

# Review Essay

## DISABLING PREJUDICE

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### INTRODUCTION

Donald Perkl is a person with intellectual disabilities and autism spectrum disorder.<sup>1</sup> After successfully working in a sheltered workshop for more than six years, he was hired as a janitor at a local Chuck E. Cheese. On Perkl's first day on the job, regional manager Donald Creasy visited the restaurant. Seeing Perkl, Creasy instructed store manager Brea Wittwer to fire Perkl on the ground that it was Chuck E. Cheese's policy not to hire "those kind of people."<sup>2</sup> Creasy made a similarly dismissive statement regarding Perkl's predecessor, another individual with developmental disabilities.<sup>3</sup> Wittwer attempted to resist Creasy's order by requesting additional time to sort out Perkl's position. She also faxed a plaintive note to the human resources department indicating that, although Perkl was

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<sup>1</sup> See *EEOC v. CEC Entm't*, No. 98-C-698-X, 2000 WL 1339288, at \*2 (W.D. Wis. Mar. 14, 2000); see also Peter Blanck, *First Thornburgh Family Lecture on Disability Law and Policy, Americans with Disabilities and Their Civil Rights: Past, Present, and Future*, 66 U. PITT. L. REV. 687, 695 (2005) [hereinafter Blanck, *First Thornburgh*] (Professor Blanck testified as an expert witness on Mr. Perkl's behalf); Peter Blanck, *Justice for All? Stories About Americans with Disabilities and Their Civil Rights*, 8 J. GENDER RACE & JUST. 1 (2004).

<sup>2</sup> *CEC Entm't*, 2000 WL 1339288, at \*3.

<sup>3</sup> *Id.*

qualified and his accommodations externally paid for, Creasy was intent on firing Perkl because of his disabilities.<sup>4</sup>

Perkl continued to work at the restaurant for several more weeks, earning excellent work evaluations and the esteem and friendship of his co-workers. However, upon a later visit to Chuck E. Cheese, Creasy terminated Perkl's employment after Wittwer refused to do so.<sup>5</sup> Wittwer and her entire staff resigned in protest and testified on Perkl's behalf in a subsequent lawsuit.<sup>6</sup> Perkl prevailed at trial, and the jury awarded him legal fees, seventy thousand dollars in compensatory damages and thirteen million dollars in punitive damages.<sup>7</sup> The trial court later reduced the punitive damages award to the statutory maximum.<sup>8</sup> Notably, the defendant contended that Perkl's intellectual disability rendered him incapable of experiencing emotional distress from the abrupt firing.<sup>9</sup>

The narrative of Donald Perkl's employment discrimination experience involves two tightly linked threads. First is the overt bigotry animating Creasy's statement that Perkl was inherently inferior and undeserving of equal treatment. This form of prejudice drives Mark C. Weber's powerful book, *Disability Harassment*.<sup>10</sup> Second is the equally harmful preconception that influenced Chuck E. Cheese's contention that people with cognitive disabilities cannot feel emotional anguish,<sup>11</sup> and by implication, that the legal and social standing of people with disabilities is not the same as that of other citizens.

This second theme of unconscious prejudice animates the field of anti-discrimination law but is an area less explored in Weber's latest book. We therefore address invidious, unconscious discrimination in this Review Essay by making the case for why people with psycho-social (also called mental) disabilities,<sup>12</sup> who are largely considered to be among the most

<sup>4</sup> *Id.* ("Can someone please help me with this situation, so we can at least give this guy a chance? We are an equal opportunity employer, are we not?").

<sup>5</sup> *Id.* at \*4.

<sup>6</sup> See Blanck, *First Thornburgh*, *supra* note 1, at 695.

<sup>7</sup> See *id.* at 696 ("[Perkl's jury verdict was] the largest monetary award from a jury in an [Americans with Disabilities Act] employment case brought by the EEOC.").

<sup>8</sup> *CEC Entm't*, 2000 WL 1339288, at \*1 ("[T]he total award is statutorily capped at \$300,000.").

<sup>9</sup> See Leye Jeannette Chrzanowski, *Jury Finds Hiring and Firing Based on Ability Not Myths, Fears and Stereotypes*, GREAT LAKES ADA NEWS SERVICE, Jan. 31, 2000, <http://www.uic.edu/orgs/ada-greatlakes/adanews/001juryfinds.htm>.

<sup>10</sup> MARK C. WEBER, *DISABILITY HARASSMENT* (2007).

<sup>11</sup> On the contrary, Perkl's foster mother testified that he "was very excited and happy when he got the job," proudly showed off his new uniform "and jumped up and down so high that his head hit the ceiling." By contrast, "Perkl came home early on the day he was terminated and went immediately to his room without communicating with anyone;" subsequently, "Perkl has been less attentive to his personal hygiene, fails to get up on his own in the morning, has less interest in participating in social activities or family activities and lost 11 pounds." *CEC Entm't*, 2000 WL 1339288, at \*5.

<sup>12</sup> The nomenclature involving people with disabilities can be confusing as well as problematic. "Disability," "disabilities," and "disabled," when coupled with prefixes referring to people or persons,

stigmatized individuals, should and can be integrated into the workplace. In doing so, our assertions go beyond legal protections to argue that occupationally integrating individuals with mental disabilities is also beneficial for their coworkers without disabilities.

Part I of this Review Essay sets forth Weber's thesis, arguments, and conclusions regarding disability-based harassment. Part II briefly overviews the influence of deeply embedded unconscious discrimination, especially as it affects occupational participation by minority groups, including people with disabilities. Next, Part III provides an initial treatment of why people with mental disabilities normatively should and practically can be incorporated into the workforce. In doing so, we highlight some of the less currently appreciated benefits of integrating these workers. We conclude with a few thoughts on how incorporating individuals with psycho-social disabilities may be seen as part of the overall dynamic of increasing flexibility in the evolving workplace, including some advantages that redound to their nondisabled peers.

### I. DISABILITY HARASSMENT

Mark Weber accomplishes three significant tasks in *Disability Harassment*: he demonstrates the existence of disability harassment, explains the harm that it causes, and provides courts with tools to prevent future instances of disability-based maltreatment. *Disability Harassment* thereby contributes to the antidiscrimination literature by focusing attention on the comparatively less examined, but pervasive phenomenon of intentional mistreatment of people with disabilities.<sup>13</sup> In doing so, Weber deftly weaves his three central points through an account that is at turns both doctrinal and normative. Doctrinally, *Disability Harassment* addresses the application of the Americans with Disabilities Act (ADA)<sup>14</sup> in the workplace, and the application of the Individuals with Disabilities Education Act (IDEA)<sup>15</sup> in schools. Weber's normative assertions regarding disability-based harassment are consistent across these fields. Yet, because less effort has gone

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have become terms of art and are utilized worldwide in statutory language and in policy schemes, although some disability rights advocates are adverse to them. How one draws a line between physical and mental disabilities, however, is open to interpretation. For the purposes of this Review Essay, psycho-social disabilities and mental disabilities are intended to embrace persons with psychiatric conditions (e.g., schizophrenia and bipolar disorder) as well as neuro-atypical conditions (such as the autism spectrum), but not intellectual disabilities (like Down Syndrome). We note that members of the latter group also number among the most excluded and socially stigmatized, and are therefore addressed separately in other scholarship by the authors.

<sup>13</sup> See also Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079 (2002); Mark C. Weber, *Exile and the Kingdom: Integration, Harassment, and the Americans with Disabilities Act*, 63 MD. L. REV. 162 (2004).

<sup>14</sup> 42 U.S.C. § 12,101 (2000).

<sup>15</sup> 20 U.S.C. § 1400 (2000).

into integrating Americans with disabilities in the workplace than in schools, this Review Essay focuses on workplace practices.<sup>16</sup>

*Disability Harassment* opens with powerful narratives that poignantly show the face of disability harassment. Sandra Spragis Flowers was ostracized when her employers discovered she had HIV. Her employers and fellow employees stopped going to lunch with Sandra, refused to shake her hand, subjected her to constant drug tests and eventually fired her.<sup>17</sup> Ricky Casper's supervisors subjected him to a barrage of abuse centered on his learning disability. He was called a "tax write-off," told his children would be mentally impaired, subjected to profanity, required to repeat satisfactorily completed work, and threatened by one supervisor that he would have sex with Casper's fiancé so she could see "what good sex was."<sup>18</sup>

Having initiated the reader to the sort of discrimination *Disability Harassment* seeks to combat, Weber turns to the applicable legal doctrine. Courts have held that the ADA furnishes a cause of action for workplace harassment<sup>19</sup> through Title I's prohibition of discrimination in the "terms, conditions, and privileges of employment."<sup>20</sup> Specifically, these courts have noted that the ADA's statutory language is identical to the antidiscrimination prohibitions of Title VII of the Civil Rights Act of 1964.<sup>21</sup> Because the latter's terms routinely are interpreted to cover race- and sex-based harassment claims,<sup>22</sup> courts have reasoned that harassment actions likewise extend to the realm of disability-based discrimination.<sup>23</sup>

*Disability Harassment* argues that the statutory analogy between Title VII and Title I harassment claims is understandable but nonetheless is ultimately inappropriate.<sup>24</sup> This is because a second statutory analogy drawn from Title VII harassment case law requires plaintiffs to show the harsh and invidious nature of the harassing conditions.<sup>25</sup> Within the disability field,

<sup>16</sup> See also Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861 (2006).

<sup>17</sup> WEBER, *supra* note 10, at 1–2.

<sup>18</sup> *Id.* at 1.

<sup>19</sup> *Id.* at 30 ("In fact, courts have uniformly concluded that the ADA furnishes a cause of action to remedy a work environment that is hostile to persons with disabilities."); see also, e.g., *Fox v. Gen. Motors Corp.*, 247 F.3d 169, 176 (4th Cir. 2001) (allowing an employee with a back injury to bring a suit against his employer under Title I of the ADA for creating a hostile work environment).

<sup>20</sup> 42 U.S.C. § 12,112(a) (2000).

<sup>21</sup> *Id.* § 2000e-2(a)(1).

<sup>22</sup> See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

<sup>23</sup> WEBER, *supra* note 10, at 31 ("The ADA antidiscrimination provisions were drafted with language similar to the language in Title VII that had authoritatively been construed to include hostile-environment causes of action."); see also, e.g., *Fox*, 247 F.3d at 175–76 (finding a right of action under the ADA because it uses language drawn from Title VII).

<sup>24</sup> WEBER, *supra* note 10, at 31–35.

