

2016

Expressive Law and the Americans with Disabilities Act

Alex C. Geisinger

Drexel University Thomas R. Kline School of Law

Michael Ashley Stein

Harvard Law School

Follow this and additional works at: <http://repository.law.umich.edu/mlr>



Part of the [Civil Rights and Discrimination Commons](#), [Disability Law Commons](#), [Law and Economics Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Alex C. Geisinger & Michael A. Stein, *Expressive Law and the Americans with Disabilities Act*, 114 MICH. L. REV. 1061 (2016).

Available at: <http://repository.law.umich.edu/mlr/vol114/iss6/11>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

EXPRESSIVE LAW AND THE AMERICANS WITH DISABILITIES ACT

Alex C. Geisinger*
Michael Ashley Stein**

THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS. BY
Richard H. McAdams. Cambridge and London: Harvard University
Press. 2015. P. 261. \$39.95.

INTRODUCTION

The question of why people follow the law has long been a subject of scholarly consideration.¹ Prevailing accounts of how law changes behavior coalesce around two major themes: legitimacy and deterrence. Advocates of legitimacy argue that law is obeyed when it is created through a legitimate process and its substance comports with community mores.² Others emphasize deterrence, particularly those who subscribe to law-and-economics theories. These scholars argue that law makes certain socially undesirable behaviors more costly, and thus individuals are less likely to undertake them.³

* Professor, Drexel University Thomas R. Kline School of Law.

** Executive Director, Harvard Law School Project on Disability; Visiting Professor, Harvard Law School; Extraordinary Professor, University of Pretoria Faculty of Law, Centre for Human Rights.

We thank Peter Blanck and Michael Waterstone for comments and Dylan Caplan for excellent research assistance.

1. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (Princeton Univ. Press 2006) (1990); Herbert Jacob, *Deterrent Effects of Formal and Informal Sanctions*, 2 *LAW & POL'Y Q.* 61 (1980); Peter J. May, *Compliance Motivations: Affirmative and Negative Bases*, 38 *LAW & SOC'Y REV.* 41 (2004); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *Nw. U. L. REV.* 453, 468–77 (1997); cf. John M. Darley, *Citizens' Sense of Justice and the Legal System*, 10 *CURRENT DIRECTIONS PSYCHOL. SCI.* 10 (2001) (“[C]ontradictions between criminal codes and the moral views of the community put people’s respect for the legal system at risk.”).

2. See, e.g., Janice Nadler, *Flouting the Law*, 83 *TEX. L. REV.* 1399, 1402, 1404–10 (2005) (presenting evidence that citizens are less likely to consider the law a moral authority when they perceive a disconnect with community norms); William J. Stuntz, *Self-Defeating Crimes*, 86 *VA. L. REV.* 1871, 1871 (2000) (noting that individuals’ law-abiding behavior is typically influenced more by social norms than by black letter law).

3. See, e.g., Steven D. Levitt & Thomas J. Miles, *Deterrence (Empirical)*, *Economic Analyses of*, in 2 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* 461 (Steven N. Durlauf & Lawrence E. Blume eds., 2d. ed. 2008), http://www.dictionaryofeconomics.com/article?id=pde2008_E000226 [<http://perma.cc/G6DL-NLZE>]; Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 *J. CRIM. L. & CRIMINOL.* 765 (2010); Mats Persson & Claes-Henric Siven, *Incentive and Incarceration Effects in a General Equilibrium Model of Crime*, 59 *J. ECON. BEHAV. & ORG.* 214 (2006).

More recently, legal scholars have recognized expressive effects as a third mechanism by which law influences behavior.⁴ Expressive law scholars often focus on law's ability to change the social meaning of particular behaviors.⁵ A common example is smoking laws, which likely contributed to changing the social understanding of smoking from a desirable "cool" activity to one that is dirty and undesirable.⁶ This changed understanding in turn affects behavior by increasing the likelihood that individuals will socially sanction those who violate no-smoking laws. In addition, some will internalize the law's message by changing their own preferences regarding smoking. While smoking laws are a paradigmatic example, an expressive mechanism has explained a wide variety of laws.⁷

Being relatively new as a field, the expressive effect of law is the least studied and understood among theories on how law affects behavior. It is likewise heavily discounted.⁸ As Richard McAdams⁹ notes in his important new book *The Expressive Powers of Law (Expressive Powers)*, empirical scholarship portrays analyses of legal compliance as "a long-running conflict between the social sciences, a battle between the rival hypotheses of deterrence and legitimacy" and in doing so "diverts our attention away from the possibility of other explanations" (p. 4). Thus the entrenched debate between deterrence and legitimacy partly obscures expressive effects from consideration.

4. See, e.g., Dhammika Dharmapala & Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law*, 5 AM. L. & ECON. REV. 1 (2003); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000) [hereinafter *Attitudinal Theory*]; Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000) [hereinafter *Focal Point*].

5. See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35 (2002); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 968–72 (1995); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

6. See Sunstein, *supra* note 5, at 2022, 2035–36, 2050–52.

7. See, e.g., Cooter, *supra* note 5, at 595 (finding a high level of compliance with "pooper-scooper" laws and airport smoking laws, even though enforcement of either is rare); Yuval Feldman & Janice Nadler, *The Law and Norms of File Sharing*, 43 SAN DIEGO L. REV. 577, 577–81, 608–12 (2006) (examining the effects of file-sharing laws on social norms between students); Dov Fox & Christopher L. Griffin, Jr., *Disability-Selective Abortion and the Americans with Disabilities Act*, 2009 UTAH L. REV. 845, 860–70 (2009) (finding antidiscrimination laws to generate unexpected social costs unrelated to those laws' protections and regulations); Patricia Funk, *Is There an Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135, 137–39 (2007) (finding voting to decline in Swiss Cantons after the repeal of mandatory voting laws that carried nominal fines); Maggie Wittlin, *Buckling Under Pressure: An Empirical Test of the Expressive Effects of Law*, 28 YALE J. REG. 419, 419–23, 456–59 (2011) ("[A] highly publicized seatbelt law in one state can affect seatbelt use in other states.").

8. See, e.g., FREDERICK SCHAUER, *THE FORCE OF LAW* 40 (2015) (explaining that noncoercive law hardly deserves exclusive or dominant attention).

