The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA

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The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA

ELIZABETH F. EMENS*

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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 Act1 (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 Article 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 those with mental illness, I argue, because of how those with mental illness make them feel, in ways that are intimately bound up with how people with mental illness themselves feel. Mental illness tends to produce what I call “hedonic costs”—an increase in negative emotions or a loss of positive emotions—in people with mental illness. And the hedonic costs of an individual’s mental illness may create hedonic costs for nearby others. 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 feelings. Hedonic costs are relevant to various types of discrimination, but particularly 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 cause others to share their negative emotions. For example, spending time around a person with depression—even having a short conversation—typically causes others to feel greater sadness and hostility. And studies indicate that liking someone makes the liker more susceptible to absorbing 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.

Hedonic costs based on emotional contagion defy our intuitions about the potential benefits of fully integrating people with mental illness into the workplace and thus seem to present a peculiarly difficult case for antidiscrimination

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law. 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 side by side with members of the disliked group, a discriminator will overcome his discomfort with and dislike of that group. Emotional contagion suggests limits, however, 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: others' 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 cases brought by plaintiffs with mental illness under the ADA, which expressly protects mental as well as physical disabilities. 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 some costs. Thus, employers may not generally define the essential functions of jobs to include making others feel positive emotion or not making them feel negative emotion. Courts must therefore apply greater scrutiny to claims by employers that a certain job requires affecting others' emotions to be sure that such emotional effects are indeed among the fundamental, rather than the marginal, job duties. 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: Because difficulty in negotiating may commonly accompany mental illness, employers should bear the greater burden for facilitating these negotiations, as a form of meta-accommodation of the mental disability. Third, at this moment when the Equal Employment Opportunity Commission's ("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 the answer: Interacting with others should be considered a major life activity for purposes of defining what counts as a disability under the statute.

The Article comes in four parts. Part I briefly sets out some preliminary
I. MENTAL ILLNESS: DEFINITIONAL AND STATISTICAL MATTERS

Defining mental illness is not an exact science.\(^2\) For the definitions of specific disorders, this Article 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").\(^3\) The general term "mental illness," as used in this Article, 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). 4

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 Article 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, 5 and the DSM-IV-TR is dedicated to the disorders of the mind, even while it explicitly acknowledges the indistinct line between the physical and the mental. 6

In addition, the DSM-IV-TR groups together a set 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.” 7 Moreover, attitudes towards learning disorders such as mental retardation differ from attitudes towards mental illnesses such as psychosis and depression, with the latter group bearing significantly more stigma. 8 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 Article, however, I bracket the

4. See, e.g., DEBORAH ZUCKERMAN ET AL., THE ADA AND PEOPLE WITH MENTAL ILLNESS: A RESOURCE MANUAL FOR EMPLOYERS 7 (1993). 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 Ann Hubbard, The ADA, the Workplace, and the Myth of the “Dangerous Mentally Ill,” 34 U.C. DAVIS L. REV. 849, 861 (2001). 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.

5. § 12102(2)(A).

6. DSM-IV-TR, supra note 3, 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 ‘mental’ in ‘physical’ 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.”).

7. 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 the term “incorrectly implies that other mental disorders in the manual do not have a biological basis.” DSM-IV-TR, supra note 3, at 10; see also supra note 6.

8. See, e.g., Patrick W. Corrigan et al., Stigmatizing Attributions About Mental Illness, 28 J. COMMUNITY PSYChOL. 91, 97 (2000) (reporting that psychosis was perceived as more controllable than AIDS, depression, mental retardation, and cancer, and as more treatable than mental retardation, AIDS, and cocaine addiction).
question of whether or to what extent mental illness is culturally constructed.\textsuperscript{9}

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 mitigate 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.\textsuperscript{10} He may nonetheless 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 countertherapeutic impulse.\textsuperscript{11} 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.\textsuperscript{12} 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

\textsuperscript{9.} See, e.g., THOMAS S. SZASZ, THE MANUFACTURE OF MADNESS (1997); THOMAS S. SZASZ, THE MYTH OF MENTAL ILLNESS (rev. ed. 1984). 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. 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.”); 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).

\textsuperscript{10.} "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.'” California Mental Health and Developmental Disabilities Center, Psychotropic Medications: Overview & General Comments (1998), http://www.mhddc.ucla.edu/INFO/modules/psychotropicmedsoverview.htm.


\textsuperscript{12.} See, e.g., ANDREW SOLOMON, THE NOONDAY DEMON 79–80 (2001) (explaining that acquaintances are surprised to hear that he expects to be on medication “indefinitely” to prevent relapse of his depression, and then quoting mental health professionals who discuss the dangers of going off psychiatric medication and analogize ongoing medication in this context to medication for diabetes, hypertension, or heart conditions).
present diagnosis or history. The next Part, which applies traditional categories of discrimination to the context of mental illness, discusses some points particularly relevant to discrimination against people in this situation. After that, the examples that form the core of the Article focus principally on symptomatic mental illness.

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 (2.6%), manic depressive disorder (1.9%), schizophrenia (0.4%), and "other psychological disorders" (3.3%). Within the U.S. population more generally, a recent World Health Organization ("WHO") study reported that 26.4% of Americans suffer from mental illness, including alcoholism and substance abuse, within a twelve-month period. Similar to the EEOC figures, mood and anxiety disorders were the most prevalent, though with anxiety disorders taking first place in the WHO report (18.2%) and mood disorders, which include depression, taking second (9.6%).

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 "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, 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 an employer's having a generic preference for a white over a black employee.

13. Plaintiffs in this situation are likely to argue for protection under the "record of" or "regarded as" prongs of the definition of disability. See 42 U.S.C. §§ 12102(2)(B)–(C) (2000); see infra Part IV.A; see also infra Part IV.D.

14. The Equal Employment Opportunity Commission is the federal agency charged with enforcing the employment provisions of the ADA and other federal antidiscrimination laws. See § 12117.

15. EEOC, ADA Charge Data by Impairments/Bases – Receipts, http://www.eeoc.gov/stats/ada-receipts.html (last modified Jan. 27, 2005). Autism, which lies on the boundary of mental illness, is listed as 0.0%, which represents eighty-seven cases. Id. In addition, alcoholism makes up 1.5% and drug addiction 0.8%. Id.


17. 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).
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.18 Those who seek to avoid or exclude people with mental illness are not outliers who can be isolated and criticized. Rather, the pervasiveness of the impulse to discriminate in this context naturalizes the impulse, renders it a form of common sense. It is therefore important to try to understand its nature and origins, to try to root out what will otherwise be its unnoticed applications.

And there are further reasons for focusing on the mind of the discriminator against people with mental illness. 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.19

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 the past thirteen years have narrowed its scope,20 and advocates for people with mental illness have felt that this group has fared particularly badly under the statute.21 The limited empirical work on the question, conducted by Ruth Colker, showed no significant variation in appellate outcomes for plaintiffs suffering from psychological impairments, though the lack of an effect may be attributable to selection bias.22 Colker’s work focused principally on the broader question of how ADA plaintiffs fare relative to plaintiffs under other antidiscrimination statutes, and found that ADA plaintiffs fare signifi-

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18. Cf. Natalie Zemon Davis, “Women’s History” in Transition: The European Case, FEMINIST STUD., Spring–Summer 1976, at 83, 90 ("It 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.").
21. See, e.g., Stephanie Proctor Miller, Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability, 85 CAL. L. REV. 701, 701–02 (1997); Michael D. Meuti, Disabling Legislation: The Judicial Erosion of the ADA’s 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.

cantly worse. 23 Regardless of whether advocates' frustration is especially justified in the context of mental illness, the courts' response to ADA plaintiffs 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 Article therefore tries to imagine the perspective of the relevant actors in workplace discrimination, including the discriminators, each in turn.24

This Part provides an overview of how the traditional types of discrimination may affect people with mental illness. 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.25 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 how the standard categories apply to discrimination against people with mental illness lays the groundwork for the rest of the Article, in which I identify a basis for discrimination that cuts across these categories.

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, 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.26 And I decline to endorse any perfect distinction between efficient and inefficient discrimination: On the contrary, my aim is to prepare the reader

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23. Id. at 257.
24. This approach, or empathy exercise, is inspired by the writings of Susan Okin:

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... . . The 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.

Susan Moller Okin, Reason and Feeling in Thinking About Justice, 99 Ethics 229, 244–45 (1989). 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. From another perspective, Chai Feldblum recommends a similar kind of empathy exercise, which she calls "constructive visualization." Noting the impossibility of completely bridging differences, Feldblum recommends empathy and interpersonal connection as a way for those who are relatively advantaged along a particular axis to try to understand better the perspective of the relatively disadvantaged. Chai R. Feldblum, Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender, 54 Me. L. Rev. 159, 191–92 (2002).


for a discussion, in the next Part, of a form of discrimination against people with mental illness that seems to straddle efficiency and inefficiency. More generally, 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 she treats someone differently because of dislike or hostility towards the protected class of which that person is a member. 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. 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 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 Part, 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


28. See BECKER, supra note 27, at 39–42.
with mental illness. Moreover, in contrast to the domains of sex and race, and even physical disability, where overt hostility and dislike have arguably diminished to some extent, or at least gone underground by morphing into less conscious forms of discriminatory animus, overt animus against people with mental illness is not uncommon. And more subtle or implicit negative atti-

29. 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.

30. See, e.g., Perlin, supra note 25, at 22 (explaining, in discussing the prevalence of what he calls "sanist" attitudes, that "[i]mportantly, and not coincidentally, most of the attention that has been paid so far to the ADA considers questions of physicality: e.g., retrofitting buses, installing ramps, restructuring buildings. Little attention has been paid to questions of attitude towards all disabled persons, less to questions of attitude regarding the mentally disabled, and even less to questions of attitude regarding persons with mental illness....") (footnotes omitted)); Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458, 460 (2001) (explaining that "[c]ognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality ...."); 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 1960s began eliminating the irrational bigotry posed by racism. Yet, the very necessity of such laws underscores how painfully widespread such prejudice and bigotry are.").

31. See, e.g., Paul Brest, The Supreme Court, 1975 Term—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); Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site, 6 GROUP DYNAMICS 101, 111 (2002) (reporting, based on data on over 600,000 web-based tasks measuring explicit and implicit biases about sex, race, and age, that "implicit biases were notably stronger than their explicit counterparts and were sometimes in contradiction to them[,] . . . reflect[ing] the propensity to consciously deny feelings and thoughts either because of social (external) pressures or personal (internal) standards"); Reva Siegel, Why Equal Protection No Longer Protects, 49 STAN. L. REV. 1111, 1113–14 (1997) (discussing the mechanism of preservation-through-transformation by which changing legal regimes merely cause the state’s role in gender and race stratification to "assume new form"); Sturm, supra note 30, at 459–60, 465–74 (discussing the partial shift from more deliberate "first generation" discrimination to subtler "second generation" discrimination in the domains of race and sex).

32. See, e.g., Bethany A. Teachman et al., Implicit and Explicit Stigma of Mental Illness in Diagnosed and Healthy Samples, 25 J. SOC. & CLINICAL PSYCHOL. 75 (2006); see also Jacques v. DiMarzio, Inc., 386 F.3d 192, 195 (2d Cir. 2004) ("Jacques's immediate supervisor[, on learning that Jacques was suffering from severe depression and taking Prozac,] told Jacques that, while on leave, she should 'get crayons and a coloring book and make pot holders'" and "Jacques testified that, at some point in the 'early '90s,' she was questioning [the plant manager] 'about some kind of work' and [he] responded by shaking his head and calling Jacques 'nuts.'"); Steele v. Thiokol Corp., 241 F.3d 1248, 1250 (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)); Newberry v. E. Tex. State Univ., 161 F.3d 276, 278 (5th Cir. 1998) ("[O]ther faculty members . . . allegedly characterized Newberry with phrases like 'paranoid,' 'nuts,' 'crazy,' and 'having mental difficulties.'").
Discrimination based on animus might be thought of as discrimination based on a negative affect or feeling towards the members of the group. Thus, when explicit, 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 basic rationale remains based on a taste or preference.

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 one-month gap between jobs, this skilled computer specialist was employed as a bookstore clerk for five 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 four weeks, and then worked a flexible schedule at the book store for five 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

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33. See Teachman et al., supra note 32 (finding, using the Implicit Association Test, implicit bias against mental illness, relative to physical illness, along the dimensions of helplessness, blameworthiness, and more generally negative attitudes, in both in-group and out-group samples; and finding helplessness and negative attitude bias at an explicit level).

34. 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., BECKER, supra note 27, at 16 (“Ignorance may be quickly eliminated by the spread of knowledge, while a prejudice (i.e., preference) is relatively independent of knowledge.”).

35. Given that Alan’s symptomatic mental illness was in the past, the employer’s animus might stem from stereotypes about Alan’s likelihood of relapse. But stereotyping is not necessarily at work here. Because of the ambiguities surrounding whether a person should still be considered “depressed” if his ongoing medication successfully eliminates his symptoms of depression, see supra text accompanying notes 11–14, an employer may think of someone in Alan’s situation as part of the group—“crazy people”—who make him uncomfortable. Alternatively, even if the employer thinks that the person should not technically be called “depressed” now, the employer might still think of Alan as a “crazy person” because of his past hospitalization; in this instance, the employer’s discomfort with crazy people may simply be categorical—that is, once a person has been crazy, he always bears the taint or stigma of that classification.
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 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.36 If, however, we assume that Alan falls within the scope of the Act, the employer’s actions 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.37 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 and Bridget were equally qualified, so

36. 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; some circuits have set the bar very high for what a person’s past record must involve. See Justin S. Gilbert, Prior History, Present Discrimination, and the ADA’s “Record of” Disability, 31 U. Mem. L. Rev. 659, 663–64 (2001). Hospitalization for a month may or may not pass that bar. See id. at 671–73. And, as I explain in Part IV, the “regarded as” prong of the definition of disability currently offers uncertain protection. See infra Part IV.D.