<sup>25</sup> See *Harris*, 510 U.S. at 21 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment . . . is beyond Title VII's purview.")

this manifests in a parallel proof requirement that the workplace is “permeated with discriminatory conduct—intimidation, ridicule, insult—that is sufficiently severe or pervasive as to alter the conditions of employment.”<sup>26</sup>

In Weber’s view, this condition has precluded many disability-based harassment claims because judges have not appreciated the severity of disability harassment, even in those cases with shocking fact patterns.<sup>27</sup> To document this claim, the book sets forth cases where supervisors harassed employees in front of other coworkers by habitually referring to them as “lazy,” “crippled,” or worthless; managers condoned coworkers “routinely” ridiculing and jeering the oral communication of an employee with a severe speech disorder; and an employee with a mild developmental disability was derided and called “Rick Retardo”; as well as other harassing incidents.<sup>28</sup> Yet none of these deplorable episodes was considered severe or pervasive enough to impair working conditions.<sup>29</sup>

*Disability Harassment* avers that the ADA contains a more specific provision regarding harassment than the broad interpretation drawn from Title VII’s general antidiscrimination prohibition.<sup>30</sup> Specifically, the ADA makes it “unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of” any protected right.<sup>31</sup> The provision exists in addition to a separate, earlier one making retaliation unlawful.<sup>32</sup> The discrete harassment section, § 12,203(b), likewise super-

<sup>26</sup> *Silk v. City of Chicago*, 194 F.3d 788, 804 (7th Cir. 1999).

<sup>27</sup> WEBER, *supra* note 10, at 33–35. Other commentators also challenge the propriety of the severe or pervasive standard for disability cases. See, e.g., Lisa Eichorn, *Hostile Environment Actions, Title VII, and the ADA: The Limits of the Copy-and-Paste Function*, 77 WASH. L. REV. 575 (2002) (arguing that people with disabilities have faced greater seclusion and isolation than women and minorities, and hence that the ADA ought to be given leeway from Title VII standards). We argue elsewhere that judges comprehend disability-based discrimination as being different from discrimination on the ground of race or sex. See Stein & Waterstone, *supra* note 16, at 886 (“[N]either judges nor scholars have felt comfortable replacing ‘black or female workers’ with ‘disabled workers.’”); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004) (describing a canonical view of disability discrimination that distinguishes it from “real” civil rights claims).

<sup>28</sup> WEBER, *supra* note 10, at 33–34.

<sup>29</sup> *Id.* The book also recounts one case in which a veteran with post-traumatic stress disorder was harassed by coworkers who made loud explosive noises and laughed as he hid under furniture. The court dismissed the case before trial on the ground that the plaintiff’s “mental condition did not establish him as a person with a disability.” *Id.* at 32. Yet, as Weber explains, the coworkers clearly regarded the victim as disabled—one of the ADA’s definitions of disability—and so the court should have gone forward with the claim. *Id.*

<sup>30</sup> *Id.* at 43. This assertion is all the more plausible when one considers that much advocacy was required to bring about judicial recognition of race and sex-based harassment as causes of action, whereas the notion of harassment was already well instantiated by the time of the ADA’s passage. See generally Catherine MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813 (2002).

<sup>31</sup> 42 U.S.C. § 12,203(b) (2000).

<sup>32</sup> *Id.* § 12,203(a) (“No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge,

sedes the retaliation proscription because disability-based harassment interferes with an employee's ability to show up to work on the same terms as her peers.<sup>33</sup> It is this "right of being there" that, in Weber's estimation, is the most important legal protection established by the ADA.<sup>34</sup> Indeed, he grounds this right in the ADA's preamble section, which acknowledges the historic exclusion of people with disabilities from mainstream society and mandates its eradication.<sup>35</sup> Thus, according to *Disability Harassment*, there is no basis for grafting the "severe or pervasive" standard derived from Title VII suits onto disability harassment claims.<sup>36</sup>

Weber also notes other intriguing possibilities for the ADA's anti-harassment section. First, because § 12,203(b) covers "any person" and not "any person with a disability," it extends to individuals without disabilities who are subject to prejudicial treatment. This includes individuals who mistakenly are considered disabled, and nondisabled individuals who associate with disabled persons.<sup>37</sup> Second, the provision is not limited to an employer's vicarious liability, with the consequence that discriminatory coworkers and supervisors can conceivably be sued as well.<sup>38</sup> Finally, because § 12,203(b) applies to the entire statute, disability-based harassment claims might be brought under the ADA's other titles covering public services and public accommodations.<sup>39</sup>

Apart from these doctrinal moves, the real power of Weber's analysis comes from its normative underpinnings. *Disability Harassment* consistently locates its topic within the larger theoretical framework of the minority model of disability.<sup>40</sup> According to this view, the constructed

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testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.").

<sup>33</sup> See WEBER, *supra* note 10, at 43–46.

<sup>34</sup> *Id.* at 46. For the origin of this notion, also called "participatory justice," see Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (1966). For a discussion in contemporary context, see Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 88–91 (2007).

<sup>35</sup> 42 U.S.C. § 12,101(a)(2)–(5) (setting forth the legislative findings regarding the historical exclusion of people with disabilities from American society, including the workplace).

<sup>36</sup> Courts have not imposed this standard on retaliation claims. See *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778 (3d Cir. 1998); see also *Finnegan v. Dep't of Pub. Safety & Corr. Servs.*, 184 F. Supp. 2d 457 (D. Md. 2002); *Crane v. Vision Quest Nat'l*, No. Civ.A.98-4797, 2000 WL 1230465 (E.D. Pa. Aug. 23, 2000).

<sup>37</sup> See 42 U.S.C. § 12,203(b); WEBER, *supra* note 10, at 55.

<sup>38</sup> See 42 U.S.C. § 12,203(b); WEBER, *supra* note 10, at 55–56. Notably, courts have held that § 12,203(a), which contains similar language, includes liability for individual defendants. See, e.g., *Higdon v. Jackson*, 393 F.3d 1211 (11th Cir. 2004); *Shotz v. City of Plantation*, 344 F.3d 1161, 1168 (11th Cir. 2003); *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 45 n.1 (2d Cir. 2002).

<sup>39</sup> See WEBER, *supra* note 10, at 56–57. See generally Michael E. Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807 (2005) (discussing the relative dearth of ADA Title II and III cases).

<sup>40</sup> See WEBER, *supra* note 10, at 13–15.

environment and the attitudes that it reflects play a central role in creating what society labels as “disability.”<sup>41</sup> Thus, factors external to a person’s impairments determine how disabled from functioning in a given society that individual will be.<sup>42</sup> The model thus suggests that the current exclusion based on disability is a social construct, much like the now-outmoded conventions relating to race and sex.<sup>43</sup>

In making a case for the social model of disability, Weber argues that architectural and communication barriers isolate people with disabilities.<sup>44</sup> “If barriers prevent individuals from riding the bus, entering stores, restaurants, and government buildings, or making use of places of public entertainment,” he reasons, “people with impairments will remain invisible, hidden, and a source of fear and unpleasant associations.”<sup>45</sup> *Disability Harassment* uses the example of the Academy Award-winning film *Million Dollar Baby* and “its apparent endorsement” of euthanizing an injured female boxer to demonstrate how society constructs a distorted view of disability, one in which life with a disability is not worth living.<sup>46</sup> Weber argues that the movie, by displaying horrible and worsening conditions for

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<sup>41</sup> A blunt version of the social model is that of feminist disability rights advocate Susan Wendell, who avers that “the entire physical and social organization of life” has been created with the able-bodied in mind. SUSAN WENDELL, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY* 39 (1996). A more nuanced description is by philosopher and disability rights commentator Anita Silvers, who argues that being biologically anomalous is only viewed as abnormal due to unjust social arrangements, most notably the existence of a hostile environment that is “artificial and remediable” as opposed to “natural and immutable.” Anita Silvers, *Formal Justice*, in *DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY* 13, 75 (Anita Silvers et al. eds., 1998).

<sup>42</sup> As explained by one of the originators of the theory:

[The social model] is based on three major postulates: (1) the primary problems faced by disabled persons stem from social attitudes rather than from functional limitations; (2) all facets of the man-made environment are shaped or molded by public policy; and (3) in a democratic society, public policies represent prevailing public attitudes and values.

Harlan Hahn, *Feminist Perspectives, Disability, Sexuality, and Law: New Issues and Agendas*, 4 S. CAL. REV. L. & WOMEN’S STUD. 97, 105 (1994).

<sup>43</sup> For elaboration of this argument, see Stein, *supra* note 27, at 599 (“According to this framework, the physical environment and the attitudes it reflects play a controlling (if not central) role in creating what society terms ‘disability.’ Thus, factors exogenous to a person’s own impairments determine how much she can function in society.”).

<sup>44</sup> *But see* Adam M. Samaha, *What Good is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251 (2007) (claiming that the social model has “no policy implications” because it does not provide the values upon which any policy judgment must rest).

<sup>45</sup> WEBER, *supra* note 10, at 23–24.

<sup>46</sup> *Id.* at 23. Weber also points out that the film was directed by Clint Eastwood, a notable opponent of disability rights. *Id.* at 25 (citing MARY JOHNSON, *MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE, AND THE CASE AGAINST DISABILITY RIGHTS* (2003)). For an argument that the onset of disability need not be seen by tort law as giving rise to hedonic damages on the ground of diminution of enjoyment of life, see Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745 (2007).

the now-quadruplegic protagonist,<sup>47</sup> justifies its conclusion by equating the protagonist's disability "with illness and death."<sup>48</sup> This type of imagery, he avers, manifests in externally imposed barriers that ought to be challenged for effectively excluding people with disabilities from work, social activities, and educational opportunities.<sup>49</sup> *Disability Harassment* is therefore valuable for demonstrating and discussing an ugly form of human behavior that people engage in and contribute to,<sup>50</sup> but do not like to think or talk about.<sup>51</sup>

In providing examples of harassment as a form of intentional discrimination, *Disability Harassment* acknowledges that these cases are only the "tip of a very large mass."<sup>52</sup> Weber's work draws insights from social science research suggesting that discomfort and anxiety relating to disability can lead nondisabled people to deliberately stigmatize people with disabilities.<sup>53</sup> Yet, this mass may be even larger than is acknowledged by the book.<sup>54</sup> While "existential anxiety"<sup>55</sup> can lead to harassment, intentional discrimination is not the only potential consequence.