9. Bernard D. Meltzer Professor of Law, University of Chicago Law School.

Another potential reason for the marginalization of expressive mechanisms from law and economics is concerns about the complexity of expressive mechanisms, which some argue negatively affects their ability to be used predictively.¹⁰ Expressive effects occur through a variety of incompletely understood cognitive and social mechanisms.¹¹ Hence, determining the expressive influence of law requires a sophisticated understanding of complex social and cognitive processes that are not yet fully grasped. Adding further complexity to expressive analysis, scholars also recognize that law is just one of many different influences on social meaning and individual belief.¹² A proper understanding of expressive effects therefore also requires separating the influence of law from other potential behavioral influences such as religion or social movements.

McAdams steps into this academic fray and sets an ambitious agenda with his newest book, *Expressive Powers*. He aspires to a detailed, rational choice-based model of expressive effects, and likewise seeks to demonstrate the relative importance of expressive effects to our understanding of how law affects behavior.¹³ *Expressive Powers* is thus both an exegesis and an attempt to thrust expressive theory into the mainstream discussion of why individuals obey the law. McAdams succeeds laudably on both accounts. First he provides a detailed, analytically rigorous framework, and then he explains how to apply that framework to a wide range of laws from traffic regulation to international law. Such a far-reaching account of expressive effects challenges the conventional wisdom on why citizens obey the law and lays the course for richer future research.

Any effort to develop a theory in an area of great complexity, however, is likely to raise particular concerns about the theory. In the case of *Expressive Law*, these concerns include lack of comprehensiveness and lack of predictability. No theory is likely to capture every aspect of the complex interaction of the numerous and varied forces responsible for law's expressive influence on behavior. Further, the same complexity raises trepidation that expressive analysis does not yield predictive results and thus is of limited

10. See discussion *infra* Part II.

11. See Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1604 (2000).

12. See, e.g., Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1438–45 (2005) (constitutional law and culture are mutually reinforcing and “non-judicial actors” often influence the direction of law); Michael C. Dorf, *The Paths to Legal Equality: A Reply to Dean Sullivan*, 90 CALIF. L. REV. 791, 794–802 (2002) (discussing the relationship between the women’s movement and the law); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 420–21 (2001) (finding that “social movements literature does not adequately reflect the importance of law”); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001) (discussing the feminist movement’s effect on equal protection jurisprudence).

13. See pp. 6–8. McAdams does not claim that expressive effects are more powerful than legitimacy or deterrence: “I hope to demonstrate that, in some contexts, an alternative, *expressive* mechanism plausibly causes more of the compliance we observe than deterrence *or* legitimacy.” P. 4.

utility to lawyers. These two concerns are often interrelated. The need for predictability requires structure and simplification which, of course, threatens comprehensive analysis of complex behavioral mechanisms. While few theories are utterly comprehensive, a key goal for success of expressive analysis is to be as comprehensive as possible without sacrificing analytical rigor or predictable application.

In this Review, we address both issues of comprehensiveness and predictability. We turn first to the criticism that behavioral theories cannot be used predictively. This critique is founded on the notion of an unavoidable trade-off between complexity and predictive ability. We argue that, even if increasing complexity decreases predictability, that result does not militate in favor of more parsimonious theories. Theories such as deterrence can become so Spartan that they too, by blinding themselves to other causal mechanisms, cannot predict law's effect on behavior. We find McAdams's claim that expressive effects are relatively ubiquitous convincing. The ubiquity of expressive influence—as well as myriad other influences on behavior described in the social sciences—seriously undercuts the core critique because parsimonious theories will ignore these other behavioral effects although they occur often.

We then turn to concerns regarding comprehensiveness. Complexity, of course, makes it difficult to develop a comprehensive theory, especially when analytical rigor and predictability are also necessary. McAdams's theory is certainly robust enough to provide predictive results in many cases, yet it does not claim to be comprehensive. Indeed, McAdams is very attentive to the limits of his theory and explains that the book is intended solely to provide a starting point for empirical analysis of expressive mechanisms.¹⁴ Nonetheless, *Expressive Powers* provides a solid foundation from which further exploration and application of expressive theories can progress. We expect that the book, as the first synthesis and thorough exegesis of expressive mechanisms, will become the starting point for many scholars wishing to consider the expressive effects of law. In the spirit of using *Expressive Powers* as the springboard McAdams intended it to be, this Review considers two limitations on McAdams's theory and argues that these limitations can be overcome—increasing comprehensiveness without sacrificing the clarity that comes from analytical rigor.

We raise our suggestions for extension of McAdams's theory through an analysis of the expressive influences of the Americans with Disabilities Act (ADA).¹⁵ The ADA, which passed twenty-five years ago, prohibits discrimination against people with disabilities across many sectors, prominently in employment and places of public accommodation.¹⁶ In analyzing the ADA's

14. See pp. 4–7.

15. Americans with Disabilities Act of 1990, 42 U.S.C §§ 12101–12213 (2012).

16. For an overview of the ADA by one of its designers, see Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991).

expressive effects we offer two specific suggestions for extension of McAdams's theory. First we aver that a model of inferential reasoning—which the book relies on frequently but never adopts explicitly—should be used to ensure that all types of information provided by law can be considered in expressive analysis. McAdams considers only how law provides information on the attitudes of others, risks of the regulated activity, and compliance with the law, but law can provide information on myriad factors. Second, we maintain that an additional inferential test regarding the expressive effects of compliance with a law should also be developed.

The Review is organized as follows. Part I describes McAdams's theory and its application to a wide variety of laws. Part II considers the assertions made by skeptics that the incomplete nature of behavioral theories makes the predictive use of such theories more difficult, and argues that continued disregard of behavioralism makes parsimonious theories less predictive as well. In Part III, we use the ADA to demonstrate the importance of expressive analysis while also identifying ways to expand McAdams's theory, especially in relation to providing information.

