

2004

# The Sympathetic Discriminator: Mental Illness and the ADA

Elizabeth Emens

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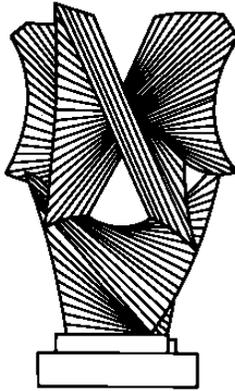
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Elizabeth Emens, "The Sympathetic Discriminator: Mental Illness and the ADA" (University of Chicago Public Law & Legal Theory Working Paper No. 74, 2004).

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# CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 74



## THE SYMPATHETIC DISCRIMINATOR: MENTAL ILLNESS AND THE ADA

*Elizabeth F. Emens*

THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

September 2004

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## **The Sympathetic Discriminator: Mental Illness and the ADA**

(work in progress, forthcoming 2005, *Georgetown Law Journal*)

Elizabeth F. Emens<sup>†</sup>

### ABSTRACT

*Discrimination against people with mental illness occurs in part because of how those with mental illness can make other people feel. A psychotic person may make others feel agitated or afraid, for example, or a depressed person may make others feel sad or frustrated. Thus, a central basis for discrimination in this context is what I call hedonic costs. Hedonic costs are affective or emotional costs: an influx of negative emotion or loss of positive emotion. In addition, the phenomenon of emotional contagion, which is one source of hedonic costs, makes discrimination against people with mental illness peculiarly intractable. Emotional contagion is a largely unconscious process by which we absorb the emotions of nearby others. Research on emotional contagion indicates that people with mental illness are likely to prompt others to absorb their negative emotions, and that emotional contagion increases the more we like someone. Contrary to the much-vaunted contact hypothesis that workplace integration increases liking and decreases discriminatory animus, then, integration of people with mental illness may instead give coworkers and employers more reason to want to avoid people with mental illness.*

*These insights have at least four doctrinal implications. First, the Americans with Disabilities Act (“ADA”) requires employers to bear the hedonic costs imposed on the workplace by employees with mental illness, subject to certain limitations. In particular, employers may not generally define the essential functions of a job to include not inflicting hedonic costs, with the exception of jobs that have the mental state of others as their focus. Second, understanding both the centrality of hedonic costs to mental illness and the mechanism of emotional contagion helps resolve a disagreement between circuits about whether the employer or the employee bears the greater responsibility for effective negotiations about reasonable accommodation of a disability. Third, at a time when the EEOC’s most promising interpretation of what it means for a person to be “regarded as” disabled is on uncertain footing in the courts, an awareness of negative emotional contagion and other hedonic costs of mental illness helps show why that disputed interpretation is in fact vital to implementing the mandate of the ADA. Finally, appreciating the understandable fear of the hedonic costs of mental illness helps explain the difficulty courts have had with the apparently easy doctrinal question of whether interacting with others is a major life activity for purposes of the definition of disability under the ADA, and thus helps supply an answer to that question.*

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<sup>†</sup> Bigelow Fellow and Lecturer in Law, University of Chicago School of Law, 2003-05. J.D., Yale Law School, 2002. Ph.D., King’s College, University of Cambridge, 2002. I am grateful to participants at the Feminism and Legal Theory Workshop conference on the Subject of Disability at Emory University (Mar. 4-5, 2004) and at the University of Chicago Work-in-Progress Seminar (July 15, 2004), at which I presented earlier versions of this work in progress, and to the following people for their comments on earlier drafts: Ian Ayres, John Bronsteen, Mary Anne Case, Adam Cox, J. Richard Emens, Jeanne Fromer, Jill Hasday, Philip Hamburger, Adam Hickey, Ann Hubbard, Jenia Iontcheva Turner, Sarah Lawsky, J. Georgia Lee, Martha Nussbaum, Eric Posner, Rachel Smith, James Spindler, Geof Stone, Lior Strahilevitz, David Strauss, Cass Sunstein, Beatrice Wolper, Kenji Yoshino. All mistakes are of course my own.

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(work in progress, forthcoming 2005, *Georgetown Law Journal*)

Elizabeth F. Emens<sup>†</sup>

INTRODUCTION

Social discrimination against people with mental illness is widespread. Treating people differently on the basis of mental illness does not provoke the same moral outrage as that inspired by differential treatment on the basis of race, sex, or even physical disability. Indeed, many people would freely admit preferring someone who does not have a mental illness as a neighbor, dinner party guest, parent, partner, or person in the next seat on the subway. Moreover, more than ten years after the Americans with Disabilities Act (the “ADA” or “Act”) expressly prohibited private employers from discriminating on the basis of mental, as well as physical, disabilities, most people would still likely prefer not to have a coworker or employee with a mental illness. This paper seeks to understand what lies behind discrimination on the basis of mental illness, and to connect that understanding with a set of disputes about the meaning and scope of the ADA.

People often discriminate against people with mental illness, I argue, because of how those with mental illness make them feel. Those with mental illness may create for others what I call *hedonic costs*, an increase in negative emotions or a loss of positive emotions. For example, an employee with bipolar disorder may behave erratically or express hostility during a manic phase, causing her coworkers to feel frustrated or scared or hostile. Her coworkers may therefore wish to avoid her, in order to avoid these

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feelings. Hedonic costs are relevant to various forms of discrimination, but uniquely capture a core reason for discrimination against people with mental illness.

Hedonic costs based on *emotional contagion* form a peculiarly sympathetic and potent basis for discrimination. Emotional contagion is the process by which we absorb the emotions of nearby others through largely unconscious mechanisms. Research on emotional contagion suggests that people with mental illness are likely to prompt others to share their negative emotions. For example, spending time around a person with depression—even having a short conversation—typically prompts others to feel greater sadness and hostility. And studies indicate that the more an individual likes someone, the more susceptible that individual will be to “catching” the other person’s emotions. Thus, someone who bears no animus towards people with mental illness, and perhaps cares about or likes certain individuals with mental illness, may for this reason feel an impulse to avoid coworkers and others with mental illness.

Emotional contagion defies our intuitions about the potential benefits of fully integrating people with mental illness. Under the standard ideal of workplace integration—sometimes called the contact hypothesis—integration helps to overcome discriminatory animus by putting members of the disliked group alongside potential discriminators. The hope is that by working with members of the disliked group, a discriminator will overcome his discomfort with and dislike of that group. Emotional contagion suggests limits to the salutary antidiscrimination effects of contact with people with mental illness. Most mental illnesses are defined in part by the mentally ill person’s negative emotions; for example, depression is defined at least in part by negative affect, by hedonic costs to the depressed person herself. And the research on emotional contagion indicates that the depressed person’s hedonic costs are more likely to be transmitted to coworkers who like her. Thus, even if contact could eliminate the traditional bases for discrimination against people with mental illness—such as animus and stereotyping—there would likely remain a core basis for discrimination in this context: the desire to avoid absorbing negative emotions that constitute a person’s illness.

An understanding of emotional contagion and the hedonic costs of mental illness has important implications for resolving ADA cases involving plaintiffs with mental illness. First, employers must bear the hedonic costs of a plaintiff’s mental illness unless

those costs prevent the employee from performing the essential functions of the job. Antidiscrimination efforts are not costless, and the ADA, with its explicit accommodation requirement, expressly envisions employers absorbing certain costs. In most contexts, then, employers may not define the essential functions of a job to include making others feel positive emotion or not making them feel negative emotion. Exceptions may arise, though, for jobs that actually have the mental state of others as their core aim. Second, a recognition of the role of hedonic costs in mental illness helps resolve a disagreement between circuits over who should bear the greater burden in employer-employee negotiations over possible accommodations for people with mental illness. Third, at this moment when the EEOC's most promising interpretation of what it means for a person to be "regarded as" disabled is on shaky doctrinal ground, a better understanding of the mind of the discriminator helps to show why that interpretation is vital to the correct interpretation of the Act. Finally, recognizing the "rational" fear of certain hedonic costs helps to explain why an apparently easy doctrinal question—whether interacting with others is a major life activity for purposes of the definition of disability under the ADA—has been hard for courts, and thus helps to supply an answer.

The paper comes in four parts. Part I briefly sets out some preliminary matters: the statutory framework of the ADA, its commitment to protecting people with mental illness, and some definitions and statistics pertinent to mental illness. Part II explores animus, irrational stereotyping, and rational discrimination as sources of discrimination against people with mental illness, laying the groundwork for my argument that these traditional rubrics, developed in the context of race and sex, fail to capture a basis for discrimination particularly salient in the context of mental illness. Part III explains hedonic costs and argues for their special role in the definition of mental illness and discrimination in this context. This Part discusses the research on emotional contagion, its relevance to mental illness, and its importance in the workplace, in order to frame my central argument: that certain hedonic costs of being around people with mental illness form a hybrid, and peculiarly intractable, basis for discrimination in this context. Part IV lays out the doctrinal implications of this analysis, first analyzing the extent to which employers must absorb the hedonic costs of mental illness, then resolving three further doctrinal questions: who must bear the burden of effective accommodation negotiations,

the proper interpretation of the “regarded as” prong of the definition of disability, and whether interacting with others is a major life activity for purposes of the definition of disability under the ADA.

## I. PRELIMINARIES

This Part provides background to what follows by outlining the statutory framework of an ADA claim, the statute’s mandate to protect people with mental illness, and some pertinent definitions and statistics about mental illness.

### A. Statutory Framework and Mandate

Enacted in 1991, the ADA explicitly protects people with both mental and physical disabilities. Much of the ADA’s language was taken from the Rehabilitation Act of 1973, with certain meaningful alterations.<sup>1</sup> The statutory framework is not uncomplicated, so this Section sketches the basic contours of the ADA plaintiff’s prima facie case of employment discrimination, highlighting key features of the definition of disability, then briefly discusses the ADA’s mandate as it particularly relates to people with mental illness.

(1) *The statute.* A worker who suffers from discrimination by a private employer on account of her mental illness may seek recourse under Title I of the ADA,<sup>2</sup> which provides that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees.”<sup>3</sup> A “qualified individual with a disability” is “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>4</sup>

To establish a prima facie case of discriminatory discharge under the ADA, the plaintiff therefore has the burden of showing four things:

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<sup>1</sup> For example, the Rehab Act had required the plaintiff to show that she suffered adverse employment action “solely by reason of her or his disability,” 29 U.S.C. § 794(a), whereas the ADA drops the word “solely,” requiring only that she suffer adverse action “because of the disability,” 42 U.S.C. § 12112(a).

<sup>2</sup> Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (1990)).

<sup>3</sup> 42 U.S.C. § 12112(a).

<sup>4</sup> *Id.* § 12111(8).

- (1) his employer is subject to the ADA;
- (2) he was disabled within the meaning of the ADA;
- (3) he was otherwise qualified to perform the essential functions of his job, with or without reasonable accommodation; and
- (4) he suffered adverse employment action because of his disability.<sup>5</sup>

For purposes of establishing whether a plaintiff “counts” as having a disability under the second prong above, the ADA defines “disability” in three distinct ways:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.<sup>6</sup>

The question of what activities are “major life activities” is one that courts decide as a matter of law, as discussed later, whereas the substantial limitation inquiry is individualized and fact-specific.<sup>7</sup> Many of the cases brought by plaintiffs with mental illness are dismissed on summary judgment because the courts find that the plaintiff’s diagnosed impairment, such as depression or obsessive-compulsive disorder, does not substantially limit him in a major life activity (or is not regarded as such or on record as such).<sup>8</sup>

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<sup>5</sup> *E.g.*, *Giordano v. City of New York*, 274 F.3d 740, 747 (2d Cir. 2001) (internal quotation marks omitted). The plaintiff’s evidentiary burden depends upon whether courts apply the *McDonnell Douglas* burden-shifting pretext scheme or the mixed-motive analysis of *Price Waterhouse*. For a discussion of the two models in the ADA case law, see Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 661 (2000).

<sup>6</sup> 42 U.S.C. § 12102(2).

<sup>7</sup> For a discussion of major life activities, see *infra* Section IV.D. The regulations provide that a plaintiff is substantially limited when he is

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

*Id.* § 1630.2(j)(1). The regulations suggest that consideration be given to “(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.” *Id.* § 1630.2(j)(2).

<sup>8</sup> *See, e.g.*, *Wright v. CompUSA, Inc.*, 352 F.3d 472 (1st Cir. 2003) (“While Wright provided evidence that his ADD affected various activities in his everyday life, this evidence was not sufficient to allow a reasonable juror to conclude that he was substantially limited in the major life activities of reading,

Of the doctrinal interpretations of the ADA's core language, the most noteworthy in the context of mental illness concerns the treatment of a plaintiff's efforts to "mitigate" his disability. Under the Supreme Court's decision in *Sutton v. United Air Lines*,<sup>9</sup> a plaintiff must be evaluated in his post-mitigation state for purposes of determining whether his impairment substantially limits him in a major life activity. Thus, if a plaintiff wears eyeglasses, as the plaintiffs did in *Sutton*, the court should evaluate how limited he is once he is wearing the glasses, in order to determine if he is limited enough to qualify as having a disability under the Act. Similarly, a plaintiff who has successfully mitigated her severe depression with medication, such that her depression no longer substantially limits her in any major life activity, would probably not qualify as actually disabled under § 12102(2)(A)—unless perhaps her medication causes side effects that substantially limit her in a major life activity.<sup>10</sup> Nor would the Act cover, as actually

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speaking, concentrating, hearing and processing information, and thinking and articulating thoughts, as he contends."); *Heisler v. Metropolitan Council*, 339 F.3d 622, 628-29 (8th Cir. 2003) ("Heisler has simply failed to establish that her depression, or any other impairment, significantly restricted her ability to sleep [or interact with others or concentrate] as compared to the general population."); *Roeber v. Yakima*, 21 Fed. Appx. 649, 650-51 (9th Cir. 2001) (unpublished opinion) (plaintiff with migraines and bouts of depression not disabled; "The affidavit also described bouts of depression brought on by migraines; although these were 'essentially incapacitating' while they lasted, Roeber 'minimize[d] the[ir] effects . . . as [he] want[ed] to believe that [he was] living a normal life.');" *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1254-55 (10th Cir. 2001) (finding plaintiff with depression and OCD not to be substantially limited in sleeping, walking, or interacting with others because "he is still physically and psychologically capable of walking" and because he "has not provided any evidence that his OCD has caused him to have trouble getting along with people in general"); *Doyal v. Oklahoma Heart, Inc.*, 213 F.3d 492, 497 (10th Cir. 2000) (finding plaintiff with major depression and anxiety attacks not to be substantially limited in a major life activity because he presented insufficient evidence that his limitations in learning, inter alia, were much greater than others'); *Pack v. Kmart Corp.*, 166 F.3d 1300, 1306 (8th Cir. 1999) (JMOL) ("Pack was required to establish that she was unable to sleep or was significantly restricted as to the condition, manner, or duration of her ability to sleep as compared to the average person in the general population . . . Pack did not allege that she was completely unable to sleep."); *Lee v. Arizona Bd. of Regents*, 25 Fed. Appx. 530 (9th Cir. 2001) (unpublished opinion); *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 508 (7th Cir. 1998) (plaintiff with ADD was not actually disabled; "The lack of evidence that ADD presently limits [the plaintiff's] ability to learn is more troubling. . . . There is, in addition, Davidson's own assertion that she succeeded at her previous employment because her superiors had supplied her with a structured environment and had viewed her questions as a strength."); *Soileau v. Guilford of Maine*, 105 F.3d 12, 15 (1st Cir. 1997) ("Here, Soileau's alleged inability to interact with others came and went and was triggered by vicissitudes of life which are normally stressful for ordinary people—losing a girlfriend or being criticized by a supervisor. Soileau's last depressive episode [in his depressive disorder, dysthymia, which is "characterized by intermittent bouts of depression,"] was four years earlier, and he had no apparent difficulties in the interim."); *Horwitz v. L. & J.G. Stickleby, Inc.*, 20 Fed. Appx. 76 (2d Cir. 2001) (unpublished) (finding that plaintiff on medication for bipolar disorder with history of multiple hospitalizations for her illness did not have a record of being substantially limited in a major life activity).

<sup>9</sup> *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

<sup>10</sup> See, e.g., Jill Elaine Hasday, *Mitigation and the Americans with Disabilities Act*, 103 MICH. L. REV. (forthcoming November 2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=573521](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=573521);

disabled, a plaintiff with obsessive-compulsive disorder<sup>11</sup> who has learned through ongoing cognitive-behavioral therapy to manage her repetitive thoughts and behaviors so that they no longer substantially limit her in any major life activity. These plaintiffs might qualify under one of the other prongs of the definition of disability, such as the regarded-as prong, which I discuss in detail in Part IV, but they will probably not qualify as actually disabled.

(2) *Mandate to protect people with mental illness.* The congressional mandate to protect people with mental as well as physical disabilities is plain. Most importantly, of course, the face of the statute repeatedly incorporates both physical and mental disabilities.<sup>12</sup> In addition, although the legislative history and findings of the ADA contain little specific discussion of mental illness, the Act's coverage of most mental illnesses is further emphasized by the enumerated exclusions of certain specific conditions apparently deemed morally unworthy of protection, such as gender-identity disorder, pedophilia, compulsive gambling, and drug addiction in those who are currently using drugs.<sup>13</sup> Such exclusions are the remnants of an effort by Senator Helms and others to remove serious mental illnesses—such as bipolar disorder and schizophrenia—from the Act's protection.<sup>14</sup> Helms's effort failed, and the Act covers most mental illnesses so

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Sarah Lawsky, *Disregarding Disability: The Effect of Sutton v. United Airlines on Litigation Under the Fair Housing Amendments Act*, Nat'l Fair Housing Advocate Online, <http://www.fairhousing.com/> (August 1999); Lauren J. McGarity, Note, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might Be the Saving Grace of Sutton*, 109 YALE L.J. 1161 (2000); see also *infra* text accompanying notes 253-254.

<sup>11</sup> Obsessive-compulsive disorder is characterized by “recurrent obsessions or compulsions . . . that are severe enough to be time consuming (i.e., they take more than 1 hour a day) or cause marked distress or significant impairment.” DSM-IV-TR, *supra* note XX, at 456.

<sup>12</sup> See, e.g., 42 U.S.C. § 12102(2).

<sup>13</sup> 42 U.S.C. § 12211 (b) provides

Under this chapter, the term ‘disability’ shall not include--

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

<sup>14</sup> See, e.g., Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J. L. & HEALTH 15, 28-29 (1993/94). Robert Burgdorf thus summarizes the debate over mental illness as Senators “struggled into the late evening on September 7, 1989, to complete Senate approval of the bill”:

Precipitated by the conservative trio of Senators Jesse Helms, William Armstrong and Gordon Humphrey, the amendments grew out of a broad attack on the breadth of individuals afforded protection under the bill. The Senators expressed outrage at a variety of characteristics they charged would cause an individual to be protected from discrimination under the Act. Specifically targeted at various points in oratorical diatribes were: pedophilia, schizophrenia, kleptomania, manic depression,

long as the individual plaintiff meets the requirements of one of the three prongs of the definition of disability discussed above.

The congressional mandate to protect people with mental illness from employment discrimination—and thus to help facilitate integration of people with mental illness into the workforce—serves numerous important ends. First, studies indicate that work helps people with mental illness meet various of their needs and avoid relapse.<sup>15</sup> Research indicates that people with mental illness appreciate work as an opportunity to contribute to society, as a way to feel normal, and as a welcome challenge and chance to build confidence.<sup>16</sup> Second, according to the well-known “contact hypothesis,” which will be considered further in Part III, successful integration into an employment context can help to overcome stereotypes and bias of outsiders to mental illness.<sup>17</sup> In particular, studies have shown that contact in the form of working together as equals—rather than just isolated visits or specially arranged interactions—has relatively greater potential to improve attitudes to people with mental illness.<sup>18</sup> Finally, employment obviously allows many people to be self-supporting rather than relying partially or fully on public benefits, a particularly important effect in light of the large proportion of the population that suffers from mental illness at some point in their lives, as explained in the next Section.

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significantly low I.Q., psychotic disorders, homosexuality, transvestitism, AIDS and HIV infection, drug use, bisexuality, voyeurism, alcoholism and compulsive gambling. At one point, Senator Armstrong stood on the Senate floor and pointed to a long list of conditions in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association as an example of all the conditions included. His remarks raised the specter of a potential roll call on individual amendments to remove each of these conditions.

Attacks upon certain conditions provoked a strong response from other Senators who rose up to defend their inclusion in the Act’s protection; Senator Kennedy led a defense of the inclusion of HIV infection, and Senator Domenici gave a spirited speech on behalf of individuals with manic-depression and schizophrenia, suggesting that Winston Churchill and Abraham Lincoln suffered from such disturbances. Other conditions did not have the advantage of such Senatorial advocacy.

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, 451-52 (1991) (citing 135 CONG. REC. S10765-86 (daily ed. Sept. 7, 1989)).

<sup>15</sup> See, e.g., Perlin, *supra* note XX, at 35 (“Having a job and a place to live are the two key variables that serve to separate those ex-patients who can permanently stay out of hospitals and live a decent life from those who face the revolving door or life in back alleys.”).

<sup>16</sup> Bonnie Kirsh, *Work, Workers, and Workplaces: A Qualitative Analysis of Narratives of Mental Health Consumers*, 66 J. REHABILITATION 24 (Oct.-Dec. 2000).

<sup>17</sup> See *infra* text accompanying notes XX.

<sup>18</sup> See, e.g., Corrigan & Penn, *supra* note XX; see *supra* note XX.

## B. Mental Illness: Definitional and Statistical Matters

Defining mental illness is not an exact science.<sup>19</sup> For the definitions of specific disorders, this paper nonetheless relies on the criteria laid out in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (“DSM-IV-TR”).<sup>20</sup> The general term “mental illness,”<sup>21</sup> as used in this paper, includes what are typically thought of as psychological disorders, such as mood, anxiety, thought, and personality disorders (e.g., depression, obsessive-compulsive disorder, schizophrenia, borderline personality disorder), and excludes those impairments commonly understood as more physical or organic than psychiatric, including learning disabilities, neurological impairments, developmental disorders, and chemical addictions (e.g., mental retardation, Down syndrome, epilepsy, autism, alcoholism).<sup>22</sup>

These distinctions are easily disputed. The purpose in so defining mental illness is not, however, to name an essential category. Rather, since the focus of the paper is workplace discrimination and the attitudes of the discriminator, the aim is to capture as best as possible the group commonly thought of as the mentally ill. Thus, while I do not intend to endorse the idea of a split between mind and body, or between psychology and physiology, legal and scientific sources indicate that ideas and attitudes about mental illness are sufficiently distinct to warrant separate attention. For example, the ADA specifically mentions both “physical and mental impairments,”<sup>23</sup> and the DSM-IV-TR is dedicated to the disorders of the mind, even while it self-consciously acknowledges the indistinct line between the physical and the mental.<sup>24</sup> In addition, the DSM-IV-TR groups

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<sup>19</sup> See, e.g., *Mental Illness*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <http://plato.stanford.edu/entries/mental-illness/> (last updated Nov. 30, 2001).

<sup>20</sup> AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., text rev. 2000) [hereinafter DSM-IV-TR].

<sup>21</sup> See, e.g., DEBORAH ZUCKERMAN ET AL., THE ADA AND PEOPLE WITH MENTAL ILLNESS: A RESOURCE MANUAL FOR EMPLOYERS 1 (1993).

<sup>22</sup> See, e.g., *id.* at 7. Other work makes similar and also different distinctions, such as, for example, including only those disorders designated as Axis I disorders in the DSM, which excludes mental retardation, as I do, but also excluding personality disorders which I include. See Hubbard, *supra* note XX. Personality disorders are a contested diagnostic category, normatively and scientifically, but they also capture some of the behavior others find most “crazy,” so they seem important to include here.

<sup>23</sup> E.g., 42 U.S.C. § 12102(2).

<sup>24</sup> DSM-IV-TR, *supra* note XX, at xxx (“Although this volume is titled the *Diagnostic and Statistical Manual of Mental Disorders*, the term *mental disorder* unfortunately implies a distinction between ‘mental’ disorders and physical disorders that is a reductionistic anachronism of mind/body dualism. A compelling literature documents that there is much ‘physical’ in ‘mental’ disorders and much ‘physical’ in ‘mental’

together a number of the disorders that my definition excludes, such as substance abuse, delirium, and dementia, and until the most recent edition labeled them “organic mental syndromes and disorders.”<sup>25</sup> Moreover, attitudes towards learning disorders such as mental retardation differ markedly from attitudes towards mental illnesses such as psychosis and depression, with the latter group bearing significantly more stigma.<sup>26</sup> One reason for some of the differences in attitudes to mental illnesses, as opposed to other mental or physical impairments, may be a belief that mental illnesses are more amorphous and culturally constructed than other kinds of impairments; for the purposes of the paper, however, I bracket the question of whether or to what extent mental illness is culturally constructed.<sup>27</sup>

A further point of definitional difficulty deserves mention: A person described as having a particular diagnosis of a mental illness may or may not be symptomatic. That is, due to psychotropic medication or ongoing therapy, the person may be mitigating his symptoms to such an extent that a new mental health professional, unaware of his history and ongoing treatment, might not diagnose him with the disorder.<sup>28</sup> He may nonetheless

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disorders. The problem raised by the term ‘mental’ disorders has been much clearer than its solution, and, unfortunately, the term persists in the title of DSM-IV because we have not found an appropriate substitute.”).

<sup>25</sup> Though these disorders remain next to each other in the manual, ostensibly for facilitating certain diagnostic purposes, the name “organic” was abandoned in the fourth edition of the DSM because of concerns about the implication of a mind-body split. DSM-IV-TR, *supra* note XX, at 10; *see also supra* note 24.

<sup>26</sup> *See, e.g.*, Patrick W. Corrigan, L. Philip River, Robert K. Lundin, Kyle Uphoff Wasowski, John Campion, James Mathisen, Hillel Goldstein, Maria Bergman & Christine Gagnon, *Stigmatizing Attributions About Mental Illness*, 28 J. COMMUNITY PSYCHOLOGY 91, 94 (2000).

