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JUSTICE DISPARITIES: DOES THE ADA ENFORCEMENT SYSTEM TREAT PEOPLE WITH PSYCHIATRIC DISABILITIES FAIRLY?

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The 1990 Americans with Disabilities Act (ADA) was expected to decrease discrimination against people with disabilities. However, discrimination against people with psychiatric disabilities may exist in the legal system that is charged with implementing the ADA. This study describes and compares the characteristics of people with psychiatric and non-psychiatric disabilities who filed employment discrimination lawsuits under Title I of the ADA from 1993 to 2001. The Article examines actual and perceived outcomes of these lawsuits, features of the surrounding legal process, effects of psychiatric disability status on receiving a benefit from litigation, and predictors of overall satisfaction with the experience of bringing an ADA Title I claim.

The study consisted of telephone interviews with a national stratified quasi-random sample of N=537 persons who had filed ADA employment discrimination lawsuits in federal court. The study compared subsamples of n=148 persons with psychiatric disa-

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bilities and n=222 persons with non-psychiatric disabilities. The primary outcome was receiving a benefit from filing an ADA Title I lawsuit, defined as a court ruling in favor of the plaintiff or a settlement between the parties, with the plaintiff's confirmation of having received some benefit. The secondary outcome was the degree of overall satisfaction with the experience of bringing a claim of employment discrimination from the initial charging process through litigation.

The study finds that people with psychiatric disabilities fared significantly worse in employment discrimination lawsuits than their counterparts with non-psychiatric disabilities, controlling for other significant predictors of litigation outcome, including health status, plaintiff's education, reasons for the lawsuit, and assistance by a lawyer. Plaintiffs with psychiatric disabilities were also significantly less satisfied with the overall process of filing a claim of employment discrimination and bringing a lawsuit under the ADA. The effects of poor outcome on dissatisfaction were mediated by perceived unfairness, lack of "voice," and lack of procedural justice in the charge process and litigation.

These disparities are not easily explained by differences in the law, the behavior of employers or lawyers, or the effects of psychiatric illness on perception. Even accounting for the influence of outcome on retrospective perception of justice, people with psychiatric disabilities experienced less procedural justice than others. While the disparities are clear, the causes are not. There is no reason to suspect that actors in the legal system—personnel in state agencies, judges, court clerks, lawyers for the defendants, and even lawyers for the plaintiffs—are immune from prejudicial attitudes shaped by the stigma of mental illness, but there is also no reason to jump to the conclusion that the system is rife with "sanism." What should not be doubted is the need for a vigorous response to these findings to ensure that the system intended to protect people from discrimination does not discriminate.

"It was emotionally upsetting."—ADA plaintiff whose case was settled without any monetary award.

"Two years of hell."—ADA plaintiff whose case was settled with a monetary award for the plaintiff of $93,000.

I. INTRODUCTION

The "gap" has returned to the study of law and policy, and with a vengeance. Decades ago, legal scholars and social scientists were busy showing that there was a difference—the implementation gap—between the laws on the books and what happened in the real world. It became so common, and so easy, to find implementation gaps that the movement choked on its own success. It was no longer news that law on the books was very different from law on the streets, and scholars moved on.[1] Now, when the gap between what is spun by policymakers and what actually transpires seems wider than ever, there are

1. Early seminal implementation literature included such works as JEFFREY L. PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION (1st ed. 1973); Donald S. Van Meter & Carl E. Van Horn, *The Policy Implementation Process: A Conceptual Framework*, 6 ADMIN. & SOC'Y 445 (1975); EUGENE BARDACH, THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW (1977); MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980); JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983). However, even as studies of implementation began proliferating, the case began to be made that those who wanted to understand implementation might better spend their time studying organizations. For example, Richard Elmore argued that "[s]ince virtually all public policies are implemented by large public organizations . . . [o]nly by understanding how organizations work can we understand how policies are shaped in the process of implementation." Richard F. Elmore, *Organizational Models of Social Program Implementation*, 26 PUB. POL'Y 185, 187 (1978).

global signs of a renewed interest in documenting and alleviating implementation gaps.[2] The fact of the gap is not news, but that makes gaps no less challenging in both the moral and the practical sense—it is rank hypocrisy to create rights or entitlements that are not enforceable in practice, but it is also no easy task to create regulatory systems that can efficiently and fairly deliver the goods that lawmakers promise.