I. MCADAMS AND EXPRESSIVE POWERS

Before discussing McAdams's theory, it is necessary to define what we mean by expressive effects because the concept is subject to different descriptions. Many law-and-economics scholars are particularly interested in the relationship between legal rules, community norms, and the "social meaning" of particular behaviors. Generally, these commentators suggest that law acts expressively when it changes the likelihood of social sanctioning or changes internal beliefs so that one feels guilty for doing something that she used to do without guilt.¹⁷ For example, Professor Lessig describes how dueling laws changed the social meaning of dueling by providing a competing way in which community members could understand the subject.¹⁸ Prior to the law's passage, refusing a duel was considered dishonorable. Passage of a law against dueling, Lessig argues, changed the social meaning of declining to duel from a dishonorable action to an honorable undertaking of legal duty.¹⁹ Other academics have likewise considered the way in which law influences social norms and thus takes advantage of social-sanctioning mechanisms as a means of enforcement.²⁰ Finally, scholars have specifically considered ways in which individuals can internalize a law's message,

17. See, e.g., Geisinger, *supra* note 5, at 65–72; Lessig, *supra* note 5, at 964–73; *Attitudinal Theory*, *supra* note 4, at 341–49; Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340, 397–99 (1997) (Norms are "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both").

18. Lessig, *supra* note 5, at 968–72.

19. *Id.*

20. See Geisinger, *supra* note 5, at 63–70; *Attitudinal Theory*, *supra* note 4, at 364–72.

thereby changing their beliefs and in turn their preferred behaviors.²¹ Sanctioning in this case is accomplished by feelings of guilt that arise if one fails to do what she believes to be the correct action.²²

In *Expressive Powers*, McAdams argues that expressive impacts can arise from two distinct mechanisms. McAdams describes the first mechanism as law's coordinating function (p. 5). Pursuant to this mechanism, the law serves as a focal point around which individuals can coordinate their own behavior. The other way by which law works expressively is through providing information (p. 6). As McAdams notes, passage of a law carries with it information that enables individuals to update their own beliefs about the regulated behavior: "law provides information; information changes beliefs; new beliefs change behavior" (p. 136; emphasis omitted). While McAdams provides many examples of how these two different mechanisms influence behavior, he begins his discussion by explaining the novel theory of focal points.

Perhaps because of concerns regarding the complexity of human behavior, McAdams identifies the way in which law works as a focal point with painstaking detail. Indeed, *Expressive Powers* is at its best in these chapters as it lays out a clear, deep, and far-reaching explanation of focal points and describes the differences between focal-point effects, legitimacy, and deterrence. To start, McAdams turns to the groundbreaking work of Thomas Schelling to identify a number of different games that require coordination (rather than cooperation) among rationally self-interested individuals and to explain how focal points solve these problems.²³

Consider one of many examples throughout the book that lucidly applies the theory of focal points: traffic control. McAdams explains that much driver interaction can be described as a hawk/dove game:

Traffic involves a constant stream of priority "disputes" between drivers, pedestrians, and bicyclists. For example, two drivers on intersecting streets seek to make turns that cut across the path of the other. Drivers on merging roads or lanes each seeks [sic] to get ahead of the other or those traveling in opposite directions These countless priority disputes are prototypical coordination problems. They have the structure of a [hawk/dove] game because each driver wants to proceed ahead of the other . . . but there is a common interest in coordinating to avoid the worst outcome—a collision (pp. 76–77)

21. See Robinson & Darley, *supra* note 1, at 474 (noting that our society sets norms based on criminal law); Michael P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 *VAND. L. REV.* 515, 517–21 (2004) ("[I]nformation, alone or in combination with other regulatory instruments, may have substantial effects on individual behavior.").

22. See Geisinger, *supra* note 5, at 63, 65–73 ("[O]ften times law is enforced through social sanction or internalized guilt."); McAdams, *supra* note 17, at 377–80.

23. P. 23. This is in response to the vast majority of scholarship in the field focusing on information provision, in consequence of which coordination problems (unlike cooperation problems such as the prisoner's dilemma) are substantially overlooked in the legal literature. Pp. 22–23.

The law controls behavior in these circumstances not just through legitimacy or deterrence. Instead, while people may follow the rules in such situations partly because the law is legitimate or creates a fine for its violation, a major reason people follow the rules is because they don't want to get into an accident. This is law's coordinating function: it "expresses" a focal point around which people can coordinate their behavior.

Of course, law is only one means of providing a focal point for coordination. To use an example from Schelling, when a traffic light fails, individuals may direct traffic at an intersection, enabling drivers to coordinate their behavior (p. 23). This raises a secondary question of "when is law likely to serve as a focal point?" McAdams answers by identifying four general conditions for focal effect:

- (1) The situation the law addresses includes an element of coordination—the most important limit . . . ; (2) the law is sufficiently clear; (3) the law is sufficiently public; and (4) there are no stronger, competing focal points. (p. 62)

Even with these important limitations, McAdams avers that the focal-point effect of law is broad, and that his assertions regarding "coordinating on places, times, communication, and games is true about a great many parts of life" (p. 29). The next two chapters of *Expressive Powers* are dedicated to this claim and seek to illustrate that "life is permeated by the need for coordination by convention, including the situations of social conflict that law addresses" (p. 29). Accordingly, McAdams demonstrates ways in which law works to coordinate behavior in situations as diverse as traffic regulation (pp. 76–82) and property disputes (p. 88), and ranging as far as international law (p. 91).

McAdams's comprehensive treatment of coordination adds substantially to the behavioral legal compliance field because to date expressive law scholars have given little attention to the coordinating function of law. Rather, the vast majority of expressive law scholarship has focused on the second component of *Expressive Power's* theory—providing information.²⁴ As a general matter, McAdams's thoughts on how law provides information are in keeping with the existing literature. His most significant contribution is thus not to describe a new way in which the law provides information, but to offer a more refined and complete view of how law informs individual belief. McAdams refines this theory along a number of dimensions. He posits that law primarily²⁵ provides information on three different things: others' attitudes toward the regulated behavior (pp. 137, 139–52), the risks of the regulated

24. Pp. 6, 136–260. We elaborate on the information provision mechanism *infra* Parts II and III. Hence we describe the framework only generally right now while endeavoring to show how *Expressive Powers* both comports with and diverges from the existing literature.

