social Security revenues, enable older Americans to prolong coverage under employee health plans thus reduce the demands on Medicare, and reduce dependency on Old Age and Survivors' Insurance benefits.[7]

An increase in the proportion of workers aged 65 and older raises distinctive issues with respect to workplace policies. For example, the desire of many older workers to retire gradually by "phasing" to part-time work before full retirement introduces questions about continuity of health insurance and pension eligibility.[8] Workplace design interventions might enable older workers to work more comfortably, safely, and productively given visual, hearing, and other physical changes with aging that can affect performance.[9] For similar reasons, training and retraining may be necessary to take full advantage of the human resources of older workers who change vocations.[10]

Another concern, and the subject of this article, is the need among older workers for occasional, temporary, work interruptions. As I will elaborate below, older workers have a higher risk of health complications, and as a corollary to this, may need to miss work. If such leaves require a suspension of pay, they can impose economic strain on the workers who take leave and their families. In this chapter, I argue that policies to accommodate the need for income security during temporary work interruptions may be desirable for a number of reasons: first, they might alleviate economic strain on older workers who need time off, as well as similar strains on younger workers who must interrupt work to care for elderly parents. In addition, by responding to a heightened need for flexibility, they have the potential to encourage extended workforce participation by older citizens, which for reasons mentioned earlier, might be desirable as a matter of social policy. Absent such participation, there may be increased pressure on other aspects of the social welfare system, such as old age pensions and long-term disability insurance.[11]

In addition, I examine the political task of generating public support for paid leave. Most who have advocated some kind of wage replacement for workers who need leave due to personal illness or the need to care for ill family members have focused on the needs of working parents with dependent

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[6] See generally, Favreault and Steuerle (2008) and Goda, Slavov, and Shoven (2007).

[7] Goda *et al., id*. at 4.

[8] Feldblum (2008).

[9] Wegman and McGee (2004).

[10] *Id*., at 186–198.

[11] *See, e.g.*, Li and Maestas (2008) (finding increase in federal Social Security Disability Insurance application rate as the Social Security full retirement age has increased and speculating that as old age benefits have become less generous relative to disability benefits there has been substitution between the two).

children.[12] Some have addressed elder care, although these analyses tend to focus on problems faced by adult children, particularly women, who must balance paid employment and caring for their aging parents.[13] Very few have addressed workers who themselves are older, and the economic insecurity associated with work interruption due to their own (or their spouse's) health needs.[14] I argue that refocusing public discourse in a way that takes a broader range of interests into account may be an important tool for generating public support for paid leave in the short run, and political resiliency in the longer run.

I begin by examining the argument in favor of paid leave given the growing needs of an aging workforce, both in terms of the demographic shift currently taking place, and in terms of the existing public and private infrastructure for supporting workers who need to take temporary leaves of absence from work. I then turn to questions of political feasibility.

Work Interruption for Health-Related Personal and Family Care

The Aging Workforce and Worker Health

The percentage of workers over 55 years of age is projected to rise from 16.8% in 2006 to 22.7% in 2016.[15] This is five times higher than the projected growth rate of the workforce as a whole.[16] The age groups expected to grow the fastest over the next several years are those workers between 65 and 74 and those 75 and older; both groups are expected to grow by more than 80% between 2006 and 2016.[17]

In addition, older workers are working longer hours. In the early 1990s, part-time work increased among older workers with a corresponding decline in full-time work. But since 1995, this trend has reversed itself, with a sharp rise in full-time work among workers 65 and over.[18] The majority of older workers now work full-time.[19]

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[12] Many have argued for public provision of paid leave for family care needs. Examples include Ayanna (2007), Gielow (2002), Hayes (2001), Issacharoff and Rosenblum (1994), Keels (2006), Lenhoff and Withers (1994), Lester (2005), Selmi (2000), and Young (1998).

[13] *See*, *e.g.*, Holly Shaver Bryant (2001–2002), Harms (2004), Morris (2007), and Smith (2004).

[14] An exception is Chai Feldblum, Testimony Before the United States Senate Special Committee on Aging, Hearing on Leading By Example: Making Government a Model for Hiring and Retention of Older Workers, April 30, 2008.

[15] Toossi, *supra* note 2, at 34.

[16] *Id.*, at 33.

[17] US Bureau of Labor Statistics (2008), at 9.

[18] *Id.*, at 3 (between 1995 and 2007, the number of older workers on full-time work schedules nearly doubled, while the number working part-time increased by only 19%).

[19] *Id.*

Although the health of older Americans has been improving, episodic and chronic health problems nevertheless accompany aging. In 2006, nearly 19% of people aged 55–64, and 22% of people aged 65–74, reported that their health was only fair to poor, compared with 9% of people in all age groups.[20] The fact of poor health does not mean that an individual is incapable of work. Many older workers with chronic health conditions remain in the workforce, even though their participation is lower than that of people without chronic conditions.[21]

If the proportion of older workers in the workforce continues to increase, we may see a corresponding decline in average worker health. Predicting the relationship between delayed retirement and worker health is complicated by the phenomenon of selection: it is possible that those workers who elect to remain in the workforce will be healthier, on average, than those who exit. Studies that have tried to capture this phenomenon have found some evidence of this type of "survivor bias."[22] However, when the size of the workforce expands, we might see a dampening of this selection effect: to the degree that those who historically would have selected themselves out of the workforce due to poor health find it more difficult to do so because of pressure to maintain wage income, we might predict declining health among older workers.[23] Another factor that might lead to declining worker health as older adults delay retirement is that the segment of the population most likely to need to work longer to maintain economic security is low-income individuals, a group that tends to have poorer than average health.[24]

Health- and Care-Related Work Interruptions

The absence rate for older workers is higher than for workers in other age groups.[25] The difference is sharper if the comparison is limited to absences by reason of illness, injury, or medical problems (this category excludes maternity).[26] The Bureau

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[20] National Center for Health Statistics (2007).

[21] Rix (2001).

[22] *Id.*, at 4; Nuyts, Elseviers, and DeBroe (1993) (discussing self-selection effects such as drop-out of unhealthy workers, that may explain finding that workers in jobs involving lead exposure are healthier than the general population).

[23] Rix (2001).

[24] *Id.*, at 3; Munnell, Soto, and Golub-Sass (2008) (finding disparities in healthy life expectancy between those in the top and bottom income quartiles of the population).

[25] US Department of Labor, Bureau of Labor Statistics, Current Population Survey (2007). The rate for workers 16–19 is 2.8, for 20–24 is 2.9, for 25–54 is 3.1, and for 65 and over is 3.5. Reasons include own illness, injury, or medical problems; child-care problems; other family or personal obligations; civic or military duty; and maternity or paternity leave. Excluded are situations in which work was missed due to vacation or personal days, holiday, labor dispute, slack work or business conditions, and the wait for a new job to begin.

[26] *Id.* The rate for workers 16–19 is 1.9, for 20–24 is 1.9, for 25–54 is 2.1 and for over 65 is 2.8. Note that "illness, injury, or medical problem" excludes absence to care for others, maternity, and paternity leave.

of Labor Statistics also collects data on the duration of absence of workers who become ill or injured, although this data is limited to *occupational* injuries. Older workers who miss work due to occupational illness or injury are also much more likely than others to require a lengthy absence (31 days or more), and their median number of days away from work is double or even quadruple the median number of days for workers in age categories below 44.[27]

The most marked increase in workforce participation among older Americans has been among women.[28] The increased prevalence of dual-earner families across all age groups means workforce entry by a non-working partner within a household is less likely to be available as "insurance" against loss of the working partner's income. If both partners are already working in order to meet a household's non-discretionary expenses, no "backup" earner is available.[29] Moreover, if one partner becomes ill and the other must give care, a dual-income household may suffer a significant shock to financial security if both partners are required to interrupt work.[30]

In addition, and no less important, illness among older Americans (whether working or not) is likely to impose increased demands on the next generation to provide care. The adult children of disabled elders often provide care, and may need to interrupt work in order to do so. If older citizens are more likely to be working now than in the past, and if they have adequate leave and health care policies, those policies will assist not only older citizens themselves, but also their adult working children who will otherwise be left with difficult burdens given their own dual-career circumstances.

Normative Arguments Favoring Intervention

When work interruption leads to a loss of income, households might compensate by drawing down savings or by borrowing. However, given the potentially unexpected nature of illness, the possibility that the need to care for others may occur early in one's career, and the lack of discretionary income available in many households,

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[27] US Department of Labor, Bureau of Labor Statistics (2007) (37.7% of workers 65 and over, and 33.3% of workers 55–64 were absent more than 31 days in 2007, compared with 20.8% of workers 25–34 and 27.1% of workers 35–44; the median days away from work for workers in age group below 44 ranged from 3 to 8 days, whereas for workers 65 and over it was 16 days).

[28] The number of employed women over 65 years old increased by 147% between 1977 and 2007 (compared with 75% for men in that age group). US Bureau of Labor Statistics (2008) at 1. Moreover, the proportion of employed women 65 and older is also increasing: in 1977 only about one-third of employed women over 65 were married, but by 2007 it was nearly one-half. *Id.*, at 4.

[29] *See* Warren and Tyagi (2003) (describing this phenomenon as the "two-income trap").

[30] The costs are not limited to foregone wages. A recent study estimates that caregivers of ailing loved ones spend on average 10% of their household income on the out-of-pocket costs of such necessities as groceries, medications, and transportation (National Alliance for Caregiving, 2007).

savings may be inadequate to cover the shortfall.[31] Obtaining a loan against the promise of future earnings is often difficult or impossible. If supporting and enabling delayed retirement is a desirable policy goal, it is useful to consider mechanisms for provision of income security during work interruption.

Insurance could increase social welfare by pooling the risk of income interruptions, thus helping to smooth consumption over the life cycle. Competitive insurance markets, however, depend on the availability of accurate information in order to quantify risk and set an efficient price, and certain determinants of personal financial risk – such as risk of unemployment, longevity, long-term health, or future costs of health care – can be very difficult to quantify.[32]

Private insurers also need accurate information about the risk characteristics of potential claimants. If there are significant information asymmetries between insurers and consumers, private insurance may be impossible.[33] Suppose, for example, prospective insurance buyers have systematically better information about their own health risks, unobservable to insurers (i.e., there is *adverse selection).* Without means to distinguish between "high risk" and "low risk" consumers, a private insurance provider might charge a premium that is actuarially competitive *on average*, effectively presuming the presence of both high- and low-risk consumers. But such pricing will drive away low-risk consumers, with the result that the private market will supply insurance only to the high-risk individuals, with all others inefficiently failing to purchase insurance.[34] Secondly, when an insurer is unable to monitor behavior perfectly, it is unable to adjust prices to account for the possibility that an individual who is fully insured will reduce efforts to avoid injury. Consequently, it will charge rates that reflect an expectation that consumers will (inefficiently) reduce efforts at avoiding claims.[35]

Where private insurance is unavailable, government intervention can help in a number of ways. One possibility is that the government could mandate or create incentives for individual savings. Such policies, however, cannot solve the problem of early-career interruptions that occur before sufficient savings have accumulated. If the program were mandatory, the government could enable those who have failed to accumulate sufficient savings to borrow to some extent against the future for certain kinds of need.[36] But even assuming this were possible,

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[31] Warren and Tyagi, *supra* note 29, at 51 (reporting a drop since the 1970s in the discretionary income available to the average middle-class American family after covering fixed household expenses such as mortgage, child care payments, etc.).

[32] *See*, *e.g.*, Lester (2001) (discussing this problem in the context of unemployment risk).

[33] *See generally* Pauly (1974).

[34] Akerlog (1970) (classic demonstration that where the quality of used cars cannot be ascertained, sellers with higher quality cars, because they cannot be fully rewarded, will exit the market leaving behind a "market for lemons").

[35] Shavell (1979) (modeling the optimal insurance policy, where the cost of insurance factors in the ability of the insurer to observe level of care by the insured).

[36] *See* Sugarman (1987) (discussing strengths and limitations of this approach).

for people with low incomes, setting aside a portion of earnings may lead to perilously low residual cash flow.

Another possible intervention is to mandate participation in a system of public insurance that provides partial wage replacement to workers who must temporarily leave work due to personal health or the need to care for others. A mandate can help to resolve adverse selection problems because it obviates the necessity of sorting individuals based on unobservable or only partially observable characteristics. Compulsory participation also improves the ability of the insurer to adapt ex post the cost of insurance if there are unexpected changes in risk of hazard or cost of losses.[37] Taking these factors into account, public provision might occur at lower cost than private provision, leading to efficiency gains.

Existing Protection Against Health- and Care-Related Work Interruption

Existing provision for workers who need to take temporary leaves of absence from work due to either personal illness or the need to care for others is limited. Benefits that provide some kind of financial assistance are available to only a limited subset of workers, and when available, include either no, or only very short-term benefits.

Unpaid Benefits – The Family and Medical Leave Act

The Family and Medical Leave Act of 1993 (FMLA)[38] is the US federal law that grants up to 12 weeks of job-protected leave during any 12-month period to eligible workers who need to take time off due to a serious health condition that makes them unable to perform the functions of the job[39] or to care for a spouse, son, daughter, or parent who has a serious health condition.[40] While on leave, employees must continue to receive any group health plan benefits that the employee would have

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[37] The costs imposed by moral hazard issues are organic to the provision of insurance generally. Government provision has no clear comparative advantage in addressing this problem. As a result, social insurance contains devices designed to reduce moral hazard parallel to those used in private insurance, such as copayments, deductibles, and so forth.

[38] The Family and Medical Leave Act, Pub L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 29 U.S.C. and 5 U.S.C.).

[39] 29 U.S.C. § 2612(a)(1)(D).

[40] *Id.* § 2612(a)(1)(C). Domestic partners do not qualify as spouses, and in-laws are not considered parents. 29 C.F.R. § 825.113. A “serious health condition” is an illness, injury, impairment, or physical or mental condition that involves inpatient care in a medical facility or continuing treatment by a health care provider. 29 U.S.C. § 2611(11).

received had the employee not gone on leave.[41] Fairly restrictive eligibility rules mean that only about half of the American workforce is covered by the FMLA.[42]

A significant feature of the FMLA is that it does not include wage replacement. A government survey completed in 2000 found that the most common reason for leave given by workers who took leave during the previous 18 months – whether covered by the FMLA or not – was due to their own health condition.[43] The survey found two-thirds of workers who took a family or medical leave between 1999 and 2000 received wage replacement from their employer, primarily through private sick leave plans.[44] This figure, however, does not account for workers who did *not* take leave or who cut short their leave because of inadequate wage replacement. Although 16.5% of all employees in the United States took leaves of absence from work to handle family or personal medical needs in 2000, another 2.4% of employees reported that they did not take leave despite feeling that they needed it (i.e., roughly 13% of employees who reported needing to take a leave did not take it).[45]

Among those who were unable to take a needed leave, the most common reason cited was not being able to afford it.[46] Workers who took leaves were more educated, had higher incomes, and were more likely to earn a salary (as opposed to hourly wage) than those who did not.[47] The average duration of leave was fairly short: 10 days.[48] Among those who did take leave, more than half reported

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[41] *Id.* § 2614(c)(1); *see also* 29 C.F.R. § 825.209. If an employee fails to return from leave, the employer may seek to recover the costs of continuing health benefits to the employee during the leave period. 29 U.S.C. § 2614(c)(2).

[42] In 2005, the FMLA covered only 54% of employees in the United States (US Department of Labor, 2007). Only workers who are "employees" (as defined in the Fair Labor Standards Act of 1938, 29 U.S.C. § 207(e)) are eligible, and then only if they have worked for at least 1,250 hours during the previous 12-month period at a worksite where the employer employs at least 50 employees within a 75-mile radius. 29 U.S.C. § 2611(2). Covered employers are those that employ at least 50 employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. *Id.* § 2611(4)(A)(i). Finally, the employer need not accommodate salaried employees in the top 10% of the payroll if denying their reinstatement is necessary to prevent substantial and grievous economic injury to the employer. *Id.* § 2614(b).

[43] Personal health problems were the reason given by 52.4% of leave-takers, followed in a distant second place by leave to care for a newborn or newly-adopted child (18.5%) (US Department of Labor, 2000) [hereinafter US Department of Labor, Balancing].

[44] *Id.*, at 4–5 tbl.4.4.

[45] *Id.* at 2-2 tbl.2.1, 2-14 tbl.2.14. In a 2003 survey of employed workers in California, 18.4% reported that at some point in the previous 5 years, they did not take a leave despite having wanted to do so (Milkman and Applebaum, 2004).

[46] US Department of Labor, Balancing, *id.* at 2–16 tbl.2.17 (77.6% of workers who reported needing leave cited this reason for not taking it). *See also* Milkman and Applebaum, *id.*, at 58 (reporting similar findings from the 2003 California survey; 83% of women and 52.2% of men in the group who reported having foregone a leave despite wanting to take one cited not being able to afford it as the main reason).

[47] US Department of Labor, Balancing*, id.,* at § 2.1.3.

[48] Although the average duration was short, about 10% of leave-takers took between 41 and 60 days and another 10% took more than 60 days. *Id.*, at 2–3.

that their biggest source of anxiety about the leave was financial.[49] Thirty-seven percent of leave-takers in 2000 reported cutting short their leave time because of lost wages.[50] Among workers in the 2000 survey who reported being unable to take a needed leave, 48% would have taken the leave for their own health condition and 23% would have used the leave to care for an ill parent.[51]

Paid Benefits: Private

Sick leave is a fixed or proportional amount of paid, job-protected, leave time that an employee can accumulate upon working a certain number of hours. Approximately 57% of private industry workers are eligible for sick leave through their employer.[52] Private sick leave is typically available for only a short duration – about 10–20 days[53] – which limits its usefulness in enabling workers to take advantage of their job-protected leave entitlements under the FMLA. In addition, sick leave is usually intended only for the worker's own illness, although some plans allow workers to use their sick leave to care for others.[54] It ordinarily provides full wage replacement, and can usually be used for minor non-work related illnesses, such as the flu, that are very common but do not meet the rigorous definition of a "serious" illness (under a physician's care) required by the FMLA.

Short-term disability benefits are an insurance benefit funded by contributions by the employer or employee (or both). Like sick leave, these benefits are intended for personal illness. About 38% of workers in private industry have paid short-term disability insurance: 13% receive coverage through their employer, while the remainder either self-insure or are covered by state-mandated social insurance (discussed below).[55]

About one-third of private establishments polled in a 2000 government survey reported offering fully or partially paid leave benefits specifically designated for family care needs: 31.8% reported offering benefits for workers to care for a seriously ill family member.[56] However, the fact that an establishment provides paid benefits for family leave does not mean that all workers will be eligible to

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[49] *Id.* at 4–2 tbl.4.1 (53.8% of leave-takers cited this worry, with smaller percentages citing worries about job loss, job advancement, or loss of seniority).

[50] *Id.* at 4–9 tbl.4.8.

[51] *Id.* at 2–15.

[52] *Id.* at 28 tbl.19.

[53] US Department of Labor, Press Release (1997) (showing average number of sick days ranging from 11.2 days for an employee who has worked for a particular employer for 1 year, to 21.1 days for an employee of 25 years).

[54] Lovell (2004), at 9, tbl.4 (between 1996 and 1998, 30% of workers were in plans that permitted sick leave to be used for care of sick family members).

[55] US Department of Labor, Bureau of Labor Statistics (2007) [hereinafter Compensation Survey].

[56] US Department of Labor, Balancing, *supra* note 43, at 5–14 tbl.5.6. Some establishments stated that pay would depend on circumstances.

receive them. A recent government survey reported that in 2007 only 8% of private industry workers were actually eligible for paid family leave benefits through their employer.[57]

Paid Benefits: Public

A number of programs that have existed for many years and might commonly be thought to provide some measure of insurance against wage loss due to family care or non-occupational illness are in fact aimed at other types of income interruption. For example, workers' compensation programs in every state provide cash benefits to workers who become ill or injured, but coverage is limited to workplace-related injuries and illnesses. Social Security Disability Insurance (SSDI) is an important benefit for workers who experience long-term disability, but is not appropriate for workers who experience temporary absences: benefits are available only to workers who have impairments that are expected to last at least a year, and are available only after a 5-month waiting period.[58] A few states interpret their unemployment insurance laws to allow workers forced to quit by reason of family caregiving obligations to collect UI benefits, but for the most part, such work interruptions are considered voluntarily quits and foreclose benefits.[59]

Recently there has been an increase in publicly provided wage replacement for temporary work interruptions resulting from non-work related illnesses or injuries or the need to care for family members. Still, such benefits are very limited.

Sick Leave

Wider adoption of sick leave benefits is a major thrust of current advocacy efforts. San Francisco and the District of Columbia recently passed laws mandating employers to provide sick leave.[60] In both instances, employees may use their sick leave to care for family members as well as themselves.[61] Several other states and cities are currently considering similar mandates of between five and nine sick days

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[57] Compensation Survey, *supra* note 55, at 28 tbl.19.

[58] To be considered medically disabled under Social Security rules, an individual must be unable to engage in any "Substantial Gainful Activity" (SGA) due to any medically determinable physical or mental impairment(s) which can be expected to result in death or which have lasted or can be expected to last for a continuous period of not less than 12 months.

[59] US Department of Labor, Bureau of Labor Statistics (2008).

[60] See S.F., CAL., ADMINISTRATIVE CODE § 12 W.3 (mandating all employers to provide maximum of between 5 and 9 days of accrued sick leave, depending on size of employer); Accrued Sick and Safe Leave Act of 2008, § 3(a)(1)-(3), 55 D.C. Reg. 3452, 3453 (employers, depending on size, must provide maximum of between 3 and 7 days sick leave per calendar year).

[61] S.F., CAL., ADMINISTRATIVE CODE § 12 W.4(a); D.C. Accrued Sick and Safe Leave Act of 2008 § 3(b)(1)–(3).

per year.[62] Most current proposals would exempt small businesses, requiring only businesses over a certain size – typically fifty employees or more – to provide the benefit. All provide that the sick days may be used not only for personal illness, but also to care for a sick family member. In addition, a bill recently introduced in the House of Representatives, The Healthy Families Act, would require employers with more than 15 employees to allow their workers to earn up to 7 days of sick leave in a year, which they could use to care for themselves or family members.[63]

A key aspect of many current reform proposals is to make existing private sick leave benefits transferable to care of family members. Several states have also recently passed laws that require employers with sick leave plans to permit employees to use the benefits to cover work absences to care for family members, although in some cases these are limited to caring for sick children.[64]

Short-Term Temporary Disability Insurance (TDI)

Five states (California, Hawaii, New Jersey, New York, and Rhode Island) and Puerto Rico mandate short-term disability insurance through a state social insurance program.[65] Together, these state insurance programs account for coverage of 6% of the US workforce. As with private short-term disability insurance, these benefits were historically intended for personal illness only, although in some places this has changed.

Recently, three states have enacted universal paid family leave programs based on a social insurance model,[66] and five other states have recently considered or are currently considering such proposals.[67] In 2004, California expanded its temporary disability insurance program to cover workers who must take time off to care for

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[62] See generally, National Partnership for Women & Families (2009).

[63] Healthy Families Act, HR 2416, introduced May 18, 2009.

[64] Jurisdictions that permit extension of these rights to private employees include California, CAL. LAB. CODE § 233; Connecticut, CONN. GEN. STAT. § 31-51ll; District of Columbia, D.C. CODE § 32-502; Hawaii, HAW. REV. STAT. § 398-4; Minnesota, MINN. STAT. § 181.9413 (applicable only for ill children); Oregon, OR. REV. STAT. § 659A.174; Vermont, VT. CODE ANN. tit. 21, § 472; Washington, WASH. REV. CODE § 49.12.270; and Wisconsin, WIS. STAT. § 103.10.

[65] Employment & Training Admin., US Department of Labor, Comparison of State Unemployment Insurance Laws: Temporary Disability Insurance 8-1 [hereinafter Temporary Disability]. Available from http://www.workforcesecurity.doleta.gov/unemploy/uilawcompar/2008/disability.pdf. Of workers in private industry covered by short-term disability benefits in 2007, 17% (about 6% of all workers) were given the benefits because of state mandates or public provision. Compensation Survey, *supra* note 55, at 27 tbl.18.

[66] CAL. UNEMP. INS. CODE §§ 3300-3306; WASH. REV. CODE § 49.86 (2008); Act of May 2, 2008, 2008 N.J. Sess. Law Serv. ch. 17.

[67] Arizona, Massachusetts, New Hampshire, New York, and Oregon. *See* H.B. 2598, 49th Leg., 1st Reg. Sess. (Ariz. 2009); S. 71, 186th Gen. Ct. (Mass. 2009); H.B. 661-FN, 161st Sess. (N.H. 2009); A. 7130, 2009 Leg. (N.Y. 2009); SB 966, 75th Sess. Reg. Ass. (Or. 2009). *See also* National Partnership for Women & Families (2009).

seriously ill family members or to bond with a new child.[68] Financed by a payroll tax on workers, it covers substantially more employees than the FMLA – almost all private-sector workers – but does not include job restoration rights. The state of Washington followed in 2007, creating a parental leave program that would give new parents up to $250 per week for a maximum of 5 weeks following the birth or adoption of a child, and include job protection rights for many of those who do not have it under FMLA.[69] In 2008, New Jersey also expanded its existing temporary disability insurance program to include a family leave benefit.[70]

These recent developments indicate public support for paid leave insurance for the care of ill family members, at least in some states. However, in two instances (California and New Jersey), the new programs built on a pre-existing short-term disability insurance scheme, whereas most states have no established program of cash benefits for short-term illness and disability. The feasibility of establishing short-term disability insurance programs in the first instance, let alone extending them to include a caregiving component, is perhaps the greater challenge for imagining a more comprehensive regime of cash benefits for health- and caregiving related work interruption.

In sum, workers have limited access to wage replacement programs, public or private, when they experience work absences that are beyond just a few days (i.e., as covered by sick leave programs), but not expected to result in long-term disablement (as might be covered by Social Security Disability Insurance). While expanding the availability of sick leave is an important step toward income security for workers who must interrupt work due to personal or family care needs, the availability of temporary paid time off of intermediate duration fills a distinct niche. It is likely to be especially valuable for older workers, given their greater likelihood of requiring an extended absence following illness or injury.[71] Moreover, for workers in their middle years who may confront multiple needs at once, e.g., care for children, parents, and possibly personal health needs linked with the birth of children, short-term sick leave may be inadequate.

Social Preferences and Accommodation of Older Workers

It is possible that the absence of more extensive private or public provision of protection against family or health-related income interruption reflects a lack of public

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[68] CAL. UNEMP. INS. CODE §§ 2625–3306. The new provisions on Family Temporary Disability Insurance are located at CAL. UNEMP. INS. CODE §§ 3300-3306.

[69] WASH. REV. CODE § 49.86 (2008). Employment protection rights are extended to those leave-takers working for employers with (1) twenty-five employees or more and (2) who have worked for the employer for at least 12 months and for at least 1,250 hours during the previous period. WASH. REV. CODE § 49.86.090 (2008). At the time of writing, the funding mechanism has yet to be determined and thus the program has not been implemented.

[70] Act of May 2, 2008, 2008 N.J. Sess. Law Serv. ch. 17 (West) (providing up to 6 weeks of partial wage replacement benefits for family temporary disability leave).

[71] *See supra,* text accompanying note 26.

demand. However, the previous section of this chapter offers at least circumstantial evidence of an unmet need that more extensive provision would serve. Lobbying by business interests has undoubtedly played an important role in limiting public intervention. While I do not wish to suggest that the influence of this factor is unimportant – on the contrary, it is probably quite profound[72] – it is also important to consider the preferences of citizens who vote and influence elected officials with respect to policy change. In this Part of the chapter, I consider the dimensions across which a proposal for public provision of paid leave might garner public support.

In the abstract, if state intervention helps to surmount a market failure, thus enabling the provision of a benefit that the public desires, the majority of the voting public might support the intervention. However, social insurance often goes beyond simply correcting an information- or coordination-based market failure.

By mandating participation by individuals who would otherwise exit from a risk pool that includes high-risk individuals, public insurance *redistributes* relative to the market. Public pensions, for example, tend to redistribute resources from young to older generations (assuming pay-as-you-go financing), and from people with short- to long-life spans. Social insurance also might not (indeed typically does not) distinguish between households of different sizes. For risks that multiply with the number of persons in a family (such as health risks), larger families become net transfer beneficiaries. Further still, some types of social risks, including illness, disproportionately affect low-income populations, such that mandatory social insurance might also lead to cross-class redistribution.[73]

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[72] *See, e.g.*, Pear (2007), Hester (2008), and Greenhouse (2007) (reporting that businesses objected to N.Y. paid family leave proposal as it would "increase absenteeism, [which thereby would] increase costs and create burdens for employers").

[73] Whether an employment-based mandated benefit does in fact lead to redistribution depends on a number of factors. If the benefit is taken up disproportionately by easily identifiable individuals or groups, its cost might be passed on to those beneficiaries in the form of reduced wages or employment. Employment levels will also fall if workers value the benefit less than the cost of the wage reduction. *See generally*, Summers (1989) (modeling the cost-shifting of mandated benefits using partial equilibrium analysis based on price theory). If this is the case, the redistributional character of the mandate may be muted. Populations more likely to suffer frail health (e.g., older workers, low-income workers) or have caregiving obligations (especially women in their child-bearing years), might pay for a paid leave benefit in wages or employment levels.

Cost-shifting to intended beneficiaries might occur even when a mandate imposes no direct costs on employers. If a social insurance scheme were created and funded entirely by a tax on workers, employers might still perceive certain groups of workers as more expensive to hire than others because once funded, they would be more likely to take leaves of absence thus imposing "disruption" costs on the employer. The employer might reduce the hiring or wages of these workers to offset the costs of having to hire and train replacement workers. *See* Jolls (2000) and Rabin-Margalioth (2003).

However, both the existence and degree of cost-shifting are uncertain. Statutory prohibitions on discrimination in wages and hiring, to the degree they are enforced, would ameliorate the shifting of costs to beneficiaries, at least those from protected groups, in heterogeneous workforces. Further, to the degree that a benefit increases the workforce attachment of its beneficiaries, employers will bear lower costs of turnover. The employer might place higher value on certain groups of workers that it previously avoided hiring, paid lower wages, or made fewer investments in based on predictions that they would quit before the employer could recoup its investment. Lester (2005), at 61.

Assuming a new policy to expand availability of paid leave benefits were financed through a payroll tax (as is the case in the existing states that have short-term disability insurance and paid family leave programs), redistribution would occur principally between groups of workers. If the frequency and duration of absences for personal injury and illness are higher for older workers than others, a paid leave benefit that covers illness-related leaves would tend to redistribute from younger workers to older workers.

As the proportion of older workers increases, we might expect political support for policies that benefit older workers also to increase, either because of self-interest on the part of voters who will immediately benefit from such policies, or because an increasing number of voters come to believe "that could be me" (given longer life expectancy) or "that could be me soon" (given fewer average years to the decision over whether to retire or continue working).[74] Senior citizens are a powerful constituency in American politics and only growing stronger as the population ages. Certain social programs, such as Social Security and Medicare, owe their resilience in significant part to the powerful lobby of senior citizens.[75]

Thus, it is possible that we are entering into a period in which there will be increasing public support, driven by voters' perceptions of their own interests, for policies to accommodate the needs of older workers who delay retirement.

However, it is possible that the mobilization of older workers around their own interests would be inadequate to the task of policy change. This raises the further question of under what conditions citizens might support a redistributive social program even believing that they will *not* be its principal beneficiaries. There is a significant body of research showing that although self-interest remains an important – perhaps the predominant – human motivator, altruism is also a distinct motivation that influences human sociality.[76] In other words, rationality appears to encompass a fairly complex utility function that incorporates both self- and other-regarding motivations. Although the literatures in economics and psychology addressing this topic are large, I focus here very briefly on studies of empathy–altruism and its connection to in-group favoritism.

Social cognition is made possible through the learned human capacity to take the perspective of others.[77] Perspective-taking might take the form of true identification or empathy with another – mentally imagining oneself to be the other – but absent a fair degree of knowledge about the other person, this may be difficult or impossible. More commonly, people take the perspective of others by "projection," i.e., imagining what they would have done and thought if put in the role of the other.[78]

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[74] Lindert (1996) (studying effects of aging of the population on mass support for social spending).

[75] Campbell (2003) (describing the effect of senior citizen political participation on the growth and strengthening of Social Security and Medicare).

[76] *See generally,* Pilivian and Chang (1990), Fehr and Schmidt (2006), and Fehr and Gintis (2007).

[77] Levy-Garboua, Meidinger, and Rapoport (2006).

[78] *Id.*, at 574–575.

As a judgmental heuristic, self-projection enables people to make predictions about others that are often accurate.[79]

Both forms of social cognition can give rise to pro-social behavior. Empathy in response to the needs or distress of others can drive individuals to help (or decline to help). Researchers debate whether what appears to be other-regarding behavior truly reflects pure altruism. For example, voluntarily helping someone in need may reflect a truly empathic, other-oriented response, or it may reflect an egoistic desire to reduce personal distress induced by seeing another in distress.[80] Regardless of the precise mix of egoism and altruism that drives it, the fact remains that some portion of the population *can* be motivated to help others without promise of pecuniary reward.

The cognitive mechanism of self-projection carries over to the group level. "Social identity theory" posits that people's identity is significantly organized around their membership in salient groups.[81] People are more likely to project onto others who are in their own social group than they are onto people from different groups.[82] Self-anchoring may lead them to reason that similar others will think and behave more like themselves than dissimilar others.[83] The use of the self-projection heuristic at the group level gives rise to a number of social phenomena. People perceive more cohesion, expect more reciprocal behavior, and are, in turn, likely to be more generous and cooperative toward members of their own group.[84]

Meanwhile, context also matters. It is well established that people will express different social preferences depending on how an issue is presented or "framed."[85] The framing of a social problem can influence who takes an interest in the problem, and how different members of the public perceive their own role. Importantly, social groups can be framed in different ways – they can be defined narrowly, at the level of classmate or neighborhood, or more broadly, at the level of nation. Any given person will belong to multiple groups, and membership in a particular group will have salience in some contexts but not others.[86] A key finding of the research, when viewed from a policy perspective, is that group status is mutable:

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[79] Note, however, that the egocentric foundation of the heuristic may lead people to overestimate the extent to which others have the same beliefs, the so-called "false consensus" effect. *Id.*, at 576.

[80] Robert B. Cialdini et al. (1987) (offering examples of an egoistic motive of distress-reduction).

[81] Tajfel and Turner (1986).

[82] *See generally*, Robbins and Kreuger (2005).

[83] Levy-Garboua, et al., *supra*, note 77 at 589.

[84] *Id.*, at 593; Robbins and Kreuger, *supra*, note 82 at 43–44.

[85] *See generally* Hanson and Yosifon (2004) and Kahneman (2003) (describing his research with Amos Tversky in the 1970s and 1980s that illustrated the effects of framing).

[86] This phenomenon can be morally problematic; indeed, much of the literature on groupism has focused on its role in the formation of racist attitudes. American benevolent societies, which created some of the first forms of social insurance, were premised on the formation of an identity that excluded those outside the brotherhood of members (Glenn, 2001).

in-group favoritism can be altered depending on the level at which groups and social categories are made salient.[87]

If one's goal is to marshal support for a paid leave program, mindfulness of groupism might counsel different decisions in terms of framing the public debate than one would initially imagine. Although much of this chapter argues for the importance of paid leave for the growing proportion of older workforce participants, appealing to the *special* needs of older workers might reduce, rather than increase, public support.

It is true that older people have often been identified as a "deserving" group in public opinion surveys relating to Social Insurance and Medicare.[88] In cross-national studies, those deemed most "deserving" across cultures are often the elderly.[89] In general, people express stronger support for redistribution if they believe that the recipient's need is caused by circumstances beyond his or her control.[90] The inclusion of the elderly as worthy beneficiaries of public support has been linked to the assumption that the retired elderly cannot be expected to work. The new non-retirees who remain in the workforce, however, may not fit as comfortably within the class of people whose need is beyond their control. They are, after all, gainfully employed. As such, they may be perceived as less deserving than if they were faultlessly unable to earn a living. One could even imagine hostility generated out of the perception that by remaining in the workforce beyond the traditional retirement age, older workers are imposing the costs of their failing health on co-workers.

Another potential problem with emphasizing the special needs of older workers is that doing so might increase the salience of elderliness as a social category that divides "in-group" (younger) contributors from "out-group" (older) beneficiaries. Psychologists have found that most negative stereotypes about aging relate to mental or physical debilitation as a precursor to death.[91] A campaign that emphasized the need of older workers to have paid leave for health-related work interruptions could reinforce the public's association of "older workers" with "poor health," activate stereotypes about the "frail elderly," and even increase hiring discrimination notwithstanding the formal protection of laws against age-based discrimination. It might also, paradoxically, reduce support on the part of older workers themselves. Another research finding is that most older adults have a positive sense of subjective

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[87] Robbins and Kreuger, *supra*, note 82 at 42; Gaertner, Mann, Murrell, and Dovidio (2001) (reviewing literature on recategorization of social groups); Oakes, Haslam, and Turner (1994) (reviewing studies on the role of context, or frame of reference, in self-categorization).

[88] A classic study is Coughlin (1980).

[89] Van Oorschol (2000).

[90] *Id.*, at 38–39 (polling Dutch subjects, whether the recipient had control over his needy status was the most significant factor among several in its influence on support for welfare transfers); Wills (1993) (polling American subjects).

[91] *See* Levy and Banaji (2002).

well-being.[92] Appealing to the "special needs" of older workers might conflict with the positive self-identity of many older workers, leading them to distance themselves from negative stereotypes of the frail elderly, and thus alienate them rather than garner their support for intervention.

Given these considerations, we might instead think of ways to frame a public debate about paid leave in such a way as to emphasize commonality rather than difference among citizens. I mentioned in the introduction that most public attention and advocacy on the issue of paid leave has emphasized working parents with dependent children. This may have much to do with the history of the implementation of the Family and Medical Leave Act, which was driven in large measure by concerns about gender equality. This skew of the literature may have had the effect of framing the existing debate surrounding paid family leave as predominantly a women's issue, or an issue for "families with children." The framing of the needs of caregivers, especially women, as the group with significant need for paid leave has tended to conflate the role of caregiver with the role of parent of young children.

The successful framing of a paid leave proposal might do well to de-emphasize particular "needy" groups, such as women with children or, for that matter, older workers. The need for income continuity when personal health or family caregiving needs disrupt work might fruitfully be reframed as something that is not an old people's problem, nor a young family's problem, nor a women's problem, nor a poor people's problem – it is a basic human challenge we all face, if not now, then some time in our lives. This re-framing might not only make common experience of life-cycle risks *more* salient, but also reduce the salience of perceived "taxpayer" versus "beneficiary" group status.

A related but distinct strategy for fostering public support of redistribution to older citizens is to emphasize the importance of intergenerational reciprocity. Given the prevalence of common "life cycle" risks, younger citizens might support programs that accommodate older workers on the basis that they, too, will be old one day. Each generation recognizes that it must give care twice, once for the previous generation and once for the next generation, and that it, in turn, will receive care twice.[93] This recognition can give rise to a kind of social compact that encourages public adoption of insurance against life-cycle risks, for which citizens at various stages of their lives will be either net contributors or net beneficiaries.[94]

The foregoing discussion presents a number of opportunities for future psychological inquiry in the service of policy design. For example, does fostering political mobilization for social insurance that will redistribute resources to a particular demographic group, older citizens, trigger self-regarding opposition from others

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[92] Whitbourne and Sneed (2002) (describing the "paradox of well-being," whereby most older adults have a positive sense of subjective well-being).

[93] Bovenberg (2008). *See generally*, Cigno (2006).

[94] Note that such arguments are often framed in terms of efficiency. Compulsory intergenerational transfers (e.g., public pensions) financed either through accumulation of reserves, or pay-as-you-go financing, whereby current workers finance the pensions of current retirees, enable efficient "life-cycle" income smoothing. *See, e.g.*, Bodie (1990).

who see themselves as the outgroup? Does appealing to intergenerational reciprocity eliminate such opposition? Does the perception that elderly citizens are "deserving" change when the elderly are understood as the *working* elderly? Do young, middle-aged, or *even older people* try to increase social distance between themselves and "the elderly" based on negative associations between aging and mental or physical debilitation, and if so, does this have the effect of reducing public support for programs that benefit the elderly? Is it feasible, for purposes of generating support for social insurance, to appeal to common life-cycle risks within a "group" the size of the populace, or is the phenomenon of group-based self-projection so attenuated at that level as to be insignificant?

If this chapter raises more questions than it answers, perhaps it nevertheless serves a useful purpose within this collection of essays, a central aim of which is to inspire fruitful collaboration on problems of aging, disability, and discrimination at the intersection of law and psychology.

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Chapter 5
Baby Boomers at Work: Growing Older and Working More

Eve M. Brank

"Take the sum of human achievement in action, in science, in art, in literature – subtract the work of the men above 40, and while we should miss great treasures even priceless treasures, we would practically be where we are today . . . The effective, moving, vitalizing work of the world is done between the ages of 25 and 40" (Bliss, 1991, p. 323). Dr. William Osler – author, professor, and esteemed physician – spoke those words in 1905 when he was 55 years old and leaving the employment of Johns Hopkins for a prestigious position at Oxford University. He went on to say, ". . . the uselessness of men above 60 years of age, and the incalculable benefit it would be in commercial, political and in professional life if, as a matter of course, men stopped work at this age" (p. 323). Osler continued by alluding to a euthanasia scheme from Anthony Trollope's novel, *The Fixed Period.* His comments were meant to cleverly reflect his humility for his own work and critique the status of universities that hired faculty for life. His sarcasm and subtleties were missed by much of the media reporting on the farewell address, and they assumed he was truly in favor of euthanasia (e.g., *The New York Times,* 1905). Despite Dr. Osler's cynical intent, soon some older Americans feared being *oslerized* (Elster, 2006).

Why did the media and society in general respond in such a way to Dr. Osler's sarcastic comments? Perhaps Dr. Osler spoke what many silently believed and felt about older adults and the process of growing older. Even though he had a humorous intent, his comments seemed believable by many who heard them. At the time of Dr. Osler's speech, the United States was still in the process of transforming from an agrarian to industrial society. In more agrarian societies, old age is generally venerated, but in industrialized societies older people lose their place of authority (Butler, 2009). As such, old age is no longer respected, but feared.

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Certainly if Dr. Osler made his same speech today and it was taken at face value, it would create a stir, but for what reason? Would it be true or feigned outrage? Now, over a century later, 40 is popularly referred to as the "new 30" (Tierney, 2004) with it common for people to start careers or families at 40 years of age or older. Statistics and anecdotes substantiate an underlying and ubiquitous notion that growing older is something to fight (Nelson, 2002). In the current chapter, I will first detail the legal framework for workplace age discrimination and court case examples that have largely mirrored race and gender discrimination law. Next, I will discuss the psychological research that details the consequences of age discrimination with a particular focus on the combined effects of stereotype assimilation and notions of deservingness of respect. Last, I will suggest that until we know the causes of age discrimination, we cannot legitimately address its consequences the same way we have addressed other forms of discrimination. Specifically, I will argue that legislating against age discrimination is inherently different from laws against other forms of discrimination because of the fundamental distinctions between the discrimination targets (e.g., that most people will develop into the target group for age, but that similarly cannot occur with most other target groups). In other words, making laws that ban age discrimination is a futile attempt to prohibit the fear and misconceptions of growing old.

Legal Framework for Workplace Age Discrimination

The Age Discrimination in Employment Act of 1967 (ADEA) makes it unlawful to discriminate in employment settings based on older age.[1] The Act is intended to protect applicants and employees 40 years of age or older from age-based discrimination when employers make decisions about hiring, promotion, compensation, and other job-related determinations. The ADEA was enacted based on the premise that older workers were disadvantaged in finding, retaining, and regaining employment. The Act states that its purpose is to prohibit arbitrary age discrimination and promote employment for older persons based on their abilities (Sec. 2). At its inception, the Act was limited to persons who were at least 40, but less than 65 years of age. In the 20 years that followed its enactment, the upper age limit was first extended to age 70, and then eliminated entirely (with some exceptions) (Frolik & Barnes, 2007). Before the law was enacted, many private job openings included age-based limits (Bessey & Ananda, 1991; Graebner, 1984). In fact, more than 60% of non-skilled industrial jobs had age limits between 35 and 49 years old (Bessey & Ananda, 1991), and mandatory retirement policies were quite common (Frolik & Barnes, 2007).

Age discrimination law is based on the template of the Civil Rights Act of 1964 (Title VII), which prohibits discrimination based on race, color, religion, sex, or national origin (Van Ostrand, 2009). The Equal Employment Opportunity

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[1] The ADEA applies to employers with 20 or more employees; although many states have laws that include all or most employers.