<sup>27</sup> *See, e.g.*, THOMAS SZASZ, *THE MYTH OF MENTAL ILLNESS* (rev. ed. 1984); THOMAS S. SZASZ, *THE MANUFACTURE OF MADNESS* (1997). Also, because I am focusing on the mind of the discriminator, I at times use some less formal terms for mental illness, because when talking about stereotyping and group identities, the older, more generalized terminology sometimes captures something differently meaningful in people’s understandings. *Cf.* Maura Tumulty, *Distinguishing Loquacity from Understanding: Illusions of Sense and the Execution of the Insane* 2 n.8 (Dec. 29, 2003) (unpublished manuscript, on file with author); KAY REDFIELD JAMISON, *AN UNQUIET MIND: A MEMOIR OF MOODS AND MADNESS* 179-81 (1996) (“In the language that is used to discuss and describe mental illness, many different things—descriptiveness, banality, clinical precision, and stigma—intersect to create confusion, misunderstanding, and a gradual bleaching out of traditional words and phrases. . . . [T]he assumption that rigidly rejecting words and phrases that have existed for centuries will have much impact on public attitudes is rather dubious. It gives the illusion of easy answers to impossibly difficult questions and ignores the powerful role of wit and irony as positive agents of self-notion and social change. Clearly there is a need for freedom, diversity, wit, and directness of language about abnormal mental states and behavior. Just as clearly, there is a profound need for a change in public perception about mental illness.”).

<sup>28</sup> “Psychotropic medications are drugs prescribed to stabilize or improve mood, mental status, or behavior. In other words, they are medications used to modify emotions or behavior. These medications are sometimes called ‘psychiatric medications’ or ‘psychoactive medications.’” *Mental Health and*

retain the diagnosis, however, not only for practical reasons such as insurance coverage, but also because he and his clinician may not know for certain whether the symptoms would return if he ceased the medication or the therapy. Going off of psychotropic medication, even under supervision, is a risky endeavor, which may involve symptoms of withdrawal in addition to the risk of relapse and of associated harm to self or others, and for these and other reasons, a patient's desire to end medication is often viewed with skepticism as a counter-therapeutic impulse.<sup>29</sup> For this reason, many people diagnosed with mental illness, particularly those with a history of serious mental illness, continue to take medication throughout their lives.<sup>30</sup> People thus may be no longer symptomatic, or not markedly so, but still be subject to the stigma associated with mental illness, if others learn of their present diagnosis or history. Plaintiffs in this situation are likely to argue for protection under the record of or regarded as prongs of the definition of disability.<sup>31</sup>

Among the ADA charges filed with the EEOC between 1992 and 2003, the most common mental illness is, by far, depression. The breakdown, as a percentage of total ADA charges, is as follows: depression (6.7%), anxiety disorders (2.7%), manic depressive disorder (1.8%), schizophrenia (0.4%), and "other psychological disorders" (3.5%).<sup>32</sup> Within the U.S. population more generally, a recent World Health Organization ("WHO") study reported that 26% of Americans suffer from mental illness, including alcoholism and substance abuse, within a twelve-month period.<sup>33</sup> Similar to the EEOC figures, mood and anxiety disorders were the most prevalent, though with anxiety

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Developmental Disabilities Center, Psychotropic Medications: Overview & General Comments (1998), <http://www.npi.ucla.edu/mhdd/INFO/modules/psychotropicmedsoverview.htm>.

<sup>29</sup> See, e.g., Mary Duenwald, *How To Stop Depression Medications: Very Slowly*, N.Y. TIMES, May 25, 2004, at F1; Center for Addiction and Mental Health, *Challenges and Choices: Going Off Medication*, [http://www.camh.net/care\\_treatment/challenges\\_choices\\_goingoffmeds.html](http://www.camh.net/care_treatment/challenges_choices_goingoffmeds.html) (last updated July 8, 2004).

<sup>30</sup> See, e.g., *id.*

<sup>31</sup> See 42 U.S.C. § 12102(2)(A),(B); see also *supra* Section I.A; *infra* Section IV.C.

<sup>32</sup> EEOC, ADA Charge Data by Impairments/Bases – Receipts, available at <http://www.eeoc.gov/stats/ada-receipts.html> (last modified Mar. 8, 2004). Autism, which lies on the boundary of mental illness, is listed as 0.0%, which represents 80 cases. *Id.* In addition, alcoholism makes up 1.6% and drug addiction 0.8%. *Id.*

<sup>33</sup> WHO World Mental Health Survey Consortium, *Prevalence, Severity, and Unmet Need for Treatment of Mental Disorders in the World Health Organization World Mental Health Surveys*, 291 JAMA 2581, 2584 (June 2, 2004); Todd Zwillich, *Rate of Mental Illness Is "Staggering": 25% of Americans Have Mental Disorder at Some Point, Though Many Untreated, Researchers Say*, <http://content.health.msn.com/content/article/88/99740.htm> (June 1, 2004).

disorders taking first place in the WHO report (18%) and mood disorders, which include depression, taking second (10%).<sup>34</sup>

## II. THE MIND OF THE DISCRIMINATOR: TRADITIONAL CATEGORIES

The discriminator against people with mental illness is not much understood or much studied. A key reason for this neglect is, paradoxically, the pervasiveness of discrimination against people with mental illness. A person's being "completely crazy" or "unbalanced" is generally taken to be an understandable reason not to want the person at one's dinner party, in one's bed, or at the next table at Starbucks. Similarly, in the employment context, many would think it not unreasonable for an employer to prefer a stable employee to an unstable one, or a worker to prefer a mentally well to a mentally ill coworker, even if the ADA makes it legally impermissible for the employer to act on such preferences. The social acceptability of the impulse to discriminate against a person with mental illness thus seems strikingly different from the normative reaction we would expect to an account of a particular employer's having a generic preference for a white over a black employee.

This puzzle creates the need to think seriously about the mind of the discriminator against people with mental illness. The pervasiveness of the impulse to discriminate in this context calls for an effort to understand it from the inside.<sup>35</sup> And there are further reasons for this approach. First, the ADA expressly recognizes the role of the discriminator in the creation of disability. The statute itself defines, as one form of having a "disability," the status of being "regarded as" disabled by others.<sup>36</sup>

Second, the current doctrinal debates over the ADA call for such efforts at varied position-taking. To many advocates and scholars, courts' interpretations of the Act over

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<sup>34</sup> *Id. Cf., e.g.,* President's New Freedom Commission on Mental Health, *Achieving the Promise: Transforming Mental Health Care in America 2* (2003) (reporting that, in a given year, about 5% to 7% of adults have a serious mental illness, and similar percentage of children—about 5% to 9%—have a serious emotional disturbance).

<sup>35</sup> *Cf.* Natalie Zemon Davis, "Women's History" in *Transition: The European Case*, 3 *FEMINIST STUDIES* 90 (Spring-Summer 1976) ("[I]t seems to me that we should be interested in the history of both women and men, that we should not be working only on the subjected sex any more than an historian of class can focus exclusively on peasants. Our goal is to understand the significance of the sexes, of gender groups in the historical past.").

<sup>36</sup> 42 U.S.C. § 12102(2).

the past thirteen years have narrowed its scope,<sup>37</sup> and advocates for people with mental illness have felt that this group has fared particularly badly in the courts.<sup>38</sup> Justified or not, such frustration creates the temptation to approach discussions of current doctrinal questions with a kind of “save the ADA” mindset. To try to overcome some of the polarization in the doctrinal debates, this paper therefore tries to imagine the perspective of the relevant actors in workplace discrimination, including the discriminators, each in turn.<sup>39</sup>

This Part provides an overview of the types of discrimination against people with mental illness under traditional rubrics of discrimination. This overview serves two purposes. First, legal scholarship on mental illness has focused largely on the myths, fears, and stereotypes that limit the opportunities of people with mental illness.<sup>40</sup> This Part aims to bring the results of this important work together with an account of other forms of discrimination in this area—including so-called rational discrimination. Second, this outline of discrimination against people with mental illness under the standard categories lays the groundwork for the rest of the paper, in which I identify a basis for discrimination that cuts across these categories.

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<sup>37</sup> See, e.g., Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? What Can We Do About It?*, 21 BERK. J. EMP. & LAB. L. 91 (2000).

<sup>38</sup> See, e.g., Stephanie Proctor Miller, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disabilities*, 85 CAL. L. REV. 701, 701-02 (1997); Michael D. Meuti, *Disabling Legislation: The Judicial Erosion of Protection for Employees with Psychiatric Disorders*, 14 STAN. L. & POL'Y REV. 445, 464 (2003). This concern is enhanced by the fact that labor participation rates for people with mental illness are substantially lower than for the general population, and even than for people with physical disabilities. “Between 1987 and 1991, only 44% of individuals with mental disorders, compared to 75% of individuals without, participated in the labor force. Of people whose mental conditions were severe enough to qualify as disabilities, only 27% were in the labor force, compared to 50% of people who experienced physical disabilities.” Meuti, *supra*, at 447 (citing Edward H. Yelin & Miriam G. Cisternas, *Employment Patterns among Persons with and without Mental Conditions*, in MENTAL DISORDER, WORK DISABILITY, AND THE LAW 25, 37, 38-39 (Richard J. Bonnie & John Monahan eds., 1997)).

<sup>39</sup> This approach, or empathy exercise, is inspired by the writings of Susan Okin. See Susan Moller Okin, *Reason and Feeling in Thinking About Justice*, 99 ETHICS (1989), reprinted in 30, 34 (1990) (“In the absence of knowledge about their own particular characteristics, those in the original position cannot think from the position of *nobody* (as Rawls’s desire for simplicity might suggest); they must think from the position of *everybody*, in the sense of *each in turn*. . . . [T]he only coherent way in which a party in the original position can think about justice is through empathy with persons of all kinds in all the different positions in society, but especially with the least well-off in various respects.”). I express no view on Okin’s account of Rawls’s original position as involving this kind of empathy exercise, but invoke her account merely as a useful analogy for the kind of empathy exercise I aim to engage in.

<sup>40</sup> See, e.g., Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585 (2003); Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J. L. & HEALTH 15 (1993/94); Ann Hubbard, *The ADA, the Workplace, and the Myth of the “Dangerous Mentally Ill,”* 34 U.C. DAVIS L. REV. 849 (2001).

This discussion is broadly framed by the distinction between inefficient discrimination and efficient, or rational, discrimination. My purpose here is not to suggest a clean line dividing these forms, either normatively or descriptively. Rather, normatively, I accept the basic contours of our current antidiscrimination law and thus the premise, elaborated by various scholars, that most forms of rational discrimination against protected groups are impermissible under Title VII and the ADA.<sup>41</sup> And descriptively, I also decline to endorse any perfect distinction between efficient and inefficient discrimination: On the contrary, my aim is to prepare the reader for a discussion, in next Part, of a form of discrimination against people with mental illness that seems to straddle efficiency and inefficiency. Moreover, the distinction between these forms of discrimination is rhetorically and conceptually useful to a discussion of mental illness in the workplace, because it provides organizational rubrics that reflect many of our actual practices as well as our intuitions about workplace discrimination.

#### A. Animus-Based Discrimination

A person discriminates based on animus if he treats someone differently because of dislike or hostility towards the protected class of which that person is a member.<sup>42</sup> The idea arises from, among other places, the concept of a “taste for discrimination” that runs counter to an employer’s hardheaded interests in market success.<sup>43</sup> If an employer caters to her mere preference to avoid certain types of people, then in theory she should lose out to competitors whose choices depend entirely on material self-interest. Much like a business owner who used company money to buy herself chocolate bars, the employer who indulges her taste for discrimination effectively pays a price with company resources by, for example, declining to hire the most qualified job applicants when they come from the group she dislikes. Animus-based discrimination by an employer thus falls under the

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<sup>41</sup> See, e.g., David A. Strauss, *The Myth of Colorblindness*, 1986 THE SUPREME COURT REVIEW 99 (Philip B. Kurland, Gerhard Casper & Dennis J. Hutchinson, eds., 1986); Cass R. Sunstein, *Why Markets Won't Stop Discrimination*, 8 SOC. PHIL. & POL'Y 21 (1991); Samuel R. Bagenstos, “*Rational Discrimination, Accommodation, and the Politics of (Disability) Civil Rights*,” 89 VA. L. REV. 825 (2003).

<sup>42</sup> See, e.g., GARY BECKER, THE ECONOMICS OF DISCRIMINATION 39-54 (2d ed. 1971); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 615-17 (2003); Bagenstos, *supra* note XX, at 846; Sunstein, *supra* note XX; Strauss, *supra* note XX. Ian Ayres has distinguished associational animus from consequential animus; this discussion means to include both under the broader umbrella of animus. Ian Ayres, *Further Evidence of New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 111 (1995).

<sup>43</sup> See BECKER, *supra* note XX, at 39-42.

rubric of inefficient discrimination. By contrast, decisions based on third-party animus may be efficient from an employer's perspective, as I discuss below.

This account has of course been complicated and criticized in various ways, which need not be elaborated here. As noted earlier, my purpose is not to argue for a particular view of the relationship between markets and discrimination, but rather to use these conceptual categories to survey the landscape of discrimination against people with mental illness. In this Section, I will first discuss employer animus, then third-party animus, which might involve coworkers, customers, or both.

(1) *Employer animus*. Classic animus-based discrimination—an employer's acting on the basis of hostility or dislike towards an employee because of the employee's membership in a protected group—still features prominently in discrimination against people with mental illness.<sup>44</sup> Moreover, in contrast to the domains of sex and race, and even physical disability, where overt hostility and dislike have to some extent diminished,<sup>45</sup> or at least gone underground by morphing into less conscious forms of discriminatory animus,<sup>46</sup> overt animus against people with mental illness is not uncommon.<sup>47</sup> And more subtle expressions of animus also characterize the response to people with mental illness.

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<sup>44</sup> By speaking of the discriminator against people with mental illness in the singular, I do not mean to suggest that there is one unitary type of discriminator or discrimination in this context. I mean though to conjure an image of a real person engaging in the various forms of discrimination I discuss.

<sup>45</sup> See, e.g., Perlin, *supra* note XX; cf., e.g., *Godwin v. State*, 593 So.2d 211, 215 (Fla. 1992) (Kogan, J., concurring in part & dissenting in part) (“The law itself is beginning a process of rooting out acts of irrational prejudice based on mental disability, just as the law in the 1960's began eliminating the irrational bigotry posed by racism. Yet, the very necessity of such laws underscores how painfully widespread such prejudice and bigotry are.”).

<sup>46</sup> See, e.g., Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem and Stereotypes*, 102 PSYCH. REV. 4, 9 (1995); see also, e.g., Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 2, 14-15 (1976) (discussing the success of the civil rights movement in eliminating many of the most flagrant practices of racial discrimination, although many forms of covert discrimination remain, and also discussing why the practice of racially selective sympathy and indifference violates the antidiscrimination principle); Reva Siegel, *Why Equal Protection No Longer Protects*, 49 STAN. L. REV. 1111 (1997) (discussing the mechanism of preservation-through-transformation).

<sup>47</sup> See, e.g., *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1256 (10th Cir. 2001) (“Steele often heard co-workers refer to him as ‘Psycho Bob.’ Steele overheard one team member say, ‘I hope I’m not here or around when Bob loses it,’ and another say that he thought Steele was ‘crazy as hell. He’s a psychopath. One team member would make cuckoo noises in Steele’s presence. Steele also took offense when his supervisor said, ‘Robert, what am I going to do with you and Jill?’ Jill Hopper was a Thiokol employee who many believed to have mental problems.”) (quoting district court opinion (internal quotation marks to district court omitted)); *Newberry v. East Texas State Univ.*, 161 F.3d 276, 278 (5th Cir. 1998) (“[O]ther faculty

Discrimination based on animus might be thought of as discrimination based on a negative affect or feeling towards the members of the group. Thus, the core affective statement is simply “I don’t like crazy people.” The speaker might give some further explanation or detail, as long as the explanation remains based on a taste or preference.<sup>48</sup>

Consider, for example, an employer presented with two applicants for the job of computer programmer, Alan and Bridget, who have similar qualifications for the job. The only difference notable to the employer is a six-month interruption, five years ago, in Alan’s stellar work record: Following a two-month gap between jobs, this skilled computer specialist was employed as a bookstore clerk for four months, before starting another programming job. When the employer asks Alan why he left programming for that time, Alan explains that he was hospitalized for depression for eight weeks, and then worked a flexible schedule at the book store for four months while he settled into a successful regime of medication and therapy. Alan adds that he continues to take medication and has had no problems with depression during the past five years.

Bracketing any predictive concerns an employer might have about Alan’s work performance, as well as the question whether such concerns would be valid, we can imagine that this employer might simply prefer to hire Bridget because of animus towards Alan. He might think: “I just don’t like crazy people—they make me uncomfortable.” The employer might hold a particular grudge against the group he calls “crazy” because his family and friends always derided “crazy” people, or because he had a bad experience in the past with someone “crazy,” or because he has always worried at some level about his own sanity after he learned of a history of mental illness in his family, or perhaps because he harbors a generalized hostility towards people he considers different or less powerful than himself, such that animus towards people with mental illness is merely one manifestation of a more general bigotry. Whatever the explanation, if the employer acts upon this preference, he is engaging in animus-based discrimination. Because of recent developments in the doctrine surrounding who qualifies as disabled

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members . . . allegedly characterized Newberry with phrases like ‘paranoid,’ ‘nuts,’ ‘crazy,’ and ‘having mental difficulties.’”).

<sup>48</sup> The person might also have *reasons* for the dislike, but the important point about animus is that the dislike would likely persist even if the reasons proved unfounded. *See, e.g.*, GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* 16 (2d ed. 1971) (“Ignorance may be quickly eliminated by the spread of knowledge, while a prejudice (i.e., preference) is relatively independent of knowledge.”).

under the ADA, the question of whether Alan would actually be able to assert his claim under the ADA as currently interpreted by the courts is a surprisingly complicated one.<sup>49</sup> As a general normative matter, though, if we assume that Alan falls within the scope of the Act, this would be impermissible discrimination on the basis of disability.

(2) *Third-party animus*. Sometimes coworkers or customers harbor animus towards a group and thus give an employer an incentive to behave in discriminatory ways. An employer's capitulation to the animus of coworkers or customers involves animus at one level, but, from the employer's perspective, it can look more like market-rational statistical discrimination, discussed further below. For example, if the employer in the above example personally had nothing against people with mental illness and thus nothing against Alan, and also harbored no doubts about Alan's ability to perform the job as well as Bridget, economic self-interest might still lead the employer to prefer Bridget because of the potential costs of the reaction of customers or coworkers who dislike "crazy" people. If they learned of Alan's depression or history of hospitalization, prejudiced customers or coworkers might punish the employer for hiring Alan by taking their business or skills elsewhere or simply by making friction in and around the workplace that has productivity costs.

Thus, if an employer had a crystal ball that could tell him which applicant would produce the most benefits and least costs from a purely bottom-line perspective, the employer might choose to hire Bridget without knowing about Alan's mental illness.<sup>50</sup> The efficient decision would depend on whether the benefits of hiring Alan would ultimately exceed the costs imposed by customers or coworkers. In the hypothetical, Alan

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<sup>49</sup> This would seem to be an easy case for the plaintiff to win under the ADA. Oddly, it might not be. If Alan could get past the evidentiary hurdle—perhaps the employer actually made his hostile comments to the wrong person in human resources—then Alan would presumably have an easy time showing that the failure to hire was *because of* his disability. Alan is qualified for the job, and let's also say the employer is a covered employer under the ADA. So far, so easy. Where Alan may run into trouble is in showing that he has a "disability" for purposes of the Act. Under *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), which holds that an employee should be evaluated in his post-mitigation state to determine if he is actually disabled, Alan is probably not actually disabled, unless he can show some major life activity in which he is substantially limited because of, most likely, side effects from his medication. Alan's case might seem to fit more neatly, however, under the record of or regarded-as prongs of the definition of disability. But the status of the record of prong is somewhat uncertain; courts have been reluctant to apply it, and have frequently set the bar very high for what a person's past record must involve. Hospitalization for two months may or may not pass that bar. And, as I explain in Part IV, the regarded-as prong of the definition of disability currently offers uncertain protection. See *infra* Section IV.C.

<sup>50</sup> The metaphor of the crystal ball is adapted from David Strauss, *The Myth of Colorblindness*, *supra* note XX, at 104-05.

and Bridget were equally qualified, so without further information, any amount of costs due to coworker or customer animus would tip the crystal ball result in favor of Bridget.<sup>51</sup>

An additional factor could be other countervailing tastes, including a customer taste for antidiscrimination, akin to what Mary Anne Case has called a “taste for not being discriminated against.”<sup>52</sup> In a case involving a grocery bagger with Asperger’s syndrome,<sup>53</sup> the Eleventh Circuit reversed the district court’s grant of summary judgment to the defendant Food World, on the basis that a material issue of fact existed as to whether the plaintiff could carry out the essential functions of the job of utility clerk which the court agreed included not “offending customers.”<sup>54</sup> Due to his disability, the plaintiff often spoke “more loudly than necessary” and engaged in echolalia, a form of “constant repetitive speech.”<sup>55</sup> Because the plaintiff’s communication and social interaction skills were impaired, he “tend[ed] to make inappropriate comments or ask personal questions of strangers.”<sup>56</sup> Interestingly, in concluding that a factual question surrounded whether the plaintiff could do his job, the court emphasized that the store received, in addition to customer complaints about the plaintiff, *favorable customer comments* on the plaintiff’s “attempt to work despite his disability.”<sup>57</sup> Those who submitted the favorable comments might have had a taste for antidiscrimination efforts and, depending on the strength of that taste, might have positively affected business by

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<sup>51</sup> Though the employer is acting in his economic self interest, the reason that Alan was not hired would be, at the level of third-parties, simple animus. For this reason, even those who endorse a normative distinction between irrational and rational discrimination tend to condemn the hybrid form of rational discrimination based on third-party animus. *See, e.g.,* Bagenstos, *supra* note XX.

<sup>52</sup> Mary Anne Case, *Developing a Taste for Not Being Discriminated Against*, STANFORD L. REV. (forthcoming 2004), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=410262](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=410262).

<sup>53</sup> DSM-IV-TR, *supra* note XX, at 80 (“The essential features of Asperger’s Disorder are severe and sustained impairment in social interaction . . . and the development of restricted, repetitive patterns of behavior, interests, and activities . . . . The disturbance must cause clinically significant impairment in social, occupational, or other important areas of functioning . . .”).

<sup>54</sup> *Taylor v. Food World, Inc.*, 133 F.3d 1419, 1424 (11th Cir. 1998).

<sup>55</sup> *Id.* at 1421.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1424 (“We do not think that the record shows, as a matter of law, that Gary could not carry out the tasks of his job without offending customers. One customer complained to Jones about Gary’s behavior and two customers commented that Gary appeared to be drunk or on drugs, but did not comment that he was performing his job poorly or that Gary had said anything offensive. Other managers and many employees testified that they received no complaints and observed no inappropriate behavior. Although Gary did ask customers questions, there is an issue of fact as to whether these questions were offensive or inappropriate.”).

increasing their loyalty to this store or by advertising its efforts to friends and others who might share a similar taste.

Such positive feedback is unlikely, however, in the context of mental illness as opposed to other mental, or physical, disabilities. Asperger's, a variant of autism, is not easily categorized,<sup>58</sup> but is generally understood as more of a developmental disorder than a mental illness.<sup>59</sup> Studies indicate that people blame individuals with mental illnesses more than they blame those whose disorders are understood as more organic, such as mental retardation;<sup>60</sup> a similar distinction may be made with regard to Asperger's.

People also distinguish among different mental illnesses, to some extent, in the stigmatizing attributions they make. For example, research on attitudes indicates that psychosis is more stigmatized than depression.<sup>61</sup> Such research seems consistent with mainstream attitudes expressed in the media and the recent popularization of antidepressants such as Prozac. Moreover, though some psychological data suggest that depression does not lie along a simple continuum with nonclinical emotional states,<sup>62</sup> depression may arguably be seen at least by lay observers as an extreme version of certain "normal" emotions like sadness. Research is needed to understand the extent to which certain mental illnesses are understood to be on a continuum with nonclinical emotions and behaviors, while other mental illnesses are understood to be qualitatively

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<sup>58</sup> See, e.g., Kristin Bumiller, *Feminism Outside the "Norm": Sex and Autism in the Postmodern Condition* 13-18 (unpublished manuscript, on file with author) (discussing the ways that autistic disorders defy traditional diagnostic classifications, such as the distinction between developmental disorders, which are lifelong disabilities that arise in childhood, and emotional or other impairments that respond to behavioral treatment or that sometimes simply diminish with age).

<sup>59</sup> See Nat'l Institute of Neurological Disorders and Stroke, Pervasive Developmental Disorders Information Page, [http://www.ninds.nih.gov/health\\_and\\_medical/disorders/pdd.htm](http://www.ninds.nih.gov/health_and_medical/disorders/pdd.htm) (last updated July 15, 2003).

<sup>60</sup> See, e.g., Patrick W. Corrigan, L. Philip River, Robert K. Lundin, Kyle Uphoff Wasowski, John Champion, James Mathisen, Hillel Goldstein, Maria Bergman & Christine Gagnon, *Stigmatizing Attributions About Mental Illness*, 28 J. COMMUNITY PSYCHOLOGY 91, 94, 97 (2000) (demonstrating that outsiders perceive mental retardation as significantly less "controllable" than psychosis or depression, i.e., they view people with mental retardation as less to "blame for [their] problems" and think they "should be avoided" less).

<sup>61</sup> See, e.g., Corrigan et al., *Stigmatizing Attributions*, *supra* note XX, at 97 (reporting that psychosis scored higher on controllability, i.e., attributions of blame for the disorder and inclinations to avoid, and lower on stability, i.e., the disorder's resistance to treatment).

<sup>62</sup> Darcy A. Santor & James C. Coyne, *Evaluating the Continuity of Symptomatology Between Depressed and Nondepressed Individuals*, 110 J. ABNORMAL PSYCHOLOGY 216, 221 (2001) (finding different symptom constellations in depressed and nondepressed individuals experiencing similar levels of symptom severity, such as more depressed mood, anhedonia, and suicidal thinking in clinically depressed individuals and more hypochondria and mid-level insomnia in nondepressed individuals, and concluding that such results are inconsistent with a view of depression as a simple continuum).

different emotional and behavioral states, and how these perceptions relate to hostility towards people with these conditions.<sup>63</sup>

### B. Inefficient Stereotyping

People use stereotypes all the time. In the absence of perfect information, or in the absence of time and energy to process all the available information, people rely on proxies and generalizations.<sup>64</sup> A parent may avoid a certain chain of grocery stores because the one in his neighborhood is less than clean. A coach may select players for a junior high school basketball team based on height. A college student might take classes only with professors who wear blue, generalizing from the fact that his two favorite high school teachers often wore blue to the belief that blue clothes predict a dynamic teaching style.

Some stereotypes are more accurate and effective than others, depending on the availability and cost of better information. If the parent generalizing about grocery stores has easy access to a comprehensive report on his city's grocery stores, and the chain he avoids actually has the highest cleanliness ratings around, then his generalization about that particular chain is an irrational stereotype. If the basketball coach is choosing among seventh graders who have no prior experience playing basketball, and she has limited time to choose the players, then height might be the best available proxy for eventual success at junior high basketball. The college student, generalizing from the sartorial habits of two high school teachers, is likely to be disappointed.