25. McAdams does recognize that law can signal information on things other than attitudes, risk, and compliance. Nonetheless, he limits his exegesis to these three mechanisms due to his belief that these are the types of information most often signaled by law. P. 137.

behavior (pp. 153–62), or how often the law is violated.²⁶ McAdams then applies this basic model to explain how different forms of lawmaking—legislation (pp. 136–38), executive orders (pp. 170–73), judicial decisions (pp. 170–73), or even arbitration (pp. 199–232)—can provide that information. He also recognizes that law enforcement, and particularly criminal law enforcement, can also signal information (pp. 173–79). The framework in *Expressive Powers* thereby synthesizes a disparate literature while also providing a level of granularity that should serve as a springboard for scholars to more deeply explore the expressive analysis of law in the future.

For an example of McAdams's theory regarding the three types of information law provides, consider the passage of a law requiring the use of car seats. Because law is somewhat majoritarian,²⁷ its passage may signal to some individuals that others in the community prefer the use of car seats. Similarly, the law may influence individuals to change their estimates of the risk of not using a car seat for their children. If, after a number of years, legislators increase the penalties for violating the car-seat rule, individuals may once more update their beliefs regarding the number of people who don't comply with the rule.

One aspect of the information-providing effect of law that we believe requires a bit more clarity is McAdams's focus on how law primarily provides information on attitudes, risk, or violations. *Expressive Power* relies on the mechanism of inferential reasoning to describe how law expresses information (pp. 144–47, 154–56), yet it doesn't present a general model of how law affects belief inferentially. Instead McAdams provides a detailed analysis of how law informs individuals' understanding of three particular things—the attitudes of others, the risk of a particular behavior, and compliance with the law. Failure to provide a more complete picture of the information-provision mechanism, we believe, will unnecessarily limit expressive analysis to consideration of just attitudes, risk, or violations when law provides information on a wide variety of other things.

II. PREDICTABILITY VERSUS COMPREHENSIVENESS

Despite some additional minor areas where more explanation may be needed,²⁸ *Expressive Powers* succeeds in its ambition to provide a detailed, rational choice-based model of expressive effects, and to demonstrate the importance of expressive effects to our understanding of how law works. Ultimately, the book leaves little doubt that expressive influences should be considered in any comprehensive analysis of how law influences behavior.

26. Pp. 162–65. McAdams defines the three different types of information provision as attitudinal signals, risk signals, and violation (compliance) signals. Pp. 137–38.

27. McAdams similarly spends significant effort explaining the influence of public choice theory on the belief that law reflects the preferences of the majority. Pp. 144–47.

28. This critique of *Expressive Powers* ought not to be overstated. We may quibble with some of McAdams's theories but these are minor concerns that do not distract attention from what we would describe as the most rigorous analysis of law's information provision function in the legal literature.

Nonetheless, a further obstacle to full acceptance of expressive theory that McAdams does not take into account needs to be addressed. Many scholars, and particularly those law-and-economics commentators wed to rational choice theory, criticize what they call “behaviorally thick” theories of law specifically because the theories’ complexity undermines their predictive ability.²⁹ One scholar notes the mechanism by which this occurs:

[W]hen one makes one’s model more realistic by introducing more complex premises, one also thereby increases—sometimes dramatically—the problems involved in *applying* it The conclusions reached as the model is made more complex become less robust—more sensitive to small variations in the initial parameters—and greater and greater precision in the data inputs is needed to avoid reaching indeterminate conclusions. The result is often an elegant and complex but *relatively useless model that cannot produce determinate results* unless one has recourse to an often unavailable comprehensive and precise data set.³⁰

These scholars assume that there must necessarily be a trade-off between complexity and predictability. In other words, when a theory becomes more complex it also becomes less predictive.³¹ These scholars prefer parsimonious theories because they can be applied predictively.³²

This criticism, however, itself frames the issue incompletely because there is also a trade-off between parsimony and predictability. Indeed, if

29. See Kenneth N. Waltz, *Law and Theories*, in *NEOREALISM AND ITS CRITICS* 27, 34 (Robert O. Keohane ed., 1986); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 *STAN. L. REV.* 1551, 1558–59, 1567 (1998); Scott, *supra* note 11, at 1607–08.

30. Gregory S. Crespi, *Does the Chicago School Need to Expand Its Curriculum?*, 22 *LAW & SOC. INQUIRY* 149, 154 (1997) (emphases added); see also Gregory Mitchell, *Why Law and Economics’ Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 *GEO. L.J.* 67, 121 (2002).

31. Some behavioral law-and-economics scholars explicitly reject this. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 *N.Y.U. L. REV.* 632 (1999); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1475 (“Just as people often have imperfect information, which has predictable consequences for behavior, the departures from the standard conception of the economic agent also alter behavior in predictable ways.”); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Sciences: Removing the Rationality Assumption from Law and Economics*, 88 *CALIF. L. REV.* 1051, 1069–74 (2000) (noting that advocates of “thick” conceptions of rational choice theory defend these theories on grounds that they account for the multiple factors that influence actors’ behavior); Mitchell, *supra* note 30, at 122 (“If the rationality of behavior depends on the particular characteristics of the legal actor or on even just a few characteristics of the situation at hand, then the development of behavioral models that are both realistic and predictive becomes enormously complex.”).

32. Owen D. Jones, *Time-Shifted Rationality and the Law of Law’s Leverage: Behavioral Economics Meets Behavioral Biology*, 95 *Nw. U. L. REV.* 1141, 1201 (2001) (“We should, as a general rule, prefer more parsimonious explanations to less parsimonious ones”); Scott, *supra* note 11, at 1607–08; W. Bradley Wendel, *Mixed Signals: Rational-Choice Theories of Social Norms and the Pragmatics of Explanation*, 77 *IND. L.J.* 1, 5 (2002).

predictability is the desired goal, as many law-and-economics scholars suggest,³³ parsimonious theories could be just as nonpredictive as complex theories. For example, if the effect of a law will occur primarily through an expressive or other behavioral mechanism and not because of its cost-signal, use of a model that focuses solely on costs will be ineffective at predicting the outcome of a rule's passage. Indeed, the more Spartan a theory, the greater this risk. Such is the case with the extremely parsimonious view that law works simply as an external cost to preference satisfaction. As a theory it may be simple, but it blinds itself to other ways in which law influences behavior.