37. The metaphor of the crystal ball is adapted from Strauss, supra note 26, at 104–05.
without further information, any amount of costs due to coworker or customer animus would tip the crystal ball in favor of Bridget.  

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.” In a case involving a grocery bagger with Asperger’s syndrome, 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.” Due to his disability, the plaintiff often spoke “more loudly than necessary” and engaged in echolalia, a form of “constant repetitive speech.” Because the plaintiff’s communication and social interaction skills were impaired, he “tend[ed] to make inappropriate comments or ask personal questions of strangers.” Interestingly, in an opinion concluding that a factual question surrounded whether the plaintiff could do his job, the court noted in the facts section 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.” 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 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, but is generally understood as more of a

38. 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 26, at 849 & n.66, 881–85.


40. DSM-IV-TR, supra note 3, 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 . . . .”).


42. Id. at 1421.

43. Id.

44. Id.; cf. 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.”).

45. See, e.g., Kristin Bumiller, Feminism Outside the “Norm”: Sex and Autism in the Postmodern Condition 15–18 (unpublished manuscript, on file with author) (discussing the ways that autistic
developmental disorder than a mental illness. 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; 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 suggests that psychosis is more stigmatized than depression. 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, 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 different emotional and behavioral states, and how these perceptions relate to hostility towards people with these conditions.

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. A parent may avoid a certain chain of grocery stores because the one in his neighborhood is less than clean. A

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47. See, e.g., Corrigan et al., supra note 8, at 94, 97 (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).

48. See, e.g., id. at 97.

49. Darcy A. Santor & James C. Coyne, Evaluating the Continuity of Symptomatology Between Depressed and Nondepressed Individuals, 110 J. ABNORMAL PSYCHOL. 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).


51. 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. L. & SOC. CHANGE 277, 345–49 (2004).

52. See, e.g., Bagenstos, supra note 26, at 850; Sunstein, supra note 26, at 25.
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 Section. 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 resumés 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.)

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

53. See infra Part II.C.
54. A disparate impact of the school-based choice would of course be a factor that would change the calculus.
group but where a less expensive or more accurate classifying device is available.  

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.  

If only one person had such a belief, 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.  

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, unreliable, lazy, responsible for their illness or

55. See Sunstein, supra note 26, 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.”).

56. See, e.g., RUTH MELINKOFF, 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 (last visited Jan. 11, 2006) (“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 a keren.) . . . Even in the 21st century there are places where ignorant people remain under the impression that Jews have horns . . . .”).

57. 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%.”).

58. See, e.g., Patrick W. Corrigan & David L. Penn, Lessons from Social Psychology on Discrediting Psychiatric Stigma, 54 AM. PSYCHOLOGIST 765, 766 (1999); Hubbard, supra note 4, at 850–52; NAT’L INST. ON MENTAL HEALTH, SURGEON GENERAL’S REPORT ON MENTAL HEALTH 7 (1999), available at http://media.shs.net/ken/pdf/surgeongeneralsreport/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, 1331–32 (1999); see also, e.g., McKenzie v. Dovala, 242 F.3d 967 (10th Cir. 2001) (reversing 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 posttraumatic stress disorder in conjunction with sexual abuse by her father).

otherwise blameworthy,\textsuperscript{61} faking or exaggerating their condition,\textsuperscript{62} or childlike and in need of supervision or care.\textsuperscript{63} Beliefs about these traits are often exaggerations.

For example, some argue that although there is a slightly elevated risk of violence among people with mental illness, outsiders' perceptions of the dangerousness of people with mental illness "grossly exaggerates" the reality.\textsuperscript{64} (Definitive answers here are, however, elusive.)\textsuperscript{65} If so, then 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. Whether efficient or inefficient, though, to use mental illness as a categorical proxy in this way would be impermissible under the ADA in most circumstances.\textsuperscript{66}

\textsuperscript{60} See, e.g., Mental Illness in Society, supra note 50; see also, e.g., Bultemeyer v. Fort Wayne Cmty. Schs., 100 F.3d 1281 (7th Cir. 1996) (reversing 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 did not walk faster he would never get the job done); Overton v. Reilly, 977 F.2d 1190 (7th Cir. 1992) (reversing, under the Rehabilitation 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).

\textsuperscript{61} See, e.g., Corrigan et al., supra note 47; supra text accompanying note 27.

\textsuperscript{62} See, e.g., Mental Illness in Society, supra note 50 ("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., Felix v. N.Y. City Transit Auth., 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.).").

\textsuperscript{63} See, e.g., Corrigan & Penn, supra note 58, 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 to 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).

\textsuperscript{64} Hubbard, supra note 4, at 867; id. at 895 ("The 'vast majority' of people who have mental disorders are not violent.").

\textsuperscript{65} See id. 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))).

\textsuperscript{66} See supra text accompanying note 42; see also Hubbard, supra note 4, at 889–92. Brian Prestes has also persuasively argued that misperceptions of the relative dangerousness of employees with mental illness (as well those with a stigmatized physical impairment, HIV) cause courts to conclude that these impairments are disproportionately dangerous for purposes of the direct threat analysis; in these contexts, courts are more likely to ignore the probability of harm and focus merely on the
C. RATIONAL DISCRIMINATION

Discriminating between potential employees on the basis of a protected trait may sometimes be efficient. 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.67 Here the metaphor of the crystal ball, mentioned above, is again helpful.68 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., race, age, disability status—would choose to rely on the proxy solely because of accuracy and cost.69

For instance, mental illness is plausibly a cost-effective proxy for diminished workplace productivity, if mental illness is defined by the presence of currently active symptoms.70 Whether mental illness would be the best available proxy is uncertain and context-dependent, but it might well be a cost-effective one in serious of the harm. See Brian S. Prestes, Disciplining the Americans with Disabilities Act's Direct Threat Defense, 22 BERKELEY J. EMP. & LAB. L. 409 (2001).

67. See, e.g., Bagenstos, supra note 26, at 849 (describing "rational statistical discrimination" as employers' "rationally us[ing] protected-class status as a proxy for lower productivity"); Strauss, supra note 26, 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."); Sunstein, supra note 26, 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"); see also Kenneth J. Arrow, The Theory of Discrimination, in DISCRIMINATION IN LABOR MARKETS 3, 24, 26–27 (Orley Ashenfelter & Albert Rees eds., 1973) (observing that "[s]kin color and sex are cheap sources of information. Therefore prejudices (in the literal sense of pre-judgments, judgments made in advance of the evidence) about such differentia can be easily implemented," and then after discussing various reasons why employers might develop misperceptions of the meaning of those proxies, also noting that real differences might develop through differential investments in one's own human capital).

68. See supra text accompanying note 37 (citing Strauss, supra note 26, at 104–05).

69. See supra note 67; see also RICHARD A. POSNER, AGING AND OLD AGE 322–28 (1995) (presenting reasons that "the argument that statistical discrimination is inefficient in the case of age is unpersuasive").

70. See supra Part I (discussing definitional difficulties surrounding mental illnesses that are presently asymptomatic through treatment).

71. See Carolyn S. Dewa & Elizabeth Lin, Chronic Physical Illness, Psychiatric Disorder and Disability in the Workplace, 51 SOC. SCI. & MED. 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).
some settings. 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.\textsuperscript{72}

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 involving Alan and Bridget,\textsuperscript{73} 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.\textsuperscript{74}) 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.\textsuperscript{75} But from the perspective of the employer looking into the crystal ball, it might seem perfectly rational to prefer Bridget on this basis.\textsuperscript{76}

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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, and 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 that 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.

\textsuperscript{72} See supra note 26 and accompanying text; infra note 226.

\textsuperscript{73} See supra text accompanying notes 35–38.

\textsuperscript{74} See supra Part I.


\textsuperscript{76} 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, as simply warranted and not factored into a cost calculation, whereas these same employers view accommodations for disabilities to be aberrant and costly special treatment. See, e.g., Bagenstos, supra note 26, at 867–68 (citing sources).
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, Helen, sits down at the next table. She fidgets, bouncing her leg under the table and muttering to herself. She runs her hands through her hair, tugging at it, while repeatedly glancing at a newspaper in front of her and then looking away. Every few minutes she jumps out of her chair and hurries across the store to get more sugar for her coffee. 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.77 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 is just as agitated in the interview as she was at Starbucks. Five minutes into the interview, Irwin decides not to hire her, explaining to his wife later 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

77. Her behavior could, for instance, be consistent with a diagnosis of bipolar I disorder, 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 3, at 362. In addition, "[t]he 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.
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 even if they knew Helen was completely sane, they might still wish to avoid her. There’s no particular stereotype to which they must subscribe. For example, it is unlikely that either avoids Helen because he 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. Three people she met at a neighbor’s barbecue shared some of her interests, but their dispositions seemed strikingly different. Karen and Lorin were both lively and upbeat, whereas Mark seemed down, even sad and lethargic. Mark may be, for example, clinically depressed. June decides to invite Karen and Lorin rather than Mark, feeling that Mark might

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78. 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.

79. The criteria for major depressive episode include, inter alia, the following:

A. The individual must experience over a period of at least two weeks during which there is either depressed mood or loss of pleasure. The individual must also experience at least four of the following symptoms:

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 or weight gain, 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)
ruin her party’s atmosphere. The same example could be reframed in terms of the job interview. Thus Irwin might decide to hire Karen or Lorin instead of 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.

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. 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 are 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.

This Part discusses several different forms of hedonic costs. People with mental illness bear hedonic costs; indeed, hedonic costs define an essential feature of most mental illnesses for the people with mental illness themselves. 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. Section A below explains 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—forms a peculiarly intractable basis for discrimination.

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(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 3, at 349–51.

80. 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.
A. THE DEFINING ROLE OF HEDONIC COSTS IN MENTAL ILLNESS

Mental illness is unusually, if not uniquely, defined by what I call hedonic costs. That is, most mental illnesses are defined at least in part by negative affect or by distress caused to the mentally ill person or to those around her. This may be seen in at least three ways. First, many 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."

And anxiety disorders count among their symptoms "[e]xcessive anxiety and worry." Depression and anxiety disorders together constitute more than half of all the ADA charges based on mental illness brought before the EEOC. And mental illnesses not categorized as mood or anxiety disorders in the DSM often count negative emotions among their core symptoms. Mood disturbances are important features of borderline and schizotypal personality disorders, for example, and the distrust and suspicion that characterize paranoid personality disorder are

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81. 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.

82. DSM-IV-TR, supra note 3, at 349.

83. See, e.g., id. at 472 (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"); see also, e.g., id. at 462 (including among the symptoms of obsessive-compulsive disorder that obsessions must include "recurrent and persistent thoughts, impulses, or images that are experienced, at some time during the disturbance, as intrusive and inappropriate and that cause marked anxiety or distress" and that the compulsions are "aimed at preventing or reducing distress or preventing some dreaded event or situation").

84. See supra note 15 and accompanying text.

85. Charles A. Sanislow III, David V. Perkins & Deborah Ware Balogh, Mood Induction, Interpersonal Perceptions, and Rejection in the Roommates of Depressed, Nondepressed-Disturbed, and Normal College Students, 8 J. Soc. & CLINICAL PSYCHOL. 345, 347 (1989) ("Also, given that mood disturbances are key features of both borderline and schizotypal personality disorders, and are accompaniments of other types of disturbance, selection of depressed individuals with a unidimensional measure of depression may lead to groups of individuals displaying a diverse range of psychopathology, albeit all suffering depressed mood.").

The DSM-IV-TR defines borderline personality disorder as follows:

A pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following:

(1) frantic efforts to avoid real or imagined abandonment. Note: Do not include suicidal or self-mutilating behavior covered in Criterion 5.

(2) a pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation

(3) identity disturbance: markedly and persistently unstable self-image or sense of self

(4) impulsivity in at least two areas that are potentially self-damaging (e.g., spending, sex,
sources of obvious distress. And other diagnoses depend on highly specific negative emotions: For instance, anorexia nervosa is defined by an "[i]ntense fear of gaining weight," and posttraumatic stress disorder requires that a "traumatic event is persistently reexperienced" in one or more ways.

Second, many disorders require as part of their diagnosis the presence of distress or impairment of social or other functioning. For example, the broad...
category of personality disorders—which are 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"\(^9\) and include specific disorders such as narcissistic or paranoid personality disorder—must "[involve] clinically significant distress or impairment in social, occupational, or other important areas of functioning."\(^9\) Thus, a personality disorder must specifically involve significant distress for the diagnosed individual or some kind of diminished ability to perform key activities of life. That is, the impairment in mental functioning must be 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 affective 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 only an individual's ability to work is impaired; 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\(^9\) and which might characterize Helen in the Starbucks example\(^9\)—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."\(^9\) 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, erratic behavior, the threat of violence to self or others which presumably prompts fear and anxiety at least in others, or psy-

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\(^9\) See, e.g., JAMISON, supra note 9, 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"); \(but cf.\) id. at 213, 219 (describing, by contrast, the depressive side of the "cyclic upheavals of manic-depressive illness" as, inter alia, "flat, hollow, and unendurable. It is also tiresome. People cannot abide being around you when you are depressed. They might think that they ought to, and they might even try, but you know and they know that you are tedious beyond belief: you're irritable and paranoid and humorless and lifeless and critical and demanding and no reassurance is ever enough. You're frightened, and you're frightening . . .").

\(^90\) Id. at 685.

\(^91\) Id. at 689.

\(^92\) Id. at 685. 

\(^93\) See supra text accompanying note 77.

\(^94\) See supra note 77.
psychotic features, 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.\textsuperscript{95} 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 this would be surprising.