Commission (EEOC) enforces these discrimination laws and the courts often apply Title VII-type analyses. But, it was clear even before its inception that age discrimination was distinct from discrimination protected under Title VII. Congress originally rejected proposals to include age with the other protected classes within Title VII (Eglit, 1986). Not until Williard Wirtz, then Secretary of Labor, reported to Congress that workplace age discrimination was a problem (Wirtz, 1965) did Congress pass the ADEA. Through his report, Wirtz demonstrated that, unlike racial discrimination, age discrimination was not based on hatred or dislike of the older workers, rather the discrimination was based on faulty assumptions about older person's abilities. Therefore, from the very beginning, the ADEA did not endeavor to address vindictive employment policies, but rather general societal negative, and usually untrue, notions about growing old. Despite the superficial similarities between Title VII and the ADEA, the ADEA's original goal was quite different from addressing discrimination based on hostile intent that is commonly believed to be the underlying basis for racial and gender discrimination (Crosby & Dovidio, 2008). In other words, the ADEA purposed to promote the new and continued employment of older persons by addressing the misconceptions about older workers.

Notwithstanding the intentions and progress of the ADEA, workplace age discrimination still occurs. In the four decades since the inception of the ADEA, US courts have addressed a number of issues arising in alleged cases of age discrimination. Case law primarily focuses on the issues of (1) disparate treatment, and (2) adverse impact. Both types of claims are addressed pursuant to the Supreme Court's model from *McDonnell Douglas Corp. v. Green* (1973)[2] as amended by *Reeves v. Sanderson Plumbing Products, Inc.* (2000). Under disparate treatment, plaintiffs must demonstrate that they were intentionally treated less favorably because they are older (i.e., within the protected age group). Under adverse impact, plaintiffs must demonstrate, usually with statistical data (Labriola, 2009), that a facially neutral employment policy has more negative effects on employees within the protected age group. Within both types of claims, courts have grappled with how plaintiffs can prove age discrimination – how much burden should be placed on the employee versus the employer, what kind of evidence is appropriate, and how much evidence is sufficient (Chapter 1 by R.L. Wiener and S.N. Keller, this volume). Generally, the courts have answered these questions for ADEA claims by applying principles from Title VII (Green, 2005).

The ADEA prohibits age discrimination in hiring decisions, but these kinds of cases are extremely difficult because there are generally no records of why a person was not offered a job, or why an interview was not extended. The courts usually defer to the judgment of the employers in choosing among qualified candidates and allow subjective evaluations of candidate's employment suitability (*Shute v. Vigo County School,* 1993), but sometimes an older employee is able to successfully demonstrate discrimination in hiring (*Byrnie v. Town of Cromwell,* 2001). In general,

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[2] But note that the Court in *Gross v. FBL Fin. Serv., Inc.* (2009) stated that the *McDonald* evidentiary framework may not apply in ADEA cases.

the courts are reluctant to act as a "super-personnel" department (*Byrnie v. Town of Cromwell,* 2001) second-guessing business decisions (*Shute v. Vigo County School,* 1993). This means that absent clear evidence of discrimination in hiring, an older applicant will have a very difficult time establishing a cause of action (Frolik & Barnes, 2007). Many times not only will there not be reasons provided to the applicant why someone else was given the job, but there may not be any paper record of the company's hiring processes (Frolik & Barnes, 2007).

Because of the difficulty in establishing a discrimination in hiring decision case, most of the age discrimination case law involves those decisions that occur once a person has been hired – specifically, employment termination and advancement. These cases will have more of a "paper trail" than the hiring decisions and that should make them somewhat easier to prove. Companies are often required to make a reduction in force that involves reducing positions and employee numbers (e.g., *Sprint/United Management Company v. Mendelsohn*, 2008) and companies must also decide who to promote (e.g., *Whitman v. Mineta,* 2008). Both instances are fraught with decision making that can lead to age discrimination or suspicions of age discrimination.

In demonstrating that an employer discriminated against an employee in termination or promotion decisions, the employee can establish a claim based on direct or indirect evidence of discrimination. Direct evidence denotes a specific link between the discriminatory employment action and the underlying negative attitudes toward older adults (*Yates v. Rexton,* 2001). Indirect, or circumstantial, evidence is proof that does not facially suggest discrimination, but a trier of fact could reasonably conclude that such discrimination did occur. In addition, the discrimination source must be a company decision maker (*Rowan v. Lockheed Martin Energy Sys., Inc.*, 2004) and in the context of company decision making (*Bush v. Dictaphone Corp.,* 1998). Sometimes workplace comments are indicative of negative stereotypes held in the workplace (McCann & Giles, 2002). Statements about an employee being "too damn old to do [his] job" and that he "was so old [he] must have come over on the Mayflower" (*Reeves v. Sanderson,* 2000, p. 2110) were found to be evidence of discrimination. In contrast, another supervisor told co-workers that he planned to replace a 63-year-old female employee "with a young chippie with big tits" (*Glanzman v. Metropolitan Management Corporation,* 2004). Because there were other reasons for the employee's dismissal, an age discrimination case was unfounded. These two cases (*Reeves* and *Glanzman*) exemplify how the courts can differentially weigh evidence of age discrimination.

In *Gross v. FBL Financial Services* (2009) the Supreme Court decided an issue that had been dividing the circuit courts. Jack Gross at age 54 was reassigned to a different position while his former position was given to someone younger. At trial, the jury was instructed that they should find in favor of Gross if his age was a "motivating factor" in his employer's decision. After an appeal and reversal, the Supreme Court reversed and remanded saying not only were the jury instructions incorrect, but also the ADEA only supports a cause of action if the employment decision was made "because of" age. In other words, the mixed motives jury instructions are not appropriate in ADEA claims the way they are for Title VII claims. In other discrimination cases (i.e., those involving race, color, religion, sex, or national origin) a complainant can establish that the discrimination was a motivating factor for an employment decision, even if other factors were also at play. The *Gross* case makes age discrimination cases more difficult for plaintiffs because the burden is on the plaintiff to prove that the adverse employment decision resulted *because of* the employee's age (see Chapter 1 by R.L. Wiener & S.N. Keller, this volume).

A difficulty and difference with age discrimination versus other cases of discrimination is the continuous senescence of the protected class. Not only is a person's class designation mutable based on chronological age (i.e., as a person ages they will become part of the protected class), but unlike gender and race, protected and unprotected status is not mutually exclusive. An age discrimination case could involve a situation where an employer wrongfully chooses one member of the protected class (e.g., a 45 year old) over another member of the protected class (e.g., a 70 year old) (Bessey & Ananda, 1991). The important consideration is that he or she is younger than the plaintiff (*O'Conner v. Consolidated Coin Centers Corp.,* 1996). And, designations of less "senior people" can legitimately mean less time in the company (*Bell v. Raytheon,* 2009). Similarly, even the use of the word "old" can hold the double meaning of "old" as in later chronological age that might indicate discrimination or "old" as in former employee that would not indicate discrimination (*E.E.O.C. v. Maricopa Co.,* 2007). Despite the intentions of the ADEA, the above sampling of cases demonstrates that workplace age discrimination still occurs and may be more legally difficult to prove than other forms of discrimination. This is particularly troubling because the older adult population is the only group that transcends all other protected classes and is virtually inevitable for everyone.

Empirical Research and Implications for Workplace Age Discrimination

As more baby boomers reach and exceed retirement age, crass statements and discriminatory policies against older adults will likely increase. Of course, if a workplace situation turns into a court case that means a claim was raised by an employee or applicant, and pursuant to *Gross*, there is a heavy burden on the employee. How many other ageist interactions occur without legal attention? Unfortunately psychological research suggests that it is likely that many, if not most, cases of age discrimination are never brought, and if a plaintiff does bring a claim it is difficult to prove and may be particularly difficult for an older plaintiff simply because of accessibility issues (Adams, 2000; Dunlop, Rothman, & Entzel, 2000). The next section will examine two reasons why this may be true: (1) negative attitudes against aging are prevalent because ageist stereotypes are socially acceptable, and (2) older adults may feel that they are deserving of less respect and therefore they unknowingly and without complaint accept the negative stereotypes and treatment.

Societal Acceptability of Ageism

Recent medical and safety advances have significantly increased the life expectancy in the United States and other industrialized nations (Arias, 2006). Yet, people do still physically and mentally change as they age. Although many age-based changes are easily visible, yet considered non-pathological – such as graying of the hair or wrinkling of the skin (Warner, 2003) – other physical and cognitive changes create vulnerabilities in a person's body and mind that increase the risks of injury, illness, and ultimately death (Miller, 1999). Importantly, even with the vulnerabilities that come with aging, older adults mostly function within normal levels of cognition (Dunkin & Kasl-Godley, 2000) and can be actively involved in society (Jarvik & Small, 2000). Research is mixed about the effects of aging on intelligence. Most research suggests that fluid intelligence (ability to solve novel problems without any prior training) declines slightly with age (Stuart-Hamilton, 2003, but see Beier & Ackerman, 2003), but crystallized intelligence (knowledge a person has) remains unchanged and can even improve. Although fluid intelligence and memory ability declines are thought to be inevitable, they may be inflated by self-report. As a case in point, Parkin and Walter's (1992) older adult participants were significantly less confident than younger participants about their abilities even when they were correct in the memory task. In other words, research on intelligence and memory certainly does not support discriminating in employment situations based solely on age – the evidence simply is not there to indicate that age is a clear indication of inability.

Research suggests that negative age stereotypes are more prevalent than gender and race stereotypes (Nosek, Banaji, & Greenwald, 2002). The prevalence of these ageist stereotypes leads to older adults trying to appear younger in order to succeed at work (Lee, Czaja, & Sharit, 2009; Leonard & Johnson, 2007). Many older workers believe that in order to break through the "silver ceiling" they must look younger (Weiss, 2002), Currently, Botox injections (used to reduce the appearance of wrinkles) are the most popular cosmetic surgery procedure. In fact, "Botox Parties" are opportunities for groups of people to enjoy a festive atmosphere while reducing the appearance of aging (Sobel, 2002).

Society in general places a strong emphasis on youth and vitality (Pasupathi & Lockenhoff, 2002). Television shows and commercials rarely include older adults but when they are present, older adults are generally portrayed as comically amusing either physically, cognitively, or sexually (Zebrowitz & Motepare, 2000). Similar biases are also found in children's story books (Ansello, 1978). Even in death it seems we are age-biased. Anderson and Han (2008) coded how old people looked in their obituary pictures and compared that age to actual age at death. They found that the age discrepancy increased with age. In other words, obituary pictures are less age-accurate the older the deceased was at the time of death.

Our societal obsession with youth results in real-world implications. Studies that mimic human resource managers choosing between resumes that are identical except for the age of the applicant, consistently find that the younger applicants are chosen more frequently (Nelson, 2002). In a field study, Lahey (2005) sent out 4,000 resumes, varied only by the age of the applicant, in two different cities for entry-level positions. A younger worker was more than 40% more likely to be called for an interview than an older worker. This may be because older potential employees are seen as difficult to train and likely to have lower job performance (Avolio & Barrett, 1987).

Research has also demonstrated an attribution double standard. When young people forget, it is attributed to lack of effort or attention. In contrast, when an older adult forgets it is attributed to memory decline or incompetence (Erber, 1989; Erber, Etheart, & Szuchman, 1992; Erber, Szuchman, & Etheart, 1993). Furthermore, older employees are more likely to be punished for their poor performance than younger employees. For instance, older employees who performed poorly were more likely to receive a demotion, while younger employees who performed poorly were more likely to receive training recommendations (Rupp, Vodanovich, & Credé, 2006).

Procedural Fairness and the Self-Acceptance of Ageism

The problems of negative stereotyping of older adults and discrimination based on those stereotypes may be compounded on societal and individual levels because of the effects of procedural fairness and unfairness. Chapter 11 by L. Heuer (this volume) reviewed procedural justice research for the purposes of discrimination against individuals with disabilities, but I will extend his review to apply specifically to the older worker.

Procedural justice research has taught us that workers who are fired or not hired in a discriminatory way will value fair processes when making determinations of satisfaction. The way people are treated – the procedures employed – can affect how satisfied they are independent of the outcome or the outcome fairness (Thibaut & Walker, 1975, 1978). Further, the treatment that a person receives (e.g., being asked to provide input) provides information about a person's standing and value within the group (Lind & Tyler, 1988; Tyler, 1989). Chapter 11 by L. Heuer (this volume) provides empirical evidence that the following three concepts may moderate the influence of procedural fairness: (1) a person's notion of deservingness, (2) the different notions of procedural fairness between a decision maker and a decision recipient, and (3) what members of other groups think about the person's group. For the purposes of age discrimination, the first and third – deservingness and in-group versus out-group – are important considerations and are discussed below.

Heuer's research suggests that a person's notion of their own deservingness of respect contributes to their beliefs about how fairly they were treated. In other words, a person who is involved in undesirable behavior or attributes will not be seen as deserving of fair, respectful, and unbiased treatment. Based on various empirical findings and theories, a non-disabled or disabled worker's motive (e.g., just world belief, own group superiority, group inequality justification) can create a belief that a person with disabilities has less because they deserve less and therefore deserve less fair treatments. Because the deservingness effect can influence judgments of one's *own* deservingness, older workers might view inability to obtain or retain employment as what they deserve. In fact, because they are in the disadvantaged position of being older they may further justify the inequalities they experience on the job. These same feelings of worthlessness may decrease the likelihood that an older person would pursue a discrimination case. Further, older applicants may even change their expectations for the type of employment they can obtain (Berger, 2009). This lowered expectation means that an older adult's feelings of inadequacies are so deeply ingrained that they may not feel worthy to even apply for some jobs, which means the discrimination is possibly occurring at a deeper level than can be detected through the legal system.

The role of the group has been an integral component in procedural fairness research, but Chapter 11 by L. Heuer (this volume) describes the intergroup, rather than only the intra-group effect. We know that respect can provide us with information about our standing within our own group, and Heuer's recent work suggests that respect may also tell us something about what the out-group thinks of our in-group. In each of his described studies, regardless of the group or the source, when respect was present then procedures were judged to be fairer. Heuer further suggests that if the workers with disabilities view themselves as having a collective social identity, and they view that social identity as the reason for their disadvantage, then the mistreatment they receive could increase their desire, and formulation of, a movement to obtain equal access and fair treatment. Because of the life-course segmentation and segregation based on age (Hagestad & Uhlenberg, 2005), the collective social identity of older adults may be as strong as or stronger than the collective social identity Heuer describes for people with disabilities. Our general social structure is based on a segregation that imposes age-based restrictions upon children and juveniles while providing retirement benefits and social services for older adults. For the rest of the age groups, the focus is on increasing wealth and offspring (Hagestad & Uhlenberg, 2006) with the family being the one place that people of different generations interact. In fact, older adults are generally segregated into different activities and separate places of residences (e.g., assisted living facilities or nursing homes). This clear segmentation of our society combined with the strong organizational power of groups such as the AARP (formerly the American Association of Retired Persons) it seems likely that older adults, similar to people with disabilities, would view themselves as having a collective social identity, which will increase the likelihood that they will attempt to obtain fairness and equality.

It is possible that having a collective social identity would increase the likelihood of dissatisfaction and result in oppositional action, but when an older adult is treated as if they are incompetent they may act in stereotype confirming ways, otherwise known as stereotype assimilation. Research that exposes older adult participants to ageist stereotypes leads to the participants acting consistent with the stereotypes (Horton, Baker, Pearce, & Deakin, 2008). Eventually, this stereotype assimilation can lead to an actual decrease in older adults' abilities (Bugental & Hehman, 2007) even when the older adults are unaware they have been primed with negative aging stereotypes (Levy, 1996). Therefore, older adults who are repeatedly exposed to negative ageist stereotypes in the workplace and other interactions can assimilate to those stereotypes, which can lead to actual decreases in ability.

By combining Heuer's deservingness element of procedural fairness with stereotype assimilation research, we can surmise that older adults might not view themselves as deserving of respect. The negative and discriminatory treatment they receive may influence their notions of their own abilities, which could influence actual abilities. That means that an older adult may be treated as if they are incompetent, resulting in them believing they are less competent, and acting less competent. These issues of competency combined with feeling that they deserve less respect, older adults may be less likely to raise objections to negative and discriminatory treatment because they view the negative treatment as getting what they deserve. Obviously, this cyclical spiral toward self-devaluation should be addressed, but are laws against it the solution?

Legislation Against Age Discrimination Is Not the Answer

When we hear that someone has cancer we would all like to blame a specific cause, but passing legislation against cancer will not stop its spread. On the other hand, legislation against cancer-causing agents such as asbestos has reduced the spread of lung cancer. In order to be able to pass that legislation, researchers had to first determine that asbestos was causing lung cancer. Psychological research on ageism is relatively new (Nelson, 2002), and research on the causes of ageism is scant compared to the causes of other forms of discrimination. Some believe that ageism is caused by the fear and misunderstanding of what growing old will entail (Martens, Goldenberg, & Greenberg, 2005; Nelson, 2005).

Terror Management Theory (Greenberg, Pyszczynski, & Solomon, 1986) explains this fear as coming from the apprehension of one's own death (see Chapter 2 by T.D. Nelson, this volume). Interacting with older adults is believed to increase mortality salience, which increases anxiety. Specifically, when young people are made mortality salient, they will harden their stereotypes against older adults because confronting older age reminds the younger person that death is inevitable (Martens et al., 2005). The anxiety and fear that are associated with death lead to blaming older people. Blaming someone for getting older allows younger people to trick themselves into believing that they will not also eventually grow old (and eventually die). Pursuant to Terror Management Theory, we can respond to the misfortunes of others by believing that the same result will not befall us. In all likelihood, such a belief is true for fears of becoming other groups that experience discrimination. Most people will not become disabled, another gender, or another race. In contrast, more than most of us will die.

Although somewhat compelling, Terror Management Theory is not a universally accepted rationale for ageism (Lerner, 1997) and it falls short in explaining the worldview defense and stereotypical attitudes toward the elderly. First, Terror Management Theory postulates that a person relies on their cultural worldview as the one constant aside from the knowledge of their death. Therefore, those who are in the out group represent a different worldview and threaten one's own worldview.

The main problem is that older people are supporters of the cultural worldview and therefore do not generally threaten the worldview (Greenberg, Schimel, & Martens, 2002) and should therefore comfort rather than distress a young person. Second, Terror Management Theory does not explain the dichotomous stereotyping of older adults. Stereotyping research informs us that older adults are generally seen as "doddering, but dear" (Cuddy & Fiske, 2002). Fiske and her colleagues have found that people often categorize based on two distinct dimensions – competence and warmth (Fiske, Xu, Cuddy, & Glick, 1999). Older adults generally are categorized as low on competence and high on warmth, which is similar to people with mental or physical disabilities. The resulting prejudice is generally one of pity and sympathy, in other words, a paternalistic prejudice rather than an intentionally malicious prejudice.

Another possible cause of ageism beyond a potential fear of death and sympathy for the aged, may simply be the way we segregate our society based on age. It has become quite rare, outside the family, for people of different age-groups to interact (Hagestad & Uhlenberg, 2006). Even within the family, we segregate the older members and only interact on limited and infrequent occasions. The misunderstanding of growing older may result partly from a simple lack of knowledge.

If the underlying reason for our ageist beliefs stem from fear of dying, sympathy, or misunderstanding, then the consequences of age discrimination must be distinguished from the consequences of racial or gender discrimination. These other forms of discrimination are generally believed to stem from hate or power differential goals. The underlying reason for the discrimination should dictate how it is addressed.

A first step in the process should be a general awareness among researchers of the need for elder research as it relates to psychology and law (see, Brank, 2007). More specifically, research should endeavor to determine the causes of ageism. It seems fairly clear that ageism occurs, but why? Are we ageist because we fear death, we feel sorry for the aged, we misunderstand the aging process, we see older adults as a threat to our worldview, or a completely different reason? Cross-cultural studies are extremely important for these questions. For instance some cultures routinely have three or four generations living together while others do not. Does the increased familiarity with aging decrease ageism? A societal conflict is inevitable when we combine the physical degeneration, the increased life-expectancy most people enjoy, and the dichotomous stereotypes about older adults. Because of the high stakes and competition for limited resources (i.e., jobs and salaries), the workplace has been one setting for this societal conflict. Unfortunately, we have responded by legislatively prohibiting age discrimination rather than first seeking to understand what is causing ageism and why it is rampant.

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Part II
Disability and Discrimination

Chapter 6
The Relationship Between Disability Discrimination and Age Discrimination in Workers' Compensation

John F. Burton, Jr.

Workers' Compensation Overview

Workers' compensation programs provide cash benefits, medical care, and rehabilitation services to workers who are temporarily or permanently disabled by work-related injuries or diseases.[1] In 2007, the national total of $55.4 billion of workers' compensation benefits included $28.3 billion of cash benefits and $27.2 billion of medical benefits, while the costs to employers were $85.0 billion (Sengupta, Reno, & Burton, 2009, Table 1).[2] Only Social Security Disability Insurance (SSDI) and Medicare provide more support to disabled workers. In 2007, SSDI paid $95.9 billion in cash benefits to disabled workers and their dependents, while Medicare paid $57.2 billion for disabled persons under age 65.

Workers' compensation is the oldest social insurance program, and many of the current features of the program reflect the context in which the program emerged in the early decades of the twentieth century (Burton & Mitchell, 2003). At that time, a negligence suit was the only remedy an employee injured at work had against the employer. If the employee won the suit, the recovery could be substantial since the damages could include replacement of lost wages, reimbursement of all medical expenses, and payments for nonpecuniary consequences, such as pain and suffering. An injured worker faced substantial obstacles to winning the suit, however, including the necessity to prove the employer was negligent. The tort suit approach was

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[1] In workers' compensation, a worker is disabled if he or she experiences an actual loss of earnings or a loss of earning capacity as a result of a work-related injury or disease.

[2] The $29.6 billion difference between the $85.0 billion in workers' compensation costs for employers and the $55.4 billion of benefits paid to workers includes (1) for self-insuring employers, the administrative costs of providing the benefits, and (2) for employers who purchase insurance, the difference between premiums paid to the insurance carrier and the benefits paid to the employees these employers. These costs of the workers' compensation delivery systems are examined in Sengupta et al., 2009, p. 30.

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DOI 10.1007/978-1-4419-6293-5_6,

also criticized because recovery depended on the worker bringing a law suit, and the litigation often was costly and time consuming.

Workers' compensation was designed to overcome some of the deficiencies of the negligent suit approach. All workers' compensation statutes incorporated the "workers' compensation principle," which has two elements. Workers' compensation is a no-fault system, which means that a worker does not need to demonstrate the employer is negligent. The employee only has to prove the injury is "work-related" (although there are legal obstacles to meeting the work-related requirements in some cases, as discussed below). The other side of the workers' compensation principle is that the statutory benefits provided by the program are the employer's only liability for the workplace injury, and these benefits generally are less than the potential recovery from a tort suit.

The legal context of the early twentieth century also affected the design of the workers' compensation programs. At that time, the US Supreme Court interpreted the commerce clause of the Constitution in a narrow fashion, which limited the ability of Congress to regulate matters not directly involved in interstate commerce. The federal government was able to enact workers' compensation programs for its own employees and for workers who were clearly engaged in interstate commerce, such as railroad workers. However, most workers in the private sector, as well as state and local government employees, could not be regulated by the federal government and therefore, out of necessity, the initial workers' compensation laws applicable to private sector employers were enacted by the states. Although the Supreme Court changed its interpretation of the commerce clause in the 1930s and consequently a federal workers' compensation statute covering all private sector workers would now be constitutional, the pattern established almost 100 years ago of states controlling workers' compensation benefit levels and eligibility requirements for most workers persists today.

Another distinctive feature of workers' compensation dating to origin of the program is the variety of insurance arrangements available in different states. As of 2007, all but two states allowed employers who meet certain requirements to self-insure their workers' compensation obligations. In addition, in 47 jurisdictions (including the District of Columbia), employers could purchase insurance from private carriers; in four states, employers could only purchase insurance from an exclusive state fund; and in 21 states, employers could purchase insurance from private carriers or a competitive state fund (Sengupta et al., 2009, p. 13). The resulting diversity among states in eligibility requirement, benefits levels, and insurance arrangements provides an unusual opportunity to examine the effect of public policy on behavior by employees and employers.

Workers' Compensation Developments in Recent Decades

From the mid-1980s until the early 1990s, benefits paid to workers and costs paid by employers increased rapidly, as shown in Fig. 6.1. Costs increased by 46% from a low point of 1.49% of payroll in 1984 to a peak of 2.18% of payroll in 1990,

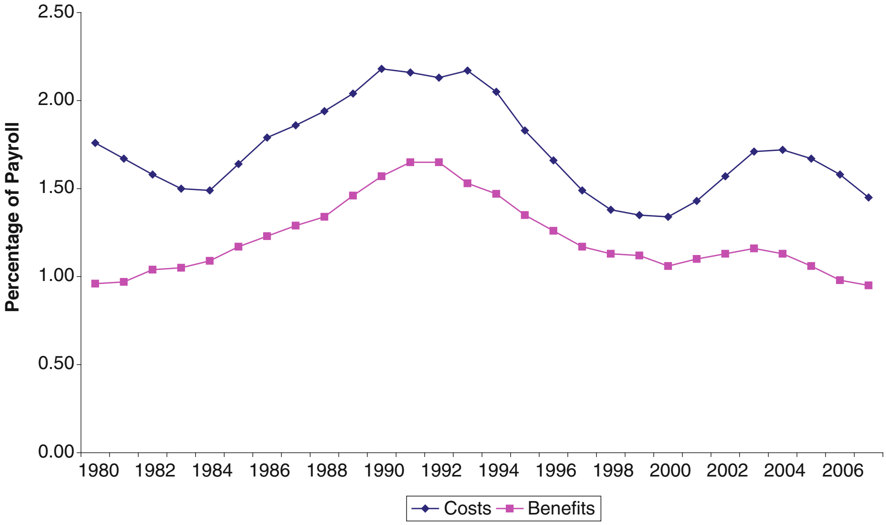

Fig. 6.1 Workers' compensation benefits and costs as a percentage of payroll, 1980–2007

while benefits increased by 44% from 1.09% to 1.57% of payroll over those years. Meanwhile, the workers' compensation insurance industry was unprofitable in every year from 1984 to 1992 (Burton, 2008, p. 14).

One consequence was that many states "reformed" their laws to reduce costs to employers and improve the profitability of workers' compensation carriers. Spieler and Burton (1998) documented the changes that occurred in many states during the 1990s, including: (1) limitations in coverage when the workplace injury involved the aggravation of preexisting conditions, such as adding the requirement that work be the "major contributing cause" of any disability; (2) changes in procedural and evidentiary rules that made it more difficult for workers to establish their injuries or diseases were work-related, such as requirements that causation be demonstrated by "objective medical evidence" or that workers must establish their cases by a "preponderance of the evidence" or "clear and convincing evidence"; (3) reductions or elimination of coverage of certain condition, such as psychological diseases or cumulative trauma disorders (CTDs); and (4) in some states, reductions in the durations or weekly amounts of cash benefits for long-term disabilities.

Effects of These Developments on Cash Benefits

Cash benefits paid by workers' compensation programs nationally declined from \$0.94 per \$100 of payroll in 1990, to \$0.63 in 1999, to \$0.48 in 2007, which is a cumulative decline of 49% (Sengupta et al., 2009, Figure 2). Guo and Burton (2010) examined incurred cash benefits per 100,000 workers for 46 jurisdictions from 1975 to 1999 for employers who purchased insurance from private carriers or from some competitive state funds. Between 1990 and 1999, the national average of incurred cash benefits per 100,000 workers in constant dollars declined by 41.6%. During the decade, the statutory level of all cash benefits (including temporary and permanent disability benefits) increased and without changes in any other factors would have increased incurred benefits by 4.8%. Guo and Burton (2010) found that the decline in the workplace injury and illness rate would have explained 20.9% of the actual decline in cash benefits during the 1990s. However, three variables measuring changes in the statutory eligibility rules and administrative practices adopted by the states during the decade explained over 30% of the decline in benefits. They found that the proportion of injuries reported to the Bureau of Labor Statistics resulting in compensable workers' compensation claims declined in the 1990s and accounted for 21.6% of the drop in incurred cash benefits. They also found that statutory changes in compensability rules accounted for 6.3% of the decline in cash benefits, and that the drop in the proportion of cases resulting in permanent partial disability benefits explained another 2.2% of the actual decline.

Oregon provides an example of the changing compensability rules. The legislature passed a series of amendments to the workers' compensation statute between 1987 and 1995 that made it harder for workers to quality for benefits. These included a 1990 Act which provided that claims were only compensable if work was the major contributing cause (MCC) of the permanent disability and which also required workers to provide medical evidence based on "objective findings" in order to establish compensability. The Oregon legislature also enacted a law effective in 1995 which provided further restrictions on claims that involved a "combined condition." Thomason and Burton (2005, pp. 402–403) estimated that by the mid-1990s, the Oregon benefits to workers and costs to employers were about 20–25% below what the amounts would have been if these two laws had not been enacted.

These Oregon changes in workers' compensation eligibility rules and practices had a disproportionate effect on some categories of injured workers. The Oregon workers were separated into eight types of injuries. Thomason and Burton predicted that the effects of the two laws would have a greater than average effect on four types of injuries (back strains and sprains; other strains and sprains; carpal tunnel syndrome; and musculoskeletal diseases); would have a less than average effect on two types of injuries (trauma injuries and open wounds); and that the expected effect was not clear for two types of injuries (other injuries and other diseases). In regressions that did not control for trend, the actual declines corresponded to the predictions for all six of the injury types for which declines relative to the total sample average were predicted. In regressions that did control for trend, shown in Fig. 6.2, the expected relationships were found for five of the six injury types (all but open wounds). Overall, Thomason and Burton (2005) concluded that the individual injury type results supported the hypotheses about which injuries would experience the greatest decline because of the changes in the Oregon workers' compensation statute.

The national developments in the workers' compensation program in the 1990s, exemplified by the results in Oregon, indicate that an increasing proportion of

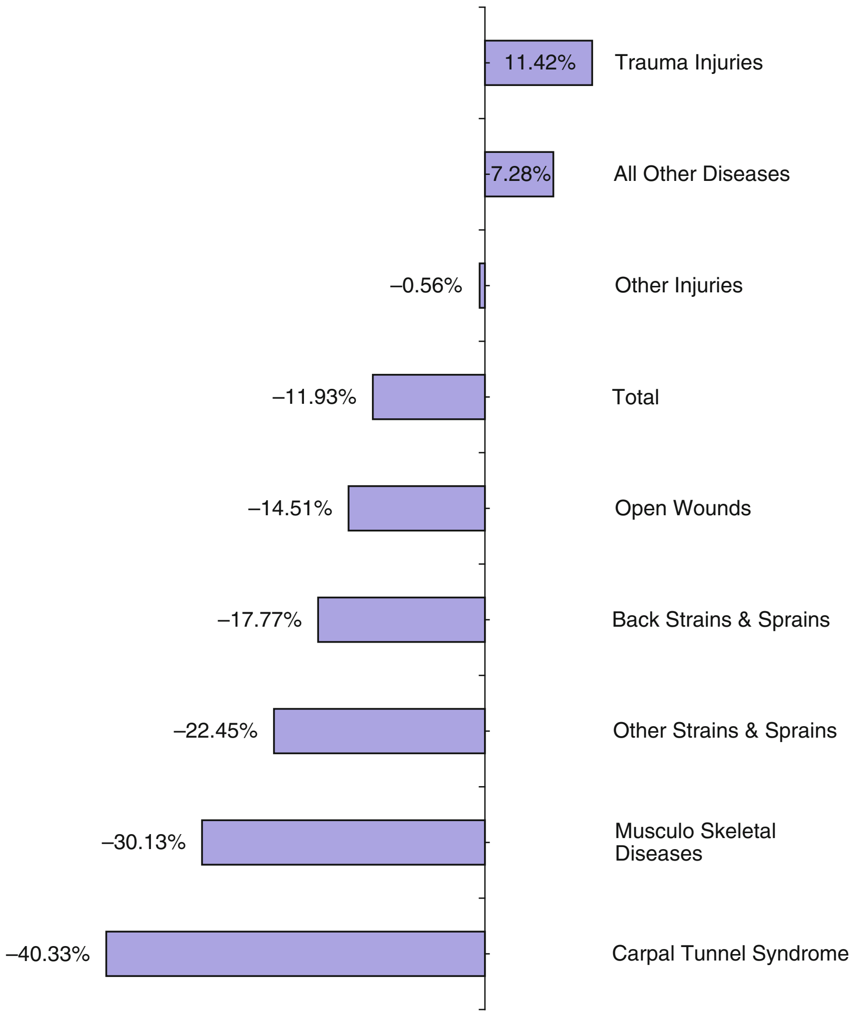

Fig. 6.2 Percentage decline in predicted claim rates controlling for trend, by type of injury, 1996 compared to base years (1986–1989)

the cost of workplace injuries was shifted to injured workers and their families. The generally accepted test of adequacy for workers' compensation is that cash benefits should replace two-thirds of lost wages (Hunt, 2004). However, recent studies of five states found that for workers with relatively serious injuries who received permanent partial disability (PPD) benefits, the 10-year replacement rates (benefits divided by earnings losses) ranged from 30% to 46%, well below the 66.67% rate required for adequacy (Boden, Reville, & Biddle, 2005, Table 3.4). For Oregon workers injured in 1992–1993 who received PPD benefits, the

10-year replacement rate was 36%, indicating that the Oregon program was providing inadequate cash benefits to injured workers in the early 1990s at the same time that eligibility standards for benefits were being tightened. The paucity of the Oregon benefits is understated because those workers who no longer qualified for cash benefits from the workers' compensation program are not included in the study of adequacy of benefits. The national results from the study by Guo and Burton (2010) and the Oregon results suggest that workers' compensation changes in the 1990s represented a form of disability discrimination, since injured workers in general, and workers with certain types of injuries in particular, received declining protection from the earnings losses resulting from workplace injuries and diseases.

The Relationship Between Age and Three Important Variables: Health Status, Work Disability, and Sources of Medical Conditions

Health Status

The link between age and health status is well established. A recent example of the relationship is shown in the data in Table 6.1 from the 2006 National Health Interview Survey. The percentages of respondents who rate their health status as excellent or very good decreases for older persons, while the percentage of those who rate their health status as fair or poor increases for older persons.

Table 6.1 Respondent-assessed health status, by age, 2006

	All ages	18–44 years	45–64 years	65–74 years	75 years and over
Excellent or very good	61.4	71.8	55.3	43.6	35.2
Good	26.5	22.3	28.9	33.9	37.3
Fair or poor	12.1	5.9	15.8	22.5	27.5

Source: Pleis and Lethbridge-Cejku (2007), Table 21.

Work Disability

Work disability is defined by Burton (2005a, p. 74) as "having two phases: the *loss of earning capacity*, which results in *actual wage loss*." The generally increasing prevalence of work disability with higher ages is shown in the 2006 results in Table 6.2 from the National Health Interview Survey: employed persons aged 45–64 had twice as many work-loss days as employed persons aged 18–44.

The Bureau of Labor Statistics began a data series in 2009 that compares the labor force status of persons with a disability with the status of persons without a

Table 6.2 Work-loss days per employed person, by age, 2006

All ages	18–44 years	45–64 years	65–74 years	75 years and over
4.7	3.1	6.2	6.1	7.3

Source: Pleis and Lethbridge-Cejku (2007), Table 17.

disability.[3] As shown in Table 6.3, the labor force participation rate – the percentage of the population seeking work – is consistently higher in all age categories for persons with no disability (column 7) than for persons with a disability (column 4). The unemployment rate – the percentage of the population seeking work who are unsuccessful – is lower for persons with no disability (column 9) than for persons with a disability (column 6), except for persons over 65. And the employment-population ratio – the percentage of the population who are employed – is consistently higher in all age categories for persons with no disability (column 8) than for persons with a disability (column 6). The relationship between age and the various measures of labor force status reported in Table 6.3 is clearly demonstrated in Fig. 6.3. In every age category, persons with a disability are less likely to participate in the labor force and less likely to be employed than persons with no disability. Of particular interest is that participation and employment do not begin to decline for persons without a disability until they are 55–64 years old, while these measures of labor force status begin to decline for persons with a disability when they are 35–44 years old. This is one illustration of the interaction between age and disability status.

Sources of Medical Conditions

The sources of medical conditions also change with age. The National Health Interview Survey reports that in 2007 paid workers aged 18–44 had 37.02 injuries or poisoning episodes per 100 workers, while workers aged 45–64 had 19.08 episodes (Adams, Barnes, & Vickerie, 2008, Table 12). But while the importance of injuries declines with age, the incidence of most chronic medical conditions increases with age, as shown in Table 6.4. The percentages of persons with these 11 conditions is higher for persons age 45–64 than for persons age 18–44, and for 10 of the conditions, the incidence continue to increase for those 65–74 and 75 years and over. The only medical condition that becomes less important after age 65 is a measure of mental status: does the respondent have the feeling that everything is an effort all or most of the time?

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[3] The Bureau of Labor Statistics data are based on the Current Population Survey (CPS), which uses a set of six questions to identify persons with disabilities. A person is classified as disabled if the person responses "yes" to any of the questions. The questions ask if a person is deaf or has serious hearing difficulties; is blind or had serious difficulty seeing even with glasses; has serious difficulty concentrating, remembering, or making decisions; has serious difficulty walking or climbing stairs; has difficulty dressing or bathing; or has difficulty doing errands alone.

Table 6.3 Labor force status of the civilian noninstitutional population by age and disability status, January, 2009

Disability status and age	Total			Persons with a disability			Persons with no disability		
	Labor force participation rate (1)	Employment-population ratio (2)	Un-employment rate (3)	Labor force participation rate (4)	Employment-population ratio (5)	Un-employment rate (6)	Labor force participation rate (7)	Employment-population ratio (8)	Un-employment rate (9)
Total									
16 years and over	65.4	59.8	8.5	23.1	20.0	13.2	70.8	65.0	8.3
16–64 years	74.6	68.2	8.6	35.7	30.5	14.7	77.7	71.2	8.4
16–19 years	35.4	27.8	21.4	23.5	13.9	40.9	35.8	28.4	20.9
20 years and over	67.7	62.3	7.9	23.1	20.2	12.5	73.8	68.1	7.8
20–24 years	72.1	62.3	13.5	47.4	35.2	25.7	73.1	63.5	13.2
25 years and over	67.3	62.3	7.3	22.3	19.7	11.6	73.9	68.6	7.1
25–34 years	82.6	75.1	9.2	50.2	40.2	19.9	84.1	76.6	8.9
35–44 years	84.0	77.8	7.4	42.5	37.1	12.8	86.3	80.0	7.3
45–54 years	82.0	76.5	6.7	36.0	31.1	13.6	86.8	81.2	6.4
55–64 years	65.2	61.3	6.0	27.9	25.5	8.5	72.2	68.0	5.8
65 years and over	17.3	16.3	5.7	7.2	6.9	3.9	21.9	20.6	6.0

Table 6.3 (continued)

Disability status and age	Total			Persons with a disability			Persons with no disability		
	Labor force participation rate (1)	Employment-population ratio (2)	Un-employment rate (3)	Labor force participation rate (4)	Employment-population ratio (5)	Un-employment rate (6)	Labor force participation rate (7)	Employment-population ratio (8)	Un-employment rate (9)
65–69 years	31.4	29.8	5.3	17.9	17.2	3.6	34.8	32.9	5.5
70–74 years	17.5	16.3	7.1	10.5	10.0	4.7	19.9	18.4	7.6
75 years and over	7.8	7.4	5.4	3.0	2.9	3.7	11.3	10.7	5.7

Source: Current Population Survey results provided by the Bureau of Labor Statistics.

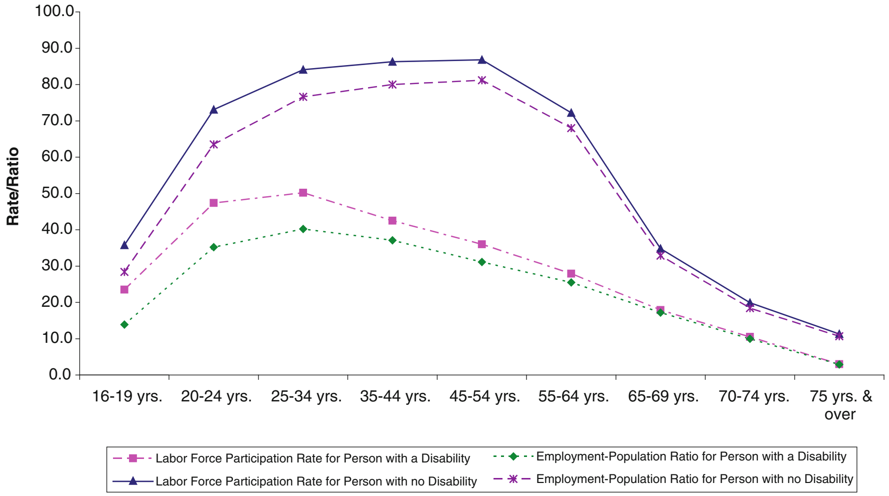

Fig. 6.3 Labor force participation rate and employment-population ratio; persons with a disability and persons with no disability, by age, January 2009

Table 6.4 Percentage of persons with chronic conditions by age, 2006

Type of chronic condition	All ages	18–44 years	45–64 years	65–74 years	75 years and over
Heart disease	10.9	3.6	12.3	26.2	36.6
Hypertension	22.9	7.8	32.5	52.9	53.8
Emphysema	1.8	0.3	2.4	5.0	6.4
Asthma (still has)	7.3	7.3	7.5	7.8	6.1
Chronic bronchitis	4.2	2.9	5.5	5.6	6.7
Cancer	7.1	2.1	8.0	17.2	25.7
Arthritis	20.7	6.9	28.7	48.0	51.3
Chronic joint symptoms	25.2	14.5	33.7	42.7	44.2
Pain in lower back	27.4	23.9	31.1	31.2	32.2
Hearing trouble	16.8	7.6	19.4	31.9	50.4
Feeling that everything is an effort: all or most of the time	5.1	4.7	6.0	5.1	4.8

Source: Pleis and Lethbridge-Cejku (2007), Tables 2, 4, 6, 8, 10, 12, and 14.

The Link Between Disability Discrimination and Age Discrimination

The previous section indicates that increasing age is associated with poorer health status and with a higher incidence of work disability. There also is a connection between disability discrimination and age discrimination that is related to the changing sources of medical conditions as persons become older. Burton and Spieler (2001) argued the changes in workers' compensation programs that occurred during the 1990s were likely to have a disproportionate effect on the medical conditions associated with aging. This argument is supported by comparing the effects of the Oregon statutory changes on various types of injuries summarized in Fig. 6.2 with the evidence from the previous section on the relationship between prevalence of various medical conditions and age. The evidence from Oregon indicates that traumatic injuries was the type of injury least affected by the legislative changes, and the medical evidence indicates that the rate of injuries declines with age, which means the Oregon reforms had less impact on the sources of disability more prevalent among younger workers. The Oregon results also indicate that the statutory changes had their greatest impact on musculoskeletal diseases, strains, and sprains. While the categories in Table 6.4 do not exactly correspond to the types of injuries used in Fig. 6.2, nonetheless it is evident that the Oregon reforms had their greatest impact on older workers since the conditions more prevalent in older workers were those with the greatest decline in successful claims.

The argument that the changes in the workers' compensation program during the 1990s had a particularly large effect on older workers is consistent with research by Guo and Burton (2008). They examined the changes in the compensability rules in workers' compensation programs on the application for Social Security Disability Insurance (SSDI) benefits. The applicants to the SSDI program are typically older workers, with the average age of new SSDI beneficiaries ranging between 48.4 and 50.2 for men and 48.1 and 49.7 for women between 2000 and 2006 (Social Security Administration, 2008, Table 6.C2). Guo and Burton (2008) found that the more states tightened the eligibility rules for workers' compensation, the more applications for the SSDI program increased. This result suggests that older workers with disabilities, who are the age group most likely to be adversely affected by the changes in the workers' compensation eligibility rules in the 1990s, were required to turn to the SSDI program for protection.

Conclusions

The changes in workers' compensation eligibility standards in the 1990s resulted in less protection against earnings losses for disabled workers, which is a form of discrimination against persons with disabilities. The disability discrimination in turn resulted in age discrimination because the changes in the workers' compensation compensability rules had a disproportionate impact on older workers. The discrimination against disabled workers represented deliberate decisions by state policymakers, while the age discrimination may have been an unintended or inadvertent consequence of the changes in state workers' compensation laws. Whether intended or not, the result has been deterioration in the economic status of older disabled workers.