A number of measures that employers commonly use to make hiring decisions are proxies for ability and success on the job, including diplomas, grades, prestige of education, and scores on various tests. Sometimes these proxies, although overgeneralizations, are the most cost-effective means of determining the likely job success of individual applicants. This is statistical discrimination, the subject of the next

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<sup>63</sup> For other marginal groups, the argument has been made that the possibility of greater similarity between the group and outsiders to it does not necessarily reduce hostility because outsiders may feel a greater need to bolster their defenses against falling into groups thought to be on a continuum with normality. *See, e.g.*, Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 *STAN. L. REV.* 353 (2000); Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 *N.Y.U. REV. LAW & SOCIAL CHANGE* (forthcoming 2004).

<sup>64</sup> *See, e.g.*, Bagenstos, *supra* note XX, at 849; Sunstein, *supra* note XX, at 25.

Section.<sup>65</sup> But sometimes an employer uses a proxy that is not the most efficient means available of gaining the relevant information. For example, an employer who does not even glance at the typing speeds listed on resumes, and instead chooses all her secretaries from one school on the mistaken impression that that school produces the fastest typists, employs economically irrational stereotyping. Similarly, if an employer assumes that being white is a reliable proxy for the fastest typing speed, when résumés of faster nonwhite typists were crossing her desk unread, then this would also be economically irrational stereotyping. In both cases, we would expect an economically rational employer to behave differently. (Title VII of course prohibits the employer from making hiring decisions on the basis of race, whether or not the proxy is reliable and cost-efficient, whereas no law prohibits the employer from hiring on the basis of an applicant's school, in the absence of other factors.<sup>66</sup>)

Inefficient stereotyping thus means stereotyping that is mistaken or otherwise costly. And we may understand it to include at least three types of prejudice: (1) myths about a group, i.e., the belief that a group's members have a certain characteristic when they do not; (2) exaggerated views of a group's traits, i.e., the belief that a disproportionate number of a group's members—or, more strongly, most or all members—have a certain trait when only a few do; and (3) the use of group-based generalizations that do reflect certain properties of the group but where a less expensive or more accurate classifying device is available.<sup>67</sup>

A myth, as I am defining it, is a belief about a group that completely fails to track reality, such as the fantasy that Jews have horns.<sup>68</sup> If only one person had such a belief,

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<sup>65</sup> See *infra* Section II.C.i.

<sup>66</sup> A disparate impact of the school-based choice would of course be a factor that would change the calculus.

<sup>67</sup> See Sunstein, *supra* note XX, at 26 (“But the category of irrational prejudice is an ambiguous one. Perhaps we can understand it to include (a) a belief that members of a group have certain characteristics when in fact they do not, (b) a belief that many or most members of a group have certain characteristics when in fact only a few do, and (c) reliance on fairly accurate group-based generalizations when more accurate classifying devices are available.”).

<sup>68</sup> See, e.g., RUTH MELLINKOFF, *THE HORNED MOSES IN MEDIEVAL ART AND THOUGHT* (1997); Ophir Yarden, *Anti-Semitic Perceptions of the Jewish Body*, [http://www.myjewishlearning.com/daily\\_life/TheBody/Body\\_Th\\_and\\_Th/Antisemitic\\_Stereotypes.htm](http://www.myjewishlearning.com/daily_life/TheBody/Body_Th_and_Th/Antisemitic_Stereotypes.htm) (last visited June 19, 2004) (“A widespread medieval negative image of the Jew was based upon a misinterpretation of the Hebrew Bible. Moses was often depicted with two horns on his head as a result of the Latin mis-rendering of the verb ‘sent forth beams’ (*karan*) in Exodus 34:35 as ‘grew horns.’ (A horn is

rather than the belief developing through cultural ignorance, that person might herself be deemed delusional. Under such a rigorous definition, myths about people with mental illness are difficult to identify. Mental illnesses are so numerous and variable that at least some individuals with some particular illness are likely to reflect any given stereotype. For instance, even the seemingly more cinematic than real notion that insanity is linked to creative genius can find some exemplars.<sup>69</sup> Thus, stereotyping in the context of mental illness would seem to fall largely if not completely into the second or third category described above, exaggerated views of certain traits and inefficient proxies.

The common stereotypes about people with mental illness include the beliefs that they are dangerous,<sup>70</sup> unreliable,<sup>71</sup> lazy,<sup>72</sup> responsible for their illness or otherwise

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a *keren*.) . . . Even in the 21st century there are places where ignorant people remain under the impression that Jews have horns . . .”);

<sup>69</sup> In addition to examples of individual people whose creativity seemed bound up with their mental illnesses, some disorders do seem to have some link to “genius” traits: For example, a group such as autistic savants is defined by special cognitive talents, and there is some evidence that, while most people with bipolar disorder are not creative geniuses, a disproportionate number of creative geniuses may suffer from bipolar disorder. *See, e.g.,* Kay Redfield Jamison, *TOUCHED WITH FIRE: MANIC DEPRESSIVE ILLNESS AND THE ARTISTIC TEMPERAMENT* (1996); Stephen M. Edelson, *Autistic Savant* (1995), <http://www.autism.org/savant.html> (“‘Autistic savant’ refers to individuals with autism who have extraordinary skills not exhibited by most persons. . . . The estimated prevalence of savant abilities in autism is 10%, whereas the prevalence in the non-autistic population, including those with mental retardation, is less than 1%.”).

<sup>70</sup> *See, e.g.,* Patrick W. Corrigan & David L. Penn, *Lessons from Social Psychology on Discrediting Psychiatric Stigma*, 54 *AMER. PSYCHOLOGIST* 765, 766 (1999); Ann Hubbard, *The ADA, the Workplace, and the Myth of the “Dangerous Mentally Ill,”* 34 *U.C. DAVIS L. REV.* 849, 850-52 (2001); NAT’L INSTITUTE ON MENTAL HEALTH, *SURGEON GENERAL’S REPORT ON MENTAL HEALTH 7* (1999), available at <http://media.shs.net/ken/pdf/surgeongeneralreport/C1.pdf> (stating that, by the 1990s, public views of mental illness “more frequently incorporated violent behavior” than in the 1950s); Bruce G. Link et al., *Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance*, 89 *AM. J. PUB. HEALTH* 1328, 1331 (1999); *see also, e.g.,* McKenzie v. Dovala, 242 F.3d 967 (10th Cir. 2001) (overturning grant of summary judgment to a defendant sheriff’s office, which refused to consider rehiring a deputy sheriff with ten years of excellent experience, without even submitting her for a standard psychological evaluation required by state law, after she was diagnosed with PTSD in conjunction with sexual abuse by her father).

<sup>71</sup> *See, e.g.,* *Mentally Ill “Suffer Discrimination,”* BBC NEWS, Apr. 24, 2000, <http://news.bbc.co.uk/1/hi/health/720475.stm>.

<sup>72</sup> *See, e.g.,* *Mental Illness*, in *MERCK MANUAL* (2d home edn. 2004), available at [http://www.merck.com/mrkshared/mmanual\\_home2/sec07/ch098/ch098b.jsp](http://www.merck.com/mrkshared/mmanual_home2/sec07/ch098/ch098b.jsp); *see also, e.g.,* Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996) (reversing district court’s grant of summary judgment to the defendant where the court failed to analyze the case properly as a failure to accommodate case, in which the employer told the plaintiff-janitor, who suffered from bipolar disorder and paranoid schizophrenia, that he would get no “special accommodations” as a janitor at this school and that if he didn’t walk faster he would never get the job done); Overton v. Reilly, 977 F.2d 1190 (7th Cir. 1992) (reversing, under the Rehab Act, the grant of summary judgment to the defendant on a discrimination claim brought by a chemist with a history of severe depression whose medication caused him to take occasional naps).

blameworthy,<sup>73</sup> faking or exaggerating their condition,<sup>74</sup> or childlike and in need of supervision or care.<sup>75</sup> Beliefs about these traits are often exaggerations.

For a stereotype such as dangerousness, for example, important work has been done comparing actual dangerousness of people with mental illness with outsiders' perceptions of dangerousness. Though definitive answers are elusive,<sup>76</sup> there is indeed some slightly elevated risk of violence among people with mental illness, but the perception "grossly exaggerates" the reality.<sup>77</sup> For persons with one mental illness, the rate of violence is approximately 7%, and for those with one or more diagnoses, the rate is approximately 11% to 13%.<sup>78</sup> These risks are comparable to risks for other, less stigmatized populations. For instance, the figure for those with one mental illness—7%—is comparable to the rate among young people, including females and males, aged eighteen to twenty-four.<sup>79</sup> And the rate for the population that includes those with

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<sup>73</sup> See, e.g., Corrigan et al., *Stigmatizing Attributions*, *supra* note XX; see *supra* text accompanying note 27.

<sup>74</sup> See, e.g., MERCK MANUAL, *supra* note XX ("Mental illness may be seen as less real or legitimate than physical illness, leading to reluctance on the part of policy makers and insurance companies to pay for treatment."); see also, e.g., *Cameron v. Community Aid for Retarded Children*, 335 F.3d 60 (2d Cir. 2003) (oral argument transcript); *Felix v. NYCTA*, 324 F.3d 102, 109 (2d Cir. 2003) (Jacobs, J., concurring) ("On the other side of the balance, the benefit of accommodating this employee's insomnia cannot be estimated, depending as it does on the relative severity of the disorder (as compared with some unknown norm for sleeptime), the absolute severity of the disorder (which is self-reported and depends on a drowsy person's estimate of how long she is unconscious), and the efficacy or sufficiency of measures taken at work to help the plaintiff sleep better at night (which wholly depends on the employee's say-so).").

<sup>75</sup> See, e.g., Corrigan & Penn, *Lessons from Social Psychology*, *supra* note XX, at 766; see also, e.g., *Krocka v. City of Chicago*, 203 F.3d 507 (7th Cir. 2000) (affirming district court's grant of summary judgment in favor of the defendant on the plaintiff's claim to be regarded as disabled where, after ten years as a police officer, he was diagnosed with depression and went on Prozac, and two years later, when the police department found out, they evaluated him, certified him fit for duty, and then put him under the kind of surveillance usually reserved for disciplinary actions, telling him that he would be so monitored as long as he was on the medication).

<sup>76</sup> See Hubbard, *Dangerous Mentally Ill*, *supra* note XX, at 867 ("Somewhere between two extremes—'any person with a mental illness is to be feared' or 'there is no reason to fear any person with a mental illness'—emerges a complex truth, nuanced and not yet fully understood. As Professor John Monahan has observed, 'few questions in mental health law [are] as empirically complex or as politically controversial' as the relationship between mental disorder and violent behavior." (quoting John Monahan, *Mental Disorder and Violent Behavior: Perceptions and Evidence*, 47 AM. PSYCHOLOGIST 511, 511 (1992)).

<sup>77</sup> Hubbard, *Dangerous Mentally Ill*, *supra* note XX, at 867; *id.* at 895 ("The vast majority of individuals with mental disabilities do not engage in violent conduct, in the workplace or elsewhere.").

<sup>78</sup> See, e.g., Jeffrey W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from the Epidemiologic Catchment Area Surveys*, 41 HOSP. & COMMUNITY PSYCHIATRY 761, 765-67 (1990).

<sup>79</sup> See, e.g., Paul E. Mullen, *A Reassessment of the Link Between Mental Disorder and Violent Behaviour, and Its Implications for Clinical Practice*, 31 AUSTL. & N.Z. J. PSYCHIATRY 3, 7 (1997).

multiple diagnoses is substantially less than the rate among young males who are of low socioeconomic status (“SES”).<sup>80</sup>

Thus, a decision not to hire people with mental illness in order to avoid having violent employees might involve a less accurate proxy for dangerousness—and possibly a more expensive one—than is available. Deciding not to hire young males of low SES would be a more effective way to root out dangerousness, so mental illness here may be an inefficient proxy. Of course, the picture is a complicated one; for instance, depending on how determined an employer was to root out violence, refusing to hire individuals in both groups might well be an efficient way to reach one’s goals. To use sex and mental illness as categorical proxies in this way would nonetheless be impermissible under Title VII and the ADA in most circumstances.<sup>81</sup>

### C. Rational Discrimination

In certain contexts, discriminating on the basis of a protected trait could be an efficient hiring decision at the level of the group-based policy or individual determinations. The trait could be an efficient proxy for productivity at the level of group-based distinctions, or an individual applicant could actually reveal anticipated costs associated with the protected trait, such as accommodations. I discuss these points in turn.

(1) *Statistical Discrimination*. Market-rational “statistical” discrimination is the use of protected-class status as an efficient proxy for worker productivity or another relevant end.<sup>82</sup> Here the metaphor of the crystal ball, mentioned above, is again helpful.<sup>83</sup>

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<sup>80</sup> See Hubbard, *supra* note XX, at 889-90 (citing Monahan, *supra* note XX, at 519); see also, e.g., Virginia Aldigé Hiday, *The Social Context of Mental Illness and Violence*, 36 J. HEALTH & SOC. BEHAV. 122, 124 (1995) (“Other variables [other than mental disorder] are much more strongly predictive: being a young, adult, single male of lower socioeconomic status, and being a substance abuser hold far greater risks of violence.”); Peter M. Marzuk, *Violence, Crime and Mental Illness: How Strong a Link?*, 53 ARCHIVES GEN. PSYCHIATRY 481, 482 (1996) (asserting that, because “men commit the vast majority of crimes in every culture,” they pose greater risk of violence than the mentally ill) (citations omitted)).

<sup>81</sup> See *supra* text accompanying note 42; see Hubbard, *Dangerous Mentally Ill*, *supra* note XX, at 889-92.

<sup>82</sup> See, e.g., Bagenstos, *Rational Discrimination*, *supra* note XX, at 849 (describing “rational statistical discrimination” as employers’ “rationally us[ing] protected-class status as a proxy for lower productivity”); Strauss, *Myth of Colorblindness*, *supra* note XX, at 108 (“‘Rational discrimination,’ as I am using the term, is a generalization of the economists’ notion of ‘efficient discrimination.’ Using an explicit racial classification is ‘rational discrimination’ if race is the best available proxy for some other characteristic that the government is unquestionably entitled to use as a basis for classifying people. In such cases, an explicitly racial classification is the best way to accomplish the government’s legitimate objective.”);

A protected-trait classification might be the most cost-effective way to determine worker productivity and thus to set hiring policy, such that an employer who did not know what proxy was being used—e.g., standardized test scores, university prestige, or disability status—would choose to rely on disability status based solely on the accuracy and cost of the proxy.

For instance, it is at least possible, perhaps even likely, that mental illness would be a cost-effective proxy for diminished workplace productivity, if mental illness is defined by the presence of currently active symptoms.<sup>84</sup> Whether mental illness would be the best available proxy is uncertain and context-dependent,<sup>85</sup> but it might well be a cost-effective one in some settings. With regard to dangerousness, discussed earlier, the general category of mental illness might not be the most efficient proxy in a particular hiring context, but certain mental illnesses or dual diagnoses of mental illness and drug or alcohol abuse might be.<sup>86</sup> I have seen no studies indicating definitively whether mental illness is the most cost-effective proxy for work productivity or other traits, but it is conceivable that it might be, at least at these somewhat greater levels of specificity. A key difficulty in determining the efficiency of such proxies is that the relative efficiency depends on the employer's other options for identifying valued traits. Nonetheless, as discussed earlier, even efficient proxies are generally impermissible under current antidiscrimination law.<sup>87</sup>

(2) *Individualized, Cost-Based Discrimination*. Finally, on an individual level, an employer might correctly conclude that hiring a particular person with a mental illness will impose certain costs. For example, in the earlier hypothetical about a hiring decision

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Sunstein, *Why Markets Won't*, *supra* note XX, at 27 (defining “statistical discrimination” as the situation in which “the employer does not harbor irrational hatred or discriminatory feelings, but instead acts according to stereotypes of the sort that are typically relied on by market actors, and that are no less false than are those ordinary stereotypes”).

<sup>83</sup> See *supra* text accompanying note 51 (citing Strauss, *Myth of Colorblindness*, *supra* note XX, at 104-05).

<sup>84</sup> See *supra* Section I.B (discussing definitional difficulties surrounding mental illnesses that are presently asymptomatic through treatment).

<sup>85</sup> Carolyn S. Dewa & Elizabeth Lin, *Chronic Physical Illness, Psychiatric Disorder and Disability in the Workplace*, 51 SOCIAL SCI. & MEDICINE 41, 48-49 (2000) (concluding that, compared with people with chronic physical illness, for example, people with mental illness are less likely to miss days of work, but are more likely to require “extra effort” to function on some days, thus placing greater burdens on coworkers).

<sup>86</sup> See Hubbard, *The Dangerous Mentally Ill*, *supra* note XX, at 867.

<sup>87</sup> See *supra* text accompanying note 42.

involving Alan and Bridget,<sup>88</sup> Alan, who has a history of depression but has completely mitigated with medication and therapy, might tell the employer that he will need to leave an hour early one day each week or each month for therapy. (Even if he has completed a course of therapy, Alan must see a psychiatrist for monitoring and prescriptions.<sup>89</sup>) Even if Alan makes up that hour by working through lunch, an employer could readily conclude that this was a cost to him of hiring Alan over Bridget, who has presented no sign that she will need a modified work schedule of any kind. Of course, the question under the ADA is whether this is a reasonable accommodation that does not impose an undue hardship on the employer.<sup>90</sup> But from the perspective of the employer looking into the crystal ball, it might seem perfectly rational to prefer Bridget on this basis.<sup>91</sup>

#### D. The Next Step: A Hybrid Form

The preceding sections explain much about the mind of the discriminator against people with mental illness. But something is missing. As noted at the beginning of this Part, the impulse to discriminate against people with mental illness is pervasive and involves preferences for “normal” people over “crazy” or “unbalanced” people in most social and professional contexts. While the aforementioned forms of discrimination—animus, inefficient stereotyping, statistical discrimination, or rational cost balancing—identify various causes of the impulse to discriminate on the basis of mental illness, none is adequate to explain those preferences. There is another basis for discrimination, one that concerns both feelings and rational self-interest, but need not involve either animus or cost-benefit calculations. This basis for discrimination stems from the defining role of hedonic costs in the realm of mental illness, which is the subject of the next Part.

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<sup>88</sup> See *supra* text accompanying notes 49-50.

<sup>89</sup> See *supra* Section I.B.

<sup>90</sup> See, e.g., 42 U.S.C. § 12112(b)(5)(A).

<sup>91</sup> This is of course a schematic example. Some scholars have argued that a kind of selective sympathy leads some employers to view some types of “normal” workplace adjustments, such as staying home to wait on the electric company or leaving early to beat traffic at the weekend, are simply granted and not factored into a cost calculation, whereas these same employers view accommodations for disabilities to be aberrant and costly special treatment.

### III. HEDONIC COSTS AND DISCRIMINATION ON THE BASIS OF MENTAL ILLNESS

The traditional categories of discrimination do not fully explain discrimination on the basis of mental illness. Two examples help to illustrate the argument that follows. The examples begin by describing social interactions, as the most intuitive scenario, then move towards the context of the workplace, where the ADA becomes relevant.

Consider, for example, a situation in which a student, Greg, goes to study for his exams at Starbucks. He sits down with his drink and begins poring over his books. After a few minutes, a middle-aged woman sits down at the next table. She seems extremely nervous. She fidgets constantly, bouncing her leg under the table, and muttering rapidly to herself. She runs her hands through her hair roughly, tugging at it, while trying but failing to concentrate on a newspaper in front of her. She gets up to get more sugar for her coffee every two or three minutes. We'll call this woman Helen. Within moments of Helen's sitting down, Greg begins to feel anxious and wants to switch tables to move away from this woman. Based on these facts, we don't know for certain that Helen suffers from a clinical condition, but she could.<sup>92</sup> But if Greg became sufficiently edgy and distracted by her presence to leave Starbucks for home, he might conceivably tell his roommate that he left Starbucks because a "crazy lady" sat down next to him. Or imagine, alternatively, Helen at a job interview. Irwin is hiring a personal assistant, and Helen behaves in the interview much like she behaved at Starbucks: extremely agitated. Five minutes into the interview, Irwin decides not to hire her, explaining to his wife later

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<sup>92</sup> Her behavior could, for instance, be consistent with bipolar disorder I, most recent episode manic. A manic episode of bipolar disorder is defined by the DSM-IV-TR as "[a] distinct period of abnormally and persistently elevated, expansive, or irritable mood, lasting at least 1 week (or any duration if hospitalization is necessary)," which includes three or more of the following symptoms (four if the mood is only irritable):

- (1) inflated self-esteem or grandiosity
- (2) decreased need for sleep (e.g., feels rested after only 3 hours of sleep)
- (3) more talkative than usual or pressure to keep talking
- (4) flight of ideas or subjective experience that thoughts are racing
- (5) distractibility (i.e., attention too easily drawn to unimportant or irrelevant external stimuli)
- (6) increase in goal-directed activity (either socially, at work or school, or sexually) or psychomotor agitation
- (7) excessive involvement in pleasurable activities that have a high potential for painful consequences (e.g., engaging in unrestrained buying sprees, sexual indiscretions, or foolish business investments)

DSM-IV-TR, *supra* note XX. In addition, "The mood disturbance is sufficiently severe to cause marked impairment in occupational functioning or in usual social activities or relationships with others, or to necessitate hospitalization to prevent harm to self or others, or there are psychotic features." *Id.*

that one of the candidates he interviewed that day was so anxious that she would have “driven me crazy.”

None of the explanations of discrimination in the preceding Part necessarily captures Greg and Irwin’s decisions. While Greg and Irwin *may* harbor animus towards people with mental illness, neither one *necessarily* does: Neither knows whether Helen actually has any particular mental illness, though each suspects it, and if you told them that she was completely sane, their desire to avoid Helen would probably persist.<sup>93</sup> There’s no particular stereotype to which they must subscribe. For example, it is unlikely that either avoids Helen because his is actually afraid that she will behave violently. And she seems unlikely to be lazy; on the contrary, she seems very high energy. If she does have a mental illness, it is possible she will need some kind of accommodation, such as a modified schedule for therapy appointments, but again, even if Irwin were assured this would not be the case, and she would never even take one day off work, he would presumably have the same reaction to Helen. (Indeed, he might feel even more agitated at the prospect of never having a break from working with her.) Both Greg and Irwin are reacting to how being near Helen makes them feel: nervous and agitated.

Consider another example. June has just moved to a new city and is having a small dinner party to try to get to know some of her new acquaintances a bit better. The guest list includes a few old friends who happen to live nearby, and June plans to invite two others. Of the people she met at a neighbor’s barbecue, three of them shared some of her interests, but their dispositions seemed strikingly different. Karen and Lorin were both quite lively and upbeat, whereas Mark seemed very down, even sad and lethargic. She invites Karen and Lorin rather than Mark, feeling that Mark might bring the whole atmosphere down. The same example could be reframed in terms of the job interview—with Irwin deciding to hire Karen or Lorin over Mark, feeling that either of the first two will improve his mood and make him want to come into work, whereas Mark will, he thinks, have the opposite effect. Mark, we will assume, is clinically depressed.<sup>94</sup>

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<sup>93</sup> One possible difference is that Irwin might think Helen was just nervous because of the interview and not always that way. But if he were told that she always behaves that way, though not because of a mental illness, the effect would presumably be the same.

<sup>94</sup> The criteria for major depressive episode include the following:

A. Five (or more) of the following symptoms have been present during the same 2-week period and represent a change from previous functioning; at least one of the symptoms is either

June's and Irwin's reactions to Mark seem not to fit precisely any of the categories of discrimination previously discussed. Although their reactions relate to their affective response to Mark, neither of them need have any animus against people with mental illness to make the decisions they made.<sup>95</sup> Nor must they have any particular stereotypes about people with mental illness. They may or may not suspect that he is depressed, but his status as a person with depression is not the operative factor in their decisions. Both are concerned about how they feel when they're around Mark: sad and down.

In this way, the responses of Greg, Irwin, and June seem somewhere between an animus-based form of discrimination, because their responses are affective, and a kind of rational costs calculus. Greg, Irwin, and June seem concerned about what could be called *hedonic costs*, by which I mean unhappiness or other negative emotion or loss of positive emotion. They are concerned about the hedonic costs to them, and to others, of spending time around Helen and Mark. Specifically, they are concerned about absorbing the emotions of Helen and Mark.

There are various forms of hedonic costs related to mental illness—several of which I will discuss in this Part. Hedonic costs are borne by people with mental illness;

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- (1) depressed mood or
  - (2) loss of interest or pleasure. . . .
    - (1) depressed mood most of the day, nearly every day, as indicated by either subjective report (e.g., feels sad or empty) or observation made by others (e.g., appears tearful). Note: In children and adolescents, can be irritable mood.
    - (2) markedly diminished interest or pleasure in all, or almost all, activities most of the day, nearly every day (as indicated by either subjective account or observation made by others)
    - (3) significant weight loss when not dieting or weight gain (e.g., a change of more than 5% of body weight in a month), or decrease or increase in appetite nearly every day. Note: In children, consider failure to make expected weight gains.
    - (4) Insomnia or Hypersomnia nearly every day
    - (5) psychomotor agitation or retardation nearly every day (observable by others, not merely subjective feelings of restlessness or being slowed down)
    - (6) fatigue or loss of energy nearly every day
    - (7) feelings of worthlessness or excessive or inappropriate guilt (which may be delusional) nearly every day (not merely self-reproach or guilt about being sick)
    - (8) diminished ability to think or concentrate, or indecisiveness, nearly every day (either by subjective account or as observed by others)
    - (9) recurrent thoughts of death (not just fear of dying), recurrent suicidal ideation without a specific plan, or a suicide attempt or a specific plan for committing suicide
  - C. The symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.

DSM-IV-TR, *supra* note XX.

<sup>95</sup> Of course June and Irwin *may* have animus against people with mental illness, or hold stereotypical views; the point here is just that they *need* not, in order to have the reactions that they are having.

indeed, hedonic costs help to define the category of mental illness by defining an essential feature of most mental illnesses. But, as suggested by the above scenarios, there may also be hedonic costs to being around people with mental illness. One cause of these may be *emotional contagion*, the process by which we absorb emotions from others in an unreflective fashion, as in the above scenarios. The first purpose of what follows is to explain how hedonic costs help to define mental illness. Section B then provides an overview of the hedonic costs to others of being around people with mental illness, and Section C focuses specifically on the mechanism of emotional contagion, its relation to mental illness, and its implications in the workplace. Finally, Section D explains why a certain subset of the hedonic costs of mental illness—those prompted by processes such as negative emotional contagion, which tends to be greater if we like someone more—form a peculiarly intractable basis for discrimination.