A growing body of legal and social science research suggests that the discomfort generated by minorities, women, and people with disabilities in the workplace also leads to less-acknowledged, even unconscious forms of discrimination.<sup>56</sup> Like the blunt disability harassment Weber discusses,

<sup>47</sup> WEBER, *supra* note 10, at 23–24.

<sup>48</sup> *Id.* at 24.

<sup>49</sup> *Id.* at 23–24.

<sup>50</sup> Weber also discusses the manner in which the much publicized Terry Schiavo case distorted public discourse regarding disability. *Id.* at 23; *cf.* Samuel R. Bagenstos, *Disability, Life, Death, and Choice*, 29 HARV. J.L. & GENDER 425 (2006) (describing the politics within the disability rights community on life and death issues).

<sup>51</sup> Historically, this has been the case with various types of disabilities, and perhaps especially true regarding individuals with intellectual disabilities, who have been subjected to involuntary institutionalization and sterilization.

<sup>52</sup> WEBER, *supra* note 10, at 1.

<sup>53</sup> See WEBER, *supra* note 10, at 2 (citing Michelle Fine & Adrienne Asch, *Disability Beyond Stigma: Social Interaction, Discrimination, and Activism*, 44 J. SOC. ISSUES 3 (1988) for the proposition that stigma stems from others' reactions to people with disabilities rather than from the aspects of such disabilities).

<sup>54</sup> See generally Peter Siegelman & John J. Donohue, III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133 (1990) ("[Eighty to ninety] percent of employment discrimination cases filed in federal court do not produce a published opinion.").

<sup>55</sup> The term originates with Harlan Hahn, a political scientist at the University of Southern California and one of the founders of the disability studies movement, who asserted that the fear of becoming disabled results in a desire to segregate people with disabilities from the mainstream. Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective*, 14 BEHAV. SCI. & L. 41, 45 (1996); Harlan Hahn, *Toward a Politics of Disability: Definitions, Disciplines, and Policies*, 22 SOC. SCI. J. 87, 93–96, 100 (1985).

<sup>56</sup> See *infra* Part II.

courts and legislatures have found that this less blatant variant of discrimination is difficult to confront and address.

Accordingly, the next Parts pursue Weber's arguments—involving the social construction of disability and the need for robust antidiscrimination policy to ensure inclusion—beyond the realm of intentional discrimination. Part II sets forth the literature on unconscious bias generally, and specifically as it relates to employees with disabilities. Part III explores ways that the socially imposed stereotypes, prejudice, and stigma that Weber so thoughtfully documents can be confronted in regard to individuals with psycho-social disabilities in the workplace, and explains the social benefits of eradicating those barriers.

## II. UNCONSCIOUS DISCRIMINATION

By illustrating the continuing role of harassment against persons with disabilities, and then demonstrating the statutory bases available to remedy this practice, Weber provides judges, lawyers, and rights advocates with the means to combat disability-based stigma and subordination. Harassment is a particularly pernicious form of discrimination that builds and maintains obstructions and hierarchies between the mainstream population and those with differences. In this respect, Weber ably demonstrates how harassment and its exclusionary dynamic affect people with disabilities when they are characterized as “other.”<sup>57</sup>

*Disability Harassment* observes that many nondisabled people are uncomfortable interacting with people with disabilities,<sup>58</sup> a behavior that other commentators assert derives from animus.<sup>59</sup> Although there is some support for this position,<sup>60</sup> most scholars believe (as does Weber) that the main psychological feelings differentiating people with disabilities from the mainstream are pity, paternalism, and existential anxiety.<sup>61</sup> This point is ironic

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<sup>57</sup> Weber explains that “disability harassment constantly reinforces the message that the child with disabilities does not belong and that nothing he or she does can change that reality.” WEBER, *supra* note 10, at 66. Consequently, these “negative attitudes that the children encounter at school are likely to follow them the rest of their lives, harming them in the workplace and other settings.” *Id.*

<sup>58</sup> *See id.* at 2 (citing Fine & Asch, *supra* note 53).

<sup>59</sup> *E.g.*, ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 5 (1963) (this classic treatment asserts that “we believe the person with a stigma is not quite human”); *see also*, *e.g.*, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 462 (1985) (Marshall, J., concurring in part and dissenting in part) (“[The treatment of people with mental disabilities] in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow.”); Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341 (1993) (identifying intolerance and discrimination as part and parcel of the reasons for excluding people with disabilities from equal social participation).

<sup>60</sup> *See* Stein & Waterstone, *supra* note 16, at 898–99 (summarizing statutory, anecdotal, and case law evidence supporting this view, without opining on its veracity).

<sup>61</sup> *See, e.g.*, *IMAGES OF THE DISABLED, DISABLING IMAGES* (Alan Gartner & Tom Joe eds., 1987) (demonstrating how the disabled are characterized as feeble or incapable, and are often objectified); Chai Feldblum, *Definition of Disability Under the Federal Anti-Discrimination Law: What Happened? Why?*

and perhaps counterintuitive in a book about harassment wherein the most evident feelings toward those with disabilities are overt discrimination and mistreatment. This is especially true when ill treatment is attributable to good intentions gone astray.

Nevertheless, it is these more complex, and at times benign or even well-intentioned, responses to disability that result in imperceptible judgments or behaviors that over time exclude people with disabilities from social opportunities.<sup>62</sup> As such, these socially mediated actions are analogous to the unconscious bias affecting mainstream societal perceptions of women and minorities, even amongst people who profess strong egalitarian beliefs.<sup>63</sup> In both contexts, the elusive nature of this prejudice contributes to it being an intractable problem.<sup>64</sup> Such widespread preconceptions, for example, contribute to minority group members internalizing negative self-perceptions and disbelieving their capabilities.<sup>65</sup> The result is a vicious circle that can make harassing behavior and the norms that support it even more potent.<sup>66</sup>

Legal literature refers to the manifestation of less acknowledged bias in the workplace as “unconscious” or “second generation” discrimination.<sup>67</sup>

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*And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 165 (2000) (“[T]he public’s need to define a person who uses a wheelchair as ‘disabled’ . . . derives from the idea that disabled people lack value and are to be pitied.”).

<sup>62</sup> See generally David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899 (1993) (“[M]uch employment discrimination is the result of tortious acts that are most appropriately described as negligent.”).

<sup>63</sup> See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 331–44 (1987). This type of unconscious bias is widespread. See Mahzarin R. Banaji, *The Opposite of a Great Truth Is Also True: Homage to Koan #7*, in PERSPECTIVISM IN SOCIAL PSYCHOLOGY: THE YIN AND YANG OF SCIENTIFIC PROGRESS 127, 130–38 (John. T. Jost et al. eds., 2004) (using an “implicit association test,” which assesses bias by measuring the spread between individual association and categorical status, to demonstrate that unconscious bias is widespread); see also Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 5–10 (2006) (reviewing literature on unconscious bias).

<sup>64</sup> See generally Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1290 (1987) (describing the difficulty of breaking down legal barriers to gender equality); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 768 (2006) (“Absent the smoking gun, racial epithets, or other explicit exclusionary practices, it has been, and remains, hard to convince courts that intentional discrimination exists.”).

<sup>65</sup> See DAVID M. ENGEL & FRANK W. MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIVES OF AMERICANS WITH DISABILITIES* 67–69 (2003) (recounting interviews in which disabled Americans described socially induced self-distaste and the way that that feeling impacted their life choices).

<sup>66</sup> Like other self-fulfilling prophecies, this is because of a catch-22: certain workers are disadvantaged in the workplace because they are believed to have less value. In turn, those workers invest less in their own development and seek fewer opportunities commensurate with their abilities. See David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1640 (1991) (arguing that discrimination law should not focus on discrete events, but should provide incentives for nondiscriminatory employment).

<sup>67</sup> See, e.g., Bagenstos, *supra* note 63, at 8–15; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L.

According to this view, occupational features such as informal norms, networking, training, mentoring systems, and evaluations all provide ample cover for decisionmaking that is based on bias and stereotypes.<sup>68</sup> As Linda Hamilton Krieger rightly notes, a good deal of prejudiced employment decisions do not “result . . . from discriminatory motivation, as current legal models presume, but from a variety of unintentional categorization-related judgment errors characterizing normal human cognitive function.”<sup>69</sup> She further points out that categorization is so deeply ingrained into our normal mode of mediating the world that we often fail to recognize when we have treated others differently because they do not belong to our individual group identity category.<sup>70</sup> A simple but clear example of how unconscious bias manifests in discriminatory employment determinations is differential treatment by prospective employers of identically qualified job candidates based on the perceived ethnic origins of those candidates’ names.<sup>71</sup> Such discrimination may become more frequent in the modern labor marketplace as employment becomes less permanent, and job searches more frequent.

Second generation discrimination thus quietly and invidiously prevents nonmainstream employees from equal opportunities and experiences in the workplace.<sup>72</sup> Although most of the research in this area focuses on racial and sexual biases and stereotyping, there is reason to believe these issues hold just as applicable for the disability category. People with disabilities are often viewed as inauthentic workers,<sup>73</sup> meaning that society has not yet embraced the notion that employees with disabilities have an equally valu-

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REV. 1161 (1995) (suggesting that a large number of biased employment decisions result from a variety of unintentional categorization-related judgment errors); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468–474 (2001).

<sup>68</sup> See Sturm, *supra* note 67, at 468–69; see also Bagenstos, *supra* note 63, at 8–9; Krieger, *supra* note 67, at 1188.

<sup>69</sup> Krieger, *supra* note 67, at 1161.

<sup>70</sup> *Id.* at 1163–64. For a defense of nonprejudicial categorization as both natural and necessary, see FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* (2003).

<sup>71</sup> See generally Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded as” Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283, 1283–85 (discussing employer decisions based on perceived racial origins, and suggesting the extension of Title VII as a remedy); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (Nat’l Bureau of Econ. Research, Working Paper No. 9873, 2003), available at <http://www.nber.org/papers/w9873>.

<sup>72</sup> Sturm, *supra* note 67, at 460 (“Exclusion is frequently difficult to trace directly to intentional, discrete actions of particular actors, and may sometimes be visible only in the aggregate. Structures of decisionmaking, opportunity, and power fail to surface these patterns of exclusion, and themselves produce differential access and opportunity.”).

<sup>73</sup> See Stein & Waterstone, *supra* note 16, at 913 (“Much as the circumstances of people of color and women were once ignored in the workplace, employers either create or continue to maintain physical and administrative environments that exclude those with disabilities.”). For a discussion of “inauthentic workers,” see Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1919–28 (2000).

able role to play in the workplace.<sup>74</sup> Social cognition research demonstrates convincingly that “stereotypes often work independently of invidious animus, by functioning as cognitive constructs, categories, or organizing principles, which are triggered automatically when someone perceives a social event,” as well as how he or she recalls those events.<sup>75</sup> Historical,<sup>76</sup> sociological,<sup>77</sup> public choice,<sup>78</sup> and judicially influenced<sup>79</sup> reasons also support the lack of acceptance of employees with disabilities.