Third, the mere fact of diagnosis suggests that most if not all mental illnesses involve some affective costs to the individual or to those around her, even if the diagnostic criteria do not require any negative affect.\textsuperscript{96} 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 exceptions to this, such as the situation in which someone presents a physician with a physical symptom and

\textsuperscript{95}Psychotic symptoms include “delusions, hallucinations, disorganized speech (e.g., frequent derailment or incoherence) or grossly disorganized or catatonic behavior.” DSM-IV-TR, supra note 3, at 329. A discussion of the hedonic costs to others of even mild mania appears in \textit{Jacques v. DiMarzio, Inc.}, 386 F.3d 192 (2d Cir. 2004):

[Her diagnosis of bi-polar II disorder] was based on the assessment of her treating psychiatrist that Jacques has ‘major depressive episodes accompanied by hypomanic episodes,’ . . . . According to Jacques’s psychiatrist, ‘mood swings, irritability, apathy, poor judgment, and denial’ that she ‘cannot regularly control’ are symptomatic of this condition. When Jacques ‘is in a hypomanic episode, her thoughts will be racing and she does not view her behavior as pathological. However, others may easily be troubled by her erratic behavior patterns.’ Her psychiatrist indicated that her condition ‘made her vulnerable in social interactions such that she would react in unpredictable ways’ . . . .

\textit{Id.} at 196 n.2.

\textsuperscript{96}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, \textit{supra} note 3, at 332. Note, though, that even here the final demand for specification assumes “stressors,” thus implying the presence of presumably negative stress.
ends up with a psychiatric diagnosis. But overall, the combination of symptomatology—in its specific and more general features—and diagnosis suggests that most if not all diagnoses of mental illnesses will be based on or stem from hedonic costs for self or others.

Hedonic costs are of course not unique to mental illness, but mental illness is uniquely constituted by hedonic costs. A person with burn scars on her face may suffer lingering pain from the burn or may suffer the pain of others’ stares, lack of attraction, or expressions of pity, but in the absence of those hedonic costs, her face would still be scarred. Or 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. However, the unhappiness does not constitute her race in the way that it does for mental illness. To see this more plainly, imagine a person of a particular race in two different contexts: a subordinating society and a non-subordinating society. In the subordinating society, she might feel great distress on account of her race. But if she moved to a different society where her race was valued or ignored, she could conceivably cease to experience distress related to her race but still be cognizable as a member of that race. (A similar picture might be drawn of a woman who feels subordinated because of her sex, then moves to a woman-friendly society where she feels no sex-based distress but remains a woman.) By contrast, the person with a mental illness who ceases to experience the distress of that illness has ceased to exhibit the symptoms that constitute the illness, and in this sense, may no longer be mentally ill. These comparisons in no way mean to understate the significance of the hedonic costs or social meanings attached to race or physical impairment. The point here is only that hedonic costs are differently constitutive of mental illness than of other classifications.

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

97. Racial classifications and their defining features are of course not naturally given but are instead culturally constituted through processes of classification bound up with subordination. 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.

98. The relationship between symptoms and diagnosis is a complicated matter, creating difficulties, for example, for people with mental illness who take medication, who may no longer know whether the underlying illness would still be present if they stopped taking the medication. See supra text accompanying notes 10–13.

99. 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.
impairment may or may not be disabling depending upon the features of the world around her.\textsuperscript{100} 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.\textsuperscript{101} 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 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."\textsuperscript{102} This is, broadly speaking, the logic of the Court's conclusion in \textit{Sutton v. United Air Lines} that a person should be considered, for purposes of the ADA's definition of actual disability, in her post-mitigation state.\textsuperscript{103} 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.\textsuperscript{104} 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 people with mental illness, but also on others they encounter, in the workplace or elsewhere. These costs come in many forms, some of which relate squarely to animus or stereotyping, others of which 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


\textsuperscript{101} 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.

\textsuperscript{102} See also supra Part I.

\textsuperscript{103} Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999). \textit{See infra} Part IV.A (discussing the Supreme Court's decision in \textit{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).

\textsuperscript{104} \textit{See infra} Parts IV.A & IV.D.
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 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. 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 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 generally like who happens to be in a bad mood on a particular day, it may seem not animus-driven to want to avoid a coworker whose mental illness puts him in what might seem to an outsider to be a perpetually bad mood. For example, people who work in an organization dedicated to helping people with certain mental disabilities might oppose discrimination against people with mental illness, but they may nonetheless not want to bear the hedonic costs of a supervisor whose bipolar disorder and posttraumatic stress disorder prompt her to yell at her staff members.

As discussed in the previous Section, imposing hedonic costs on others may define, in part, certain mental illnesses. For instance, disorders that may be diagnosed based in part on a significant impairment in social functioning, such as personality disorders, may be constituted in part by the infliction of emotional costs on others.

Other disorders are defined by negative emotions in the person with mental illness. There are many ways that these negative emotions internal to the mental illness can cause negative emotions in other people. A person with depression may voice pessimistic views on work projects and persuade others that the

105. Cf., e.g., Hamilton v. Sw. Bell Tel. Co., 136 F.3d 1047, 1049 (5th Cir. 1998) (describing, in a case involving a plaintiff who suffered from posttraumatic stress disorder, a letter written by coworkers to the employer that characterized the plaintiff as, inter alia, "disgusting").
107. See supra Part III.A.
projects will fail. 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. A person with obsessive-compulsive disorder may want flexible hours because her morning personal hygiene rituals consume large, unpredictable amounts of time. Even if her flexible hours do not affect her work, they may nonetheless frustrate others in the workplace who like consistency. Or, through unconscious mechanisms that psychologists call emotional contagion, a person suffering from depression may cause a coworker to feel increased levels of sadness and depressed mood. And, directly opposite to an animus-based response, which involves dislike, 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 ON OTHERS: 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 another, has been studied in the workplace and also in the context of mental illness. This Section sketches the basic mechanism of emotional contagion and its relevance to the workplace and to mental illness, laying the groundwork for a discussion of the broader implications both for discrimination against people with mental illness and for 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 behavior of another person or group through the conscious or unconscious induction of emotion states and behavioral attitudes.” 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.

112. 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: “[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 et al., Emotional Contagion, 14 REV. PERSONALITY & SOC. PSYCHOL. 151, 153–54 (1992), quoted in Elaine Hatfield et al., Emotional Contagion 5 (1994).

Following Hatfield et al., supra, and Sigal 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
To the lay observer of human behavior, everyday examples abound. Spending time with a sad person might leave 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. And being around a person with 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 and then discussing its role in the creation of hedonic costs through mental illness. Research in psychology and management studies suggests that emotional contagion does not occur only among friends and family, but also 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. In one study, 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. The other individuals in the group, and the group as a whole, picked up the emotion of the confederate, based on self-reports by the participants and scored evaluations conducted by observers of the videotaped group discussions.

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 psychological researchers." Sigal G. Barsade, The Ripple Effect: Emotional Contagion and Its Influence on Group Behavior, 47 ADMIN. SCI. Q. 644, 646 (2002) (citations omitted).

113. See, e.g., HATFIELD ET AL., supra note 112 (reviewing studies); Barsade, supra note 112 (same).

114. Barsade, supra note 112, at 653–55. 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. Id. at 653 (citing DEVELOPMENT DIMENSIONS INT'L, LEADERLESS GROUP DISCUSSION EXERCISE (1982)).

115. See Barsade, supra note 112, 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)).
sophisticated cousins.\textsuperscript{116} Though definitions in this area are multifarious and contested,\textsuperscript{117} empathy is typically understood to be a mental process of putting oneself in another person’s shoes, or, put another way, an imaginative exercise in seeing the world through another’s eyes.\textsuperscript{118} (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.\textsuperscript{119}

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 involves a two-step process involving mimicry and feedback.\textsuperscript{120} Under 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.\textsuperscript{121} Particularly when we like someone, we often unconsciously

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\item[116.] E.g., Hatfield et al., supra note 112, 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.
\item[117.] See Robert W. Levenson & Anna M. Ruef, Empathy: A Physiological Substrate, 63 J. Personality & Soc. Psychol. 234, 234 (1992) ("[T]he term 'empathy' appears to have 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.").
\item[118.] See, e.g., John T. Lanzetta & Basil G. Englis, Expectations of Cooperation and Competition and Their Effects on Observers’ Vicarious Emotional Responses, 56 J. Personality & Soc. Psychol. 543, 544 (1989) ("Empathy is typically considered to arise from the observer’s taking the other’s perspective or fantasizing about self in the actor’s situation." (citations omitted)).
\item[119.] See, e.g., Lauren Wispe, 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.").
\item[120.] See, e.g., Hatfield et al., supra note 112, at 7–78 (citing sources supporting the process of mimicry and feedback). 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 Int'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). Even Hess and Blairy, who are vocal critics of the afferent feedback hypothesis, acknowledge its prevalence, in what is perhaps the most evocative (mis)phrase in this literature: "The two processes, mimicry and emotional contagion, have been suggested to be causally elated." Hess & Blairy, supra, at 130.
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adopt the person's manner and expression. For example, research suggests that the movements of students track those of their teachers, especially the teachers they like. 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.

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. This notion runs contrary to the common intuition that emotions start inside our selves and then, if we choose to show them (and sometimes even when we do not), display themselves on our physical selves. Instead, through afferent feedback, acting out the physiological markers of certain emotional states actually causes us to feel those emotions. "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."

Our emotions follow our physiology not only when we observe and mimic others, but even when we indifferently contort our faces and postures into the positions associated with particular emotions. In one type of study, subjects were told 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).\textsuperscript{128} Those in the frown condition tended to report 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 lips (thus preventing smiling) or between their teeth (thus causing smiling).\textsuperscript{129} Some research suggests that viewing facial expressions is necessary to emotional contagion,\textsuperscript{130} though other findings indicate that exposure to a person's voice may be adequate to produce emotional contagion in some circumstances.\textsuperscript{131}

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.\textsuperscript{132} And studies indicate that we are more likely to experience this process of emotional contagion with those we like than with those we dislike.\textsuperscript{133}

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

\textsuperscript{128} 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 & SOC. PSYCHOL. 909, 909 (1984) (discussing several such studies); see also HATFIELD ET AL., supra note 112, at 54–56 (discussing these studies).

\textsuperscript{129} See Strack et al., supra note 127, at 770, 775–76.

\textsuperscript{130} See Daniel J. Howard & Charles Gengler, Emotional Contagion Effects on Product Attitudes, 82 J. CONSUMER RES. 189, 197 (2001) (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).

\textsuperscript{131} See, e.g., James C. Coyne, Depression and the Response of Others, 85 J. ABNORMAL PSYCHOL. 186, 188–89 (1976) (finding emotional contagion during a phone conversation of twenty minutes); see also infra text accompanying note 142.

\textsuperscript{132} 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 Part, such as hearing another person's negative views and becoming persuaded of them. See supra Part III.B.

\textsuperscript{133} See, e.g., HATFIELD ET AL., supra note 112, at 169–75; Dennis Krebs, Empathy and Altruism, 32 J. PERSONALITY & SOC. PSYCHOL. 1134, 1139 (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); Dana Bramel et al., An Observer's Reaction to the Suffering of His Enemy, 8 J. PERSONALITY & SOC. PSYCHOL. 384, 388–90 (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).
pain is delightful to me."\(^{134}\) 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 happy when our competitor appears to feel unhappy\(^{135}\) or when we have reason to dislike someone.\(^{136}\) More research is needed to identify other contexts in which our response to others' feelings runs in the opposite direction of the mimicry that characterizes primitive emotional contagion.\(^{137}\)

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 Article—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.\(^{138}\) 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.\(^{139}\) Using measures on the Beck depression inventory, researchers found significantly elevated levels of depression and anxiety among those whose roommates were mildly depressed.\(^{140}\) 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.\(^{141}\)

Another study suggests, however, that even in the absence of such familiarity


\(^{135}\) See, e.g., Lanzetta & Englis, *supra* note 118, at 551.

\(^{136}\) HATFIELD ET AL., *supra* note 112, at 172–73; Dolf Zillman & Joanne R. Cantor, *Affective Responses to the Emotions of a Protagonist*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 155, 162 (1977) (finding that children who were shown 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).

\(^{137}\) See HATFIELD ET AL., *supra* note 112, at 199–204 (suggesting variables to explore in future research).


\(^{140}\) *Id.*

\(^{141}\) *Cf.* infra note 155 and accompanying text.
and stress, people with depression pass their emotions to others. In a study involving strangers, a twenty-minute telephone conversation with a depressed woman led her interlocutor to be significantly more depressed, anxious, hostile, and rejecting. 142 In light of other data suggesting that emotional contagion is blocked if the sender’s face is not visible, 143 this result suggests that depressed individuals may be particularly likely to pass their negative feelings on to others.

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. 144

Combined with other research about negative emotion and 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

142. Coyne, supra note 131, at 188–89.
143. See supra text accompanying note 130.
144. Hatfield et al., supra note 112, 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, id., 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, including the tendency to

1. rivet their attention on the others;
2. construe themselves in terms of their interrelatedness to the others;
3. . . . read others’ emotional expressions, voices, gestures, and postures;
4. . . . mimic facial, vocal, and postural expressions;
5. [be] aware of their own emotional responses; or
6. [be] 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.
body language. In addition, some research 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. In addition, 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.

As for imperviousness to others’ emotions, empirical work indicates that low emotional reactivity to sad or happy stimuli is a trait of depression. And for those with depression, lower emotional reactivity is related to lower levels of psychosocial functioning and lower rates of recovery. Moreover, other data suggest that people who report feeling happy are more susceptible to catching emotions than their less happy peers. 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. 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.