To illustrate, consider one of McAdams's examples of the limited explanatory power of deterrence from *Expressive Powers*. McAdams describes the case of six day-care centers that imposed a fine on parents who picked up their children late (pp. 164–65). Considering this additional external cost to preference satisfaction, one would expect fewer late pickups. The exact opposite happened, however, because the fee had an unexpected expressive effect—it signaled that more parents were picking their children up late than previously expected (pp. 164–65). Violations signaling, in turn, made the “informal sanctions for the violation decline” (p. 165). Information that others too are violating the rule makes late pickups less likely to receive social sanctions (p. 165). This decrease in informal sanctions offset any benefit from formal, financial sanctions. In other words, it was the “behavioral” mechanism that most influenced behavior. If, as McAdams suggests, expressive effects are ubiquitous, it becomes more difficult to argue that parsimonious theories based in rational choice are more predictive as social scientists identify new ways in which behavior can be influenced by law.

The complexity critique also sidesteps the fact that rational choice may not actually be as parsimonious as the critics suggest. McAdams's theory, for example, is based purely on rational choice assumptions. Ironically, the majority of legal scholarship on expressive effects and social norms is derived from rational choice schemas,³⁴ and in particular game theory.³⁵ The question therefore arises as to why the parsimonious vision that law is simply a cost on preference satisfaction should be privileged over thicker theories that are based in rational choice. As discussed above, doing so simply because of an assertion that more complex theories are less predictive ignores that a negative correlation between parsimony and prediction can also exist.

33. See MILTON FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3 (1984) (endorsing unrealistic assumptions in hypothesis formation and prediction).

34. See, e.g., ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); McAdams, *supra* note 17, at 339–43.

35. See, e.g., ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 1–7 (1990) (describing the tragedy of the commons, the prisoner's dilemma game, and the logic of collective action); POSNER, *supra* note 34, at 7–13 (discussing the need for traditional regulation to solve collective-action problems).

III. EXTENDING THE THEORY: LESSONS FROM THE ADA

To demonstrate the usefulness of expressive law analysis and to expand on McAdams's theory, especially his articulation of information provision, we apply expressive theory to the ADA. Doing so reveals two limitations that should be expanded upon. Section III.A addresses how *Expressive Powers* fails to consider the expressive influxes of compliance with law as a category distinct from enactment and implementation. Section III.B discusses how *Expressive Powers* unnecessarily limits the inferences that can be drawn from enforcement, enactment, and compliance with the law.

The ADA was enacted in 1990 as an “emancipation proclamation”³⁶ on behalf of some 43 million people with disabilities who historically had been excluded from equally participating in the social and economic opportunities of American life.³⁷ Such exclusion extended to employment, state and local government programs and services, public accommodations, and telecommunication systems.³⁸ Prominent among the ADA's five titles are Title I relating to the workplace (that is, private employment spheres)³⁹ and Title III concerning places of public accommodation (meaning any areas that members of the public can enter and use).⁴⁰ Titles I and III both prohibit discrimination,⁴¹ and each also requires that reasonable adjustments be made to existing physical and modal conditions⁴² to guarantee equal social opportunities for individuals with disabilities.⁴³ Title I refers to occupational

36. Two former senators have been credited with originating this phrase. See 136 CONG. REC. S9689 (daily ed. July 13, 1990) (statement of Senator Harkin); 135 CONG. REC. S10789 (daily ed. Sept. 7, 1989) (statement of Senator Kennedy).

37. See David L. Braddock & Susan L. Parish, *An Institutional History of Disability*, in HANDBOOK OF DISABILITY STUDIES 11, 52 (Gary L. Albrecht et al. eds., 2001) (exploring people with disabilities' history of “abuse, neglect, sterilization, stigma, euthanasia, segregation, and institutionalization”); Michael Ashley Stein et al., *Disability*, in 2 OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 334, 335–36 (Stanley N. Katz et al. eds., 2009) (explaining that the twentieth century saw the creation and expansion in the United States of separate educational, medical, and custodial institutions for people with disabilities).

38. 42 U.S.C. § 12101(a) (2012).

39. *Id.* §§ 12111–12117.

40. *Id.* §§ 12181–12189.

41. *Id.* §§ 12112, 12182.

42. *Id.* In other words, the Act provides that people must be able to access places where goods and services are provided in both a physical manner (such as ramps for wheelchair users, or large print text for the visually impaired) and a modal manner (for example, sign language interpretation for the deaf and hard of hearing, or the use of easy language instruction for those with intellectual disabilities).

43. See Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 581–82 (2004) (explaining that Congress intended Titles I and III to create equality for people with disabilities).

emendations as reasonable accommodations,⁴⁴ and Title III describes alterations to places of public accommodation as reasonable modifications.⁴⁵ Notably, the ADA defines the denial of reasonable accommodation itself as a form of prohibited discrimination.⁴⁶ Through each of these mandates, the ADA requires businesses⁴⁷ to internalize the respective cost of adjustments that do not themselves rise to a level of undue hardship.⁴⁸

A. *Considering Compliance Beyond Enactment and Enforcement*

Expressive Powers suggests that, in addition to passage of law, enforcement of law can also have expressive effects. In describing the mechanisms by which enforcement expresses information, McAdams primarily focuses on the inferences to be drawn from the actions of judges and juries.⁴⁹ What is noticeably absent from this account, however, is that private individuals may signal information on attitudes simply by complying with the law.⁵⁰ In this Section we turn to the differential impacts of two titles of the ADA to demonstrate the expressive influence of compliance.

Despite the overall normative aspirational similarity of Titles I and III, these measures have engendered dramatically different consequences.⁵¹ The disability unemployment rate—which has been increasing since 1984, six years prior to the ADA’s enactment⁵²—has continued an upward trajectory relative to that of the nondisabled population, reaching a historic level of

44. 42 U.S.C. § 12111(9).

45. *Id.* § 12184(b)(2)(A).

46. *Id.* §§ 12112(b)(5)(A), 12182(a)(2)(A).