Courts and legislatures have been vexed by the problem of second generation discrimination. Specifically, it is unclear to what extent prevailing conceptions of employment discrimination law cover unconscious discrimination. Commentators weigh in on both sides of the issue.<sup>80</sup> In response, Susan Sturm advocates a “structural” approach to these problems, whereby courts, workplaces, employers, lawyers, and mediating organizations work together to construct a regime that engages in proactive problem solving.<sup>81</sup> Others are less optimistic that this realistically could happen.<sup>82</sup>

For purposes of this Review Essay, we do not attempt comprehensive solutions to the pervasive issue of unconscious bias, although we have previously weighed in on approaches to address structural discrimination in the

<sup>74</sup> This may account for the different treatment accorded to ADA employment cases and ADA non-employment cases. *See generally* Waterstone, *supra* note 39 (finding that ADA Title II and III cases are more pro-plaintiff than Title I cases).

<sup>75</sup> Michelle A. Travis, *Perceived Disabilities, Social Cognition, and “Innocent Mistakes,”* 55 VAND. L. REV. 481, 489–490 (2002).

<sup>76</sup> *See, e.g.,* DEBORAH A. STONE, *THE DISABLED STATE* 4 (1984) (“The very act of defining a disability category determines what is expected of the nondisabled—what injuries, diseases, incapacities, and problems they will be expected to tolerate in their normal working lives.”).

<sup>77</sup> *See, e.g.,* RUTH O’BRIEN, *CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE* (2000) (arguing that modern disability employment practices are influenced by vocational rehabilitation policies that only integrate disabled workers who have fully adapted themselves to the workplace).

<sup>78</sup> *See, e.g.,* Richard V. Burkhauser, *Post-ADA: Are People with Disabilities Expected to Work?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 71, 72–78 (1997) (questioning whether the ADA was designed in a fashion that allowed the disabled the choice of working, let alone the support mechanisms necessary to that choice).

<sup>79</sup> *See* Stein, *supra* note 27, at 629–36 (describing how the Supreme Court does not view disabled workers as belonging in the workplace to the same degree as nondisabled workers); *see also* Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 918 (2004) (“As a practical matter, persons with disabilities are far more likely than are blacks or women to regularly face built-in headwinds in the form of performance standards, job structure, or workplace environment.”).

<sup>80</sup> *Compare, e.g.,* Amy L. Wax, *Discrimination As Accident*, 74 IND. L.J. 1129 (1999) (arguing that employers should not be held liable for unconscious discrimination), *with* Michael Selmi, *Response to Professor Wax: Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233 (1999) (arguing that unconscious discrimination is controllable and thus should be subject to legal remedies).

<sup>81</sup> *See* Sturm, *supra* note 67, at 479.

<sup>82</sup> *See* Bagenstos, *supra* note 63, at 20–34 (expressing skepticism that Professor Sturm’s recommendations will work on a larger scale).

disability employment context.<sup>83</sup> Rather, we start with one of Weber's core arguments that discrimination must be broadly defined to bring down social barriers precluding people with disabilities from labor market participation. We apply this argument in a direction that Weber does not: to a particularly vexing case, that of workers (or would-be workers) with mental disabilities.

Weber presents a compelling snapshot of the problem of harassment facing workers (and others) with disabilities. However, as discussed in the Introduction, there is a larger universe of people with psycho-social disabilities who do not get the chance to work because prejudice bars their entry into the workplace. There are strong and pervasive unconscious biases against people with mental disabilities, so much so that contact theory (the notion that day-to-day interaction with an otherwise socially excluded group helps to break down prejudice),<sup>84</sup> which Weber views as offering a hope for reduction of stigma,<sup>85</sup> never has a chance to function. It is to this subject that we now turn.

### III. PEOPLE WITH MENTAL DISABILITIES AND EMPLOYMENT

Individuals with psycho-social disabilities historically have been among the most excluded members of society. This failing has unfortunately continued despite the ADA's strong employment mandate. Similarly, insufficient academic attention has been paid to the employment of persons with psycho-social disabilities. We therefore highlight the case for why individuals with mental disabilities normatively should, and reasonably can, be included in the workplace.

#### A. A Most Vexing Case

The ADA has not increased the overall employment rate of Americans with disabilities.<sup>86</sup> Among subgroups of people with specific disabilities, the post-ADA experiences of individuals with psycho-social disabilities are among the most vexing as far as realizing the ADA's goals of achieving inclusive employment and economic equality.<sup>87</sup>

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<sup>83</sup> See Stein & Waterstone, *supra* note 16 (advocating a form of collective action using class actions and disparate impact unified by a theory of "pandisability").

<sup>84</sup> See discussion *infra* at text accompanying notes 100–04.

<sup>85</sup> See WEBER, *supra* note 10, at 6 ("Lack of daily contact at a level of true equality with persons with disabilities promotes and constantly reinforces stereotypes.").

<sup>86</sup> See generally THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE (David C. Stapleton & Richard V. Burkhauser eds., 2003) (collected econometric studies and policy essays). For a comparative perspective on why this may be so, see Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203 (2007).

<sup>87</sup> See Kathryn Moss et al., *Mediation of Employment Discrimination Disputes Involving Persons with Psychiatric Disabilities*, 53 PSYCHIATRIC SERVICES 988 (2002) (finding that employers are less likely to engage in mediation with employees who have psychiatric disabilities than with employees who have other disabilities); Jeffrey Swanson et al., *Justice Disparities: Does the ADA Enforcement System Treat People with Psychiatric Disabilities Fairly?*, 66 MD. L. REV. 94, 95 (2006) (finding that peo-

The vignettes in *Disability Harassment* make evident the harassment targeted at subgroups of people with diverse disabilities in the workforce.<sup>88</sup> This authentication is much needed, yet it still does not present as complete a picture as possible. Research firmly establishes that people with mental disabilities are subjected to greater prejudice than are people with physical disabilities.<sup>89</sup> For example, one study comparing attitudes regarding specific disabilities determined that people with psycho-social disabilities suffer greater stigma than people with criminal records.<sup>90</sup>

Adding to this difficulty, the popular media often portray people with mental disabilities as threatening or dangerous.<sup>91</sup> Moreover, pervasive cultural myths claim that psychiatric disabilities are either the fault of the impaired person (for example, for not taking their medication) or that they are something other than legitimate disabilities (for example, viewing a person with severe depression as “blue” rather than as experiencing a psychiatric impairment).<sup>92</sup> Positive cultural depictions are rare, with a small number of

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ple with psychiatric disabilities are less successful in the legal system than are those with other disabilities).

<sup>88</sup> See, e.g., WEBER, *supra* note 10, at 32 (discussing Glen Zale, a war veteran with post-traumatic stress disorder who was harassed by coworkers who would make loud noises and then laugh when he hid under furniture).

<sup>89</sup> See Jane Byeff Korn, *Crazy (Mental Illness under the ADA)*, 36 U. MICH. J.L. REFORM 585, 586–87 (2003) (“[P]eople with mental disabilities are more feared, more stigmatized, discriminated against more often, and are seen as more likely to commit acts of violence than are people with physical disabilities.”); see also NAT’L INST. ON MENTAL HEALTH, SURGEON GENERAL’S REPORT ON MENTAL HEALTH 6 (1999) (noting that although for people with physical disabilities the most common form of discrimination is paternalism, in the case of mental disability, discrimination is manifested as bias, distrust, stereotyping, fear, embarrassment, anger, or avoidance).

<sup>90</sup> John L. Tringo, *The Hierarchy of Preference Toward Disability Groups*, 4 J. SPECIAL EDUC. 295 (1970) (the ranking, from least stigmatized to most, was: ulcers, arthritis, asthma, diabetes, heart disease, amputation, blindness, deafness, stroke, cancer, old age, paraplegia, epilepsy, dwarfism, cerebral palsy, hunchback, tuberculosis, criminal record, mental retardation, alcoholism, mental illness); see also K.M. Goldstein & S. Blackman, *Generalizations Regarding Deviant Groups*, 37 PSYCHOL. REP. 278 (1975) (finding that people were most likely to have negative attitudes toward alcoholics, drug addicts, and criminals, followed by those with mental illness and mental retardation, and then physical disability).

<sup>91</sup> See Ann Hubbard, *The ADA, the Workplace, and the Myth of the “Dangerous Mentally Ill.”* 34 U.C. DAVIS L. REV. 849, 850–52 (2001); see also NAT’L INST. ON MENTAL HEALTH, *supra* note 89, at 7 (“[I]n the 1990s, in comparison with the 1950s, the public’s perception of mental illness more frequently incorporated violent behavior.”); Bruce G. Link et al., *Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance*, 89 AM. J. PUB. HEALTH 1328, 1328 (1999) (“Rather than waning, . . . stereotypes of dangerousness are actually on the increase . . . .”); Shirley Star, *The Public’s Ideas About Mental Illness* 6 (presented at the annual meeting of the Nat’l Ass’n for Mental Health, Nov. 5, 1955), available at [http://www.norc.org/NR/rdonlyres/CADE8353-C5D3-4FB0-8C84-40E2F0ECECF4/0/sstar\\_public\\_1955.pdf](http://www.norc.org/NR/rdonlyres/CADE8353-C5D3-4FB0-8C84-40E2F0ECECF4/0/sstar_public_1955.pdf).