145. See infra note 216 (describing symptoms of depression).
147. See supra text accompanying note 143.
148. Jonathan Rottenberg et al., Sadness and Amusement Reactivity Differentially Predict Concurrent and Prospective Functioning in Major Depressive Disorder, 2 EMOTION 135, 141 (2002) (finding, in a study of seventy-two depressed subjects and thirty-three nondepressed controls, that depressed individuals showed less consistent emotional reactivity—in the form of self-reports—to sad or amusing film stimuli; more specifically, depressed individuals 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).
149. Id. 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).
151. See, e.g., Howard S. Friedman & Ronald E. Riggio, Effect of Individual Differences in Nonverbal Expressiveness on Transmission of Emotion, 6 J. NONVERBAL BEHAV. 96, 101-02 (1981) (finding that in silent groups of three together for two minutes, the highly emotionally expressive member was significantly less affected by the negative emotions of the members with low emotional expressiveness than vice versa).
152. Two findings might seem in tension with the conclusion that the negative emotion of depression is necessarily transmitted more readily than others’ positive emotion. First, Friedman and Riggio found no consistent effect for the transmission of happiness (or boredom) as opposed to fear, anger, and anxiety, id. at 99, which might be interpreted to mean that highly expressive people are distinguished only by their particular ability to transmit negative emotion but that all people are able to transmit happiness. Second, the finding described by Barsade 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 112, at 650 (citing Kenneth M. Prkachin et
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 illnesses are likely to spark negative emotions in others. First, contagion can take multiple forms. In addition to primitive contagion—in which the first person’s feelings are mimicked and absorbed—emotional contagion also describes the process by which we cause others to feel emotions different from our own. Thus, anger may inspire fear instead of or in addition to anger. 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 coworkers with their mental illnesses? In other words, are they literally driving their coworkers 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 the intimate context of marriage appear to show contagion of negative affect rather than of clinical levels of depression. In this sense, the term “contagion” may be misleading.

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153. See supra text accompanying notes 134–37.

154. See supra text accompanying notes 146–47.

155. See E-mail from Thomas Joiner, Bright-Burton Professor of Psychology, Florida State University, to the author (Aug. 30, 2004) (on file with author). In his work studying roommates of people suffering from depression, Joiner found that roommates showed increases in depressive symptoms within three weeks of cohabiting, Thomas E. Joiner, Jr., Contagious Depression: Existence, Specificity to Depressed Symptoms, and the Role of Reassurance Seeking, 67 J. PERSONALITY & SOC. PSYCHOL. 287, 289–90 (1994), but Joiner has pointed out that even in the roommates context, the study measured “depressive symptoms, [which is] not really the same as clinical levels of depression[, but is] really closer to increased negative affect.” E-mail from Joiner, supra. 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 James C. Coyne et al., Living with a Depressed Person, 55 J. CONSULTING & CLINICAL
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, and other contexts relevant to the workplace. 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. 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. Interestingly, 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. Customers also influence their own service experience: Displays of positive or negative emotion by customers have been shown to affect the positive emotional expressivity of service providers.

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.

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*Psychol.* 347, 350 (1987), but causal inferences about their interactions are difficult to draw. Noncausal explanations for the correlation have been suggested, for example, that the spouses recently encountered a difficult life event that triggered depression in both. See Joiner, *Contagious Depression*, supra, at 287.

156. See generally Hatfield et al., *supra* note 112.

157. S. Douglas Pugh, *Service with a Smile: Emotional Contagion in the Service Encounter*, 44 *Acad. Mgmt. 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.

158. *Id.* at 1024.

159. *Id.*

whom she liked. Pairs of subjects inspected the box, placed between them on a table, for four minutes. One subject in each pair was arbitrarily designated to be the “sender” and, in the 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. 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. 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.

- The moods of work groups tend to converge. Research on teams of nurses and accountants, for example, showed that the team members’ moods were related to each other, independent of the effect of shared work problems. 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. 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.

- 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. By contrast, people with more power may have the leeway to express their emotions more directly and

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161. Howard & Gengler, supra note 130, at 189.
162. Id. at 192.
163. Id.
164. Id.
165. Id. at 194.
168. Compare id. at 222 (concluding that moods characterized by high rather than low arousal were more likely to be detected by the work group), with Barsade, supra note 112, at 665 (suggesting 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 115 and accompanying text.
169. See, e.g., HATFIELD ET AL., supra note 112, at 175 (reviewing theoretical reasons for why there “might be an inverse relationship between power and sensitivity to others”) (citing Judith A. Hall, Gender, Gender Roles, and Nonverbal Communication Skills, in SKILL IN NONVERBAL COMMUNICATION: INDIVIDUAL DIFFERENCES 32 (Robert Rosenthal ed., 1979); JEAN B. MILLER, TOWARDS A NEW PSYCHOLOGY OF WOMEN (1976); DARWIN L. THOMAS ET AL., Role-Taking and Power in Social Psychology, 37 AM. SOC. REV. 605 (1972); SHIRLEY WEITZ, NONVERBAL COMMUNICATION: READINGS WITH COMMENTARY (1974)).
to ignore the feelings of those who report to them. Consistent with these intuitions, some evidence supports the conclusion that those with less power, such as supervisees, are more likely to catch than to shape the emotions of those who wield more power. 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.

- **Positive emotional contagion leads to greater cooperativeness and to an increased willingness to make concessions in tasks involving negotiations.** This result bears on workplace negotiations of all kinds. Moreover, the useful positive feeling that facilitates negotiations can come from either human or environmental sources.

- **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. 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.

In sum, the research to date suggests that emotional contagion has concrete effects in a variety of workplace contexts.

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170. See, e.g., Hatfield et al., supra note 112, at 175 (explaining that because supervisors may have little reason to care what impression they make on subordinates, they can be direct in expressing thoughts and feelings); Sara E. Snodgrass, Women’s Intuition: The Effect of Subordinate Role on Interpersonal Sensitivity, 49 J. Personality & Soc. Psychol. 146, 150, 152–54 (1985) (finding, in a study of thirty-six pairs of subjects assigned to roles as leader and learner, that role had a significant effect on sensitivity to the other person’s feelings, with superordinates less sensitive and subordinates more so).

171. See, e.g., Snodgrass, supra note 170; see also supra note 170 (discussing Snodgrass’s results); Hatfield et al., supra note 112, at 175 (explaining that supervisees have reason to try to understand their supervisors, in order to gain their favor).

172. See Joan E. Grusec & Rona Abramovitch, Imitation of Peers and Adults in a Natural Setting: A Functional Analysis, 53 Child Dev. 636, 636, 642 (1982) (reporting that, in a natural play setting, preschoolers who were more dominant (by visual attention received and teachers’ ratings) were imitated most and also engaged in a great deal of imitation); Christopher K. Hsee et al., The Effect of Power on Susceptibility to Emotional Contagion, 4 Cognition & Emotion 327 (1990) (reporting that more people assigned to a “teacher” position absorbed the emotions of a videotaped interviewee designated a “learner” than designated learners absorbed from designated teachers).


174. See supra note 173.

4. Further Research

More work needs to be done to answer a variety of questions that remain regarding emotional contagion. I note four of these questions here. First, apparently no research evaluates ways that either senders or receivers can prevent emotional contagion. But anecdotal evidence suggests that people can prevent emotional contagion: Emergency room nurses, psychotherapists, and airline baggage service representatives, for example, survive or even thrive in occupations involving the constant distress of others. Second, and relatedly, we do not yet know precisely what makes a person more or less susceptible to emotional contagion—information that could suggest ways to accommodate mental illness in the workplace and to manage coworker personality conflicts more generally. Third, it would be useful to know how long a given instance of emotional contagion affects the receiver—for example, how long a “transferred” emotion stays with the receiver. As noted earlier, there is no evidence that people with mental illness are actually making other people in the workplace mentally ill, but the extent of the mean effect—as well as the individual variance—would help us understand to what extent one mentally ill or distressed employee may burden coworkers or customers. Fourth, research must continue building toward a consensus on the mechanism of emotional contagion, as well as the extent to which this process differs from other mechanisms of interpersonal influence, such as persuading others of one’s world view. Much work remains on many fronts, of which these are just a few. But the current literature nonetheless points to some intriguing implications for antidiscrimination theory and law.

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 Article 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, 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 pass particular emotions to others—can create hedonic costs. 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

176. See infra note 252 and accompanying text.
177. See supra note 144 (hypothesizing that various features of individuals contribute to their relative susceptibility to emotional contagion).
178. See supra text accompanying note 155.
179. See supra Parts III.A–C.
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. 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.

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. On the contrary, the more an individual likes and feels empathy for a person with a mental illness, the more likely she is to pick up the emotions of that person. And wanting 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. And 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 sadness and loneliness. Nor do we know anything about Irwin, but when he was deciding whether to hire Mark, he might have been going through a difficult time at home or at work. Though not

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180. See also supra text accompanying notes 139–42.
182. See supra note 133 and accompanying text.
183. See supra text accompanying note 77.
184. See id.
185. See supra text accompanying note 78.
186. See id.
clinically depressed, Irwin might have struggled to go to work every morning, and therefore might have believed that hiring someone with a depressed affect could be particularly emotionally costly for 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, for instance, that those who are clinically depressed are less likely than nondepressed people to overestimate what others think of them.187 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.

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 be either statistical discrimination or inefficient stereotyping,188 though the foregoing analysis suggests that, at least for some mental illnesses, mental illness may

187. See, e.g., Peter Lewinsohn et al., Social Competence and Depression, 89 J. ABNORMAL PSYCHOL. 203, 210–11 (1980) (reporting the finding that “self-ratings of the depressed on positive attributes did not differ significantly from the observers’ ratings of them, and in that sense the depressed were the most realistic” while the nondepressed subjects “saw themselves significantly more positively than the raters judged them to be” and concluding that “[n]ondepressed people may thus be characterized with a halo or glow that involves an illusory self-enhancement in which one sees oneself more positively than others see one . . . .”); see also Shelley E. Taylor, Positive Illusions 212–15, 215 (1989) (discussing the discovery of “depressive realism,” i.e., the finding that “depression itself may not engender biases, but rather may result from a lack of or loss of the positive biases that normally shelter people from the harsher side of reality”). 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.

188. See supra Parts II.B and II.C.1.
often predict negative emotional contagion and thus its use as a proxy might look more like statistical discrimination.

Moreover, although emotional-contagion-based discrimination concerns liking and affect, it is likely not so 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 hedonic costs of mental illness would seem to bode poorly for the completely 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. Workplaces seem particularly well-suited to constructive contact of this sort, because ongoing contact among interdependent equals provides the most potential for reducing stigma. Recent work on the stigma of mental illness concludes that contact has more potential for reducing stigma than other strategies such as antistigma education or efforts to suppress negative messages about people with mental illness. And some studies have demonstrated that contact with people with mental illness can help to reduce negative attitudes towards such individuals. These results are encouraging, and unsurprising, given the widespread animus toward and stereotyping about people with mental illness. And they suggest that workplace integration is important for diminishing the stigma of mental illness.


190. See Bagensios, supra note 26, at 844 & n.55; Corrigan & Penn, supra note 58, at 771.

191. See Corrigan & Penn, supra note 58, at 772–73.

192. See, e.g., id. at 771; Donna M. Desforges et al., Effects of Structured Cooperative Contact on Changing Negative Attitudes Toward Stigmatized Social Groups, 60 J. Personality & Soc. Psychol. 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); Monika E. Kolodziej & Blair T. Johnson, Interpersonal Contact and Acceptance of Persons with Psychiatric Disorders: A Research Synthesis, 64 J. Consulting & Clinical Psychol. 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); Bruce G. Link & Francis T. Cullen, Contact with the Mentally Ill and Perceptions of How Dangerous They Are, 27 J. Health & Soc. Behav. 289, 299 (1986) (finding an inverse relationship between self-reports of previous contact with people with mental illness and perceived dangerousness, controlling for the voluntariness of the contact, to eliminate the hypothesis that less fear of mental illness increases contact rather than the other way around).

193. See supra Part II.
But the hedonic costs of mental illness—and the potential for their transmission through emotional contagion in particular—suggest special limits to the power of contact for diminishing stigma against people with mental illness. Indeed, contact alone may never completely eliminate the stigma of mental illness. Some factors have been identified that may diminish the effectiveness of contact in certain contexts, but the operation of hedonic costs in combination with emotional contagion in the context of mental illness 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 can lead to greater emotional contagion. 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 increase unwanted affect; that is, liking may, paradoxically, lead to negative feelings. Thus, in addition to its salutary effects on animus and stereotyping, contact may also inspire a desire to avoid people with mental illness.

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

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194. 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 & SOC. PSYCHOL. 965, 970 (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 supra note 189.

195. See supra note 133 and accompanying text.

196. Hedonic costs based on emotional contagion also suggest a reason why “contact” might not eradicate coworkers’ impulse to exclude members of any given disliked group. A coworker may be hostile towards someone of, say, a particular race, because of animus towards that race, and that hostility may be contagious; that is, a person who is a member of a disliked group may reflect back some of the hostility towards her. This dynamic of contagious hostility would presumably continue as coworkers interacted over time, alongside the salutary effects of contact, until the last moment when animus still exists.

197. Fear of contagion is in some sense part of the fear of any stigmatized or excluded group. For example, men may fear that women will feminize their work culture, or girls on a playground may avoid the boys for fear of catching “cooties.” But I am not describing contagion per se, nor am I describing a phenomenon that concerns categorical traits or stereotypes. Instead, emotional contagion concerns actual symptoms of illness, borne by many of the group’s members, that may individually affect nearby others.
illness is inevitable. 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 workers with mental, as well as physical, disabilities. If many people with mental illness create hedonic costs, then we must examine the workplace and case law closely to determine how the ADA requires employers to behave towards employees with mental illness. Part IV therefore addresses four key doctrinal questions in this light. And for those who may ask whether the statute should be rewritten to treat people with mental illness differently than those with other disabilities, or to treat hedonic costs differently from other costs of integration and accommodation, Part V sketches several reasons why the statute should offer the protection that it does.

IV. DOCTRINAL IMPLICATIONS

The foregoing analysis of the hedonic costs of mental illness helps to answer questions about the elements of the ADA plaintiff’s cause of action—questions about what makes an individual qualified for the job, what constitutes reasonable accommodation, and what renders someone disabled for purposes of protection under the Act. Specifically, the analysis has four key doctrinal implications, which I discuss in turn, after a brief overview of the relevant statutory framework. First, the ADA generally requires employers to bear the hedonic costs imposed in 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 include affecting the mental state of others as among their fundamental job duties. 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 under-

198. 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. According to Hsee et al.:

[T]he 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.