47. The ADA applies to state and local governments, both explicitly in Title II, and implicitly as in the case of state and local governments acting in their capacities as employers (normally covered by Title I). *See id.* §§ 12111–12112. *But see* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (invalidating certain portions of the ADA as applied to actions for monetary damages against state and local employers). Because we focus on the expressive effect of law on private actors in this Review, however, we set to the side that aspect of the statute.

48. For an exhaustive account of the costs and benefits of reasonable accommodations, see Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79 (2003).

49. McAdams does suggest that executive and administrative actions can also signal information. Pp. 170–73.

50. McAdams clearly recognizes that private behavior can signal attitudes. But nowhere does he affirmatively delineate a mechanism describing how compliance can also express information.

51. *See* Michael Ashley Stein et al., *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1658–61 (2010) (highlighting the failure rate of cases brought under the ADA’s Title I employment provisions and the comparative success of Title III actions involving public accommodations); Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1826–32 (2005).

52. *See* John J. Donohue III et al., *Assessing Post-ADA Employment: Some Econometric Evidence and Policy Considerations*, 8 J. EMPIRICAL LEGAL STUD. 477, 480–82, 488 (2011) (citing work by labor economist Richard Burkhauser and others).

nearly 80 percent.⁵³ By contrast, equal access for people with disabilities to places of public accommodation has dramatically improved since the ADA's passage, vastly improving the quality of life for disabled Americans.⁵⁴

At least three interrelated reasons arising from design or enforcement of these respective titles help explain their divergent compliance.⁵⁵ Principally, and endogenous to the ADA, is the contrasting clarity of the respective titles. The definition of disability under Title I, meaning the identity of the group to be protected, has been vague and controversial since its inception.⁵⁶ This is because Congress lifted whole-cloth a tripartite definition of disability from the predecessor Rehabilitation Act (which applied to recipients of federal funding) without also incorporating into the ADA the laundry list of individuals covered by the statute.⁵⁷ As a consequence, judges reinterpreted the disability category with every case, and did so narrowly, creating an almost insurmountable barrier to trial, with some 97 percent of federal Title I plaintiffs losing.⁵⁸ Conversely, Title III's ambit of protection is much clearer because the attendant Code of Federal Regulations (CFR) details precisely

53. See KESSLER FOUND. & NAT'L ORG. ON DISABILITY, *THE ADA, 20 YEARS LATER* 10 (2010), http://nod.org/assets/downloads/2010_Survey_of_Americans_with_Disabilities_GAPS_Full_Report.pdf [<http://perma.cc/DG69-MQPX>]; KESSLER FOUND. & NAT'L ORG. ON DISABILITY, *SURVEY OF EMPLOYMENT OF AMERICANS WITH DISABILITIES* 6 n.1 (2010) http://nod.org/assets/downloads/2010_Employment_Survey_Final_Report.pdf [<http://perma.cc/DK8J-ABAD>].

54. See NAT'L COUNCIL ON DISABILITY, *VOICES OF FREEDOM: AMERICA SPEAKS OUT ON THE ADA* (1995), <http://www.ncd.gov/policy/voices-freedom-america-speaks-out-americans-disabilities-act> [<http://perma.cc/Z3HX-MQ9N>]; Michael E. Waterstone et al., *Disability Cause Lawyers*, 53 WM. & MARY L. REV. 1287, 1357 (2012).

55. Literally hundreds of law review articles have addressed the efficacy of the ADA in reference to particular provisions or more generally.

56. Take, for example, the assessment of Justice O'Connor, whose ADA opinions heavily circumscribed application of the statute (and were later overturned by Congress), that the scope of ADA coverage contains "uncertainties as to what Congress had in mind" because the legislative sponsors were "so eager to get something passed that what passes hasn't been as carefully written as a group of law professors might put together." Charles Lane, *O'Connor Criticizes Disabilities Law as Too Vague*, WASH. POST, Mar. 15, 2002, at A2. *But see* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91 (2000) (description by one of the law professor drafters of the ADA of the legislative history and how the Supreme Court Justices misunderstood the statute).

57. See Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J.L. REFORM 81, 111–23 (2002).

58. See, e.g., Amy L. Allbright, *2010 Employment Decisions Under the ADA Titles I and V—Survey Update*, 35 MENTAL & PHYSICAL DISABILITY L. REP. 394, 394–95 (2011) (reporting a 98.2 percent win rate for employers in Titles I and V litigation); Amy L. Allbright, *2009 Employment Decisions Under the ADA Title I—Survey Update*, 34 MENTAL & PHYSICAL DISABILITY L. REP. 339, 339–40 (2010) (reporting a 97.4 percent win rate for employers in Titles I and V litigation). These figures are current as of 2010, the last year the ABA Commission reported data.

what places of public accommodation must be altered and how.⁵⁹ For instance, in the context of a medical provider's examination room, the CFR mandates exact details as to the height of examination tables, the amount of floor space (including wheelchair turning space), the width of doors, and appropriate examination tables, scales, radiographic equipment, lifts and gurneys, and the extent of staff training.⁶⁰

Two effects exogenous to the ADA likewise leverage the different relative levels of compliance between the two titles. The Department of Justice, for a variety of political reasons, and the private bar, for economic reasons, have each avoided bringing employment discrimination lawsuits under Title I (after review by the Equal Employment Opportunity Commission).⁶¹ By contrast, each of these law-enforcing groups has robustly and successfully brought Title III cases,⁶² which also garner legal fees.⁶³ More difficult to measure, but having significant expressive effect, are the differing histories and social expectations relating to disability-based employment versus public-accommodation access. A binary view contrasting disability and employment reaches back to the Elizabethan Poor Laws, with the notion that people either are disabled or work capable.⁶⁴ Subsequently, laws, social-welfare benefits—and, most importantly, cultural mores—developed that simply do not expect people with disabilities to work, let alone be equal participants in the workplace.⁶⁵ Consistent with this trend, Title I prohibits discrimination but has yet to impact broader social understandings regarding the workplace; it has not made employment for people with disabilities “the new normal.”⁶⁶ And, although the ADA is not itself designed to achieve such

59. 28 C.F.R. §§ 36.401–.406 (2015).

60. For illustrated guidelines, see U.S. DEP'T OF JUSTICE & U.S. DEP'T OF HEALTH & HUMAN SERVS., ACCESS TO MEDICAL CARE FOR INDIVIDUALS WITH MOBILITY DISABILITIES (2010), http://www.ada.gov/medcare_mobility_ta/medcare_ta.htm [<http://perma.cc/Q9WE-DHYT>].