#### A. The Defining Role of Hedonic Costs in Mental Illness

Mental illness is unusually, if not uniquely, defined by what I am calling hedonic costs. That is, most mental illnesses are defined at least in part by negative affect or by the distress caused to the mentally ill person or to those around her.<sup>96</sup> This may be seen in at least three ways. First, the most prevalent mental illnesses are specifically defined by symptoms of unhappiness or anxiety. Most obviously, depression, the problem faced by Mark in the example above and the most common basis for ADA charges filed with the EEOC, must include as a symptom either “loss of interest or pleasure” or “depressed mood.”<sup>97</sup> And anxiety disorders count among their symptoms “[e]xcessive anxiety and worry.”<sup>98</sup> Depression and anxiety disorders together constitute more than half of all the

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<sup>96</sup> In characterizing the mental illness as *causing* the hedonic costs, I am bracketing a theoretical question about the nature of mental illness: Is mental illness best understood as something separate from the person, which impinges on the person’s self in certain ways, akin to a monkey on the back, or a cage surrounding the person’s self; or, is mental illness best conceived as a description of certain aspects of the person’s self? When I speak of mental illness in one way or the other in this discussion, I am doing so for purposes of explication; I do not mean to suggest a resolution to this question.

<sup>97</sup> DSM-IV-TR, *supra* note XX.

<sup>98</sup> *See, e.g.*, DSM-IV-TR, *supra* note XX (including among the symptoms of “Generalized Anxiety Disorder” “[e]xcessive anxiety and worry (apprehensive expectation), occurring more days than not for at least 6 months, about a number of events or activities (such as work or school performance)”); *see also, e.g., id.* (including among the symptoms of obsessive-compulsive disorder that obsessions must include “[r]ecurring, persisting thoughts, impulses or images inappropriately intrude into awareness and cause

ADA charges based on mental illness brought before the EEOC.<sup>99</sup> Moreover, many other psychiatric disorders, though not grouped as mood or anxiety disorders, are defined at least in part by specific negative emotions. For example, anorexia nervosa features the “[i]ntense fear of gaining weight,”<sup>100</sup> and posttraumatic stress disorder requires that a “traumatic event is persistently reexperienced” in one or more ways.<sup>101</sup>

Second, many disorders require as part of their diagnosis the presence of distress or impairment of social or other functioning.<sup>102</sup> For example, the category of personality disorder—which is generally described as “an enduring pattern of inner experience and behavior that deviates markedly from the expectations of an individual’s culture [and] is pervasive and inflexible”<sup>103</sup> and includes specific disorders such as narcissistic or paranoid personality disorder—must “[involve] clinically important distress or impair work, social or personal functioning.”<sup>104</sup> Thus, a personality disorder must specifically involve significant distress for the diagnosed individual or some kind of diminished

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marked distress or anxiety” and the aim of compulsions must be “to reduce or eliminate distress or to prevent something that is dreaded”).

<sup>99</sup> See <http://www.eeoc.gov/stats/ada-receipts.html>; see *supra* note XX.

<sup>100</sup> DSM-IV-TR, *supra* note XX, at 589.

<sup>101</sup> See, e.g., *id.*

<sup>102</sup> See, e.g., *id.* at 689 (personality disorders, general criteria include “These symptoms cause clinically important distress or impair work, social or personal functioning”); *id.* (sexual masochism: “The fantasies, sexual urges, or behaviors cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.”); *id.* (sexual aversion disorder: “The disturbance causes marked distress or interpersonal difficulty.”); *id.* at 572 (pedophilia: “The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.”); *id.* (dissociative amnesia: “The symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.”); *id.* (schizophrenia: “Social/occupational dysfunction: For a significant portion of the time since the onset of the disturbance, one or more major areas of functioning such as work, interpersonal relations, or self-care are markedly below the level achieved prior to the onset (or when the onset is in childhood or adolescence, failure to achieve expected level of interpersonal, academic, or occupational achievement).”); see also *id.* (manic episode: “The mood disturbance is sufficiently severe to cause marked impairment in occupational functioning or in usual social activities or relationships with others, or to necessitate hospitalization to prevent harm to self or others, or there are psychotic features.”). Some disorders combine specific affective symptoms with this type of requirement of distress or impairment. See, e.g., *id.* (posttraumatic stress disorder: “traumatic event is persistently reexperienced” and “The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.”); *id.* (generalized anxiety disorder: “Excessive anxiety and worry (apprehensive expectation), occurring more days than not for at least 6 months, about a number of events or activities (such as work or school performance)” and “The anxiety, worry, or physical symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.”); *id.* (including among the symptoms of obsessive-compulsive disorder that “[t]he obsessions and/or compulsions are associated with at least 1 of [the following]: Cause severe distress[:]; Take up time (more than an hour per day)[:]; Interfere with the patient’s usual routine[:]; or social, work or personal functioning”).

<sup>103</sup> *Id.* at 685.

<sup>104</sup> *Id.* at 689.

ability to perform key activities of life. That is, the impairment in mental functioning is such that, by definition, it imposes costs on self or others. If the cost is distress, then the cost is affective for the individual. If the cost is an impaired ability to function personally or socially, then the cost is an affective one for self or others or likely both. Thus, the remaining sliver of the definition, which may not necessarily involve affective costs, is the situation in which the impairment is only in the ability to work; however, the general description of the symptoms of personality disorders, as well as the practicalities of diagnosis, discussed below, suggest that an impairment only in working would be very surprising for someone diagnosed with a personality disorder.

Similarly, even a disorder that might seem to involve hedonic *benefits* for the bearer—such as a manic episode of bipolar disorder (formerly called manic depression), which is sometimes accompanied by an “elevated” mood<sup>105</sup> and which might characterize Helen in the Starbucks example<sup>106</sup>—requires that the “mood disturbance is sufficiently severe to cause marked impairment in occupational functioning or in usual social activities or relationships with others, or to necessitate hospitalization to prevent harm to self or others, or there are psychotic features.”<sup>107</sup> Here, the specified types of impairment are more varied, but several bases for hedonic costs to self or others predominate: the impairment of social functioning, the threat of violence to self or others which presumably prompts fear and anxiety at least in others, or psychotic features,<sup>108</sup> which involve disturbances in thinking such as hallucinations that are likely to be frightening or at least frustrating to others and often to the bearer. Again, it is technically possible that these criteria could be met without the presence of any hedonic costs, for instance if the only impairment were occupational, but it seems unlikely.

Third, the context of diagnosis also suggests that most if not all mental illnesses involve some affective costs to the individual or to those around her, even if the

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<sup>105</sup> See, e.g., JAMISON, AN UNQUIET MIND, *supra* note XX, at 213 (describing a certain exuberance that would sometimes characterize her low-level manic periods and which could “spill out and over and into others”).

<sup>106</sup> See *supra* text accompanying note 92.

<sup>107</sup> See *supra* note 92.

<sup>108</sup> Psychotic symptoms include “delusions, hallucinations, disorganized speech (e.g., frequent derailment or incoherence) or grossly disorganized or catatonic behavior.” DSM-IV-TR, *supra* note XX, at 329.

diagnostic criteria do not require any negative affect.<sup>109</sup> If no one is distressed, then the individual is unlikely to make it to the office of a mental health professional to receive a diagnosis. There are indeed exceptions to this, such as the situation in which someone presents a physician with a physical symptom and ends up with a psychiatric diagnosis. But overall, the combination of the symptomatology—in its specific and more general features—and the context of diagnosis suggests that most if not all diagnoses of mental illnesses will be based in part on hedonic costs for self or others.

Hedonic costs are of course not unique to mental illness; what is unusual about mental illness is that the category is constituted at least in part by hedonic costs. A person's race may bear a stigma that causes the person unhappiness, and thus the unhappiness would be a hedonic cost of her race in this culture. But the unhappiness is not what constitutes her race.<sup>110</sup> A person with burn scars on her face may suffer lingering pain from the burn, or may suffer the pain of some others' stares or lack of attraction or expressions of pity, but in the absence of those hedonic costs, her face would still have the scars. In these examples of race and scarring, I in no way mean to

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<sup>109</sup> An example of a condition that includes no affective costs on its face is brief psychotic disorder, defined thus:

A. Presence of one (or more) of the following symptoms:

- (1) delusions
- (2) hallucinations
- (3) disorganized speech (e.g., frequent derailment or incoherence)
- (4) grossly disorganized or catatonic behavior Note: Do not include a symptom if it is a culturally sanctioned response pattern.

B. Duration of an episode of the disturbance is at least 1 day but less than 1 month, with eventual full return to premorbid level of functioning.

C. The disturbance is not better accounted for by a Mood Disorder With Psychotic Features, Schizoaffective Disorder, or Schizophrenia and is not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication) or a general medical condition.

Specify if:

With Marked Stressor(s) (brief reactive psychosis): if symptoms occur shortly after and apparently in response to events that, singly or together, would be markedly stressful to almost anyone in similar circumstances in the person's culture

Without Marked Stressor(s): if psychotic symptoms do not occur shortly after, or are not apparently in response to events that, singly or together, would be markedly stressful to almost anyone in similar circumstances in the person's culture

With Postpartum Onset: if onset within 4 weeks postpartum.

DSM-IV-TR, *supra* note XX. Note, though, that even here, the final demand for specification assumes "stressors," thus implying the presence of presumably negative stress.

<sup>110</sup> This is not to say that the racial classification or its defining features are naturally given rather than culturally constituted through processes of classification bound up with subordination. On the contrary, the one drop of blood notion of blackness is, for instance, an arbitrary definitional rubric based in ideas about inferiority and contamination. Nonetheless, in contrast to mental illness, the classifying criteria for race—e.g., lineage—are not inherently hedonic.

understate the significance of the hedonic costs or the importance of the social meaning attached to the defining trait. My point is only that hedonic costs are differently constitutive of mental illness than of other classifications.<sup>111</sup>

One way to understand the significance of this concept of hedonic costs for mental illness is through the relationship between impairment and disability. A key insight of the study of disability has been the recognition that a person's impairment may or may not be *disabling* depending upon the features of the world around her.<sup>112</sup> Thus, a person who is paralyzed from the waist down may have an impairment—lower body paralysis—but whether that impairment is disabling will depend largely on features of the environment. If her workplace and home and local forms of transportation are all wheelchair accessible, she may not actually be limited in any of her life activities.<sup>113</sup> In a sense, once those accommodations are in place, there are not *necessarily* further costs associated with her impairment.

By contrast, mental illnesses seem to be defined in significant measure by their hedonic costs to self or others. It is hard to imagine the changes to the environment that eliminate the hedonic costs of depression, thus making it no longer *disabling*, but that leave the impairment of depression intact. If medication and therapy alleviate the symptoms of depression, then in what sense does the person still have the impairment of depression? The person may still have the diagnosis, and there may be side effects to the medication that are disabling, but the person is no longer “depressed.”<sup>114</sup> This is, broadly speaking, the logic of the Court's conclusion in *Sutton* that a person should be considered, for purposes of the ADA's definition of actual disability, in her post-

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<sup>111</sup> One reason to say that mental illnesses are not unique in being defined by hedonic costs is that certain physical ailments are defined by what might be considered hedonic costs—such as back pain or carpal tunnel syndrome—where in the absence of such pain the disorder would not necessarily be diagnosed. That said, such cases typically involve conditions that are not understood, where an underlying physical cause has not been identified, and so calling it a “syndrome” or something similar is a way to mark and acknowledge the person's pain without really specifying the condition. My claim is not that no physical impairments are constituted in part by hedonic costs, but that mental illnesses as a group are different because nearly all of them are so constituted.

<sup>112</sup> See, e.g., ANITA SILVERS, *Formal Justice, in* DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 13, 75 (1998).

<sup>113</sup> One can of course think of activities in which the person would always be disabled, such as moving without the wheelchair, but whether these are deemed disabilities is a matter of our frame of reference. As a point of comparison, most of us are, for example, disabled in the activity of moving forward at the speed of fifteen miles per hour without the assistance of a device such as a bicycle or car.

<sup>114</sup> See also *supra* Section I.B.

mitigation state.<sup>115</sup> Her eligibility for protection as actually disabled will depend on whether, in light of whatever mitigation she has undertaken, she is still substantially limited in a major life activity. She may qualify for protection under the statute as having a record of disability or being regarded as disabled.<sup>116</sup> But for a person still to be actually depressed would thus be for her to continue to experience the hedonic costs of depression.

## B. The Imposition of Hedonic Costs on Others: Overview

As the examples of Mark and Helen illustrate, mental illness may impose hedonic costs not just on the bearers of the illness, but also on other people in the workplace or elsewhere. These costs come in many forms, some of which relate squarely to animus or stereotyping, while others seem rather different. This Section briefly sketches several ways that people with mental illness may impose hedonic costs on others in the workplace; the next Section focuses on one particular mechanism, called emotional contagion, that is a particularly revealing and well-substantiated case of the hybrid basis for discrimination.

The hedonic costs that people with mental illness may sometimes impose upon employers, coworkers, or customers encompass a range of negative emotions—including sadness, anxiety, disappointment, anger, fear, frustration, discomfort, disgust, and guilt.

Sometimes these hedonic costs are yoked tightly to animus. For instance, the person who just does not like having “crazy” people around may experience discomfort or disgust because he is forced to work with a person with mental illness.<sup>117</sup> If he is self-critical about his animus, then the presence of the mentally ill person may make him feel guilty, because it reminds him of his own prejudice. These hedonic costs have direct corollaries in other areas of discrimination, such as race and sex. Like the person who

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<sup>115</sup> *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). *See supra* Section I.A.1 (discussing the Supreme Court’s decision in *Sutton* that a determination about whether a plaintiff actually has a disability for purposes of protection under the ADA should be made with reference to any mitigating measures undertaken by the plaintiff, such that a plaintiff who wears eyeglasses will be evaluated for whether she is substantially limited in a major life activity once she is wearing her eyeglasses).

<sup>116</sup> *See supra* Section I.B; *infra* Section IV.C.

<sup>117</sup> *Cf., e.g., Hamilton v. Southwestern Bell Telephone Co.*, 136 F.3d 1047, 1052 (5th Cir. 1998) (describing, in a case involving a plaintiff who suffered from post-traumatic stress disorder, a letter written by coworkers to the employer that characterized the plaintiff as, *inter alia*, “disgusting”).

dislikes the mentally ill because of discomfort or disgust, someone who dislikes Asian-Americans may bear certain hedonic costs if she is not allowed to indulge her taste for discrimination by refusing to hire an Asian-American job applicant.

But not all hedonic costs connect so neatly to what we think of as animus. Particularly in the context of mental illness, where hedonic costs play a defining role in the classification of many class members, a desire to avoid certain hedonic costs may be wholly consistent with indifference or liking towards the class and even towards the individual class member. Just as it seems not animus-driven to avoid a coworker we like who is in a terrible, angry mood on a particular day, it may seem not animus-driven to want to avoid a coworker whose mental illness puts him in a perpetually terrible, angry mood. For example, people who work in an organization dedicated to helping people with certain mental disabilities, even if they oppose discrimination against people with mental illness, may not want to bear the hedonic costs of a supervisor whose bipolar disorder and post-traumatic stress disorder prompt her to yell at her staff members.<sup>118</sup>

As discussed in the previous Section, sometimes the imposition of hedonic costs on others is a defining part of a mental illness. For instance, those disorders that may be diagnosed based in part on a significant impairment in social functioning, such as personality disorders, may be constituted by the infliction of emotional costs on others.<sup>119</sup>

With other illnesses, the disorder is defined by negative emotion in the person with mental illness. The question then arises as to whether and how those negative emotions internal to the mental illness prompt negative emotions in other people. There are many ways. A person with depression may voice pessimistic views on work projects and persuade others that the projects will fail.<sup>120</sup> Someone with bipolar disorder for whom one symptom is hostility may argue aggressively about vacation time and make others feel afraid or angry in response.<sup>121</sup> A person with obsessive-compulsive disorder may want flexible hours because her morning personal hygiene rituals take her unpredictable amounts of time, and even though the work she performs is not affected because of the nature of her job, others in the workplace who like consistency may find her variable

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<sup>118</sup> *Cf.* Cameron v. Community Aid for Retarded Children, 335 F.3d 60 (2d Cir. 2003).

<sup>119</sup> *See supra* Section III.A.

<sup>120</sup> *Cf.* Solieau v. Guilford of Maine, Inc., 105 F.3d 12, 15 (1st Cir. 1997).

<sup>121</sup> *Cf.* Seaman v. CSPH, Inc., 179 F.3d 297 (5th Cir. 1999).

hours frustrating.<sup>122</sup> Or, through unconscious mechanisms that psychologists call emotional contagion, a person suffering from depression may prompt a coworker to feel increased levels of sadness and depressed mood, and directly contrary to an animus account, the coworker may be particularly inclined to reflect her depressed colleague's mood if she *likes* him. This last source of hedonic costs—emotional contagion—is the focus of the next Section.

### C. The Imposition of Hedonic Costs: The Special Case of Emotional Contagion

The most sympathetic account of how one person's negative emotion can prompt negative emotion in another is what psychologists call emotional contagion. This largely unconscious process, by which one person absorbs the emotion of the other, has been studied specifically with regard to interactions in the workplace and also as it particularly relates to the effects of mental illness on nearby others. This Section therefore sketches the basic mechanism of emotional contagion and its relevance to the workplace and to mental illness, to lay the groundwork for a discussion of the broader implications for discrimination against people with mental illness and ADA doctrine.

Emotional contagion is the psychological term for a phenomenon commonly known but little understood: “a process in which a person or group influences the emotion or behavior of another person or group through the conscious or unconscious induction of emotion states and behavioral attitudes.”<sup>123</sup> The most basic form—so-called primitive emotional contagion—is the process by which one person unconsciously absorbs or “catches” the particular mood or emotion of another.<sup>124</sup>

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<sup>122</sup> Cf. *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128 (9th Cir. 2001).

<sup>123</sup> G. Schoenewolf, *Emotional Contagion: Behavioral Induction in Individuals and Groups*, 15 *MODERN PSYCHOANALYSIS* 49, 50 (1990).

<sup>124</sup> Hatfield and her coauthors define primitive emotional contagion specifically in terms of the mechanism by which they believe contagion occurs—mimicry followed by afferent feedback, as I explain later, *infra*: “[Primitive emotional contagion is] the tendency to automatically mimic and synchronize facial expressions, vocalizations, postures, and movements with those of another person and, consequently, to converge emotionally.” Elaine Hatfield, John Cacioppo & Richard L. Rapson, *Emotional Contagion*, in 14 *REVIEW OF PERSONALITY AND SOCIAL PSYCHOLOGY: EMOTION AND SOCIAL BEHAVIOR* 151, 153-54 (M.S. Clark, ed., 1992), *quoted in* HATFIELD ET AL., *supra* note XX, at 5.

Following Hatfield et al., *supra*, and Barsade, I use the term “emotion” as a “broad label, similar to that of ‘affect,’ both of which interchangeably encompass the general phenomenon of subjective feelings, and use literature from a variety of feeling states to understand contagion processes, both for semantic ease and to reflect the commonality of the overall affective experience suggested by psychological researchers.” Barsade, *supra* note XX, at 646 (citations omitted).

To the lay observer of human behavior, everyday examples abound. Spending time with a sad person tends to bring us down, leaves us feeling sad. Interacting with someone in a particularly good mood, by contrast, can lift our spirits. As popular expressions attest, laughter can be infectious, as can smiles and yawns. Seeing someone writhe in pain can make us wince or cringe or clench our bodies as if we were actually the one in pain. Moreover, being around someone suffering from depression can have hedonic costs such as feelings of anxiety and depressed mood.

A growing body of research verifies these popular intuitions. This Section discusses the key findings of that research, first outlining the basic idea of emotional contagion, then discussing its role in the creation of hedonic costs through mental illness. As indicated by research in psychology and management studies, emotional contagion occurs not just among friends and family, but plays a significant role in relations with customers and among coworkers. This Section therefore concludes with research findings specifically applicable to the workplace setting.

(1) *The concept and mechanism of emotional contagion.* Studies show that individuals and groups “catch” both positive and negative emotions from others.<sup>125</sup> In one study, for example, a group problem-solving exercise was manipulated and observed to test whether the first speaker could infect the group with his emotion. Unknown to the subjects, the first speaker in each three-to-five-person group was a “confederate” of the experimenter, and a trained actor, who expressed his views with a particular emotional valence, pleasant or unpleasant.<sup>126</sup> The results indicated that the other individuals in the group, and the group as a whole, picked up the emotion of the confederate, based on self-

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<sup>125</sup> See, e.g., HATFIELD ET AL., *supra* note XX; Barsade, *supra* note XX; Hess & Blairy, *supra* note XX; Pugh, *supra* note XX.

<sup>126</sup> Barsade, *supra* note XX, at 653-54. The task was a simulated managerial exercise called a “Leaderless Group Discussion,” in which participants, who were all business-school students, acted as managers on a salary committee negotiating over the allocation of a fixed pool of money for bonuses. Each member of the group was assigned to be a department head representing a particular candidate from his or her department through a two to three minute presentation. The participants were given two goals: to obtain as large a bonus as possible for his or her department’s candidate and to make the best use of the company’s money. Pressure for cooperation was created by the threat that no bonuses would be allocated if no agreement was reached. Barsade, *supra* note XX, at 653 (citing DEVELOPMENT DIMENSIONS INTERNATIONAL, LEADERLESS GROUP DISCUSSION EXERCISE (1982)).

report by the participants and scored evaluations conducted by observers of the videotaped group discussions.<sup>127</sup>

Is emotional contagion another word for empathy or sympathy? While there may well be overlap among the three processes, researchers distinguish emotional contagion as more primitive and less conscious than its more cognitively sophisticated cousins.<sup>128</sup> Though definitions in this area are multifarious and contested,<sup>129</sup> empathy is generally understood to be a mental process of putting oneself in another person's shoes, an imaginative exercise in seeing the world through another's eyes.<sup>130</sup> (The prevalence of metaphors in descriptions of empathy underscores its complexity.) Sympathy, on the other hand, is frequently conceived as more of a feeling *for* than a feeling *with*, and is typically linked with a desire to act on the other's behalf.<sup>131</sup>

Primitive emotional contagion, by contrast, is the automatic absorption of another's affective state, often with no conscious awareness of the process. The precise mechanism underlying emotional contagion is a subject of ongoing study. The dominant theory, though, involves a two-step process involving mimicry and feedback.<sup>132</sup> Under

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<sup>127</sup> See Barsade, *supra* note XX, at 662-65 (reporting, inter alia, that the individuals and groups absorbed the pleasantness of the confederate (hypothesis 1) and that negative emotion showed no greater effect than positive emotion (hypothesis 2)).

<sup>128</sup> E.g., HATFIELD ET AL., *supra* note XX, at 81-82. Note that while emotional contagion may contribute to the capacity for empathy or sympathy, there are also other more cognitive routes to these processes, which may be effective even in the absence of emotional contagion. We can see this by the fact that it is possible to empathize with someone without seeing or talking with the person or being in any way exposed to his emotions.

<sup>129</sup> See Robert W. Levenson & Anna M. Ruef, *Empathy: A Physiological Substrate*, 63 J. PERSONALITY & SOCIAL PSYCHOLOGY 234, 234 (1992) ("The term 'empathy' has been used to refer to at least three different qualities: (a) *knowing* what another person is feeling . . . (b) *feeling* what another person is feeling . . . and (c) *responding compassionately* to another person's distress.").

<sup>130</sup> See, e.g., J.T. Lanzetta & B.G. Englis, *Expectations of Cooperation and Competition and Their Effects on Observers' Vicarious Emotional Responses*, 33 J. PERSONALITY & SOCIAL PSYCHOLOGY 354 (1989) ("Empathy is typically considered to arise from the observer's taking the other's perspective or fantasizing about the self in the actor's situation." (citations omitted)). For a recent review of theories of empathy, see M.L. Hoffman, *Interaction of Affect and Cognition in Empathy*, in EMOTIONS, COGNITION, AND BEHAVIOR 103 (C.E. Izard, J. Kagan & R.B. Zajonc, eds., 1984).

<sup>131</sup> See, e.g., LAUREN WISPÉ, THE PSYCHOLOGY OF SYMPATHY 68 (1991) ("The definition of sympathy has two parts: first, a heightened awareness of the feelings of the other person and, second, an urge to take whatever actions are necessary to alleviate the other person's plight.").

<sup>132</sup> See, e.g., HATFIELD ET AL., *supra* note XX, at 7-78 (citing sources). *But see, e.g.*, Ursula Hess & Sylvie Blairy, *Facial Mimicry and Emotional Contagion to Dynamic Emotional Facial Expressions and Their Influence on Decoding Accuracy*, 40 INTERNAT'L J. PSYCHOPHYSIOLOGY 129 (2001) (finding no demonstrable connection between subjects' mimicry and their emotional contagion, and arguing that other studies do not adequately document the connection); U. Hess, S. Blairy & P. Philippot, *Facial Mimicry*, in THE SOCIAL CONTEXT OF NONVERBAL BEHAVIOR 213 (P. Philippot, R. Feldman & E. Coats, eds., 1999) (reviewing the literature on mimicry and finding robust evidence of mimicry but inadequate evidence that

this theory, the first step in emotional contagion is unconscious physiological mimicry. Our tendency spontaneously to mimic others' facial expressions, body language, speech patterns, and vocal tones is well documented.<sup>133</sup> Particularly when we like someone, we often unconsciously adopt the person's manner and expression.<sup>134</sup> For example, research shows that the videotaped facial expressions of students during class track those of their professors, especially the professors that they like.<sup>135</sup> In sum, studies have demonstrated that people mimic other people's expressions of smiling, laughter, affection, embarrassment, discomfort, pain, disgust, stuttering, and reaching with effort, among others.<sup>136</sup>

After mimicry, the next step in emotional contagion is a process prompted by what psychologists call afferent feedback: the mechanism by which we feel emotions because our bodies display them. The idea here runs contrary to the common intuition

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mimicry is connected to contagion). Even Hess and Blairy, who are vocal critics of the afferent feedback hypothesis, acknowledge its prevalence, in one of the most evocative (mis)phrases in the emotional contagion literature: "The two processes, mimicry and emotional contagion, have been suggested to be causally elated." Hess & Blairy, *supra*, at 130.