There are other adverse consequences of the changes in compensability rules in workers' compensation. Workers' compensation programs rely on two levels of experience rating to promote safety (Burton, 2005b). Industry-level experience rating establishes an insurance premium for each industry that is largely based on prior benefit payments by the industry. The resulting differences in labor costs and prices among industries should shift the composition of national consumption toward safer products. Firm-level experience rating determines the workers' compensation premiums for each firm above a minimum size by comparing its prior benefit payments to those of other firms in the industry. In order to remain competitive, firms have an incentive to improve safety in order to reduce premiums. The effects of experience rating on safety have been debated by a number of scholars. Burton (2009) reviewed the findings and concluded the evidence suggests experience rating is associated with greater accident prevention activities by employers. To the extent this conclusion is valid, the reductions in premiums resulting from the tightening of compensability standards in workers' compensation during the 1990s has undermined the safety incentives provided by the program.

Another adverse consequence of the increasing stringency of compensability rules in workers' compensation is that some workers who previously qualified for workers' compensation benefits turn to SSDI benefits for protection. This indicates a shifting of costs previously borne by workers' compensation programs to the SSDI program, thereby aggravating the financial problems of the federal program.

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Chapter 7
The Stigma of Disabilities and the Americans with Disabilities Act

Michael Selmi

Introduction

Recently, as I was waiting to board a plane, I heard the gate agent make the following announcement: "If you have a disability and need assistance, please come to the podium at this time." I had never heard the boarding announcement stated in quite this way before, which seemed to require individuals to declare that they had a disability in order to board the plane earlier than other passengers. It sounded so odd to me and I wondered why the airline felt comfortable placing the requirement in the form of a disability. Surely, they would never have said, "If you are black . . . or if you are a woman, if you are gay," or "If you are elderly," even though the elderly often need boarding assistance. Why, I wondered, did they believe it was acceptable to label someone as disabled? I wanted to go to the podium to express my concern, but as Paul Miller (2007) has noted, I did not even have a vocabulary to express my displeasure. Unlike racism, sexism, homophobia, or ageism, there is no word to describe discriminatory attitudes based on disability. At the time, the best I could come up with was that the airline was being insensitive but that word felt wholly inadequate.

Then it occurred to me that maybe the airline's announcement was not so offensive, not offensive at all in fact, but instead was a sign that whatever stigma attached to having a disability might be dissipating. Perhaps from the airline's perspective, no social stigma should attach to the declaration of disability, it might even be a source of pride.

I then found my thoughts drifting to curiosity over who might come forward, who might be willing to declare themselves disabled? Would those who wear glasses come forward, or those suffering from high blood pressure or perhaps those who had peanut allergies? Even if they did not need assistance, maybe they would benefit by having a particular seat on the plane? And how would the airline know if someone was disabled and needed assistance? As I waited for my group to be

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called, I noticed only one individual come forward, and that was an individual in a wheelchair.

The Americans With Disabilities Act, now 20 years old, was passed to accomplish two principal goals: (1) provide more jobs for those with disabilities so as to better integrate them into the workplace and the economy and (2) to break down the stigma that attaches to disabilities. These two goals were interrelated, as a central stigma of disability is that individuals are unable to work, are incapable of being productive members of society. Remarkably, the statute has accomplished neither goal and, in fact, has made little progress toward either. Employment data suggest that the labor market position of the disabled has not improved significantly, and there is some evidence to indicate that employment levels have even declined (Donohue, 2008). Secondly, although this is more difficult to measure, attitudes toward the disabled do not seem to have changed much. It is often noted that the ADA received wide support both within Congress and in the public but attitudes seem to remain largely as they were before the passage of the act. The fact that this issue is not easy to measure provides some indication of what has gone wrong – disability issues remain beyond, or perhaps out of is more accurate, public debate. Even the recent passage of significant amendments to the ADA was done without any broad – or really any – public debate. It was instead a legislative fix concocted in Washington, and suggests one that is likely to be subjected to the same fate as the original act.

This highlights one of the reasons why we have not made more headway on attitudinal issues – despite the passage of the two acts, and some high profile protests and events, there has been very little public debate regarding issues relating to disabilities. The ADA sought an expansive definition of disability and by adopting such a broad definition it also sought to transform our societal conception of disability by, at least in part, challenging or destabilizing the norm. It failed to do so, however, because the effort was purely statutory in nature. Without an accompanying social movement pushing to change our perceptions of disability, the statute was unlikely to prove transformative and, in fact, may have hindered any transformative efforts by providing many individuals who would not generally be thought of as disabled an opportunity to use the statute for personal gain.

This chapter will proceed in four parts. The first part explores the nature of the stigma that attaches to disabilities, emphasizing the heterogeneity of disability that makes it a distinctive category in the pantheon of antidiscrimination legislation. The second section discusses the legislative path that led to the passage of the ADA. As I will explain, the statute was passed with an unusual combination of widespread support and massive indifference, which allowed interest groups an inordinate amount of power to shape the statute. The third section discusses how and why the Supreme Court narrowed the statute, and finally, the last part will analyze the limited effectiveness of the ADA, concluding that absent a social movement intent on altering our understanding of disability discrimination, the legislation was doomed to have a limited impact.

The Stigma of Disabilities

In order to get at why the ADA has not made more headway into the issue of the stigma of disabilities, we need to better define just what that stigma is. Here things become complicated quite quickly for two distinct reasons. First, we need to define what we mean by stigma. Professor Samuel Bagenstos has written about the stigma of disability borrowing from the work of Erving Goffman to define stigma as being outside the norm, what he equates to being treated negatively based on a disability (Bagenstos, 2000). This last part is an important qualifier on the meaning of stigma, and consistent with more modern definitions that link the concept of stigma to some negative treatment, which in a legal context is typically equated with discrimination (Link & Phelan, 2001). Thus, stigma is defined not just as any mark that might place one outside the norm but rather one that leads to negative connotations and treatment. In an important article, Professor Bagenstos further suggests that we should limit the reach of the disability law to those who are stigmatized by their disability (Bagenstos, 2000).

Linking the concept of stigma to negative connotations or treatment is an important limitation on Goffman's idea of stigma. Goffman (1963), and some of his followers, defined stigma more broadly as falling outside the norm. Almost by definition, those who have disabilities would fall outside the norm because one definition of disability would be a condition that diverges from what society defines as normal. This is an overly broad definition but when we take into account disadvantageous treatment that arises from the disability or condition, we can begin to better define what we mean by stigma. At the same time, I do not think it is any differential or negative treatment related to a health condition because that would also be too broad. Lurking in the background, and discussed more fully later, is the primary question of how we define disability, or what conditions fall within our societal definition of disability.

And this leads to the second issue of complexity, namely that it is impossible to talk with any coherence about the stigma of disability but instead we need to consider what I refer to as the stigma of disabilities. A point that has been made many times bears repeating – disability is a heterogeneous condition that lacks a unifying theme and which makes the concept of disability quite different from other antidiscrimination categories. This is perhaps most readily distinguishable in the comparison to race discrimination. Although issues can arise within claims of race discrimination, we typically treat race as a social category that provides a unifying theme, at least for purposes of antidiscrimination law. Gender and age are also easy to define, although perhaps less easy to classify in terms of stigma than is the case for race. But for all of these categories, it is relatively easy to define who belongs to the group, or what we mean by the category.

That is not true for disability, for which we lack a common definition. There are many conditions that we as a society would recognize as a disability, what might be defined as traditional or core disabilities, but beyond that core, there is far less agreement on what constitutes a disability. As a result, when we talk about the stigma that attaches to disabilities, it is necessary to identify the particular disability and the accompanying stigma. Much of what we define as discrimination based on disability does not seem to be based on any particular stigma about the disabled but is instead based on a misperception of the abilities of those with disabilities. In other words, much of differential treatment of the disabled is based not on animus but on a misunderstanding regarding abilities. In fact, a central goal of the ADA was to alter these misperceptions by requiring employers to make an individualized assessment of individuals with disabilities to determine whether that individual was capable of performing the job in question. Indeed, some would suggest that the "regarded as" disabled prong of the statute was designed with a specific purpose to alter society's perceptions of the abilities of those with disabilities.

It may be that this lack of understanding regarding the abilities of the disabled – at least those disabilities that are related to work performance – is the primary stigma the disabled face, and if that is the case, then it is quite possible that the ADA has had some important effect on the issue of stigma. While the employment data are not so encouraging, there is little question that the ADA has opened up some job opportunities that would not have been there before, and that many disabled individuals who were precluded from working before the ADA based on a limited appreciation of their abilities are now in the workforce.

There is also a recognition within the statute, and in society more broadly, that abilities do vary, that many individuals with disabilities may not be able to perform the job in the same manner as someone without disabilities. This is the essence of the reasonable accommodation requirement, which requires employers to make reasonable accommodations to those defined as disabled if those accommodations will enable the person to perform the job. This recognition of differential abilities also renders disability discrimination distinct from race discrimination, where the law does not acknowledge any distinctions with respect to the abilities of African Americans, and makes it more akin to age discrimination where the law also recognizes differences in abilities associated with aging. Like disability, age is often based less on animus than misperceptions, and courts require employers to consider the actual abilities of older individuals rather than relying on group stereotypes.

Relying on a stereotyped vision of the abilities of those with disabilities can certainly be equated with stigma but again, even when the focus is on stereotypes there is no unifying theme. Individuals in wheelchairs will typically have less mobility than those who do not use wheelchairs, but it is also the case that many individuals in wheelchairs are far more capable than we often expect. There might also be a tendency to identify the person in a wheelchair as limited in other than her mobility, so that we might treat her as having mental or other limitations.

I say "tendency" because it is difficult to speak definitively about the stigma that attaches to most disabilities. The few polls that exist typically discuss disability broadly and polls have consistently demonstrated widespread support for the ADA. Indeed, with the exception of mental illness discussed below, it is rare for individuals to express concern for those who are disabled, though they may express fear or concern about becoming disabled themselves. This, too, can be seen as one of the stigmas of disability – that it is a dreaded condition. In fact, this fear may help explain the many exclusionary policies we have enacted to remove the disabled from society, to make them invisible, from leper colonies to various schools and institutions designed for those with disabilities. Society has also been structured in a way that forces the disabled out of our sight. Evidence produced during the ADA hearings indicated that two-thirds of individuals with disabilities did not attend movies, three-fourths of the disabled population did not see live theater or music performances, two-thirds had not attended sporting events. While many of the structural confinements may not have been designed with an intent to exclude the disabled, they have undeniably contributed to making the disabled population less visible, which does seem broadly consistent with the general intent or desires of the broader populace.

Two areas where stigma has played perhaps its strongest role involve mental illness and those who are HIV-Positive or who have AIDS. This latter group is often defined by fears that the condition is contagious even by casual contact, and it also seems that one's feelings regarding gay men and lesbians may influence one's approach or feelings given that for many years HIV was found disproportionately within the gay population. Indeed, during the debate over the ADA, there was an effort by conservative members of Congress to exclude those who were HIV-Positive or suffering from AIDS from coverage as a disability. Courts, however, have generally been protective of this group of individuals both before and after the passage of the ADA, and likely one reason for that protective stance is the overt discrimination at issue in the cases, which makes it easier for courts to identify as discriminatory behavior (Bragdon).

For the purposes of my discussion, I want to focus instead on issues relating to mental illness because I think we can find here the full range of issues that help us understand the development of the ADA. Those who suffer from mental illness are often described as dangerous and irrational, and many employees have indicated they would not want to work near those who have a mental disability (Hensel & Jones, 2005; Hubbard, 2001, p. 54). Mental illness varies widely as to its effects, and there is another stigma that attaches to certain forms of mental illness. Those who suffer from depression, for example, are often thought of as weak and responsible for their own condition, a condition this perspective identifies as primarily the product of will rather than biological or other factors (Hensel & Jones, 2005, p. 58). These judgments of dangerousness, irrationality, and weakness all contribute to our misunderstandings regarding mental illness and the desire by many who suffer from mental issues to conceal their condition, again making those with disabilities less visible and often invisible.

We have made some progress relating to issues of mental illness, and in fact, Congress recently passed – with little fanfare – the mental health parity act, which seeks to equalize health benefits for mental and non-mental health issues (Mental Health Parity Act, 2008). But, as evident in the film Tropic Thunder and the continued use of "retard" in public language, we may not have moved all that far in our attitudes toward those with mental illness.

Another issue that relates more directly to the influence of the ADA is that the concept of mental illness encompasses a wide range of conditions, some more severe than others, some more limiting than others. On one end of the spectrum, there are individuals with limited mental cognition who are often quite limited in their cognitive abilities. On the other end are those who experience more limited mental health issues, perhaps something like what is now defined as executive dysfunction, or a difficulty in maintaining organization. There are other similar learning issues that have a cognitive component to them and if there is any principle that links them together it is likely that we do not have a societal consensus on the presence of these behaviors. To offer one minor example, a Google search immediately turned up an article with the title, "Lazy Kid or Executive Dysfunction?"

The same seems true when we venture into issues relating to depression or other mental states that interfere with an individual's ability to work. There is again a continuum of severity for states of depression or mental illness and many individuals react differently to similar situations. Here we have experienced what appears to be an ebb and flow in terms of our societal approach to mental health issues. For a time in the 1990s, we became what was labeled as the "prozac nation," where there was a growing recognition that mental health issues often have a biological basis and, regardless of the basis, could be treated effectively with medication. This was also a time – and I am obviously speaking impressionistically at this point – when people became more comfortable revealing their own mental health state, and it was not uncommon for people to mention that they were taking medication even in casual conversations. Learning disabilities were also on the rise in schools, but soon there developed a backlash on both fronts.

Some schools, and some academics, questioned the rise of learning disabilities, and Boston University mounted a public, but ultimately unsuccessful, attack on students who sought accommodation for their disabilities (Guckenberger). There was also a backlash on the prozac nation and a growing concern that, as a society, we were becoming overmedicated, not just with Prozac but with many other conditions as well. We then moved into this equilibrium where we remain today: broadly conflicted regarding how to define mental health conditions.

Nowhere has this been more apparent than in legal cases involving mental health issues, of which there have been a substantial number. It is difficult to know whether courts are more or less skeptical of these claims than other disability claims, but there is little question that cases involving mental health issues have struggled in the courts. This has been particularly true for those who seek workplace accommodations for their mental health conditions. For example, there have been a significant number of claims brought by individuals who suffer from depression and seek some accommodation that would allow them to control when they worked. Some individuals want to be able to come in late or leave early, while others seek an accommodation that would allow them to work from home. Based on my own research, these cases appear to uniformly fail (Selmi, 2008).

I think we can find in these cases one of the ongoing problems the law has encountered in dealing with issues relating to the stigma of disability. For courts and employers, these individuals often look like malingerers – employees who would prefer not to work, or work on their own time, and courts are reluctant to recognize a disability, or provide a reasonable accommodation, for this class of individuals. One reason for this, although generally unstated, is that the ADA was designed to help the disabled move into the workplace; it was not designed to enable those with disabilities to work less, or to work when they wanted. It appears that most of the claims in which individuals seek an accommodation, whatever the disability, that would mean they would work less rather than more, fail.

Two other issues complicate the notion of stigma and the limits of the ADA in addressing the issue. First, many disabilities can be concealed, and this fact also makes the disability category distinctly different from other antidiscrimination categories, with the important exception of sexual orientation (Smart & Wegner, 1999). One difference with sexual orientation is that heterosexuals generally are free to discuss their partners, sex lives, and other social aspects that gay individuals often must suppress. There is not necessarily the same parallel with disability, though it could be that in many circumstances a disability will be related to some factor, such as sports or school performance, that those without a disability may be more free to discuss. But the fact that some disabilities can be concealed may also reveal an important aspect of stigma, namely that one fears a negative connotation or treatment if their disability were revealed. One interesting study found that many individuals devoted a substantial amount of energy concealing a disability (Smart & Wegner, 1999), and a recent opinion poll suggested that a substantial number of individuals fail to seek treatment for mental health issues because they fear their treatment will be discovered (Harris Poll, 2008).

This issue relates back to the absence of a societal consensus defining disability. Not only do we not have an accepted definition, but we lack a consensus on appropriate means to discuss or handle disability issues. Much of what a disabled individual might experience in social settings arises from an awkwardness or unfamiliarity, and it is easy to impose any interpretation on the accompanying social behavior. A study that was near comical in its analysis sought to record social interactions with individuals in wheelchairs, and it, not surprisingly, found a wide array of behavior, ranging from excessive assistance to complete refusal to acknowledge the wheelchair bound individuals. The comical part of the article was the authors' attempt to find stigmatizing influences in all of the recorded behavior, leaving those who were being observed in the position of being damned if they did and damned if they did not (Cahill & Eggleston, 1995). Rather than attaching stigma to the behaviors, the authors should have emphasized the ambiguity of the observed behavior and the lack of clear social norms for dealing with individuals in wheelchairs.

I want to mention one personal example that displayed to me the limits of existing social norms. When our children were younger, they attended a daycare facility run by a University that had a particular emphasis on children with special needs, who were fully integrated into the classrooms. One of the beauties of the school was that the children who were not obviously disabled seemed to treat those who were disabled as just another child, never, as far as I can tell, commenting on the children or their conditions. There were several children who were severely autistic in the classrooms and again as far as I could tell, the other children never labeled them or treated them differently, although some of the autistic children were very quiet and not socially interactive. At the same time, as parents we were unsure what to tell our children, or even what we could ask the school about the children. After we had been there for several years, the Director at one of the parent meetings (a director whose specialty was the education of children with special needs) mentioned that it was permissible for us to ask questions, that it was fine for us to want to know more about the children but we were never told more than that, we were never provided with a discussion about talking with our children if they should ask questions, and it was never clear what would be socially acceptable behavior.

As will be discussed in detail in the next sections, the ADA could not address these issues, it would instead require a social movement exploring and breaking down the existing norms as a way of challenging our views about disability, and equally important, developing a social consensus to define disability. The ADA could not make these transformations on its own, but that was, at least for some of the drafters, the statute's task. Arlene Mayerson argues that the ADA adopted the social model of disability (Mayerson, 1997), and my response would be that the ADA could not do that, certainly not on its own, that changing our notions of disability would have to arise from a more organic movement rather than by legislative fiat. Without going into too much detail, this is what happened with both race and gender relations – the law played an important, and in many ways integral, role toward social change but it was never the only means of social change. The norms on racial and sexual equality were transformed by the civil rights movement, by feminism, in conjunction with necessary legal changes. The disability rights movement sought to skip a step by imposing a broad definition and mandate of disability through legislative action but without an accompanying social movement. But courts typically reflect, rather than transform, existing social norms, and given the conservative orientation of the federal judiciary, on an issue like disability and particularly the question of accommodation, we might expect federal courts to limit the scope of the Act. And this is precisely what has happened, as discussed more fully below.

The Legislative Paths

In this section, I want to trace the development of the ADA to demonstrate two important facts. First, the drafters opted for a broad definition of disability, one that could readily encompass many individuals who would not likely be considered disabled as measured by social norms, and that the broad definition was, in part, an attempt to widen the class of individuals who would be considered disabled as a way of altering our perceptions of disability. Second, there was a conscious decision not to have a public debate over the ADA, and the recent ADA amendments, indeed one could take this observation back to the Rehabilitation Act, which was a predecessor to the ADA. The passage of the Acts, all of which came in the face of simultaneously broad congressional support and widespread congressional indifference, helps elucidate some of the eventual problems that have arisen during the first decade of ADA implementation.

The Passage of the Rehabilitation Act

The Rehabilitation Act was the federal government's first comprehensive foray into prohibiting employment discrimination on the basis of disability, or handicap in the language of that Act. This statute, which applies to federal contractors and the federal government, not only prohibits discrimination, and requires reasonable accommodation, but it also requires federal contractors to take affirmative steps to hire the disabled. The statute was primarily staff-driven legislation, in which a handful of congressional staff members succeeded in ensuring the bill passed without much legislative attention, and then later helped to shape its direction by crafting extensive regulations (Scotch, 2001). As historian Ruth O'Brien has noted, the Rehabilitation Act, also known as section 504, arose "without much forethought," it just emerged (O'Brien, 2001, p. 118). Despite its stealth nature, President Nixon twice vetoed the statute, although it was ultimately enacted in essentially its current form. That form offers a very short directive applicable to the federal government and those receiving federal financial assistance.

When the statute was initially passed, it contained a vague definition of handicap, the term that was in use at the time. During the following year, a more comprehensive definition was drafted at the agency level, and the statute was amended in 1974 to incorporate the definition that has continued to define disability until the recent amendments. The definition of handicap was

> Any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (b) has a record of such an impairment, or (c) is regarded as having such an impairment.

After several years of delay, administrative regulations were developed to provide some guidance for interpreting the provisions of the Rehabilitation Act, but perhaps more important to the evolution of disability rights was the open-ended language that went to the core of the statute's scope.

As noted previously, the need to define the protected class renders disability statutes different from other antidiscrimination statutes, and there is no accepted way to define disability. One possible approach would be to list certain conditions or disabilities that qualify for coverage but this approach would have the substantial disadvantage of requiring statutory amendments any time a new disabling condition arose. Given the way Congress, or any legislature operates, it was therefore important to adopt language that was sufficiently open-ended to allow for necessary evolution. Another approach might be to provide a non-exclusive list of qualifying conditions while leaving courts to determine whether conditions that are not included on the list should be covered disabilities. This was, in fact, the approach taken in the regulations that were promulgated under the Rehabilitation Act, although those regulations were not ultimately incorporated in the statutory language of the ADA, or into the recent Amendments to the ADA.

Not only is it difficult to define disability, but there is a significant dispute over how disability ought to be defined. The disability rights community generally favors a broad definition, one that is distinctly inclusive in scope. Part of the impetus for a broad definition stems from a desire to destigmatize the concept of disability: labeling more people as disabled may destabilize the existing norms regarding abilities and what it means to have a disability. While this might be a sound political project, it makes for a difficult legal one. A broad definition, for example, might dilute the meaning of disability, particularly if virtually any individual can be defined as disabled, and it might also open the door to frivolous claims by individuals seeking to take advantage of an opportunity to enter the federal courthouse. This in turn might alter the public support for disability rights, especially taking into account the cost concerns that accompany the accommodation mandate. At the same time, there is little question that the prospect of a broad and inclusive definition enlarged the statute's advocacy community and ultimately the push for a broad definition prevailed (Switzer, 2003, p. 101).

With this background in mind, three features of the passage of the Rehabilitation Act are noteworthy as they relate to the eventual passage of the ADA. First, the Rehabilitation Act was pushed by a handful of Senators with a deep interest in the subject who met very little opposition within Congress (Scotch, 2001). This intense but small support allowed interested congressional staff, and later agency staff, to shape the legislation without significant vetting or compromise. Second, the bill was adopted without much public input, and without the development of any substantial social movement that may have helped increase both public awareness and a societal commitment to disability rights. As a concept, there is very little opposition to providing rights to the disabled (Skrentny, 2002); however, as evident by the two Presidential vetoes of the Rehabilitation Act, there are substantial concerns regarding the costs that might accompany those rights and once the legislative initiative slides closer to the "special rights" or affirmative action category, public support appears to weaken substantially.

The Passage of the ADA

The ADA was introduced in Congress in the late 1980s at the behest of a number of members who had particular experience with disabilities. The primary house sponsor, Tony Coehlo, suffered from epilepsy and had been subjected to discrimination in his youth as a result of his condition. In the Senate, Tom Harkin, whose brother was deaf, took the lead, where he was joined by many other influential Senators who also had personal experience with disabilities – Senator Kennedy had a sister who suffered from mental retardation, Bob Dole lost the use of his right arm in the military, and Senator Orin Hatch's brother-in-law suffered from polio. In addition to the Congressional members, President Bush had a son with a severe learning disability, and Attorney General Thornburg's son suffered significant head injuries in an accident. These and other members would play critical roles in ensuring the passage of the ADA, and perhaps because of the personal connections to issues of disability, there was virtually no opposition to the ADA in either the House or the Senate.

Among advocates, the lack of legislative opposition is almost always met with joy because it speeds the bill's journey to passage. The lack of controversy, however, can just as easily lead to problems during the statute's implementation phase – problems that might have been addressed through more careful congressional deliberation. This was particularly true in the context of the ADA, which arose at an unusually complex time concerning the interaction between Congress and the courts. At the time the ADA was passed, Congress was largely receptive to the demands of civil rights groups, while the Court was not, resulting in a situation in which the courts, if given the opportunity, could readily take away what Congress had provided. This tension between the branches should have counseled in favor of clear statutory language designed to limit judicial discretion. Yet, rather than crafting specific language that would tie the Court's hands, the disability community quickly opted to import the broad definition of disability from the Rehabilitation Act into the ADA. This move may have simply proved too irresistible given that it would be difficult for Congress to object to a definition it had already adopted. At the same time, there were many reasons why a broad definition that relied on judicial interpretation would prove problematic for the ADA.

Perhaps most significantly, a broad definition of disability was in clear tension with the nature of the Supreme Court at the time. As a practical matter, an open-ended and potentially expansive definition of disability would have its best chance to flourish under a Court that was sympathetic to the statutory goals or perhaps one that was determined to remain faithful to the congressional language. Yet, in 1988–1989 when the ADA was debated in Congress, there was no reason to see the Supreme Court as sympathetic to any aspect of civil rights. The Civil Rights Acts of 1990 and 1991 were designed to overturn a series of hostile civil rights decisions, and there was no reason to expect the Supreme Court of the early 1990s to interpret the ADA any differently than it had interpreted Title VII. In fact, there was reason to expect that the Court might treat the ADA even more hostilely, since the ADA did not have the broad public support of Title VII, nor did it have a lobbying arm as powerful as the AARP with respect to the ADEA, or the traditional civil rights groups such as the NAACP for Title VII. The ADA was also a new and innovative statute that posed issues about which a conservative court would naturally be skeptical, in large part because of the explicit cost considerations imposed on employers through the accommodation mandate.

At the same time, while the Supreme Court appeared to be in a hostile mood toward civil rights, Congress's disposition was almost exactly the opposite. The Congress that passed the ADA was among the most prolific in our nation's history in passing Civil Rights legislation, and undoubtedly the most prolific since the mid-1960s. During the time the ADA was under consideration, Congress passed the Civil Rights Restoration Act of 1987 (to overturn a Supreme Court decision), the Family Medical Leave Act (ultimately three times because of two presidential vetoes), substantial amendments to the Fair Housing Act, an important Age Discrimination bill, a revision of the Rehabilitation Act, as well as the Civil Rights Acts of 1990 and 1991. If ever there was a time for passage of civil rights legislation, it was in the late 1980s.

All of this legislative activity came with a downside that has proved particularly troublesome for the ADA. Of all the civil rights statutes that were passed toward the end of the decade, the ADA was the least controversial. The Family and Medical Leave Act ("FMLA") was vetoed twice by President Bush, the Civil Rights Act of 1990 was likewise vetoed, and the Civil Rights Act of 1991 was headed for a veto until the Clarence Thomas hearings intervened. As a consequence, all of these statutes received more congressional attention, and more legislative massaging than the ADA. The Civil Rights Act of 1991, for example, provided very specific statutory language that has frequently guided the Supreme Court in a more moderate direction over the last decade. Faced with this division between a receptive Congress and a hostile Supreme Court, the last thing one would want to do is draft a statute that was dependent on judicial interpretation, yet that is precisely what was done.

The lobbying community also made an important strategic decision that further limited the possibility of an expansive judicial approach to the statute. Early on in the legislative process, the lobbying community decided not to mount a large publicity campaign for the ADA or to rally broad public support but instead opted to work solely within Congress (Switzer, 2003, p. 107). This decision was primarily due to a sense that public support was unnecessary and seeking public support might stir up unwanted opposition (Shapiro, 1994). Congressional support was strong with very little open opposition to the goals of the ADA. What little opposition existed, centered on questions relating to homosexuality, and a handful of conservative Congressional members criticized the potential scope of the Act but to no persuasive effect. In light of this broad support, the business lobby also decided early in the process to de-escalate its opposition and instead to focus on fashioning a bill it could live with.

The decision by the lobbying community to produce a statute under the public radar ultimately proved a mistake, and likely a serious one. Without broad public support, without a coherent social movement pushing an expansive agenda, there was little reason to expect that the ADA could, by legislative fiat, expand the definition of disability to include non-traditional disabilities. One of the issues that is apparent, often implicit, in all of the various criticism of the Supreme Court interpretations of the ADA is that there was a hope that the statute might enshrine the social model of disabilities into the public consciousness. This model, which is particularly prominent within the disability rights community, sees disability as primarily a product of social attitudes and constructs, environmental in many ways, rather than something that is out of the norm or biologically based. I am sympathetic to the social model and believe that, in many respects, it aptly captures how we have defined disability without thinking more broadly about how we could reduce or erase the limitations so many of those with disabilities currently face. At the same time, it was entirely fanciful to think we could legislate this model – especially without any explicit acknowledgement of this change in course – and even more fanciful to think the Supreme Court might be receptive to the social model in its interpretive guise. This is particularly true when we return to how, at the very same time the ADA was being formulated, the Supreme Court was eviscerating other civil rights protections.

Not only was there no apparent public support for an expansive definition of disability, but the statute's normative force was never adequately articulated in the public sphere. There was, for example, no public discussion of why the ADA did not involve "special rights," why the accommodation mandate was a product of right and equity rather than special treatment akin to affirmative action, or why disability rights ought to be seen as equivalent to earlier civil rights movements. Professor Michael Stein notes that a public perception exists that the ADA involves special rights, but without a social movement to change that perception, there was very little the legislation could do to alter the public consciousness (Stein, 2004). More was needed than new legislation, but that more never materialized. Instead, the disability rights community appeared to fear a public dialogue and sought refuge in the courts, the wrong place, by almost any measure, for refuge.

Had there been a public dialogue, it is also quite likely that the disability community would have opted for a more narrow statutory definition because the community would have been required to articulate a justification for the statute – a justification that would have likely stemmed from discrimination, the stigma that attaches to disabilities, structural barriers that could be alleviated, or the needs of the disabled. This may, in turn, have also focused the advocacy community on justifying a broad definition of disability or to confront some of the many issues that have subsequently arisen, such as whether temporary disabilities, or work-related disabilities, are deserving of statutory protection, or whether individuals with rather minor conditions, such as allergies, ought to be treated as disabled.

Given the apparent limited support for an expansive disability definition, it is worth emphasizing that the public advocacy that did arise to support the statute all focused on traditional disabilities. Deaf students at Gallaudet University, for example, mounted highly visible and successful protests demanding a deaf University President; disabled individuals crawled up the Capitol building to demonstrate its lack of accessibility, while others tied themselves to buses and engaged in similar protests centered around traditional disabilities. The members of Congress whose support was based on personal experiences were all likewise involved with traditional disabilities, including deafness, cancer, paralysis, and epilepsy. In other words, entirely missing from the public debate was a discussion regarding the need for a broader definition of disability, one for which public support appeared to be missing and a public justification lacking.

Before discussing the Supreme Court cases interpreting the ADA, I want to highlight one other problem that was lurking in the background that should have provided additional caution to those seeking an expansive definition. A broad interpretation posed particular problems for employers, not just in the immediate costs of accommodation, but in providing opportunities for workers to raise excuses for their workplace behavior. There are very few things that anger employers more than lazy workers or workers seeking to gain an unearned advantage in the workplace, and courts interested in protecting the interests of employers, as many are, would likely interpret the statute to ensure that it did not become a font for worker grievances. Indeed, to the extent the ADA was perceived as providing statutory protections to lazy workers, malingerers, and whiners – those who have a difficult time coping with the everyday stresses of the workplace – it was a virtual certainty that courts would cut back on the statute to eliminate those protections. In fact, that is what happened. To date, the largest volume of ADA claims have been brought by individuals with bad backs, which is largely an extension of an issue that has long plagued social security and workers' compensation systems where back injuries have generated a tremendous amount of litigation and controversy for decades. Some of the very first claims to arise under the ADA came from law students seeking additional time on the bar examination because they had bad memories, claims that again generally have failed. My non-scientific review of the literature suggests that the most frequently requested workplace accommodation is a right to work at home, or in the alternative, a right to set one's own hours, or to come in late. Not surprisingly, these claims have uniformly failed and one reason is that they are precisely the kind of claims that the business community becomes most exercised about because, to them, these claims exude laziness or malingering, rather than any serious disability.

The hostile reception most of these cases have received may be taken as evidence that the stigma that attaches to disabilities has not receded, but I think there is something slightly different at work. While it is true that those who seek workplace accommodations may often be seen as malingerers, it is also true that many of these claims arose from individuals who, as a society, we would not define as disabled, and I would suggest should not be defined as disabled. An additional complicating factor is that the vast majority of claims are filed by existing employees rather than applicants, and their request for accommodation may be met with some skepticism since many of the individuals had been working without accommodation for some time. Applicants, on the other hand, may present stronger candidates for protection as they come into the workplace with a disability that may require some workplace accommodation. Yet, for a variety of reasons, these cases are few in number and we are instead confronted with a slew of claims by existing employees, mainly of whom are newly seeking disabled status. It simply cannot be the case that every claim succeeds or that every medical condition should be treated as a disability, and those who believe all of these conditions and claims should be covered under the ADA need to develop a normative framework for defining disability so broadly. This is an issue, in other words, that needs to be debated – and needs to be debated publicly – rather than asserted legislatively.

The Supreme Court's Interpretations

Returning to the concept of stigma, it is relatively easy to see why the employment provisions of the ADA have made little progress on challenging our stereotypes and perceptions of the disabled. The statute sought to expand the definition of disability, and a substantial portion of the developed case law has focused on that very definition, rather than tussling with the question of reasonable accommodations – accommodations that would have helped to integrate the disabled into the workplace. As I have argued elsewhere, the desire to expand the definition of disability legislatively, without a forceful social movement, was doomed to failure, and has largely failed (Selmi, 2008).

For the purposes of this chapter, I do not want to belabor the cases in any great detail but instead I want to highlight the issues that have arisen in the Supreme Court to demonstrate how the Court, and I think courts more generally, remain fixed in a more limited vision of disability than the statute's advocates had perhaps anticipated. In other words, at least with respect to the employment provisions, the social model of disability has not become part of the developed body of law.

The Supreme Court has, over time, handled a number of different disability cases, and the results have broken down largely along the lines of what might be defined as traditional and non-traditional disabilities, with plaintiffs succeeding in claims of traditional disabilities but failing, and often miserably, with claims that sought to stretch the definition of disability.

The best known of these latter cases is *Sutton v. United Air Lines*, where twin sisters applied to be pilots but were rejected from the job because of the airline's uncorrected vision requirement. Both of the Sutton sisters suffered from bad eyesight and they could not meet the airline's standards, and they sued under the ADA. The underlying question – whether an individual should be assessed in their unmitigated condition – was critical to the statute, as many disabilities can be mitigated, particularly through medication. But the more immediate issue was whether, under the ADA, those who wear glasses should be defined as disabled? This is the question the Supreme Court was primarily interested in, and it answered that question with a resounding no, and in the process, seriously limited the scope of the statute by holding that mitigating factors should be taken into account when assessing whether an individual meets the statutory definition of disabled. This meant, as a practical matter, that many individuals who were intended to be protected, such as those who suffer from epilepsy, may fall outside of the statute's scope.

Although the *Sutton* case has received the bulk of the attention, there were two other cases that arose at the same time, and which were disposed of in the same manner. One is what I would consider another non-traditional disability – hypertension – while the other was more complicated as it involved an individual who had vision in only one eye but who had trained himself to see as if he had both eyes. This self-correction the Court treated as a mitigating factor, which seemed both pernicious and wrong in that the person was effectively being penalized for his ability to self-accommodate his disability – penalized in the sense that he may have received protection under the statute if his self-mitigation had not been considered in the initial calculus. This was also a highly unusual case and reflects the fall-out from the other far more common cases of those with high blood pressure or those who wear glasses, two groups the Court was determined to exclude from statutory coverage.

A third case also proved highly controversial and has been altered by the recent amendments. In a case against Toyota Motors, an employee sought protection under the disability statute for her carpel tunnel syndrome that she developed on the job (Williams). This latter issue seemed important though it has often been ignored in the many discussions of the case. Because the plaintiff's injury arose on the job, it arguably should have been handled under the state workers' compensation system, which is where workplace injuries are typically addressed. As a result, it is not so much that the plaintiff presented a non-traditional disability but she presented an injury for which there was a well-established and exclusive existing forum. The Supreme Court held that for an individual like the plaintiff to be covered she had to demonstrate that she was substantially limited in a major life activity and in this case, they found that she was not because she could still perform most of her daily activities, such as brushing her teeth.

The other case that has drawn criticism involved a USAir employee who sought a preferential assignment for his bad back, and the Court limited the force of the reasonable accommodation requirement, even though the airline did not challenge the plaintiff's classification as disabled (U.S. Airways).

Pausing for a moment on these cases, we can see that none implicates, at least in any substantial fashion, the issue of stigma, or raises a question of discrimination as commonly defined. Those who wear glasses, have high blood pressure or bad backs, or those who suffer workplace injuries are not generally stigmatized by their conditions, nor can any of those groups argue that they have been the subject of broad discriminatory attitudes or treatment. As I say this, I realize it might be possible to identify stigma in all of the above circumstances, particularly to the extent the individuals are defined by their conditions, as they arguably were in the various job classifications. But this seems to stretch the concept of stigma too far to mean that the person is different from the norm, where norm in this instance, particularly with respect to high blood pressure, is defined as the average. We can also assert that it is highly unlikely that Congress sought to protect any of these individuals when it enacted the ADA, or perhaps more limitedly, that Congress failed to consider any of these situations when it passed the Act.

We can also see one of the statutory deficiencies that arose as a result of having no public debate. For each of the plaintiffs mentioned above, it is not obvious – and I would actually contend it is not easy at all – that the individuals should be protected by the statute, not as a positive matter but on a purely normative basis. Unless we want to preclude employers from making employment judgments with respect to any health condition, then these judgments, while perhaps not necessary, do not seem to have a basis in discrimination, misunderstandings, or even stereotypes. The policy at United Airlines was based on a safety concern, and although it may have been broader than necessary, there was no serious question that the policy was pretextual. Similarly, in the Toyota Motors case, the employer had provided some accommodations as well as worker's compensation that went on for more than 2 years, facts that again do not suggest a desire to exclude the disabled from the workplace. One might wonder about the relevance of high blood pressure, but this is a condition that would not traditionally be defined as a disability, and without an articulated basis for why any of these individuals should be covered, there was little likelihood that they would be, regardless of the ability to fit these individuals under statutory language. In contrast, courts, including the Supreme Court, have been much more protective of what are generally classified as traditional disabilities. In the Supreme Court, there have only been two cases that fall into this category, one involving an individual who was HIV-Positive and the other involving a golfer who had mobility problems and sought to use a golf cart in professional tournaments (Bragdon, PGA Tour). This last case was not a proper employment case, though golfing was his occupation, but in both cases the Court found for the plaintiffs, even though neither case presented an easy statutory path to protection.

As noted previously, the lower court cases largely track this broad division, and courts have generally been more sympathetic to plaintiffs trying to get into the workplace than those trying to get out. The issue that has been most complicated as a result of the *Sutton* decision were those conditions that could be ameliorated with medication, and it seems to me that those who suffered from epilepsy probably had the most difficult time, and one that was most inconsistent with Congressional intent.

When it comes to mental health issues, I think we find in the courts the ambivalence that pervades our society more generally. With some exceptions, courts have generally been more protective of severe mental illness, or severe cases of depression, than less severe mental states, which seems consistent with a focus on discrimination or stigma, but is actually a bit ironic when it comes to accommodation issues (Calero-Cerezo). In fact, this is a theme that runs throughout many of the cases – the more severe the disability the more likely courts have been to offer protections, and that in turn means, the more costly the accommodation requests. Before moving to some concluding thoughts, two other issues should be addressed. First, one reason the ADA may not have made much progress in terms of integrating the disabled into the workplace is that those who have the most severe disabilities are the least capable of working, and there have been relatively few cases involving severe disabilities. This is also true with issues of mental health or retardation where the more severely affected are the least prominent in the cases. This returns us to a concern expressed earlier, namely that disability is different from some of the other antidiscrimination categories because many disabilities do, in fact, affect one's ability to work. This also means, as a practical matter, the individuals who go to the core of the ADA protections are often the least able to take advantage of the workplace protections. However, in the cases that present traditional and more serious disabilities, such as deafness, plaintiffs have typically fared well despite the costs of accommodation.

The second issue relates to the public accommodation provision of the statute, which I think has had far more impact on public attitudes than the workplace provisions. In an important study, Michael Waterstone has documented the far greater success – if far fewer cases – involving the public accommodation provisions, and we have widely come to expect that certain public accommodations will be made for individuals who have disabilities (Waterstone, 2005). This will vary from interpreters at public events, to ramps and curb cutaways, to sounds at crosswalks, and other provisions. These changes are now routinely accepted without much rancor except for a few cranky individuals who still complain about reserved parking spaces.

There are a number of reasons why the public accommodation provisions have been implemented more successfully. Perhaps most important, the accommodations necessary under the public accommodations provisions invariably relate to traditional disabilities. The ramps, crosswalk protections, special seating at stadiums are all designed for those individuals with the most traditional disabilities – those in wheelchairs, the deaf and blind – and there are virtually no accommodations required for non-traditional disabilities. In addition these changes have been more readily integrated into our social conscience because they are group issues that have a broad impact, and have made the disabled more visible in society. In contrast, the vast majority of disability employment cases involve individuals and are isolated in their effects, and also in their recognition. The workplace and school settings are complicated by the privacy concerns that surround disability issues that make it so that I and other students, for example, are not to know who might have a disability. As a result, co-workers are unlikely to know about another's disability unless it is a visible disability, and without that knowledge, it is difficult to see how an individual's views are likely to be altered, which is also true of the stigma of disabilities.

The Impact of the ADA

The ADA set out to change the way we think about disability, and also to integrate the disabled into the workplace. But, to date, the impact has been limited, and for advocates, quite disappointing. The recent amendments may make a difference, although I would suggest that they are the product of the same error as was found in the original act, namely that the amendments were produced without any public debate and very limited congressional input. The idea that the Court will be more receptive to the amendments than the original statute seems entirely mistaken, and the new language is not sufficiently specific to tie courts' hands. As a result I expect that the statute will continue to be defined narrowly consistent with traditional norms relating to disability, and that any greater transformation will await a social movement aimed at our social consciousness regarding disabilities. Indeed, I would suggest that the Court's real freedom to rewrite the statute did not come from Congressional preferences, or the lack thereof, but from the absence of any social movement pushing for a broader definition of disability.

This leads to one final lesson to be drawn regarding the importance, or absence, of social movements. The last few years have seen a surge of interest within legal scholarship regarding the importance of social movements in the pursuit of equality. Traditionally the social movement literature has identified legal action as in tension with social change, with law frequently seen as disruptive to more meaningful political action (Crossley, 2002). More recently, legal scholars have emphasized the interrelation between effective social movements and legal action (Brown-Nagin, 2005). Professor Bill Eskridge has explored the relationship as it applies to constitutional law, with a particular focus on gender and race movements, as well as the development of social change in the area of sexual orientation (Eskridge, 2002). In his classic work on the pay equity movement, Michael McCann demonstrated how legal actions can energize social movements and result in significant political progress even when those legal actions ultimately fail, as they typically did in the context of the comparable worth movement he studied (McCann, 1994). Within antidiscrimination law, three areas where substantial progress has been made over the last few decades – sexual orientation, sexual harassment, and affirmative action – all had parallel social movements that supported the development of an effective legal strategy. Social change, Eskridge (2001) and others have concluded, requires both legal action and a coherent social movement.

The experience with the ADA supports this claim, as the lack of an effective social movement influenced both the development of the original legislation and its subsequent interpretation. With greater social pressure or attention, Congress may have drafted more specific legislation, or at least addressed some of the imminent issues more clearly, such as the question of mitigating measures or the potential conflict with workers' compensation laws. It is also possible that a coherent movement would have arrived at a more specific definition of disability, rather than one that could accommodate any or all conditions. A social movement devoted to increasing public awareness about disabilities and the many ways in which our society is constructed based on a limited norm of ability might also have affected the normative vision the Supreme Court brings to its interpretive task. In contrast, it was unrealistic to expect to alter the very definition of disability by simple legislative action. Instead, the Supreme Court remains steeped in a traditional notion of disability, one that emphasizes limitations rather than abilities and sees the disabled as deserving of protection rather than independence.