The Americans with Disabilities Act (ADA)[3] was a sweeping and ambitious attempt to enhance employment and other opportunities for people with disabilities by eliminating barriers rooted in myths and stereotypes about individuals with disabilities.[4] Title I of the ADA is the statute's employment section. It prohibits private employers with fifteen or more employees, state and local governments, employment agencies, labor unions, and joint labor-management committees from discriminating against qualified individuals with disabilities.[5] The provision for enforcing Title I explicitly adopts the mechanisms and remedies of Title VII of the Civil Rights Act of 1964.[6] Both administrative and judicial enforcement mechanisms are available.

The U.S. Equal Employment Opportunity Commission (EEOC) has primary responsibility for the administrative charge process.[7] It shares this responsibility with state and local Fair Employment Practice Agencies (FEPAs).[8] Under Title I of the ADA, individuals who believe that they have been discriminated against in employment on the basis of a disability may file an administrative charge with the EEOC or a FEPA.[9] Only upon receiving a "right-to-sue" letter from either the EEOC or a FEPA may they then file a lawsuit.[10]

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2. *See, e.g.*, Emilio J. Cárdenas, *The United Nations Security Council's Quest for Effectiveness*, 25 MICH. J. INT'L L. 1341 (2004) (international diplomacy); Gabriel Gari, *Free Circulation of Services In MERCOSUR: A Pending Task*, 10 LAW & BUS. REV. AM. 545 (2004) (international trade); Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT'L ECON. L. 191 (2005) (international economics); Luke W. Goodrich, Note, *Implementing Environmental Law in the European Union: Lessons from the Bathing Water Directive*, 16 GEO. INT'L ENVTL. L. REV. 301 (2004) (international environmental law).

3. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000).

4. Scott Burris & Kathryn Moss, *A Road Map for ADA Title I Research*, *in* EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT 19, 42 (Peter David Blanck ed., 2000).

5. 42 U.S.C. §§ 12111–12112.

6. *Id.* § 12117(a); *see also id.* §§ 2000e-4 to -6, 2000e-8 to -9 (Title VII enforcement sections).

7. 29 C.F.R. §§ 1601.1, .15 (2006).

8. *Id.* § 1601.13.

9. *Id.*

10. *Id.* § 1601.28.

Our research on the implementation of the ADA has repeatedly shown gaps between the promise of Title I's employment discrimination protections and the enforcement practices of the state and federal agencies that implement the law.[11] While we have recognized that the ADA has many important potential beneficial effects on people with disabilities,[12] and that more people benefit from both the