<sup>92</sup> See generally Michael L. Perlin, *On “Sanism,”* 46 SMU L. REV. 373, 391–98 (1992) (arguing that prejudice against disabled people is analogous to “racism, sexism, heterosexism and ethnic bigotry”).

individuals with psycho-social disabilities presented as heroic exceptions for “overcoming” the mammoth impediments of mental disability.<sup>93</sup>

Michael Perlin, an intrepid advocate for individuals with psycho-social disabilities, suggests the root cause of these social constructs is “sanism,” a phenomenon he characterizes as “an irrational prejudice” against mental disability. According to Perlin, sanism has “the same quality and character” as “other irrational prejudices” such as “racism, sexism, homophobia, and ethnic bigotry.”<sup>94</sup> Unfortunately, sanist preconceptions currently impact the legal system as well as the workplace. For instance, one study links this schema to the fact that people with psychiatric disabilities fare significantly worse than people with nonpsychiatric disabilities in ADA employment cases, both in terms of their success rates and their feelings of satisfaction with the process.<sup>95</sup> It is also notable that one legal commentator even claims that mentally disabled workers extract “hedonic costs” in the form of inevitably negative “emotional contagions”<sup>96</sup> in nondisabled people who are forced to associate with them.<sup>97</sup>

We agree with Perlin that many existing barriers individuals with mental disabilities face are socially constructed and premised on exaggerated and mutable baseline assumptions regarding psycho-social disability.<sup>98</sup> So, too, the assumption that mental disability inevitably leads to inadequate

<sup>93</sup> For a discussion of the myth of overcoming disability, see Michael Ashley Stein, *From Crippled to Disabled: The Legal Empowerment of Americans with Disabilities*, 43 EMORY L.J. 245, 262–63 (1994).

<sup>94</sup> Michael L. Perlin, “*Things Have Changed: Looking at Non-Institutional Mental Disability Law Through the Sanism Filter*,” 46 N.Y.L. SCH. L. REV. 535, 536 (2003).

<sup>95</sup> See Swanson et al., *supra* note 87, at 95, 132–36.

<sup>96</sup> Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 401 (2006) (“Emotional contagion is the process by which we absorb the emotions of nearby others through largely unconscious mechanisms.”). We use the phrase “emotional contagion” because it is a term of art applied by commentators. See, e.g., Gerald Schoenwolf, *Emotional Contagion: Behavioral Induction in Individuals and Groups*, 15 MOD. PSYCHOANALYSIS 49, 50 (1990). Note that some may find the phrase offensive as harkening to notions of contagion associated with offensive racist beliefs.

<sup>97</sup> See Emens, *supra* note 96, at 401. The normative thrust of Emens’s argument endeavors to be positive by arguing that hedonic costs must be borne by the employer, via her employees, as part of the ADA’s mandate of social inclusion for persons with disabilities. We strongly disagree with Emens to the extent that she believes that individuals with psycho-social disabilities inescapably create emotional contagions and extract costs.

<sup>98</sup> For example, the “crazy” employee who could turn violent at any moment is largely a myth. An excellent analysis of this topic can be found in Hubbard, *supra* note 91. See also *Hearing on the Nat’l Insts. of Health Before the Subcomm. on Labor, Health, & Human Servs., Educ. & Related Agencies of the H. Comm. on Appropriations*, 104th Cong. 377 (1996) (statement of Stephen Hyman, Director, Nat’l Inst. of Mental Health) (“I can state without reservation that research shows no biomedical justification for differentiating serious mental illness from other serious and potentially chronic disorders of the nervous system such as stroke, brain tumor or paralysis.”); Randy Borum et al., *Assessing and Managing Violence Risk in Clinical Practice*, J. PRAC. PSYCHIATRY & BEHAV. HEALTH 205, 208 (1996); John Monahan & Jean Arnold, *Violence by People with Mental Illness: A Consensus Statement by Advocates and Researchers*, 19 PSYCHIATRIC REHAB. J. 67, 70 (1996).

work performance.<sup>99</sup> Accordingly, the next sections elaborate our arguments for why occupational integration is socially beneficial as well as practically feasible.

*B. The Importance of Integrating People with Mental Disabilities into the Workplace*

Although a few commentators discuss the normative desirability of integrating people with psycho-social disabilities into the workplace, discussions of the multifarious advantages that accrue to society, workplaces, and fellow employees without psycho-social disabilities are notably absent in the legal literature. We therefore set forth in this Section an initial précis of these positive effects.

*1. Social Benefits to Society.*—Integrating persons with mental disabilities into the workplace creates a society-wide social benefit by helping to erode existing prejudices and misconceptions regarding the group. This dynamic has long been recognized by contact theory, a key theoretical underpinning of the larger antidiscrimination project. Originally developed in the race context, contact theory posits that socially constructed stereotypes and hostility can be improved by close contact between members of different races.<sup>100</sup> This notion was a key part of the assault against “separate but equal” in *Brown v. Board of Education*.<sup>101</sup>

Although contact theory (but not its normative goals) has been criticized as naïve and overly simplistic,<sup>102</sup> it generally has been defended as empirically robust and has withstood the test of time.<sup>103</sup> Because the workplace is a social arena where people work together closely, it has proven a particularly fertile ground for helping to overcome discriminatory animus by putting members of disliked or simply unfamiliar groups alongside mainstream society members who might otherwise be potential discriminators.<sup>104</sup> Yet contact theory has been underapplied regarding individuals with psycho-social disabilities, and to the extent that it has been discussed,

<sup>99</sup> See Hubbard, *supra* note 91, at 892–93 (“[I]t is hard to imagine a job for which a diagnosis of a mental disorder would ‘by its very nature’ prevent a person from performing the job . . . .”); see also James C. Beck, *Epidemiology of Mental Disorder and Violence: Beliefs and Research Findings*, 2 HARV. REV. PSYCHIATRY 1, 5 (1994).

<sup>100</sup> See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 264, 267 (1958); see also GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1962).

<sup>101</sup> 347 U.S. 483, 494–95 (1954).

<sup>102</sup> See, e.g., Lee Sigelman & Susan Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes*, 71 SOC. FORCES 781, 781–82 (1993) (finding empirical support for contact theory).

<sup>103</sup> This is the thesis of a persuasive book. CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 74–76 (2003).

<sup>104</sup> *Id.* at 103–17. Unfortunately, Estlund omits individuals with disabilities from an otherwise inclusive book.

commentators, including Weber, focus on its limits rather than on its potential. Nor has contact theory been developed in the context of the growing prevalence of information and communication technology, wherein individuals with psycho-social disabilities can interact with fellow workers while also maintaining a comfortable distance.

Empirical evidence substantiates the idea that occupational contact can change attitudes toward individuals with discernable disabilities.<sup>105</sup> One study, based on a vignette asking people to judge the work performance of a secretary who used a wheelchair, concluded that people who had previously hired, worked with, or supervised an employee with a disability ranked the secretary higher.<sup>106</sup> Similarly, in the educational context, another study found that students who had exposure to and familiarity with individuals with disabilities exhibited more positive attitudes toward disabled students.<sup>107</sup> And a study of nurses' attitudes toward their patients with disabilities found that prior work and clinical experiences with this population resulted in favorable perceptions of people with disabilities.<sup>108</sup>

Research likewise suggests that contact increases tolerance and positive attitudes toward workers with psycho-social disabilities.<sup>109</sup> One empirical study compared the attitudes of employers who respectively did and did not employ people with psychiatric disabilities.<sup>110</sup> It found that employers with mentally disabled workers perceived it to be significantly easier to accommodate those disabilities than did nonemployers of similarly situated workers.<sup>111</sup> The study also found that the employers with psycho-socially disabled employees were significantly more likely than the nonemployers to rebut social stereotypes and equally value those employees with disabilities. Specifically, employers with mentally disabled workers believed that employees with mental disabilities display equivalent motivation to work, fol-

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<sup>105</sup> The subjects of these particular studies possessed discernable physical disabilities. Although more research regarding contact theory and mental disabilities is needed, as the subsequent paragraph discusses, there is evidence that the same conclusions should apply, at least to individuals with discernable mental disabilities.

<sup>106</sup> Cheryl H. Smith et al., *Attitudes Toward & Performance Evaluations of Workers with Disabilities*, 16 J. APPLIED REHAB. COUNSELING 39 (1985); see also Gil Elmaleh, *A Study of Attitudes Toward Employees with Disabilities* 87 (2000) (unpublished Ph.D. dissertation, Yeshiva University) (on file with the Northwestern University Law Review) (reporting on a questionnaire-based study finding a relationship between contact with disabled people and positive attitudes toward them).

<sup>107</sup> See James A. Pitman & John R. Slate, *Students' Familiarity with and Attitudes Toward the Rights of Students Who are Disabled*, 18 J. APPLIED REHAB. COUNSELING 38, 39 (1993).

<sup>108</sup> See Barbara Biordi & Marilyn H. Oermann, *The Effect of Prior Experiences in a Rehabilitation Setting on Students' Attitudes Toward the Disabled*, 18 REHAB. NURSING 95-98 (1993).

<sup>109</sup> See OFF. OF TECH. ASSESSMENT, U.S. CONGRESS, OTA-BP-BBS-124, *PSYCHIATRIC DISABILITIES, EMPLOYMENT, AND THE ADA 80* (1994) [hereinafter OTA REPORT].

<sup>110</sup> See J.A. Cook & Lisa Razzano, *Cultivation and Maintenance of Relationships with Employers of Persons with Psychiatric Disabilities*, 17 PSYCHOSOCIAL REHAB. J. 103 (1994).

<sup>111</sup> *Id.* at 110.

low directions equally well, are not more likely to be injured on the job, and are not quicker to anger than are other workers.<sup>112</sup>

Another study examined employer attitudes toward hiring persons with psycho-social disabilities in four particular areas (symptomatology, work personality, work performance, and administrative concerns) across eight employment sectors.<sup>113</sup> The results of this analysis show that employers with a history of hiring persons with mental disabilities expressed significantly lower levels of concern about work performance and administrative challenges.<sup>114</sup> In consequence, the researchers suggested that experience in hiring persons with psycho-social disabilities may lead to the lessening of an employer's concerns regarding those individuals.<sup>115</sup> They further suggested "that fears about psycho-social disabilities are allayed when persons with disabilities are successfully employed" and demonstrate that they need not burden employers.<sup>116</sup> These results confirm earlier analyses. Moreover, various studies show that educational interventions, sensitivity trainings, and mentoring programs can be effective in changing beliefs and attitudes about disability.<sup>117</sup> In sum, empirical evidence demonstrates that stereotypes about mental disability are malleable and amenable to change through inclusive workplaces.

Changing attitudes are of great social benefit as part of a larger effort to make the workplace, and through it society at large, more inclusive of individuals with differences. Historically, women, African Americans, and people with disabilities have been viewed by society as atypical workers.

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<sup>112</sup> *Id.*

<sup>113</sup> Edward Diksa & E. Sally Rogers, *Employer Concerns About Hiring Persons with Psychiatric Disability: Results of the Employer Attitude Questionnaire*, 40 REHAB. COUNSELING BULL. 31 (1996).

<sup>114</sup> *Id.* at 38.

<sup>115</sup> *Id.* at 41.