Hsee et al., supra note 172, at 336.
standable 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 to supply an answer. This Part ends with a brief discussion of the effect these doctrinal points will have on outcomes in the courts. In sum, this analysis does not tell us who wins, but, if adopted, these conclusions are likely to push more cases past summary judgment to the trial stage, where courts must squarely confront the difficult factual questions that arise under the statute in this context.

A. PRELIMINARIES: STATUTORY FRAMEWORK

As noted earlier, the ADA explicitly protects people with mental as well as physical disabilities. Most importantly, of course, the face of the statute repeatedly incorporates both physical and mental disabilities.\textsuperscript{199} 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.\textsuperscript{200} Such exclusions are the remnants of an effort by Senator Armstrong and others to remove serious mental illnesses—such as bipolar disorder and schizophrenia—from the Act’s protection.\textsuperscript{201} Armstrong’s effort failed after a negotiated compromise between Senators Hatch and Kennedy,\textsuperscript{202} and the Act covers most mental illnesses as long as the individual plaintiff meets the requirements of one of the three prongs of the definition of disability discussed above.

The text of the statute, enacted in 1991, duplicates much of the language of the Rehabilitation Act of 1973, with certain meaningful alterations.\textsuperscript{203} The statutory framework of Title I of the ADA is not uncomplicated, so what follows

\begin{footnotesize}
\begin{enumerate}
\item[199.] See, e.g., 42 U.S.C. § 12101(a)(1) (2000) (reporting in the findings of the statute that “some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older”); § 12102(2)(A) (defining disability as, inter alia, a “physical or mental impairment that substantially limits one or more of the major life activities of such individual”).
\item[200.] § 12211(b) provides:
Under this Act, the term “disability” shall not include—
\begin{enumerate}
\item transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
\item compulsive gambling, kleptomania, or pyromania; or
\item psychoactive substance use disorders resulting from current illegal use of drugs.
\end{enumerate}

\item[202.] Feldblum, supra note 201.
\item[203.] For example, the Rehabilitation 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) (2000). The ADA
\end{enumerate}
\end{footnotesize}
is a brief sketch of the basic elements of the ADA plaintiff’s cause of action, highlighting key features of the definition of disability.

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, 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 . . . .” 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.”

There are four elements to the plaintiff’s cause of action in a discriminatory discharge case under the ADA:

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.

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.

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. 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).  

The most noteworthy interpretation of the ADA’s core language for our purposes concerns a plaintiff’s efforts to mitigate her disability. Under the

(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.

29 C.F.R. § 1630.2(j)(1) (2005). 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).

210. See, e.g., Wright v. CompUSA, Inc., 352 F.3d 472, 477 (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, speaking, concentrating, hearing and processing information, and thinking and articulating thoughts . . . .”); Heisler v. Metro. Council, 339 F.3d 622, 628–29 (8th Cir. 2003) (“Heisler has simply failed to establish that his depression, or any other impairment, significantly restricted her ability to sleep (or interact with others or concentrate) as compared to the general population.”); Lee v. Ariz. Bd. of Regents, 25 F. App’x 530, 534 (9th Cir. 2001) (unpublished opinion) (concluding, inter alia, under the Rehabilitation Act that “Lee [a university professor] was not substantially impaired in intellectual function and concentration, which arguably are not even major life activities, as evidenced by the fact that she continued to teach a full course load”); Roeber v. Dowty Aerospace Yakima, 21 F. App’x 649, 650–51, (9th Cir. 2001) (unpublished opinion) (finding plaintiff with migraines and bouts of depression not disabled, and stating, “The affidavit also described bouts of depression brought on by migraines; although these were ‘essentially incapacitating’ while they lasted, Roeber ‘minimized their effects . . . as [he] wanted to believe that [he was] living a normal life . . . .’”); Horwitz v. L. & J.G. Stickley, Inc., 20 F. App’x 76, 81 (2d Cir. 2001) (unpublished opinion) (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); 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. Okla. 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 (10th Cir. 1999) (“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.”); Davidson v. MidElfort Clinic, Ltd., 133 F.3d 499, 508 (7th Cir. 1998) (finding plaintiff with ADD was not actually disabled and stating, “The lack of evidence that ADD presently limits [the plaintiff’s] ability to learn is more troubling . . . . There is, in addition, [the plaintiff’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 Me., Inc., 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.”).
Supreme Court’s decision in *Sutton v. United Air Lines*, a plaintiff must be evaluated in her post-mitigation state for purposes of determining whether her impairment substantially limits her in a major life activity. Thus, if a plaintiff wears eyeglasses, as the plaintiffs did in *Sutton*, the court should evaluate how limited she is once she is wearing the glasses, in order to determine if she 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. Nor would the Act cover, as actually disabled, a plaintiff with obsessive-compulsive disorder 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 Section C, but they would probably not qualify as actually disabled.

B. HEDONIC COSTS AND ESSENTIAL FUNCTIONS

The first question raised by this analysis is 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:

1. A paralegal in a small law firm, Robert, suffers from depression. Robert has excellent credentials and does a fine job at his work tasks, which mostly involve independent research. Due to his depression, how-

212. *See infra* note 293.
213. 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 3, at 456.
214. *See supra* Part I (discussing symptomatic/asymptomatic divide).
215. As a private employer, the firm would need to have at least fifteen employees to be subject to the Act. 29 C.F.R. § 1630.2(e) (2005).
216. *DSM-IV-TR*, *supra* note 3, 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.").
ever, others in the workplace tend to leave interactions with Robert feeling sad and anxious.

2. A used car salesman, Tom, suffers from bipolar disorder.\textsuperscript{217} When he is in a depressed phase, his sales are 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.\textsuperscript{218} 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 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 part 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.\textsuperscript{219} In addition, in any negotiation required among coworkers, concessions will come more slowly if the group mood is more negative.\textsuperscript{220} Moreover, personality conflicts in the workplace might themselves consume the time and energy of

\textsuperscript{217} DSM-IV-TR, supra note 3, 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 . . . .”).

\textsuperscript{218} DSM-IV-TR, supra note 3, 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 . . . .”).

\textsuperscript{219} See supra text accompanying note 175.

\textsuperscript{220} See supra text accompanying notes 173–74.
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 apparently more or less susceptible to contagion than others, the length of reaction presumably varies as well. Some interactions may therefore produce some hedonic costs that do not negatively affect productivity.

Second, negative emotional contagion may interfere with relationships with customers or clients. As discussed, positive emotional contagion can increase how much customers like products and how well they evaluate the service they receive. 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. Or in the example involving Vera the social worker, her emotional impact on her clients impeded their progress and caused them to discontinue therapy. Notably, however, a person's true affect does not necessarily leak out into her customer service behavior. Nonetheless, a lack of positive emotional expressiveness, where it characterizes an employee's relations to customers or clients, has the potential to hinder sales or service, as well as customer and client loyalty and goodwill towards the business.

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? The short answer is

221. See supra note 144 and accompanying text.
222. 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.
223. See supra text accompanying notes 157–65.
224. See supra text accompanying note 159.
225. 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.
226. In light of the individualized inquiry required by the ADA, as well as 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., Hubbard, supra note 4, at 886–87 (noting that categorical exclusion of people with mental illness, based on a presumed trait such as propensity to violence, is “incompatible with the ADA's overarching requirement of an individualized assessment of
sometimes yes, sometimes no. 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 may 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.\textsuperscript{227}

Other than as a defense to failure to accommodate, however, the statute contains no freestanding 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,”\textsuperscript{228} and thus, if fired, could make out a case of discrimination under the ADA.

One highly relevant question arising from the case law is whether an employer may 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.\textsuperscript{229} Employers have urged courts to accept definitions of the essential job functions as including, for example, not “offending customers,”\textsuperscript{230} not “making others in the workplace feel threatened for their own safety,”\textsuperscript{231} and “getting along” with others.\textsuperscript{232} What should a court make of an employer’s defining a job as requiring employees to make or not make others feel a certain way?

Courts should view such definitions skeptically. The ADA cannot permit employers generally to define the essential functions of jobs as requiring hedonic benefits or prohibiting hedonic costs. In a sense, every employer might want all employees to contribute positive energy to the workplace; with the

\textsuperscript{227} 42 U.S.C. § 12111(10) (2000). The normative underpinnings of the statute are discussed below. See infra Part V.

\textsuperscript{228} § 12111(10).

\textsuperscript{229} See supra Part IV.A (explaining the elements of the plaintiff’s cause of action to include her being otherwise qualified for the job with or without reasonable accommodation).

\textsuperscript{230} Taylor v. Food World, Inc., 133 F.3d 1419, 1424 (11th Cir. 1998).

\textsuperscript{231} Calef v. Gillette Co., 322 F.3d 75, 86 (1st Cir. 2003).

\textsuperscript{232} 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-employment medical certification of fitness violated § 12112(d) on the ground that, 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”).
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 most jobs would essentially allow employers to exempt themselves from the ADA’s grant of protection to people with mental illness.233

But hedonic costs might render an employee not otherwise qualified for the job in two possible ways. First, the ADA provides that ‘‘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.’’234 Thus an employer might, hypothetically, invoke the direct threat defense to argue that a plaintiff with mental illness poses a direct threat to the mental health of others in the workplace. Neither the statute nor case law, however, suggests that the direct threat defense was intended to cover threats to mental health, and I have seen no case in which an employer has made this argument. In addition, no research suggests that emotional contagion actually makes others in the workplace mentally ill, rather than just producing temporary affective states. The term emotional contagion may therefore, as discussed before, be misleading.235 That said, it is not inconceivable that a person with mental illness could impose hedonic costs that eventually lead another in the workplace to develop distress that rises to clinical levels—perhaps through anger and hostility prompting fear and distress. Indeed, there are ADA cases in which plaintiffs assert claims of discrimination on the basis of mental illness and argue that their mental illnesses were caused by hostile work environments based on sex or race.236 If an employee were actually making others in the workplace mentally ill, or posing a significant risk of so doing,237 then an employer could presumably defend a termination decision on the basis that the employee was posing a direct

233. Cf. PGA Tour v. Martin, 532 U.S. 661, 689 (2001) (stating, in a case holding that a disabled professional golfer could use a cart rather than walking as a reasonable accommodation modifying tournament rules, ‘‘the walking rule is at best peripheral to the nature of petitioner’s athletic events, and thus it might be waived in individual cases without working a fundamental alteration. Therefore, petitioner’s claim that all the substantive rules for its ‘highest-level’ competitions are sacrosanct and cannot be modified under any circumstances is effectively a contention that it is exempt from Title III’s reasonable modification requirement. But that provision carves out no exemption for elite athletics . . . ’’).
234. 42 U.S.C. § 12113(b) (2000). There is some disagreement among courts as to the proper framework for analyzing direct threat; Ann Hubbard has argued persuasively that assertions that a plaintiff created a threat of violence should be treated as an affirmative defense for which the employer bears the burden. See, e.g., Ann Hubbard, Understanding and Implementing the ADA’s Direct Threat Defense, 95 Nw. U. L. Rev. 1279, 1336–45 (2001) (discussing, inter alia, that the ‘‘direct threat’’ provision was created by Congress for the express purpose of protecting disabled employees from irrational fears); Hubbard, supra note 4, at 861–66.
235. See supra text accompanying note 155.
236. See 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, 798 & nn.20–21 (1998) (citing cases).
237. § 12111(3) (defining ‘‘direct threat’’ as a ‘‘significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation’’).
threat to the mental health of others in the workplace in a way that could not be eliminated through accommodation. 238

Second, hedonic costs might render an employee not otherwise qualified for the job if the essential functions of the particular job actually require making other people feel a certain way. Though employers are given some deference in their determination of the essential functions of a job, 239 claims that a job requires the production of a certain positive emotional effect on others, or requires the employee not to produce a certain negative effect, should 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.” 240 The regulations supply a nonexhaustive list of factors relevant to deciding whether something is an essential function, such as whether the position exists to perform that function, 241 and a nonexhaustive list of relevant evidence, such as written job descriptions and the amount of time spent performing the function. 242

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 fundamental job duties include, broadly construed, helping clients to attain a more positive affective state. 243 Certainly much of the psychotherapist’s time is

238. See id; cf. infra notes 253–57 and accompanying text (discussing possible accommodations).
239. See. e.g., § 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.”); see also infra note 242.
240. 29 C.F.R. § 1630.2(n) (2005).
241. Id. § 1630.2(n)(2):

(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.

242. Id. § 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) 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.

243. Cf. EEOC v. Amego, Inc., 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
spent trying to affect the mental state of clients, and the job arguably exists to perform that function. Thus, in the example, Vera would probably be unable to satisfy the elements of a claim 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. He spends very little of his time interacting with others, and he was not hired to perform that function. 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, but the actual aim of the job is sales rather than customer happiness. Thus, if Tom did not get good 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 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, hedonic costs, at least those caused by emotional contagion, may be unrelated to animus; indeed, they may be consistent with or even due to liking a person with mental illness. And they require no categorical thinking, no knowledge even that the person has a mental illness. Relevant here is the ADA’s recognition that particular disabilities may make some individuals less well suited for certain jobs, jobs whose essential functions are a poor fit with the limitations imposed by that person’s disability. Thus, the emphasis here should probably remain on Tom’s ability to make the sale, and the employer would probably have a plausible argument that Tom cannot perform the essential functions.

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, however, the employee actually had had very positive evaluations of her job performance. Id. at 138.