Too frequently we think of the Supreme Court as apart from, or above, broader social norms or movements, even though we are repeatedly reminded that the Court most commonly mimics rather than transforms those norms. As Robert Post has written regarding constitutional decisions, courts work "within the web of cultural understandings that it shares with the society that it serves" (Post, 2003, p. 77). This is not to say that courts cannot influence society or prevailing social norms, but rather the influence typically works in both directions, as was particularly apparent in the recent battle over affirmative action. In the University of Michigan cases, there seems little question that the amicus briefs filed by elite universities and powerful figures had a profound effect on the Court's ultimate determination, just as the Court's approval of affirmative action in *Bakke* influenced elite public opinion. But when the work of social change is left exclusively to the courts, advocates are almost certain to be disappointed in the ultimate results.

This is not to discount the important disability rights movement that has, in fact, had a significant social impact. In the early 1970s, the Independent Living movement proved extremely successful in deinstitutionalizing many of those who lived with disabilities but were capable of living outside of an institutional setting (Scotch, 2001). The next decade saw the emergence of ADAPT, which focused on the inaccessibility of public transportation and engaged in various protests around the country designed to highlight that inaccessibility (Shapiro, 1993, p. 127). The protests centered at Gallaudet University succeeded in producing a deaf President for the first time in the school's history and last fall student protests again prompted the board to alter its Presidential choice. All of these movements, however, were limited in their focus and none sought to expand the definition or concept of disability;

in fact, all were centered around traditional disabilities. Equally important to the future of the ADA, none of the movements sought to integrate workplace issues into the protests and none spawned a broader or sustainable group that could carry on the work beyond the targeted issues.

In the end, without a broader social movement pushing to alter the public consciousness of disability, there was simply no reason to expect that the Supreme Court would interpret the statute expansively and many reasons to expect that they would do so narrowly. Many of the difficult interpretive issues surrounding what constitutes a disability involve contested social meanings, and the Supreme Court has largely tracked public opinion in defining the scope of the ADA. In order to transform our definition of disability, it is necessary first – or at least simultaneously – to alter the public imagination. Courts can assist in that effort but they cannot do all the work.

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Chapter 8
Age and Disability Within the Scope of American Discrimination Law

Stewart J. Schwab and Garth Glissman

Age and disability discrimination were not part of the first wave of antidiscrimination laws. Race discrimination was the primary target of that initial wave, with sex discrimination added as an almost embarrassing afterthought.[1] But age and disability are now firmly established within the top tier of categories targeted by antidiscrimination laws.[2] Other areas of discrimination are also important, but they are simply not in the same league as race, sex, age, and disability discrimination in the number of cases, contributions to legal doctrine, or impact on society.

For a book like this on age and disability discrimination, a good place to begin is to think about how these categories fit within the scope of American discrimination

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[1] The insertion of language into the Civil Rights Act of 1964 banning sex discrimination by Virginia Congressman Howard W. Smith, who strongly opposed all civil rights legislation, is widely seen as an act of political gamesmanship designed to defeat passage of the Act by adding controversial amendments. Smith's amendment to the Act was greeted with laughter among fellow members of Congress (Freeman, 1991). In *Meritor Savings Bank v. Vinson*, Chief Justice William Rehnquist explained the unusual legislative history underlying the addition of sex discrimination to the Civil Rights Act of 1964:

> The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. The principal argument in opposition to the amendment was that 'sex discrimination' was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. This argument was defeated, the bill was quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'

477 U.S. 57, 63–64 (internal citations omitted).

[2] See Nielsen, Nelson, and Lancaster (2010) (showing that 40% of a random sample of federal employment discrimination cases involved a race claim, 37% involved a sex claim, 22% an age claim, and 19% a disability claim). See also Clermont and Schwab (2009) (analyzing all federal district court discrimination cases from 1998 to 2000 for which the Administrative Office gives a single US code section, and finding that Title VII cases comprise 68.4%, Americans with Disability Act claims comprise 8.8%, and Age Discrimination in Employment Act claims comprise 7.6%).

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law. In what ways are age and disability similar to race and sex discrimination so that doctrines and approaches can be transferred with relative ease? Conversely, in what ways are they different, requiring separate approaches? And to what extent, if any, does or should the intersection of age and disability affect legal and public policy?

Comparing the Top Four

One dimension for comparison of the top four is the ease with which the category can be defined. The ability of the law to address a type of discrimination becomes more difficult as the protected category becomes less clear. On this dimension, the categories would be ranked from easiest to hardest to define in this way: age, sex, race, and disability. Age is simple and straightforward: years since birth. Sex could be less clear than it is, if the development of federal law had not imposed considerable barriers against protection of more difficult-to-define manifestations of sex discrimination such as discrimination against gay people or transgendered people.[3] If those categories are included within the prohibition, as they increasingly are, sex would be more ambiguous than age but still less ambiguous than the other two categories. Race comes next. Race has always been a socially constructed category and the complications of definition have become ever more problematic as American society has become increasingly more diverse. Finally, disability is the most difficult category to define. A major issue for litigation under the Americans with Disabilities Act (ADA) is whether the plaintiff in fact is an individual with a disability.[4] There simply is no group of cases like this for the other three members of the top four. A major purpose of the ADA Amendments Act of 2008 (ADAA 2008) was to clarify this exceedingly difficult definitional issue.[5] Whether ADAA 2008 will succeed in this remains to be seen, but we have our doubts.

A related dimension for comparison of the top four is the visibility of the category – can the employer spot it? The definitional dimension focused on how easily

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[3] *See, e.g., Austin v. Norfolk Southern Corp.*, 158 Fed. Appx. 374, 381 (3rd Cir. 2005) (noting that sexual preference is not a protected category under Title VII); *Klein v. McGowan*, 36 F. Supp. 2d 885, 890 (D. Minn. 1999) ("Title VII clearly does not prohibit harassment based on the victim's sexuality").

[4] *See, e.g.*, *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) (holding that the original ADA phrase "substantially limited" required plaintiffs claiming a disability prove their disability "presents or severely restricts the individual from doing activities that are of central importance to most people's daily lives"); *Sutton v. United Air Lines*, 527 U.S. 471 (1999) (holding that potential disabilities were to be evaluated in light of any mitigating medical devices used by the person claiming the disability).

[5] The purpose of the ADAA 2008 is to extend the scope of disability protection by making it easier for individuals to establish that they suffer from a "disability" within the meaning of the ADA. In particular, the ADAA expressly overturned two Supreme Court decisions – *Sutton v. United Air Lines*, 527 U.S. 471 (1999), and *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) – that Congress perceived as unjustifiably narrowing the scope of protections afforded by the ADA.

the law can define who fits in the protected category. The visibility category is more sociological. How easily can employers or others spot a member of a protected group? On this dimension the ratings are more complex. Sex, age, and race would be ranked in that order. Sex is generally the most easy-to-spot category, although not always.[6] Despite the best efforts of plastic surgeons and cosmetologists, age probably comes next. An interesting twist here, however, is that the category is especially fuzzy right at the legal margin (that is, right around the age of 40 at which the legal protections start), probably as fuzzy as any of the other categories. This fuzziness itself comes from another contrast between age and race or sex – continuous versus binary categories. Race would come next on the visibility scale. There have been many famous "passing" cases[7] and, again, the number of people who present ambiguities is growing as American society is becoming increasingly diverse and more people view themselves (and are viewed by others) as belonging to multiple races. Because of its scope, disability is a wild card on this dimension. It presents both the easiest cases to see, such as the classic wheelchair or blind employees. But it also presents the most difficult situations. Indeed, many times the individual herself may not know if she is an individual with a disability. For example, the individual may know that she has a disability but not know if it reaches the margin of a "substantial" impairment; the person may have a clear disability, such as HIV infection,[8] but not know it; or, as with some mental disabilities, the disability itself may prevent the person from recognizing it.

Another dimension for comparison is the level of empathy or understanding people might have for the particular category of discrimination. The legal impact of this is uncertain, of course, but it may affect how commonly employers engage in animus-based discrimination; what sort of resistance fellow employees might mount in the workplace to anti-discrimination efforts; or even the sympathy with which judges or juries view cases. On this, disability is a wild card again. The other categories are probably ranked age, sex, and race. Age is most empathetic because we all aspire to become old (at least compared to the alternative), so we may all be subject personally to this type of discrimination. In addition, there is considerable

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[6] One particularly tragic case where sex was not as obviously apparent was the murder of Teena Brandon in a small Nebraska town in 1993. Brandon was born a female but lived as a male and was romantically associated with other women. The Academy Award-winning film "Boys Don't Cry" is based on this story. *See also Brandon v. Lotter*, 976 F. Supp. 872, 878 (D. Neb. 1997), for a good summary of the unusual facts of this case.

[7] See Randall Kennedy, Racial Passing, 62 Ohio St. L.J. 1145 (2001). See also *St. Francis College v. Al-Kharazraji*, 481 U.S. 604, 610 n.4 (1987) ("Many modern biologists and anthropologists . . . criticize racial classifications as arbitrary and of little use in understanding the variability of human beings . . . . Clear-cut categories do not exist"). Such ambiguity in racial classification is likely to increase considering 2000 Census figures which indicate that 4.6 million, or 1.6% of the population, designated themselves as multiracial. US Census Bureau, available at http://www.census.gov/hhes/www/housing/housingpatterns/pdf/beyond_black_and_white.pdf (last visited August 17, 2009).

[8] See *Bragdon v Abbott*, 524 U.S. 624 (1998) (holding that HIV is a disability under the Americans with Disabilities Act).

interaction between ages both in the workplace and in society. Sex would probably come next because of the close level of social interactions including, increasingly, interaction in the workplace itself. Race would come last because of the depressing persistence of racial segregation in many facets of society, including housing and education.[9] Disability, again, is hard to categorize on this dimension, but it is probably closer to race than to age. On the one hand, any of us could become disabled at any moment, so like age and unlike sex and race, it is a category each of us could join someday. On the other hand, unlike age no one aspires to be disabled. The disabled category is closer to race than age or sex based on social interactions. Individuals with disabilities have tremendous problems in gaining access to the labor market,[10] so interactions in the workplace tend to be limited. Social interactions elsewhere are also fairly limited, sometimes because the disability itself imposes limits to social interaction.

An important dimension for comparison is how law regulates employers with respect to each classification. There are two broad possibilities here. On the one hand, the law could forbid employers from considering a particular characteristic in making employment decisions. Alternatively, the law could permit, or even require, employers to pay attention to the characteristic. Race discrimination stands at one end of this continuum. In an ideal world, employers would be color-blind. There is no bona fide occupational qualification for race. Although the law permits some race conscious decision-making in affirmative action plans,[11] this is a narrow exception to the general rule of color-blindness and the law treats claims of reverse race discrimination seriously. The strong thrust of the law commands employers to ignore

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[9] Residential segregation of African Americans was highest among the various racial groups, followed by Hispanics or Latinos. Moreover, as the African-American population increased, African Americans became less likely to come into contact with non-Hispanic Whites and more likely to live near other African Americans (US Census Bureau, 2002). For example, the average African-American metropolitan resident lives in a census tract that is 51% black and around 30% of blacks live in neighborhoods that were 80% black, all this despite the fact that African Americans comprise only 13.5% of the population (Center on Urban & Metropolitan Policy).

[10] People with disabilities are less likely to be employed than non-disabled workers; disabled workers earn significantly less than non-disabled workers; and the more severe the disability, the bigger the gap in pay. For example, only 28.6% of the 18-million working-age people reporting a disability were employed in 2002, compared with 76.6% of those not reporting a work disability. Of these unemployed people with disabilities, approximately two-thirds want to be employed (Schur, Kruse, & Blanck, 2005). Moreover, the median income for people with disabilities is lower. The median annual income for disabled workers is $30,000, while the median annual income for non-disabled workers is $36,000 (Martinez, 2008).

[11] *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the affirmative action admissions policy of the University of Michigan Law School, but cautioning that race-conscious admissions policies should disappear over time); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating the University of Michigan's undergraduate affirmative admissions policy, which awarded points to minority students, on the ground that the policy was too mechanistic and thus not narrowly tailored to achieve the University's compelling interest in diversity); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (allowing race to be one consideration in the admissions process, but prohibiting the use of racial quotas).

race. Sex comes next on this dimension. Like race, employers in most cases are required to ignore sex. But the law also recognizes some exceptions to this general rule that it is not willing to indulge for race discrimination. For example, the law recognizes narrow situations where sex is a bona fide occupational qualification for particular positions[12] and it recognizes that pregnancy presents situations where narrow distinctions between men and women might be appropriate.[13] But again, as with race, the general rule counsels employers to ignore sex. Age comes next. Ignoring age is certainly appropriate. But discrimination in favor of the old and against the young is common and entirely legal. Age has no equivalent to the reverse discrimination lawsuits involving race or sex. So while employers are free to ignore age, in more circumstances than either race or sex discrimination they are permitted to discriminate so long as the discrimination cuts in favor of the elderly.[14] In the vast majority of cases, disability discrimination cuts in exactly the opposite direction. While cases exist in which employers are held liable for paying attention to disability,[15] most disability cases consider whether employers appropriately accommodated known disabilities, that is, whether they met their legal obligation to *consider* disability.[16]

The existence and strength of a discrimination prohibition also depends on the political clout of the group. On this dimension, the top four are something of a muddle. Age discrimination may well come out on the top of the heap. The elderly are a potent and growing political bloc. They are potent, in part, because they vote

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[12] In *International Union v. Johnson Controls, Inc.*, the United States Supreme Court noted that under 703(e)(1) of Title VII, an employer may discriminate on the basis of "sex" "in those certain instances where ... sex ... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 499 U.S. 187, 199 n.3 (1991).

[13] *See, e.g.*, AT*&T Corp. v. Hulteen*, 129 S. Ct. 1962 (2009) (holding that an employer does not automatically violate Title VII if it pays pension benefits calculated under an accrual system applied only prior to the Pregnancy Discrimination Act of 1978 – which legislatively prohibits any disadvantageous treatment of employees on the basis of pregnancy, childbirth, or related medical conditions – that gave less retirement credit for pregnancy leave than for medical leave generally).

[14] *See, e.g.*, *Brown v. Bowen*, 905 F.2d 632, 637 (2nd Cir. 1990) ("There is simply no constitutional basis for [invalidating discriminatory practices that benefit the elderly]. Not even the Age Discrimination Act outlaws discrimination *in favor* of the elderly. *See* 42 U.S.C. §§ 6101–6107.") (emphasis in original).

[15] *See, e.g., Moysis v. DTG Datanet*, 278 F.3d 819 (8th Cir. 2002) (upholding jury verdict that employer fired employee because of his brain injury, rejecting employer's argument that it fired employee because of customer complaints); *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131 (8th Cir. 1998) (applying *McDonnell Douglas* analysis in determining that employee was fired for insubordination rather than his disability);

[16] *See, e.g.*, *E.E.O.C. v. Chevron Phillips Chemical Co.,* 570 F.3d 606 (5th Cir. 2009) ("[w]hen an employer does not engage in a good faith interactive process to accommodate an employee's disability, that employer violates the Americans with Disabilities Act (ADA), including when the employer discharges the employee instead of considering the requested accommodations; once the employee presents a request for accommodation, the employer is required to engage in the interactive process so that together they can determine what reasonable accommodations might be available").

much more conscientiously than most other demographic groups.[17] And, as we will detail in a minute, they are a growing proportion of the entire population because of the aging of the baby boom generation. On the other hand, they are certainly fewer in number than women and fairly comparable in numbers to minorities and, maybe, individuals with disabilities.[18] Sex discrimination would certainly come out on top on numbers alone. Women, after all, are roughly 50% of the total population and even a higher percentage of the voting population.[19] But they are a more divergent group than the elderly and less focused on discrimination as a political issue. There certainly are well-known and powerful lobbying groups furthering the interests of women, but they have sparked a backlash that simply is not present with respect to the elderly.[20] African Americans and other minority groups are a large and growing demographic group and they present a cohesive and powerfully focused block on these issues. On the other hand, they vote at considerably lower rates than women and the elderly, and some segments of the population (such as illegal immigrants who tend to come from particular minority groups) have no voting rights at all. The disabled are also difficult to place on this dimension. On the one hand, they have powerful and influential lobbyists and they have been successful in the legislative arena, including recently. On the other hand, they are quite amorphous as a voting block. One sign of this amorphousness is that one regularly sees political ads that are directed at the elderly, or women, or certain minority groups, but not at individuals with disabilities. The group does not have a sufficient cohesive identity (and maybe not sufficient numbers) to justify such targeted political advertising.

Related to political clout is the rate of change of the relevant group. As a rough measure, larger groups have more political clout (at least for a given level of cohesiveness), so increases over time imply greater political impact. Women are probably

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[17] Voter turnout goes up dramatically as one gets older. For example, the voting turnout in the 2004 presidential election was over 70% for those 65 and older, while the turnout of 18–24 year-olds was a meager 45% (Warren, 2008).

[18] Persons age 40 and over comprise 53% of the labor force, and those age 65 and over comprise 4% (Bureau of Labor Statistics).

[19] In 2007, women comprised 50.7% of the population in the United States (US Census Bureau). Although men historically have voted at higher rates than women, those roles have reversed since the Presidential election of 1984. For example, 69% of women registered to vote in the 2006 congressional election, compared to only 66% of men; and women were more likely than men to actually vote (49% among women compared with 47% among men; US Census Bureau).

[20] The National Organization for Women (NOW), for example, is the largest organization of feminist activists in the United States. It boasts of 500,000 contributing members. In its own words, NOW works to eliminate discrimination and harassment in the workplace, schools, the justice system, and all other sectors of society; secure abortion, birth control, and reproductive rights for all women; end all forms of violence against women; eradicate racism, sexism, and homophobia; and promote equality and justice in our society ("About Now"). Of course, groups such as NOW are subject to intense criticism, often from various pro-life, religious, and politically conservative groups. For example, one columnist explains that, "[t]he National Organization of Women has long been considered by the political right as a bunch of bra-burning, abortion-loving feminazis") (Wall, 2008).

the most stable group. They have always been relatively stable as a proportion of the American population (at least after the colonial period, when men substantially outnumbered women in many places). However, their presence in the labor force increased rapidly through the 1970s and 1980s,[21] which led to increasing attention to their concerns.[22] Today, their numbers as measured by their presence in the labor force have stabilized.[23] Race is more difficult to assess on this dimension. The proportion of African Americans in the population and workforce has been relatively stable over time, and this will continue for the foreseeable future.[24] If protection for racial discrimination is viewed more broadly, however, the relevant population is growing because of the increase of other demographic groups, such as Asians and Hispanics.[25] But the interests of all these minority groups are not identical, so the nature of the political pressure brought to bear is not likely to be the same as in the past. The elderly are growing rapidly, as a proportion of the workforce and the general population. Because of the aging of the baby boomer generation,[26] they are an increasingly powerful political group. The political dynamic providing force to the age discrimination laws is likely to maintain and increase its force over time.

On the stable-versus-changing-numbers dimension, the disabled are again the hardest category to characterize. The size of the cohort protected by the disability laws is increasing, but in ways that make it hard to predict political impact. Several forces are pushing toward a larger cohort. First, as will be discussed below, disabilities tend to increase with age. Since the population is aging, so too should the

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[21] In 1973 only 44.7% of women worked outside the home. That figure increased to 57.4% by the end of the 1980s and 59.5% in 2008. In contrast, 78.8% of men were in the labor force in 1973; 76.4% in 1989; and 73% in 2008 (US Census Bureau).

[22] Passage of the Pregnancy Discrimination Act (PDA) in 1978 demonstrates the growing influence of women in the workforce and issues concerning their employment. "Congress added the Pregnancy Discrimination Act to Title VII ... to make it clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, 1964 (2009), *citing, Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669 (1983). Similarly, the Family Medical Leave Act guarantees that covered employers must grant an eligible employee up to 12 weeks of unpaid leave during any 12-month period for the birth and care of the newborn child of the employee (US Department of Labor).

[23] From 1990 until today, the percentage of the female population working outside the home grew only 2%, from 57.5% in 1990 to 59.5% in 2009 (US Census Bureau).

[24] In recent decades the proportion of African Americans comprising the American population has hovered around 14% (US Department of Health and Human Services). In fact, dating back all the way to the mid-nineteenth century, the percentage of African Americans has hovered between 10 and 14%. (Parrillo 2005, at 138).

[25] The largest and fastest-growing minority group is Hispanics (or Latinos), who reached 46.9 million in 2008, an increase of 3.2% from 2007. Asians are the second fastest-growing minority group, increasing by 2.7% from 2007 to 2008 (US Census Bureau News, 2009).

[26] Nearly one-third of Americans (approximately 79 million people) were born between 1946 and 1964. In the coming years, the first wave of baby boomers will approach retirement age. For the time being, however, nearly half of the American working population will be in their 50s and 60s.

proportion of those with disabilities. ADAA 2008 will also increase coverage in a number of ways. For example, it removed the 43 million population estimate in the original ADA which had been used as a reason by the courts to limit coverage,[27] it expands the scope of those "regarded" as disabled, it covers more impairments that can be mitigated,[28] and it will cover more "transitory" and "episodic" disabilities.[29] More generally, the ADAA 2008 specifically instructs courts to interpret disability broadly "to the maximum extent permitted" by the Act. Having said this, however, the political impact is difficult to assess because the expanded numbers will vary greatly by type of disability. For example, there will be little to no change in the numbers of those with mobility impairments or other "obvious" or "non-controversial" disabilities. This group tends to be the most politically active. On the other hand, there is likely to be a substantial expansion in coverage of people with "transitory" impairments, such as cancers and serious bone breaks, and of people with mental disabilities. These tend to be among the least organized sub-groups politically.

In sum, the top four categories protected by discrimination law in the United States present interesting contrasts on a number of important dimensions. But based on this, one can predict confidently that age and disability are likely to remain in the top four and, indeed, may soon challenge race and sex discrimination for the top two spots in public attention and social impact.

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[27] In the ADA Amendments Act of 2008 (ADAA 2008), Congress explained how the Supreme Court limited the scope of the ADA:

> While Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of handicap under the Rehabilitation Act of 1973, that expectation has not been fulfilled; the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases, and in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.

H.R. Rep. 110–730(1), 2008 WL 2502300.

[28] ADAA Section 4(a)(E)(i) amends the ADA by mandating that the "determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigations measures" such as medication, medical supplies, equipment, use of assistive technology, reasonably accommodations of auxiliary aids, or learned behavioral or adaptive neurological modifications.

[29] ADAA Section 4(a)(3)(D) amends the ADA by defining "disability" to include those suffering from an "impairment that is episodic or in remission" so long as "it would substantially limit a major life activity when active."

Thinking About the Intersection of Age and Disability

Age and disability are more deeply connected than any of the other top four. The elderly are disabled, and vice versa. The numbers are stark. In the general population, 14% of people aged 14–64 have disabilities, while 58% of people age 65 and over have disabilities (Cornucopia of Disability Information). About one-third of all workers with disabilities are age 65 and over. Thus, among people aged 18–28, about 3.5% are individuals with disabilities, but nearly four times that percentage of working people age 60–69 (13.6%) have disabilities.

This close connection between age and disability means that the number of individuals with disabilities in both the population and the workforce will increase significantly in the next few years, as the baby boomers age. In 2006, 3.6% of workers were age 65 and older. By 2016, that percentage is estimated to be 6.1%. (These estimates were made before the recent stock market declines, which are likely to result in more elderly in the workforce as they delay retirement for economic reasons). These workers are much more likely to be disabled, so the number of individuals with disabilities in the workforce is also going to go up in this dramatic fashion.

This close connection between age and disability may result in interesting, new legal issues. For example, scholars have recognized for a long time that claims involving the intersection of two different protected categories may differ significantly from the same claims considered separately (Abrams, 1994), but this has not been a major area of scholarship or jurisprudence. The close connection between age and disability may reinvigorate this area. For example, should age increase, decrease, or have no effect on the accommodations required for a particular disability? Assume, for example, a disability that requires a one-time fixed cost of $X to accommodate. Would it affect the "reasonableness" of the accommodation if the prospective employee were 68 years old versus 28 years old? Or maybe this is not a disability issue at all, but rather one of age discrimination? If that is the case, would it matter at all if the employer could demonstrate convincingly that it regularly hires non-disabled employees who are older than 68, or does the intersection of age and disability enhance the age claim? Again, the general point here is that there is a close connection between age and disability claims that may cause us to think again and in interesting new ways about intersectional discrimination claims.

Conclusion

Race, sex, age, and disability are the four big categories in employment-discrimination law. But the contrasts along various dimensions are striking. Race and sex came first into the legal consciousness. Age and especially disability discrimination came later. Each challenges our conception of anti-discrimination law, and their potency comes when one considers the interconnections between age and disability discrimination. We have compared the big four on several dimensions, as summarized in the table below. Each is the most and least salient, depending on the dimension. Viva la difference, except when they are similar.

Definitional ease	Visibility of individuals	Empathy	Legal command to ignore	Political clout of group	Increase in size over time
Age	Disability (mobility)	Age	Race	Age	Age
Sex	Sex	Sex	Sex	Sex	Disability
Race	Age	Disability	Age	Race	Race
Disability	Race	Race	Disability	Disability	Sex
	Disability (mental)				

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Chapter 9
Implicit Attitudes and Discrimination Against People with Physical Disabilities

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Although the study of prejudice, stereotyping, and discrimination has been a traditional focus of social psychology, researchers in this area have devoted only limited attention to the attitudes and behaviors toward people with physical disabilities. Moreover, much of the social psychological research on bias has been guided directly by Allport (1954) classic volume, *The Nature of Prejudice*, and specifically by his definition of prejudice as "an antipathy… directed toward a group as a whole, or toward an individual because he [sic] is a member of that group" (p. 9). Discrimination, according to Allport represented directly negative behavior, ranging from "antilocution" to violence. In this chapter, we argue that a narrow focus on antipathy toward people with physical disabilities obscures the complexity of contemporary attitudes and discrimination toward these individuals. Rather, appreciating the complexity of orientations toward people with physical disabilities can provide insights into the experience of this form of stigmatization and inform policies and laws for combating bias.

The current chapter builds on traditional social psychological work on prejudice and discrimination generally but considers, theoretically and empirically, the unique aspects of bias against people with disabilities. Although the Americans with Disabilities Act (1990) defined disability as a physical or mental impairment that substantially limits major life activities, we focus our chapter only on physical impairments. There are two primary objectives of this chapter, the first of which is to offer an integrative theoretical analysis of the dynamics related to bias against people with physical disabilities. Traditionally, researchers have largely relied on Katz's (1981) foundational ambivalence-amplification framework; we describe this position and relate it to a more recent, dual process perspective. The second objective of the chapter is to demonstrate how our integrative framework can help synthesize different and often apparently contradictory evidence about bias toward disabled individuals. We conclude by discussing the theoretical and practical implications of this framework for understanding people with physical disabilities, their experiences, and their responses to bias.

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The Stigma of Physical Disability: Historical and Conceptual Background

Much of the psychological research on prejudice and discrimination from the 1920s through the 1950s portrayed prejudice as a psychopathology (Dovidio, 2001), a form of social deviance. For example, stimulated politically by the Nazis' rise to power in Germany, historically by the Holocaust, and intellectually by the classic work on the authoritarian personality (Adorno, Frenkel-Brunswik, Levinson, & Sanford, 1950), psychologists of the 1950s typically viewed prejudice and other forms of racial and ethnic bias as dangerous aberrations from normal thinking. One implication of this perspective was that it focused on changing and constraining the attitudes of this "abnormal" minority as the primary way to combat prejudice.

While acknowledging the contribution of authoritarianism and other abnormal psychological influences (e.g., such as low self-esteem; Allport, 1954; Fein & Spencer, 1997), scholars have more recently recognized that prejudice and discrimination can also be rooted in *normal* psychological processes, such as the categorization of people into different groups ("we's" and "they's"). To cope with the enormous complexity of the world, people abstract meaning from their perceptions and develop heuristics and other simplifying principles for thinking about important elements in their environment. Categorization thus forms an essential basis for human perception, cognition, and functioning.

Social categorization has immediate and profound impact on how people view and respond to others (see Dovidio & Gaertner, 2010). When people categorize others into groups, differences among members within the same category are minimized while differences between groups are exaggerated in forming impressions and making decisions. Moreover, with social categorization, these similarities within groups and differences between groups tend to be perceived as inherent in the nature of the groups and to generalize to additional dimensions (e.g., character traits) beyond those that differentiated the categories originally. The association of these traits with the group represents stereotypes that then are spontaneously applied to individual members of the group.

Although there are unique characteristics of groups related to the specific intergroup context (e.g., related to the history of slavery of Blacks in the United States), there appear to be systematic principles that shape the content of stereotypes cross-culturally (Cottrell & Neuberg, 2005). The Stereotype Content Model (Fiske, Cuddy, Glick, & Xu, 2002; see also Cuddy, Fiske, & Glick, 2007) proposes that stereotypes are a function of perceptions of a particular group's position on two dimensions: warmth and competence. The specific associations for groups within each of the four combinations of high and low levels of competence and warmth may differ, but the type of orientation to each group and the emotions aroused by the groups within a particular combination are similar. Groups high in warmth and high in competence (e.g., the ingroup, close allies) elicit pride and admiration; groups high in warmth but low in competence (e.g., people with disabilities, the elderly) produce pity and sympathy; those low in warmth but high in competence (e.g., Asians, Jews) elicit envy and jealousy; and groups low on both warmth and competence (e.g., welfare recipients and poor people) are associated with feelings of disgust, anger, and resentment. The concept of differentiated reactions to members of different groups in terms of stereotypes (Fiske et al., 2002), emotional reactions (Cottrell & Neuberg, 2005; Smith & Mackie, 2005), and behavioral orientations (Cuddy et al., 2007) is now an influential theme in psychological research on prejudice.

Whereas psychologists traditionally focused on the common processes that underlie bias across groups, sociologists emphasized the unique qualities of different types of stigmas and how they shape the experiences of members of those groups. For example, in his classic monograph, *Stigma*: *Notes on the Management of a Spoiled Identity*, Goffman (1963) distinguished three categories of stigmas: (a) tribal identities (e.g., race, sex, religion, or nation); (b) abominations of the body (e.g., physical deformities), and (c) blemishes of individual character (e.g., mental disorders, addictions, unemployment). Tribal identities involve a strong sense of collective identity among members who share the "mark" (e.g., skin color) that distinguishes their group from others, and people outside the group tend to see the group as organized and capable of collective action. Tribal identities thus relate to group-based biases, such as racism or sexism. In contrast, abominations of the body and blemishes of individual character relate to qualities that individuate others – that make a particular person different from others. Thus, these types of stigmatization, such as bias toward people with disabilities (in Goffman's terms, abominations of the body), have a more individually based dynamic (Dovidio, Major, & Crocker, 2000). That is, they elicit immediate and typically strong emotional responses to the person as a "deviant" individual. Stigmas of this type commonly produce negative affective reactions of an "untutored, primitive quality," such as fear or disgust, and immediate behavioral aversion (Jones et al., 1984, p. 226). These processes contribute to the restriction of social and professional opportunities that people with disabilities face (Hunt & Hunt, 2004; O'Hara, 2004) and shape their experience of stigmatization (Lowman, West, & McMahon, 2005).

Responses to people with physical disabilities may have a genetic, evolutionary basis. For example, Neuberg & Cottrell (2008) proposed that physical disability is associated with stigma because, across human evolutionary history, it may have signaled less than optimal genetic fitness, which is the central element guiding human behavior from a sociobiological perspective. Neuberg and Cottrell explained, "Commonalities in stigmatization across cultures and relevant group-living species (e.g., chimpanzees) – for example, of those who violate the norm of reciprocity or who possess cues that heuristically signal contagious disease (e.g., morphological abnormalities; de Wall, 1989; Goodall, 1968) – point to tangible, material benefits of stigmatization for group members" (p. 68). From this perspective, because pathogens are typically microscopic, people have to rely on superficial cues to detect the potential presence of these threats, and physical disability may represent one such cue (Park, Faulkner, & Schaller, 2003).

One of the challenges for evolutionary explanations is to identify psychological mechanisms that translate these hypothesized predispositions into actual behavioral responses. With respect to this issue, Schaller and Duncan (2007) proposed that people develop a "behavioral immune system," a set of psychological processes that facilitate the detection and avoidance of people who might be infected with contagious pathogens. According to Faulkner, Schaller, Park, and Duncan (2004), because of the evolutionary adaptive value of avoiding harmful pathogens and parasites, people develop prejudices against individuals who are perceived, at a heuristic level, to be potential carriers of disease-related threats. Faulkner et al. proposed, "Thus, individuals may be perceptually sensitive to superficial physical features such as lesions, disfigurements, and other morphological abnormalities" (p. 335). Because diseases are associated with diverse morphological and behavioral anomalies, anomalous appearances of a wide range can elicit prejudicial responses – even if these anomalies are not actually symptomatic of disease (Kurzban & Leary, 2001; Schaller & Duncan, 2007). When confronted with cues that may signal exposure to contagious disease, people respond aversively and experience disgust (Curtis, Aunger, & Rabie, 2004). These cognitive and affective responses motivate avoidance (Kurzban & Leary, 2001; Schaller & Duncan, 2007).

Responses to stigmatized individuals may also be the result of existential motives, which relate to a person's existence, meaning, and mortality. Existential threats typically elicit anger directed at the parties perceived as the source of the threat. However, according to Terror Management Theory, human beings are unique in that they not only have the natural and fundamental instinct for self-preservation but also the awareness of the inevitability of their own mortality (Greenberg, Solomon, & Pyszczynski, 1997; Pyszczynski, Greenberg, & Solomon, 1997; Solomon, Greenberg, & Pyszczynski, 1991, 2004). Thus, more indirect threats, such as cues that simply remind people of their vulnerability and mortality, can elicit both avoidance and attempts to reaffirm dominant cultural views and standards. Both of these forces contribute directly to the stigma of others who deviate physically from cultural standards of normality, including people with physical disabilities or other forms of physical impairment (Martens, Greenberg, Schimmel, & Landau, 2004).

In two experiments, Hirschberger, Florian, and Mikulincer (2005, Studies 3 and 4) demonstrated that simple exposure to a person with a physical disability activates death-related cognitions and arouses fear of one's own death among people without disabilities, particularly men. Participants read a vignette describing a typical day of similar-age and same-sex ingroup or outgroup member who was either physical disabled or not. Participants then performed a word-stem completion task that assessed the accessibility of death-related thoughts or the Fear of Personal Death Scale (Florian & Kravetz, 1983). Men expressed a high level of death-related thoughts and a heightened fear of personal death when exposed to a person with a physical disability, whether an ingroup or outgroup member. By contrast, female participants responded predominantly with compassion for an ingroup member with a physical disability (consistent with a nurturant gender role), but they experienced a high level of fear of personal death when exposed to an outgroup target with physical disability.

The research reviewed thus far suggests that people consistently stigmatize persons with disabilities. Other data contradict this conclusion, though. Although many negative stereotypes of people with disabilities persist, expressed attitudes toward people with disabilities have become more positive and inclusive over time (Griffiths & Lunsky, 2000). Across a range of surveys, people exhibit high levels of support for people with disabilities. In one study (Siperstein, Romano, Mohler, & Parker, 2005), for instance, 92% of consumers felt favorable toward companies that hire individuals with disabilities, and 87% reported that they would give preference to doing business with companies that sought to hire people with disabilities. Other research reveals that people generally express a great deal of positivity, sympathy, and empathy toward those with physical disabilities, particularly because such impairments are largely thought to be uncontrollable (Weiner, 1995; Weiner, Magnusson, & Perry, 1988). In their meta-analysis of the literature, Mullen and Dovidio (1992) found that when given comparable information about the performance of people, evaluators rated the achievements of people with disabilities more highly than those without disabilities. Are the theories of stigmatization of people with physical disabilities then wrong?

Summarizing thus far, on the one hand, research from evolutionary and existential perspectives predict and find that non-disabled people tend to react to people with disabilities with negative emotions, such as disgust, fear, and anxiety, and often display avoidant behaviors. On the other hand, several studies and surveys in social psychology reveal that people generally report positive feelings, such as sympathy and compassion, as well as positive attitudes and supportive behaviors on behalf of disabled people. Thus, there appears to be a number of fundamental, and in many ways startling, contradictions among theories of stigmatization, survey results, and experimental evidence. Nevertheless, the different findings can largely be reconciled by understanding the ambivalent, multidimensional nature of prejudice and stigma. In the next section, we describe earlier and more recent research on ambivalent nature of stigma against people with disabilities and corresponding results with respect to racial bias.

Integrative Theoretical Frameworks

One of the most important psychological insights into contemporary forms of prejudice and discrimination involves the recognition of the complexity of affective and cognitive processes involved. Pioneering work by Katz (1981) proposed the existence of ambivalent attitudes, and the consequent complex dynamics, in bias toward both people with disabilities and among Whites toward Blacks. Recent frameworks, representing "dual process models," emphasize the role of explicit and implicit cognition – conscious and unconscious forces – in responses to members of stigmatized groups.

Ambivalent Attitudes

The ambivalence perspective on stigma was stimulated by the recognition that people's responses to stigmatized individuals are not consistently negative. Rather, according to ambivalence-amplification theory by Katz (1981; Katz, Wackenhut, &

Hass, 1986), people associate both positive (e.g., sympathy) and negative (e.g., aversion) elements with a number of traditionally stigmatized groups. For instance, attitudes toward Blacks often involve sympathy and a desire to be fair and egalitarian, as well as negative affective reactions (Dovidio & Gaertner, 2004; Gaertner & Dovidio, 1986; Jones et al., 1984; Katz, 1981). This same pattern is observed with physically disabled individuals. As Livneh (1988) stated, "people with disabilities are construed as objects of ambivalence, triggering momentary, fluctuating favorable and unfavorable feelings of compassion and sympathy but also of aversion and distaste" (p. 37).

Specifically, Katz proposed that these conflicted attitudes create psychological tension that amplifies responses to members of these groups as the energy drawn from one impulse is be added to the other. As a consequence, people are more likely to respond either more positively or more negatively toward a member of a stigmatized group than of a nonstigmatized group, depending upon whether the behavior exhibited by other person is construed as favorable or unfavorable.

Two studies nicely illustrate support for Katz's position, demonstrating the generalizability of these effects in responses to people with physical disabilities and Blacks. Katz, Glass, Lucido, and Farber (1979) examined in separate studies of their report how participants responded to unintentionally harming a disabled person (in a wheelchair) versus a nondisabled person (Experiment 2) or a Black person versus a White person (Experiment 1). In the experiment investigating responses related to disabilities, participants were required to administer highly noxious noise or mild noise every time the confederate, who was in a wheelchair or not confined to the wheelchair, made an error on a task. Ostensibly at the end of the study, to assess how people responded to a request for assistance, participants received a note from the confederate asking for help (in the form of writing sample sentences) in a handwriting study she was conducting. Participants who caused unintentional harm by administering noxious noise to the confederate in the wheelchair were willing to write twice as many sentences than in any other condition. Furthermore, they wrote about three times as many sentences when they administered noxious sounds to the disabled than the nondisabled confederate. In a conceptual replication in which participants were told to give harsh or weak criticism to Black or White confederates who made errors on the task, Katz et al. (1979, Experiment 1) similarly found that the most assistance was given in the Black confederate/harsh criticism condition. Paralleling the results of the other study, after giving overly harsh criticism, participants were again willing to write three times as many sentences for the Black than for the White confederate. These findings thus demonstrate the amplified positive response to members of stigmatized group when they have been unintentionally harmed.

Katz's ambivalence-amplification hypothesis, however, predicts that people will, under some conditions, also respond more negatively to members of stigmatized groups than to members of nonstigmatized groups. Building on research that revealed that when people harm somebody but are unable to compensate with help (Lerner & Simmons, 1966), they will often denigrate the victim as a way of justifying their action and affirming a "just world." The design of a study by Katz, Glass, Lucido, and Farber (1977) was almost identical to that of Katz et al. (1979, Experiment 2), in which participants administered noxious or mild noise to a confederate in a wheelchair or not in a wheelchair. The only difference was that they did not have an opportunity to subsequently help the confederate, but instead were given the opportunity to denigrate the confederate on a questionnaire. As predicted by Katz et al., the response to the confederate with the disability in the noxious noise condition was distinctly different from the other conditions. In this case, though, the response was distinctly negative: denigration was most severe in this condition. Moreover, Katz, Glass, and Cohen (1973) demonstrated a comparable pattern of denigration when the race of the confederate, not the disability, was manipulated. Denigration was most severe in noxious noise/Black confederate condition. These and other findings by Katz and his colleagues (see Katz et al., 1986) seemed to provide persuasive support for the ambivalence amplification conceptualization.

Gaertner and Dovidio (1986) incorporated key elements of Katz's (1981) framework into their work on aversive racism. Whereas traditional racism is blatant and direct, aversive racism represents a contemporary form of racism that operates, often unconsciously, in subtle and indirect ways. In particular, Gaertner and Dovidio (1986) wrote, "In our view, aversive racism represents a particular type of ambivalence in which the conflict is between feelings and beliefs associated with a sincerely egalitarian value system and unacknowledged negative feelings and beliefs about Blacks . . . . Aversive racists' inability to acknowledge their negative feelings . . . together with their sympathetic feelings toward victims of injustice convince them that their racial attitudes are largely positive" (p. 62). As a consequence, Whites will generally appear nonprejudiced in their overt expressions, but, because of their unacknowledged negative feelings, will discriminate against Blacks in subtle ways.

The basic prediction derived from the aversive racism framework is that aversive racist will behave openly in positive ways toward Blacks, because of their conscious egalitarian beliefs, but they will discriminate against Blacks when their behavior can be justified on the basis of some factor other than race (e.g., questionable qualifications for a position). Thus, aversive racists may regularly engage in discrimination while still maintaining a nonprejudiced self-image. In general, there is considerable support for the basic proposition of the aversive racism framework that contemporary biases are expressed in subtle rather than in blatant ways across a broad range of situations (Dovidio & Gaertner, 2004; Gaertner & Dovidio, 1986). For example, Whites do not show bias in their evaluation of Black relative to White job candidates when they are objectively well qualified for the position, but when the qualifications are less clear and a negative decision can be justified on an apparently non-racial basis (deficiency in a valued credential), they discriminate against Black applicants (Dovidio & Gaertner, 2000; Hodson, Dovidio, & Gaertner, 2002).

The processes hypothesized by the aversive racism framework also apply to more spontaneous prosocial orientations. A meta-analysis by Saucier, Miller, and Doucet (2005) of 31 studies examining Whites' helping behavior over the past 40 years found that, consistent with the aversive racism framework, "less help was offered to Blacks relative to Whites when helpers had more attributional cues available for rationalizing the failure to help with reasons having nothing to do with race" (p. 10). For example, discrimination against Blacks by Whites was more pronounced in helping situations involving more difficult and risky helping activities or requiring more time, effort, and investment. In such cases, the potential Whites could attribute their decisions not to help to the characteristics of the situation. Thus, they could readily withhold help with non-racist justifications.

Although the aversive racism framework has formally focused on the domain of race relations, the basic principles also apply to the stigma of physical disability. Studies of employment decisions demonstrate patterns of subtle, rather than overt, discrimination against people with physical disabilities. These biases occur mainly on indirect measures or when differential treatment can be justified on the basis of job-related demands (see also Colella, De Nisi, & Varma, 1998; Stone & Colella, 1996). For example, in one study (Colella & Varma, 1999), participants did not directly discriminate against people with disabilities in their immediate evaluations of candidates when objective measures of job performance were available (and bias would be obvious). Participants did, however, discriminate indirectly, in terms of their expectations of future performance and their training recommendations. In another experiment (Louvet, 2007, Study 1), management students evaluated job applicants who were disabled (in a wheelchair) or not. The position applicants sought required substantial public contact (sales) or minimal public contact (accounting). Participants demonstrated bias against disabled job applicants only when the job involved public contact. Moreover, the devaluation of disabled applicants emerged for traits reflecting competence, not for those related to agreeableness and personal qualities. Although a range of potential justifications can be involved (e.g., anticipated embarrassment of people with disabilities interacting with the public, a lack of perceived "fit" for the position, or other people's – the public's – presumed biases), the overall pattern of findings is consistent with the aversive racism framework: Participants discriminated against people with disabilities only when it could be justified on the basis of something other than their personal bias.

Subtle bias against people with physical disabilities also occurs in more informal, social situations. Snyder, Kleck, Strenta, and Mentzer (1979) found that participants avoided a confederate with a physical disability, compared to one without a disability, when they could justify their action on some other basis (preference for viewing a different movie) but not when there was no other readily available justification (when the movies were the same for the confederates with or without a disability). Moreover, people without disabilities show greater bias, in the form of anxiety, hostility, and avoidance, toward people with physical disabilities in more intimate interpersonal situations (Berry & Meyer, 1995). Thus, contemporary bias against people with physical disabilities appears to reflect "aversive disablism" (Deal, 2007), which is often unintentional, unrecognized, and personally denied.