<sup>133</sup> See, e.g., Barsade, *supra* note XX, at 647-48 (citing U. Dimberg, *Facial Reactions to Facial Expressions*, 26 *PSYCHOPHYSIOLOGY* 643 (1982) (facial expressions); L.O. Lundquist & U. Dimberg, *Facial Expressions Are Contagious*, 9 *J. PSYCHOPHYSIOLOGY* 203 (1995) (facial expressions); J. Frank Bernieri, *Coordinated Movement and Rapport in Student-Teacher Interactions*, 12 *J. NONVERBAL BEHAVIOR*, Summer 1988, at 120 (body language); T.L. Chartrand & J.A. Bargh, *The Chameleon Effect: The Perception-Behavior Link and Social Interaction*, 76 *J. PERSONALITY & SOCIAL PSYCHOLOGY* 893 (1999) (body language); P. Ekman, W.V. Friesen, & K. Scherer, *Body Movement and Voice Pitch in Deceptive Interaction*, 16 *SEMIOTICA* 23 (1976); Elaine J. Hatfield, C.K. Hsee, J. Costello & M.S. Weisman, *The Impact of Vocal Feedback on Emotional Experience and Expression*, 10 *J. SOCIAL BEHAVIOR & PERSONALITY* 293 (1995) (vocal tones); J.K. Hietanen, V. Surakka & I. Linnankoski, *Facial Electromyographic Responses to Vocal Affect Expressions*, 35 *PSYCHOPHYSIOLOGY* 530 (1998) (vocal tones); R. Neumann & F. Strack, *Mood Contagion: The Automatic Transfer of Mood Between Persons*, 79 *J. PERSONALITY & SOCIAL PSYCHOLOGY* 211 (2000) (vocal tones)); Ursula Hess & Sylvie Blairy, *Facial Mimicry and Emotional Contagion to Dynamic Emotional Facial Expressions and Their Influence on Decoding Accuracy*, 40 *INTERNAT'L J. PSYCHOPHYSIOLOGY* 129, 138 (2001) (facial expressions); U. Hess, S. Blairy & P. Philippot, *Facial Mimicry*, in *THE SOCIAL CONTEXT OF NONVERBAL BEHAVIOR* 213 (P. Philippot, R. Feldman & E. Coats, eds., 1999) (reviewing the literature and finding evidence for mimicry of facial, vocal, and postural behaviors).

<sup>134</sup> See, e.g., J. Frank Bernieri, *Coordinated Movement and Rapport in Student-Teacher Interactions*, 12 *J. NONVERBAL BEHAVIOR*, Summer 1988, at 120; DESMOND MORRIS, *Postural Echo*, in *MANWATCHING* 83, 83-85 (1966); cf. Linda Tickle-Degnen & Robert Rosenthal, *Group Rapport and Nonverbal Behavior*, 9 *REV. PERSONALITY & SOCIAL PSYCHOLOGY* 113, 124 (1987) (reviewing studies indicating that "feelings of positivity tend to be conveyed and interpreted as such through participants' demonstrating greater amounts of forward lean, direct body orientation, mutual gaze, smiling, and gestures," and, interestingly, noting that some data also suggest that people adopt similar behaviors when trying to create rapport in a situation they expect to be unfriendly).

<sup>135</sup> See J. Frank Bernieri, *Coordinated Movement and Rapport in Student-Teacher Interactions*, 12 *J. NONVERBAL BEHAVIOR*, Summer 1988, at 120.

<sup>136</sup> HATFIELD ET AL., *supra* note XX, at 22.

that emotions start inside our selves and then, if we choose to show them (and sometimes even when we don't), travel outwards to display themselves on our physical selves. Instead, through afferent feedback, the physiological markers of certain emotional states actually prompt us to feel those emotions.<sup>137</sup> “As myriad facial, postural, and vocal feedback studies have shown, once people engage in the mimicking behavior, they then experience the emotion itself through the physiological feedback from their muscular, visceral, and glandular responses.”<sup>138</sup>

Our emotions follow our physiology not only when we observe and mimic others, but even when we just indifferently contort our faces and postures into the positions associated with particular emotions. In one study, subjects were told that they were participating in a study of facial muscle activity.<sup>139</sup> The experimenter asked them to contract certain muscles, thereby putting them into a “smiling” position (in which they contracted the muscles around the corners of their mouths, and drew the corners back and up) or a “frowning” position (in which they contracted the muscles between the eyebrows to furrow them and clenched the muscles at the back of the jaw). Those in the frown condition reported angrier feelings, and those in the smile condition happier feelings, compared with controls. Similar results have been obtained by, for example, requiring subjects to hold a pen between their teeth (thus preventing smiling) or between their lips (thus prompting smiling).<sup>140</sup> Some research suggests that viewing facial expressions is necessary to emotional contagion,<sup>141</sup> though other findings indicate that exposure to a

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<sup>137</sup> *Id.* at 48-78.

<sup>138</sup> Barsade, *supra* note XX, at 648 (citing S.E. Duclos et al., *Emotion-Specific Effects of Facial Expressions and Postures on Emotional Experiences*, 57 J. PERSONALITY & SOCIAL PSYCHOLOGY 100 (1989); HATFIELD ET AL., *supra* note XX; P.K. Adelman & R. Zajonc, *Facial Efference and the Experience of Emotion*, 40 ANNUAL REV. PSYCHOLOGY 249 (1989); J.D. Laird & S. Bresler, *The Process of Emotional Experience: A Self-Perception Theory*, in 13 EMOTION: REVIEW OF PERSONALITY AND SOCIAL PSYCHOLOGY 213 (M.S. Clark ed., 1992)).

<sup>139</sup> James D. Laird, *The Real Role of Facial Response in the Experience of Emotion: A Reply to Tourangeau and Ellsworth, and Others*, 47 J. PERSONALITY & SOCIAL PSYCHOLOGY 909 (1984).

<sup>140</sup> See Fritz Strack, Leonard L. Martin & Sabine Stepper, *Inhibiting and Facilitating Conditions of the Human Smile: A Nonobtrusive Test of the Facial Feedback Hypothesis*, 54 J. PERSONALITY & SOCIAL PSYCHOLOGY 768 (1988).

<sup>141</sup> See Daniel J. Howard & Charles Gengler, *Emotional Contagion Effects on Product Attitudes*, 82 J. CONSUMER RES., Sept. 2001, at 189, 197 (finding a lack of emotional contagion in a condition in which the sender and the receiver were divided by a screen that allowed them to see each other's hands and to hear each other's voices, but not to see each other's faces).

person's voice may be adequate to produce emotional contagion in some circumstances.<sup>142</sup>

Thus, in the process of primitive emotional contagion as typically understood, we first mimic the expressions, movements, and intonations of another, and then we infer from our bodies an emotional state similar to that of the person we mimic.<sup>143</sup> And studies indicate that we are more likely to experience this process of emotional contagion with those we like than with those we dislike.<sup>144</sup>

To date, most research on emotional contagion has focused on this “primitive” process, but of course our emotions do not always follow those of others. Sometimes our emotions contradict others’. As Bertrand Russell once said, “I care for very few people and have several enemies—two or three at least whose pain is delightful to me.”<sup>145</sup> A limited amount of research has tried to discover the contexts in which we will experience “complementary” or “reverse” contagion. The best empirical support thus far documents a tendency to experience reverse contagion in competitive settings—that is, we feel pleasure when our competitor appears to feel pain<sup>146</sup>—or when we have reason to dislike someone.<sup>147</sup> More work is needed to identify other contexts in which our response to

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<sup>142</sup> See, e.g., James C. Coyne, *Depression and the Response of Others*, 85 J. ABNORMAL PSYCHOLOGY 186 (1976) (as discussed further below, *see supra*, showing emotional contagion during a phone conversation of twenty minutes).

<sup>143</sup> As noted earlier, this is only one theory of emotional contagion, one which focuses on unconscious processes. People can affect one another's emotions in a variety of ways, though, including those discussed in the previous Section, such as hearing another person's negative views and becoming persuaded of them. *See supra* Section III.B.

<sup>144</sup> See, e.g., HATFIELD, CACIOPPO & RAPSON, *supra* note XX, at 169-75; D. Krebs, *Empathy and Altruism*, 32 J. PERSONALITY & SOCIAL PSYCHOLOGY 1134 (1975) (finding that when male subjects were told that they were very similar, based on personality tests, to experimental confederates, then they experienced more pain in response to those confederates' pain); D. Bramel, B. Taub & B. Blum, *An Observer's Reaction to the Suffering of His Enemy*, 8 J. PERSONALITY & SOCIAL PSYCHOLOGY 384 (1968) (finding that when subjects were treated kindly by an experimental confederate, they then shared his emotional reactions as expressed on an audiotape of his alleged response to several different laboratory drugs that induced different emotional responses, but when they had been treated rudely by him, they did not evince his emotions).

<sup>145</sup> Bertrand Russell, *Self-Appreciation*, in 1 THE COLLECTED PAPERS OF BERTRAND RUSSELL: CAMBRIDGE ESSAYS 1888-99, at 73, 73 (K. Blackwell, ed., 1983). Related is the idea of *schadenfreude*, or “Malicious enjoyment of the misfortunes of others.” OXFORD ENGLISH DICTIONARY (1993).

<sup>146</sup> See, e.g., J.T. Lanzetta & B.G. Englis, *Expectations of Cooperation and Competition and Their Effects on Observers' Vicarious Emotional Responses*, 33 J. PERSONALITY & SOCIAL PSYCHOLOGY 354 (1989).

<sup>147</sup> Dolf Zillman & Joanne R. Cantor, *Affective Responses to the Emotions of a Protagonist*, 13 J. EXPERIMENTAL SOCIAL PSYCHOLOGY 155 (1977) (finding that children who were showed a film of a boy behaving benevolently, neutrally, or malevolently then responded differentially to film of the boy either experiencing a happy or sad fate, with emotions mimicking the benevolent or neutral boy but operating contrary to those of the malevolent boy); HATFIELD ET AL., *supra* note XX, at 172-73.

others' feelings runs in the opposite direction of the mimicry that characterizes primitive emotional contagion.<sup>148</sup>

(2) *Mental illness and emotional contagion.* As discussed above, primitive emotional contagion operates in a range of settings, in groups and between individuals, to cause people's emotions to converge. The subject of this paper—mental illness under the ADA—prompts the question of what happens when one of the individuals in an interaction is mentally ill.

Numerous studies document the transmission of negative emotions by individuals suffering from depression.<sup>149</sup> For example, in a study of forty-four pairs of first-year undergraduates, new college roommates of clinically depressed individuals showed a progressive increase in depressive symptoms over a three-month period.<sup>150</sup> Using measures on the Beck depression inventory, researchers found significantly elevated levels of depression and anxiety among those whose roommates were mildly depressed.<sup>151</sup> This study involved young people in a new setting of ongoing intimacy (cohabitation), all of which may have contributed to the roommates' susceptibility to contagion.

Another study suggests, however, that even in the absence of such familiarity and stress, people with depression pass their emotions to others. In a study of conversations between strangers, a twenty minute telephone conversation with a depressed woman led to heightened levels of depression, anxiety, and hostility in her interlocutor.<sup>152</sup> In light of other data suggesting that emotional contagion is blocked if the sender's face is not visible,<sup>153</sup> this result suggests that depressed individuals may be particularly likely to pass their negative feelings on to others.

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<sup>148</sup> See HATFIELD ET AL., *supra* note XX, at 198-99.

<sup>149</sup> See Thomas E. Joiner, Jr. & Jennifer Katz, *Contagion of Depressive Symptoms and Mood: Meta-analytic Review and Explanations from Cognitive, Behavioral, and Interpersonal Viewpoints*, 6 CLINICAL PSYCHOLOGY: SCIENCE & PRACTICE 149, 150 (Summer 1999) (concluding that a meta-analysis of forty findings from thirty-six peer-reviewed studies reveals "strong overall support" for the "phenomenon of contagious depression").

<sup>150</sup> Mary J. Howes, Jack E. Hokanson & David A. Loewenstein, *Induction of Depressive Affect After Prolonged Exposure to a Mildly Depressed Individual*, 49 J. PERSONALITY & SOCIAL PSYCHOLOGY 1110 (1985) (twenty-two pairs of experimental subjects and twenty-two controls).

<sup>151</sup> *Id.*

<sup>152</sup> James C. Coyne, *Depression and the Response of Others*, 85 J. ABNORMAL PSYCHOLOGY 186 (1976).

<sup>153</sup> See *supra* text accompanying note 141.

One pertinent question of ongoing interest in the literature on emotional contagion is how to know whose emotion will be sent and whose will be received. Between any two individuals in a particular interaction, how can we predict whose emotion will prevail? The following hypotheses about the qualities of likely senders of emotion find support in the empirical literature:

1. They must feel (or at least appear to feel) strong emotions.
2. They must be able to express (facially, vocally, and/or posturally) those strong emotions.
3. When others are experiencing emotions incompatible with their own, they must be relatively insensitive to and unresponsive to the feelings of others.<sup>154</sup>

Combined with other research about negative emotion and about depression, this model of the powerful sender may help to explain the empirical finding that people with depression are likely to transmit their negative feelings.

As for feeling or appearing to feel strong emotions—and expressing those emotions physically—depression is characterized by a lack of pleasure or depressed mood that may be expressed verbally or evinced through posture and body language.<sup>155</sup> In addition, some research, though not all, suggests that negative emotions are effectively “stronger” when it comes to transmission. That is, people may respond more strongly and quickly to others’ negative emotions than to their positive or neutral ones.<sup>156</sup> In addition,

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<sup>154</sup> HATFIELD ET AL., *supra* note XX, at 146. The authors do not expressly indicate whether they intend these three hypotheses about “powerful communicators” to be disjunctive or conjunctive, but they found “some evidence” in support of all three hypotheses, suggesting that each is important, even if not in every case. Hatfield et al. also presented an expressly disjunctive list of traits that might be associated with the likelihood of catching others’ emotions, i.e., the tendency to

1. rivet their attention on the others;
2. construe themselves in terms of their interrelatedness to the others;
3. are able to read others’ emotional expressions, voices, gestures, and postures;
4. tend to mimic facial, vocal, and postural expressions;
5. are aware of their own emotional responses; or
6. are emotionally reactive.

*Id.* at 182. The authors draw no conclusions as to whether the literature supported any of these individual hypotheses, focusing their closing observations instead on the effects of power and love on the tendency to receive emotion, as well as the relevance of particular occupational contexts. *Id.*

<sup>155</sup> See *infra* note XX (on symptoms of depression).

<sup>156</sup> Compare J.T. Cacioppo, W.L. Gardner & G.G. Bernston, *Beyond Bipolar Conceptualizations and Measures: The Case of Attitudes and Evaluative Space*, 1 PERSONALITY & SOCIAL PSYCHOLOGY REV. 3 (1997); P. Rozin & E.B. Royzman, *Negativity Bias, Negativity Dominance, and Contagion*, 5 PERSONALITY & SOCIAL PSYCHOLOGY REV. 296 (2001) (a review); with Barsade, *supra* note XX, at 665 (finding in a laboratory context no difference in the strength of transmission of positive versus negative emotions).

as noted earlier, emotions associated with depression are apparently strong enough to be transmitted over the telephone, despite other results indicating that emotional contagion may not occur without the sight of the sender's face.<sup>157</sup>

As for imperviousness to others' emotions, empirical work indicates that low emotional reactivity to sad or happy stimuli is a trait of depression.<sup>158</sup> And for those with depression, lower emotional reactivity is related to lower levels of psychosocial functioning and lower rates of recovery.<sup>159</sup> Moreover, other data suggest that people who report feeling happy are more susceptible to catching emotions than their less happy peers.<sup>160</sup> These findings are consistent with the third hypothesis above about strong senders of emotion: They are relatively unlikely to be affected by the emotions of those around them.<sup>161</sup> This conclusion also makes clinical sense: If people with depression could be easily cheered up by being around happy people, then the diagnosis would have little meaning.

Research therefore suggests that people with depression will typically be strong transmitters of their negative emotions of sadness and anxiety. No studies have yet confirmed whether other mental illnesses tend to prompt the transmission of certain emotions. But there are several reasons to think that people with a variety of mental

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<sup>157</sup> See *supra* text accompanying note 153.

<sup>158</sup> Jonathan Rottenberg, Karen L. Kasch, James J. Gross & Ian H. Gotlib, *Sadness and Amusement Reactivity Differentially Predict Concurrent and Prospective Functioning in Major Depressive Disorder*, 2 *EMOTION* 135, 141 (2002) (finding, in a study of 72 depressed subjects and 33 nondepressed controls, that depressed individuals showed less consistent emotional reactivity—in the form of self-reports—to sad or amusing film stimuli, and, more specifically, reacted with less happiness to happy stimuli and more sadness in response to neutral stimuli than controls, but also with less sadness to sad stimuli).

<sup>159</sup> Rottenberg et al., *supra* note XX, at 141 (finding that the lesser emotional reactivity—based on behavioral and physiological responses—was related to lower psychosocial functioning and lower rates of recovery, with the best predictor of recovery rates the heart rate responses to the amusing film stimulus).

<sup>160</sup> See C.K. Hsee, E. Hatfield & C. Chemtob, *Assessment of the Emotional States of Others: Conscious Judgments Versus Emotional Contagion*, 11 *J. SOCIAL & CLINICAL PSYCHOLOGY* 119 (1991).

<sup>161</sup> Two findings seem to run contrary to this conclusion: first, the finding that the ability to transmit fear, anxiety, or anger distinguishes those people with high expressivity scores (on the ACT, discussed earlier) because people in all score ranges are able to transmit happiness, Howard S. Friedman & Ronald E. Riggio, *Effect of Individual Differences in Nonverbal Expressiveness on Transmission of Emotion*, 6 *J. NONVERBAL BEHAVIOR* 96 (1981); and second, the finding that depression, as a “low-energy display of emotion,” has been “correlated with low accuracy in its transmission to others, that is, others did not understand the subject was depressed,” Barsade, *supra* note XX, at 650 (citing K.M. Prkachin et al., *Nonverbal Communication and Response to Performance Feedback in Depression*, 86 *J. ABNORMAL PSYCHOLOGY* 224 (1977); A.C. Gerson & D. Perlman, *Loneliness and Expressive Communication*, 88 *J. ABNORMAL PSYCHOLOGY* 258 (1997)). In light of the argument by Hatfield et al., Barsade, and others that awareness of emotional contagion can help to prevent it, the result in the second study actually makes the effect of emotional contagion in conjunction with depression likely to be even greater, to the extent that the finding is that others interacting with a depressed person were unlikely to be able to identify the depression.

illnesses are likely to spark negative emotions in others. First, in moving from depression to a discussion of other mental illnesses, we must remember that contagion can take multiple forms. In addition to primitive contagion—in which the first person’s feelings are mimicked and absorbed—the broad category of emotional contagion also describes the process by which we prompt others to feel emotions different from our own. Thus, anger may prompt fear instead of or as well as anger.<sup>162</sup> Second, as discussed above, negative affect or distress contributes to the clinical definition of most mental illnesses; thus, the affect associated with many mental illnesses may be particularly prone to transmission, according to the data on the power of negative emotion. Finally, as with depression, the negative or unwanted feelings associated with a variety of mental illnesses must be relatively tenacious. Otherwise, people would not persist in distressing behaviors, and therapy would be unnecessary or at least brief. Thus, those with mental illness are more likely to be senders than receivers of emotion.

A final question concerns the meaning of “contagion” in the context of mental illness. Are people with mental illness actually infecting other people with their mental illnesses? In other words, are they literally driving other people crazy? The short answer is apparently not. Although the extant research on depression does not supply a definitive yes or no answer to the question, the current data on emotional contagion and depression outside of the marital context show contagion of *negative affect* rather than of clinical levels of depression.<sup>163</sup> In this sense, the term “contagion” may be misleading, because although the emotions travel from one person to another, the underlying illness does not seem to be “catching.”

(3) *Emotional contagion in the workplace.* Emotional contagion has been studied in a variety of contexts, including teacher-student interactions, mother-child dynamics, communication between spouses, romantic encounters between strangers, negotiations,

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<sup>162</sup> See *supra* text accompanying notes 145-148.

<sup>163</sup> See, e.g., Thomas E. Joiner, Jr., *Contagious Depression: Existence, Specificity to Depressed Symptoms, and the Role of Reassurance Seeking*, 67 J. PERSONALITY & SOCIAL PSYCHOLOGY 287 (1994); E-mail from Thomas Joiner, to the author (Aug. 30, 2004) (on file with author). In the intimate context of marriage, some research has found that people living with a currently depressed person were significantly more likely to warrant therapeutic intervention themselves than people living with a previously depressed person, see J.C. Coyne et al., *Living with a Depressed Person*, 55 J. CONSULTING & CLINICAL PSYCHOLOGY 347 (1987), but a lack of proper controls prevents causal inferences. Non-causal explanations for the correlation readily come to mind: for example, that the spouses recently encountered a difficult life event that triggered depression in both. See Joiner, *supra*, at 287.

and other contexts relevant to the workplace.<sup>164</sup> The focus here on workplace discrimination warrants a brief discussion of findings related to workplace behaviors and tasks.

- *Emotional contagion affects customers' evaluations of service encounters and of products.* Not surprisingly, customer evaluations of customer service may be affected by displays of positive emotion by employees and by resulting transmission of positive emotion. In a recent study of customer service interactions in thirty-nine regional bank branches, when employees displayed more positive emotion, customers displayed and reported more positive emotion and, notably, rated the quality of the service interaction more highly.<sup>165</sup> In addition, employee scores on a test designed to measure a person's disposition towards emotional expressivity—the Affective Communication Test (ACT)—predicted employees' displays of emotion in service interactions.<sup>166</sup> Interestingly, though, the study did not support previous findings suggesting that employees' true emotions “leak” out in customer interactions: An employee's self-reported degree of positive affect was not significantly related to his or her outward expression of positive emotion.<sup>167</sup>

Moreover, emotional contagion may even affect how consumers feel about products. One study showed that a female subject's feelings about a product she was viewing—a lacquered Russian box—were positively affected by displays of positive emotion by another potential customer whom she liked.<sup>168</sup> Pairs of subjects inspected the box, placed between them on a table, for four minutes.<sup>169</sup>

One subject in each pair was arbitrarily designated to be the “sender” and, in the

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<sup>164</sup> See generally HATFIELD ET AL., *supra* note XX.

<sup>165</sup> S. Douglas Pugh, *Service with a Smile: Emotional Contagion in the Service Encounter*, 44 ACADEMY MANAGEMENT J. 1018, 1024 (2001). Pugh notes that one limitation of the study design is that he did not incorporate a mechanism for measuring whether customer affect could have been contributing to the emotion passed between employee and customer. *Id.* at 1026.

<sup>166</sup> *Id.* at 1024.

<sup>167</sup> Pugh, *supra* note XX, at 1024. *But cf.* J. Van Maanen & G. Kunda, *Real Feelings: Emotional Expression and Organizational Culture*, in 11 RESEARCH IN ORGANIZATIONAL BEHAVIOR 43 (L.L. Cummings & B.M. Staw eds., 1989); R.I. Sutton, *Maintaining Norms about Expressed Emotions: The Case of Bill Collectors*, 36 ADMINISTRATIVE SCI. Q. 245 (1991).

<sup>168</sup> Daniel J. Howard & Charles Gengler, *Emotional Contagion Effects on Product Attitudes*, 82 J. CONSUMER RES., Sept. 2001, at 189.

<sup>169</sup> *Id.* at 192.

positive emotion condition, made to like the box by being told just prior to the four-minute inspection period that she had won the box.<sup>170</sup> The other subject in each pair was designated to be the “receiver” and, in the liking condition, encouraged to like her sender by being told that the sender had given her a gift just before the inspection period.<sup>171</sup> If the receiver liked the sender, and the sender felt positively towards the box, then the receiver absorbed the sender’s positive feelings towards the box.<sup>172</sup>

- *The moods of work groups tend to converge.* Research on teams of nurses and of accountants, for example, showed that the team members’ moods were related to each other, independent of the effect of shared work problems.<sup>173</sup> Specific factors that predict the development of shared moods in groups include stable group membership, task interdependence, social interdependence, and shared norms about mood regulation in the group.<sup>174</sup> Interestingly, some research suggests that work groups are more likely to converge towards unpleasant moods than towards pleasant moods, but not all studies support this result.<sup>175</sup>
- *Power affects the transmission of emotional contagion in seemingly complicated ways, suggesting that supervisors may absorb emotions from supervisees and vice versa.* People with less power may have reasons to hide their own feelings and to notice and mimic the posture and expressions of their superiors.<sup>176</sup> By contrast, people with more power may have the leeway to express their emotions more

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 194.

<sup>173</sup> P. Totterdell et al., *Evidence of Mood Linkage in Work Groups*, 74 J. PERSONALITY & SOCIAL PSYCHOLOGY 1504 (1998), cited in Barsade at 645.

<sup>174</sup> C.A. Bartel & R. Saavedra, *The Collective Construction of Workgroup Moods*, 45 ADMIN. SCI. Q. 197 (2000).

<sup>175</sup> Compare *id.*, with Sigal G. Barsade, *The Ripple Effect: Emotional Contagion and Its Influence on Group Behavior*, 47 ADMINISTRATIVE SCI. Q. 644, 665 (2002). Barsade suggests that the result that negative emotion expressed by the confederate had no more of an effect on the group’s mood than positive emotion could be the result of the nonnormative nature of the group task—a problem-solving exercise among management students. For further discussion of this experiment, see *supra* note 127 and accompanying text.

<sup>176</sup> See, e.g., HATFIELD ET AL., *supra* note XX, at 175; J.A. Hall, *Gender, Gender Roles, and Nonverbal Communication Skills*, in SKILL IN NONVERBAL COMMUNICATION: INDIVIDUAL DIFFERENCES 32 (R. Rosenthal, ed., 1979; J.B. MILLER, TOWARDS A NEW PSYCHOLOGY OF WOMEN (1976); D.L. Thomas, D.D. Franks & J.M. Calonico, *Role-Taking and Power in Social Psychology*, 37 AMER. SOCIOLOGICAL REV. 605 (1972); S. WEITZ, NONVERBAL COMMUNICATION: READINGS WITH COMMENTARY (1974).

directly and to ignore the feelings of those who report to them.<sup>177</sup> Consistent with these intuitions, some evidence supports the conclusion that those with less power, such as supervisors, are more likely to catch than to shape the emotions of those who wield more power.<sup>178</sup> But other studies suggest the possibility that people in more powerful positions may absorb at least as much if not more emotion than they transmit.<sup>179</sup>

- *The moods of work groups affect evaluations of their performance.* Positive emotional contagion has also been shown to correlate with success on assigned tasks, as measured by self report and evaluation by other group members.<sup>180</sup> Further research is needed to confirm the effect on performance as measured by objective standards rather than other group members, whose evaluations may also be affected by group mood.
- *Positive emotional contagion leads to greater cooperativeness and to an increased willingness to make concessions in tasks involving negotiations.*<sup>181</sup> This result bears on workplace negotiations of all kinds. Moreover, the useful positive energy that facilitates negotiations need not come from the negotiation partner, but may be induced by a third party. In one study, if a subject received positive emotional contagion from a third party prior to an interaction with a difficult, aggressive person, then the subject dealt in more constructive ways with the conflict with the difficult person and even liked the difficult person better.<sup>182</sup>

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<sup>177</sup> See, e.g., HATFIELD ET AL., *supra* note XX, at 175; S.E. Snodgrass, *Women's Intuition: The Effect of Subordinate Role on Interpersonal Sensitivity*, 49 J. PERSONALITY & SOCIAL PSYCHOLOGY 146 (1985).