11. In the first phase of our ADA implementation project, we analyzed the administrative charge process administered by the EEOC and the FEPAs. Kathryn Moss, *The ADA Employment Discrimination Charge Process: How Does It Work and Whom Is It Benefiting?*, *in* EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT, *supra* note 4, at 118; KATHRYN MOSS, FILING AN ADA EMPLOYMENT DISCRIMINATION CHARGE: "MAKING IT WORK FOR YOU" (2000); Kathryn Moss, Matthew Johnsen & Michael Ullman, *Assessing Employment Discrimination Charges Filed by Individuals With Psychiatric Disabilities Under the Americans With Disabilities Act*, 9 J. DISABILITY POL'Y STUD. 81 (1998); Kathryn Moss et al., *Different Paths to Justice: The ADA, Employment, and Administrative Enforcement by the EEOC and FEPAs*, 17 BEHAV. SCI. & L. 29 (1999); Kathryn Moss & Matthew C. Johnsen, *Employment Discrimination and the ADA: A Study of the Administrative Complaint Process*, 21 PSYCHIATRIC REHABILITATION J. 111 (1997); Kathryn Moss et al., *Mediation of Employment Discrimination Disputes Involving Persons With Psychiatric Disabilities*, 53 PSYCHIATRIC SERVICES 988 (2002) [hereinafter Moss et al., *Mediation*]; Kathryn Moss et al., *Outcomes of Employment Discrimination Charges Filed Under the Americans With Disabilities Act*, 50 PSYCHIATRIC SERVICES 1028 (1999); Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1 (2001) [hereinafter Moss et al., *Unfunded Mandate*]. Between July 26, 1992, and September 30, 2000, 233,469 Title I complaints were filed with the EEOC or a FEPA. Moss et al., *Unfunded Mandate*, *supra*, at 25. Of these complaints, where all the charging parties were entitled to file lawsuits, 195,657 (84%) were closed without benefits. *Id.* at 48.

Beneath the statistics, we found an administrative apparatus for enforcing Title I that was simply too small in staff and other resources to properly do the job. The EEOC planned to receive 2,000 charges in its first year of existence, but instead received 8,856. *Id.* at 9. The number continued to increase steadily. By 1975, the EEOC was getting 71,023 new complaints each year. *Id.* Despite efforts over the years at improving enforcement operations, the fact remained that most complaints were not being properly investigated, and so for most people, filing with the EEOC or a FEPA was essentially a waste of time and hope. *See id.* at 9–10.

Our current study takes the inquiry into the federal court system. We have previously shown that the vast majority of people whose cases are not resolved in the administrative process do not take advantage of the opportunity to sue in federal court, but that most of those who pursue their claims in court receive some sort of benefit. Kathryn Moss et al., *Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 303, 308–09 (2005) [hereinafter Moss et al., *Prevalence and Outcomes*].

12. Evaluation focused solely on the ADA litigation sometimes fails to capture the benefits obtained from the voluntary compliance of employers. *See* Jeb Barnes & Thomas F. Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practices*, 40 LAW & SOC'Y REV. 493, 504–05 (2006) (examining proactive and reactive responses by organizations addressing ADA regulations); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1544 (1992) (discussing the role organizations play in shaping the meaning of employment discrimination law through interpretation). It also tends to omit the empowerment effects that help people with disabilities advocate more effectively for themselves in the workplace. *See* DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE

administrative and court dispute resolution procedures than may commonly be recognized,[13] we have found that the nation has failed to provide a level of legal services minimally necessary to assure that plausible, good-faith ADA Title I lawsuits claiming employment discrimination are resolved in a manner that is just for both employers and employees.[14]

In this Article we present evidence of what may be the most worrisome gap of all. Our data, collected from ADA Title I outcomes in federal courts and interviews with litigants, reveal significant differences between what happens to people with psychiatric disabilities and those with other forms of impairment. We analyze our data in search of answers to two questions: first, are there "justice disparities" in the ADA enforcement system, by which we mean durable differences in outcomes between cases brought by people with psychiatric disabilities and those brought by people with other disabilities that are not attributable to differences in the legal and factual merits of the cases;[15] and second, if there are disparities, what are the causes?[16]

STORIES OF AMERICANS WITH DISABILITIES 243 (2003) (discussing the influence of the ADA on the self-perception of those with disabilities); David M. Engel & Frank W. Munger, *Rights, Remembrance, and the Reconciliation of Difference*, 30 LAW & SOC'Y REV. 7, 44–45 (1996) (exploring how those with disabilities use their ADA rights to legitimize their employment positions). While harder to document than litigation outcomes, these are real and valuable benefits of the statute.

13. *See* Moss et al., *Mediation*, *supra* note 11, at 992–93 (examining the benefits of the EEOC's mediation program); Moss et al., *Unfunded Mandate*, *supra* note 11, at 37 (same); Moss et al., *Prevalence and Outcomes*, *supra* note 11, at 307 (discussing the positive effects of ADA claim settlement).