Taken together, the work of Katz and his colleagues (see Katz, 1981; Katz et al., 1986) and the research of Gaertner and Dovidio (Dovidio & Gaertner, 2004; Gaertner & Dovidio, 1986) reveal the broad explanatory power of ambivalent attitudes for understanding a wide range of stigma. However, much of this work supported the role of ambivalence indirectly, for example by demonstrating subtle and indirect rather than blatant and direct expressions of bias. Moreover, because of heightened awareness and greater social sensitivity, it has become increasingly difficult to assess the hypothesized negative component of ambivalent attitudes though self-reports (Fazio, Jackson, Dunton, & Williams, 1995). However, developments in the study of implicit cognition, which often involve unconscious attitudes, offered new insights into ambivalence and stigma. This approach was largely stimulated by interest in racial attitudes, but it has also been applied to responses to people with disabilities.

Dual Processes

Attitudes do not have to be consciously accessible to produce evaluative reactions. The mere presence of the attitude object is often sufficient to activate the associated attitude automatically (Chen & Bargh, 1997). In contrast to explicit processes, which are conscious, deliberative, and controllable, these types of implicit processes involve a lack of awareness and are unintentionally activated (Greenwald & Banaji, 1995). Whereas explicit measures of prejudice typically utilize direct self-reports of attitudes, implicit measures involve a variety of techniques, including indirect self-report responses, such as word fragment completions, linguistic cues, attributions, and explanations (for a review, see Fazio & Olson, 2003). Implicit assessments also include measures of brain activity, as indicated by functional magnetic resonance imaging (fMRI) and psychophysiological indices of autonomic arousal or threat (Blascovich, Mendes, Hunter, Lickel, & Kowai-Bell, 2001). For instance, Harris and Fiske (2007) found that people exhibit different types of neural activation (in the medial pre-frontal cortex) when making decisions about disabled or elderly people than about homeless people or drug addicts who are seen as responsible for their condition. Whereas homeless people and drug addicts appear to be dehumanized, disabled and elderly people are not.

Measures involving response latencies, however, represent the most widely used techniques to assess implicit prejudice. One type of response latency measure involves priming people, subliminally (Dovidio, Kawakami, Johnson, Johnson, & Howard, 1997; Wittenbrink, Judd, & Park, 1997) or supraliminally (Fazio et al., 1995), with a word, symbol, or photograph representing a social category (e.g., Blacks or Whites) and asking respondent to make a decision about a positively- or negatively-valenced word. The basic assumption is that shorter latencies reflect greater association between the social category and the positive or negative evaluation in memory. Another popular implicit measurement technique utilizing response latencies is the Implicit Association Test (IAT; Greenwald, McGhee, & Schwartz, 1998; Greenwald, Poehlman, Uhlmann, & Banaji, 2009) and the Go/No-Go Association Task (GNAT; Nosek & Banaji, 2001). The general assumption underlying these tests is that people respond more quickly to stimuli with compatible than incompatible evaluations (e.g., negative category and negative words vs. negative category and positive words).

The early work on implicit cognition, attitudes, and prejudice was devoted to establishing the existence of social processes that occur outside of awareness (Bargh & Pietromonaco, 1982), demonstrating their robustness (Bargh, 1999), and illustrating their operation in the area of prejudice (Dovidio, Evans, & Tyler, 1986; Gaertner & McLaughlin, 1983). The value of examining implicit measures of attitudes (and stereotypes) is now widely acknowledged (Blair, 2001; Fazio & Olson, 2003). Convergent evidence has been obtained with a variety of different priming procedures (see Blair, 2001; Dovidio, Kawakami, & Beach, 2001), as well as with other response latency techniques such as the Implicit Association Test (Greenwald et al., 1998).

Conceptually, implicit and explicit (i.e., self-report) attitudes have been considered as reflecting "dual attitudes" (Wilson, Lindsey, & Schooler, 2000), which may arise developmentally. With experience or socialization, people change their attitudes but the original attitude is not replaced; rather, it is stored in memory and becomes implicit, whereas the newer attitude is conscious and explicit. In general, explicit attitudes can change and evolve relatively easily, but implicit attitudes are rooted in overlearning and habitual reactions and thus, persist and are much more difficult to alter (see Wilson et al., 2000).

Because explicit attitudes may be a product of similar experience and learning history and may, in fact, form the basis for the development of implicit attitudes through repeated exposure or application, explicit and implicit attitudes may correspond with each other. Other times, they might not. One factor that may determine the correspondence of the implicit and explicit evaluations involved in dual attitudes is the normative context for the attitude object. For instance, people may initially acquire negative attitudes toward groups through socialization within a particular cultural or historical context. Later, when norms change or the person is exposed to new normative proscriptions that dictate that people should *not* have these negative feelings toward these groups, people adopt explicit unbiased or positive attitudes. Nevertheless, negative implicit attitudes linger. This distinction between implicit and explicit racial attitudes and their potentially different influences is consistent with a number of models of cognitive systems (e.g, rapid, associative vs. slower but more flexible rule-based reasoning; Sloman, 1996; Smith, 1984) and recent findings in neuroscience (cortical versus limbic system activation; see Quadflieg, Mason, & Macrae, 2010).

This reasoning suggests that there may be greater correspondence between implicit and explicit attitudes for issues that are not socially sensitive than for those that are socially sensitive or are associated with norms that are inconsistent with historical norms or traditional socialization. In line with this notion, Fazio, Williams, and Sanbonmatsu (1990) found that correlation between explicit and implicit attitudes for objects that did not involve socially sensitive issues (e.g., snakes, dentists) was high ($r = 0.63$), whereas the correlation for objects associated with socially sensitive issues (e.g., pornography, Blacks) was weak and, in fact, negative ($r = -0.11$). With respect to racial attitudes, three different meta-analytic reviews showed only a modest relationship (rs ranging from 0.12 to 0.24) between explicit and implicit measures of prejudice (Dovidio et al., 2001; Greenwald et al., 2009; Hofmann, Gawronski, Gschwendner, Le, & Schmitt, 2005). Moreover, consistent with dual process models (such as aversive racism theory), implicit attitudes are consistently more negative than are explicit attitudes, not only toward Blacks but also toward other stigmatized groups, such as elderly persons (Nosek, Banaji, & Greenwald, 2002).

Research is increasingly documenting implicit biases toward people with physical disabilities. In a review of the literature, Guglielmi (1999) reported evidence of psychophysiological reactivity, in terms of electrodermal activity, heart rate, and facial EMG activity, indicating substantial discomfort in the presence of disabled individuals (see also Antonak & Livneh, 2000). Direct assessments of implicit and explicit attitudes toward people with physical disabilities reveal results similar to those for race: Implicit attitudes show significant bias against people with disabilities while explicit attitudes yield little evidence of prejudice; also, implicit and explicit attitudes are only weakly related (Pruett & Chan, 2006; Rojahn, Komelasky, & Man, 2008). These biases occur even among professionals who work directly with people with disabilities (Benham, 1988; Brodwin & Orange, 2002; Reeve, 2000; Robey, Beckley, & Kirschner, 2006).

Beyond the typical evaluative bias, reflecting the stronger association of people with than without physical disabilities with more negative concepts, physical disability is implicitly associated with some unique qualities. Robey et al. (2006) further found that participants implicitly associated disability with child-like characteristics, reflecting infantilizing attitudes – even though participants showed little evidence of this bias on explicit measures. In addition, in line with their disease-avoidance hypothesis, Park and colleagues (2003) found a significant implicit association between disability and disease, which was even stronger when a contextual cue about contagion was introduced.

The distinction between implicit and explicit attitudes is important because implicit and explicit attitudes can influence behavior in different ways and under different conditions (Dovidio, Fazio, & Tanur, 1992; Fazio, 1990; Wilson et al., 2000). Wilson et al. (2000), for example, propose that "when dual attitudes exist, the implicit attitude is activated automatically, whereas the explicit one requires more capacity and motivation to retrieve from memory" (p. 104). Accordingly, the relative influence of explicit and implicit attitudes depends upon the type of response that is made. Explicit attitudes shape deliberative, well-considered responses in which the costs and benefits of various courses of action are weighed. Implicit attitudes influence "uncontrollable responses (e.g., some nonverbal behaviors) or responses that people do not view as an expression of their attitude and thus do not attempt to control" (p. 104). Thus, Wilson et al.'s position also indicates that implicit measures of prejudice will better predict spontaneous behavior, whereas explicit measures will better predict deliberative, controllable responses.

The evidence in the area of racial prejudice, in particular, and social attitudes, in general, is largely consistent with this proposition. For instance, Fazio et al. (1995) showed that direct ratings related to the legitimacy of the Rodney King verdict and the illegitimacy of the anger of the Black community were correlated mainly with explicit measures of prejudice such as self-reported attitudes and not with implicit measures of prejudice such as response latencies. However, the implicit measure of prejudice correlated more highly than the explicit measure with the *relative* responsibility ascribed to Blacks and Whites for the tension and violence that ensued after the verdict as well as perceptions of participant's friendliness by a Black interviewer. These latter behaviors related to the implicit measure of prejudice because they were presumably more subtle and indirect manifestations of racial bias. Dovidio et al. (1997, Study 2) similarly found that whereas an explicit measure of prejudice predicted deliberative expressions of bias such as the perceived guilt of a Black defendant in a jury decision-making task, an implicit measure of prejudice primarily predicted less deliberative expressions of bias such as completions of letter sequences with more negative words under time pressure.

Dovidio et al. (1997, Study 3) pursued this line of research by examining the predictive validity of explicit and implicit measures of prejudice on overt evaluations of a Black partner and on more spontaneous, less controllable, nonverbal behavior such as eye contact and blinking. Although nonverbal behavior can be controlled to some extent, nonverbal signals are frequently emitted without awareness or intention (DePaulo & Friedman, 1998). As Fazio et al. (1995) proposed, "Nonverbal behavior, in particular, may be subject to 'leakage' of negativity that a person is experiencing, despite the individual's effort to behave in a non-prejudiced manner" (p. 1026). Whereas higher levels of visual contact (i.e., time spent looking at another person) reflect greater attraction, intimacy, and respect, higher rates of blinking reflect more negative arousal and tension. As hypothesized, although the explicit measure of prejudice predicted less favorable evaluations of a Black relative to a White interviewer by White participants, implicit prejudice did not predict these evaluations. In contrast, although the implicit measure of racial prejudice predicted higher rates of blinking and less visual contact with the Black relative to the White interviewer, the explicit measure of prejudice predicted neither of these behaviors. Subsequent work provides further evidence that implicit measures of prejudice predict a range of nonverbal behaviors in Whites' interactions with Blacks better than do explicit measures (McConnell & Leibold, 2001).

Son Hing and colleagues (2008) investigated another form of racial bias, discrimination against Asian job applicants in Canada, using a paradigm borrowed from research on aversive racism on candidate qualifications and selection decisions (Dovidio & Gaertner, 2000). Paralleling the findings of subtle bias against Blacks in the USA, these researchers found that when assessing candidates with more moderate qualifications, evaluators recommended White candidates more strongly for the position than Asian candidates with identical credentials. However, when evaluating candidates with exceptionally strong qualifications, no such selection bias emerged. Moreover, Son Hing et al. found that implicit bias against Asians (as measured by an IAT), but not explicit prejudice, predicted weaker support for hiring Asian candidates who had moderate qualifications. However, when the Asian candidate had distinctively strong qualifications (and a failure to hire the applicant could not be justified on the basis of factors other than race) neither implicit nor explicit prejudice predicted the hiring decision, which generally supported the hiring of the Asian applicant.

These effects, which support the dual attitudes perspective, generalize to forms of stigma other than racial stigma. For instance, implicit anti-fat prejudice, but not explicit anti-fat attitude, predicts how far people sit from an overweight woman

(Bessenoff & Sherman, 2000). Pryor, Reeder, Yeadon, and Hesson-McInnis (2004, Study 1) have extended the dual-process approach to people's reactions to persons with HIV/AIDS. They found that participants initially showed "reflexive" and spontaneous, avoidance of a person who contracted HIV/AIDS through a blood transfusion; however, later they adjusted their behavior and responded in a less biased way, more in line with their motivation to control prejudice against people with AIDS.

Together these results suggest that implicit rather than explicit measures of prejudice are generally better predictors of subtle nonverbal manifestations of bias and discrimination that can be attributed to factors other than the person's group membership toward a range of stigmatized groups. Beyond the personal impact of subtle expressions of bias on individual targets, these processes have important implications for the law and legal processes. To the extent that current anti-discrimination laws in the USA require clear evidence that protected group membership is *the* determining factor (not some other factor) and discrimination is intentional, the effects of implicit bias may be relatively immune to prosecution. The discrimination associated with implicit bias tends to be conveyed subtly (e.g., nonverbally), can be readily justified on the basis of some factor other than group membership (e.g., by emphasizing weaker aspects of one's qualifications), and often occurs without conscious intention or even personal awareness of bias. Thus, discrimination may occur largely unrecognized, and as a consequence largely unaddressed, personally and legally, over time.

Stigma, Disability, and Interactions: Re-examining the Literature

Understanding the distinction between implicit and explicit attitudes and their correlates can help integrate diverse, and seemingly contradictory, findings both across different studies and across different measures within studies. In this section, we review evidence of nonverbal responses, which are presumed to reflect implicit negative attitudes, and verbal responses, which are hypothesized to be linked to explicit, more positive attitudes, across a range of stigmatized groups, including studies that involve interactions with people with physical disabilities (see Hebl & Dovidio, 2005).

Nonverbal Behaviors

Most interactive research has focused on stigmatizers' nonverbal reactions to targets. This research reveals negative behavioral biases against targets. Table 9.1 depicts the interactive studies that have shown such findings. These results emerge across a range of stigmas – whether it involves wearing an eyepatch; having a birthmark; or being Black, obese, or pregnant. In the case of reactions toward

Table 9.1 Examples of past interactive studies demonstrating negativity and avoidance in nonverbal behaviors (adapted from Hebl & Dovidio, 2005)

Study	Type of stigma	Result
Blascovich et al. (2001)	Facial birthmark	Those interacting with stigmatized (versus nonstigmatized) partners performed more poorly and showed greater cardiovascular reactivity consistent with threat
Doob and Ecker (1979)	Eyepatch	Housewives helped those wearing an eyepatch more, but only if it did not involve further face-to-face interaction
Edelmann, Evans, Pegg, and Tremain (1983)	Red birthmark	Woman with/without birthmark asked stranger for directions. Birthmark elicited less eye contact and shortened interactions
Harris, Milich, Corbitt, Hoover, and Brady (1992)	ADHD	Interactants were less friendly and talked less with children labeled as ADHD than these same children without such labels
Hastorf et al. (1979)	Physical disability	When a performer was thought to be physically disabled, he received less accurate feedback than when he was presented as an able-bodied individual
Ickes (1984)	Race = Black	Black and white interactants sometimes experienced increased anxiety and concern about mixed interactions
King, Shapiro, Hebl, Singletary, and Turner (2006)	Obese	Store personnel assisted obese customers in shortened, more negative interactions than average weight customers
Kite and Deaux (1986)	Homosexuality	Stigmatizers liked ‘gay’ interactants less, recalled less about these partners, and remembered more stereotypical information, particularly those who were intolerant
Kleck (1968)	Physical disability	People sat farther from disabled than nondisabled persons
Klink and Wagner (1999)	Outgroup foreigner	Nine out of 14 field experiments revealed that foreigners received worse behavioral treatment than did citizens
Langer, Fiske, Taylor, and Chanowitz (1976)	Physical disability; pregnancy	Participants sat farther away from disabled and from pregnant individuals than a nonstigmatized individual
Marinelli (1974)	Physical disability	Participants interacting with a facially disfigured person (versus non disfigured) showed a tendency of higher heart rate
Perlman and Routh (1980)	Physical disability	Participants looked at and talked less to, and made fewer movements toward, disabled than nondisabled child
Sigelman, Adams, Meek, and Purcell (1986)	Physical disability	Children interviewed by a disabled person stood closer to him and stared at the body (curiosity), while parents stood closer to their children (protective gesture)
Word, Zanna, and Cooper (1974)	Race = Black	Interviewers made more speech errors and spent shorter amounts of time with Black than White applicants

physically disabled targets, in particular, nondisabled participants interacting with disabled rather than nondisabled individuals display reduced gesturing (Kleck, 1968), stand farther away (Kleck, 1969), offer more exaggerated and inaccurate feedback (Gouvier, Coon, Todd, & Fuller, 1994; Hastorf, Northcraft, & Picciotto, 1979), and attempt to avoid interactions altogether (Comer & Piliavin, 1972).

Verbal and Nonverbal Mismatches

Perhaps because of the different affective and cognitive processes involved, past stigma research has also consistently shown that nonverbal displays toward people with physical disabilities and other types of stigma often are at odds with their verbal behaviors. People often report feeling positively toward targets, but their nonverbal and paraverbal behaviors often indicate more negative reactions (see Table 9.2). For example, in a classic study by Kleck, Ono, and Hastorf (1966), participants who interviewed a physically disabled (versus a nondisabled) applicant were more physiologically aroused during the interaction, took a longer time deciding what questions to ask, terminated the interview sooner, and showed more behavioral inhibition. At the same time, however, participants were more likely to distort their own personal opinions in a direction consistent with those thought to be held by disabled applicants than the nondisabled applicants, so that they could ostensibly appear kind. Consistent with this, nondisabled participants were more likely to report enhanced positive impressions of physically disabled individuals, but simultaneously maintained greater interaction distance with them than with nondisabled interactants and showed signs of anxiety (Kleck, 1969).

A plausible reason for these verbal and nonverbal mismatches is that nondisabled people when interacting with people with disabilities may focus the majority of their attention on managing their verbal behaviors, which may be easier to monitor and control than nonverbal behaviors (DePaulo & Friedman, 1998). Moreover, to the extent that monitoring and controlling verbal responses involve high cognitive demand, these activities may actually facilitate the expression of more spontaneous responses (Gilbert & Hixon, 1991). As a consequence, people may be less adept at managing affect-driven behaviors that occur in interactions spontaneously and without time for deliberation. For instance, nondisabled people may try to appear sympathetic and supportive of people with disabilities, but they may show signs of anxiety (e.g., averted gaze, closed posture, greater interpersonal distance) that reflect their implicit attitudes without personal awareness of what they are communicating nonverbally (Kawakami, Phills, Steele, & Dovidio, 2007) Thus, favorable verbal behaviors, which are controllable, reflect nondisabled people's conscious effort to conform to the social norm of being kind to physically disabled individuals; nonverbal behaviors, which are less easily controlled, may represent a more automatic and implicit "negative affective disposition toward physically disabled individuals" (Hebl & Kleck, 2000, p. 423).

Nonverbal expression, in turn, can play a powerful role is shaping the nature and outcomes of interactions between nondisabled people and people with disabilities.

Table 9.2 Examples of past studies showing a mismatch between verbal and nonverbal behaviors (adapted from Hebl & Dovidio, 2005)

Study	Type of stigma	Result
Cuenot and Fugita (1982)	Homosexuality	Participants showed no difference in eye contact; spoke faster to the gay versus nongay targets; and did not alter publicly expressed attitudes about homosexuality, but espoused more conservative sexual behavior attitudes
Doob and Ecker (1979)	Eyepatch	Housewives indicated a willingness to help those wearing an eyepatch more than those not wearing a patch, but only if it did not involve further face-to-face interaction
Dovidio, Kawakami, and Gaertner (2002)	Race = Black	White stigmatizers focused on positive verbal behaviors they expressed whereas black targets focused on stigmatizers' less positive nonverbals to judge responses
Frable, Blackstone, and Scherbaum (1990)	Race = Black; homosexuality; acne; obesity	"Normal" participants behaviorally compensated (talked, smiled, and encouraged) deviants but simultaneously reported liking them less
Gargiulo and Yonker (1983)	Physical disability	Comparing teachers with different levels of experience, no group differences emerged for self-reported stress, but significantly higher heart rate for those less experienced
Gouvier et al. (1994)	Physical disability	Although approached similarly, individuals with a disability were addressed differently (e.g., shorter interactions, simpler language, than those without disabilities)
Hebl, Foster, Mannix, and Dovidio (2002)	Homosexuality	Employers did not formally discriminate (e.g., hiring) against gay (versus heterosexual) applicants but less covert, more nonverbal-based measures did reveal discrimination
Heineman, Pellander, Vogelbusch, and Wojtek (1981)	Physical disability; homosexuality	More positive trait ratings and self-rated emotions for disabled individuals than homosexual and nonstigmatized individuals, but higher skin conductance response and higher interpersonal distance
Ickes (1984)	Race = Black	White participants displayed more interactional involvement than did black partners but also reported more stress and discomfort
Katz, Farber, Glass, Lucido, and Emswiller (1978)	Physical disability	If disabled individuals displayed inappropriate social behavior, subjects express more negativity after, but not during, the interaction
Kleck et al. (1966)	Physical disability	Participants terminated the interaction sooner and exhibited reduced motoric behaviors, but distorted opinions more in line with disabled than nondisabled interactants
Shelton (2003)	Black	Whites trying not to be prejudiced felt more anxiety and enjoyed interactions less, but were liked more by blacks
Tagalakis, Amsel, and Fichten (1988)	Physical disability	More positive evaluations for disabled than nondisabled on 8 of 10 measures, but hiring preference against disabled

People tend to respond reciprocally to others' nonverbal behavior (Tiedens & Fragale, 2003), and thus cues of anxiety may contribute to a generally tense interactional climate. Moreover, because many of the nonverbal behaviors associated with feelings of anxiety, such as averted gaze and closed posture, are also associated with dislike, members of stigmatized groups who have experiences with or expectancies of social rejection may perceive expressions of anxiety by nondisabled people as indications of dislike and rejection. As a result, individuals with disabilities may tend to respond with confirming nonverbal reactions (Comer & Piliavin, 1972), which support original negative expectations, further increase anxiety and exacerbate tensions (Hebl & Kleck, 2000), and create a self-fulfilling prophecy.

Implications and Conclusions

The psychological evidence demonstrates that stigma toward people with physical disabilities reflects ambivalent orientations. On the one hand, people have apparent sympathy toward people with disabilities and express support for them in overt ways. Surveys show that people feel positively toward companies that employ people with disabilities and, when given the opportunity, people personally recommend hiring candidates with disabilities who are clearly qualified for a position. On the other hand, people often spontaneously exhibit negative emotional reactions to people with disabilities, discriminate against them in subtle ways, avoid interactions with them, and manifest their anxiety in interactions with people with disabilities that they can not avoid. Drawing on the broader literature on stigma, social psychological theory, particularly recent empirical and conceptual developments relating to dual-attitude processes, helps to explain these divergent responses to people with physical disabilities.

This perspective also offers insights into the dynamics of social exchanges and the impressions and responses of people with disabilities in these situations. Interactions involving people with disabilities are characterized by mixed messages, "awkward moments," and anxiety (Hebl & Kleck, 2000). From the perspective of people with disabilities, these mixed messages can create suspicions of others' true feelings and intentions. As a consequence, these interactions substantially tax cognitive resources (Salvatore & Shelton, 2007). Mixed messages also contribute to mistrust (Dovidio, Gaertner, Kawakami, & Hodson, 2002), which in turn can lead to increased vigilance and sensitivity to negative cues by people with physical disabilities, as it does for members of other stigmatized groups (Vorauer, 2006). Thus, disabled individuals may "show a tendency to perceive even neutral behaviors displayed by nondisabled individuals as discriminatory actions against their stigmatized status" (Hebl & Kleck, 2000, p. 424).

Because nonverbal cues of anxiety are similar to those reflecting negative attitudes, the anxiety aroused by awkward moments in exchanges between members of stigmatized and nonstigmatized groups is often misinterpreted as aversion or negativity (Pearson et al., 2008). Thus, high levels of anxiety, which are characteristic of these interactions, can lead to disengagement from contact and the avoidance of future contact (Plant & Devine, 2003; Shelton & Richeson, 2006). These processes, which have been demonstrated with others forms of sigma, have not yet been fully explored in the context of people with physical disabilities.

Future research also needs to consider the distinctive aspects of the stigma of people with physical disabilities, beyond those processes that it has in common with other types of stigma. In this chapter, we focused only physical disability; we did not include other forms of impairment, such as psychological impairment, in our review or analysis. Physical and mental disabilities, for example, elicit different emotional reactions. While physical disability (as well as some forms of mental impairment, such as mental retardation) generate some feelings of sympathy (Katz, 1981) and pity (Cuddy et al., 2007), they can simultaneously elicit anxiety and disgust. By contrast, in part because they are associated with perceptions of unpredictability and danger, many forms of mental illness, such as schizophrenia and depression, also arouse a substantial fear (Angermeyer & Matschinger, 2004; Corrigan et al., 2005).

Responses to people with physical disabilities may also differ in specifiable ways from reactions to members of other types of stigmatized groups. Compared to "tribal stigmas," for instance, exposure to a person with physical disabilities is more likely to activate associations with disease (Park et al., 2003) or with child-like characteristics (Robey et al., 2006). These associations are likely to not only limit contact with people with disabilities, but also shape interactions when they do occur. Because of child-like associations (e.g., weak and dependent), both at the explicit level (Fichten & Amsel, 1986) and at the implicit level (Robey et al., 2006), nondisabled people may behave in patronizing ways toward people with physical disabilities. Also, when they offer assistance, it is more likely to promote dependency than to empower people with disabilities, which can also generate resentment among people with disabilities (Nadler, 2002).

Moreover, within the domain of stigma of physical disabilities, there are likely differentiated responses to different types of disabilities. Physical disabilities vary substantially in terms of visibility, controllability of the disability, and mobility-impairment (Hebl & Kleck, 2000). These differences affect both disabled individuals' experiences and challenges and the affective, attitudinal, and behavioral responses of nondisabled people. For instance, individuals with less visible stigmas (e.g., epilepsy, wearing a colostomy bag) tend to have higher self-esteem and face less problematic interactions than those with more evident stigmas (e.g., birthmark, facial disfiguration) (Crocker & Major, 1994; Jones et al., 1984; Kleck, 1968).

The heterogeneity of physical disability also has important policy implications. Prerequisite conditions for collective action by members of stigmatized groups to occur are, first, a strong sense of a shared social identity and, second, recognition of collective mistreatment (Wright & Lubensky, 2009). These conditions are less likely to occur for groups in which stigmatization takes different forms for different group members, the members vary widely in the nature of their experience of stigmatization, and in which people identify more strongly with subgroups (such as with others who are hearing or sight impaired) than with the larger group as a whole (people with physical disabilities).

Nevertheless, policies can focus on interventions that emphasize individual experiences and interactions. One such intervention is intergroup contact. Intergroup contact under certain conditions, involving cooperation, personal exchanges, equal status, and cooperation, represents one of psychology's most effective strategies for reducing bias and improving intergroup relations (Allport, 1954; Williams, 1947; see also Dovidio, Gaertner, & Kawakami, 2003; Pettigrew, 1998). Although much of this work has focused on contact between members of different racial and ethnic groups (Pettigrew & Tropp, 2006), this technique has been effective for improving attitudes toward people with physical disabilities (Amsel & Fichten, 1988; Krahe & Altwasser, 2006; Maras & Brown, 1996, 2000; Mpofu, 2003) as well as those with mental illness (Kolodziej & Johnson, 1996). Intergroup contact reduces bias by decreasing anxiety, providing opportunities to disconfirm stereotypes, and changing expectations for interactions in the future (Plant, 2004).

At a larger scale, policies might be directed at addressing the general perspective with which people see those with physical disabilities, rather than trying to undermine particular stereotypic beliefs that may vary substantially across different types of disabilities. Consistent with this view, recent initiatives have attempted to shift the focus of objects of change from people with disabilities to those without disabilities. In particular, policy and public education efforts encourage people to abandon a *medical model* that views people with disabilities as individuals who need to be helped and rehabilitated and pressures them to appear "normal." In its place, these initiatives advocate a *social model* that recognizes the role of society in constructing disability as a problem and excluding people with disabilities (Jaeger & Bowman, 2005; Kahn, 1984; Swain, French, & Cameron, 2003). Thus, social policies might be directed at creating a more accessible and integrated society, not only in terms of environment and services (e.g., accommodations, access to buildings), but also in terms of a "more realistic and less paternalistic" representation of people with disabilities (e.g., in the media) and increased possibility of autonomy for people with disabilities (e.g., though education, employment).

Encouraging nondisabled people to recognize their role in perpetuating the stigma of disability and the often unconscious processes that contribute to it can lead not only to more equitable social policies and action but also to changes in personal behavior that can ameliorate even subtle manifestations of bias. Awareness of subtle bias can allow people to exert more conscious control, limiting subtle expressions of bias. When people are aware of their unfairly biased implicit emotional and cognitive reactions (e.g., irrational concerns about disease; Park et al., 2003) to others, they may be more motivated to prevent these reactions from influencing their behavior. One consequence of this awareness is that people may be less likely to avoid interactions with people with disabilities. More contact and more intimate contact, in turn, can undermine negative stereotypes, alleviate anxiety and other negative emotional reactions, and create positive personal experiences that have the potential, over time, and experience, to affect implicit attitudes. This change in representations of people with disabilities has the potential to translate, although probably gradually and possibly across generations, into different and more uniformly positive implicit associations with and attitudes toward people with disabilities.

In conclusion, research on prejudice and stigma reveals the complexity of orientations toward people with physical disabilities. Attitudes are ambivalent and conflicted, and people may be unaware of the existence or source of their negativity. Even though people may consciously be sympathetic and supportive, much of people's responses toward people with disabilities is motivated spontaneously by negative emotional reactions and guided by implicit stereotypes and associations. Even the anticipation of interactions with people with disabilities may arouse feelings of anxiety and discomfort, and even when not consciously acknowledged these feelings might motivate nondisabled people to avoid these interactions – particularly when such avoidance can be rationalized, for example, by competing demands. Thus, discrimination is typically subtle rather than blatant, and it often takes the form of avoidance, physically or psychologically (e.g., producing the "invisibility" of people with disabilities). In addition, when they do occur, interactions between people with disabilities and those who are not disabled frequently involve mixed messages, anxiety, and awkwardness, which often lead to miscommunication and mistrust. These types of exchanges are demanding cognitively, emotionally, and socially for both interactants.

Nevertheless, bias against people with disabilities is not inevitable. Individually, recognition of the unconscious stereotypes and spontaneous negative reactions that violate one's personal standards can motivate people to consciously regulate their behavior in ways that can control and ultimately inhibit implicit bias (Monteith, Arthur, & Flynn, 2010). Interpersonally, intergroup contact reduces anxiety and disconfirms negative sterotypes. And socially, reframing the "problem" of people with disabilities from their deviance to the biases of nondisabled people promises to change the ways people think about, feel about, and act toward people with disabilities in way of mutual benefit to society.

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Chapter 10
Cross-Cultural Perspectives on Stigma

Cynthia Willis Esqueda

> *He (Sitting Bull) heard a voice from above, so he looked there, he said: 'These have no ears,' he said, and he looked beneath the sun; like so many grasshoppers, with heads down they came; that is what he saw, he said. 'These, they will die, but you must take none of their possessions from them, he said*
>
> (One Bull, Lakota, quoting Sitting Bull in DeMallie, 1993, p. 519.)

> *Some visions are too powerful to follow, unless you know what you are doing. Only those who are chosen should seek the visions, because evil spirits can do terrible things to you. I have seen it.*
>
> (Bordeaux, 2009).

> *Hallucinations are false perceptions. They can be visual (seeing things that aren't there), auditory (hearing), olfactory (smelling), tactile (feeling sensations on your skin that aren't really there...*
>
> (DSM IV, 2009).

When I was asked to write a commentary chapter for the work by Stewart Schwab and Garth Glissman (Chapter 8 on Disability) and John Dovidio, Lisa Pagotto, and Michelle R. Hebl (Chapter 9, on Race), I was flummoxed. What could I contribute to the fine work of eminent scholars on the topic of stigma, particularly as it relates to discrimination and public policy? Chapter 8 focuses on the similarities and differences between disability definitions, discrimination, and legal protections and other forms of stigma, such as age, sex, and race definitions and discrimination. The review of the legal issues inherent in defining and responding to treatment, based

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This chapter is dedicated to my 87 year old Cherokee cousin, Kay Owen, who lived in Henryetta, Oklahoma, not far from where our Brown family originally settled in Indian Territory. She taught me well. Wado.

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on stigma, by Schwab and Glissman provides a foundation for future research on the psychological processes attending legal decision making on these issues. The dynamic interplay between age and disability, for example, is sure to be a contentious area of law (with significant practical implications) well into the future, given the aging US population (US Census Bureau, 2004). The chapter puts our understanding at the forefront of these issues.

Chapter 9 provides the historical context for prejudice and discrimination research within social psychology from both psychological and sociological perspectives. We are reminded that psychological theorizing about stigma transitioned from conceptualizing prejudice as an abnormal psychological feature to a normal psychological one – albeit one with potentially negative consequences for the target group. From a sociological perspective, Goffman's (1963) seminal work expanded the understanding of stigma by an analysis of the underlying conditions that shape stigma. Dovidio, Pagotto, and Hebl provide an overview of Goffman's concepts and of the research methods that demonstrate various components of attitudes about stigma. In addition, the ambivalent nature of attitudes toward those with stigma is examined, since we often hold contradictory attitudes concerning stigmatized groups and, hence, their members.

Based on the excellent content of these two chapters, then, it required some thoughtful review (and faith in the editors) to determine what I could contribute to this volume. The most striking conclusion is that the perspectives concerning stigma that the aforementioned authors present are not necessarily shared by other cultural groups, including my own. As the opening quotes indicate, even fundamental notions of what constitutes spirituality, health, and mental illness can differ between cultures. Thus, this chapter concerns the issues surrounding cross-cultural variations in stigma, with an emphasis on age and mental illness. Age and mental illness are socially agreed upon stigmas that are present in the United States' dominant culture, but age and mental illness carry a different meaning for America's indigenous cultures, and this is the focus of this chapter.

This is not to infer that commonalities concerning stigma do not exist cross-culturally (see the review by Cuddy et al., 2009). There may be some stigma features or groups that are universal, such as physical deformities, low social class, or personal character flaws (Major & O'Brien, 2005). Nevertheless, what constitutes each of these types of stigma may differ. For example, low social class in the dominant culture is, in part, a function of income (Rege, 2005; Williams, 2009), and the law and legal professionals grapple with how to best guarantee legal representation to those of low income (Weissman, 2002). The accumulation of wealth (and the display of such wealth) is a sign of high status in the dominant culture. This is not the case in many traditional American Indian communities, and the meaning of wealth carries a different significance. Although there is great diversity among American Indian nations, with 564 federally recognized tribes within the United States (US Department of the Interior, 2009), and hundreds more throughout Canada and Mexico, the accumulation of wealth is not the most prominent means to achieve high status among culturally traditional American Indians. The accumulation of material objects can be used as a means to give away objects during honoring ceremonies, memorial services, or other such social functions and to demonstrate generosity (Byrd, 1971). To accumulate wealth and not share that wealth is not part of an Indian value system, and this is a basic tenet of tribes as diverse as the Cherokee (Perdue, 1998; Strickland, 1975), the Kiowa (Gelo, 1999), the Kwakwaka'wakw (Masco, 1995), or the Lakota (Pickering, 2004). As the prolific writer, Luther Standing Bear, related, "Little children were taught to give and to give generously. A sparing giver was no giver at all. Possessions were given away until the giver was poor in this world's goods and had nothing left but the delight and joy of pure strength" (Standing Bear, 1933, pp. 14–15).

For example, even today giveaways are a common means of honoring someone during tribal events such as powwows or memorials (Byrd, 1971; Gelo, 1999). The person who hosts the giveaway must accumulate a great deal of material objects prior to the event – usually at great personal cost and sacrifice. Entire families contribute to the material cache, so that the giveaway will do honor to the person being acknowledged. The tribes of the Northwest have made the giveaway, or potlatch, a fundamental feature of social life. In the Northwest, the process of giving away wealth, even to the point of penury, is highly structured. Numerous rules and protocols define and implement the process (Ringel, 1979; Rosman & Rubel, 1972). It takes a lifetime of apprenticeship to learn the intricacies of the potlatch. Although such generosity was a major component of American Indian life, the practice of giving away wealth during formalized ceremonies was outlawed by both the United States (Talbot, 2006) and Canadian governments (Masco, 1995), as a means to promote capitalism and sever Indians' ties to an ethnic collective.

However, wealth for distribution is not the only means of status within Indian culture. For example, in traditional Omaha culture one's clan membership may determine status, at least informally (Barnes, 1984; O'Shea & Ludwickson, 1992). One of my Omaha Indian relatives often reminds me he is from the Honga, the leadership clan, a high status clan. Such clan membership proffers a high status, regardless of one's gross annual income or Ivy League degrees. To know the origins and intricacies of your clan is a valuable asset. Nevertheless, clan membership can carry special obligations and responsibilities – at least traditionally.

Given the variation in stigma notions, then, more research is needed on the content and the form that stigma takes across cultures within the United States, (Sue & Sue, 1987; Winnick & Bodkin, 2009) and internationally (Furnham & Baguma, 1994; Raguram, Weiss, Channabasavanna, & Devins, 1996). In addition, when conducting stigma research from a cross-cultural perspective, care must be given to a cultural group's conceptualization of stigma and to the research methodology that is employed to investigate it (Link & Phelan, 2001). In other words, sound conclusions regarding cross-cultural stigmas require increased attention to emic research approaches, as well as the more common etic research techniques.

Stigma and Modern Day Issues

Although most of us could provide a list of those features we believe are stigmatizing, a systematic examination of stigma outlines the general categories. What are the most commonly agreed upon stigmas in the US dominant culture? Prior

Table 10.1 Towler and Schneider (2005) basic taxonomy of stigmatized groups

Physically disabled	The blind, epileptics, deaf, rape victims, cancer patients, multiple sclerosis, stutterers, Alzheimer's patients, car accident victims, amputees, the wheelchaired, asthma sufferers, diabetics, the retarded, paraplegics, burn victims, AIDS patients, dyslexics
Mental	The depressed, mental patients, the suicidal, people who have had a nervous breakdown, schizophrenics, obsessive people, neurotics
Physical appearance	The obese, people with severe acne, ugly people, facially scarred people, people with body odor, the unkempt, the bald, eczema sufferers, strabismus sufferers
Sexual identity	Gays, lesbians, transsexuals, bisexuals
Racial identity	Blacks, Hispanics, Asians, Native Americans
Social deviants	Murderers, reformed felons, drug addicts, smokers, alcoholics, sex offenders, people with tattoos, skinheads, people who body-pierce
Economically disadvantaged	The homeless, welfare recipients, the unemployed

studies had identified types of stigma acknowledged by children using qualitative tasks (Harper, 1999). By expanding on the types of stigma included for analysis, Towler and Schneider (2005) provided a basic taxonomy of stigmatized groups in the United States. Numerous stigmatized groups (generated from prior literature and common knowledge) were sorted into categories based on perceived similarity. Trait ratings for each category were also measured. Cluster analyses of the sorting task indicated seven general stigma groupings. As shown in Table 10.1, the list includes generic stigma categories and the types of stigmatized features or behaviors that fall within each category. Some of these categories would seem to be more prevalent in our accepted notions of "true" stigma (e.g., physically disabled or mentally ill), while other features may not appear to be acceptable stigmas (e.g., race or economically disadvantaged status) – particularly if one possesses negative attitudes about the characteristic or believes in their biological origin. This is true for both majority group members (Kaiser & Pratt-Hyatt, 2009) and minority group members (Jost, Pelham, & Carvallo, 2002; Neville, Coleman, Woody Falconer, & Holmes, 2005). For example, Neville and colleagues (2005) examined *Psychological False Consciousness* (PFC), or the beliefs which serve to deny bias against one's group and that work to maintain an unjustifiable social hierarchy. With an African American sample, they found:

> … greater levels of color-blind racial beliefs in this sample [were] related to increased (a) blame of African Americans themselves for economic and social disparities; (b) belief in a social hierarchical system that is justified by the existence of inferior and superior social groups; and, (c) internalization of racist stereotypes of Blacks. These findings support the link between color-blind racial ideology and PFC or the degree to which one adopts a cognitive framework that works against his or her own individual or social group interest (pp. 39–40).

Moreover, people can fall within more than one stigmatizing category, and the perceived negative social value of one stigma may enhance the effects of the other one (Willis-Esqueda, Espinoza, & Culhane, 2008; Espinoza & Willis-Esqueda, 2008; Hardaway & McLoyd, 2009; Reid, 2002; Weeks & Lupfer, 2004), depending on one's cultural or regional environment. For example, being Mexican American *and* of low SES produces more negative attributions of culpability for a criminal offense, than when one is White and of low SES (Willis-Esqueda, Espinoza, & Culhane, 2008; Espinoza & Willis-Esqueda, 2008). Moreover, there are regional variations in the enhanced culpability attributions made for the combination of being Mexican American and of low SES. If one is in the northern Great Plains, with a predominantly White population, the enhanced attribution has been found. If one is in the southern Great Plains, with a predominantly Mexican American population, the effect has not been found (Willis-Esqueda, Espinoza, & Culhane, 2008).

Similarly, although the female sex category is thought to be a stigmatizing feature (see Chapter 8, this book), being female and a racial/ethnic minority carries enhanced bias. For example, biases against African American women are more negative than against European American women in domestic violence culpability assignment (Willis, Hallinan, & Melby, 1996). Although American Indian women have the highest risk for domestic assault (Tjaden & Thoennes, 1998), their beliefs about and interpretations of their experience are rarely considered, compared to other ethnic groups of women (Tehee & Willis Esqueda, 2008), and more negative attributions are made against them for domestic violence, compared to their White female counterparts (Willis-Esqueda & Tehee, 2006). There may be differences in perceptions of men and women professors in general, but Latina professors are evaluated more negatively when they adhere to strict teaching guidelines compared to White women professors (Anderson & Smith, 2005). At the same time, the intersection of race and gender for women of color is an overlooked issue within the stigma literature (Hall, 2004; Reid, 1988; Reid, 2002).

Thus, the general notion of stigma includes constructs within it that reflect agreed upon features which are negatively valued or perceived by a given cultural group, and people can possess more than one stigma which leaves them especially vulnerable to biased treatment. It is not surprising, then, that low income, minority elderly are particularly vulnerable in terms of health care access and standard of living (US Department of Health and Human Services, 1995, 2007; Yeats, Crow, & Folts, 1992). When people possess two stigmatizing features their issues and concerns become easily invisible to the larger dominant culture.

Although stigma varies by social and environmental context (Willis-Esqueda, Espinoza, & Culhane, 2008; Major & O'Brien, 2005), some stigmas are so engrained within US culture that stigmatized group members sometimes share in the biases against their own. For example, although both Black and White women negatively evaluate overweight women, White women are more likely to negatively evaluate overweight ingroup members (i.e., White women), compared to outgroup members (i.e., Black women). US Latinos show no explicit preference for light or dark skinned Latinos, but they do demonstrate a positive implicit preference for lighter skinned Latinos, compared to darker skinned ones (Uhlmann, Dasgupta, Elgueta, Greenwald, & Swanson, 2002). The acceptance of negative age stereotypes by the elderly, compared to positive age stereotypes, can have negative consequences for their physical, emotional, and social functioning (Levy, 2009).

In addition, those who hold stronger negative beliefs about aging and the aged when young adults are more likely to suffer from physiological ailments related to age as older adults (Levy, Zonderman, Slade, & Ferrucci, 2009). Thus, notions of stigma can become so culturally accepted that negative biases against one's ingroup can occur and serve to reinforce the stigma for both ingroup and outgroup members.

While research tends to focus on identifying and examining the dominant culture's notions of stigma, there are cultural variations in the acknowledgement and treatment of mainstream stigmas, even within the United States. As a means to demonstrate this, I describe two areas (stigma based on age and mental illness) which I believe convey the most meaningful cultural differences between the dominant culture and American Indians in everyday experience. These areas do not provide a complete review of all the categories where there are cultural variations between the two groups on what constitutes stigma. Rather, the following areas are the most meaningful, where cultural differences exist for notions of stigma and discrimination.

Aging

Age is one of the prominent features that the dominant US society has agreed signifies an illegitimate stigma and where the law should address discrimination. However, in the United States, an elder status does not guarantee a positive social position and perceptions of positive characteristics. Kite, Stockdale, Whitley, and Johnson (2005) found evidence for negative bias against the elderly in a meta-analytic review using effect sizes from 232 studies. Gordon and Arvey (2004) also found evidence for bias in a meta-analytic review. It appears that bias against the aged is a long standing and meaningful social stigma.

Indeed, such bias can be activated by physiognomic cues alone. Hummert and colleagues (Hummert, 1994; Hummert, Garstka, & Shaner, 1997) have demonstrated that mere exposure to elderly facial features is sufficient to produce the negative bias. Negative categories of the elderly, such as "despondent," "shrew/curmudgeon," and "severely impaired," contain a number of negative trait terms (e.g., complaining, bitter, demanding, stubborn, slow-thinking, incompetent, and feeble).