<sup>178</sup> See, e.g., HATFIELD ET AL., *supra* note XX, at 175; Snodgrass, *supra* note XX.

<sup>179</sup> See J.E. Grusec & R. Abramovitch, *Imitation of Peers and Adults in a Natural Setting: A Functional Analysis*, 53 CHILD DEVELOPMENT 636 (1982), *cited in* HATFIELD ET AL., *supra* note XX, at 175-76; Christopher K. Hsee, Elaine Hatfield, John G. Carlson & Claude Chemtob, *The Effect of Power on Susceptibility to Emotional Contagion*, 4 COGNITION & EMOTION 327 (1990).

<sup>180</sup> Sigal G. Barsade, *The Ripple Effect: Emotional Contagion and Its Influence on Group Behavior*, 47 ADMINISTRATIVE SCI. Q. 644, 666-67 (2002).

<sup>181</sup> R. Baron, *Environmentally Induced Positive Affect: Its Impact on Self-Efficacy, Task Performance, Negotiation, and Conflict*, 20 J. APPLIED SOCIAL PSYCHOLOGY 368 (1990); J.P. Forgas, *On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies*, 74 J. PERSONALITY & SOCIAL PSYCHOLOGY 565 (1998).

<sup>182</sup> R. Baron, *Reducing Organizational Conflict: An Incompatible Response Approach*, 69 J. APPLIED PSYCHOLOGY 272 (1984).

In sum, though more work remains to be done to develop a better understanding of these processes, the research to date suggests that emotional contagion has concrete effects in a variety of workplace contexts.

#### D. Implications for Discrimination against People with Mental Illness

The foregoing discussion has important implications for discrimination against people with mental illness. While the next Part of the paper focuses on doctrinal implications under the ADA, this Section makes a broader theoretical point: An understanding of the hedonic costs of mental illness to its bearers and nearby others illuminates a peculiarly intransigent basis for discrimination against people with mental illness.

As discussed earlier, mental illness may impose hedonic costs not just on the person with mental illness but on others, and emotional contagion—the process by which we “infect” others with particular emotions—can create hedonic costs.<sup>183</sup> Thus, the distress of a person with mental illness is not her distress alone. On the contrary, studies indicate that a person with depression is likely to make others around her feel sad, anxious, and hostile, as in the example of Mark at the beginning of this Part.<sup>184</sup> And the data on emotional contagion more generally suggest that affective states associated with other mental illnesses would transmit as well. For example, the intense anxiety of Helen, which could be associated with a diagnosis such as bipolar disorder, could also agitate or otherwise distress those around her in a workplace. Moreover, as discussed above, emotional contagion comprises not only the passage of identical emotions but also the prompting of contrary or complementary emotions, such as fear in response to anger. More generally, a fearful response, caused by the mechanism of emotional contagion or by another means such as fearful imagining of possible future events, can be a hedonic cost.

The hedonic costs of mental illness—especially those created by emotional contagion—suggest a hybrid basis for discrimination against people with mental illness.

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<sup>183</sup> See *supra* Part IV (explaining that primitive emotional contagion involves the process whereby others mimic our same emotions and that emotional contagion more generally comprises a range of different emotional interrelationships including the production of complimentary emotions).

<sup>184</sup> See *supra* text accompanying notes 150-152.

Avoiding hedonic costs would seem to be a story about animus—about avoiding those whom we do not like. And in the workplace, this might mean an employer’s wanting to avoid hedonic costs to himself, which would look rather like classic employer animus, to the extent that it was about an employer trying to avoid associating with people he does not like. Or, an employer might be trying to spare his employees or customers the hedonic costs of associating with a particular person, a form of discrimination that would look like capitulation to third-party animus.

But, on the other hand, the desire to avoid the hedonic costs of emotional contagion in these contexts looks rather different from classic animus. The discriminator need not have any hostility towards people with mental illness, at the categorical level or the individual level. Nor must she engage in selective empathy and indifference.<sup>185</sup> On the contrary, the more empathy and liking that an individual feels for a person with a mental illness, the more likely she is to pick up the emotions of that person.<sup>186</sup> And the desire to avoid the intrusion of unwanted emotions seems not only understandable but highly rational from a personal productivity standpoint.

Greg, the student who encountered Helen at Starbucks in the beginning of this Part, found it too difficult to study for his exam in the presence of Helen. For similar reasons, Irwin could not imagine hiring Helen. In the other scenario, we know nothing specific about the mental state of June who was having the dinner party and excluded depressed Mark, but, since she just moved to a new city, she may well be working quite hard to fight negative emotions such as sadness and loneliness. Nor do we know anything about Irwin, who was considering whether to hire Mark. But Irwin might be going through a difficult time at home or at work, and though he is not clinically depressed, he finds it somewhat difficult to motivate himself to go to work in the mornings. Hiring someone with a depressed affect might sound particularly emotionally costly to him.

Moreover, people’s efforts to avoid sadness and other negative feelings are generally not limited to times of particular difficulty or challenge. Most of us apparently maintain a mindset that is more optimistic than realistic: Studies indicate that those who are clinically depressed are less likely than nondepressed people to overestimate what

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<sup>185</sup> See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7, 14-15 (1976).

<sup>186</sup> See *supra* text accompanying note 144.

others think of them.<sup>187</sup> It is unsurprising, then, that people who see things more clearly, and more negatively, than the nonclinical population might be perceived as a threat. And others, with disorders that do not necessarily involve more realistic thinking but still involve negative or unwanted affect, could nonetheless present a threat to the careful maintenance of one's affective state and personal productivity.

In this light, the fear of having one's emotions, one's self, imposed upon by unwanted affect seems a reasonable act of self-preservation. Employment discrimination on the basis of emotional contagion thus looks increasingly like rational discrimination in some circumstances, particularly if the hedonic costs translate into productivity costs for the employer or coworkers, or into the loss of sales and other business at the level of the customer.

Even if we had perfect data on the relationship between mental illness and emotional contagion, the expectation of negative emotional contagion from a particular individual with mental illness would always be a stereotype, a generalization from a tendency of the group. And, as with other stereotypes, then, the stereotype may be a more or less accurate description of the members of the group, and it may be a more or less cost efficient way to determine the likelihood that individuals bear the relevant trait. Thus, treating mental illness as a proxy for negative emotional contagion in the workplace may or may not be statistical discrimination. The foregoing analysis suggests that at least for some mental illnesses, however, mental illness may be a quite good predictor of negative emotional contagion and thus an efficient basis for discrimination.

Moreover, although emotional-contagion-based discrimination concerns liking and affect, it is likely not susceptible to the type of integration-based solution that we tend to think workplace integration promotes in response to the problem of animus and animus-based discrimination. Specifically, this discussion of emotional contagion and the

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<sup>187</sup> See, e.g., SHELLEY TAYLOR, POSITIVE ILLUSIONS 212-15, 226 (1989); Peter Lewinsohn et al., *Social Competence and Depression*, 89 J. ABNORMAL PSYCHOL. 203, 207-08, 210-11 (1980). A related idea—of mental illness as the lifting of the protection from reality generated by the “sane” mind—may be reflected in Susanna Kaysen's metaphor: “Something had been peeled back, a covering or shell that works to protect us. I couldn't decide whether the covering was something on me or something attached to every thing in the world. It didn't matter, really; wherever it had been, it wasn't there anymore.” SUSANNA KAYSEN, GIRL, INTERRUPTED 42 (1993). Kaysen's representation of her relationship to illness is complicated and ambiguous, but the metaphor is nonetheless a powerful one.

hedonic costs of mental illness would seem to bode poorly for the successful application of the much-vaunted contact hypothesis to the stigma of mental illness.

The contact hypothesis is the idea that increasing contact between members of stigmatized groups and outsiders will decrease the stigma attributed to those groups by the outsiders.<sup>188</sup> In general, workplace-type settings seem particularly well-suited to constructive contact of this sort, since studies show that ongoing contact among interdependent equals provides the most potential for reducing stigma.<sup>189</sup> Recent work on the stigma of mental illness concludes that contact has more potential for reducing stigma than other strategies such as anti-stigma education or efforts to suppress negative messages about people with mental illness.<sup>190</sup> And some studies have demonstrated that contact with people with mental illness can have some effect on reducing negative attitudes.<sup>191</sup> These results are encouraging, and they suggest that workplace integration is important to whatever strides can be made towards diminishing the stigma of mental illness.

But the hedonic costs of mental illness—and the potential for their transmission through emotional contagion in particular—suggest that the power of contact for diminishing stigma faces special limits in the context of mental illness. Indeed, contact

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<sup>188</sup> See, e.g., Bagenstos, “Rational” Discrimination, *supra* note XX, at 844 & n. 55; Cynthia L. Estlund, *The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, 1 U. PA. J. LAB. & EMP. L. 49 (1998); GORDON W. ALLPORT, THE NATURE OF PREJUDICE 261-81 (1954); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1331 (1998); Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 23-24 (2000). For discussion of some general limitations of the contact hypothesis, see, for example, Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1279 (2002) (explaining that the potential of contact to diminish stereotypes is reduced by people’s tendency to create “subtypes” in their stereotypes when they meet individuals who differ greatly from those stereotypes).

<sup>189</sup> See Bagenstos, “Rational” Discrimination, *supra* note XX, at 844 & n. 55; Corrigan & Penn, *Lessons from Social Psychology*, *supra* note XX, at 771.

<sup>190</sup> See Corrigan & Penn, *Lessons from Social Psychology*, *supra* note XX, at 772-73.

<sup>191</sup> See, e.g., M.E. Kolodziej & B.T. Johnson, *Interpersonal Contact and Acceptance of Persons with Psychiatric Disorders: A Research Synthesis*, 64 J. CONSULTING & CLINICAL PSYCHOLOGY 1387 (1996) (concluding in a meta-analysis that providing contact with persons with mental illness is associated with improved attitudes, with the greatest effect produced by contact during undergraduate education); B.G. Link & F.T. Cullen, *Contact with the Mentally Ill and Perceptions of How Dangerous They Are*, 27 J. HEALTH & SOCIAL BEHAVIOR 289 (1986) (finding an inverse relationship between self-reports of previous contact with people with mental illness and stigmatizing attitudes); D.M. Desforges et al., *Effects of Structured Cooperative Contact on Changing Negative Attitudes Toward Stigmatized Social Groups*, 60 J. PERSONALITY & SOCIAL PSYCHOLOGY 531 (1991) (finding, in a laboratory setting, that students who participated in a cooperative task with a person they were told had recently been released from a mental institution expressed more positive attitudes towards people with mental illness); Corrigan & Penn, *supra* note XX, at 771.

alone may never suffice to eliminate the stigma of mental illness. Some factors have been identified that may diminish the effectiveness of contact in certain contexts,<sup>192</sup> but the idea of hedonic costs in combination with emotional contagion would seem to run counter to the very premise of the contact hypothesis: that greater contact and greater *liking* will lead to diminished stigma.

The literature on emotional contagion suggests, contrary to the contact hypothesis, that greater liking leads to greater emotional contagion.<sup>193</sup> Thus, the more someone comes to like someone with a mental illness, the more the outsider is likely to absorb the emotions of the person with mental illness. And to the extent that mental illnesses are defined largely by unwanted feelings, closeness is likely to lead to an increased experience of an unwanted affect; that is, liking may, paradoxically, lead to negative feelings. Thus, stated most bluntly and generally, contact may cause a desire for avoidance as well as diminishing certain negative responses such as stereotyping.

This discussion of hedonic costs therefore reveals a unique reason why discrimination against people with mental illness may be difficult to eradicate. Even if all the traditional bases of discrimination against people with mental illness were eliminated—including animus, myths, fears, stereotypes, proxies, and financial costs—one basis for discrimination would apparently remain: the desire to avoid the hedonic costs of closeness to people whose disability is defined in part by negative emotions.

This conclusion might seem to suggest that workplace discrimination against people with mental illness is inevitable.<sup>194</sup> But such discrimination is inevitable only (or largely) to the extent that the market is the only mechanism for eliminating discrimination in this context. On the contrary, by passing the ADA, Congress provided a statutory mandate for the protection and accommodation of people with mental illness in

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<sup>192</sup> See, e.g., Ziva Kunda & Kathryn C. Oleson, *When Exceptions Prove the Rule: How Extremity of Deviance Determines the Impact of Deviant Examples on Stereotypes*, 72 J. PERSONALITY & SOCIAL PSYCHOLOGY 965 (1997) (finding that, under certain circumstances, individuals who completely depart from stereotypes may do less to change people's attitudes about a group than those who bear some resemblance to stereotypes); see also sources cited *supra* note 188.

<sup>193</sup> See *supra* text accompanying note 144.

<sup>194</sup> Indeed, some of the foremost researchers of emotional contagion appear to think that the way to deal with emotional contagion is to avoid spending much time with those who transmit negative energy. See, e.g., Hsee et al., *supra* note XX, at 336 ("Secondly, the recognition that emotions are 'contagious' gives us some hints as to how to control our own emotions as well. If we spend too much time associating with people who are angry, bitter, or depressed, we may end up feeling the same way ourselves. The implication is that, to control one's emotions, one should exercise control over one's relationships.").

the workplace within certain limits. To the extent that hedonic costs may be expected to attach to many or most people with mental illness, an awareness of this process therefore points out the need to examine the workplace and case law closely, to determine when and how the ADA prevents employers from discriminating on this basis.

#### IV. DOCTRINAL IMPLICATIONS

The foregoing analysis of the hedonic costs of mental illness has at least four key doctrinal implications. First, the ADA generally requires employers to bear the hedonic costs imposed on the workplace by employees with mental illness, subject to certain limitations. In particular, employers may not generally define the essential functions of a job to include not inflicting hedonic costs, with the exception of jobs that have the mental state of others as their focus. Second, understanding the centrality of hedonic costs to mental illness, and the particular processes of emotional contagion, helps to resolve a disagreement between circuits about whether the employer or the employee bears the greater responsibility for effective negotiations about reasonable accommodation of a disability. Third, at a time when the EEOC's most promising interpretation of what it means for a person to be "regarded as" disabled is on uncertain footing in the courts, an awareness of negative emotional contagion and other hedonic costs of mental illness helps to show why that interpretation is vital in this context. Finally, an appreciation of the understandable fear of the hedonic costs of mental illness helps to explain the difficulty that courts have faced when trying to answer an apparently easy doctrinal question—whether interacting with others is a major life activity for purposes of the definition of disability under the ADA—and thus to supply an answer.

##### A. Hedonic Costs and Essential Functions

The previous discussion raises the question of whether employers are required to bear the hedonic costs of emotional contagion in the workplace. Consider the following examples of contexts in which an employer might want to treat a person with symptomatic mental illness differently at least in part because of the hedonic costs of emotional contagion<sup>195</sup>:

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<sup>195</sup> See *supra* Section I.B (discussing symptomatic/asymptomatic divide).

1. A paralegal in a small law firm,<sup>196</sup> Robert, suffers from depression.<sup>197</sup> Robert has excellent credentials and does a fine job at his work tasks, which mostly involve independent research. Due to his depression, however, he makes almost everyone he encounters in a workday feel sad and anxious.
2. A used car salesman, Tom, suffers from bipolar disorder.<sup>198</sup> When he is in a depressed phase, his sales are extremely low, and when he is in a manic phase, his sales are variable, with some customers taken with his energy but others driven away by his intensity.
3. Vera, a social worker, has generalized anxiety disorder.<sup>199</sup> She knows all the right things to say to clients, but her clients tend to leave sessions feeling more anxious and unhappy than they were on arrival. They therefore show little improvement, and most cease therapy after only a few sessions.

The rest of this Section will address the question of the employer's obligations in each case. The Section first describes the main types of hedonic costs that may be prompting the employer's reaction, then discusses the potential conflict between the hedonic costs of mental illness and an employee's ability to perform the essential functions of certain jobs.

(1) *Types of costs.* The hedonic costs of mental illness in the workplace may result in two main types of monetary costs to the employer: coworker productivity costs and

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<sup>196</sup> As a private employer, the firm would need to have at least 15 employees to be subject to the Act. 29 C.F.R. § 1630.2(e) (1992).

<sup>197</sup> DSM-IV-TR, *supra* note XX, at 369 ("The essential feature of Major Depressive Disorder is a clinical course that is characterized by one or more Major Depressive Episodes."); *id.* at 349 ("The essential feature of a Major Depressive Episode is a period of at least 2 weeks during which there is either depressed mood or the loss of interest or pleasure in nearly all activities. . . . The individual must also experience at least four additional symptoms drawn from a list that includes changes in appetite or weight, sleep, and psychomotor activity; decreased energy; feelings of worthlessness or guilt; difficulty thinking, concentrating, or making decisions; or recurrent thoughts of death or suicidal ideation plans, or attempts. . . . The symptoms must persist for most of the day, nearly every day, for at least 2 consecutive weeks. The episode must be accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning. For some individuals with milder episodes, functioning may appear to be normal but requires markedly increased effort.").

<sup>198</sup> DSM-IV-TR, *supra* note XX, at 382 ("The essential feature of Bipolar I Disorder is a clinical course that is characterized by the occurrence of one or more Manic Episodes . . . or Mixed Episodes . . . . Often individuals have also had one or more Major Depressive Episodes . . .").

<sup>199</sup> DSM-IV-TR, *supra* note XX, at 472 ("The essential feature of Generalized Anxiety Disorder is excessive anxiety and worry (apprehensive expectation), occurring more days than not for a period of at least 6 months, about a number of events or activities . . . . The individual finds it difficult to control the worry. . . . The anxiety and worry are accompanied by at least three additional symptoms from a list that includes restlessness, being easily fatigued, difficulty concentrating, irritability, muscle tension, and disturbed sleep . . .").

customer/sales costs. First, coworker productivity might be reduced directly if, for example, coworkers have a more depressed affect and thus diminished motivation and energy because of negative emotional contagion. Or negative emotional contagion or other hedonic costs might reduce coworker productivity indirectly by causing coworkers to dislike coming to work and therefore to miss days or even to quit. Or some work might be delayed because coworkers put off interacting with the mentally ill coworker responsible for a relevant portion of the task. As discussed in Part III, the mood of a work group contributes to the group's evaluation of performance on work tasks: Thus, the mood affects how well the group does the job or at least affects how well they *feel* they did the job.<sup>200</sup> In addition, in any negotiation required among coworkers, concessions will come more slowly if the group mood is more negative.<sup>201</sup> Moreover, personality conflicts in the workplace might themselves consume the time and energy of coworkers, taking away from their time spent on workplace duties. At an extreme, personality conflicts can lead to violence in the workplace, which obviously has its own set of productivity and reputational costs.

Note, however, that not every instance of negative affect necessarily has productivity costs. There is no research yet on how long the effects of emotional contagion last. But a fleeting interaction with a depressed person, for instance, is unlikely to have lasting effects. And since different people are more or less susceptible to contagion than others,<sup>202</sup> the length of reaction presumably varies as well. Some interactions may therefore produce insignificant hedonic costs that do not negatively affect productivity.<sup>203</sup>

Second, negative emotional contagion may diminish sales or otherwise impose costs on customer relations. As discussed, positive emotional contagion can increase how much customers like products and how well they evaluate the service they receive.<sup>204</sup>

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<sup>200</sup> See *supra* text accompanying note 180.

<sup>201</sup> See *supra* text accompanying notes 181-182.

<sup>202</sup> See *supra* note 154 and accompanying text.

<sup>203</sup> Certain kinds of negativity, such as the more realistic thinking associated with depression, may of course be useful in particular workplaces. For instance, if an entity's tasks involve planning, one or more employees who always expect the worst may usefully counterbalance more optimistic thinkers. Such benefits might or might not outweigh any productivity losses due to hedonic costs to coworkers. The focus here, though, is on situations in which an employer wants to fire the employee because his mental illness produces hedonic costs.

<sup>204</sup> See *supra* text accompanying notes 165-172.

Thus, as in the above example involving Tom the used car salesman, a failure to generate such positive energy, or negative energy of various sorts, can diminish sales. Notably, however, a person's true affect does not necessarily leak out into her customer service behavior.<sup>205</sup> Nonetheless, a lack of positive emotional expressiveness, where it characterizes an employee's relations to customers, has the potential to diminish sales, as well as customer and client loyalty and goodwill towards the business.<sup>206</sup>

(2) *Hedonic costs and the essential functions of the job.* So, does the ADA require an employer to bear hedonic costs that individuals with mental illness may impose in the workplace?<sup>207</sup> The statute plainly envisions that employers may have to bear certain costs to integrate people with disabilities into the workplace. In addition to the hedonic costs of an employer's not indulging his own animus, or the productivity or sales costs that come from not indulging coworker and customer preference, the statute requires employers to bear the costs of reasonable accommodations that do not create an undue hardship.<sup>208</sup> Other than as a defense to failure to accommodate, however, the statute contains no cost defense to discrimination on the basis of disability. Thus, the central question in the above scenarios is whether the plaintiff can show that he is able to perform the "essential functions" of the job, "with or without reasonable accommodation,"<sup>209</sup> and thus can make out a prima facie case of discrimination under the ADA.

May an employer define the essential functions of the job to preclude the imposition of hedonic costs, such that an employee who failed at this task was not otherwise qualified for the job?<sup>210</sup> This is not a hypothetical question. Employers have urged courts to accept definitions of the essential job functions as including, for example,

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<sup>205</sup> See *supra* text accompanying note 167.

<sup>206</sup> Of course, the research indicating that positive emotional expressiveness helps customer relations does not mean that alternative emotional attitudes would create costs in all circumstances. For instance, in certain contexts, such as highly fashionable restaurants, cafés, or galleries, a positive staff attitude is apparently not always most marketable. Such contexts are the exception rather than the rule, however, and there is also little reason to think that the kind of negative affect associated with various mental illnesses would be particularly likely to create the alternative style of customer relations sometimes favored in such workplaces.

<sup>207</sup> In light of the individualized inquiry required by the ADA, as well by most facets of antidiscrimination law more generally, I assume here that employers could not categorically exclude people with mental illness on this basis. See, e.g., Bagenstos, *supra* note XX; Hubbard, *supra* note XX; Strauss, *supra* note XX; Sunstein, *supra* note XX.

<sup>208</sup> 42 U.S.C. § 12111(10).

<sup>209</sup> *Id.*

<sup>210</sup> See *supra* Section I.A (explaining the plaintiff's prima facie case to include her being otherwise qualified for the job with or without reasonable accommodation).

not “offending customers,”<sup>211</sup> not “making others in the workplace feel threatened for their own safety,”<sup>212</sup> and “getting along” with others.<sup>213</sup> If an employee is not actually dangerous, a matter for the direct threat inquiry,<sup>214</sup> the core question remains squarely with the essential functions of the job: What should a court make of an employer’s defining a job as requiring employees to contribute to positive energy in the workplace or not bring negative emotion to the workplace?

The ADA cannot generally permit employers to define the essential functions of a job as requiring hedonic benefits or prohibiting hedonic costs. In a sense, every employer might well like all employees to contribute positive energy to the workplace; with the exception of jobs that involve no human contact, then, almost every job could in theory require employees to contribute positively to the workplace energy. Given the likelihood that people with mental illness may instead increase hedonic costs in the workplace, permitting such a broad requirement for all jobs would essentially excise the ADA’s grant of protection to people with mental illness.<sup>215</sup>

Some jobs, though, specifically require making other people feel a certain way. Though employers are given some deference in their determination of the essential functions of a job,<sup>216</sup> claims that a job requires the production of a certain positive

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<sup>211</sup> Taylor v. Food World, Inc., 133 F.3d 1419, 1424 (11th Cir. 1998).

<sup>212</sup> Calef v. Gillette Co., 322 F.3d 75, 86 (1st Cir. 2003).

<sup>213</sup> Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 675 (1st Cir. 1995) (affirming grant of summary judgment to the defendant on plaintiff’s claim that the employer’s request for a pre-re-employment medical certification of fitness violated § 12112(d), because, inter alia, the essential functions of the job of a shift electrician in a plant include “getting along” with others, not just “technical ability and experience as an electrician”).

<sup>214</sup> See, e.g., Hubbard, *Direct Threat*, supra note XX (arguing persuasively that assertions that a plaintiff created a threat of violence must be analyzed under the “direct threat” provision expressly created by Congress for the purpose of protecting disabled employees from irrational fears); Hubbard, *Dangerous Mentally Ill*, supra note XX. An employer might want to invoke the direct threat defense and argue that a plaintiff poses a direct threat to the mental health of others in the workplace, but there is nothing in the statute or case law to suggest the direct threat defense was intended to cover mental health, nor does the literature on emotional contagion indicate that people with mental illness are actually making other people mentally ill. 42 U.S.C. § 12113(b) (“qualification standards’ may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace”).

<sup>215</sup> Cf., e.g., P.G.A. Tour v. Martin, 532 U.S. 661 (2001).

<sup>216</sup> See, e.g., 42 U.S.C. § 12111(8) (“[C]onsideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.”); 29 CFR § 1630.2(n)(3) (“Evidence of whether a particular function is essential includes, but is not limited to: (i) The employer’s judgment as to which functions are essential; (ii) Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job performing the function; (iv) The consequences of not requiring the incumbent to perform the function; (v)

emotional effect on others, or requires the employee not to produce a certain negative effect, would need to be evaluated very carefully. Specifically, the proclaimed emotional effect would have to be the core aim of the job, not a means to the job's aim, and not peripheral to it. As explained in the regulations, "essential functions means the fundamental job duties of the employment position [and] does not include the marginal functions of the position."<sup>217</sup>

For example, a mental health professional, such as Vera in the example above, may be required to produce a certain affective state in another. An employer of psychotherapists would have a conceivable basis for claiming that the essential functions of the job include, broadly construed, helping clients to attain a more positive affective state.<sup>218</sup> Thus, in the example, Vera would probably be unable to make out a prima facie case of discrimination under the ADA, because she would not be able to demonstrate that she could perform the essential functions of the job.