61. See Stein et al., *supra* note 51, at 1697–98; Waterstone et al., *supra* note 54, at 1301–04, 1313, 1324 n.184.

62. NAT'L COUNCIL ON DISABILITY, *supra* note 54; Waterstone et al., *supra* note 54, at 1357.

63. See Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLA L. REV. 1, 10 (2006); Waterstone, *supra* note 51, at 1868.

64. See Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 821–23 (1966).

65. For a contemporary overview of laws and policies, see Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689 (2014). For an historical account of the same, see DEBORAH A. STONE, *THE DISABLED STATE* (1984).

66. See, e.g., Michael Ashley Stein, *Disability and Employment, in EMERGING WORKFORCE ISSUES: W.I.A., TICKET TO WORK, AND PARTNERSHIPS* 95, 95 (L. Robert McConnell ed., 2001) (stating that post-ADA studies “find a relative reduction in the employment rate of workers with disabilities concurrent with either a neutral or a beneficial effect on wages”).

change,⁶⁷ it was sold to the American public as being capable of doing so.⁶⁸ This set of deeply embedded social expectations contrasts sharply with the historical exclusion of individuals from places of public accommodation on the ground of race, and the subsequent transformation in American cultural expectations that every member of the public—regardless of race, sex, or now, disability—is entitled to go everywhere in public.⁶⁹ Such a sea change maps well onto “a new normal”: that people with disabilities are entitled to equally access and enjoy areas of public accommodation.⁷⁰ Consequently, the implementation and enforcement of Titles I and III have been dramatically different.

While there are many ways to explain the relative successes and failures of Titles I and III, we argue that one major source of their differing effects on behavior is expressive, and in particular, expression that comes from compliance with the law. McAdams makes an important contribution to the literature by considering how enforcement, separate from passage of a law, can have expressive effects. In his usual manner, McAdams provides a rigorous and detailed structure for considering enforcement’s expressive effects. He identifies different enforcement mechanisms—criminal (pp. 176–93), civil (pp. 193–98), and arbitral (pp. 199–232)—and specifically details the ways in which each of these can signal information. In the case of the ADA, however, we suggest that expressive effects are best explained not by looking at the actions of judges, juries, and prosecutors in enforcing the law, but rather by examining compliance. We further suggest that there is a slightly different inferential mechanism attendant to compliance with a law that will also provide information on, among other things, attitudes regarding the matter being regulated.

We note at the outset that we agree with McAdams, who describes the strong relationship between expression and deterrence effects of enforcement. Enforcement of the law clearly can “send a message” to the public about the possibility that violating a legal standard will result in punishment or payment to the injured party. In this sense, when enforcement acts expressively it is providing information relevant to deterrence. By raising perceptions of the probability of having to pay, such a message increases the exogenous costs of failure to comply with the law. As McAdams notes, however, there are times when enforcement of law can send a different message as well (pp. 175, 178–79). We do not dispute that the ADA influenced behavior through its deterrent effects. Rather, we argue that in considering the ADA’s expressive effects, enforcement and compliance should be treated as

67. *See id.* (“The efficacy of any law is dependent upon considerations beyond the mere fact of its existence. This is especially true for civil rights statutes, which seek not only to equalize opportunities for their targeted groups, but also to transform society’s attitudes towards those individuals.”).

68. *See* Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 955 (2003).

69. *See* Bradley Allan Areheart & Michael Ashley Stein, *Integrating the Internet*, 83 GEO. WASH. L. REV. 449, 476–89 (2015).

70. *See id.*

discrete inferential mechanisms. From differences in compliance with the ADA in part, the right of public accommodation is much more accepted in today's world than it was twenty-five years ago, while attitudes toward employing disabled persons have not substantially changed.

To begin, we turn to the theory of enforcement in *Expressive Powers*. McAdams identifies a number of conditions that must be met for enforcement to potentially have expressive effect: (1) the enforcement action must carry some clear audience meaning; (2) enforcement must be publicized; and (3) there must be a logical basis for inferring that a judge or jury is providing information on the attitudes of others (pp. 179–87). Of these conditions, McAdams suggests that the first condition is the most often ignored (p. 180). It is important, he notes, to explain specifically what the populace and not the speaker will infer from enforcement.⁷¹ In other words, what a judge thinks the law expresses is irrelevant to the inquiry. Rather, as *Expressive Powers* puts it, “[w]hen evaluating causal claims about ‘sending a message,’ we are really looking for the message *received*” (p. 179).

Applying McAdams's enforcement criteria to the ADA suggests that enforcement may have had some impact on perception regarding, and subsequent acceptance of, equal access to places of public accommodation for people with disabilities. Consider, for example, the visibility of court rulings, as well as settlements, on accessibility impacting venues such as the Empire State Building, Exxon gas stations, Macy's department stores, AMC movie theatres, and Safeway supermarkets.⁷² Separate from enforcement, compliance with the law has also influenced society's attitudes toward places of public accommodation. Compliance with Title III of the ADA has resulted in private businesses installing a large number of publicly visible accommodations. These changes can certainly provide information to society even though they are done voluntarily without requiring enforcement. Using McAdams's conditions on expressive enforcement as a starting point, we suggest a set of standards to use in determining when compliance with the law will have expressive influence: (1) compliance carries clear audience meaning; (2) compliance is visible to the public; and (3) there must be a basis for inferring from the compliance attitudes of others. In comparing enforcement and compliance, we suggest that the visibility of compliance was the most significant factor in expressing attitudes toward places of public accommodation.

Beyond being much more publicly visible, an additional factor supporting the expressive effect of compliance is that the actors are the regulated

71. See pp. 179–83.

72. The panoply of cases brought, won, and/or settled by the Department of Justice is available at *ADA Enforcement*, ADA.gov, http://www.ada.gov/enforce_current.htm [<http://perma.cc/3J8Y-DSKM>]. For discussion of well-publicized private enforcement, see Stein et al., *supra* note 51, at 1669–77, 1692–702; Waterstone et al., *supra* note 54, 1348–51; Waterstone, *supra* note 51, at 1838–46.

community, creating a more solid basis for inferring attitudes than inferences drawn from the actions of judges and juries. The installation of parking spaces, curb cuts, ramps, accessible restrooms, service bells, low-level counters, Braille signage, elevators, and the like sends a message not of what a judge thinks, but of what those individuals subject to the law think—the attitudes of some members of the public in general. Parenthetically, to the extent the entity complying is a government entity, individuals could infer similar information about attitudes from compliance as from passage of legislation.