In fact, the stigma of age demonstrates itself in the employment outcomes of elders in the United States. Employment discrimination based on age is a significant limitation for elders who wish to maintain an active work life and sufficient income (Hedge, Borman, & Lammlein, 2006). And, for those elders who do remain in the workforce, they may be subjected to negative causal attributions concerning their actions (Rupp, Vodanovich, & Crede, 2006), which, of course, can lead to less pay and increased employment terminations. Such discrimination certainly impacts the elderly victims, but it also increases the burden of younger workers who must contribute to pension plans and health care costs (Sargeant, 2005).

In response to societal ageism, the Age Discrimination in Employment Act of 1967 was passed. The goal was to eliminate discrimination against workers over 40 years of age. Although the goal of the ADEA was to eliminate discrimination based on age, evidence suggests that older workers are still the target of bias. According to the EEOC, for the years 1997–2008 the largest number of ADEA complaints occurred in 2008 (US EEOC, 2009). Thus, even with federal laws to protect older workers, the current statistics indicate age bias is present (Neumark, 2009). Consequently, interest in enforcement of the ADEA may become more important in future with an aging population (Neumark, 2009), and at the same time, an increase in older workers may bring more discrimination lawsuits. Unfortunately, judges and other decision makers may not be particularly sympathetic to older workers who claim discrimination (Manning, Carroll, & Carp, 2004), and those who hold ageist attitudes may respond less positively to older witnesses in a legal case (Mueller-Johnson, Toglia, Sweeney, & Ceci, 2007).

American Indian Notions of Elderly

While the dominant culture stigmatizes the elderly and discriminates against them, American Indian cultures have a different perspective of age and elders (Coe & Palmer, 2009; Garrett & Walkingstick Garrett, 1994; Hall & Barongan, 2002; Standing Bear, 1933; Weibel Orlando, 1997), and elders' place within a family composition in general. The family unit is the foundation for Indian life, and the family unit serves to provide a sense of self and one's place in a collective (Perdue, 1998). The family unit is composed of extended family members (e.g., brothers, sisters, mother, father, aunts, uncles, cousins, grandparents), as well as family through formal or informal adoption. The Lakota formalize this extended family concept with its own name, *Tiospaye* (Medicine, 1985; Poor Bear, 2009). "Responsibility actually is a bilateral phenomenon in that it is adopted by and binding across the generations. Every age cohort, regardless of gender, is accorded respect because each fulfills critical functions in the community" (Red Horse, 1997, p. 245). It is not uncommon for three or more generations to live in the same household, as well as nieces and nephews to be cared for or spend time living with aunts and uncles. Grandparents are often sole caretakers of children, and if grandparents are not sole caretakers, it is not uncommon for children to spend long periods of time with them (Ide, Dahlen, Gragert, & Eagleshield, 2006; Weibel Orlando, 1997). In this way, psychological ways of knowing and cultural traditions and information are passed from one generation to another. When grandparents are missing, parents often rely on other tribal elders to serve as grandparents. In traditional Indian culture, elders have a special purpose and distinguished function within Indian society (Coe & Palmer, 2009; Standing Bear, 1933).

This reliance on the extended family and elders is distinctly different from the dominant culture's concept of nuclear family (Red Horse, 1980). The dominant culture relies on a linear understanding of age and independence, with increasing age bringing increased psychological independence. In Indian families, "... development is a phenomenon whereby age and independence are negatively correlated" (Red Horse, 1997, p. 245). As a person assumes an elder status, psychological responsibility increases for providing care-giving and leadership to one's family.

Although there is great diversity among tribes, reverence for our elders is a common cultural tie among Indian people and tribes because of the vital roles elders fulfill (Coe & Palmer, 2009). Learning one's Indian identity requires reliance upon elders to teach history, religion, traditions, clan membership, and social skills and practices – both public and private (Cross, 2005). For example, eye contact patterns may be different, depending on the relationship or gender of the target of communication. Nuances of nonverbal behavior signal to others if one has learned the traditional forms of communication. There is a protocol for handling most life events, such as honoring good works, assisting those who are in need, or conducting funerals and memorials. Elders are teachers of nonverbal behaviors and protocols and the behaviors that go with public and private events. Learning through elders becomes especially important, because American Indians have traditionally relied on oral traditions to convey cultural knowledge. Thus, nearly every tribal event includes a place of honor for elders to sit and engage in the activities. Nearly, every Indian gathering includes a special word of thanks to ancestors and elders for their wisdom and sacrifices. Being an Indian elder brings a respected status and special tasks that are vital for the continuity of tribal and clan knowledge and culture. To dishonor or eschew one's elders is tantamount to rejecting that which makes one Indian. Although many of today's American Indian elders are faced with increased poor health, poverty, and living conditions, they also experience high social support from extended family members to address these problems, due to their elder status. (Ide et al., 2006; Weibel-Orlando, 1997).

Mental Illness

As with aging, mental illness is considered another significant stigma within the dominant culture (Ferino, Holland, & Ring, 1966; Fink & Tasman, 1992; Towler & Schneider, 2005). Some of the first mentions of mental illness and its treatment came in the works of Felix Platter in the 1500s who noticed distinctive types of "mental handicap" (James, 1991). The Age of Enlightenment further expanded on the understanding of mental illness (for a review see James, 1991), and in the early 1800s Philippe Pinel dealt with both diagnosis and treatment of mental illness (Pinel, 1806a, 1806b, 1806c).

In the European Middle Ages, those who experienced visions were often thought to be possessed by demons or evil spirits (Kroll, 1982). During the seventeenth century in Europe, those who were mentally ill were considered possessed of evil spirits, although records indicate a growing concern with a medical explanation for mental disease (Eldridge, 1996; James, 1991). Nevertheless, those who suffered from mental illness were often locked away or even executed.

That same ideological tradition was carried to the British American Colonies. It was epitomized in the famous Salem Witch Trials of 1692 and other similar cases involving accusations of witchcraft (Woolf, 2000). There was a belief that those who were mentally ill were possessed by the devil or were possessed with an evil spirit (Deutsch, 1949; Eldridge, 1996; Jimenez, 1986).

Today, the stigma of mental illness serves as an obstacle to both seeking and obtaining treatment (Peris, Teachman, & Nosek, 2008). In addition, mental illness has ramifications for social standing and achievement (Sibicky & Dovidio, 1986). For example, in 1972 Thomas Eagleton was George McGovern's vice presidential nominee, but dropped out after it was revealed that he had been hospitalized for psychiatric treatment and had twice undergone electroshock therapy for depression (Strout, 1995). Some considered McGovern's decision-making abilities flawed because he allowed Eagleton on the ticket – a kind of stigma by association. Subsequently, McGovern chose Sargent Shriver to replace Eagleton but lost to Richard Nixon in the general election. Not surprisingly, Sibicky and Dovidio (1986) found merely being a client of psychological therapy was enough to engender biased perceptions. And negative portrayals of those with mental illness permeate modern media (Diefenbach & West, 2007).

American Indians and Mental Illness

American Indians' experience with the stigma of mental illness and its treatment is different than for members of the dominant culture (Gone, 2008a). Early British notions of American Indians reflected much of the early conceptions of mentally ill persons. Both groups were possessed by the devil, evil incarnate, and savage (Deboe, 1970; Mandell, 2004; McWilliams, 1996; Simmons, 1981; Takaki, 1993). A 1609 pamphlet noted,

> The report goeth, that in Virginia, the people are savage and incredibly rude, they worship the divell, offer their young children in sacrifice unto him, wander up and downe like beasts, and in manners and condition, differ very little from beasts, having no art, nor science, nor trade, to imploy themselves, or give themselves unto. . .. (Deboe, 1970, p. 40).

Non-Indians, accused of witchcraft, were also accused of being too friendly with Indians, and it was thought they learned their "witchcraft knowledge" from attending Indian powwows (McWilliams, 1996).

This negative conceptualization of Indians had implications for legal treatment, as well (Williams, 1990). Early colonists felt impelled to monitor the behavior of even christianized Indians for legal infractions, because of the latter's inherent savage and evil character (Bragdon, 1981). It made warfare against them for land a matter of lawful enterprise – an enterprise that could stand the test of international legal challenges (Williams, 1990). Indeed, American Indians are labeled as "savages" in the Declaration of Independence – one of the foundational documents of the United States. Numerous other governmental documents, including those from the Commissioners of Indian Affairs, describe and identify Indians as grossly unintelligent and savage (see Prucha, 2000, for a review of these documents).

The negative bias toward American Indians did not end with the Plains Indian wars or the subjugation of the Apaches in the late 1800s. By the early 1900s, missionaries and federal Indian agents transferred some "troublesome" Indians (e.g., those who practiced Indian spirituality, challenged the European American federal agents, or refused to obey the rules of reservation life) over to the federal government for placement as 'mentally ill' patients as a means of social control (Soule & Soule, 2003; Stawicki, 1997). At the time, medical facilities were racially segregated, so in 1899 the US government appropriated money to build the Hiawatha Asylum for Insane Indians. It was the first federal mental hospital devoted to American Indians, and it operated from 1902 to 1934 in Canton, South Dakota. An almost complete lack of record keeping, therapeutic activity, minimal medical standards, and horrific living conditions forced the government to close the facility (Saxman, 1999; Spaulding, 1986; Stawicki, 1997). More importantly, evidence exists that many of the 'patients' showed no signs of mental illness (Saxman, 1999; Soule & Soule, 2003). No records were kept of diagnoses after 1906 (Spaulding, 1986), and there was no psychiatrist or physician on staff. Many of the patients did not speak English, and the hospital employed local, European Americans, who spoke no indigenous languages. Thus, an accurate psychological evaluation would have been impossible. As is the tradition, many of the patients sang death songs during their enforced lock up (Stawicki, 1997; Yellow Bird, 2002).

Due to the supposed mental inferiority of American Indians, early conceptions of and research into American Indian psychology focused on deficit models (Winston, 2002). A complete review of psychological studies that conceptualize of Indians as mentally feeble is not possible here, but a few references will suffice. For example, Malthus (1804/1890) reported that Indians throughout the Americas were savages and, therefore, incapable of interfacing with their physical environment for survival. Bache (1895) theorized that American Indians were inferior and closer to savagery because their reflexes were faster than Whites and Blacks. According to Bache, in a compensation model, higher intelligence was thought to produce slower reflexes, while faster reflexes indicated a connection with lower life forms. In 1903, Chamberlain's study on Indian "savages" found ". . .chief facts concerning the taste-words of several Algonkian peoples. . ." which produces ". . .the primitive confusions and associations of the various senses naturally to be expected at the stages of culture considered" (p. 153). And finally, LaBarre (1947) reported on the use of peyote by America's indigenous people as a form of "primitive psycho-therapy." He mistakenly believed peyote became popular because it sped up the process of obtaining visions, which usually required praying and fasting. He further surmised that "The valuing of psychically deranged states [by Indians] may partly account for the notorious helplessness of Indians when addicted to alcoholic liquors." (p. 295). He failed to mention that peyote had been successfully in use as a spiritual medicine for thousands of years prior to the introduction of western psychological therapies and alcohol. It is still considered effective medicine today, throughout the indigenous North America of Mexico, United States, and Canada.

The use of peyote by Native American Church members during prayer meetings allows for healing of those who are prayed for or who ingest it for medicinal purposes (Vicenti, Long, & Looking Horse, 2004). Peyote had been in use as both a sacrament and a trade good in the southwestern USA prior to Spanish colonization (Riley, 1974). By the time of the spread of peyote use in religious services across most of Northern America during the 1870s, the US government began to outlaw it. The American Indian Religious Freedom Act of 1978 was an attempt to provide religious protections for American Indians, including the use of peyote and other sacred objects. However, the legality of peyote use remained an issue until the American Indian Religious Freedom Act Amendments of 1994. Today, such use is lawful and strictly controlled by state and federal laws (American Indian Religious Freedom Act Amendments of 1994).

Although the dominant culture often portrayed America's indigenous peoples as mentally and psychologically deficient, there are no US indigenous languages that have a term for "insane" or "mentally ill" (Jacobs, 1964; Yellow Bird, 2002). Walker (2006) describes the work of one of the first mental health professionals to examine American Indians. A physician named Charles Lillybridge was hired by the US government to attend to the 20,000 Cherokees during the time prior to forced removal to Indian Territory. According to Walker, the earliest psychiatric descriptions by Lillybridge found no evidence of mental illness. Likewise, Gone (2008b) reported fewer instances of mental illness among American Indian populations, as well.

In the Indian world, those who hear voices, or see visions, or speak to the spirits are revered. Countless descriptions of American Indian cultures and biographies include references to those with special powers to see, hear, and communicate with spiritual beings (Grenville, 1938; Grinnel, 1962; Mails, 1990; Mooney, 1991; Powell, 1998; Standing Bear, 1928, 1933; Walker, 1991). Some of us grew up with parents and grandparents, aunts and uncles who communicated with spirits. Such behavior is not indicative of mental illness. Rather, those who are capable of such behavior are close to the creator and have powerful medicine. They are spiritual people. If you hear that someone has had a vision you want to know all about it, and dissect it with them! If you are not having visions, hearing voices, seeing spirits, or observing omens you should pray for some. Some (e.g., the Lakota) have ritualized the pursuit of such events (Martinez, 2004; Walker, 1991).

It should be remembered that American Indians, belonging to sovereign, dependent nations (see *Cherokee Nation v. Georgia* 1831), were not protected by the Bill of Rights, and the Indian Civil Rights Act of 1968 was passed, in part, to address this issue (Wunder, 1994). Traditional spiritual and religious behavior, such as seeing visions, hearing voices, seeing spirits, and observing omens, or gaining access to sacred sites on federal lands to perform such behaviors, was outlawed by federal regulations and approved by federal courts until well into the twentieth century (Fletcher, 2006). Indian religious practices went underground, and open practice of spirituality was hidden. The American Indian Religious Freedom Act of 1978, the subsequent Religious Freedom Restoration Act in 1993 (2009), and American Indian Religious Freedom Act of 1994 were attempts to allow American Indians to practice their ancient spirituality. Yet, the legal battle for the right to practice such spirituality rages on (Vicenti et al., 2004; Wunder, 1999). The Indian wars are not over.

Even after assimilative measures were taken by American Indians to conform to European American values and legal systems, Indian people sought visions and communicated with spirits. For example, during most of the nineteenth century, the Cherokee Nation West transitioned from a clan-based system of revenge to a US sanctioned legal system, complete with police, attorneys, judges, and courts (Strickland, 1975). Nevertheless, during court sessions judges openly cried during jury deliberations, and judges and jurors would share in tobacco smoking with the accused (Payne, 2002), as a means of conjuring spiritual assistance and/or to bond each other together in a spiritual connection and mark the importance of the event. It was not uncommon for Cherokee legal actors to conjure spirits during courtroom sessions to assist with their cases even into the mid twentieth century (Kirkpatrick & Kirkpatrick, 1967; Strickland, 1975).

Given the history of the dominant culture's views on mental illness and their treatment of American Indians vis-à-vis mental illness, it is no wonder that American Indians today have limited regard for westernized notions of mental dysfunction and treatment (Gone, 2008b). As Gone has noted,

> . . .a pivotal question in regard to culture and mental health in indigenous communities remains: under what conditions might mental health professionals, whose clinical approaches and techniques emerge from and depend upon a variety of 'Western' notions and norms, therapeutically benefit their vulnerable Native 'patients' or 'clients' without reinforcing (or re-enforcing) the colonial project? (p. 370).

Thus, the stigma of mental illness, the meaning of mental illness, and the methods to treat mental illness are not consistent between the dominant culture and traditional Indian notions. Although American Indians are at high risk for negative physical, emotional, and mental health issues (Lafromboise, 1988; Manson, Beals, Suzell, Klein, & Croy, 2005; Whitbeck, McMorris, Hoyt, Stubben, & LaFromboise, 2002), there is yet no standard treatment protocol for American Indians that blends the best that westernized notions of mental illness has to offer in multicultural settings with traditional practices of healing and wellness that are tribally specific (Gone, 2009).

How to Integrate Divergent Stigma Perspectives Between Cultures Within the Law

When reflecting on cultural differences in stigma concerning age and mental illness, it seems apparent that the discipline of psychology has begun to address the ramifications of various forms of stigma (Klonoff, Landrine, & Ullman, 1999; Latrofa, Vaes, Pastore, & Cadinu, 2009; Link & Phelan, 2001; Major & O'Brien, 2005; Mulia et al., 2008; Reupert & Maybery, 2007). However, our knowledge is limited concerning the meaning and limits of socially stigmatized features across cultures, and the field of law must address these differences to provide equitable and appropriate relief from stigma and discrimination.

For example, I realize that a person can be surrounded by an overarching cognitive framework that defines stigmatized features, and know the contents of such a framework, but those features may not be shared by one's own personal cultural experience. I realize that the dominant culture can express their biases against certain stigmatized groups, and this has ramifications for a minority culture, even when the minority culture does not acknowledge or share the stigma. Thus, dominant culture biases directed against American Indian elderly may be experienced by American Indians in a particularly egregious way, given the cultural differences surrounding the meaning of age and the elderly. Moreover, the effects of negative stereotypes and evaluations of the elderly may effect dominant culture members, both old and young, (Levy, 2009), but for American Indians, such negative evaluation hinges on a core foundation of American Indian cultural life, the value of the elderly as agents and transmitters of culture and tradition and identity. How can the law, then, effectively deal with such cultural diversity in the meaning and ramifications of age bias? This issue of the changing nature and meaning of stigma within the law is the important, central force within the chapter by Schwab and Glissman, and their analysis of how the law must interface with the meaning of stigma from a cultural standpoint signals a comprehensive approach to resolving discrimination claims now and in the future.

A somewhat different issue surrounds the chapter by Dovidio, Pagotto, and Hebl. What expressions of bias occur for different groups? Clearly, the stigma of mental illness within the dominant culture produces bias (Diefenbach & West, 2007; Reupert & Maybery, 2007; Sanders Thompson, Noel, & Campbell, 2004). However, those who are stigmatized by virtue of their "race" may not be shown the same discriminatory behaviors as those who are mentally or physically challenged. Dovidio, Pagotto, and Hebl address this issue in Chapter 9, with a review of the comparisons between prejudice and discrimination toward the disabled and Blacks. Hebl and Skorin (2005) have shown that acknowledging one's disability early in an interview is perceived more favorably than not acknowledging or waiting until the end of the interview process. However, some stigmas are not easily concealed. The classic study by Word, Zanna, and Cooper (1974) indicated that merely being a racial minority produced biased verbal and nonverbal treatment, and that such treatment led to performance decrements.

Similarly, the subtle and overt forms of expression of cultural bias should be understood, as they communicate information to both non-targets and targets, alike. Early research in nonverbal behavior addressed this issue, in part. Mehrabian (1968, 1969) found that various body movements (e.g., body relaxation, distance, eye contact patterns, etc.) were indicative of liking for a partner and can indicate one's status relative to the partner. Bias for or against another can be shown through affective expression, body movements indicating status differences, social distance, and social touch (LaFrance & Mayo, 1978). What is not clear is how these bias indicators are used in everyday social interactions to display negative attitudes toward various types of stigma and how we learn these behaviors whether we acknowledge the stigma or not.

How do these different expressions based on stigma type create unique psychologies for perpetrators and targets? And, how does the law begin to address the diversity of experienced harm based on unique psychologies? Although those with stigma have acknowledged and felt the outcomes of bias, psychology researchers are just now addressing the psychological experience of discrimination by perpetrators and targets of bias (Bryant-Davis & Ocampo, 2005; Hamill, 2003; Johnson & Lecci, 2003; Kaiser & Pratt-Hyatt, 2009; Klonoff et al., 1999; Plant & Butz, 2006). Future research findings will add to this growing body of work and provide a deeper understanding of the ramifications of stigmatization. The law, meanwhile, must provide a comprehensive legal approach to addressing stigma and its ramifications and incorporate cultural variation within its reasoning. In this way, the psychology of cross cultural stigma will be met by a law that fits the best interests of all the people – now and in the future.

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Chapter 11
Disability and Procedural Fairness in the Workplace

Larry Heuer

> *We receive so many messages from the nondisabled world that we are not wanted, that we are considered less than human. For those with restricted mobility or sensory disabilities, the very physical environment tells us we don't belong. It tells us that we aren't wanted in the places that nondisabled people spend their lives—their homes, their schools and colleges, their workshops, their leisure venues...*
>
> (Morris, 1991, pp. 26–27)

In a recent law review article, Peter Blanck (2006) writes movingly about disabled individuals' experiences with, and reactions to, workplace discrimination, "... they wanted real jobs. They did not want to live on welfare checks; they wanted paychecks. They fought to be participants in society and not view the world as outsiders from a nursing home bed." (p. 694). Blanck's stories are about disabled Americans who fought against discrimination. The individuals were discriminated against *because of* their disabilities: they were fired from their jobs; denied the necessary accommodations to perform their assigned tasks; and denied equal access to governmental services and public facilities. Typically, the relative deprivation these individuals experienced stemmed from *procedural* biases, formal or informal, that netted them less desirable *outcomes*, not because they were incapable of performing their assigned tasks, nor because they were unmotivated to do so, but because they were disabled.

This confounding of biased procedures and undesirable outcomes is precisely the sequence that the Americans with Disabilities Act of 1990 (ADA) was designed to address. Yet, although the problems addressed by the ADA, as well as the mandated responses, are both procedural and distributive, it is my impression that much of the scholarly work focuses on distributive concerns, such as real jobs, real paychecks, equal benefits, and public services. While it is clear that procedures are not ignored (in the same article, for example, Blanck notes that US society has not

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fully confronted the fact that “millions of persons with disabilities . . . continue to face segregation and isolation, stigma and discrimination” p. 705), the procedural aspects of workplace disability seem infrequently to be the *primary* concern. In other words, seemingly few scholars focus on the *procedures* (formal or informal) that produced disadvantageous outcomes, or the procedures employed to respond to discrimination, *in and of themselves, independent of the outcomes they produce*, as the primary, or even a critical component of the environment faced by disabled individuals in the workplace.

In this chapter, I summarize some of the psychological research and theory on procedural fairness, with an eye toward the implications of this scholarship for understanding the attitudes and behaviors of those who encounter workplace discrimination against disabled individuals – whether they are the target of discrimination, the employer who formulates a response to a request for a reasonable accommodation, or a coworker who is simply observing this interaction. I focus primarily on those attitudes and behaviors that have been shown to be responsive to variations in procedural fairness, such as satisfaction with the outcomes of these interactions, satisfaction with, and the perceived legitimacy of the authorities who administered those procedures and decided on those outcomes, and satisfaction with, and support for the organizations those authorities represent.

The psychological research and theory concerning fairness began with a focus on outcomes, and subsequently advanced to incorporate a focus on procedures. I will briefly summarize this procedural justice research and one of its critical discoveries: that procedural fairness – merely the fairness of the way individuals are treated – is an important determinant of satisfaction, sometimes even more so than either fair, or even purely beneficial, outcomes. Throughout my comments, I will emphasize the implications of this scholarship for thinking about the *strictly procedural aspects* of discrimination against disabled individuals and about the ADA.

Finally, the bulk of my comments focus on research that reveals how several variables can moderate the influence of procedures on people’s judgments of fairness and satisfaction, and I speculate about how these variables might play a role in settings involving discrimination against disabled individuals. The moderating variables I will consider are (1) beliefs about deservingness; (2) one’s role as either a decision maker or a decision recipient in an encounter; and (3) group membership and group identity, such as identification with one’s organization versus identification with the community of disabled individuals seeking equal opportunities across organizations.

A Brief History

In an early fairness study, social psychologists J. Stacey Adams and William B. Rosenbaum (Adams & Rosenbaum, 1962) lead undergraduates at NYU to believe they had been hired for part-time work as interviewers. Upon their arrival for their first day of work, these students were randomly assigned to believe either that they were appropriately qualified (“You meet all of the qualifications required for the job...") or under qualified ("You don't have nearly enough experience...") for their $3.50 hourly wage. Based on an equity theory of distributive justice (and in contrast to a simple economic theory of human motivation), the researchers predicted that those employees who believed they were under-qualified for their hourly wage would experience discomfort with their over-compensation, which would lead them to increase their performance in order to reduce the distributive injustice of being over-paid. This equity theory hypothesis was supported: the "under-qualified" workers produced 42% more interviews than those workers who believed they were appropriately qualified for the job. While subsequent theory and research proposed formulations of distributive fairness based on other criteria than equity, such as equality and need (Deutsch, 1975), this finding, like others reported in numerous studies across a wide variety of contexts, supported the authors' prediction that satisfaction is influenced by the fairness of one's outcomes independently of the absolute value of those outcomes (for reviews, see Cohen-Charash & Spector, 2001, 2002; Walster, Berscheid, & Walster, 1976).

About a decade after distributive justice researchers had begun to make the case that outcome fairness models could enhance predictions of satisfaction beyond those made by purely economic models, Thibaut and Walker's (1975, 1978) research and theorizing initiated a marked transformation away from the focus on distributional fairness by posing a question about the role of the procedures employed for allocating resources: What procedures are just? According to their procedural justice theory, the manner in which people are treated during their social exchanges can influence their satisfaction independently of either their absolute outcomes or the fairness of those outcomes. In their seminal research, Thibaut and Walker found that, as predicted, when disputants' conflicts were resolved by fair procedures, they were more satisfied with their *treatment* than when they were resolved by unfair procedures. Furthermore, they reported what has come to be referred to as the *fair process effect* – that fair procedures increased disputants' satisfaction with their *outcomes*, regardless of whether those outcomes were favorable or unfavorable (e.g., Greenberg & Folger, 1983).

Thibaut and Walker and their colleagues (Houlden, LaTour, Walker, & Thibaut, 1978; Thibaut & Walker, 1975, 1978) went on to ask what procedural criteria would influence judgments of procedural fairness. They theorized that since disputants are motivated to obtain fair and satisfactory outcomes (as predicted by distributive justice theories), they would judge procedures as fair according to the manner in which they allocated two kinds of control: control over the presentation of information (process control) and control over the final decision (decision control). Overall, the research in the decade following Thibaut and Walker's original claims – claims concerning the fair process effect, as well as claims concerning the importance of process control, or as it came to be called, "voice," (Folger, 1977) and decision control as determinants of procedural fairness – was very supportive of their theory: fair treatment influenced satisfaction independent of fair, or favorable outcomes, and judgments of fair treatment were shaped by voice and decision control (for an overview, see Lind & Tyler, 1988).

However, about a decade later, there was another considerable transformation in the theorizing about fairness. This transformation followed several reports of an unexpected finding. Whereas Thibaut and Walker's control theory implied that outcome control would be a more important determinant of satisfaction than process control, evidence began to accumulate that pointed to a more prominent role for process control – a variable that had been operationalized in most of this research as voice, or having one's say prior to a decision being issued. In a classic experimental demonstration of the problem, Lind, Kanfer, and Earley (1990) led undergraduates to believe that the experimenter had made an important decision about the amount of work that would be required of them during their experimental session. Although all participants were lead to believe that the experimenter had decided on a workload that was slightly higher than most of them thought to be desirable, the study varied the description of the procedure employed to decide on that outcome. In one condition, participants were lead to believe that the experimenter had decided on the outcome *after* having solicited their input about their preferred decision. In another condition, the participants were lead to believe that the experimenter had decided the outcome *before* soliciting their input. Compared to participants whose input had not been solicited at all, both of these groups of participants judged the experimenter's procedure to have been fairer. In other words, voice enhanced fairness even when it could not have influenced the final decision. Such findings posed a strong challenge to the instrumental assumptions of Thibaut and Walker's theory, and they lead to a theory that continues to exert a profound influence on the thinking about procedural fairness, the group value theory.

Why would voice enhance fairness perceptions even if it occurred after the decision had already been made? According to the group value theory of procedural fairness (Lind & Tyler, 1988; Tyler, 1989), the favorable influence of voice, absent any instrumental effect on the resulting outcomes, could be explained by taking a broader view of the motives of individuals in a social exchange. In addition to a motive to obtain fair or beneficial outcomes (a motive that assumed a central role in Thibaut and Walker's theory), Tyler and Lind drew on social identity theory (Tajfel & Turner, 1986; Tajfel, 1982) to develop the claim that we care about our relationship with our valued groups because we take pride in identifying with them (Blader & Tyler, 2003). From this perspective, one's treatment was postulated to carry important symbolic or relational content: being asked for one's input influenced judgments of procedural fairness because it communicated that the decision maker respected the decision recipient as a valued member of one's valued group. Because individuals are concerned with their long-term relations with social groups (Kramer & Brewer, 1984; Sedekides & Brewer, 2001; Tajfel & Turner, 1986; Tyler & Blader, 2000), the group value and relational theories (Tyler & Blader, 2000; Tyler & Lind, 1992; Tyler & Smith, 1999) assert that non-instrumental, or relational, variables such as trust, neutrality, and respect, assume important symbolic meaning: participation in group procedures signifies one's positive standing in valued social groups.

In a classic early test of the group value theory, Tyler (1989) surveyed Chicago residents about an encounter with either a cop or a judge. In addition to being asked how favorable an outcome they obtained from this encounter, respondents were asked questions about how much process control (opportunity to tell their side of the story) and how much decision control (influence over the decision made by the authority) they had in this encounter, as well as questions about the extent to which they were treated in a trustworthy, neutral, and respectful manner. While this study replicated the finding that the control variables were linked to the respondents' judgments of both procedural and distributive justice, as well as their reactions to the authority with whom they had the encounter, the group value variables were more strongly linked to these justice and affective judgments. Most importantly, once the group value variables were included in the predictive model, the influence of the control variables was trivially small – a finding that is strongly supportive of the group value theory.

An extensive literature now supports the group value and relational models' claim that individuals base procedural fairness judgments on cues about belongingness (De Cremer & Blader, 2006; De Cremer & Tyler, 2005b; Tyler & Lind, 1992). Furthermore, this research has established the importance of these relational concerns in a wide variety of contexts, including legal (e.g., Tyler & Huo, 2002; Tyler, 1990), political (Leung, Tong, & Lind, 2007; Peate, Platow, & Eggins, 2008), and organizational (e.g., Cohen-Charash & Spector, 2001) ones.

Procedural Justice and the ADA: Do Procedures Influence Satisfaction Beyond Accommodations?

It is natural and reasonable to think about the implications of the ADA in terms of its implications for the distribution of valued resources, including mandated accommodations, and the ancillary benefits that accrue to disabled workers when accommodations are implemented: the satisfaction stemming from gainful employment; the ability to perform one's assigned tasks; the maintenance of valued social relationships (Ward & Baker, 2005); and the realization of meaningful citizenship that derives from full participation in the work force (Barton, 1993). In addition, the theory and research on distributive justice referred to above has established the importance of fair distributions for enhancing satisfaction in a wide variety of contexts, including one's workplace. Although there is a paucity of research testing the role of distributive fairness in contexts involving accommodations for people with disabilities, justice scholars have argued that beliefs about distributive fairness will influence the likelihood that a disabled individual will request an accommodation (Baldridge & Veiga, 2001), and at least one study has shown that distributive fairness judgments can shape the reactions of non-disabled employees to the accommodations made for their disabled coworkers (Colella, 2001).

However, the procedural justice research has shown that the fairness of the procedures employed to respond to accommodation requests might be equally, or in some circumstances even more important than distributional concerns for shaping the satisfaction of disabled workers, and for achieving such goals as enhancing employees' satisfaction with their job, their employer, and their workplace, and their enthusiasm for assigned tasks and their inclination to engage in discretionary, organizational citizenship behaviors.[1] Furthermore, these salutary effects seem likely to extend to the coworkers of employees whose disabilities are accommodated – Brockner and colleagues repeatedly have found that workers respond more favorably to their organization when their coworkers are treated fairly (Brockner, 1990; Brockner, DeWitt, Grover, & Reed, 1990; Brockner, Wiesenfeld, & Martin, 1995).

There is also ample reason to expect that these procedural effects emanate from both formal procedures, such as those mandated by the ADA regarding the manner in which supervisors or organizations respond to requests for accommodation (Colella, Paetzold, & Belliveau, 2004), and informal ones, such as the manner of treatment received by disabled individuals in routine encounters with fellow employees or organizational authorities. Although Thibaut and Walker's original research focused mostly on formal procedures, numerous studies have examined less formal procedures such as corporate culture or organizational norms. Brockner and colleagues (Brockner & Wiesenfeld, 1996; Brockner et al., 2001), for example, distinguished between procedural concerns that are structural (minimizing bias, permitting voice, or considering appeals) versus more informal ones that relate to the nature of the social interaction, or interpersonal concerns (e.g., politeness, dignity, and respect).

Regrettably, there is some reason to think that the formal and informal workplace procedures that are being employed are not well suited to the task of enhancing fairness and satisfaction. Of the formal procedures that are relevant to perceptions of procedural fairness among disabled workers, perhaps the most obvious is the procedure employed to consider an accommodation request, as specified in the ADA. However, Colella et al. (2004) suggest that some of these mandated procedural criteria might actually work against workers' perceptions of fairness. For example, the ADA specifies that coworkers may not play a role in determining whether accommodations are made or whether the requests are reasonable, that cases are to be decided on an individual basis; and that the nature of peoples' disabilities should be disclosed on a need-to-know basis. Together, these rules might interfere with procedural fairness criteria such as voice, consistency across persons, and the provision of accounts for decisions (Bies & Moag, 1986), a shortcoming on a procedural dimension that has been referred to as informational justice (Greenberg, 1993).[2]

There is some reason to think that informal procedures are falling short as well. According to Schur, Kruse, and Blanck (2005), local corporate culture can exert considerable effects on the manner of treatment directed toward people with disabilities, including discrimination and prejudice, or even the subtler discomfort evidenced by some workers when interacting with their disabled coworkers. Such informal behaviors, whether stemming from local norms, or individual idiosyncrasies, seem likely

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[1] For reviews of the relative impact of procedural and distributive fairness on a variety of attitudinal and behavioral reactions, see Colquitt, Conlon, Wesson, Porter, and Ng (2001), and Skitka, Winquist, and Hutchinson (2003).

[2] For an empirical examination of various dimensions of justice, including informational, interactional, formal, and interpersonal dimensions, see Colquitt (2001).

to diminish the extent to which disabled individuals feel included, or valued by their workgroup – a fundamental fairness concern. Noting the social significance of the work environment, Ward and Baker (2005) suggest that such informal factors might infringe on workers' sense of freedom or autonomy, a form of indignity that also communicates a message of exclusion.

Most of the discussion so far has emphasized the research supporting the claim about the unique contribution of procedures on fairness and satisfaction, and about the symbolic, or relational (as opposed to instrumental) bases of this procedural effect. In essence, this evidence supports the group value theory's claim that these procedural effects on fairness are mediated by their effect on beliefs about being valued by one's group. However, some research has shown that, even with the relational effects accounted for, the procedural effects on fairness and satisfaction are also mediated by their effect on expected outcomes. Two studies conducted in nonorganizational contexts (Heuer, Penrod, Hafer, & Cohn, 2002) have shown that procedural effects reflect resource value (fair or favorable outcomes) as well as relational value (e.g., within-group status). This resource-mediated effect of procedures seems likely to be the sort of effect of informal procedures on outcomes described by Colella (2001) who asserts that informal procedures can influence whether accommodations for disabilities are requested, and if so, whether they are granted. According to Colella (2001), informal interactions with coworkers can communicate disapproval of accommodation requests, which in turn might discourage disabled individuals from seeking accommodations. Similarly, Blanck and Marti (1997) assert that the negative treatment emanating from a work environment that is hostile toward accommodations, while legally irrelevant, is, as a practical matter, an influential factor in determining the success of accommodation requests.

One recent set of studies shows a procedure-outcome link that works in the other direction: Just as procedural effects can reflect resource value, outcome effects can reflect relational value. In these studies, Okimoto (2008) examined the effect of providing victims of procedural injustices with material compensation – a sequence broadly analogous to ones in which accommodations or compensation are provided under the ADA after workplace procedural failures have contributed to an environment of stigma, inequality, or discrimination (Blanck, 2006; Chapter 7 by M. Selmi, this volume). Across the set of studies, Okimoto found that the provision of material resources, and even the mere effort to provide such compensation, helped to alleviate the negative effects of prior procedural injustices, but only when the compensation was attributed to benevolent motives. Additional measures revealed that the compensation's positive effects occurred because the effort communicated the same message as the one communicated by fair procedures – the symbolic message that the victim of the injustice was seen as a valued and respected group member.

The primary claim advanced in this section is that there is ample reason to expect that procedural fairness effects – ones that have been well established in a variety of contexts, though not in settings involving individuals with disabilities – will generalize to these settings as well. Furthermore, the fairness of both formal and informal procedures will contribute to the satisfaction of individuals with disabilities and their coworkers, a contribution that is independent of outcome effects, and that is due in part to the procedure's value as a signal about social, or relational concerns such as the concern with one's within-group standing. In short, a clear implication of the procedural justice research is that a full accounting of the reactions of disabled workers and their coworkers to workplace accommodation of employees with disabilities must include a consideration of the fairness of the procedures employed to decide on these allocations.

Potential Moderators of Procedural Fairness Effects

Having advanced a broad claim concerning the generalizability of the procedural justice research findings to contexts involving disability accommodations, the remainder of this chapter considers potential limits to the generalizability of these effects. Absent more research testing these procedural effects in a disability context, it is impossible to rule out the potential for interactions of these procedural variables with a host of contextual ones, such as variables unique to settings involving disability concerns, or variables that occur in different magnitudes in these settings than those where these effects have been more extensively examined. Numerous moderators have already been identified. For example, Brockner and Wiesenfeld (1996) have shown that procedural justice is more important for people's reactions when outcomes are unfavorable. In addition, van den Bos and Lind (2002) point to numerous studies that show that procedural justice is more important among individuals who are high in uncertainty, such as uncertainty about an authority's trustworthiness, or uncertainty about one's job security. Furthermore, Skitka and colleagues (e.g., Skitka & Houston, 2001; Skitka, 2002) have shown that procedural fairness matters less than outcomes among people who see the outcomes at stake as threats to their core moral values.

In this final section I summarize three lines of research revealing the way that three different variables (beliefs about deservingness; decision makers versus decision recipients; and ingroup versus outgroup encounters) can alter procedural justice effects, or alter the interpretation of procedures in ways that raise practical and theoretical questions. First, I describe several studies suggesting that much of the procedural justice research has overlooked the influence of people's judgments about the type of treatment they deserve. After describing work showing that beliefs about deservingness can vary considerably across individuals and across settings, and that these beliefs can exert a considerable influence on people's reactions to the kinds of treatment implicated by procedural justice theories (treatment such as respect, or voice, or neutrality), I speculate about how beliefs about deservingness might play out in workplace contexts when issues of discrimination arise.

Second, I describe a set of studies that examines the way in which decision makers (those who would typically formulate a response to discrimination or requests for accommodations) respond differently to procedural fairness than decision recipients (those who are likely to be the targets of discrimination, or the ones requesting accommodations). After summarizing research suggesting that decision makers are less sensitive to procedural concerns, and more sensitive to outcome concerns than has typically been observed to be the case among decision recipients, I speculate about the ways in which this role variable might influence the nature of workplace encounters involving discrimination.

Finally, I describe a recent set of studies indicating that respectful treatment communicates a message about more than just within, or intragroup, standing (the relational concern highlighted by the group value theory). These studies show that respectful treatment can also convey a symbolic message about what outgroup members think about one's ingroup. I will speculate that this alternative intergroup message might be a particularly relevant one in workplace contexts when issues of discrimination against disabled individuals arise.

Research on Procedural Fairness and Beliefs About Deservingness

Although the group value theory asserts a direct effect of respectful treatment on judgments of procedural fairness (such that as respect increases, perceived fairness increases), Heuer and colleagues (Heuer, Blumenthal, Douglas, & Weinblatt, 1999) suggest that the effect of respect on procedural fairness is qualified in a potentially important way – one that distributive justice theories explicitly recognized, but that is not acknowledged by the group value theory. Distributive justice theorists have consistently asserted that fairness judgments are dependent on beliefs about deservingness. So for example, in developing equity theory, Adams was clear about the importance of deservingness judgments for people's reports that they had received a fair outcome:

> Many men, when comparing their rewards to those of another, will perceive that their rewards are smaller, and yet they will not feel that this state of affairs is unjust. The reason is that persons obtaining the higher rewards are perceived as *deserving* them (p. 273, italics added).

Relative deprivation theories have also included feelings of deservingness as an important determinant of the anger that accompanies the experience of deprivation. For example, Crosby listed two conditions as essential for the experience of relative deprivation among working women: lesser outcomes than one wants and lesser outcomes than one deserves. Adopting this reasoning, Heuer et al. (1999) proposed that procedural justice might be similarly influenced: Rather than a direct relationship between respectful treatment and procedural fairness, this relationship might be moderated by beliefs about the extent to which one deserves respectful treatment. If so, how would this deservingness be assessed?

In some early tests of the Justice Motive, Lerner (Braband & Lerner, 1974; Lerner, 1980; Simmons & Lerner, 1968) showed that judgments of deservingness can be based on the value of one's attributes or the value of one's behaviors. Subsequently, Feather (1994) extended this reasoning to judgments of distributive justice: Positive outcomes will be seen as most fair when they follow positively valued behaviors, whereas negative behaviors will be seen as most fair when they follow negatively valued behaviors. Feather's research applied this reasoning to better understand the observation that Australians had been reported to derive pleasure from such events as seeing politicians caught in a foolish act. Two possible explanations examined for the reputed schadenfreude were envy and resentment: envy of those in higher status positions, and resentment stemming from the observation of others who are *undeserving* of their good fortune. This research found that Australians thought well of high achievers and derived no particular pleasure from hearing about their fall. In fact, they felt badly about the fall of both high and average achievers. However, when participants in a subsequent study learned of a similar misfortune for someone who had cheated to attain their favorable position, they reported pleasurable reactions, particularly the fall of *tall poppies* (high achievers). According to Feather, these studies argue against envy as an explanation for the Australians' schadenfreude (which would predict undiscriminating pleasure in the misfortunes of others who are more successful than oneself), and in favor of resentment stemming from beliefs about deservingness – those who cheated to attain their high positions, and who were thus personally responsible for a mismatch between their input and their outcomes, were deserving of their fall from grace. Feather's (2006, 2008) research has been strongly supportive of his analysis.

Whereas Feather's analysis focused on the role of deservingness for judgments about the fairness of outcomes, Heuer and colleagues (1999) applied similar reasoning to suggest a role for deservingness as a mediator of the relationship between respectful treatment and the fairness of *procedures*. Rather than a direct relationship between respect and fairness, as implied by the group value theory, we predicted that people would judge respectful treatment more or less favorably depending on their beliefs about the treatment they deserved. Thus, people who were responsible for positively valued behaviors would feel more deserving of respectful treatment, and those who were responsible for negatively valued behaviors would feel more deserving of disrespectful treatment. Furthermore, we predicted that across all individuals, the relationship between respectful treatment and procedural fairness would be mediated by beliefs about the extent to which respectful or disrespectful was deserved.

We tested this prediction in three studies. In two of the studies participants read about a fictitious social encounter. Our vignettes manipulated three variables, so that in an encounter between two individuals, one individual was treated either respectfully or disrespectfully by the other after having been more or less responsible for performing a positively or negatively valued behavior. In both studies, as predicted, the relationship between respectful treatment and fairness judgments was qualified by judgments of deservingness. So, for example, participants in Study 1 reported that a supervisor's respectful treatment was most fair when it was directed at a coworker who had turned in a favorable performance at work, and least fair when it was directed at a coworker who turned in a negative performance at work.

Similarly, disrespectful treatment was judged most fair when directed at a coworker who had performed unfavorably, and least fair when directed at a coworker who had performed favorably. Furthermore, the relationship between the value of the coworker's behavior, respectful treatment, and judgments of procedural fairness was strongest when the coworker was seen to be personally responsible for his successes or failures. The second study replicated this finding among college students asked to imagine themselves as the target of more or less respectful treatment from their professor after having performed well or poorly in class. This study added a measure of the participants' judgments of whether respectful or disrespectful treatment was deserved, which permitted a test of our claim that deservingness judgments would mediate the relationship between the value of an actor's behavior and judgments of the fairness of the way he or she had been treated. The mediation test supported our prediction.

In a third study, we extended the same reasoning to predict that people with high self-esteem would perceive themselves as more deserving of respectful treatment in their own social encounters compared with those with low self-esteem. The study was again supportive of our prediction that the relationship between respectful treatment and judgments of procedural fairness was not the direct one implied by the group value theory; instead, the relationship was mediated by people's beliefs about the extent to which they were deserving of respectful treatment, such that those respondents with high self-esteem reported themselves as most deserving of respectful treatment, and they were most indignant when it was not received.