By contrast, Robert the paralegal seems very likely to win. The core functions of his job are research and writing and have nothing to do with the emotional state of others. While the employer might like her paralegals to contribute to a positive mood in the workplace, or not to diminish the mood of others, she has little basis for claiming that Robert's essential job functions require him to produce this effect.

The case of Tom the used car salesman is more difficult. It may be useful for a salesman to make the customer feel happy,<sup>219</sup> but the actual aim of the job is sales rather

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The terms of a collective bargaining agreement; (vi) The work experience of past incumbents in the job; and/or (vii) The current work experience of incumbents in similar jobs.").

<sup>217</sup> 29 C.F.R. § 1630.2(n). The regulations proceed to list three nonexhaustive factors relevant to deciding if a job function is essential rather than marginal: "(i) The function may be essential because the reason the position exists is to perform that function; (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function." *Id.*

<sup>218</sup> *Cf.* EEOC v. Amego, 110 F.3d 135, 137 (1st Cir. 1997) (concluding that a depressed, suicidal employee who had demonstrated a propensity for attempting suicide by overdosing on prescription medication could not perform the essential functions of her job in a "small not-for-profit organization which cares for severely disabled people suffering from autism, retardation, and behavioral disorders" because the essential job functions included administering prescription medication to the mentally disturbed clients). Particularly if the depressed employee had been a mental health professional rather than a "Team Leader," i.e., a kind of caretaker or supervisor, then the employer in *Amego* could possibly have argued that the essential functions of her job involved generating therapeutic improvement in the mental state of the clients. In this case, the employee had actually had very positive evaluations of her job performance, however. *Id.* at 138.

<sup>219</sup> *See supra* Section III.B.

than customer happiness. Thus, if Tom did not get great customer satisfaction reports but did sell a lot of cars, an employer would be hard pressed to claim that Tom was unable to perform the essential functions of the job just because he did not make customers *happy*. In the example as given, however, Tom's sales are very low, and thus he presumably will not be able to show that he can perform the essential functions of the job of selling cars. That said, Tom's low sales relate to how much customers like him; if customers did not buy from Tom because he was African-American, or because he was in a wheelchair, then his low sales would not be an adequate basis for firing him. But as discussed above, at least with regard to emotional contagion, hedonic costs may be unrelated to animus; indeed, they may be entirely consistent with liking. Thus, the emphasis here should remain on Tom's ability to make the sale.

The distinction between the product and the presentation is even less clear in a customer service job, such as a bank teller, where the product is largely the service. Even here, though, customer satisfaction with the service, rather than customer affect per se, is the aim. A supervisor may be more successful if she can inspire positive feelings in those she supervises, but it is not clear that, from the employer's perspective, the supervisee's happiness is the aim of the supervisor's job: The supervisee's productivity seems more central. (Of course, it might be a different matter if, according to her job description, the supervisor is actually held responsible for the supervisee's productivity.)

It bears repeating here that, even if a job's essential functions do involve making others feel a certain way, this does not mean that all people with mental illness will be unable to perform that job. Among other reasons, people's true emotions do not necessarily "leak out" into their emotional expressiveness on the job, as discussed in Section III.C.<sup>220</sup> In addition, even if a person were unable to perform the essential functions of a job that required producing a certain affect in others, the next question would be whether any specific accommodations might be provided to ameliorate the production or effects of negative emotional contagion inspired by a particular employee with mental illness. As of yet, there appears to be no specific research on ways that either

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<sup>220</sup> See *supra* text accompanying note 167.

senders or receivers of emotional contagion can prevent it, other than ceasing contact.<sup>221</sup> Completely isolating individuals with mental illness would be extremely stigmatizing and surely is not a solution.<sup>222</sup> But other options, such as shifting certain employees from customer service duties to other tasks, might well be suitable accommodations if, for example, vacancies exist or job tasks are flexible,<sup>223</sup> although the ADA does not require employers to hire additional employees or otherwise assign away the essential functions of a person's job.<sup>224</sup> Moreover, research on customer service evaluations suggests that the busyness of the site contributes to customer dissatisfaction, so modifications to alter waiting time, for instance, might help to counterbalance the effects of hedonic costs.<sup>225</sup>

Finally, an employee whose performance at the essential functions of his job is somewhat limited by the hedonic costs of his mental illness might want to argue, by analogy to the ADA's accommodation requirement, that he must be retained because the hedonic costs of his mental illness do not exceed the financial costs an employer would have to bear to provide affirmative accommodations to a physically disabled employee. For instance, Tom the car salesman might want to argue that his diminished sales due to the hedonic costs of his mental illness to customers are no greater than the costs an employer would have to pay for a wheelchair ramp or other accommodation for a physical disability. That is, Tom would essentially be arguing that his diminished sales

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<sup>221</sup> See, e.g., HATFIELD ET AL., *supra* note XX, at 195-96; E-mail from Elaine Hatfield, to the author (May 7, 2004) (on file with author); E-mail from John Cacioppo, to the author (May 5, 2004) (on file with author); E-mail from Thomas Joiner, to the author (Aug. 30, 2004) (on file with author).

<sup>222</sup> See, e.g., *Duda v. Bd. of Educ. of Franklin Park Public Sch. Dist. No. 84*, 133 F.3d 1054 (7th Cir. 1998); 29 C.F.R. Pt. 1630 App. § 1630.2(o) ("Reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices or facilities.).

<sup>223</sup> Cf. *Overton v. Reilly*, 977 F.2d 1190, 1195 (7th Cir. 1992) (reversing under the Rehab Act the district court's grant of summary judgment to the defendant on the ground that a question of fact exists as to whether the plaintiff, a chemist who had suffered from depression and whose medication made him drowsy, was qualified to perform the essential functions of his job; concluding that it was not clear that his job needed to involve contact with the public, but that if it did, an appropriate accommodation might be provided: "Even if contact with the public is an essential function of Overton's job, there is evidence to suggest that Overton could perform that function with reasonable accommodation by the EPA. First, even if contact is essential, the job does not require much of it: Parker testified that about five percent of Overton's job involved public contact. And there does not seem to be any question that Overton is capable of corresponding with permit applicants by mail. To the extent that telephone contacts are required, it may be reasonable for the EPA to provide Overton with someone to talk for him, just as it might be a reasonable accommodation for the EPA to provide an interpreter for an employee who was deaf.").

<sup>224</sup> See, e.g., *Barber v. Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 709 (5th Cir. 1997); *Riddle v. Louisiana Power & Light Co.*, 654 So.2d 698, 701 (1995).

<sup>225</sup> See Pugh, *supra* note XX, at 1024; *supra* text accompanying notes 165-167.

due to hedonic costs do not impose an “undue hardship” on the employer. Tom’s argument has a certain intuitive appeal, particularly to the extent that an employee’s performance is only minimally costly to an employer compared to the cost of accepted physical accommodations. But this argument would probably fail: Under current case law and EEOC interpretation, an employer need not accept a lesser performance of essential job functions, in terms of quantity or quality, from an employee with a disability.<sup>226</sup>

In sum, an employer generally must bear the hedonic costs of mental illness in the workplace, if the employee can perform the essential functions of the job. In most cases, an employer cannot claim that the essential functions include making other people feel a certain way, as the affective state of others is not central to most jobs. But an employer may be able to make such an argument if the affective state of other people is actually the aim of the employee’s work, and not merely a means to that aim.

#### B. Accommodating Accommodation

An understanding of the hedonic costs of mental illness also helps to resolve a point of disagreement between circuits about negotiations over accommodation. Specifically, the Fifth and Seventh Circuits have articulated opposite viewpoints about who bears the greater responsibility for successful negotiation about accommodation in cases involving employees with mental illness.<sup>227</sup> The employee has responsibility for indicating that she has a disability, as employers are responsible for accommodating only the “known disabilities” of an applicant or employee.<sup>228</sup> After that, according to the Fifth Circuit, the opacity of mental illness, among other factors, means that the employee should bear a greater responsibility to articulate what accommodations are needed. In

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<sup>226</sup> See, e.g., *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1124-25 (10th Cir. 1995) (“An employer is not required by the ADA to reallocate job duties in order to change the essential function of a job. An accommodation that would result in other employees having to work harder or longer hours is not required. Slowing the production schedule or assigning plaintiffs lighter loads would fundamentally alter the nature of defendant’s warehouse operation, a change not demanded by the law.” (internal citations omitted)); 29 C.F.R. Pt. 1630 App. § 1630.2(o) (“It is important to note that the inquiry into essential functions is not intended to second guess an employer’s business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards. . . . If an employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of 65 words per minute, would not be adequate.”).

<sup>227</sup> Compare *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996), with *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155 (5th Cir. 1996), and *Seaman v. CSPH, Inc.*, 179 F.3d 297 (5th Cir. 1999).

<sup>228</sup> See, e.g., Senate Report No. 116, 101st Cong., 1st Sess., at 34 (1989). \*

contrast, under the Seventh Circuit's rule, the communicative difficulties faced by the employee with mental illness require employers to bear the greater burden in facilitating effective negotiations about accommodation. The hedonic costs of mental illness, though only one piece of this picture, help us to see why the ADA is best read to call for the Seventh Circuit's approach.

(1) *Employee's responsibility*. In a case involving a plaintiff with bipolar disorder, *Taylor v. Principal Financial Group*,<sup>229</sup> the Fifth Circuit concluded that the plaintiff bore the burden of proposing specific accommodations because his impairment was a mental illness. The court reasoned that mental illness is difficult to understand, and any appropriate accommodations may be known only to the employee and his doctor, and thus the employee must specifically suggest accommodations in order to trigger the duty to accommodate. As the court explained it:

When the nature of the disability, resulting limitations, and necessary accommodations are uniquely within the knowledge of the employee and his health-care provider, a disabled employee cannot remain silent and expect his employer to bear the initial burden of identifying the need for, and suggesting, an appropriate accommodation. When dealing in the amorphous world of mental disability, we conclude that health-care providers are best positioned to diagnose an employee's disabilities, limitations, and possible accommodations.<sup>230</sup>

In *Taylor*, the manager of an insurance office was having trouble meeting targets for recruiting new agents. After telling his supervisor about his diagnosis during a meeting about his difficulties, the agent went on to say that he would meet the proposed targets. Shortly thereafter, he was hospitalized. The court concluded that sound policy reasons argue against employers assuming that a person with a disability would want accommodations,<sup>231</sup> thus reinforcing the conclusion that the duty to raise the issue of accommodation lies with the disabled employee. Because the plaintiff did not say that his disability limited him, and asserted that he could meet the recruitment targets rather than proposing an accommodation, the employer had no duty to accommodate him.

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<sup>229</sup> *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155 (5th Cir. 1996).

<sup>230</sup> *Id.* at 165.

<sup>231</sup> *Id.* at 164 (“For this reason, the ADA does not require an employer to assume that an employee with a disability suffers from a limitation. In fact, better public policy dictates the opposite presumption: that disabled employees are not limited in their abilities to adequately perform their jobs.”).

More recently, the Fifth Circuit applied this reasoning to a Domino's pizza restaurant manager who suffered from depression and possibly bipolar disorder.<sup>232</sup> The employee had provided his supervisor with a letter from his doctor stating that he suffered from "Major Depressive Reaction" and that he was "emotionally and physically exhausted."<sup>233</sup> He requested a demotion to assistant manager, which was granted. In his new position as assistant manager, the plaintiff was apparently "counsel[ed]" "for disruptive comments on the job."<sup>234</sup> About two weeks after he was demoted to assistant manager, the plaintiff was fired when he "yelled" at a supervisor who refused to give him the vacation days he requested:

In early April Seaman sought two weeks of vacation and a third week of unpaid leave commencing April 27. On April 10 he filed a charge of discrimination with the EEOC. In an April 12 telephone conversation with Mark Frisbie, Seaman's then area supervisor, he was told that he should choose other vacation dates because the requested dates had been given to other employees. Seaman became upset, the conversation became heated, Seaman repeatedly yelled at Frisbie and Frisbie fired him.<sup>235</sup>

Quoting language from *Taylor* about the plaintiff's obligation to identify accommodation, the Fifth Circuit affirmed the district court's grant of summary judgment to the defendant, concluding that the plaintiff had failed to provide adequate information about any further accommodations he needed.<sup>236</sup>

(2) *Employer's responsibility.* By contrast, in *Bultemeyer v. Fort Wayne Community Schools*, the Seventh Circuit concluded that when an employee has a mental illness, an employer has more, not less, responsibility to facilitate conversation about proper accommodations.<sup>237</sup> In a case involving a janitor who had suffered "serious mental illnesses, including bipolar disorder, anxiety attacks and paranoid schizophrenia,"<sup>238</sup> the court focused on the mentally ill plaintiff's particular difficulty requesting an accommodation.

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<sup>232</sup> *Seaman v. CSPH, Inc.*, 179 F.3d 297 (5th Cir. 1999).

<sup>233</sup> *Id.* at 299.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 301.

<sup>237</sup> *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996).

<sup>238</sup> *Id.* at 1282.

The plaintiff had worked as a janitor for fifteen years then had stopped working due to his illness; after about a year, he was rehired, but informed that he would receive no “special accommodations” in this new school and that he would need to move much faster to get the job done.<sup>239</sup> Intimidated by the new school environment, the plaintiff never took his physical or showed up to work. Hours after a letter was sent firing him, he requested the accommodation of a less stressful work site.

In reversing the district court’s grant of summary judgment to the defendant,<sup>240</sup> the Seventh Circuit reasoned that the employer bore a special duty in the process of negotiations over accommodation with a plaintiff with mental illness: “In a case involving an employee with mental illness, the communication process becomes more difficult. It is crucial that the employer be aware of the difficulties, and help the other party determine what specific accommodations are necessary.”<sup>241</sup>

(3) *Hedonic costs and meta-accommodation.* The literature on emotional contagion similarly suggests why the “communication process” about accommodation might be difficult when the employee has a mental illness: Not only may the employee have difficulty articulating his wishes and needs, but he will also likely prompt negative emotions in his co-negotiator.

It should therefore not surprise us that when “Seaman became upset” in his conversation with his supervisor about his requested vacation time, the conversation “became heated.”<sup>242</sup> Whether the supervisor needed to tolerate Seaman’s later yelling is a separate question,<sup>243</sup> but the court was wrong to conclude that Seaman bore the greater burden in these exchanges to negotiate effectively for the accommodations he needed.

In contrast, the Seventh Circuit correctly recognized that a kind of meta-accommodation is required of employers in the context of mental illness. Negotiations pose particular difficulties for plaintiffs with mental illness; indeed, that difficulty is part of the disability. It therefore must be accommodated. That is, subject to the usual limitations of reasonableness and undue hardship, the employer must bear a greater

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.* (reversing because the district court failed to treat the case as a failure to accommodate case).

<sup>241</sup> *Id.* at 1285 (internal quotation marks omitted).

<sup>242</sup> *Seaman v. CSPH, Inc.*, 179 F.3d 297, 299 (5th Cir. 1999).

<sup>243</sup> *Cf.*, e.g., Susan Stefan, “*You’d Have to Be Crazy to Work Here*”: *Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 *LOY. L.A. L. REV.* 795 (1998).

responsibility to try to communicate effectively and to devise an appropriate accommodation because the mentally ill employee's difficulty communicating about accommodation is itself something that should be reasonably accommodated.

An employer might adopt any of a number of tactics to try to facilitate successful negotiations. For instance, research discussed in Part III suggests that an influx of positive emotional energy just prior to speaking to a difficult person can lead a negotiator to negotiate more constructively and even to like his co-negotiator better.<sup>244</sup> An employer could therefore frame the discussion with a mentally ill employee by interacting with someone very positive first. Or perhaps an employer could suggest that a third party help to facilitate the negotiations or ask as a kind of advocate or negotiator for the employee. If the employee is an effective written communicator, the employer could perhaps suggest that such negotiations take place in writing, being careful not to seem to be discouraging negotiation through such a suggestion. In addition, an employer could encourage an employee to ask his therapist to suggest any possible accommodations.<sup>245</sup>

Whether the employer engages in specific efforts to ameliorate the difficulty of the negotiation, merely exercises greater restraint and patience, or tries to have the conversation on more than one occasion, the particular context of mental illness gives the employer a duty to accommodate a mentally ill plaintiff's communication difficulties, where present, by making additional efforts to promote an effective and cooperative dialogue about possible accommodation.

### C. Regarded as Mentally Ill

A focus on hedonic costs in general and emotional contagion in particular also helps unravel knotty questions related to the "regarded as" prong of the definition of disability.<sup>246</sup> As noted earlier, the ADA recognizes that a person can actually *be disabled* by virtue of others' perceptions, and thus the Act is uniquely concerned with the mind of the discriminator. Arguably, as an asymmetrical statute—a statute that protects only one

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<sup>244</sup> See *supra* note 182.

<sup>245</sup> E.g., *Ralph v. Lucent Technologies, Inc.*, 135 F.3d 166 (1st Cir. 1998).

<sup>246</sup> As discussed in Part II, the ADA defines the protected class of individuals to include those in any of three types of situations: (1) individuals actually have a disability—who have "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"; (2) individuals with a "record of" disability; and (3) those who are not thus disabled but are "regarded as" such. 42 U.S.C. § 12102(2).

class of people, i.e., people with disabilities, rather than all people along a certain axis of identity, i.e., disability—the ADA has particular reason to offer express protection to those who are discriminated against because of being perceived as members of the class, even if they are not members of that class. That is, in contrast to Title VII’s protection of everyone against discrimination on the basis of, for example, his sex or race (i.e., both men and women, whites and people of color), the ADA protects only against discrimination on the basis of *having* a disability and apparently would not protect someone discriminated against because he *does not have* a disability.<sup>247</sup> Thus, the ADA could fail to reach certain discriminatory attitudes towards people with disabilities where those attitudes were mistakenly directed at people who did not meet the statutory definition of disability.<sup>248</sup> This is a practical reason why the ADA in particular might expressly include those merely regarded as disabled within the protection of the statute. But the statute’s inclusion of regarded-as disabled within the definition of disability proper—rather than as some separate category of protected class, i.e., those merely thought to be disabled—signals an important recognition that social attitudes can help to constitute disability itself.<sup>249</sup>

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<sup>247</sup> For example, a white man is protected from discrimination on the basis of his race or his sex because these are impermissible axes of discrimination (in contrast to, say, hair color). Whereas, under the ADA, an able man is not protected from discrimination based on his ability along the axis of disability/ability. In this way, the ADA is an asymmetrical statute—it more plainly embraces an antisubordination mission, rather than antidifferentiation. In the context of people being “regarded as” members of a particular class, this distinction between the two statutes might be relevant in the following way. A white person who was thought to be black by an employer, and discriminated against on that basis, could still argue that she is a member of a protected class under Title VII (white people) and is the object of racially discriminatory animus, whereas if the ADA lacked a regarded-as provision, an able person who was mistakenly thought to be disabled, and discriminated against on the basis of that mistake, could not argue that she was a member of the protected class covered by the ADA.

<sup>248</sup> The implications of protecting people who have not been systematically subordinated (i.e., those who are not disabled) in order to root out discriminatory attitudes towards those who are subordinated (i.e., by giving a cause of action to people who are perceived to be disabled and discriminated against on that basis) deserves further discussion with regard to race and sex, as well as disability. *Cf.* Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 *Or. L. Rev.* 647, 677-78 (1996).

<sup>249</sup> The point is furthered by the lack of provision for regarded-as status in the other key asymmetrical statute, the ADEA. *See* *General Dynamic Land Systems v. Cliné*, 124 S. Ct. 1236, 1239 (2004) (“The Age Discrimination in Employment Act of 1967 (ADEA or Act), 81 Stat. 602, 29 U.S.C. § 621 et seq., forbids discriminatory preference for the young over the old. The question in this case is whether it also prohibits favoring the old over the young. We hold it does not.”). While the statute is clearly asymmetrical, the asymmetry was not sufficient to prompt Congress to include regarded-as old discrimination. This is presumably because the contours of age are relatively unambiguous and, more importantly, are not thought to be in any way constituted by others’ attitudes. A person who has lived sixty years is sixty regardless of how old others think she is, whereas a person whose impairment requires him to use a wheelchair may be

For people with mental illness, for whom others' attitudes can be particularly limiting, the regarded-as prong is especially important. But recent Supreme Court dicta on the regarded-as prong of disability threaten to undermine the ability of this prong to help root out discrimination against people of mental illness. In particular, the Court's articulation in *Sutton v. United Air Lines*<sup>250</sup> of the "apparent ways" a person could be regarded as disabled is a mechanistic inquiry that overlooks several key ways in which animus and stereotypes operate to disable people with mental illness. The preceding discussion of key bases for discrimination in the context of mental illness sets these problems into relief.

(1) *A sketch of Sutton's two apparent ways.* In *Sutton*, the Court set forth the following as the "two apparent ways in which individuals may fall within [the regarded-as prong of the] definition" of "disability":

- (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities; or
- (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.<sup>251</sup>

Each "apparent way" requires a specific mistake of fact by the employer. In the first type of claim, the employee has no impairment at all, and so the employer's subjective error is in thinking that he does. For example, the employer thinks the employee is blind (which presumably must substantially limit him in the major life activity of seeing), but he's not.

In the second type, the employee has an impairment, but not a substantially limiting one; the employer's subjective error is, therefore, thinking that an actual non-limiting impairment substantially limits the employee in a major life activity. That is, the employer thinks that the employee's vision impairment substantially limits him in a major life activity, when in fact it does not. The latter type of claim is the more likely scenario to reach the litigation stage, because there is much more ambiguity. (If your employer really wrongly thinks you're blind when you don't even have a vision impairment, his lawyers are probably going to tell him to settle.) Unless courts require the

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more or less disabled in his ability to live and work depending in part on how disabled others perceive him to be and thus what opportunities, assistance, and encouragement he receives.

<sup>250</sup> *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

<sup>251</sup> *Sutton*, 527 U.S. at 489.

employer to have extremely specific ideas about the plaintiff's mental illness and limitation, both of these ways might allow some plaintiffs with mental illness to get protection under the Act.

(2) *A place for animus?* But the Court's mechanistic mistake-of-fact approaches miss core forms of discrimination, most notably, animus.<sup>252</sup> This omission in *Sutton* becomes particularly important in light of the insight that animus and animus-like avoidance of people with mental illness will persist due to the hedonic costs of emotional contagion. Consider my example of animus-based discrimination from Part II, in which the employer preferred to hire Bridget over Alan for the job of computer programmer because Alan had been hospitalized for depression for eight weeks five years ago. The employer does not doubt that Alan can do the job as well as Bridget; he just doesn't like "crazy people." Perhaps his family and friends always derided "crazy" people, or he had a traumatic history with someone "crazy," or he worries about his own sanity, or he just likes to pick on those he considers weak. The etiology of his animus could be simple or complex, but in any case, this would seem an easy case for an antidiscrimination statute.

But, as noted earlier, under *Sutton* Alan must be considered in his post-mitigation state,<sup>253</sup> and his depression no longer limits him, much less substantially so. There is some chance that Alan could argue that his medication limits him in some major life activity, such as reproduction,<sup>254</sup> but the prospects for this argument with regard to psychotropic medication have not yet been confirmed by any court. Nor does it seem that Alan should have to engage in such indirection to get protection here, in light of the regarded-as prong.

The EEOC regulations present a possible route to interpreting the regarded-as prong to include limitation by virtue of animus. The EEOC regulations list three, rather than two, ways a person might be regarded as having a disability. Two of them look

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<sup>252</sup> See sources cited *infra* note 254.

<sup>253</sup> See *supra* Section I.A.

<sup>254</sup> For example, under *Bragdon v. Abbott*, if Alan were female, Alan might be able to claim a substantial limitation in the major life activity of reproduction, due to potential harm to the fetus from the psychotropic medication. See, e.g., Sarah Lawsky, *Disregarding Disability: The Effect of Sutton v. United Airlines on Litigation Under the Fair Housing Amendments Act*, Nat'l Fair Housing Advocate Online, <http://www.fairhousing.com/> (August 1999) (making this argument about reproduction and sexual dysfunction as major life activities that might be impaired by medication); Lauren J. McGarity, Note, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might Be the Saving Grace of Sutton*, 109 Yale L.J. 1161 (2000) (same).

much like the two “apparent ways” articulated by the Court in *Sutton*, but the regulations also contain the following route to regarded-as disabled: “Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment.”<sup>255</sup> Under this prong, Alan could argue that he was substantially limited in the major life activity of working by virtue of the employer’s animus: How could he work if the employer would not hire him, due to the employer’s attitudes?

Even this path would be complicated, though, by the Court’s doctrine on what constitutes a substantial limitation in the major life activity of working, which requires that the plaintiff be regarded as limited in working at a class of jobs, not just this particular job.<sup>256</sup> All of this suggests that the only clean solution may be to permit the EEOC to designate certain impairments as per se regarded-as disabilities, as Sam Bagenstos has suggested, based on an analysis of which impairments are subject to pervasive stigmatizing attitudes.<sup>257</sup>

Until or unless this solution is adopted, however, the missing EEOC others’-attitudes prong seems to be the best hope for capturing animus-based discrimination under the regarded-as prong. The status of the others’-attitudes aspect of the regarded-as inquiry is somewhat uncertain, though, because the Court left it out of its statement of the “two apparent ways” a plaintiff could be regarded-as disabled.

But the Court did not expressly reject the EEOC’s additional prong or specifically state that others’ attitudes are not a mechanism by which someone could count as regarded-as disabled. And the facts of *Sutton*—involving plaintiffs with minor, correctable vision impairments—prompted no attention to the disabling role of stigmatizing attitudes. Indeed, wearing glasses is so common as to be arguably without stigma, at least for adults. Thus, the Court’s omission of the EEOC’s additional prong—and seeming neglect of animus-based regarded-as status—may even have been

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<sup>255</sup> 29 CFR § 1630.2(l)(2).

<sup>256</sup> See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999) (“When the major life activity under consideration is that of working, the statutory phrase ‘substantially limits’ requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs.”).

<sup>257</sup> Samuel R. Bagenstos, *Subordination, Stigma, and Disability*, 86 VA. L. REV. 397, 446-52, 527-30 (2000) (arguing that the EEOC and the DOJ should have the power to identify conditions that count as disabilities either under the actually disabled or regarded as disabled categories, on the basis that those impairments subject their bearers to widespread, subordinating stigma).

inadvertent. And, regardless of the Court's intention, the omission of that prong is not part of the *Sutton* holding, and so the third prong is still available for courts to take up in their analysis of regarded-as claims.<sup>258</sup>

(3) *Sufficiently limiting attitudes*. The preceding discussion of the mind of the discriminator against people with mental illness, in Parts II and III, prompts two further conclusions about the importance and proper interpretation of the EEOC's others'-attitudes prong of regarded-as disabled. The first point concerns the language of the others'-attitudes prong, in particular, the word "only" in the phrase "[h]as a physical or mental impairment that substantially limits major life activities *only* as a result of the attitudes of others toward such impairment."<sup>259</sup> Why should it matter for purposes of determining if someone counts as disabled by virtue of others' attitudes whether his limitations are "*only* as a result of the attitudes of others"<sup>260</sup>?