<sup>116</sup> *Id.*; see, e.g., J.M. Levy et al., *Employment of Persons with Severe Disabilities in Large Businesses in the United States*, 14 INT'L J. REHAB. RES. 323-32 (1991) (finding that employers with previous experience in hiring persons with disabilities were more willing to hire persons with disabilities again).

<sup>117</sup> See Courtney Shelton Hunt & Brandon Hunt, *Changing Attitudes Toward People with Disabilities: Experimenting with an Educational Intervention*, 16 J. MANAGERIAL ISSUES 266, 274-76 (2004) ("Although training professionals could develop entire programs focused on issues associated with people with disabilities, such extensive efforts may not be necessary. Even a brief lecture . . . can significantly influence people's attitudes. . . . [I]t could be relatively easy to incorporate training on people with disabilities into existing programs, such as diversity training."). See generally David Hagner, *What We Know About Preventing and Managing Coworker Resentment or Rejection*, 34 J. APPLIED REHAB. COUNSELING 28 (2003) (on the effectiveness of mentoring); Robert Loo, *Attitudes Toward Employing Persons with Disabilities: A Test of the Sympathy-Discomfort Categories*, 34 J. APPLIED SOC. PSYCHOL. 2200, 2212 (2004) (suggesting that a simple self-assessment exercise regarding attitudes toward disabilities in training could cause employees to critically reflect on their own attitudes); Frank R. Rusch et al., *Descriptive Analysis of Interactions Between Co-Workers and Supported Employees*, 29 MENTAL RETARDATION 207, 210 (1991) (noting a "striking" finding that a large percentage of coworkers supported employees with mental retardation in the workplace).

When adjustments are made, they happen last to unfamiliar differences.<sup>118</sup> Biases and misperceptions fall away when differences become more familiar. Assertions once made about women and African Americans, for example, are now considered unacceptable.<sup>119</sup> Eliminating parallel biases and misperceptions that unnecessarily exclude people with mental disabilities from the workplace is the next step in this progressive social reconstruction. In this respect, workplace integration of individuals with psycho-social disabilities can achieve several important attitudinal changes that are normatively beneficial to a diverse society. As Professor Sturm notes in the race and gender context, “[t]he project of achieving inclusive institutions is not only about eliminating discrimination or even increasing the representation of previously excluded groups. It is about creating the conditions enabling people of all races and genders to realize their capabilities as they understand them.”<sup>120</sup> Removing institutional barriers thereby fosters the more general goal of full and fair participation for all groups.<sup>121</sup>

Congress passed the ADA to end the historic isolation and segregation of disabled persons;<sup>122</sup> to combat discrimination in employment for a particularly vulnerable group;<sup>123</sup> and to create equality of opportunity, full participation in community life, and economic self sufficiency.<sup>124</sup> People with mental disabilities are among those in the most, not least, need of the ADA’s protections. For people with psycho-social disabilities (like all people) securing and maintaining gainful employment is crucial to economic self-sufficiency.<sup>125</sup>

More trenchantly, employment is a hallmark of true citizenship because it enables individuals to participate meaningfully in society.<sup>126</sup> As one commentator notes, “paid work, and even full-time work, is becoming a nearly

<sup>118</sup> See generally Stein, *supra* note 27.

<sup>119</sup> *Id.* at 584; see also Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J.L. REFORM 81, 82 (2002) (arguing that stereotypes regarding woman are no longer the subject of judicial deference).

<sup>120</sup> See Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 250 (2006).

<sup>121</sup> *Id.*

<sup>122</sup> 42 U.S.C. § 12,101A(2) (2000).

<sup>123</sup> *Id.* § 12,101A(3) (describing the legislation’s goal of ending discrimination in employment); see also *id.* § 12,101A(6)–(7) (describing the disabled as a discrete and insular minority).

<sup>124</sup> For an account of the ADA as “a perfect storm” that combined politically compatible liberal and neoclassical goals of removing disabled people from federal government dependency, see Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921 (2003).

<sup>125</sup> See generally *id.* See also Swanson et al., *supra* note 87, at 116–17 (on the economic benefits of employment for people with mental disabilities).

<sup>126</sup> See Deirdre M. Smith, *The Paradox of Personality: Mental Illness, Employment Discrimination, and the Americans with Disabilities Act*, 17 GEO. MASON U. CIV. RTS. L.J. 79, 142 (2006) (“Maintaining gainful employment is a prerequisite to being seen as a full citizen.”).

universal experience of adult life.<sup>127</sup> The workplace is the one social forum that brings diverse communities together.<sup>128</sup> It is where meaningful conversations occur, where meaningful relationships form, and where loyalty to coworkers is forged.<sup>129</sup> Being a part of this community is a crucial way for people with disabilities to be full members of society, and to be deemed as such.<sup>130</sup> Likewise, including mentally disabled people in the workplace provides them a mechanism through which to positively affect the lives of their coworkers.

Integrating individuals with psycho-social disabilities, specifically, also counteracts a number of pervasive misconceptions, the elimination of each of which redounds to society's benefit. First is the erroneous notion that mentally disabled people are a distinct and separate group, apart from the social norm. In fact, "[a]bout half of all the people in the United States will develop one or more mental disorders in their lifetimes" and in the course of "any year, one of every four people in this country fits the definition of 'mentally ill.'"<sup>131</sup> A second myth ascribes permanence to mental disability. Yet, people with significant psycho-social disabilities, including schizophrenia spectrum disorder, often recover sufficiently to maintain successful employment.<sup>132</sup>

Perhaps the most significant cultural myth is the most obvious one: the notion that group members are unable to be effective employees.<sup>133</sup> Exam-

<sup>127</sup> ESTLUND, *supra* note 103, at 23.

<sup>128</sup> *Id.* at 3 ("[T]he typical workplace is a veritable hotbed of sociability and cooperation, of constructive and mostly friendly interactions among co-workers day after day, and often year after year. . . . of all the places where adults interact with others, the workplace is likely to the *most demographically diverse*." (emphasis added)).

<sup>129</sup> Estlund examines these bonds that are formed at work in detail. "[W]orking adults have more meaningful conversations—conversations about things that they consider important—with co-workers than anyone outside of their families." See ESTLUND, *supra* note 103, at 24. "Over weeks, months, or years of working together, co-workers learn about each others' lives and develop feelings of affection, empathy, sympathy, and loyalty for each other." *Id.* at 6. "Loyalty to companies may be disappearing, but loyalty to colleagues is not." *Id.* at 87; see also Swanson et al., *supra* note 87, at 116–17 ("The ramifications of employment discrimination [for people with mental disabilities] are enormous. The ability to find and maintain a job is essential to full inclusion in everyday life. In addition to the economic benefits it provides, employment offers the chance for independence, the improvement of skills, friendships, self-esteem, a sense of purpose, and meaningful participation in society.").

<sup>130</sup> See Smith, *supra* note 126, at 142 ("[S]ociety's perception of a 'disabled' person is one who does not work and therefore is not a full, responsible member of society."); Sturm, *supra* note 120, at 324 ("Workplaces are important intermediate institutions through which citizens make their voices heard and determine their opportunity to participate fully in economic and political life.").

<sup>131</sup> William J. Cromie, *Half of Us Suffer from Mental Illness, Survey Finds*, HARV. U. GAZETTE, June 16, 2005, available at <http://www.news.harvard.edu/gazette/2005/06.16/05-suicide.html>.

<sup>132</sup> See Zlatka Russinova et al., *Correlates of Vocational Recovery for Persons with Schizophrenia*, 14 INT'L REV. PSYCHIATRY 303, 306 (2002) (reporting that seventy-five percent of schizophrenic study participants had uninterrupted employment in the previous two years).

<sup>133</sup> See Schultz, *supra* note 73, at 1892 (first using the term "inauthentic workers" in the context of views associated with women employees); see also Harlan Hahn, *Advertising the Acceptably Employable Image: Disability and Capitalism*, 15 POL'Y STUD. J. 551 (1987) (averring that the dominant model

ples of people with mental disabilities who have been successful in the workplace demonstrate that this is indeed a myth. Elyn Saks, the Associate Dean and Orrin B. Evans Professor of Law, Psychology, and Psychiatry and the Behavioral Sciences at the University of Southern California (USC) Law School, recently wrote a book about her experiences as a law professor with schizophrenia.<sup>134</sup> Saks, whose condition was so pronounced that she spent time in mental hospitals, details the many times she was placed in restraints against her will.<sup>135</sup> That she was forced to keep her disability a secret until writing her book is a testament to the stigma, stereotypes, and societal dismissal she witnessed.<sup>136</sup> Saks considers herself fortunate that her colleagues at USC have been understanding and allowed modifications such as substituting teaching loads (that cause anxiety, which can trigger psychotic episodes) with research responsibilities.<sup>137</sup>

Saks, of course, is not alone as a person with a mental disability who has achieved professional success, even in legal academia. James Jones, a professor of law at the University of Louisville Law School, recently wrote of his own (heretofore secret) battle with mental illness, in his case bipolar disorder.<sup>138</sup> His account sounds themes similar to Professor Saks's: self-accommodation and nondisclosure because of fear of stigma from colleagues and students.<sup>139</sup> Susan Stefan argues that people with psychiatric disabilities do not just work in fast food, yard work, or as janitors.<sup>140</sup> Rather, as she details, they are senators, television journalists, print journalists, clinical psychologists, and astronauts.<sup>141</sup> One might also note Ludwig

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of image projected by employers seeking to develop an "industrial reserve army" was one that excluded the participation of workers with disabilities). Carrying the point of exclusion even further, historian Deborah Stone argues that "[t]he very act of defining a disability category determines what is expected of the nondisabled—what injuries, diseases, incapacities, and problems they will be expected to tolerate in their normal working lives." STONE, *supra* note 76, at 4.

<sup>134</sup> See ELYN SAKS, *THE CENTER CANNOT HOLD* (2007).

<sup>135</sup> *Id.*

<sup>136</sup> In one particularly compelling vignette, Professor Saks describes how she applied for a volunteer position at a facility she had been previously committed to as a patient. When the head of volunteers learned about Saks's history, she withdrew the volunteer opportunity. *Id.* at 105–06.

<sup>137</sup> *Id.* at 335.

<sup>138</sup> See James T.R. Jones, *Walking the Tightrope of Bipolar Disorder: The Secret Life of a Law Professor*, 57 J. LEGAL EDUC. 349 (2008).

<sup>139</sup> See generally *id.*

<sup>140</sup> SUSAN STEFAN, *HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES* 7 (2002).