244. See 29 C.F.R. § 1630.2(n)(3)(iii).
245. See id. § 1630.2(n)(2)(i).
246. See id. § 1630.2(n)(3)(iii).
247. See id. § 1630.2(n)(2)(i).
248. See supra Part III.C.
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 there, though, the job involves completing particular transactions, and so a court would have to look closely at job descriptions and testimonial evidence to determine the extent to which tellers in that workplace are hired for their interpersonal effect on others and expected to fulfill particular expectations in that regard. A receptionist whose primary tasks are to answer phones and greet people would seem an easier case for the employer, given that receptionists in most workplaces are probably hired for the way they make others feel, and they likely spend much of their time on the job trying to make people feel welcome.

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 earlier. In addition, even if a person were unable to perform the essential functions of a job that required producing a certain affect in others, specific accommodations might ameliorate the 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 senders or receivers of emotional contagion can prevent it, other than ceasing contact. Completely isolating individuals with mental illness would be highly stigmatizing and therefore not acceptable (or practical) in most situations, though accommodations like telecommuting might be worth considering under certain circumstances. But other options, such as shifting certain employees from customer service duties to other tasks, might well be suitable accommodations if, for

250. See id. § 1630.2(n)(3)(iii).
251. See supra text accompanying note 159.
252. See, e.g., Hatfield et al., supra note 112, at 195; E-mail from Elaine Hatfield, Professor of Psychology, University of Hawai'i, to the author (May 7, 2004) (on file with author); E-mail from John Cacioppo, Tiffany & Margaret Blake Distinguished Service Professor, University of Chicago, to the author (May 5, 2004) (on file with author); E-mail from Joiner, supra note 155.
253. See, e.g., Duda v. Bd. of Educ., 133 F.3d 1054 (7th Cir. 1998); 29 C.F.R. pt. 1630 app. § 1630.2(o) (2005) ("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.").
254. Requests for telecommuting as an accommodation have generally not fared well in the courts, see, e.g., Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995) (holding that an employer did not have to permit an employee with pressure ulcers to work at home as a reasonable accommodation); Mason v. Avaya Commc'ns, 357 F.3d 1114 (10th Cir. 2004) (holding that an employer did not have to permit an employee with posttraumatic stress disorder to work at home as a reasonable accommodation). However, some employers are providing this accommodation. See, e.g., Jacques v. DiMarzio, Inc., 386 F.3d 192, 196 (2d Cir. 2004) (noting in the facts of the case that the employer had proposed that an employee suffering from depression and bipolar disorder work exclusively from home, to avoid conflicts with coworkers).
example, vacancies exist or job tasks are flexible, though the ADA does not require employers to hire additional employees or otherwise assign away the essential functions of a person’s job. 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.

Finally, an employee whose performance at the essential functions of his job is 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 the 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 due to hedonic costs should be “accommodated” because they do not impose an “undue hardship” on the employer. Tom’s argument has a certain intuitive appeal, particularly if an employee’s performance is only minimally costly to an employer compared to the cost of accepted physical accommodations. But this argument would presumably fail as a doctrinal matter: 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.

255. Cf. Overton v. Reilly, 977 F.2d 1190, 1195 (7th Cir. 1992) (reversing under the Rehabilitation 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). In Overton, the court concluded that it was not clear that the 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.

Id.


257. See Pugh, supra note 157, at 1024; supra text accompanying notes 157–59.

258. Cf. infra Part V (discussing the normative underpinnings of the ADA).

259. 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.”)
In sum, an employer 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 or a positive marginal attribute. Thus, rather than simply deferring to employers’ assertions in this context, courts must closely scrutinize employers’ claims that the essential functions of a job involve making or not making others feel a certain way.

C. 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. The employee generally has responsibility for indicating that she has a disability and needs an accommodation, as employers are responsible for accommodating only the “known disabilities” of an applicant or employee. 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 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 show why the ADA is best read to call for the Seventh Circuit’s approach.

260. Compare Bultemeyer v. Fort Wayne Cmty. Schs., 100 F.3d 1281 (7th Cir. 1996), with Seaman v. CSPH, Inc., 179 F.3d 297 (5th Cir. 1999), and Taylor v. Principal Fin. Group, Inc., 93 F.3d 155 (5th Cir. 1996). For a lengthier discussion of this issue, see Amy Renee Brown, Note, Mental Disabilities Under the ADA: The Role of Employees and Employers in the Interactive Process, 8 WASH. U. J.L. & Pol’y 341, 352–68 (2002) (arguing that the EEOC should issue a mandate that employers engage in an interactive process to negotiate over accommodation).

1. Employee's Responsibility

In Taylor v. Principal Financial Group, the Fifth Circuit concluded that a plaintiff with bipolar disorder 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:

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.

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, 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.

More recently, the Fifth Circuit applied this reasoning to a Domino’s Pizza restaurant manager who suffered from depression and possibly bipolar disorder. The employee had provided his supervisor with a letter from his doctor stating that he suffered from “Major Depressive Reaction” and was “emotionally and physically exhausted.” The plaintiff requested a demotion to assistant manager, which was granted. In his new assistant manager position, the plaintiff was apparently “counsel[ed] . . . for disruptive comments on the job.” About two weeks later, the plaintiff was fired because he repeatedly “yelled” at

262. Taylor, 93 F.3d 155.
263. Id. at 165.
264. 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.”).
265. Seaman, 179 F.3d 297.
266. Id. at 299.
267. Id.
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. 268

Quoting Taylor's language regarding the plaintiff's obligation to identify necessary accommodations, the Fifth Circuit affirmed the district court's grant of summary judgment to the defendant. The court concluded that the plaintiff had failed to provide adequate information about any further accommodations he needed. 269

2. Employer's Responsibility

By contrast, in Bultemeyer v. Fort Wayne Community Schools 270 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. In a case involving a janitor who had suffered "serious mental illnesses, including bipolar disorder, anxiety attacks and paranoid schizophrenia," 271 the court focused on the mentally ill plaintiff's particular difficulty requesting an accommodation.

The plaintiff worked as a janitor for fifteen years before stopping work due to illness. The plaintiff was rehired about a year later. In the new school, the plaintiff was informed that he would not receive "special accommodations" and that he would need to move much faster to get the job done. 272 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, 273 the Seventh Circuit explained 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 accommoda-

268. Id.
269. Id. at 301.
270. 100 F.3d 1281 (7th Cir. 1996).
271. Id. at 1281–82.
272. Id. at 1282.
273. Id. (reversing because the district court failed to treat the case as a failure-to-accommodate case).
tions are necessary." 274

3. Hedonic Costs and Meta-Accommodation

The literature on emotional contagion suggests one reason 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. 275

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." 276 Whether the supervisor needed to tolerate Seaman’s yelling is a separate question, 277 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 meta-accommodation is required of employers in the mental illness context. Due to negative emotional contagion, negotiations must pose particular difficulties for many plaintiffs with mental illness. And given the constitutive role of hedonic costs in mental illness, such a difficulty in negotiating 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 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. 278

An employer might adopt any number of tactics to facilitate successful negotiations. For instance, research discussed in Part III suggests that an influx of positive emotional energy can lead a negotiator to negotiate more constructively with a difficult co-negotiator and even to like his co-negotiator better. 279 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 act as a kind of advocate or negotiator for the employee. If the employee is an effective written

274. Id. at 1285 (internal quotation marks omitted).
275. See supra Part III.C.3.
276. Seaman v. CSPH, Inc., 179 F.3d 297, 299 (5th Cir. 1999).
277. Cf., e.g., supra notes 234–38 and accompanying text.
278. This is consistent with the following general approach encouraged by the EEOC:

[A]n employer should initiate the reasonable accommodation interactive process without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.

EEOC Enforcement Guidance on Reasonable Accommodation, supra note 261 (question 40) (footnote omitted).
279. See supra note 173.
communicator, the employer could 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 possible accommodations, or the employer could seek suggestions from technical resources offered by the EEOC.

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, an employer has a duty to accommodate a mentally ill employee's communication difficulties by making additional efforts to promote an effective, cooperative dialogue about possible accommodation.

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An understanding of the importance of hedonic costs in and around mental illness also helps to answer questions about the definition of disability under the Act. This is the subject of the next two sections.

D. 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. 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 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 they do not have a disability. Thus, the ADA could fail to reach certain discriminatory

280. E.g., Ralph v. Lucent Techs., Inc., 135 F.3d 166, 168 (1st Cir. 1998).
281. See EEOC Enforcement Guidance on Reasonable Accommodation, supra note 261 (supplying an appendix with resources that help employers identify reasonable accommodations).
282. As discussed in Part IV.A, the ADA defines the protected class of individuals to include those in any of three types of situations: (1) individuals who 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) (2000).
283. 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, 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, rather than antidifferentiation, mission. In the context of people being "regarded as" members of a particular class, this
attitudes towards people with disabilities where those attitudes were mistakenly directed at people who did not meet the statutory definition of disability.\footnote{284} 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.\footnote{285}

For people with mental illness, for whom others’ attitudes can be particularly limiting, the regarded-as prong is especially important. Recent Supreme Court dicta, however, threaten to undermine the use of this prong to help root out discrimination against people with mental illness. In particular, the Court’s articulation in \textit{Sutton v. United Air Lines, Inc.}\footnote{286} 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 \textit{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”:

\begin{quote}
\footnotesize
\textit{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.}

\footnote{284. 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. \textit{Cf.} Martha Minow, \textit{Not Only for Myself: Identity, Politics, and Law}, 75 Or. L. Rev. 647, 677–78 (1996).}

\footnote{285. The point is furthered by the lack of provision for regarded-as status in the other key asymmetrical statute, the ADEA. \textit{See} \textit{Gen. Dynamics Land Sys., Inc. v. Cline}, 540 U.S. 581, 584 (2004) (“\textit{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 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.}

\footnote{286. 527 U.S. 471 (1999).}
(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, (2) a covered entity mistakenly believes that an actual nonlimiting impairment substantially limits one or more major life activities.  

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—when he is 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. For example, 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 more likely to be litigated, because it is much more ambiguous. Unless courts require the employer to have extremely specific ideas about the plaintiff’s mental illness and limitation, the second type might provide some plaintiffs with mental illness 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. This omission in Sutton becomes particularly important in light of the insight that the impulse to exclude people with mental illness will likely 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 four weeks five years ago. The employer does not doubt that Alan can do the job as well as Bridget; he just does not like “crazy people.” 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, Alan is not “actually” disabled within the meaning of the statute because, after Sutton, Alan must be considered in his post-mitigation state, and his depression no longer limits him at all, much less substantially so. Alan might be able to argue that his medication limits him in some major

287. Id. at 489.
288. If your employer really wrongly thinks you are blind when you do not even have a vision impairment, his lawyers are probably going to tell him to settle.
289. See infra note 295 and accompanying text.
290. See supra text accompanying note 35.
291. See supra Part IV.A.
292. Alan might want to argue that he falls under the “actually” disabled prong, since others’ attitudes “actually” disable him, though I have not seen this type of argument made by any plaintiffs or the EEOC. I thank Ben Gutman for this point.
life activity, such as reproduction, but to my knowledge, no court has yet addressed this argument with regard to psychotropic medication. Moreover, in light of the regarded-as prong, it seems odd that Alan should have to engage in such indirection to fall within the scope of the Act. But he plainly does not fall under either of the *Sutton* paths for being regarded-as disabled.

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 resemble the *Sutton* Court’s two “apparent ways,” but the regulations also contain the following route to regarded-as disability: “Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment.” 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. Moreover, an employer might argue that the language of the regulation implies that multiple “others” must so regard the person and that the plaintiff must show that more than just the one employer has this attitude in a way that limits him. All 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.


294. From the face of the statute, Alan might seem to be a good fit for the “record of” disabled category, but the scope of the record-of prong is uncertain and varies widely among circuits. See supra note 36.


296. 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.”).

297. For example, it might be relevant that coworkers or customers have such attitudes.
of which impairments are subject to pervasive stigmatizing attitudes.\textsuperscript{298}

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 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 have been inadvertent. Regardless of the Court's intention, the omission of the other prong is not part of the Sutton holding, and so that prong remains available for courts to take up in their analysis of future regarded-as claims.\textsuperscript{299}

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."\textsuperscript{300} 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"\textsuperscript{301}?

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

\textsuperscript{298} 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).

\textsuperscript{299} 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 obsessive-compulsive disorder, 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).

\textsuperscript{300} 29 C.F.R. § 1630.2(f)(2) (emphasis added).

\textsuperscript{301} Id.
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 force them to labor under substantial stigma. This may well describe most mental illnesses. The important point, though, is that the word “only” should not be understood to mean that the plaintiff must show that she is not otherwise limited, merely that the employer’s attitudes, or societal attitudes, are significant enough to be substantially limiting on their own.

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 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.” 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.

302. See supra Parts II.A–B.
303. But cf. Hamilton v. Sw. Bell Tel. Co., 136 F.3d 1047, 1052 (5th Cir. 1998) (concluding that the plaintiff, who suffered from posttraumatic 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”).
304. 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., 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”); 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” (citations omitted)).
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.

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 and therefore knows the hedonic costs intimately. Still, the concerns the employer 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.

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 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.

305. See, e.g., Corrigan & Penn, supra note 58, at 766 (reporting on studies indicating that mental health professionals also show stigmatizing attitudes towards people with mental illness).

306. 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 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. In such a situation it is not important whether those others are wrong about his impairment or limitations, but whether they think he is so limited or whether their attitudes so
E. 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.\(^{307}\) 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 hedonic costs helps us understand and resolve this difficulty with the definition of the class covered by the statute.

1. Defining Mental Disability

In order to qualify as having a disability, therefore 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.\(^{308}\) The question of substantial limitation is an individualized fact-based inquiry, while the question of what constitutes a major life activity is a matter of law. The ADA itself gives no guidance as to what constitutes a major life activity. The EEOC regulations interpreting the ADA, like those of HEW interpreting the Rehabilitation Act, offer only the following illustrative list: “Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”\(^{309}\)

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. Of those, courts have had the most difficulty accepting “interacting with others” as a major life activity. Only one circuit—the Ninth—has plainly held interacting with others to be a major life activity, two have assumed without deciding it to be so or apparently embraced the idea in dicta, and several circuits have expressed reservations about it.