Finally, one probable inference from observation of ubiquitous access to places of public accommodation is that they are approved of by the public in general. To support this claim we suggest that individuals observing public accommodations may employ the following syllogism: (1) accommodations have been placed everywhere by a variety of people and groups; and (2) therefore, a large number of people believe disabled individuals should have equal access to public spaces. Of course, other inferences are also possible. One could, for example, infer that a business owner has complied with the ADA to bring more customers into her store or simply to follow the law or avoid legal sanction. While it may be argued that individuals infer these additional meanings from compliance, such inferences are not mutually exclusive. Put another way, one might infer a number of different things from compliance, one of which is that the person or entity complying believes disabled persons should be given equal access to places of public accommodation.

B. *Extending the Inferential Mechanism*

As noted earlier, it is unclear why *Expressive Powers* focuses on certain limited types of information that law provides rather than turning to a general model that can be used to consider the many different types of information that laws convey. Throughout the book, McAdams primarily uses an inferential reasoning model to describe how law provides information. But, in describing information provision, he narrowly chooses to consider the way that law provides information on three categories—attitude, risk, and compliance (pp. 137–38). Limiting relevant inferences to this troika serves McAdams's important goal of providing a rigorous structure in which to ground further exploration of expressive forces. At the same time, however, we suggest such a limitation is too stringent. We argue instead that if applied rigorously to the passage of a law, the simple mechanism of inference *without restrictions* can be more comprehensive, while also adequately constraining an analysis of expressive effects. We attempt to provide just such a rigorous application to describe how the ADA may provide information on the employability of disabled workers.

Inferential reasoning is the process of deriving logical conclusions from premises that are, or are believed to be, true. Analysis of expressive effects thus requires identification of premises and consideration of whether conclusions follow logically from those premises. Our application begins with

the following syllogism: (1) I believe disabled workers are relatively unproductive and costly, which is why traditionally they have been cared for by the state; (2) a law is passed for the purpose of increasing hiring and retention of disabled workers that imposes costs in the form of workplace accommodations; and therefore (3) the fact that disabled workers need such a law confirms my belief that they are relatively more costly than individuals who are not disabled.

Let us look at the first premise of the syllogism—the belief that disabled workers are costly and unproductive. There is a well-established literature explaining the stereotyped basis for this belief,⁷³ which nevertheless prevails across all sectors of society including employers, judges, and even otherwise progressive academics.⁷⁴ Moreover, the misconception that disabled workers and their related accommodations (when required) are costly persists in spite of all available quantitative studies concluding that the vast majority of accommodations carry either no cost or are more than paid for by related benefits (including tax credits).⁷⁵ The second premise—that a law was passed for the purpose of increasing employment among disabled workers—is easily verified objectively.⁷⁶ The conclusion that disabled workers need affirmative assistance in accessing and maintaining employment follows logically from these premises. That is, a person who thinks that disabled workers require a law to get hired and retained can logically conclude that such workers are not economically competitive with nondisabled members of the workforce because they need additional help. The use of such basic inferential reasoning will allow for consideration of more of the informational consequences of law than the three mechanisms described in *Expressive Powers*. Certainly, we should aim for a model that can provide regulators with as much information on the potential expressive effects of law as possible. We understand that opening the door to inferential reasoning about more than just attitudes, risk, and compliance creates more complexity in expressive analysis. Constrained and clear application of logic, however, allows for a relatively rigorous analysis of how these inferences occur while polling techniques could easily bear out what people actually believe.

In sum, McAdams constrains his inferential analysis to three specific categories upon which passage of a law may provide information, and such artificial limitation is unnecessarily restrictive. Instead, the process of inferential reasoning provides a rigorous framework for judging how passage of a law may influence beliefs beyond those about attitudes of others, risk of any

73. See, e.g., Stein, *supra* note 43, at 592–622, 629–36.

74. See *id.* at 604–08, 616–20, 629–36. Among nonprogressive academics, Richard Epstein's analysis in advance of the ADA's regulations coming fully into effect is especially revealing. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 480–94 (1992) (arguing against the ADA joining the family of antidiscrimination laws, all of which he opposes, on the ground that it is especially inefficient in that the accommodation mandate creates a disincentive for employers to hire disabled workers).

75. See Stein, *supra* note 48, at 102–09; 124–27 (collecting empirical data and demonstrating the underlying market failure).

76. See, e.g., *supra* notes 38–39, 56–58, 68 and accompanying text.

particular activity, and/or the number of people who violate the law. In the case of the ADA, such a framework allows for rigorous and grounded expressive analysis without unduly limiting the expressive inquiry.

CONCLUSION

Expressive Powers is an ambitious contribution to the literature and theory of the influence of law's expressive effects on behavior. McAdams succeeds in his stated goals of delineating a rigorous rational choice-based model of expressive effects while also demonstrating the expressive effect of law on behavior. In achieving these twin goals, *Expressive Powers* challenges current understandings of why individuals obey the law, and is certain to become an essential reference point for scholars engaging in expressive law research. We assert that concerns about the unpredictable nature of complex behavioral theories, which hampers acceptance of models such as expressive analysis, are misplaced. McAdams succeeds in demonstrating the ubiquity of effects other than legitimacy and deterrence on behavior. This undermines claims that more parsimonious theories will be better at predicting the effects of law. In addition, the book's rigorous structure may be unnecessarily Spartan. While we appreciate the importance of rigor to predictability, we also recognize that a more comprehensive theory better satisfies McAdam's desire to describe the many ways in which law works expressively. To expand its scope without harming its rigor, we applied McAdams's theory of information provision to the ADA, a statute not addressed in *Expressive Powers*, and suggested ways in which the book's structure can be extended without sacrificing its rigor.