<sup>141</sup> See *id.* at 7–8; see also KATHY CRONKITE, *ON THE EDGE OF DARKNESS: CONVERSATIONS ABOUT CONQUERING DEPRESSION* 13–20 (1994) (on Mike Wallace's account of his battles with depression); MARTHA MANNING, *UNDERCURRENTS* (1994) (clinical psychologist); TRACY THOMPSON, *THE BEAST: A RECKONING WITH DEPRESSION* (1995) (print journalist); Dana Parsons, *Bad Moods: Manic-Depressives Worry About Violence Giving Ailment Bad Name*, L.A. TIMES, Feb. 1, 1989 (on astronaut Buzz Aldrin).

van Beethoven,<sup>142</sup> Winston Churchill,<sup>143</sup> Charles Dickens,<sup>144</sup> Albert Einstein,<sup>145</sup> Abraham Lincoln,<sup>146</sup> or Isaac Newton.<sup>147</sup> In many ways, the workplace success of individuals with mental disabilities demonstrates how real-life events are outpacing legal reform and academic discussion: large numbers of people with mental disabilities already exist in the workplace, albeit perhaps under fear of discovery.<sup>148</sup>

Altering the expectations regarding work for individuals with psychosocial disabilities enables them to flourish and contribute greatly to society.<sup>149</sup> Open and inclusive employment could assist in breaking down the cultural taboo that requires mental disability to be hidden and unspoken, which is in itself a sizeable burden to those with psychosocial disabilities and their families. Providing positive cultural images of people with mental disabilities can also alter broad misperceptions regarding their capabilities and better enable them to lead valued and productive lives. By lessening the impact of external factors, these effects might also potentially allow those individuals to experience less severe disabilities.

2. *Economic Benefits to Society.*—There are significant economic benefits to society that can be achieved by integrating people with mental

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<sup>142</sup> D. JABLOW HERSHMAN & JULIAN LIEB, *THE KEY TO GENIUS* 63–80 (1988) (on Beethoven's outbursts of anger, mood shifts, depression, manic episodes, and suicidal tendencies).

<sup>143</sup> Richard L. Worsnop, *An Ancient Malady*, 37 CQ RESEARCHER 866 (Oct. 9, 1992) (on Churchill's melancholy).

<sup>144</sup> HERSHMAN & LIEB, *supra* note 142, at 106–08 (on Dickens's mania and mood swings).

<sup>145</sup> ANTHONY STORR, *THE DYNAMICS OF CREATION* 61 (1972) (on Einstein's "schizoid detachment").

<sup>146</sup> Worsnop, *supra* note 143, at 870 (on Lincoln's depression).

<sup>147</sup> HERSHMAN & LIEB, *supra* note 142, at 46, 49 (on Newton's manic-depression and paranoia). Although the political arena is not the same as the workplace, it can provide a barometer for evolving social attitudes, not least of all because of the intense scrutiny to which it is subjected. In 1964 and 1988, allegations about lack of "psychological fitness" to be President helped derail the presidential candidacies of Barry Goldwater and Michael Dukakis, respectively. Yet in 1990, Lawton Chiles won the Florida gubernatorial race despite acknowledging his depression. In 1992, the medical records of Nydia Velasquez, a candidate for the House, revealed depression, drug and alcohol abuse, and an attempted suicide. She assured the voters that counseling had helped her, and won the election with seventy-seven percent of the vote. OTA REPORT, *supra* note 109, at 33–34.

<sup>148</sup> See Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271 (2000).

<sup>149</sup> Commentators also aver that employing workers with mental disabilities prevents socially harmful "churning." Samuel R. Bagenstos defines churning as a process in which "employees with hidden conditions experience repeated cycles of being hired by unknowing employers, discharged when their conditions are discovered, and then hired again by different unknowing employers." Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 463 (2000) (also noting that churning is inefficient because it creates "friction" in the labor market without improving the quality of matches between employers and employees). Given the pervasive prejudice against persons with psychosocial disabilities in the workplace, one has to wonder how often people with mental disabilities are repeatedly hired.

disabilities into the workforce.<sup>150</sup> Simply put, social dependency, the option when people with mental disabilities are not working, is expensive.<sup>151</sup> General disability-related public assistance obligations exceed \$120 billion annually;<sup>152</sup> and specifically, social insurance programs are used disproportionately by persons with mental disabilities, and remain a hugely increasing trend.<sup>153</sup> Occupational exclusion also creates a norm of nonwork, which carries with it additional social dependency costs,<sup>154</sup> including harder-to-quantify costs borne by families and friends of unemployed individuals with psycho-social disabilities, who often must take on these obligations.<sup>155</sup>

Additionally, studies show that hiring people with disabilities generally can lower taxpayers' general burdens<sup>156</sup> and benefit the national economy.<sup>157</sup> One report, for example, estimated that for every one million disabled people employed,

there would be as much as a \$21.2 billion annual increase in earned income; a \$1.2 billion annual decrease in means-tested cash income payments; a \$286 million annual decrease in the use of food stamps; a \$1.8 billion decrease in Supplemental Security Income payments; 284,000 fewer people using Medicaid and 166,000 fewer people using Medicare.<sup>158</sup>

Indeed, Samuel Bagenstos persuasively demonstrates that the ADA was in large part "sold" to Congress as an effective means of decreasing disability-

<sup>150</sup> See generally Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 167–77 (2003) (describing Kaldor-Hicks socially beneficial workplace accommodations).

<sup>151</sup> See Bagenstos, *supra* note 149, at 463 (“[B]ringing people with disabilities into the workforce avoids the very significant social costs of dependency.”); Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671, 1677–81 (2000) (presenting empirical studies on the costs of dependency).

<sup>152</sup> David I. Levine, *Reinventing Disability Policy 1* (Inst. of Indus. Relations, Working Paper No. 65, 1997).

<sup>153</sup> See STEFAN, *supra* note 140, at 17.

<sup>154</sup> See Amy L. Wax, *Disability, Reciprocity, and “Real Efficiency”*: A Unified Approach, 44 WM. & MARY L. REV. 1421, 1425 (2003) (emphasizing the costs of a norm of nonemployment).

<sup>155</sup> For a discussion of how these obligations are gender-skewed, see JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000). For a discussion of how and why societies ought to compensate for that imbalance, see Martha C. Nussbaum, *Capabilities and Disabilities: Justice for Mentally Disabled Citizens*, 30 PHIL. TOPICS 133 (2002). See generally EVA FEDER KITTAY, *LOVE’S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* (1999) (asserting the social benefits of care giving in the disability context).

<sup>156</sup> See, e.g., Stein, *supra* note 151, at 1676 n.26 (citing both *The JWOD Program: Providing Cost Savings to the Federal Government by Employing People with Disabilities* (Feb. 6, 1998) and *Taxpayer Return Study, California Department of Rehabilitation Mental Health Cooperative Programs* (Oct. 1995) to show that the federal government and the state of California saved a significant amount of money by employing disabled people).

<sup>157</sup> See Thomas N. Chirikos, *Aggregate Economic Losses from Disability in the United States: A Preliminary Assay*, 67 MILBANK Q. (SUPP. 2) 59 (1989).

<sup>158</sup> See Patricia Digh, *People with Disabilities Show What They Can Do*, HRMAGAZINE, June 1998, at 141, 144 (citing Rutgers University economist Douglas Kruse).

based dependency on public resources.<sup>159</sup> Although it is difficult to disaggregate social costs according to disability-specific status, it does not make sense to accept that the ADA can work to integrate one population of people with disabilities, but not another.<sup>160</sup>

A further, significant benefit is that eliminating workplace discrimination against individuals with mental disabilities encourages people within that group to more fully invest in their own human capital to develop their potential, and thereby add to the talent pool of people in the workforce.<sup>161</sup> Individuals with psycho-social disabilities, much like other minority group members, will not invest in their own development if they are signaled that certain career paths or other opportunities are inappropriate or unattainable.<sup>162</sup> The result is a vicious circle: people are not in a position to challenge exclusion from particular prospects if they do not first consider those options viable.<sup>163</sup> By contrast, altering the American workplace environment to include individuals with mental disabilities in turn creates a strong incentive for those putative workers to enable their abilities to flourish and, in doing so, add talents and abilities to the workplace and society.

3. *Benefits to Workplaces.*—Making employment opportunities inclusive to people with mental disabilities has several benefits that accrue to employers, nondisabled employees, and the workplace environment.<sup>164</sup> To

<sup>159</sup> Bagenstos, *supra* note 124, at 926–27. These arguments beg the question, raised in 1997 by Burkhauser, whether despite these intentions the ADA was effectively designed to increase employment opportunities for disabled workers. See Burkhauser, *supra* note 78. For a recent response in the negative, see Stein & Stein, *supra* note 86.

<sup>160</sup> See generally David A. Weisbach, *A Welfarist Approach to Disabilities* (John M. Olin Law & Econ., Working Paper No. 355, 2007), available at [http://ssrn.com/abstract\\_id=1008985](http://ssrn.com/abstract_id=1008985) (proposing ways that the tax system can compensate for the greater costs generally associated with economically discernable disabilities).

<sup>161</sup> The desirability of self-investment, and the converse undesirability of underinvestment, is a proposition held by a variety of commentators from divergent perspectives. Compare, e.g., Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, 70 J. POL. ECON. 9, 9 (1962) (“[Investment in human capital will] improve the physical and mental abilities of people and thereby raise real income prospects”), with Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities Under United States Law*, 9 YALE J.L. & FEMINISM 213, 217–20 (1997) (“The United States has not facilitated long-term investment in human capital through social market protection. If our choices were based on a careful study of the experience of other countries rather than unexamined rhetoric, we might make different and more humane choices.”).

<sup>162</sup> See Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 VA. L. REV. 1151, 1157–58 (2004) (“[S]ocietal pressure can prevent persons with disabilities from having a sense of entitlement in the workforce and in society as a whole.”).

<sup>163</sup> See *supra* note 66; see also Strauss, *supra* note 66, at 1640 (“Statistical discrimination encourages minorities to underinvest in human capital, which in turn makes statistical discrimination rational.”).

<sup>164</sup> See generally Heidi M. Berven & Peter David Blanck, *The Economics of the Americans with Disabilities Act Part II—Patents and Innovations in Assistive Technology*, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 9, 85–89 (1998) (arguing for the wider application of technology conventionally believed to be limited to use strictly for individuals with disabilities).

begin with, it is unclear whether these workers actually require accommodations,<sup>165</sup> and if they do require accommodations, whether these accommodations carry any significant cost.<sup>166</sup> It stands to reason that the majority of accommodations will involve reconsidering methods of job performance, rather than purchasing or providing physical alterations. There is also a wealth of anecdotal evidence that people with psycho-social disabilities are already in the workplace because they self-accommodate their differences. In the case of schizophrenia, for example, they set aside time to focus away outside voices.<sup>167</sup>

Thus, for many the issue is recognition and tolerance, not alterations to workplace hierarchies.<sup>168</sup> Consider, for example, that there is no material or tangible difference between a daily ten minute smoking break, a daily ten minute insulin injection break, and a daily ten minute isolation break to stop hearing voices, beyond the employer's attitude.