There is no reason to think that a person could not be actually disabled and regarded-as disabled at the same time. The possibility of some plaintiffs' falling within multiple categories of disabled does not render any of the categories superfluous, as long as some plaintiffs could be in any one category but not the others. The "record of" prong makes the possibility, indeed the likelihood, of overlap obvious. Most plaintiffs who are actually disabled presumably also have a record of disability. Thus, it cannot be that a plaintiff's impairment must limit her *exclusively* through others' attitudes.

But then what does that word "only" mean? It must mean that the others' attitudes are sufficiently disabling as to be capable of substantially limiting the plaintiff, even in the absence of other limitations. The idea must be to capture within regarded-as only those plaintiffs whose impairments labor under substantial stigma. This may well describe most mental illnesses.<sup>261</sup> In any case, the important point is that the word "only" should not be understood to mean that the plaintiff must show that she is not otherwise

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<sup>258</sup> See, e.g., *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1256 (10th Cir. 2001) (quoting all three of the EEOC's prongs in a post-*Sutton* case involving a rocket test technician with depression and OCD, who was called "Psycho Bob" and "crazy" by his coworkers, but whom the court concluded was not regarded as disabled because he presented insufficient evidence that he was "regarded by *his employer* as being substantially limited in his ability to sleep, walk, or interact with others as a result" (emphasis added), although the third EEOC prong refers only to "others' attitudes" not specifically those of the employer).

<sup>259</sup> 29 CFR § 1630.2(1)(2) (emphasis added).

<sup>260</sup> 29 CFR § 1630.2(1)(2).

<sup>261</sup> See *supra* Section II.B.

limited, only that the employer's attitudes, or societal attitudes, are significant enough to be substantially limiting on their own.<sup>262</sup>

(4) *Looking for fear of contagion and other hedonic costs.* The final point about the others'-attitudes regarded-as prong concerns the kinds of disabling stereotypes for which courts should look. The First Circuit, for example, has dismissed in a footnote a plaintiff's claim to be regarded as disabled on the basis that "there is not a whiff of proof that the fears of the nurses and supervisor were motivated by stereotypes about the disabled."<sup>263</sup> That is, the court refused to find that the plaintiff was regarded as disabled under the Act, because the court saw the employer as having real and "reasonable" concerns about the plaintiff's behavior in the workplace, rather than fanciful ideas about mental illness.

The court's reasoning is problematic, particularly in light of the preceding discussion of emotional contagion as a basis of discrimination. Because of the attention to certain kinds of misguided and largely inefficient stereotypes about mental illness—such as dangerousness or laziness—the public is relatively aware of these stereotypes. Emotional contagion, by contrast, and the "rational" fear of certain hedonic costs of mental illness, have not been discussed in education campaigns.<sup>264</sup>

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<sup>262</sup> *But cf.* Hamilton v. Southwestern Bell Telephone Co., 136 F.3d 1047, 1052 (5th Cir. 1998) (concluding that the plaintiff, who suffered from post-traumatic stress disorder after saving a drowning woman, was not regarded as disabled under the third EEOC prong, despite inter alia an anonymous letter to his employer from his coworker after he was diagnosed that accused him of being a "disgusting, dangerous and abusive man and manager," because his "tearfulness, overeating, fatigue, and violent outbreak against a co-employee did not occur only as a result of the attitudes of others but were, he admits, symptomatic of PTSD").

<sup>263</sup> Calef v. Gillette Co., 322 F.3d 75, 87 n.9 (1st Cir. 2003) ("As to Calef's argument that this is a 'perceived to be disabled' case, there is not a whiff of proof that the fears of the nurses and supervisor were motivated by stereotypes about the disabled. Even on plaintiff's version of the facts of that night, the reported reactions of the supervisors and nurses were entirely reasonable, and there is no evidence they were not genuine."); *see also, e.g.*, Krocka v. City of Chicago, 203 F.3d 507, 514 (7th Cir. 2000) (reading *Sutton's* statement of the "two apparent ways" as exhaustive and thus reading the decision to require that "a covered entity entertain misperceptions about the individual," in a decision holding that a police department did not regard a police officer as disabled by his depression when it required him to participate in a mandatory supervision program, typically reserved for disciplinary action, for as long as he was taking Prozac, because, the court concluded, the department did not regard his impairment "as substantially more limiting than it truly is"); Ogborn v. United Food and Commercial Workers Union, Local No. 881, 305 F.3d 763, 768 (7th Cir. 2002) (concluding that a plaintiff with depression was not covered by the regarded-as prong because he "has not presented evidence that union personnel held exaggerated views about the seriousness of his illness").

<sup>264</sup> One reason that such fears have not been discussed by advocates may be obvious: Talking about concrete reasons that people might want to avoid people with mental illness could further entrench discriminatory impulses in this area by providing people with further justifications to discriminate. But

Nonetheless, in light of the expanding management-studies literature on the role of emotional contagion in, for instance, the service industries, we should not be surprised to see increasing numbers of cases in which an employer refuses to hire or fires a person with current or past mental illness because of a fear that that person will “bring people down” or otherwise “upset people.” The employer may not evince animus towards people with mental illness; indeed, he could even be a person who works with the mentally ill or who has suffered from mental illness himself and therefore knows the hedonic costs intimately.<sup>265</sup> And the concerns he articulates may not sound like what courts generally think of as “myths, fears, and stereotypes” because they seem entirely reasonable. As discussed, fears of emotional contagion in the context of mental illness may indeed be reasonable, but this makes them no less likely to form the basis of impermissible discrimination. On the contrary, their very reasonableness may help to make them the most intractable basis of discrimination against people with mental illness, as discussed in Part III.

So rather than dismissing a “regarded as” claim because the employers’ fears do not seem to involve animus or mythical concerns about the plaintiff, courts should be on the lookout for disabling fears of negative emotional contagion and other hedonic costs from people with mental illness. Sometimes the fears may reflect “rational” discrimination, that is, they will be related to real costs or real concerns about the person’s ability to perform the essential functions of a job, as discussed earlier. And sometimes the fears will exceed the reality in an individual case, or fears of emotional

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even without the literature documenting negative emotional contagion and an express discussion of these and other hedonic costs of mental illness, most people are probably aware that being around people with mental illness can sometimes make them feel certain negative emotions. To confront this intuition and its role in the impulse to discriminate seems an important corrective, then, to what may otherwise be an assumption that such an impulse is just a matter of individual taste in personalities, rather than a cost like any other borne by a society trying to facilitate societal participation and contribution of people with disabilities. Moreover, as discussed earlier, some people are less susceptible to contagion than others. *See supra* note 154 and accompanying text. Although no research has apparently been conducted thus far on how people might combat contagion, on the side of senders or of receivers, *see* text accompanying note 221, a better understanding of the potential consequences of contagion on discrimination may help prompt further efforts to identify and study ways to stop contagion. Moreover, it is possible that the mere awareness of the possibility of emotional contagion could help some people resist the phenomenon.

<sup>265</sup> *See, e.g.,* Corrigan & Penn, *supra* note XX, at 766 (reporting on studies indicating that mental health professionals also show stigmatizing attitudes towards people with mental illness); *cf.* Cameron v. Community Aid for Retarded Children, 335 F.3d 60 (2d Cir. 2003) (oral argument transcript) (posing questions that assume that an employer whose job involves people with mental disabilities would not hold discriminatory attitudes towards people with mental illness).

contagion will be used as a group-based proxy. In all of these cases, the plaintiff may be substantially limited by virtue of others' attitudes toward his impairment, even if those attitudes comprise no animus and no myths, fears, or stereotypes as they have conventionally been understood.<sup>266</sup>

#### D. Interacting with Others

Litigation surrounding mental illness under the ADA has been plagued by the question of what counts as a major life activity for purposes of the definition of disability.<sup>267</sup> And courts have had a particularly difficult time deciding whether interacting with others is a major life activity—and this in spite of its endorsement by the EEOC and its apparent fit within either of the primary doctrinal frameworks for defining major life activities. The foregoing analysis of emotional contagion and other hedonic costs helps us to understand and resolve this difficulty.

(1) *Defining Mental Disability.* As discussed in Part I, in order to qualify as having a disability for purposes of falling within the scope of the Act's protection, a person must either have, be regarded as having, or have a record of having *an impairment that substantially limits him in a major life activity.*<sup>268</sup> The question of substantial limitation is an individualized fact-based inquiry, but the question of what constitutes a major life activity is a matter of law for courts to determine. The text of the ADA gives no guidance as to what constitutes a major life activity. The EEOC regulations interpreting the ADA, like those of HEW interpreting the Rehab Act, offer only the following illustrative list: "Major Life Activities means functions such as caring for

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<sup>266</sup> It might seem that unless the employer makes a mistake about how limiting the plaintiff's impairment is, then the plaintiff should be knocked out of the regarded-as prong and into the actually disabled prong. For the reasons discussed above, however, a person could be both regarded as disabled and actually disabled, just as a person could be actually disabled and have a record of disability. The reason that it is important for courts to proceed with the regarded-as analysis wherever it might apply is that a plaintiff may not have sufficient evidence that his impairment actually substantially limits him, but he may have sufficient evidence that others so regard him or that others' attitudes towards his impairment otherwise substantially limit. What is important in such a situation is not whether those others are wrong about his impairment or limitations, but whether they think he is so limited or whether their attitudes so limit him. The First Circuit's easy dismissal of the plaintiff's regarded-as claim because the others' attitudes were reasonable and not based on misperceptions, discussed above, shows why it is important for courts to recognize the range of *reasonable* views that could render a plaintiff regarded-as disabled.

<sup>267</sup> See, e.g., Carolee Kvorciak Lezuch, *The Americans with Disabilities Act: Redefining "Major Life Activity" to Protect the Mentally Disabled*, 44 WAYNE L. REV. 1839 (1999).

<sup>268</sup> 42 U.S.C. § 12102(2)(A).

oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>269</sup>

The EEOC Enforcement Guidance on the ADA and Persons with Psychiatric Disabilities proposed four additions to that list to include activities in which people with mental illness are particularly likely to be limited: thinking, concentrating, sleeping, and interacting with others.<sup>270</sup> Of those, courts have had the most difficulty accepting “interacting with others” as a major life activity. Only one circuit—the Ninth—has held interacting with others to be a major life activity,<sup>271</sup> and one other has assumed without deciding it to be so,<sup>272</sup> while several others have expressed reservations about it.<sup>273</sup>

(2) *Doctrinal frameworks.* The Supreme Court’s decisions about major life activities present two distinct ways of thinking about the question. First, in *Bragdon v.*

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<sup>269</sup> 29 C.F.R. § 1630.2(i); see 45 CFR § 84.3(j)(2)(ii) (2001) (same substance). As the Supreme Court has explained, there are “two sources of guidance” for interpreting the terms in the ADA’s definition of disability: (1) regulations issued by the Department of Health, Education, and Welfare (HEW) in 1977, which appear without change in the current regulations issued by the Department of Health and Human Services, and which interpret the Rehabilitation Act of 1973, 87 Stat. 361, as amended, 29 U.S.C. § 706(8)(B) (1988 ed.), from which the ADA draws the definition of disability verbatim; and (2) the regulations issued by the EEOC interpreting the definition of disability in the ADA, 29 CFR §§ 1630.2(g)-(j) (2001). See *Toyota Motor Manufacturing, Ky., Inc. v. Williams*, 534 U.S. 184, 194 (2002). With regard to the former, Congress included in the ADA a specific statutory provision indicating that “[e]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.” 42 U.S.C. § 12201(a) (1994 ed.). By contrast, Congress gave no agency express authority to promulgate regulations interpreting the definition of disability in the ADA in particular. See, e.g., *Toyota*, 534 U.S. at 194; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479 (1999); but cf. *id.* at 514 (Breyer, J., dissenting). The EEOC nonetheless issued such regulations, and the Court has thus far declined to decide “what level of deference, if any, they are due.” *E.g., id.*

<sup>270</sup> See, e.g., EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, A.D.A. Man. (BNA) No. 63, at 1281 (Mar. 25, 1997), <http://www.eeoc.gov/docs/psych.html>.

<sup>271</sup> *McAlindin v. County of San Diego*, 192 F.2d 1226, 1233-34 (9th Cir. 1999), *cert. denied*, 530 U.S. 1243 (2000); see also *Jacques v. DiMarzio, Inc.*, 20 F.Supp.2d 151, 160 (E.D.N.Y. 2002).

<sup>272</sup> *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1255 (10th Cir. 2001); see also *Doyal v. Oklahoma Heart, Inc.*, 213 F.3d 492 (10th Cir. 2000).

<sup>273</sup> The First, Fourth, and Eighth Circuits have disagreed with or expressed reservations about that conclusion. *Davis v. Univ. of N. Carolina*, 263 F.3d 95, 101 n. 4 (4th Cir. 2001) (expressing “some doubt” about “the claim that the ability to get along with others is a major life activity”); *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1027 (8th Cir. 1999) (noting that “it is questionable” whether the “ability to get along with others” is a major life activity); *Solieau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (stating that “[t]he concept of ‘ability to get along with others’ is remarkably elastic, perhaps so much so as to make it unworkable as a definition. While such an ability is a skill to be prized, it is different in kind from breathing or walking, two exemplars which are used in the regulations. Further, whether a person has such an ability may be a matter of subjective judgment; and the ability may or may not exist depending on context. . . . It may be that a more narrowly defined concept going to essential attributes of human communication could, in a particular setting, be understood to be a major life activity, but we need not address that question here.”).

*Abbott*, the Supreme Court explained that “the plain meaning of the word ‘major’ denotes comparative importance and suggests that the touchstone for determining an activity’s inclusion under the statutory rubric is its significance.”<sup>274</sup> The meaning of the phrases “comparative importance” and “significance” would seem to be clarified in part by the specific activity that the Court in *Bragdon* concluded with “little difficulty” was a major life activity: reproduction.<sup>275</sup> Rejecting the idea that major life activities must have a “public, economic, or daily character,”<sup>276</sup> the Court observed that “[r]eproduction falls well within the phrase ‘major life activity’ [because] [r]eproduction and the sexual dynamics surrounding it are central to the life process itself . . . .”<sup>277</sup> Reproduction suggests a model of major that concerns the activity’s significance over the course of a lifetime, or what we might call its *lifetime significance*.

Then, four years later, in *Toyota Motor Manufacturing v. Williams*,<sup>278</sup> the Court offered a somewhat different model of major. Without mentioning its earlier discussion of the nature of major life activities in *Bragdon*, the Court glossed the phrase as follows: “‘Major’ in the phrase ‘major life activities’ means important. See Webster’s [Third New International Dictionary 1363 (1976)] (defining ‘major’ as ‘greater in dignity, rank, importance, or interest’). ‘Major life activities’ thus refers to those activities that are of central importance to daily life.”<sup>279</sup> The dictionary definition would seem to permit the lifetime significance of an activity to bring it within the scope of major, but the Court’s subsequent general explanation of major life activities suggests that lifetime significance alone would not be sufficient. Rather, as stated, the Court’s definition suggests that an activity must be central to daily life in order to be major. It is hard to see how reproduction could fall under this dailyness conception of major life activity. But *Toyota* did not overrule *Bragdon*. As noted, *Bragdon* goes entirely unmentioned in the major life activities discussion in *Toyota*, even though *Bragdon* expressly rejected the idea that

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<sup>274</sup> *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) (citation and internal quotation marks and alterations omitted).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* (“Nothing in the definition suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word ‘major.’ The breadth of the term confounds the attempt to limit its construction in this manner.”).

<sup>277</sup> *Id.* at 638.

<sup>278</sup> *Toyota Motor Manufacturing, Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

<sup>279</sup> *Id.* at 197.

major life activities must have a “daily character.”<sup>280</sup> The seeming about-face in the language of the decision may be explained by the context of the major life activity at issue in *Toyota*—performing manual tasks—and thus by an understanding of the Court’s holding as limited to the question of when a daily activity like performing manual tasks can be deemed significant enough to be major.<sup>281</sup> Nonetheless, *Toyota* leaves us with another idea of major life activity: central to daily life for most people, in short, *daily centrality*.

The broader question of the best way for courts to decide what is a major life activity is an interesting one, to which others have proposed intriguing solutions.<sup>282</sup> But this is not why the question as to interacting with others has been a hard one. To decide whether interacting with others is a major life activity, courts need not resolve the broader question. Interacting with others is apparently a major life activity under either of the Court’s conceptions—lifetime significance or daily centrality. Most people would presumably agree that interacting with others is a significant aspect of the course of a person’s life. And it also seems fair to conclude that interacting with others is of central importance if not to all then to most people’s daily lives. In addition, human interaction forms the foundation for other life activities, including those of importance along the axes

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<sup>280</sup> *Bragdon*, 524 U.S. at 638.

<sup>281</sup> This is essentially how the Court describes its holding: “We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.” *Id.* at 198. Performing manual tasks appears in the regulations as an exemplary major life activity, and the Court did not directly consider whether it agreed with that general designation. Instead, the Court held that the manual tasks in which the plaintiff’s carpal tunnel syndrome substantially limited her—“repetitive work with hands and arms extended at or above shoulder levels for extended periods of time,” i.e., the “inability to do such manual work [as required by] her specialized assembly line job,” *id.* at 201—were not sufficient to make them the major life activity of performing manual tasks. Because the plaintiff was able to perform household manual tasks, such as “brush[ing] her teeth, wash[ing] her face, bath[ing], tend[ing] her flower garden, fix[ing] breakfast, do[ing] laundry, and pick[ing] up around the house,” her restrictions in performing manual tasks were insufficient to render her disabled. The Court’s decision is somewhat ambiguous as to whether the problem for the plaintiff comes within the individualized substantially limited inquiry, or the major life activity legal inquiry, but the logic of the decision seems geared towards whether the activities presented as difficult to perform were not central enough to constitute the major life activity of performing manual tasks.

<sup>282</sup> For example, Ann Hubbard has recently drawn upon concepts of human flourishing from psychology, sociology, and philosophy to develop the following definition: “Major life activities include at least those that promote human flourishing or thriving; advance human growth and development; secure personal autonomy; are important to well-being, happiness, comfort or dignity; integral to self-respect, identity or actualization; recognized by most people in our society as important; or necessary for full participation in and equal benefits from community, civic, social or political activities.” Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997, 1006 (2004).

of lifetime significance (e.g., reproduction, in most cases) and daily centrality (e.g., shopping or working, in most cases).

(3) *The role of hedonic costs.* So why is this a hard question? No doubt a number of factors contribute, including animus and stereotypes, as others have suggested.<sup>283</sup> But another basis is suggested, rather dramatically, in the dissent to the one circuit court decision to hold that interacting with others is a major life activity, *McAlindin v. County of San Diego*<sup>284</sup>:

[N]ot only do we serendipitously create a mischievous Pandora's box, but we then open it with a flourish and invite into federal court all but the "cantankerous" to sue those employers with whom they cannot get along. Employers beware, now you may have an obligation at the risk of being sued to accommodate someone who does not possess the ability to "get along with others." Not only is this "disability" vague, but it's bizarre, ominous, and wholly outside of the group of serious disabilities Congress intended to cover with this statute. Does this opinion suggest that a person's foul temperament may no longer be a reason to deny that person a job?<sup>285</sup>

Of course, designating interacting with others a major life activity does not mean designating a person's foul temperament as a protected disability; far from it. The ADA involves many steps and burdens for such a plaintiff, beginning with the requirement of a psychiatric impairment,<sup>286</sup> one which *substantially limits*.<sup>287</sup> So why does it seem so worrying to designate interacting with others a major life activity?

A key reason is that the idea of a person with mental illness being limited in her interactions with others captures the core "rational" fear animating social discrimination

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<sup>283</sup> See, e.g., Wendy F. Hensel, *Interacting with Others: A Major Life Activity Under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139, 1169 (2002) (arguing that the courts have been more inclined to embrace interacting with others as a major life activity in the context of physical rather than mental disabilities because, inter alia, "of the significant discomfort that many in society experience in the presence mental illness, which historically has been met with stigma, fear and revulsion. Because mental illness often manifests itself in behavior that others may consider 'voluntary' rather than in the functional limitations associated with physical disability, strong, negative stereotypes continue to be associated with individuals with mental disabilities.").

<sup>284</sup> *McAlindin v. Cty. of San Diego*, 192 F.2d 1226, 1233-34 (9th Cir. 1999), *cert. denied*, 530 U.S. 1243 (2000).

<sup>285</sup> *McAlindin*, 192 F.3d at 1240 (Trott, J., dissenting).

<sup>286</sup> *Cf.*, e.g., *Daley v. Koch*, 892 F.2d 212 (2d Cir. 1989) (holding under the Rehab Act that "'poor judgment, irresponsible behavior and poor impulse control' do not amount to a mental condition that Congress intended to be considered an impairment").

<sup>287</sup> See *supra* note 8 (citing cases in which the plaintiff's claim is dismissed on summary judgment because her psychiatric impairment is deemed not to be substantially limiting).

against people with mental illness: the fear of hedonic costs. The idea that the way a mental illness would substantially limit someone is in her interactions with other people raises the specter of the person's impairment imposing costs not on her but on us. Of course, the dichotomy between costs to "us" and to "them" is typically a false one. To the extent that a person's mental illness is partially constituted by negative emotion or distress, as the most common illnesses in these cases are,<sup>288</sup> then the hedonic costs she bears are likely to be at least as great as those she inflicts on others.

Nonetheless, it may seem perverse to give someone protection under the Act because her mental illness does what we fear all mental illnesses do: imposes hedonic costs on others. And it may seem particularly perverse to give that protection to those who are *substantially* limited in this way, that is, to those may inflict *substantial* costs on "us."

But, as discussed throughout this paper, a person's impairment is disabling precisely because of the interaction between the impairment and the world. The way that those interactions render the impairment disabling generally captures the cost that the world must bear to make the impairment no longer disabling or otherwise to integrate the person into the workforce. In the case of mental illness, those costs may well be the absorption of the hedonic costs of having people with mental illness in the workplace. Of course, if the person with mental illness cannot perform the essential functions of her job, with or without accommodation, then the employer cannot be made to bear those costs, as discussed in the first Section.

If, however, she can perform the essential functions, then we cannot let our desire to avoid bearing certain hedonic costs turn an easy legal question into a hard one. This would be to capitulate to the most intractable basis for social discrimination against people with mental illness: fear of the Pandora's box of negative emotion that might be inflicted on our selves through mechanisms such as unconscious contagion. Under either of the doctrinal apparatuses offered by the Court on this question, interacting with others should be a major life activity. An understanding of the fear of emotional contagion and other hedonic costs shows us why it must be one.

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<sup>288</sup> See *supra* Section III.A.

## CONCLUSION

Like other protected classes, people with mental illness suffer discrimination based on animus, inefficient stereotyping, efficient stereotyping, and other forms of rational discrimination. But mental illness also prompts a hybrid basis for discrimination, one that presents particular problems for interpretation of the ADA: hedonic costs.

Most mental illnesses are defined at least in part by some kind of negative emotion or distress. As suggested by our intuitions and confirmed by research in psychology and management studies, moreover, we often respond emotionally to others' emotions through largely unconscious processes. Through these and other aspects of interaction, employers and others are therefore likely to absorb certain hedonic costs from people with mental illness. Discrimination against those with mental illness is often a response to those hedonic costs.

There is a larger implication for discrimination law. Because emotional contagion in particular tends to increase with liking, the hedonic costs of negative emotional contagion seem to straddle the traditional categories of animus and rational discrimination, and they seem unlikely to dissipate through contact. They therefore represent a uniquely intractable basis for the desire to discriminate on the basis of mental illness. Contact, in short, will not eliminate discrimination; it might even increase it.

With regard to the workplace, however, the statutory protection provided by the ADA usually requires employers, coworkers, and customers to bear the hedonic costs of mental illness. With a few exceptions, employers cannot define the essential functions of most jobs to include making others feel a certain way. Thus, a depressed paralegal who gets his job done probably must be retained, even if a happier person would be a more pleasant worker. But for some jobs, the ADA provides a defense to a claim of employment discrimination, squarely rooted in the notion of hedonic costs. A therapist with an anxiety disorder who makes her clients anxious probably cannot perform the essential functions of her job. Harder cases involve sales and customer service jobs; a focus on whether the essential functions of a particular job actually include producing particular affective states, or whether such emotional effects are merely useful to the core job tasks, should help to answer these questions.

A recognition of the hedonic costs of mental illness also helps to resolve a conflict between circuits over the relative responsibilities of employer and employee in negotiations over accommodations. Because people with mental illness are likely to prompt emotional contagion that makes negotiations difficult, such difficulty in negotiation is likely to be a symptom of the disability and must be accommodated by the employer.

In addition, an understanding of hedonic costs and emotional contagion helps to illuminate the most appropriate interpretation of the regarded-as prong of the definition of disability. In an important case involving physical disabilities, the Supreme Court neglected to mention a crucial way that someone can be substantially limited: by virtue of others' attitudes. The foregoing discussion of animus and emotional contagion shows why recognizing that someone can be limited in this way is crucial to capturing key forms of discrimination and thus to implementing the ADA's mandate.

Finally, an understanding of the fear of hedonic costs allows us to see why the courts have had such difficulty with what should be an easy doctrinal question: whether interacting with others is a major life activity for purposes of defining disabilities under the ADA. Though the relevant doctrinal principles both indicate an affirmative answer, the cases contain conflicting dicta, and only one circuit has actually held it to be so. A fear of the hedonic costs of integrating people with mental illness seems to be contributing to courts' reluctance in this area. As the preceding discussion has indicated, however, the ADA requires employers to bear such hedonic costs within certain limits, and thus the statute cannot be interpreted in a manner inconsistent with the doctrinal framework in order to permit employers to evade such costs.

Discrimination against people with mental illness is so pervasive as to be almost invisible. For this and other reasons, the ADA's mandate with regard to mental illness is especially difficult to understand and presents distinctive challenges for courts. The concepts of hedonic costs and emotional contagion should help to frame the process of confronting those challenges.

Readers with comments may address them to:

Elizabeth Emens  
University of Chicago Law School  
1111 East 60th Street  
Chicago, IL 60637  
eemens@law.uchicago.edu

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