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. 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.” 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


312. Steele v. Thiokol Corp., 241 F.3d 1248, 1255 (10th Cir. 2001); see also Jacques v. DiMarzio, Inc., 386 F.3d 192 (2d Cir. 2004); Doyal v. Okla. Heart, Inc., 213 F.3d 492 (10th Cir. 2000). While the Tenth Circuit expressly indicated that it was assuming without deciding that interacting with others is a major life activity, Doyal, 213 F.3d at 496, the status of the Second Circuit’s decision about interacting with others is more ambiguous. In Jacques, the employee won a $190,000 jury verdict based on her claim that she was discriminated against because her employer regarded her bipolar disorder as substantially limiting her in interacting with others. Jacques v. DiMarzio, Inc., 20 F. Supp. 2d 151, 160 (E.D.N.Y. 2002). The Second Circuit vacated the judgment in favor of the plaintiff on the basis that the jury instructions were erroneous, observing that it “accept[ed] the Ninth Circuit’s premise” that interacting with others is a major life activity but disagreed with the district court about what rendered someone “substantially limited” in this activity. Jacques, 386 F.3d at 202–04. The court appears to embrace the idea that interacting with others is a major life activity, see also infra note 323 (quoting other language supporting this conclusion), but its conclusion that the district court’s jury instructions were erroneous depended only on the court’s conclusion about what makes someone substantially limited in this activity, 386 F.3d at 202–04.

313. The First, Fourth, and Eighth Circuits have disagreed with or expressed reservations concerning this interpretation. See Davis v. Univ. of N.C., 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); Soileau v. Guilford of Me., 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.”).

"little difficulty" was a major life activity: reproduction.\textsuperscript{315} Rejecting the idea that major life activities must have a "public, economic, or daily character,"\textsuperscript{316} 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 . . . ."\textsuperscript{317} 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 \textit{Toyota Motor Manufacturing v. Williams},\textsuperscript{318} the Court offered a somewhat different model of major. Without mentioning its earlier discussion of the nature of major life activities in \textit{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.”\textsuperscript{319} 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 \textit{Toyota} did not overrule \textit{Bragdon}. As noted, \textit{Bragdon} goes entirely unmentioned in the major life activities discussion in \textit{Toyota}, even though \textit{Bragdon} expressly rejected the idea that major life activities must have a "daily character."\textsuperscript{320} The seeming about-face in the language of the decision may be explained by the context of the major life activity at issue in \textit{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.\textsuperscript{321}

\textsuperscript{315} Id.
\textsuperscript{316} 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.").
\textsuperscript{317} Id.
\textsuperscript{318} Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).
\textsuperscript{319} Id. at 197.
\textsuperscript{320} Bragdon, 524 U.S. at 638.
\textsuperscript{321} 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.” \textit{Toyota}, 534 U.S. 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," that is, "such manual work [as required by] her specialized assembly line job," \textit{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
Nonetheless, Toyota leaves us with another idea of major life activity: central to daily life for most people, in short, daily centrality.

But to decide whether interacting with others is a major life activity, courts need not resolve the broader question of the ideal approach to determining whether something is a major life activity, for 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 of lifetime significance (e.g., reproduction, in most cases) and daily centrality (e.g., shopping or working, in most cases).

Moreover, recognizing that hedonic costs are central to mental illness suggests another reason that interacting with others should be a major life activity under the Act. The "substantially limited in a major life activity" inquiry aims to determine if the person's impairment disables her enough. The purpose of defining the major life activities is therefore to identify those sufficiently major activities in which people with disabling impairments are particularly likely to be disabled. So the regulations' illustrative list of major life activities includes things like walking and seeing, apparently because these are important activities in which people with well-known disabilities are particularly likely to be disabled. Thus, the blind person is substantially limited in seeing; the person with paraplegia is substantially limited in walking. When the EEOC proposed further possible major life activities in its Guidance on implementing the act for people with psychiatric disabilities, it aimed to identify those activities—of significant life importance, as always—in which people with mental illness are

"brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house," her restrictions in performing manual tasks were insufficient to render her disabled. Id. at 202. 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.

322. Others have proposed intriguing answers to this question. 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.


323. As the Second Circuit recently put it, "it is difficult to contradict the Ninth Circuit's characterization of 'interacting with others' as 'an essential, regular function' that 'easily falls within the definition of "major life activity."'" Jacques v. DiMarzio, Inc., 386 F.3d 192, 202 (2d Cir. 2004) (quoting McAlindin v. County of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999)).
particularly likely to be disabled. This Article’s discussion of the hedonic costs of mental illness, for the person with the illness and often for nearby others, supports the conclusion that interaction is likely to be such an activity. Therefore, because interacting with others would qualify as a major life activity under either of the Court’s doctrinal schemes, and because people with mental illness are particularly likely to be limited in the area of interacting with others, interacting with others should plainly be considered a major life activity for purposes of the Act.

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. But another basis is suggested, rather dramatically, in the following excerpt from the dissent to the one circuit court decision that clearly holds that interacting with others is a major life activity, *McAlindin v. County of San Diego*:

>[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?

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, one which

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324. 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 of, inter alia, “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”).

325. 192 F.3d 1226, 1233–34 (9th Cir. 1999), cert. denied, 530 U.S. 1243 (2000).

326. *Id.* at 1240 (Trott, J., dissenting).

327. Cf., e.g., Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) (holding under the Rehabilitation 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”). If the person does not have an impairment, then she would instead need to show that she is regarded as having, or has a record of having, an impairment.
substantially limits. As in this quotation from the McAlindin dissent, courts seem to forget these various steps and burdens in their worry over the consequences of this move. This prompts the question of why it seems 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 most sympathetic fear animating social discrimination 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. 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 who may inflict substantial costs.

A recent Second Circuit opinion, Jacques v. DiMarzio, Inc., perfectly captures this anxiety about the hedonic costs of mental illness in the workplace. In a decision whose precise holding is less than clear, the court “accept[ed] the premise” of the Ninth Circuit that interacting with others is a major life activity, then proceeded to cabin that conclusion by inventing a novel standard for substantial limitation, one unique to interacting with others:

This standard is satisfied when the impairment severely limits the plaintiff’s ability to connect with others, i.e., to initiate contact with other people and respond to them, or to go among other people—at the most basic level of those activities. The standard is not satisfied by a plaintiff whose basic ability to communicate with others is not substantially limited but whose communication is inappropriate, ineffective, or unsuccessful. A plaintiff who otherwise can perform the functions of a job with (or without) reasonable accommodation could satisfy this standard by demonstrating isolation resulting from any of a number of severe conditions, including acute or profound cases of: autism, agoraphobia, depression or other conditions that we need not try to anticipate today.

328. See supra note 210 (citing cases in which the plaintiff’s claim is dismissed on summary judgment because her psychiatric impairment is deemed not to be substantially limiting).

329. In an opinion quoting from McAlindin’s dissent, the Second Circuit recently exemplified the tendency by courts to forget that a plaintiff claiming disability based on being substantially limited in interacting with others or based on being regarded as such must actually have or be regarded as having a mental impairment. Jacques v. DiMarzio, Inc., 386 F.3d 192, 202–03 (2d Cir. 2004). The jury instructions at issue in the appeal had specifically stated that, to be disabled by virtue of being regarded as substantially limited in interacting with others, the relevant limitations must be “all due to her mental impairment.” Id. at 200 (apparently quoting the record on appeal). Nonetheless, the court’s opinion seems to imply that any person who did not get along with others would potentially fall within the ambit of the instructions’ definition. See, e.g., id. at 203 (“All things being equal, a ‘cantankerous’ person or a curmudgeon would be more secure by becoming more unpleasant.”).

330. 386 F.3d 192 (2d Cir. 2004).

331. Id. at 203–04 (emphasis added). The court had already highlighted the hedonic costs of working with a person whose mental illness makes her bad at interacting with others.
Tellingly, the court devises a test that restricts protection for interaction-based disabilities to those whose mental illness "isolates" them, implicitly excluding those whose illness prompts them to impose on others. Some other courts had tried to limit the scope of interacting with others as a major life activity by making the substantially limited inquiry particularly stringent in this context—requiring something like an "utter inabilit[ty]," contrary to the Supreme Court's understanding of substantial limitation.\(^3\) But the Second Circuit in Jacques took a new tack: actually giving "substantial limitation" a unique meaning in the context of interacting with others.

The court's reasoning is inconsistent with the accepted meaning and application of the definition of disability under the statute. To be substantially limited in one's ability to engage in a major life activity need not mean doing none or less of the activity. Rather, it means that one lacks the ability to perform the activity in the usual "condition, manner, or duration,"\(^3\) i.e., to do the activity well, properly, or as others do it.\(^3\) Thus, a person who is dyslexic is substantially limited in reading because she reads differently and less well, not because she reads fewer words; a person with severe, uncorrectable myopia is substantially limited in seeing, not because she sees less light or fewer images, but because she sees differently and less well.

Thus the Second Circuit turned away from the accepted doctrinal account when faced with a plaintiff whose mental illness allegedly limited her in her interactions with others, inventing a novel way to exclude a person with mental illness from the scope of the ADA, for fear of the hedonic costs that person might inflict upon others.

Of course, the dichotomy between costs to "us" and to "them" is generally a false one. To the extent that a person's mental illness is partially constituted by negative emotion or distress, as the illnesses in these cases generally are,\(^3\) then the hedonic costs she bears are likely to be at least as great as those she inflicts on others.

Moreover, as discussed throughout this Article, a person's impairment is disabling as a result of the interplay between the impairment and the world. The way that interplay renders 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

\(^3\) See, e.g., Mark DeLoach, Note, Can't We All Just Get Along?: The Treatment of "Interacting with Others" as a Major Life Activity in the Americans with Disabilities Act, 57 VAND. L. REV. 1313, 1336, 1339–40 (2004); see also Bragdon v. Abbott, 524 U.S. 624, 641 (1998) (noting that substantial limitation does not mean "utter inabilities").
\(^3\) See supra note 209.
\(^3\) See supra Part III.A.
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—whether interacting with others is a major life activity—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.\footnote{336} 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.

But plaintiffs who have a choice will not necessarily want to base their claims on being substantially limited in this major life activity as opposed to another. Evidence that a plaintiff is limited in interacting may prompt a court to conclude that the plaintiff is not otherwise qualified for the job, if the court concludes that interacting well with others is an essential function of the particular job. Thus, as others have suggested, plaintiffs may want to base their claims of disability on other major life activities, such as sleeping or caring for oneself, where possible, or on the regarded-as prong of the definition of disability.\footnote{337} Where plaintiffs do argue, however, that their mental illnesses substantially limit them in interacting with others, the courts should interpret the statute according to its language and applicable doctrine and hold that interacting with others is indeed a major life activity.

F. OUTCOMES

This discussion raises a practical question: If courts were to adopt the doctrinal resolutions presented in this Article, what would be the result? Simply put, would more plaintiffs win, or would more lose?

It is not easy to answer this question in the abstract, because the outcome of any given case depends on many factors that are not resolved by the broader doctrinal points discussed here. For instance, even if interacting with others is a major life activity, a plaintiff arguing under that rubric still needs to show, among other things, that her impairment substantially limits her in that activity, and that she could perform the essential functions of her job—which means that interacting well with others is not an essential function of that job or that there is a reasonable accommodation that would enable her to fulfill that function.

\footnote{336} For the Pandora's box metaphor, see supra text accompanying note 326 (quoting McAlindin v. County of San Diego, 192 F.3d 1226, 1233–34 (9th Cir. 1999) (Trott, J., dissenting)); see also Martin Kohl, New EEOC Guidelines May Give Employers a Headache, MENTAL CRT. NEWS, Oct. 1, 1997, at 5 (stating that the EEOC “may have opened a Pandora’s Box” with the new Guidelines), quoted in Sarah Starnes, Psychiatric Disabilities and the ADA: An Analysis of Conventional Defenses and EEOC Guidelines, 18 REV. LITIG. 181, 182 n.2 (1999).

\footnote{337} See, e.g., DeLoach, supra note 332, at 1339–40, 1343–45.
These factual questions cannot be answered by this Article’s doctrinal conclusions.

The fact-intensive nature of these inquiries does, however, suggest one practical outcome of this analysis, one that plaintiffs should welcome: fewer summary judgments and more trials. This analysis, if adopted, eliminates a number of routes to easy dismissal of cases. It says, for instance, that a case cannot be summarily dismissed because interacting with others just is not a major life activity, or because the only way you could be substantially limited in that activity would be not to be able to do it at all, or because all jobs must require interactive skills among their essential functions, or because to be regarded as disabled, others have to make an actual mistake about you and not just have limiting attitudes, or because people with mental illness have the greater burden in negotiations over accommodation because mental illness is hard to understand. For courts to reject these simple resolutions at the summary judgment stage is to open the door to more scrutiny of the merits and hence more careful scrutiny of factual issues. To this extent, the analysis here, if accepted, would likely lead the law in pro-plaintiff directions.

Of course, the underlying factual questions will often be difficult; the fact that a court must decide these issues does not mean it will decide them in the plaintiff’s favor. And in a sense, it may seem that this Article encourages courts to find against plaintiffs, by highlighting a reason that reasonable people may want to discriminate against people with mental illness, and discussing an essential function of some jobs that may be especially difficult for some individuals with mental illness. By sympathizing with the discriminator, might the analysis help to justify exclusion by saying that people with mental illness may impose significant hedonic costs on others, including coworkers and customers?