In a subsequent study, Sunshine and Heuer (2002) tested the deservingness hypothesis for procedural fairness by surveying New Yorkers about how fairly they'd been treated in a recent encounter with a New York City police officer. Our prediction, that respondents would report their treatment by a police officer as most fair when there was a match between how respectfully they were treated and how respectfully they *deserved* to be treated, was again supported.

Overall, these studies combine to make a strong case that people judge the relationship between the manner of their treatment and the fairness of their treatment as a function of the fit between the treatment they deserved and the treatment they received. Furthermore, the deservingness reasoning leads to some predictions that do not readily follow from the group value theory. For example, it permits the prediction that there are circumstances under which disrespectful treatment might be viewed as more fair than respectful treatment, and this finding was obtained by Heuer et al. (1999, Study 1). Similarly, group value theorists (Tyler & Smith, 1999; Tyler, 2001) have asserted that respect is important because of its implications for group membership and group status, and that respect will be particularly important for group members who are insecure about their status (De Cremer & Tyler, 2005b; De Cremer, 2002). However, Diekmann, Sondak, and Barsness (2007) predicted that beliefs about deservingness would lead high-status group members, who are presumably relatively secure regarding their group membership and group status, to care more about fair treatment than low-status members; a prediction that was supported in each of their three organizational field studies (see also, Chen, Brockner, & Greenberg, 2003).

Deservingness Judgments in a Workplace Disability Context

The research reviewed above suggests that beliefs about deservingness can lead to judgments that people (including oneself) associated with undesirable behaviors or undesirable personal attributes are less deserving of the kinds of treatment generally considered fair: respectful and unbiased treatment, decision makers' concern for their welfare, the opportunity to communicate their views to decision makers, accurate procedures, and so on. In this section I consider the potential implications of such views about deservingness for people's beliefs about the fair treatment of disabled individuals in the work place. I will address three questions: (1) Is there reason to think that non-disabled individuals, such as coworkers, or superiors, or legal decision makers, such as judges or lawyers, might think disabled individuals are less deserving than non-disabled individuals? (2) Is there reason to think that such judgments about deservingness actually occur in settings involving disabled workers and potential claims for accommodations? (3) Is there reason to think that disabled workers might think themselves less deserving than their non-disabled coworkers?

There are various suggestions from social psychological theory and research that non-disabled individuals will perceive disabled individuals as less deserving, so that they might judge it fair to grant them fewer procedural considerations than would be granted to others. For example, Lerner's (Lerner & Simmons, 1966; Lerner, 1980) Just World theory (JWT) postulated a basic human need to believe that the world is a fair place where good things happen to good people and bad things happen to bad people. In his own early research on this question, Lerner (1965) showed that when research participants were led to believe that only one of two individuals whom they knew to have performed similarly on an assigned task could be paid, they subsequently rated the paid worker as having contributed more to the joint effort. This effect has also been shown to have a negative impact on impressions of the victims of random negative events. For example, Lerner and Simmons (1966) showed that observers who witnessed a research participant suffer through a series of shocks subsequently rated this victim as a less attractive and less desirable potential acquaintance.

Since these early studies, evidence has accumulated to support the Just World theory's claim that people respond to the threat of random misfortunes by implementing strategies to protect their just world belief, or as Lerner (1980) says, their "fundamental delusion." Among the strategies enlisted is the derogation of a victim's personal attributes or behaviors (Karuza & Carey, 1984; Lerner & Miller, 1978) so they can be seen as deserving of their negative fate (Hafer & Begue, 2005). According to Just World theory, the successful implementation of this strategy enables people to continue to interact with their environment as if it were an orderly and stable one where people get what they deserve (Hafer, 2002). Of course, such derogation of people's behaviors or their personal attributes are precisely the kinds of judgments that would be expected to produce lowered estimates of deservingness in subsequent social interactions as well.

Alternatively, Louis, Duck, Terry, Schuller, & LaLonde (2007) drew on social identity theory (Tajfel & Turner, 1986), to predict that members of advantaged groups who perceived a threat to their group's status from a lower-status group (a likely perception among workers who view accommodations for the disabled as a threat to their own resources) would be more supportive of efforts to exclude the outsiders from the advantaged group. Their survey of Australians about their attitudes and behavioral intentions toward asylum seekers supported this prediction. Furthermore, their study found that the effect of perceived threat on exclusion was mediated by fairness judgments: group threat lead members of advantaged groups to think it was procedurally fair to engage in the exclusionary treatment of outsiders, and the procedural fairness beliefs, in turn, led to support for the exclusion of the asylum seekers. Although not explicitly tested in this study, this fairness effect is consistent with a process by which the members of the advantaged group judged the members of the disadvantaged one as less deserving of fair treatment.

Still other theorists have proposed that individuals are motivated to justify existing inequalities between groups. According to social dominance theory (Sidanius & Pratto, 1999), individuals are motivated to justify the dominance of their high-status groups over lower status ones (Pratto, Sidanius, Stallworth, & Malle, 1994). Furthermore, system justification theory (Jost, Banaji, & Nosek, 2004) asserts that members of both advantaged and disadvantaged groups adjust their views so as to rationalize existing inequalities, a claim that has also been advanced by social dominance theorists (Sidanius, Levin, Federico, & Pratto, 2001). Each of these theories is consistent with the claim that various motives (whether a motive to believe the world is a fair place, or that one's own group is superior to others, or that group inequality is justified) are capable of initiating psychological processes that might culminate in a judgment that those who have less deserve to have less.

Is there any reason to think that such judgments about deservingness actually occur in settings involving disabled workers who might be seeking accommodations? In addition to the early experimental evidence of the derogation of innocent victims (see Lerner & Miller, 1978, for a review), research has linked just world beliefs to reactions to people who have been the victims of a wide variety of negative outcomes, including cancer (Furnham & Procter, 1992; Maes, 1994), AIDS (Correia & Vala, 2003), and other illnesses (Clyman, Roth, Sniderman, & Charrier, 1980; Hafer, 2000). More to the point, correlational evidence from a survey of British adults revealed a negative relationship between the belief in a just world and comfort with the thought of interacting with individuals with disabilities (Furnham, 2005). Such findings are consistent with the notion that disabled individuals might pose a threat to the just world beliefs of non-disabled individuals, which, in turn, might be sufficient to engage defensive mechanisms culminating in derogation and potentially lowered beliefs that disabled individuals deserve accommodations.

Drawing from social psychological research more broadly, Colella (2001) points to research showing that observers react more negatively to persons whose disabilities are believed to be self-caused, such as those resulting from an accident involving a degree of negligence (Bordieri & Drehmer, 1987; Bordieri, Drehmer, & Comninel, 1988; Weiner, 1979; Weiner, Perry, & Magnusson, 1988) and she predicts that when disabilities are ones that are not obviously visible (such as back-pain or depression) or are perceived as self-caused (such as ones resulting from negligence), coworkers will perceive accommodations, either distributive (Colella, 2001) or procedural (Colella et al., 2004) as less fair. Colella's hypothesis – that observers' judgments regarding the fairness of accommodations are shaped by their beliefs about the recipient's responsibility for his disability – is consistent with the role of responsibility reported for observers' distributive fairness judgments (e.g., Feather, 2008) and procedural justice judgments (Heuer et al., 1999) in work summarized above.

Furthermore, whereas the social psychological research on justice implies that beliefs about deservingness are relevant to the issue of accommodating disability concerns in workplace contexts, other scholars point to more direct indicators of its effects. In 1890 Congress passed the Disability Pension Act (a precursor to the ADA), which considerably expanded the number of veterans eligible for illness or disability pensions. Blanck (2001) reports that after the passage of this Act, the number of pensioners more than tripled, a result that quickly lead to criticism that undeserving individuals were exaggerating their disabilities, and the individuals most likely to be targeted by such criticism were those whose disabilities were poorly understood or not obviously visible, such as psychological impairments.

Today, more than 100 years later, similar notions of deservingness continue to exert a pervasive effect on disability judgments (Anderson, 2000). Noting that the ADA is unique among civil rights statutes in that the protected class must be determined on a case-by-case basis, Anderson argues that the statutory language guiding the courts as they issue decisions about eligibility has increased the opportunity for value judgments about who deserves protection (e.g., the blind and the deaf) and who does not (e.g., persons with back or psychological impairments). As a telling example, Anderson points to the Casey Martin–PGA golf cart case. Casey Martin was a professional golfer who had a congenital circulatory disorder that made it difficult for him to walk. When the PGA denied his request to use a golf cart, he sued, claiming that the ADA's protections extended to his right to accommodation in a professional sport (in 2001 the Supreme Court agreed with him). Anderson (2000) reports that one legal scholar characterized Martin's case as "a 'trivial cause' that diverted attention from individuals with 'genuine' disabilities who have been losing their cases under inappropriately narrow interpretations of the term 'disability'" (p. 2).

Finally, is there any reason to think that the processes leading to judgments that the disabled are less deserving than their non-disabled coworkers might affect beliefs among disabled individuals concerning their own deservingness? In our own work, in both laboratory (Heuer et al., 1999) and field settings (Sunshine & Heuer, 2002), we showed that people judged the treatment of others, as well of themselves, to be fairer when there was a match between their inputs (positive or negative behaviors or attributes) and their more or less respectful treatment. Furthermore, just world beliefs have also been shown to lower people's judgments of *their own* deservingness (Hafer & Olson, 1989), and, as mentioned above, system justification theorists claim that those in disadvantaged positions (such as disabled individuals) might engage in even greater justification of existing status hierarchies (Jost, 2001; Jost et al., 2004).

Decision Makers Versus Decision Recipients: Role as a Moderator of Procedural Fairness Concerns

The “fair process” effect is a highly reliable one, and by most indications it generalizes well across settings (e.g., legal, political, organizational, educational), populations (the effect appears to be stable across cultures, gender, ethnic groups), and research methods (e.g., laboratory experiments, field experiments, correlational surveys). Still, as the research on procedural justice has proliferated, there’s been increasing interest in identifying variables that are capable of moderating the fair process effect. So for example, Brockner and Wiesenfeld (1996, 2005) have consistently shown that the fair process effect is less pronounced when outcomes are favorable than when outcomes are unfavorable. In another line of work Linda Skitka and colleagues (Skitka & Houston, 2001; Skitka, 2002; Skitka, Bauman, & Mullen, 2008) have shown that the fair process effect is considerably diminished when people perceive that the outcomes at stake are ones that pose a threat to their core moral values. In one early test of the moral mandate hypothesis Skitka surveyed US residents about the dispute concerning whether Elián Gonzalez, the 5-year-old Cuban boy who survived when his mother perished in her attempt to immigrate from Cuba to the United States, should remain in Florida with relatives, or be returned to Cuba to live with his father. This study revealed that the respondents’ satisfaction with the resolution of this dispute as well as their judgments of the fairness of the government’s procedures in this case were better predicted by the fit between their moral mandates and the outcome of this case than by their assessments of the procedures employed by the US government.

In our own work (Heuer, Penrod, & Kattan, 2007) we have explored another potential moderator of procedural justice effects that until recently has received little attention. The procedural justice research has been conducted overwhelmingly among individuals who were the targets of those procedures, or the subordinates in authority – subordinate encounters. Therefore, rather little is known about whether authorities, or decision makers, exhibit the same fair process effect that has been repeatedly observed among decision recipients. Our investigation of this question began with the observation that Supreme Court justices have described their own decision-making in a number of fourth amendment cases (ones in which plaintiffs’ challenge the reasonableness of a search or seizure) as focusing primarily on search outcomes, such as the harm to the target of the search versus the benefit to the state, rather than search procedures. The Court’s cost-benefit analysis, particularly when applied to an evaluation of a legal procedure, poses a challenge to several decades of research and theory showing procedural concerns such as respect and neutrality to be an important determinant (often as important or more important than distributed fairness or absolute outcomes) of satisfaction with both procedures and decisions.

In two closely related studies, we sent a summary of a hypothetical case to a sample of state appellate court judges (Study 1) and circuit court judges (Study 2). The materials described a hypothetical case in which an airline passenger was stopped for questioning based upon the results of a technology called voice stress analysis. The search culminated in the passenger's arrest, and ultimate conviction. The case described the defendant's appeal of his conviction on the argument that the search leading to his arrest constituted a violation of his fourth amendment rights. Because the defendant's appeal challenged the search procedure employed prior to his arrest, the judge's decision in this case amounted to a procedural evaluation.

Each judge received one of four versions of the case summary; the versions varied according to the description of the search procedure employed by the police prior to the passenger's arrest, and according to the description of the search outcome. A test of the procedural fairness prediction was created by varying the description of the police search as one that was conducted respectfully (e.g. the police were polite and permitted the passenger an opportunity to explain his side of the story) or disrespectfully (the police were rude and hostile, and denied the passenger an opportunity to explain his side of the story). A test of the cost-benefit prediction was created by varying the description of the outcome of the police search as one that produced a high (the search of the passenger's luggage revealed a.45 caliber pistol) or low societal benefit (the search of the passenger's luggage revealed one marijuana cigarette in Study 1, or several stolen credit cards in Study 2). After reading the case summary, the judges completed a questionnaire that included questions about the fairness of the search procedure, the fairness of the search outcome, the individual and societal costs and benefits of the search, and their likely decision in this case.

Several findings of these two studies are noteworthy. First, of the manipulated variables of the search procedure and the search outcome, the outcome variable was the only one to significantly influence the judges' decisions. Additional analyses revealed that the outcome manipulation affected the judges' decision by way of influencing their fairness assessments. Critically, additional analyses revealed that between the measured variables of outcome fairness and procedural fairness, only outcome fairness contributed significantly to the judges' decisions. Overall, while these analyses are supportive of the view that fairness concerns were important to the judges as they considered this case, they revealed that the judges' evaluations were more heavily influenced by outcome fairness than procedural fairness. Finally, both of these fairness judgments were largely determined by cost-benefit concerns similar to those described by the Supreme Court justices themselves.

While these studies pose a challenge to the generalizability of a body of research, neither of them included a manipulation of the participant's role as a decision maker or decision recipient. Therefore, two additional studies were conducted. Study 3 employed a vignette that posed a similar problem to the one described to the judges, but adapted to a setting that would be more familiar to this study's undergraduate participants (a student was appealing a penalty imposed by the College after a search of her room uncovered a more or less serious violation of campus housing regulations). Like Studies 1 and 2, this one also varied the search procedure to be one that was enacted in a more or less respectful manner. Unlike Studies 1 and 2, this study also varied the perspective adopted by the participants as they read the description of the search, so that one group of participants imagined themselves as the authority who conducted the search, while another group imagined themselves as the student whose room was searched. Overall the findings of this study were consistent with those obtained among actual judges: authorities' decisions were influenced by outcomes, but not by procedures. In addition, this study added the critical experimental finding that the concern with procedures versus outcomes was moderated by the manipulated variable of one's perspective when considering this case: among those who imagined themselves as the student whose room was searched, procedural fairness was an important determinant of their satisfaction with the outcome of this case; however among those who imagined themselves in the role of the authority as they read this case, the search outcome influenced their decisions, but procedural fairness did not.

A final study testing this effect was conducted in a field setting. In this study, we approached restaurant managers and restaurant employees in various restaurants throughout New York City and asked them to read a fictitious newspaper story describing a procedure being proposed by the City Health Department to curb the threat of a hepatitis outbreak in New York restaurants. Like our previous studies, this one included a manipulation of the seriousness of the threat, and the procedure being proposed to minimize it. Because the group value theory suggests that within-group standing can be communicated by dignity, as well as by respect and politeness (Tyler, 1989, 1994), the procedure manipulation in this study varied the dignity of the procedure proposed to curb the threat: high-dignity condition participants were told that employees would be required to sign a contract agreeing to wash their hands after a visit to the restroom; low-dignity employees were told that a designated employee must observe all employees wash their hands after a visit to the restroom. In order to manipulate threat, we varied what participants were told about a hepatitis outbreak: high-threat participants were told that hepatitis was easily transmitted, that its symptoms included nausea and jaundice, and that the likelihood of highly damaging civil lawsuits resulting from its outbreak was high; low-threat participants were told that hepatitis was difficult to transmit, that its symptoms were mild ones such as a headache or scratchy throat, and that the likelihood of civil lawsuits was very low.

After reading the news article, all participants indicated their approval of the procedures being proposed by the Health Department. Overall this study replicated our previous findings: the manipulation of the threat of a hepatitis outbreak exerted a greater effect on approval of the proposed procedure among restaurant managers than among restaurant employees, and procedural concerns exerted a greater effect on approval among employees than among managers.

In sum, these studies are strongly suggestive of an authority – subordinate distinction concerning the importance of procedural fairness for procedural evaluations: relative to decision recipients, decision-makers' judgments of procedural fairness and procedural satisfaction are more influenced by cost-benefit criteria and less influenced by the procedural criteria typically linked to fairness by procedural justice theories. Below I speculate on some potential implications of this finding for thinking about the social dynamics of providing appropriate and legal accommodation for the disabled in work settings.

Role Effects in a Workplace Disability Context

The research on decision makers and decision recipients suggests that employers who are confronted with evidence of discrimination in the workplace, or who are responding to requests for accommodations from disabled individuals, might be less concerned with the procedural fairness of their response than are the individuals who are seeking accommodation. For example, an employer confronted with evidence that its organization's work environment is hostile toward accommodating the needs of disabled individuals might interpret this as an argument against accommodation because she views the hostility and its consequences as a physical cost to be exacted on the organization if accommodations are provided. In the employer's view, then, denying the accommodation might seem the fair and appropriate response. Furthermore the employer might expect her cost-based fairness analysis to be shared by her employees. However, the research consistently suggests that the employees – those who are seeking accommodation and their coworkers – will be highly attentive to the procedural element of the encounter. Paradoxically then, the employers' best efforts to respond fairly might lead to alienation among employees, who perceive the employers' response as disrespectful, undignified, or as a violation of the employees' rights, and hence, unfair.

Although there appears to be little research that addresses this tension in settings involving disability discrimination, research in organizational settings is suggestive of a decision maker–decision recipient distinction similar to the one revealed in the studies described above. For example, Lissak and Sheppard (1983) interviewed employees about disputes at work and the procedures that were used to respond to them. Half of those interviewed were managers and half were non-managers. This study found fairness to be a top priority among the non-managers, but managers rated fairness as less important than getting at the facts, resolving the dispute, and reducing the likelihood of future conflicts. Similarly, Tyler and Griffin (1991) surveyed managers and found that procedural and distributive fairness mattered when the goal was to enhance favorable employee relations, but that neither type of fairness was relevant when the goal was increased productivity. Finally, studies by Field and House (1990) and Heilman, Hornstein, Cage, and Herschlag (1984) suggest that subordinates are more concerned than authorities with opportunities for participation in conflict resolution procedures.

Research on the Symbolic Consequences of Respect: In-Group Versus Out-Group Encounters

Recently in New York, a group of deaf actors assembled to protest the casting of a Broadway production of *The Miracle Worker*. Of concern to the protesting actors was the fact that the role of a deaf character was being played by a hearing actor. According to one of the protesters, it was not okay to cast the role of Helen Keller "without seriously considering an actress from *our community*" (Healy, 2009, emphasis added). While the play's producer defended the casting as the only way to make money for the production's investors, the protester asserted that "There are other, larger human and artistic issues at stake here." Two aspects of this protest are relevant to the research I will describe here. First, these "human" issues seem less likely to refer to any particular actor's gainful employment than to more symbolic concerns such as recognition and respect; thus the protest seems to reflect precisely the sort of procedural concerns discussed throughout this chapter. Second, the concern with respect being articulated here seems inconsistent with the nature of respect as it is characterized by the group value theory. Rather than expressing a concern about any individual's standing within their own highly valued group, the protesters seem concerned with the extent to which one group (e.g., Broadway producers) is granting their own group (deaf actors) the recognition and respect it deserves. This concern with intergroup respect (as opposed to intragroup respect) is the topic of the final line of research to be described.

This work takes its start from a simple test of a central claim of the group value theory, a fundamentally symbolic, or relational theory, which proposes that people evaluate the manner of their treatment according to what it implies about their standing within their valued social groups, a claim that has been well supported (De Cremer & Blader, 2006; De Cremer & Tyler, 2005a). Importantly, this theory about the symbolic value of voice, or respectful treatment, implies a moderation hypothesis that could not have been derived from Thibaut and Walker's control theory: because of its significance as a communication about once standing *within one's valued groups*, the effect of respect should be greater in encounters with ingroup members than in encounters with outgroup members (De Cremer & Tyler, 2005a; Huo, Smith, Tyler, & Lind, 1996; Tyler & Lind, 1990; Tyler, Lind, Ohbuchi, Sugawara, & Huo, 1998). Furthermore, according to the group value theory, the influence of respect on procedural fairness should be mediated by feelings of ingroup standing.

Our own research on this question began with multiple studies conducted to test the moderation hypothesis that respect would matter more for ingroup than for outgroup encounters (Heuer & Stroessner, 2009). To our surprise, in three quasi-experimental field studies and one laboratory experiment (each of which included a substantial manipulation of respect versus disrespect, from either a member of a valued ingroup or a member of an outgroup), we did not obtain the predicted group membership by respect interaction. Rather, across all of the studies, the effect of respect on judgments of procedural fairness was consistently high: when respect was present, procedures were judged to be more fair – an effect that was virtually identical regardless of the group membership of the source. In order to provide the strongest possible test of this moderation hypothesis, we conducted a meta-analysis of these four studies, thus pooling them to permit the most powerful test of the hypothesized group membership by respectful treatment interaction. This analysis, which included more than 500 respondents, revealed a trivially small and non-significant effect of the interaction (mean effect size across the four studies, $z_r = 0.007$, which, transformed to a correlation effect size of $r = 0.007$). Again, the effect of respect on fairness was positive, and strong, but this effect was unqualified by whether the respectful treatment came from an ingroup or an outgroup member.

Based upon this combination of a consistent positive impact of respect on procedural fairness and the failure to obtain evidence that this effect is moderated by group membership, we proposed that procedural justice is multiply determined. Respectful treatment communicates justice-relevant information in intergroup encounters just as it has been so clearly shown to do in intra-group encounters. However, just as respect from ingroup members can communicate information about our standing within our valued groups, we proposed that it can also communicate information about whether outgroup members think highly of our valued groups. If respectful or disrespectful treatment is as capable of communicating about intergroup as about intragroup standing, this would explain our consistent finding of a respect–fairness relationship both between, and within groups.

Our proposal, that respectful treatment will be interpreted as a judgment about the status of valued groups fits comfortably with social identity theory (Tajfel & Turner, 1986; Tajfel, 1982), which asserts that people derive identity information from their attachment to social groups, and that they take pride in the standing of their own group relative to others. It is also consistent with another line of work concerning the causes of inequality or cruelty directed at groups, including ones based on gender or ethnicity. One interpretation of the cruelty exhibited by the US's internment of Japanese-Americans during World War II (Nagata, 1990, 1993), for example, is that some Americans viewed this population as "subhuman" (Opotow, 1993, 1995, 2007) and thus outside the scope of just treatment. In other words, for these groups, justice is irrelevant. To the contrary, Hafer and Olson (2003) assert that such treatment can follow directly from a motive for justice: Victims are sometimes seen as deserving of negative treatment (Feather, 1992, 2002; Heuer et al., 1999; Sunshine & Heuer, 2002). We agree that intergroup relations are critical (rather than irrelevant) for justice judgments, and we proposed that one's treatment by a member of an outgroup is likely to be interpreted as a message about that person's evaluation of the standing of one's group vis-à-vis the relevant outgroup.

Our theorizing about the influence of respect on procedural fairness – that it can stem from the interpretation of respectful treatment as either a message about either one's status within one's valued group, or one's group's status vis-à-vis other groups, led to several hypotheses, that we tested in two laboratory experiments and one quasi-experimental field study. First, we predicted that a communication from an outgroup member about the value of one's group would influence fairness judgments just as would a communication from an ingroup member about one's standing within one's valued group. Second, we predicted that respectful or disrespectful treatment would impact fairness because of its impact on either of these two messages – the intragroup standing message or the intergroup standing message.

Across three studies both of these predictions were strongly supported (Heuer & Stroessner, 2009). So, for example, in the field study, we surveyed over 800 New York City police officers about a recent on-duty encounter. The officers were randomly assigned to recall either an ingroup encounter (one with another member of the NYPD), or an outgroup encounter (with a civilian). The survey asked multiple questions concerning how respectfully the officer had been treated in the encounter, as well as questions about the officer's judgment of the other person's view of (a) the NYPD as a group, and (b) the officer's status within the NYPD. Several findings are relevant to our predictions. First, we found that respectful treatment favorably influenced the officers' report that they had been treated fairly (this is consistent with either the group value theory's intra-group standing hypothesis, or our own inter-group hypothesis). Second, we found that, consistent with our multi-value hypothesis, both of the two value judgments – that the other person in the encounter thought highly of the NYPD, and that the other person thought highly of the officer's standing within the NYPD – had a favorable impact on procedural fairness. Finally, we found that the effect of respectful treatment on fairness was mediated by both of these two value judgments. We interpret these findings as strong support for our theorizing about the role of respect as a message about valued groups, as well as support for the group value theory's assertions about the role of respect as a message about one's standing within one's valued group.

Below, we speculate on the potential impact of our findings about intergroup respect, as well as about the impact of intergroup respect for thinking about some of the psychological dynamics that influence the manner in which policy makers or employers respond to requests for appropriate accommodations, as well as how they influence the attitudes and behaviors of individuals with disabilities toward their rights, as well as toward their employers.

Ingroup Versus Outgroup Respect in a Disability Context

The group value model of procedural justice is clear about the prediction that respectful treatment, unbiased decision making, and trustworthy authorities, are important fairness considerations *because* of what they imply to the treatment recipient regarding their standing within a valued social group. Group value researchers have also asserted that respect will have less influence in encounters with outgroup members (De Cremer & Tyler, 2005a; Huo et al., 1996; Tyler & Lind, 1990; Tyler et al., 1998). Tyler & Smith (1999) state this explicitly: "If the group is not important to one's sense of identity, the relational implications of treatment should not matter" (p. 229).

While an assertion about the relative magnitude of the effects of intergroup versus intragroup respect on fairness judgments seems premature until this question is examined more extensively, the Heuer and Stroessner findings suggest a way in which encounters with outgroup members – even with outgroup members whose groups are not important to one's sense of identity – can have important consequences for beliefs about fair treatment. Tyler's (1989) classic demonstration of the intragroup implications of respectful treatment (summarized above) showed that Chicagoan's surveyed about a recent encounter with a cop judged the cop's treatment as more or less fair as a function of how politely and respectfully they were treated. While this finding is consistent with the group value prediction that respectful treatment influenced fairness because of its implications for the cop's view of the civilian's standing in a shared, identity-relevant group (e.g., Chicagoans), it does not preclude the possibility that a message other than one about within group standing was communicated, and that this other, intergroup message also influenced the civilians' fairness judgment. Consider an encounter between a young black male and a middle-aged white cop. It seems plausible that the civilian in this encounter would respond to the cop's more or less respectful treatment partly according to his sense of what the cop's treatment implied about a social group that was important to his own social identity – but that could not include the cop (e.g., young black males, black males, or blacks in general). Such intergroup identities might engage similar intergroup dynamics in encounters between individuals who represent virtually any two identity-based groups, including ones between disabled individuals and their coworkers or their employers.

For our findings on intergroup respect to have any bearing on such workplace encounters would require that disabled individuals develop a social identity as a member of a common group. According to Longmore (1985) this identity formation is a likely consequence of the movement for disability civil rights, and the effort to resist stigmatization and create an alternative, positive identity – factors consistent with ones identified by social psychological research as facilitating the formation of social identities (e.g., Ellemers, De Gilder, & Haslam, 2004).

Once this is in place, several lines of work are consistent with the suggestion that when members of disadvantaged groups interpret their disadvantage as linked to their group membership, and they see their attempts at upward mobility blocked, intergroup comparisons become more likely, with the attendant consequence that judgments of unfairness are more likely, as is collective action to restore fairness (Dube & Guimond, 1986; Major, 1994; Taylor & McKirnan, 1984; Winnifred & Taylor, 1999; Wright, Taylor, & Moghaddam, 1990).

Overall, then, while these intergroup identity processes have not been examined in workplace settings involving disability rights, they seem a likely result of the situation that some individuals with disabilities will find themselves in. If so, injustice reactions to intergroup disrespect such as those reported above might play a role in these individuals' attitudinal and behavioral responses. In fact, these reactions might aggravate even further the tendencies toward dissatisfaction and collective action that are initiated once people begin to see obstacles to their advancement as linked to group relations and group boundaries.

Summary

I began this chapter with the informal observation that the scholarly work concerning the Americans with Disabilities Act devotes considerable attention to questions concerning fair outcomes for individuals with disabilities (e.g., in a workplace setting, outcomes such as hiring, promotion, compensation, and accommodation), but relatively little attention to questions concerning their fair treatment, despite the fact that the ADA is a response to discrimination on the basis of disability – a confounding of unfair outcomes resulting from unfair (e.g., biased, disrespectful, exclusionary) procedures, both formal and informal, played out in interpersonal, organizational, legal, or political contexts. Furthermore, the ADA imposes explicit requirements concerning the procedures employed by managers or organizations for responding to accommodation requests (Colella et al., 2004).

In light of these observations, it is an easy argument that greater attention to the procedural justice literature is in order, and I offered a brief summary of that research, concluding that it has clearly established the importance of fair procedures for enhancing people's satisfaction with their outcomes, with decision makers, and with the institutions that those decision makers represent. Furthermore, I advanced the claim that this research offers a potentially rich source of insight to the dynamics of interactions between individuals with disabilities and their employers (or coworkers), particularly when requests for accommodations present conflicts over the allocation of limited resources.

Finally I summarized three lines of research pointing to factors that might moderate the manner in which these procedural justice effects occur. First, I described research on the role of deservingness for procedural fairness judgments. This work showed that, while respect is clearly an important procedural fairness criterion, its influence on procedural fairness is moderated by people's judgments of the extent to which the targets of treatment are seen as deserving of respectful treatment. I concluded by claiming that these deservingness judgments might influence that way that coworkers or supervisors, and even individuals with disabilities, think about the importance of treating disabled individuals with respect. Second, I summarized work showing that decision makers and decision recipients think differently about the importance of procedural fairness versus outcomes in allocation contexts, such as ones regarding accommodation requests: decision recipients pay more attention to the manner of their treatment than do the authorities, who pay more attention to the outcomes being allocated. This work suggests a potential paradox as authorities, perhaps doing their best to assure fair or beneficial outcomes, pay insufficient attention to the procedural criteria that the decision recipients are particularly sensitive to. I concluded this section by arguing that this paradox might inflate workplace tensions, if supervisors, trying to act fairly, focus on fair outcomes, while disabled individuals and their coworkers focus on the fairness of the supervisor's treatment of disabled employees. Finally, I described work showing that respectful treatment influences fairness and satisfaction in part because of the symbolic message it communicates about what the sources of that treatment think about the identity-relevant social groups of the targets of that treatment (e.g., what does this hiring decision say about me, and others like me?). I argued that such considerations have the potential to shape the way individuals with disabilities respond to their treatment by their employers.

Overall, my claims concerning the generalizability of this procedural justice research to workplace contexts involving individuals with disabilities is largely speculative, since very little of this research has been conducted in this context. Such context-specific research offers the potential of further insights concerning the role of procedural justice for thinking about the ADA and the workplace, while also offering the potential for further advances in our theorizing about procedural justice.

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Chapter 12
Procedural Justice and the Structure of the Age and Disability Laws

Steven L. Willborn

We are all members of many groups at the same time. We are man or woman, black or white, citizen or non-citizen, young or old, Nebraska football fan or not, and on and on. In large part, our lives are shaped and influenced, and made rich and rewarding through these many and diverse group memberships. For better or worse, the discrimination laws increase our awareness of some of these groupings, and the salience of them.

This book focuses on two of the group memberships we each have – as people of a certain age and as persons with or without disabilities. It is about age and disability discrimination in an aging society. But it is also about a number of other groups – employers and supervisors, those seeking accommodations, co-workers, decision-makers and decision-recipients, high- and low-status groups, and so on. We can understand age and disability discrimination law only if we include within our analysis not only those groups directly protected by the law, but also many other groups.

Similarly, discrimination law is not solely about outcomes. To be sure, we want to see "real" improvements for protected groups, such as increased employment opportunities, fewer discharges, and higher wages and benefits. But we are also interested in perceptions of inclusion and fair treatment. This is even more true for discrimination laws, where the goals include overcoming disadvantage and subordination, than it is for other employment laws, such as unemployment or workers' compensation, where the primary goals are not as intimately tied to perceptions of fair treatment. Other contributors to this volume report on research which demonstrates that the two benefits of discrimination laws – substantive and perceptual – are not as closely connected as commonly thought (Heuer, 2010).

In this chapter, I hope to encourage refinement of the psychological literature by examining more closely the relationship between the precise structure of the age and disability laws and the findings of the procedural justice literature.[1] These two statutes differ in interesting ways relating to this body of research. I will

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[1] In this paper, I draw heavily on Professor Heuer's description of the procedural justice literature.

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describe these differences and point out ways in which the differences pose intriguing questions (and research opportunities) for procedural justice scholars. Again, the research can have special salience here because this is an area in which perception of fair treatment is one of the central goals of the law. Perhaps, as in other areas, social science research in this area can begin to inform the structure of discrimination laws and help them achieve their important goals.[2]

In the next section, I will describe the procedural structure of the age and disability laws which, as I said above, are interestingly different in ways relevant to the procedural justice literature. Then I will talk about the types of group awareness reflected and, indeed, created by the age and disability laws. Both sets of group awareness are complex and, again, the two sets are different in important ways. Finally, I will speculate on the implications of my analysis of procedures and groups under the age and disability laws on perceptions of procedural justice, and suggest directions for future research.

The Procedural Structure of the Age and Disability Laws

The Age Discrimination in Employment Act (ADEA)[3] and the Americans with Disabilities Act (ADA)[4] have different procedures that are likely to be important to perceptions of procedural justice. But the two major differences cut in opposite directions. On the one hand, the ADA procedure requires a discussion between the employer/supervisor and an individual with a disability who may require an accommodation. On the other hand, the ADA imposes specific limits on the disclosure of information that may affect the perceptions of those not privy to the required discussion, such as co-workers. The procedures of the ADEA do not include either of these features.

The place to begin is with the ADEA procedures, which are fairly standard across most discrimination laws, including Title VII (upon which they are modeled) and most state discrimination laws. The ADEA does not require any consultation between employer and employee (or applicant, but for convenience we will just say employee from now on) before an employment decision is made or before the formal complaint process is begun. Thus, in the typical case, an employer might make an adverse employment decision, such as a failure to promote or a discharge, which an employee thinks may have been based on his age. The employer need not

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[2] The Pension Protection Act of 2006, Pub. L. No. 109–280, 120 Stat. 780 (2006), drew on three central findings of the behavioral economics literature as part of its restructuring of American pension policy. It provided for automatic enrollment in pension plans, (to help counter status quo bias); provided for automatic escalation of pension contributions (to counter loss aversion and endowment effect biases); and facilitated standard investment options (to counter decision paralysis and risk aversion). For a good review, see DiCenzo (2007).

[3] 29 U.S.C. §§ 621–634.

[4] 42 U.S.C. §§ 12101–12213.

engage in any consultation with the employee before making the decision. At that point, to challenge the decision, the employee must file a charge with the federal Equal Employment Opportunity Commission (EEOC) and the state age discrimination agency (if there is one, which there usually is) within a time limit that is short by normal tort standards.[5] The employee need not talk with the employer before filing her charge. At that point, the EEOC is called upon to investigate the charge and part of that investigation may include "conciliation, conference, and persuasion,"[6] that is, attempts to bring the parties together to discuss the issue. But this conciliation stage happens quite infrequently. In 2008, for example, 24,582 charges of age discrimination were filed with the EEOC; only 678 (2.8%) reached the conciliation/talking stage.[7] A common reason for this is that the EEOC does not complete its investigation promptly enough, that is, the conciliation stage is never reached because the employee files a lawsuit before the EEOC has completed its investigation. Sixty days after filing the charge, the employee is free to file a lawsuit even if the EEOC has failed to complete its investigation.[8] Even if the EEOC completes its investigation and the conciliation stage is reached, no discussion needs to occur. Under the procedure, the EEOC must *attempt* to conciliate, but the parties are not penalized if they refuse to participate.[9]

The main point here is that the ADEA procedure (the standard procedure in discrimination cases) does not *require* any discussion between the parties at any point in the process. Of course, this does not mean discussions do not occur. No doubt, in practice, discussions occur at every point in this process. But under the ADEA, the discussions are voluntary (not legally mandated) and, when they occur, they take place at various points in the process.

The ADA process follows this same general framework, but it is different in two important ways relevant to procedural justice. First, the ADA *requires* the parties to engage in an "interactive process" to discuss accommodation possibilities. The interactive process imposes duties both on the employee (or applicant) and the employer. The employee may sacrifice her claim if she does not disclose her disability and request an accommodation, or if she does not participate appropriately in discussions about accommodation options. Similarly, the employer has a duty to talk to the employee about possible accommodations once it learns about a disability

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[5] ADEA, 29 U.S.C. § 626(d). Leaving some detail aside, the time limit is 180 or 300 days from the date of the challenged decision. The longer limit applies if there is a state discrimination agency. Id. State tort statutes of limitations generally provide 2–6 years to file a lawsuit.

[6] Id.

[7] Age Discrimination in Employment Act (includes concurrent charges with Title VII, ADA and EPA) FY 1997 – FY 2008, http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm.

[8] ADEA, 29 U.S.C. § 626(d).

[9] There is no explicit sanction for a party who refuses to participate in the conciliation process. The consequence is simply that the case proceeds to the next step in the procedure, generally either abandonment of the claim by the employee or the filing of a lawsuit.

that might require them.[10] No requirement like this is in any of the other federal discrimination laws, including the ADEA.[11]

Second, cutting in the other direction, the ADA imposes significant restrictions on the kinds of conversations that can take place. Unlike other discrimination statutes, the ADA specifically prohibits an employer from asking about an individual's disability status.[12] This deserves a small discussion since there is considerable popular confusion about this issue under other statutes. The conventional wisdom is that employers violate discrimination statutes if they ask about any protected status, for example, they violate Title VII if they ask about an applicant's race or sex or the ADEA if they ask about an applicant's age. This is not true. Except for the ADA, the discrimination statutes only prohibit employers from *relying* on protected statuses; the statutes say nothing about whether one can ask about them. As a prudential matter, of course, it makes sense that employers should be wary about asking something they cannot rely on; asking removes one possible defense to a claim of discrimination (that the employer did not know of the claimant's protected status).[13] But prudence is not law. Only the ADA *legally* prohibits employer inquiries about protected status.

Even under the ADA, however, the employer can ask questions that are closely related to ability to do the job, even if the questions may screen out certain individuals with disabilities. For example, an employer can say that the job requires one to do X (for example, lift 25-pound boxes and place them on an assembly line) and ask applicants if they can perform that function. Most applicants would probably say "yes," but some might disclose at that point that they have a disability and could do it only if provided with some type of accommodation. That is a common way for the interactive process to begin. But the point here is that the ADA imposes specific limitations on the substance and structure of the conversation that can take place about disability-related matters. Again, there is no specific limitation like this in other discrimination statutes. Under those statutes, it is probably not prudent to ask questions about irrelevant matters, but it is not illegal to do so as it is under the ADA.

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[10] This is the majority rule, although two circuits do not think employers have an independent, enforceable obligation to engage in the interactive process. Even in those Circuits, however, employers are advised to engage in an interactive process in good faith. For good discussions, see Rosenthal (2007) and Autry (2004).

[11] Ironically, the interactive-process requirement is there because the ADA imposes a *weaker* nondiscrimination obligation on employers than the ADEA. Under the ADEA, it is illegal to use age to make an employment decision. Period. As a result, there is less to talk about. Under the ADA, on the other hand, employers are *required* to consider disability in making many employment decisions (that is, they are required to make accommodations) and talking about the nature of the disability and the job is necessary to ensure the proper type of consideration. See Schwab and Willborn (2003).

[12] ADA, 42 U.S.C. § 12112(d).

[13] Commonly, of course, an applicant's protected status is so obvious that not asking about it provides little defense anyway.

The ADA also imposes limitations on the extent to which employers can gather and share disability-related information with others in the company, including co-workers and supervisors. Employers can gather such information only if it is "job-related and consistent with business necessity"[14] and can share it only with supervisors and managers who need to know it to facilitate necessary accommodations.[15] As I will discuss later, this may have implications on the extent to which these other groups evaluate the acceptability of actions taken under the ADA umbrella.

In sum, legal compulsion is the key difference between the general structure of conversations under the ADEA and the ADA. Under the ADEA, no discussions between employer and employee are required. But at the same time, such conversations are not prohibited. It is a good practice for employers to have internal dispute resolution mechanisms and those mechanisms often lead to discussions about how to resolve the dispute. Thus, although the legal structure does not *require* pre-lawsuit discussion, such discussions certainly occur in some, if not many, cases. In other cases, they do not occur.[16] We do not know how many cases fall into either category. All we know is that either option is possible. Under the ADA, on the other hand, early and meaningful discussion is a legal requirement. It ought to occur in every case. As I will discuss later, this may have implications for relative perceptions of procedural justice under the two statutes.

Groups and the Age and Disability Laws

Group consciousness is central to perceptions of procedural fairness. The perceptions of employers may differ from those of persons claiming discrimination which may differ from those of co-workers; perceptions may depend on the perceived social dominance of one's group; the perceptions of decision-makers may differ from those of decision-recipients; in-group and out-group perceptions may differ.

In this section, I will talk about some permutations of group consciousness under the age and disability laws. Again, there are commonalities between the relevant groups under the age and disability laws; in general terms, both include employers, people claiming discrimination, and co-workers. Also, importantly, in both situations the law is a central force not only in influencing group perceptions, but also in constructing the group consciousness itself. But on other important dimensions, the two discrimination regimes are likely to construct and influence group consciousness differently.

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[14] ADA, 42 U.S.C. § 12112(d)(4)(A).

[15] ADA, 42 U.S.C. § 12112(d)(3)(B).

[16] A common recommendation of some employee relations professionals is not to tell employees why an adverse employment decision is made. The theory is that giving reasons merely opens the door to disagreements and legal challenges. So not talking about the reasons for adverse employment decisions is probably not uncommon, especially when there is some possibility that the decision might be challenged on discrimination grounds.

Thinking about three broad groups provides a starting point for analysis: (1) those protected by the age and disability laws; (2) employers subject to the laws; and (3) co-workers interested in how others are treated under the age and disability laws.

But thinking about groups gets complex quickly and that is very true in thinking about groups protected by the age and disability laws. Beginning with the ADEA, it contains a back-handed distinction between young and old: only those at least 40 years old are protected by the Act.[17] But the Supreme Court has made clear that the ADEA protects only the old against the young and not the reverse, so individuals who are over 40 years old (and, therefore, within the protected class) are *not* protected if their only claim is that they are treated less favorably than people older than them.[18] This means that a simple young/under-forty versus old/forty-and-over dichotomy is not an appropriate way to think about the groups created by the ADEA. On the other hand, that dichotomy is the *only* permissible way to make out an age-based disparate impact claim in the Second and Eighth Circuits.[19] If that were not the case (and it may not be in every circuit), an almost infinite variety of age groups would be permissible under the Act – theoretically one could compare any group of "older" workers (over age 40, between age 50 and 60, over age 60, etc.) with any group of "younger" workers (under age 40, between ages 40 and 50, under age 55, etc.).[20] Thus, the ADEA helps construct a certain kind of group consciousness about age, but the precise groupings are vague and unsettled.

The group consciousness constructed and reflected by the ADA is even more ambiguous and uncertain than that under the ADEA. First, disability is less unidirectional than age. Unlike age where over time people gradually fall ever more firmly into the protected class, people can enter the class of individuals with a disability at any time (for example, through accident or injury) and many also exit the class. The ADA Amendments of 2008 have provisions that cut both ways on this dimension. On the one hand, the Amendments define a "transitory" impairment as one lasting 6 months or less.[21] This amendment was designed to expand coverage to include conditions which were not impairments before because the condition would disappear within a relatively short time (for example, within 6–12 months). Thus, under the new language, many people will be "individuals with disabilities" only temporarily, resulting in more who will exit the protected group. On the other hand, the Amendments provide that impairments that are episodic or in remission continue to qualify as disabilities even if they are not currently active.[22] Thus, on this dimension, people who formerly might have shifted in and out of the protected category

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[17] ADEA, 29 U.S.C. § 631(a).