Further, it bears noting that individuals with psycho-social disabilities are often categorized as having those conditions because they do not process information in a neurally typical manner. Consequently, at a time when more standardized tests and criteria have become the norm,<sup>169</sup> the very creativity that in many ways characterizes mental disability,<sup>170</sup> and that has in the past served to exclude the group from the workplace, may become one of its greatest assets.<sup>171</sup> People with mental disabilities may bring abilities

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<sup>165</sup> Mental disabilities are not readily discernable—pursuant to Title I, employers cannot inquire into the history, existence, or extent of a person's disability. 42 U.S.C. § 12,112(d)(4)(A) (2000); see also Chai Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside*, 64 TEMP. L. REV. 521, 531 (1991) (analyzing "the medical examinations and inquiries section of the employment title of the ADA" using legislative history). Conversely, when a person has a disability that is not readily ascertainable and does not disclose to her employer the existence of her disability, she will not be protected under the ADA's auspices, *id.*, much as when a person's religious convictions prevent her from performing her employment, she is not protected under Title VII unless she had previously disclosed that limitation. See, e.g., *Johnson v. Angelica Unif. Group, Inc.*, 762 F.2d 671 (8th Cir. 1985) (denying recourse to an employee who was terminated for missing work on religious holidays because she had not informed her employer of the holidays). This raises a very interesting (but secondary) issue relating to individuals without discernable disabilities. For the purposes of attempting to enculturate within a firm and avoid prejudice, when should a person with a nonvisible disability disclose that disability? This is an especially pertinent question if the disability in question is an episodic one or a mental disability that is likely to encounter strong prejudice.

<sup>166</sup> This subject is addressed at length elsewhere. See Stein, *supra* note 150, at 103–09 (presenting and critiquing the accommodation cost studies in depth); Stein, *supra* note 151, at 1677–81 (same).

<sup>167</sup> See, e.g., Stefan, *supra* note 148, at 307–08 (citing a case of an individual self-accommodating).

<sup>168</sup> *Id.*

<sup>169</sup> See generally KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004).

<sup>170</sup> See Claudia M. Santosa et al., *Enhanced Creativity in Bipolar Disorder Patients: A Controlled Study*, 100 J. AFFECTIVE DISORDERS 31 (2007) (empirically finding enhanced creativity in bipolar disorder patients); Diana I. Simeonova et al., *Creativity in Familial Bipolar Disorder*, 39 J. PSYCHIATRIC RES. 623 (2005) (finding that children with bipolar disorder have enhanced creativity).

<sup>171</sup> For a delightful literary treatment of why "madness" defines humanity, see SEBASTIAN FAULKES, *HUMAN TRACES* (2005).

to a position due to the effect of their disability, for instance, an unusual degree of creativity, high level of accuracy, or attention to detail.<sup>172</sup> Also accruing to the employer's benefit is the fact that many workers with disabilities have higher job retention and equal or higher performance ratings on the job than do people without disabilities.<sup>173</sup>

An additional externality accruing to employers of persons with mental disabilities is that members of the organization can feel that they are acting in a socially responsible manner and raising awareness of diverse individuals within their organization. Through interaction, managers may also come to feel that they are better able to learn the needs of their staff and to communicate better with the general workforce. They may also find that including people with psycho-social disabilities leads to greater facility in providing an overall more flexible and accommodating environment.<sup>174</sup>

Potential workplace modifications can include altering schedules and allowing absences,<sup>175</sup> modifying supervision arrangements, reorganizing duties,<sup>176</sup> and, rather than making a hiring decision on potential employees with mental disabilities in an uncomfortable setting, permitting a probationary period for these employees.<sup>177</sup> When feasible, these steps lead to more productive, satisfied, and safer workplaces for all workers and can increase overall economic productivity and development.<sup>178</sup> In the larger disability context, employers that have made accommodations report that doing so has benefited their respective companies, including their workers without disabilities.<sup>179</sup> In the modern workplace, more flexibility on these scheduling issues is becoming more prevalent with increased telecommuting.

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<sup>172</sup> For a personal account, see DANIEL TAMMET, *BORN ON A BLUE DAY: INSIDE THE EXTRAORDINARY MIND OF AN AUTISTIC SAVANT* 148 (2007).

<sup>173</sup> See Hunt & Hunt, *supra* note 117, at 267.

<sup>174</sup> This, in essence, is the point that Susan Sturm makes more globally. See Sturm, *supra* note 120.

<sup>175</sup> See OTA REPORT, *supra* note 109, at 75.

<sup>176</sup> See Cook & Razzano, *supra* note 110, at 107–08.

<sup>177</sup> See TAMMET, *supra* note 172, at 927.

<sup>178</sup> *Id.*; see also NAT'L COUNCIL ON DISABILITY, *IMPLEMENTATION OF THE AMERICANS WITH DISABILITIES ACT: CHALLENGES, BEST PRACTICES, AND NEW OPPORTUNITIES FOR SUCCESS* 28, 36 (2007) (noting that diverse stakeholders observed that a more flexible workplace brings people with disabilities to the center of the discussion in which the workplace needs of all employees are taken into account).

<sup>179</sup> See NAT'L COUNCIL ON DISABILITY, *THE IMPACT OF THE AMERICANS WITH DISABILITIES ACT: ASSESSING THE PROGRESS TOWARD ACHIEVING THE GOALS OF THE ADA 96–97* (2007) (“Almost all employers reported that providing the accommodations benefited the company by allowing it to retain and/or promote a qualified employee. Other direct benefits reported included eliminating the cost of training a new employee, saving on worker’s compensation or insurance costs, increasing the accommodated worker’s productivity, improving the accommodated worker’s attendance, and increasing the diversity of the company.”). Employers also reported that making accommodations gave them an opportunity to display their commitment to their employees, which was something that all employees valued. *Id.* at 99.

In addition to more readily calculable benefits, Peter Blanck also describes “ripple effects” emanating from the provision of accommodations.<sup>180</sup> Among these desirable consequences are purported higher productivity,<sup>181</sup> greater dedication,<sup>182</sup> and better identification of qualified candidates for promotion.<sup>183</sup> Employers may also enjoy fewer insurance claims, reduced post-injury rehabilitation costs,<sup>184</sup> an improved corporate culture,<sup>185</sup> and more widespread use by workers without disabilities of efficiency-enhancing technologies previously utilized exclusively by their peers with disabilities.<sup>186</sup>

#### CONCLUSION

Mark Weber has produced a worthy contribution to the antidiscrimination literature by highlighting the pervasive existence of disability-based harassment, describing the ways such prejudice affects its targets, and arguing that current disability law provides tools to combat that harassment. Throughout *Disability Harassment*, Weber explains and documents the socially created stigma induced by the disability classification, one manifestation of which is disability harassment. Building on this point, this Review Essay examines the impact of unconscious and nonintentional discrimination against biologically atypical workers. It then argues that as a normative matter, the American workplace should incorporate individuals with psycho-social disabilities, a group widely considered to be among the most socially marginalized. To support that assertion, the Review Essay demonstrates the social and economic benefits to society, and to the workplace, of pursuing mentally disabled occupational integration.

Weber’s book helps demonstrate that people with disabilities should be an integral part of society as opposed to being members of a discrete “other” category. In the same vein, we note that incorporating mentally

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<sup>180</sup> See PETER DAVID BLANCK, COMMUNICATING THE AMERICANS WITH DISABILITIES ACT, TRANSCENDING COMPLIANCE: 1996 FOLLOW-UP REPORT ON SEARS, ROEBUCK AND CO. 26–27 (1996).

<sup>181</sup> Patricia M. Owens, Editorial, *Manager’s Journal: Employee Disabilities Needn’t Impair Profits*, WALL ST. J., June 7, 1999, at A22 (“Savvy employers have figured out that a can-do attitude for employees with impairments is good for profits and productivity.”).

<sup>182</sup> See, e.g., Stuart Silverstein, *On the Job: With Help from New Technology, More Disabled Join the Work Force*, L.A. TIMES, Oct. 25, 1998, at C5 (“What you find are employees who probably are more focused and more dedicated to doing quality work.” (quoting EarthLink’s vice president)).

<sup>183</sup> See Thomas W. Hale et al., *Persons with Disabilities: Labor Market Activity, 1994*, MONTHLY LAB. REV., Sept. 1998, at 3, 3 (relating that the disabled are less likely to work in high paying positions relative to the nondisabled).

<sup>184</sup> See BLANCK, *supra* note 180, at 26–27.

<sup>185</sup> See *id.* at 8 (“[W]hen Sears hires, works with, and accommodates qualified employees with disabilities, Sears enhances its . . . employee morale.” (quoting Chairman and CEO of Sears)).

<sup>186</sup> For instance, the nonvisually impaired employees of a large insurance company assimilated voice-recognition technology originally provided as an accommodation. See Berven & Blanck, *supra* note 164, at 85–89 (discussing faults of cost-benefit paradigms in determining whether employers suffer undue hardship and explaining the “ripple effect”).

disabled individuals should be viewed as part and parcel of the larger social enterprise of increasing flexibility in the evolving workplace, rather than as an isolated program of social justice. The combined effects of technology and globalization increasingly impact the way businesses conduct their affairs. Whereas twenty years ago computers were rare, telecommuting unheard of, and “outsourcing” unrealistic, these modalities have become standard.

Employers have responded by becoming increasingly diverse in their hiring and flexible in the ways that they conduct business. Despite the employment at will doctrine, companies are increasingly concerned with retaining their talented employees. By integrating workers with psychosocial disabilities—presently among the most excluded from the workforce—employers can learn lessons that will enable them to keep better hold of traditionally excluded groups, including racial minorities and women.<sup>187</sup> Thus, by embracing the most marginalized, employers may also reap benefits amongst other employees.

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<sup>187</sup> See generally RUTH O'BRIEN, BODIES IN REVOLT: GENDER, DISABILITY, AND A WORKPLACE ETHIC OF CARE (2005) (advocating for a general workplace ethic of care modeled after the ADA).