To some extent, the question is a plausible one; it is certainly true that an understanding of hedonic costs will justify the exclusion of some individuals with mental illness from some jobs—in particular, those individuals whose jobs include among their essential functions making others feel positive emotions or not feel negative emotions, and whose symptoms render them unable to fulfill that function with or without accommodation. But, for at least three reasons, the claim that the Article identifies a reason for exclusion should not be overstated. First, as discussed, people with mental illness are extremely unlikely to make others in the workplace mentally ill or even come close to doing so. Certain individuals may contribute to some negative emotion for others, but this is quite different from saying that mental illness is contagious; and negative emotion is not itself a sufficient basis for discrimination. Second, more research may well show how to reduce negative emotional contagion and other hedonic costs of mental illness. Finally, and most importantly, candid discussion of the possible reasons for discrimination in this context seems likely to help plaintiffs more

338. See supra note 155 and accompanying text.
than harm them. The ADA presents many avenues for summary dismissal. And, as noted earlier, the impulse to avoid or exclude people with mental illness is widespread. The fact that potential discriminators cannot be identified and isolated—but instead include most people—means that the impulse to discriminate is likely to be naturalized as common sense. This in turn creates a risk that courts will dispose of these cases in the easiest way possible, rather than reaching the hard questions. This Article attempts to unsettle that common sense by speaking candidly about the reasonable (as well as unreasonable) reasons people might want to discriminate against people with mental illness, by pointing to the ways these reasons underpin current doctrinal quandaries, and by proposing a principled resolution to these questions, in light of the demands of the ADA.

V. NORMATIVE FOUNDATIONS

A skeptic, or any other reasonable person, might well respond to the foregoing by asking this question: Isn’t the true upshot here that the ADA should be amended so that workplaces do not have to absorb these hedonic costs? Why should others—employers, coworkers, customers—have to incur emotional costs from people with mental illness when the desire to avoid those costs is not based in animus or other irrational prejudice? Why should the sympathetic discriminator—whose sensitivities lead him to feel for and with others, and who thus wants to avoid and exclude people whose mental illnesses prompt negative emotions in themselves and thus in him—be considered a discriminator at all?

The basic answer is similar to the reason why a workplace should bear the costs of accommodating people with disabilities more generally: Unless workplaces bear these costs, people with mental illness will likely be subject to systematic exclusion. The employer faced with an individual applicant or worker with a mental illness is the person currently in a position to contribute or not to contribute to systematic exclusion and so, to the extent that the employer can do so without suffering significant hardship, she should bear the costs of including rather than excluding. I will turn to the particular matter of coworkers in a moment, but first, I offer a few remarks about workplace inclusion.

Working has numerous benefits to people with mental illness. Studies indi-

339. See also supra text accompanying note 18.

340. A more comprehensive account of this argument for the ADA’s accommodation requirement is given in Bagenstos, supra note 26, at 839–70. The government could reimburse employers’ accommodation expenses—or, similarly, compensate employers for the hedonic costs they absorb—but concerns about waste and fraud would be weighty. E.g., Julie Roin, Reconceptualizing Unfunded Mandates and Other Regulations, 93 Nw. U. L. Rev. 351, 364–68 (1999). Employers may therefore be in the best position to make cost-effective accommodations that prevent systematic exclusion, though this is an unanswered empirical question. Regardless of the relative efficiencies, however, the point here is that requiring employers to pay can be justified by the fact that employers otherwise contribute to systematic exclusion, in the absence of anyone else paying.
cate that work helps people with mental illness meet various of their needs and to avoid relapse.341 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.342 In addition, although contact is unlikely to eliminate completely the impulse to discriminate in this context, for the reasons discussed above, successful integration into an employment context can help to overcome stereotypes and bias about mental illness.343 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 some potential to improve attitudes toward people with mental illness.344 These benefits are significant.

Whether these benefits of inclusion, among others,345 outweigh whatever costs people with mental illness may impose on workplaces is a difficult empirical question. But the argument here is not that the statute necessarily can or should be defended on welfarist grounds alone. Inclusion has value beyond the particular benefits that redound to individuals. Accordingly, the statute seems to embrace both welfarist and redistributive aims. Although Congress has not done a full welfare analysis, the findings of the statute mention the costs to the nation of the "unnecessary" dependency of individuals with disabilities who could be working and thus contributing to the economy.346 But importantly, the findings begin with the goal of inclusion,347 emphasizing not only the problem of exclusion based on past prejudice, but also exclusion due to a reluctance to alter workplace rules and to make other changes that would facilitate the

341. See, e.g., Perlin, supra note 25, 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.").
343. See supra text accompanying notes 189-92.
344. See, e.g., Corrigan & Penn, supra note 58; see supra note 192.
345. A person with mental illness may of course have particular talents and skills that contribute greatly to the workplace, and compensate or more than compensate for whatever hedonic costs she imposes. In addition, as noted earlier, not every workplace or job favors a positive attitude. A range of workplaces—from chic café to funeral home—do not necessarily benefit from a cheery disposition. See supra note 225. Further, certain jobs may be best held by someone more realistic than optimist; as explained above, only the clinically depressed tend to lack a certain kind of learned optimism—i.e., an unrealistically positive view of certain aspects of life, see supra note 187. (Stock trader and military strategist come immediately to mind.) We would of course expect the market to recognize these virtues, in the absence of animus or other irrational prejudice; unfortunately, as discussed throughout, animus and irrational stereotypes about mental illness are still widespread. Moreover, if the benefits of a mental illness come with certain hedonic costs, an employer still might not value them enough to hire or retain an employee, unless required to do so by law.
346. See, e.g., 42 U.S.C. § 12101(a)(9) (2000) (finding that “the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity”).
347. See id. § 12101(a)(2).
inclusion of people who might otherwise be excluded.\textsuperscript{348}

And Congress’s emphasis on inclusion highlights the reason why, as a matter of social policy, the statutory mandate to protect people with mental illness, even if redistributive, is justified. Without the statutory mandate, the various bases for excluding people with mental illness—both rational and irrational, affective and calculated—would lead to the systematic exclusion and subordination of this group on the basis of a morally neutral trait.\textsuperscript{349} Put simply, the alternative to some pressure to include—where the costs borne by the workplace are reasonable—is unacceptable.

Broadly, then, the hedonic costs of mental illness should be borne in the workplace, up to reasonable limits, for the same reason that the financial costs of accommodation should be borne by workplaces.

The hedonic costs of mental illness—particularly those resulting from emotional contagion—are distinctive in several ways, though, which might warrant distinctive treatment. First, as discussed in Part III, these emotional costs are unlikely to bring about their own obsolescence, because they are, to an extent, constitutive of the protected class; we might call this the permanence concern. Second, the apparent social benefits of emotional contagion might make this basis for discrimination normatively distinct from—and less problematic than—animus or rational discrimination; we’ll call this the valence concern. Third, hedonic costs might seem normatively problematic to the extent that some of them fall on coworkers rather than being absorbed entirely by employers; we’ll call this the coworkers concern. Although none of these concerns ultimately trumps the value of inclusion, each warrants a brief discussion.

(1) Permanence. The likely permanence of hedonic costs associated with mental illness does not distinguish it from the accommodation costs anticipated by the statute. While some accommodations are one-time “transitional costs,”\textsuperscript{350} such as a ramp or a reading machine, other accommodations require “ongoing incremental input costs,”\textsuperscript{351} as in modified work schedules or the provision of readers. That the ADA anticipates both kinds of accommodations is plain from the statutory definition of “reasonable accommodation,” which includes not only changes to facilities and the purchase of equipment,\textsuperscript{352} but also “job restructuring,” “part-time or modified work schedules,” “modifications of . . . training materials or policies,” and “the provision of qualified readers or interpret-

\textsuperscript{348} See id. § 12101(a)(5).

\textsuperscript{349} See, e.g., Bagenstos, supra note 26, at 856–70; Strauss, supra note 26, at 100; Sunstein, supra note 26, at 34–36.

\textsuperscript{350} See Mark Kelman, Market Discrimination and Groups, 53 STAN. L. REV. 833, 846 n.23 (2001) (“[T]o respond to the] problem of dynamic discrimination, . . . [t]he organization might face fixed transitional costs—that it never would have borne had it been organized more inclusively in the first instance—but dealing with the plaintiff causes no ongoing incremental input costs.”).

\textsuperscript{351} Id.

Mental illness is not, therefore, distinctive because it may result in ongoing costs to workplaces. Mental illness is distinctive in that employers and coworkers will continue to bear emotional costs from integration of people with mental illness and thus will continue to want to exclude for affective, rather than merely financial-cost-based, reasons. That is, contact will not rid employers and coworkers of their interpersonal reasons for wanting to discriminate against people with mental illness.

Thus, as with ongoing accommodations to the work environment, the costs of inclusion in the context of mental illness require the absorption of some ongoing costs.

(2) Valence. Hedonic costs based on emotional contagion might seem to have a different moral valence than financial costs. Someone might argue that receptivity to emotional contagion is, in many contexts, an individual and social good. Emotional contagion is part of the stuff of intimacy and social glue, part of how individuals form connections and feel understood. Positive emotional contagion helps elevate others, and within the scope of human interaction, some amount of negative and positive emotional contagion may help hold workplaces, families, and friendships together by facilitating human interaction and connection.

In this way, the underlying mechanism of certain hedonic costs of mental illness might seem like the opposite of animus—that is, animus is about categorical dislike, whereas emotional contagion is about empathy and connection. And while we would be happy for people to rid themselves of animus, it would seem undesirable for people to steel themselves against emotional contagion generally; to become emotional automatons would be to lose something arguably desirable. Perhaps for this reason workplaces should not be required to absorb hedonic costs based on emotional contagion.

But this argument misses an important step: the decision to exclude. Even if emotional contagion is, at least for some purposes, morally desirable, and wanting to avoid negative emotional contagion is not morally reprehensible, actually excluding a person to avoid absorbing her negative emotions has no particular claim to moral worthiness. Rather, wanting to avoid those negative

353. Id. The full statutory definition, which is more of an exemplary list than a definition, is as follows:

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id. § 12111(9).
emotions seems closer to the morally neutral wish to avoid the financial costs associated with accommodation. And like the wish to avoid accommodation, the wish to exclude a person to avoid hedonic costs must be overcome, to the extent reasonably possible, if doing otherwise would contribute to systematic exclusion of the relevant group. So while the desire to avoid emotional contagion may be understandable or even sympathetic, that desire still must be curbed where doing so does not result in an undue hardship.

(3) Coworkers. The hedonic costs of mental illness might be distinguished from the costs of accommodation in terms of who bears them. As discussed earlier, some of the hedonic costs of mental illness in the workplace will translate into costs for the employer—through, for example, reduced productivity or sales—but others will merely be absorbed by coworkers. Someone might argue that coworkers’ absorbing some of the costs of integration distinguishes this context from that of other disabilities. The statute plainly anticipates coworkers having to overcome animus, the argument would go, but the costs of accommodation are borne by the employer. Why should coworkers have to absorb these costs?

Practically speaking, however, coworkers already absorb some of the costs of accommodation. The rational employer, for example, does not absorb all of the financial costs of accommodation. He may pass some costs on to the consumer in the form of increased prices, while passing others to his employees in the form of, for instance, lower salary increases, reduced benefits, or fewer snacks in the break room. Similarly, when one employee, because of her disability, cannot perform certain marginal functions of her job, those marginal functions must be completed by another worker. The employer may redistribute other tasks in ways that equalize the burdens. And even if the burdens are equal in terms of time or energy, some tasks may produce hedonic costs, which have to be absorbed by the employee doing them. With this scenario in mind, the EEOC has specifically concluded that coworker morale costs stemming from doing certain marginal tasks that a disabled coworker cannot do, cannot, like fears and prejudice, constitute an undue hardship. There are limits to the costs of accommodation that the EEOC says coworkers must absorb, though: Taking on the marginal functions of another’s job is an undue hardship if it would be unduly disruptive to a coworker’s own work.

Indeed, coworkers should absorb the costs of accommodation, within reasonable limits, for the same reasons that employers should. Like employers,

354. See supra text accompanying notes 219–25.
355. EEOC Enforcement Guidance on Reasonable Accommodation, supra note 261 (“An employer cannot claim undue hardship based on employees’ (or customers’) fears or prejudices toward the individual’s disability. Nor can undue hardship be based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees.”) (footnote omitted).
356. Id. (“Employers, however, may be able to show undue hardship where provision of a reasonable accommodation would be unduly disruptive to other employees’ ability to work.”).
coworkers can contribute to systematic exclusion, but should not, if they can avoid so contributing without suffering an undue hardship. The contours of the undue hardship limit are difficult to identify precisely here, as elsewhere under the ADA, but one analogous limit would seem to be if the hedonic costs imposed by the worker with mental illness prevent the coworker from adequately performing the essential functions of own job. In addition, as discussed earlier, coworkers are protected by the direct threat defense, so in the highly unlikely case that one employee's mental illness imposed hedonic costs that rose to the level of a direct threat to the mental health of others in the workplace, that would seem to be too much to ask others to bear. In the basic case, however, coworkers should bear the hedonic costs imposed by mental illness in the workplace for the same reasons that they and their employers bear the costs of accommodation: inclusion.

Finally, a practical difficulty requires coworkers and employers to bear the hedonic costs of mental illness: As discussed throughout the Article, animus and irrational stereotyping still characterize much of the reaction to mental illness in contemporary society. As a practical matter, it would be no easy task to separate out a desire to avoid or exclude an applicant or employee because of hedonic costs rather than animus or irrational stereotyping, and so the statute rightly requires workplaces to absorb these costs within reasonable limits.

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 hedonic costs from people with mental illness. Discrimination against those with mental illness is sometimes a response to those hedonic costs.

There is a larger implication for antidiscrimination 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

357. See id.
358. See supra text accompanying notes 234–38.
discriminate on the basis of mental illness. Contact, in short, will not wholly eliminate discrimination.

The ADA, however, usually requires employers, coworkers, and customers to bear the hedonic costs of mental illness. Employers cannot generally define the essential functions of jobs to include making others feel or not 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.

Recognizing 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, understanding 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, understanding 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, and an understanding of the hedonic costs of mental illness further supports that answer, the cases contain conflicting dicta, and only one circuit has plainly 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.