[18] General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004).

[19] Lowe v. Commack Union Free School District, 886 F.2d 1364 (2nd Cir. 1989); EEOC v. McDonnell Douglas Corp., 191 F.3d 948 (8th Cir. 1999).

[20] For a discussion, see Paetzold & Willborn (2009).

[21] ADA Amendments Act of 2008, § 4(a), codified at, 42 U.S.C. § 12102(3)(B).

[22] ADA Amendments Act of 2008, § 4(a), codified at, 42 U.S.C. § 12102(4)(D).

as their condition changed will now be within the category permanently regardless of the current active or inactive state of their disability.

Second, disability is less unidimensional than age. Disabilities are extremely variable on many dimensions, such as type (for example, physical, mental), severity, duration, affect on ability to work, etc. Group consciousness is likely to be affected by these types of variability in a number of ways. On some issues there may be pan-disability consciousness, but on others it may well be that there is little sense of commonality between, for example, individuals with physical disabilities and those with mental disabilities, or those with mobility versus vision limitations, or mental retardation versus learning disabilities.

Third, the disability rights "movement" is composed of many different subgroups with different goals, motivations, and ideologies. This is true of most interest groups, but here there may well be even a greater number of more diverse factions. Certainly, there is no single, largely representative group that immediately comes to mind, as AARP does for those protected by the ADEA. Sam Bagenstos has written insightfully about the different political and ideological currents that animate the disability rights movement (Bagenstos, 2003, 2009).

In sum, both the ADEA and the ADA produce and reflect very complicated notions of group consciousness among those protected by the Acts. For both, but especially for the ADA, multiple "groups" are possible which may have very different views depending on the particular issue or circumstance. As I will discuss later, this may have implications for perceptions of procedural justice under the two statutes.

Employers are another group relevant to notions of procedural justice. Matters are less complicated here, but not uncomplicated. In modern employment, "employer" is a general term that might cover everyone from one's immediate supervisor to the president of a large, international company. Where the "employer" fits within this hierarchy or, maybe even more importantly, where the affected employee situates her "employer" within this hierarchy, may well affect the employee's perception of procedural justice. The "employer" placement in the hierarchy may affect employee perceptions on factors such as ability to control the decision, social dominance, and standing within or outside the group. And these, of course, are all factors influencing perceptions of procedural justice. More about that later, too.

Finally, co-workers are another group that may be affected differently by the findings of the procedural justice literature depending on how the group constitutes and views itself. There are several broad distinctions that can be made. Consider some possibilities:

- Co-workers may be in the same or a different protected group category as the affected employee. Thus, a co-worker may also be someone within the age group protected by the ADEA or may also be an individual with a disability under the ADA.
- Co-workers may be more closely aligned with decision-makers (the "employer" at some level in the hierarchy) or with decision-recipients (the affected employee).

- Co-workers may be more closely associated with higher- or lower-status groups at the particular workplace.

Commonly, there will be “co-workers” who fall into all these groups. That is, some will be within the age group protected by the ADEA, and some not. Some will be individuals with disabilities (known or unknown to the employer and other co-workers), and others will not be. Some will be supervisors or some other category of “employer,” and others will not be. In this common situation, any overall evaluation of the perception of procedural justice for co-workers as a group will necessitate either treating different subgroups of co-workers separately or applying some mechanism for summing their perceptions.

Thinking About Procedures and Groups Under the ADEA and the ADA: Implications for Research on Procedural Justice

The types of procedures and groups described above may have implications for perceptions of procedural justice under the ADEA and ADA. The procedural justice literature makes claims about the effects of voice, decision control, and group value on perceptions of fair treatment.[23] But in each area, the details of the ADA and ADEA may affect the particular implications of the procedural justice claim. The differences between the statutes point the way for more social science research and, perhaps, to statutory design that can better achieve the fairness goals of statutes like these. In this section, I will discuss each of these areas in turn.

Voice

The procedural justice literature finds voice to be one aspect of fair treatment that influences satisfaction. People tend to be more satisfied with a particular process, regardless of the outcome, if they have had a chance to present information (Heuer, 2010). How might this apply to age and disability discrimination?

First, given the legal structure discussed earlier, one might expect there to be more satisfaction with the disability laws than with the age discrimination laws. As discussed earlier, voice is required under the ADA, but not under the ADEA. But it would be interesting to explore whether the legal compulsion itself has any effect on perceptions of procedural justice. Several possibilities seem plausible. For example:

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[23] Heuer (2010). In each case, the main effect of voice, decision control and group value may be moderated by factors such as deservedness, decision location, and group connectedness. *Id*. I will include those moderators in my discussion.

- It may be that people discount the procedure and, thus, feel *less* fairly treated if they know that the conversation is legally required. Or it may be that they feel less fairly treated with legally required voice compared to voluntarily provided voice, but more fairly treated as compared to no voice. Or it may be that the legal compulsion has no effect whatsoever.
- It may be that the conversation itself is affected in certain ways by the requirement that it take place which, in turn, may affect perceptions of procedural justice. A supervisor going through a legally required checklist may do little to improve perceptions of fair treatment (in fact, it may cut in the opposite direction), or the positive effect may survive despite the legal compulsion.[24]
- It may be that even though the conversation is legally required, the employee doesn't know this, so her perceptions are unaffected. Or maybe having only one side (the employer) know about the legal compulsion is sufficient to affect these perceptions.

In addition, we do not know much about the impressions of others in these particular "voice" circumstances. For example, do supervisors who are required to engage in discussions under the ADA come to perceive that statute as fairer than supervisors under the age discrimination statute who either engage in such discussions even though they are not legally required to do so or who do not have such discussions at all before making employment decisions? Or, given the research indicating that the fairness perceptions of decision-makers are less influenced by procedure than those of decision recipients (Heuer, 2010), are the perceptions of supervisors simply unaffected by these types of discussions or non-discussions? This last question also raises interesting questions for co-workers of various types who are neither decision-makers nor decision-recipients. Are their perceptions of fair treatment modified at all by the procedural variations in these statutes?

The procedural justice literature also finds that notions of deservedness may moderate the extent to which these procedural variations affect fairness perceptions. The general findings on deservedness are that fairness perceptions are moderated by one's views about the perceived match between the procedure one deserves and the procedure one receives (Heuer, 2010). The procedural differences between the ADA and the ADEA provide an interesting, but complex context for exploring this hypothesis. Again, the ADA requires a pre-decision discussion with the individual with a disability; the ADEA permits but does not require a pre-decision discussion. First, considering only the ADA, are perceptions of fairness moderated by the extent to which the individual with a disability "deserves" the required discussion? For example, are perceptions of fairness higher if the disability is obvious and/or not self-caused? And is that true (and true to the same extent) across all the relevant groups, including the decision-recipient, other individuals with disabilities,

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[24] This, in turn, may depend on the employer/supervisor's response to the legal compulsion. A grudging, rudimentary compliance may do little good; on the other hand, an employer may embrace the legal requirement as good personnel practice, which may produce a different type of compliance and different perceptions.

supervisors, and co-workers? Second, comparing those results (whatever they are) to the ADEA, are perceptions of fairness affected by the extent to which the procedure is "deserved"?[25] Here, the ADA pre-decision discussion is required whether "deserved" or not; the ADEA pre-decision discussion, since discretionary, might be perceived as more closely matched on "deservedness." Does that matter? Does it matter across all relevant groups?

Decision Control

Decision control is another factor influencing perceptions of procedural justice. Regardless of outcome, participants in a process tend to be more satisfied when they have some control over the ultimate decision (Heuer, 2010).

On this dimension, the age and disability laws are not dissimilar. A major effect of both is a significant change in the locus of control over decisions affecting individuals protected by the statutes. Most directly and bluntly, when employees win ADA or ADEA lawsuits, they have asserted their ability to control decisions that otherwise would have been the employer's alone.[26] Stepping back, and perhaps more relevant to the procedural justice point, even when employees lose lawsuits, the statutes permit them to have become a central part of the decision-making process. Stepping back further, even in the absence of a lawsuit or even the hint of one, the discrimination laws remove some control over employment decisions from employers and allocate it to employees.

Again this presents several interesting issues about the operation of discrimination laws that, to my knowledge, have not been explored. For example:

- Does mere knowledge of enactment of a law that re-allocates decision control improve perceptions of fair treatment among employees? If so, to what extent is that improved perception of fair treatment independent of perceptions arising from the substantive protections of the law?
- To what extent does *asserting* decision control affect perceptions of fair treatment? For example, *ceteris paribus*, do employees who lose discrimination lawsuits (and, hence, receive the same ultimate outcome) feel more fairly treated

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[25] The deservedness inquiry is necessarily two-sided. One side is the extent to which the decision-recipient deserves a certain procedure and the other is the extent to which the procedure itself matches that level of deservedness. My first point focuses on the deservedness of the decision-recipient. The second on the extent to which the procedure received is perceived to match that deservedness.

[26] Similarly, this is also true when employees have prevailed in an arbitration or other alternative dispute resolution (ADR) mechanism. ADR is increasingly common in the American workplace and it also raises interesting questions on this dimension. For example, is there a difference in perceptions of decision control, positive or negative, if the decision control is exercised through ADR instead of litigation?

than employees who have not attempted to assert decision control through a lawsuit? Is the effect the same for various forms of alternative dispute resolution, such as arbitration and mediation? Or for settlements?

- How aware do employees need to be of re-allocation of decision control before perceptions of fair treatment improve? After all, only substantive protections are an explicit component of these discrimination laws; shifting of decision control is only implicit and fairly subtle.
- How dependent on outcomes are continued perceptions of fair treatment? For example, would those perceptions persist among employees even if the outcomes were consistently adverse? [27]

This also raises interesting issues about other groups interested in the decisions covered by the discrimination laws. Decision control may be a zero-sum game. When discrimination laws re-allocate some control from employer to employee perhaps improvements in fairness perceptions among employees (to whom decision control is allocated) are offset by reductions in fairness perceptions among employers (who lose some decision control).[28] Certainly, employers complain loudly about their loss of control whenever employment statutes are being debated. On the other hand, it may be that certain re-allocations of decision control can improve overall satisfaction. Up to some point of increased employee control, increases in employee fairness perceptions may not be matched with equivalent employer reductions. Findings indicating that decision-makers are less influenced by notions of procedural justice than decision-recipients support this view (Heuer, 2010). If this is the case, it may be that there is an allocation of decision control that maximizes

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[27] Plaintiffs in employment discrimination cases tend to fare much worse in the courts than plaintiffs in other types of civil cases. A recent study made the following conclusions:

> [E]mployment discrimination plaintiffs . . . must swim against a strong tide – in the federal district court and on appeal. Findings for these cases compared to other civil cases include fewer early terminations and more trials; lower success rates for plaintiffs by settlement and lower plaintiff win rates at pretrial adjudication and trial, especially judge trial; and more appeals . . . . For the prime example of continuing adversity, defendants in the federal courts of appeals have managed over the years to reverse 41% of their trial losses in employment discrimination cases, while plaintiffs manage only a 9% reversal rate. The most startling change in the last few years' data is the substantial drop of almost 40% in the number of employment discrimination cases in the federal district courts (Clermont & Schwab, 2009).

[28] Similarly, the perceptions of co-employees may come into the equation. This has been especially obvious in cases in which the issue is whether reassignment to a vacant position is the requested accommodation, even though another employee would get the position absent the accommodation. Compare, e.g., EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1029 (7th Cir. 2000) ("the ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant;" to do so would be "affirmative action with a vengeance") with Smith v. Midland Breke, Inc., 180 F.3d 1154, 1166 (10th Cir. 1999) ([t]he disabled employee has a right in fact to the reassignment, and not just to the consideration process leading up to the potential reassignment).

satisfaction across all of the affected groups. This is reminiscent of economic efficiency. Exploring these types of trade-offs would certainly be an interesting line of research.

Group Value Theory

Voice and decision control offer an instrumental explanation for increased fairness perceptions; even if the outcomes are unfavorable, participants provided voice and decision control perceive the process as fairer because they had opportunities to affect the substantive decision. Group value theory arose out of experiments in which the decision had already been made before the participants were asked for input. Even in that circumstance, perceptions of fair treatment increase. The theory is that participants care about their groups and even asking for input after the fact evidences trust and respect for the group, resulting in improved perceptions (Heuer, 2010).

The age and disability laws themselves are interesting when viewed through group value theory. First, the disability cases should seldom present good examples to test the theory. As discussed above, the ADA *requires* a discussion *before* an accommodation decision is made. It may well be that these discussions improve fairness perceptions because of group value instead of instrumental factors, but the structure of the ADA makes it difficult to separate the possible reasons. On the other hand, both types of cases are likely to arise under the ADEA, that is, those where the relevant conversations take place before and after the relevant decision. No predecision discussion is required by the ADEA. Thus, it might be possible under the ADEA to tease out the separate contributions of group value versus instrumental considerations.

But, more importantly, group value theory raises again, and perhaps more starkly, the difficult issue of groups, especially under the ADA (and, to a lesser extent which I will not discuss here, under the ADEA). First, group value theory postulates improved perceptions because of the trust and respect shown to one’s valued group. But just what is that “valued group” under the ADA? Every ADA accommodation presents a plethora of possible ways to define the “valued group” receiving the relational benefits of the procedure: Individuals with the same specific type of disability accommodated (e.g., a mobility impairment requiring a wheelchair); individuals with that general type of disability (e.g., all types of mobility impairments); all individuals with disabilities; all employees except supervisors; all employees including supervisors; and so on. There may also be a variety of other groups whose perceptions can be affected under the same theory, but in the other direction. For example, individuals without disabilities who need to work closely with the accommodated individual may view themselves as a “valued group” which has not been a part of the process and, hence, perceive lower group trust and respect.

Professor Heuer argues that the only issue with this theory is the “magnitude of the effects rather than their presence,” implying that the effects will all be positive (Heuer, 2010). I do not doubt that there will be process effects, but I do doubt that they will all be positive. Where there are many "valued groups" operating in competition for scarce resources, group value gains for one group may well be offset by group value losses by another group. This is supported by research by Ramona Paetzold and colleagues. In experiments, they found that co-workers were likely to find it unfair when employers granted accommodations to persons with disabilities and that the perceptions of unfairness *increased* when the person with a disability subsequently excelled in performance. Ironically, this may mean that more successful accommodations are likely to increase the dissatisfaction of co-workers (Paetzold et al., 2008).

This research indicates that, as with decision control, it may be that fairness perceptions are a zero-sum game, so that the net effect will always be close to zero, or it may be that there are particular processes that can maximize overall perceptions of fairness. If the latter, one will also have to determine how to weigh the perceptions of different groups against each other. Since the ADA was enacted to attend to the needs and interests of individuals with disabilities, perhaps the perceptions of those groups (however delineated) should be weighted more heavily than those of other groups. But discounting certain preferences in this way has been a controversial topic in similar contexts (see, e.g., Donohue, 1989).

Conclusion

This discussion indicates that most current research on procedural justice, while very interesting and valuable, turns out to be too general to be of much use in evaluating the precise implications of the research for particular statutes, such as the ADEA and the ADA.[29] The research simply is not fine-grained enough to account for these particular procedures and the complicated interest groups that are produced and affected by these laws. On the other hand, the ADA and the ADEA and, in particular, their procedural differences open up a host of interesting, intriguing, and important research opportunities. Well-constructed experiments could tell us much more than we know now about perceptions of justice under these and other discrimination laws.

This would not only be of academic interest, but it could also make an important contribution to achievement of the important social goals embedded within discrimination laws.[30] After all, a principal goal of these laws is to improve public perception of the basic fairness and justice of employment relations in the United States. This line of research promises a better understanding of how that goal can

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[29] One exception is Paetzold et al. (2008), which, although a modest experiment, does tell us something specific about procedural justice and ADA accommodations.

[30] That is, the procedural justice research could begin to guide public policy on discrimination issues. This has begun to happen with another important strain of social science research – behavioral economics – and broader knowledge and acceptance are the only barriers to a similar result here. See supra note 2.

be furthered. In other areas, social science findings have been incorporated into law and are making real improvements in the world. With more development closely tied to the actual structure of discrimination laws, that could happen here, too. And that would be a good thing both for researchers in this area and for the ability of the discrimination laws to achieve their important goals.

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Chapter 13
A Social Psychological Perspective of Disability Prejudice

Sarah J. Gervais

Think of a woman. Are you thinking of someone with long hair? Are you thinking of someone who is short? Are you thinking of someone with a large chest and a small waist? If I asked each reader about the picture that came to mind, the details would vary, but the overall descriptions would probably be similar in many regards. Now, think of someone with a disability. Are you thinking of a paraplegic in a wheelchair? Are you thinking of a pregnant woman? Are you thinking of an autistic savant? Are you thinking of someone with schizophrenia? Or are you thinking of someone entirely different? If I asked each reader about the picture that came to mind for people with disabilities, their descriptions would probably widely vary.

This simple exercise illustrates the variability of types and degrees of disability, particularly compared to other commonly studied social groups (e.g., gender, race, age). Specifically, disabilities vary in type, from being mostly physical (e.g., blindness) to mostly mental (e.g., schizophrenia). Even within physical and mental disabilities, there is considerable variability. Someone with visual impairments (e.g., blindness) may be perceived differently than someone with hearing impairments (e.g., deafness). Similarly, someone with schizophrenia may be perceived differently than someone with depression. Disabilities also vary in degree, from being a minor nuisance (e.g., having colorblindness) to being a major impediment (e.g., having complete blindness). As a result of disabilities varying in type and degree, it is not surprising that people's prejudice[1] toward disabled people may also vary, depending on the type and degree of disability. Importantly, both Chapter 3 by P. Blanck (this volume) and Chapter 7 by M. Selmi (this volume) suggest that the type and degree of disability prejudice has important legal implications.

Considering the historical, economic, political, medical, and social context, Chapter 3 by P. Blanck (this volume) considers the prejudice toward disabled people over time. Blanck links disability prejudice to three eras in which laws were passed

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[1] To simplify, I use "prejudice" as a general term to represent the cognitive (i.e., stereotyping), affective (i.e., prejudice), and behavioral (discrimination) processes that underlie intergroup bias unless otherwise noted.

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to provide financial support for people with disabilities, including the American Civil War pensions for veterans with disabilities, the Disability Pension Act of 1890, and the American Disabilities Act of 1990 (ADA). Over time, the laws adopted more inclusive notions of disability. For example, the pensions that resulted from the American Civil War were intended for veterans with disabilities, whereas the Disability Pension Act of 1890 included all disabled people, regardless of whether they were veterans or not. Although the historical context and specific laws differed in several important regards, Blanck notes that during the eras in which all three laws were passed, the public (particularly the media) viewed many disabled people as malingers and frauds; they were people without actual disabilities trying to benefit financially from the disability laws. Furthermore, people with mental disabilities and lesser known disabilities were particularly likely to be viewed as malingerers.

Chapter 7 by M. Selmi (this volume) focuses exclusively on the ADA. He notes that the ADA was passed to accomplish two objectives. It sought to provide more jobs for people with disabilities and to integrate people with disabilities into the workplace. It also sought to reduce the stigma attached to disabilities. Selmi also notes that these two aims are interrelated, "a central stigma of disability is that individuals are unable to work, are incapable of being productive members of society" (p. 124). In his consideration of the ADA, Selmi notes two problems. First, the ADA sought an expansive definition of disability in order to transform societal notions of disability. Just as the Disability Pension Act of 1890 expanded the definition of disability to include veterans and non-veterans, the ADA expanded the definition of disability to include many different types and degrees of disability. One problem with adopting such a broad definition of disability is that determining whether one is disabled or not becomes problematic, "There are many conditions that we as a society would recognize as a disability, what might be defined as traditional or core disabilities, but beyond that core, there is far less agreement on what constitutes a disability" (pp. 125–126).

Because the definition of disability is broad, identifying the stigma associated with disability involves identifying the many prejudices that people may hold toward people with different disabilities. Selmi notes that "it is impossible to talk with any meaning about the stigma of disability but instead we need to consider what I refer to as the stigma of disabilities. A point that has been made many times bears repeating – disability is a heterogeneous condition that lacks a unifying theme and which makes the concept of disability quite different from other antidiscrimination categories" (p. 125). In conclusion, Selmi notes that when considering disability prejudice, it is necessary to identify the particular disability and the accompanying stigma.

Overview of the Current Work

It is clear that the type and the degree of disability influence disability prejudice. What is unclear, however, is *when* and *how* different types and degrees of disability influence disability prejudice. According to Blanck and Selmi's discussions, because of the heterogeneity of disabilities, the law must separately consider each disability and identify the idiosyncratic stigma associated with that disability. Social psychological theories of prejudice may shed light on the when and how prejudice may be displayed toward people with disabilities. In this chapter, I apply social psychological theories of prejudice to identify the common dimensions that may underlie disability prejudice. Specifically, I consider (1) when people may experience disability prejudice and (2) what form disability prejudice may take. During my discussion and my concluding remarks, I tie these considerations back to Blanck and Selmi's discussions of the legal and policy implications of disability prejudice.

When Might People Experience Disability Prejudice?

Like the law, disability prejudice has received considerably less attention than other group-based prejudices (e.g., racism and sexism) within social psychology. Dual models of person perception (e.g., Brewer, 1988; Fiske & Neuberg, 1990), however, shed light on when people may experience disability prejudice and the form disability prejudice may take. Generally speaking, dual process models of person perception suggest that during initial person perception, attention goes to the defining features of a person. The defining features tend to be those features that differ from the "typical" person. When people are asked to think about a typical person in Western cultures, an able-bodied, young, heterosexual, white man tends to come to mind (Zárate & Smith, 1990; see also Stroessner, 1996). Thus, attention goes to the breasts, waists, hips, hair, and babyish facial features of women (Zebrowitz & Rhodes, 2002) and the skin tone, hair texture, and broad facial features of Blacks (Levin, 1996; Livingston & Brewer, 2002) because both women and Blacks deviate from the normative person. Extending these findings to disability, attention likely goes to indicators of disability. A paraplegic's legs and wheelchair, for example, likely capture attention.

Attention to physical features provides the basis for social categorization. Social categorization is a split-second decision process in which people are sorted into meaningful social categories based on defining physical features (Fiske & Neuberg, 1990; Tajfel, 1969). As an example, because height is a defining physical feature for men and women, shorter people tend to be categorized as women. Similarly, because the disability is the feature differentiating disabled people and able-bodied people, people in wheelchairs may be categorized as disabled. Once categorized, within group similarities and between group differences are accentuated (Allport, 1954; Hensley & Duval, 1976; Oakes, Haslam, & Turner, 1994; Tajfel, 1981; Taylor, Fiske, Etcoff, & Ruderman (1978). Paraplegics, for example, may be viewed as very similar to other paraplegics and very different from people who can walk.

Social categorization provides the basis for prejudice (i.e., specific cognitions, emotions, and behavioral tendencies toward different groups, see Macrae & Bodenhausen, 2000, for review). For example, once a disabled person is categorized as having a disability, thoughts of disabled people as helpless and slow may come to mind. Consequently, the paraplegic is perceived as helpless and slow, regardless of actual characteristics (see Ashmore & del Boca, 1979). In this way, categorization allows people quickly and effortlessly to *simplify* – all disabled people are similar – and to *elaborate* – all disabled people have similar personalities, traits, attitudes, goals, values, and behaviors – their social worlds.

Within any group of people (e.g., disabled people, Black men, White women), there are individual differences in the degree to which a particular individual differs from the normative person and this influences categorization processes. For example, Blacks vary in the degree to which they differ from Whites. Blacks with dark skin, broad noses, and wide lips have more stereotypic features and differ more from Whites than Blacks with light skin, narrow noses, and fine lips. As a result, Blacks with more stereotypic features tend to be categorized faster than Blacks with less stereotypic features (e.g., Maddox & Gray, 2002). Blacks with more stereotypic features also tend to be stereotyped to a greater degree than Blacks with less stereotypic features (Blair, Judd, & Fallman, 2004; Blair, Judd, Sadler, & Jenkins, 2002). Finally, more negative emotions tend to be directed toward Blacks with more stereotypic features than Blacks with less stereotypic features (Livingston & Brewer, 2002).

Extending these findings to disability, disabled people with more stereotypic features differ from the normative person because they differ from able-bodied people. For example, a quadriplegic who uses her wheel chair to move around, differs from an able-bodied person, who uses her legs to move around. Someone with a broken leg and who uses crutches to move around may still differ from an able-bodied person, but less so than a quadriplegic. A paraplegic may fall somewhere in between. A paraplegic may be less stereotypically disabled than a quadriplegic, but more stereotypically disabled than someone with a broken leg.

Similar to race prejudice, the degree to which one possesses a stereotypic disability may affect the degree of disability prejudice. Generally speaking, people tend to easily categorize and direct prejudice toward more stereotypic people. Consistent with this notion, Chapter 7 by M. Selmi (this volume) suggests that stereotypic disabilities and prejudice are well understood, but as they become less stereotypic, there is much less agreement as to what constitutes a disability and disability prejudice. From a psychological perspective, however, people should display prejudice toward people with less stereotypic disabilities in predictable ways. As people become less stereotypic, others may have difficulty categorizing them as disabled and may not direct prejudice toward them. Thus, people may view someone with a broken leg and crutches as less stereotypic than someone in a wheelchair and personalize them, rather than categorize them as someone with a disability. Similarly, people may view someone in a wheelchair as less stereotypic than someone with no mobility and categorize the person in a wheelchair less so than someone with no mobility.

An important caveat is warranted here. Although scholars may speculate about how people with different types and degrees of disability may be categorized, very little research has examined whether the same principles that underlie gender, race, and age categorization also underlie disability categorization. Because of the heterogeneity of disabilities, it is likely that similar principles apply to some types and degrees some disabilities, but not others.

One feature that may influence disability categorization is the degree to which the disability is visible. Gender, race, and age tend to be the basis for categorization because they are highly visible (Fiske & Neuberg, 1990). Extending this to the current work, people with disabilities that are highly visible may be similarly categorized. As an example, people in wheelchairs may be easily categorized as disabled. Other physical disabilities, such as having a hearing impairment, however, may be less visible. As a result, people with hearing impairments may not be categorized. If people have some physical indicator of their impairment (e.g., a hearing aid), however, they may be categorized similarly to people in wheelchairs.

Because people are categorized along dimensions that are highly visible, people with mental disabilities may be less likely to be categorized than people with physical disabilities. For example, someone with depression may be less easily categorized than someone in a wheelchair. For many people, there are few visible indicators of depression. Importantly, features that are associated with mental disabilities may also be attended to and used as a basis for categorization and prejudice. Although they may be concealed for a time, people may still search for indicators of mental disabilities (e.g., the presence of medication) in the same way that they initially attend to indicators of physical disabilities. However, given that mental disabilities are considered to be less stereotypic disabilities, when claiming prejudice, people with mental disabilities may have more difficulty. Consistent with this notion, Blanck found that mentally disabled people are often not considered impaired enough to be disabled. Furthermore, because mental disabilities are often concealable, mentally disabled people may also suffer from taking extensive efforts to keep their stigma hidden (Quinn, Kahng, & Crocker, 2004). In summary, theories and findings suggest that disability prejudice may depend on the degree to which one possesses a stereotypic disability. How then, might people with more or less stereotypic disabilities be treated?

One of the purposes of the ADA is to reduce the stigma associated with having a disability. Traditionally defined as “bodily signs designed to expose something unusual and bad about the moral status of the signifier” (Goffman, 1963, p. 1), stigma has been conceptualized as including three types: (1) tribal stigmas (e.g., membership in a devalued ethnic group), (2) abominations of the body (e.g., physical deformities and disabilities), and (3) blemishes on character (e.g., addiction). Often times, physical disabilities may be categorized as abominations of the body. Because of the lack of understanding about mental disabilities, however, people with mental disabilities may be categorized as abominations of the body, but they may also be categorized as blemishes of character. For example, people without an understanding of the biological and social causes of mental illness may view someone with depression as lazy and violating work ethic values. Furthermore, one could imagine an interactive effect of these categories. When African Americans have depression, one could imagine that they may be characterized by both having a tribal stigma and a blemish of character, due to stereotypes that Blacks and people with depression are lazy.

As Chapter 3 by Blanck and Chapter 7 by M. Selmi (this volume) note, the ADA could effectively integrate people with more stereotypic disabilities into the workplace and reduce disability stigma and prejudice. However, there may be some barriers to doing this. For example, one important consequence of being stigmatized is that people may view people with stereotypic disabilities exclusively in terms of their disability. Theorists have suggested that stigmas are often conferred with master status, such that people are conceived solely in terms of their stigma (Frable, Blackstone, & Scherbaum, 1990). Thus, a worker who is blind may be categorized as a blind worker, rather than simply a worker, leaving the category and associated stigma intact.

Because people with less stereotypic disabilities may not even be categorized as having a disability in the first place, they are less likely than people with more stereotypic disabilities to experience disability prejudice. Someone with a broken leg, for example, may experience problems moving around, but they are less likely to be perceived as helpless than people with more stereotypic disabilities. Furthermore, having a broken leg may not interfere with productivity of someone who works on a computer all day.

If someone with a less stereotypic disability needs accommodations or experiences prejudice, however, there may be some ironic, hidden costs. Their employer may be less likely to provide accommodations under the ADA because the employer does not view the employee as having a disability in the first place. For example, is someone who controls their depression with medication disabled? Although they may have a mental disability without the medication, with the medication they may be viewed as less stereotypic. Treating depression, however, may be more complicated than simply taking anti-depressants. Anti-depressants may reduce the effects of depression, but they may not completely eliminate them. As a result, even people taking anti-depressants may need additional aid from employers. For example, they may need more flexible hours, so that they can attend weekly therapy sessions. Furthermore, judges and juries may be less likely to view someone with a less stereotypic disability as deserving of aid under disability law. Consistent with this notion, Chapter 3 by P. Blanck (this volume) found that after the American Civil War, veterans with lesser known disabilities were often considered malingers and denied pensions. Similarly, in the 1990s people with cancer were considered to be too healthy to be disabled (Chapter 7 by M. Selmi, this volume). If people are not categorized as possessing a disability to begin with, then they may be denied rights disability. Moreover, if people are categorized as possessing a disability that can be treated, then they may be denied rights if their treatments are not completely effective. Importantly, the ADA has adopted a more inclusive definition of disability than the general public holds. When judges and juries interpret the law, they are likely to fall back on their traditional conceptualizations of disability, and view people with less stereotypic disabilities as less deserving of disability rights.

In sum, whether people (1) experience disability prejudice and (2) benefit from the ADA may vary as a function of the degree to which they possess stereotypic disabilities. On the one hand, people with more stereotypic disabilities may be easily categorized and may experience prejudice. People with more stereotypic disabilities, for example, may be particularly likely to experience disability prejudice by being viewed exclusively as their disability. Because their disability is salient, people may focus only on the disability, ignoring other parts of the person. Importantly, however, people with more stereotypic disabilities may receive more aid and help from their employers because their disability is readily apparent. On the other hand, people with less stereotypic disabilities may not be categorized as having a disability in the first place. Because they are not readily categorized, prejudice may not necessarily follow. This could be costly for people with less stereotypic disabilities, particularly if they still experience prejudice. Employers, juries, and judges may have difficulty seeing how people with a less stereotypic disability could experience disability prejudice or should receive accommodations, given that they are not easily categorized as a typical person with a disability. Further complicating these issues, the degree to which one has a disability may influence whether one experiences disability prejudice or not, but different types of disabilities may also lend themselves to different types of prejudice.

What Does Disability Prejudice Look Like?

Early theories of prejudice sought to identify the types of prejudice that people held toward specific groups (e.g., women, Blacks, Jews; Katz & Braly, 1933; see also Devine & Elliot, 1995). Because the content of prejudice was assumed to be idiosyncratic and group-specific (e.g., Blacks are unintelligent, women are overly emotional, Jews are frugal), researchers then focused on the processes that underlie prejudice more generally (see discussion above, see also Brown, 1995; Fiske, 1998; Macrae & Bodenhausen, 2000). Recently, however, researchers have returned to examine the content of prejudice and have begun to identify universal dimensions that underlie prejudice toward different groups.

Three theories of prejudice content have been particularly influential. Cottrell and Neuberg (2005) introduced the Socio-Functional Threat-Based Approach to Prejudice. Specifically, they suggested that the prejudice directed at people from other groups depends on the specific threats that groups are presumed to possess. Specifically, they suggested that people may feel anger, disgust, fear, pity, envy, or guilt toward other groups depending on the threat they pose. For example, when people are threatened by contamination of an unpalatable object or idea, they should experience disgust and this should lead to avoidance or rejection of the disgust-provoking groups. Similarly, when people are threatened by obstacles and barriers to desired outcomes, they should experience anger and this should lead to aggression toward anger-provoking groups.

Similarly, Mackie, Smith, and colleagues (Mackie, Devos, & Smith, 2000; Smith, Seger, & Mackie, 2007) introduced the Intergroup Theory of Emotions. Building on appraisal theories of emotion (e.g., Lazarus & Folkman, 1984), they suggested that the appraisal dimensions that underlie the emotions that people experience on the individual level, may also underlie the emotions that people experience on the group level. Their approach is similar to Cottrell and Neuberg (2005), except they have primarily focused on anger and fear and the relationship between emotions and behaviors.

Finally, Fiske, Cuddy, Glick, and Xu (2002) introduced the Stereotype Content Model. Specifically, they suggested that the prejudice directed toward most groups is captured by the perceived warmth and competence of the groups. Although these theories differ in several regards, they all extend Allport's (1954) original conceptualization of prejudice as marked by antipathy and paint a much more nuanced picture of the prejudices (both negative and positive) that may be directed toward different groups. Additionally, they all suggest that certain universal dimensions underlie prejudice toward people from different groups. In this chapter, I focus on Fiske and colleague's model because it has been explicitly applied to disability prejudice.

Noting that similar dimensions may underlie seemingly idiosyncratic and group-specific prejudice, Fiske et al. (2002) suggested that when people meet others, they perceive others in terms of their social status and competitiveness. Specifically, people ask two questions when they meet people from other groups. First, they consider the potential harm or benefit of the group's goals. Second, they consider the degree to which the group can effectively pursue those goals. Groups that are perceived as competitors are stereotyped as cold, whereas groups that are perceived as cooperators are stereotyped as warm. Groups that are perceived as high in status are stereotyped as competent, whereas groups that are perceived as low in status are stereotyped as incompetent. Additionally, warmth and competence stereotypes predict four distinct emotional responses to other groups. Fiske and colleagues found that ingroups were perceived as warm and competent. As a result, people directed pride and admiration toward their ingroups. Second, poor people and welfare recipients were perceived as cold and incompetent. As a result, people directed contempt toward poor people and welfare recipients. Third, Jews, feminists, Asians, and business people were perceived as cold, but competent. As a result, people directed envy toward Jews, feminists, Asians, and business people. Finally, housewives and the elderly were perceived as warm, but incompetent. As a result, people directed pity toward housewives and the elderly. Fiske and colleagues replicated these findings from diverse samples inside and outside the US.

These stereotypes and prejudices form the basis for distinct types of discriminatory behaviors (Cuddy, Fiske, & Glick, 2007). Specifically, an active–passive dimension and a facilitation–harm dimension capture most behaviors. The active–passive dimension represents intensity. Behaviors falling on the active end of the continuum are more overt and effortful, like harassment. Behaviors falling on the passive end of the continuum are more subtle and effortless, like neglect. The facilitation–harm dimensions represent valence. Behaviors falling on the facilitation end of the continuum are more prosocial, like helping. Behaviors falling on the harm end of the continuum are more antisocial, like aggression.

Perceptions of warmth and competence and their related emotions (admiration, pity, contempt, and envy) reliably predict behavioral tendencies toward different groups. Cuddy et al. (2007), for example, found groups that experience admiration and pity elicited more active facilitation, whereas groups that experience more envy and contempt elicited more active harm. In other words, people are more likely to blatantly help and assist ingroups and people like the elderly, whereas people are more likely to blatantly harass or aggress against people like feminists and welfare recipients.

Cuddy et al. (2007) also found a consistent pattern of results on more passive and subtle behaviors. Groups that experience admiration and envy elicited higher passive facilitation while groups that experience pity and contempt elicited more passive harm. In other words, people are more likely to subtly and unknowingly assist ingroups and people like feminists, whereas people are more likely to subtly and unknowingly neglect people like the elderly and welfare recipients.

By crossing both warmth and competence perceptions, Fiske and colleagues went beyond idiosyncratic prejudices and identified prejudices that many groups may experience, depending on perceived social status and competitiveness. Furthermore, Fiske and colleagues linked all aspects of prejudice, showing that cognitive appraisals predict emotions (Fiske et al., 2002) and emotions predict discriminatory behaviors (Cuddy et al., 2007). Finally, going beyond classic definitions of prejudice that involved antipathy and hostility (e.g., Allport, 1954), Fiske and colleagues identified prejudice that may be ambivalent (see also Gaertner & Dovidio, 1986; Glick & Fiske, 1996; Katz & Hass, 1988; Swim, Aikin, Hall, & Hunter, 1995; Vescio, Gervais, Snyder, & Hoover, 2005). For example, envy and pity are both somewhat negative and positive. Feminists, Asians, and business people may be disliked, but they are still respected and envied. Similarly, housewives and the elderly are disrespected, but they are still liked and pitied.

An explanation for the often ambivalent nature of these stereotypes (e.g., being liked and disrespected at the same time) is that people tend to differentiate social groups on warmth and competence by contrasting them in a compensatory dimension (Judd, James-Hawkins, Yzerbyt, & Kashima, 2005). This compensation effect may result from perceptions of distributive justice (Kay & Jost, 2003) that encourage people to believe that every group in society possesses positive as well as negative characteristics. As a result, mixed stereotypes may be viewed as fair. Consistent with this notion, several studies demonstrate that when people judge two groups, one high and the other low on one dimension, the group presented as higher on the manipulated dimension is rated lower on the other one (e.g., Judd et al., 2005; Kervyn, Judd, & Yzerbyt, 2008; Kervyn, Yzerbyt, Judd, & Nunes, 2009).

Extending these findings to disability implies that the specific prejudice directed toward people with disabilities depends on the perceived social status and competitiveness associated with specific types and degrees of disabilities. Because of compensatory effects (e.g., Judd et al., 2005), people may be particularly likely to hold ambivalent prejudice toward people with disabilities. Though disability prejudice was not the main focus of Fiske and colleagues, they found that when participants were asked to list groups that are categorized in US society, 19% of respondents spontaneously listed people with physical disabilities (i.e., disabled people) and 16% of participants listed people with mental disabilities (i.e., retarded people, Fiske et al., 2002; see also Cuddy et al., 2007). They tended to rate people with both physical and mental disabilities as warm, but incompetent. Furthermore, along with housewives, elderly people, the blind, and housecleaners, people experienced pity and sympathy toward people with both physical and mental disabilities. It is interesting to note that people with physical disabilities were viewed as equally incompetent, but were sometimes viewed as colder than people with mental disabilities by adult, non-student samples, suggesting that people with some disabilities may elicit contempt, rather than pity. It is important to note that respondents did not spontaneously list people with mental illness. This may result from the heterogeneity of mental illness. For example, schizophrenia, depression, and post-traumatic stress disorder all constitute mental illnesses, but may be perceived as very different from one another.

The people with physical and mental disabilities that Fiske et al. (2002) examined represent a narrow range of people with disabilities. The term disabled people that Fiske et al.'s participants spontaneously generated likely represents people with typical physical disabilities (e.g., a person in a wheelchair or a deaf person). The term retarded people that Fiske et al.'s participants spontaneously generated likely represents people with low IQ or developmental disabilities (e.g., a person with Down syndrome). Because Fiske et al.'s model predicts prejudice on the basis of the universal dimensions of warmth and competence, however, predictions about prejudice toward disabled people with varying types and degrees of disability can be made. In a general sense, people with mental disabilities may be regarded as warm, but incompetent, whereas people with physical disabilities may either be regarded as warm, but incompetent, but also sometimes regarded as cold and incompetent.

Clearly, this broad distinction does not hold for all physical and mental disabilities. One can easily imagine that even within these groups, people may be perceived as differentially warm and competent, and as a result experience different types of prejudice. For example, when seeing someone in a wheelchair try to cross the street, one can easily imagine the person in the wheelchair being viewed as warm, but incompetent. As a result, the person in the wheelchair may be pitied and helped, but also neglected at times. Similarly, if people with mental disabilities are viewed as cold and incompetent, contempt may be directed at them and they may be harassed and neglected. For example, someone with schizophrenia may be perceived as dangerous and threatening. Thus, like people with physical disabilities, people may feel contempt and distance themselves from the person with schizophrenia. At times, the threat may not even be realistic, but rather symbolic. Seeing a young person in a wheel chair as a result of cancer or a car accident, for example, may threaten belief in a just world, resulting in contempt toward that person. Again, substantial future research is needed in this area.

In summary, unlike previous models that have considered prejudice as uniformly negative and hostile (Allport, 1954) or specific prejudices as idiosyncratic to particular groups (Katz & Braly, 1933), Fiske and colleague's work suggests that common dimensions may underlie prejudice toward many different groups and that prejudice may be more nuanced than previously thought. When applied to disability, Fiske et al.'s theory suggests that prejudice as a result of different types and degree of disability should result from perceptions of warmth and competence. Perceptions of warmth and competence should lead to predictable and distinct emotions and behaviors. Generally, disabled people may be viewed as warm, but incompetent. Importantly, however, depending on the type and degree of physical or mental disability, the prejudice may vary. Although policy makers, judges, and juries can clearly apply Fiske et al.'s model to different types and degrees of disability, researchers should continue to study and confirm the different prejudices for different degrees and types of disabilities.

Summary and Concluding Remarks

Historically (Chapter 3 by P. Blanck, this volume) and recently (Chapter 8 by M. Selmi, this volume) disability laws and policies have failed to account for the broad types and degrees of disabilities and disability prejudice. In this chapter, I integrated theory and research on prejudice with disability laws and policies to shed light on when disabled people will experience disability prejudice and the forms that disability prejudice may take.

Like law and policy makers, social psychologists have not historically focused on disability prejudice. Instead, they have primarily focused on prejudice directed at other negatively stereotyped groups, like racial minorities, women, gay men and lesbians, and the elderly. Because modern theories of prejudice outline the processes and content that underlie prejudice in a general sense, prejudice theories may be applied to many types and degrees of disabilities. In the first section, I drew on models of person perception and suggested that people may be most likely to categorize and direct prejudice toward disabled people with stereotypic features. I also argued that people with more stereotypic disabilities may be viewed exclusively in terms of their disability. Though disabled people with less stereotypic disabilities may be less likely to be categorized in the first place, they may experience more resistance to suggestions of disability prejudice. Ironically, then, they may be more prone to experience prejudice when they make disability prejudice claims.

In the second section, I outlined several models of intergroup prejudice. Because Fiske and colleagues have explicitly examined disability prejudice, I outlined Fiske et al.'s model in detail. Specifically, I suggested that prejudice for different types and degrees of disability may vary as a function of how warm and competent different groups of disabled people are perceived to be. Fiske et al.'s findings suggest that people with disabilities are most likely to be viewed as warm, but incompetent and experience pity or be viewed as cold and incompetent and experience contempt. Generally speaking, people with disabilities tend to be viewed as warm and incompetent. However, if people with different types of disabilities (e.g., depression, schizophrenia, HIV/AIDs) are viewed as threatening, they may be viewed as incompetent and cold and thus be targets of contempt.

This chapter is a first attempt toward understanding the prejudice associated with different types and degrees of disability. Future research, laws, and policies, however, should consider how disability prejudice may also intersect with racial, ethnic, gender, class, age, and sexual orientation prejudice. Considerations of intersectionality (Crenshaw, 1991; Collins, 1998) should lead to a better understanding of the types and degrees of prejudice that people with disabilities experience. For example, if HIV/AIDs is considered a disability, disability prejudice likely intersects with sexual orientation prejudice, such that a gay man who is HIV positive experiences different types and degrees of prejudice than a heterosexual man who is HIV positive.

I conclude this paper with a couple of observations. Given the many different types and degrees of disability prejudice, it is likely that a wide range of people experience disability prejudice. Interestingly, disability prejudice has largely been ignored by both policy makers and researchers, particularly relative to gender and racial prejudice. Selmi suggests that one reason for this discrepancy is that disability policy has not been advanced by a corresponding social movement. Another reason for this discrepancy is that people with disabilities are still largely excluded from the workplace. This includes academic, research, and legal domains. This was once the case for gender and race and as a result, policies and research largely focused on White men. As women and racial minorities became scholars and policy makers, however, research and law on sexism and racism emerged. If disability laws provide reasonable accommodations for people with disabilities so that they can work, then we might have a better understanding and articulation of disability prejudice within psychology and the law.

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