14. Moss et al., *Prevalence and Outcomes*, *supra* note 11, at 308–09.

15. We use the term "justice disparities" in deliberate reference to the issue of health care disparities that has, for the past several years, galvanized action in health care and public health policy. *See, e.g.*, COMMITTEE ON UNDERSTANDING AND ELIMINATING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE, INSTITUTE OF MEDICINE, UNEQUAL TREATMENT 5 (Brian D. Smedley et al. eds., 2003) [hereinafter UNEQUAL TREATMENT] (summarizing extensive evidence that racial and ethnic minorities receive lower quality of health care); Marsha Lillie-Blanton et al., *Racial Differences in Health: Not Just Black and White, But Shades of Gray*, *in* 17 ANN. REV. PUB. HEALTH 411 (Gilbert S. Omenn et al. eds., 1996) (reviewing empirical studies on racial inequality in health outcomes). Our definition of justice disparities is adapted from the Institute of Medicine report. UNEQUAL TREATMENT, *supra*, at 3–4 (defining healthcare disparities as "racial or ethnic differences in the quality of healthcare that are not due to access-related factors or clinical needs, preferences, and appropriateness of intervention" (footnote omitted)); *see also* Ana I. Balsa & Thomas G. McGuire, *Prejudice, Clinical Uncertainty and Stereotyping as Sources of Health Disparities*, 22 J. HEALTH ECON. 89, 90–91 (2003) (setting out conceptual framework for distinguishing various causes of disparities).

16. We assume that a disparity in justice outcomes or the quality of justice services would, like health disparities, have a complex set of causes. Race, class, disease, location, and other factors have been found to interact in complicated ways to cause racial health disparities. *See* UNEQUAL TREATMENT, *supra* note 15, at 8 (summarizing the impact of lin-

The urgent question posed by our findings is whether the ADA is being implemented in a way that actually discriminates against one of the most vulnerable groups the law was intended to protect.

The research reported in this Article, which was funded by the National Institute of Mental Health, was taken from a nationwide study of ADA employment discrimination cases initiated between the July 1992 effective date of Title I and 2001. We used a two-stage, stratified, quasi-random selection to produce a nationally representative sample of ADA Title I lawsuits filed in federal courts.[17] Analyses of case characteristics and outcomes were conducted on a total of 4,114 ADA Title I cases, using court docket files. We also conducted telephone interviews with a quasi-random sample of 537 people selected from the larger group, which consisted of 148 people with psychiatric disabilities, 222 with non-psychiatric disabilities, and 167 with indeterminate or both types of disabilities. The findings presented here exclude the latter group and are drawn primarily from the interview data.

In Part II of this Article, we describe the methods we used to collect and analyze our data. In Part III, we present our findings. Whether measured by the actual outcome of the case, or by plaintiffs' perceptions of procedural justice, people with psychiatric disabilities are less likely than people with other disabilities to receive a benefit from their suit and less likely to be satisfied with their charge and lawsuit experiences. In Part IV, we consider the possible explanations for these results, including differences in the case law for people with psychiatric compared to other disabilities, and differences in treatment during the prior administrative process. We are left with the distinct possibility that in both objective outcomes and perceptions of fair procedures, there are disparities between people with psychiatric

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guistic barriers, limited physical availability, remoteness of health care institutions, and cost-structure changes to health care services on health disparities for racial and ethnic minorities); Lillie-Blanton et al., *supra* note 15, at 428–29 (reviewing the effects of race and socioeconomic status on specific health outcomes). Thus it is difficult to attribute all health disparities to racism, let alone intentional discrimination, even though the evidence strongly suggests that racism does impose a burden on the health of minorities at the population level. *See* David R. Williams, *Race, Socioeconomic Status, and Health: The Added Effects of Racism and Discrimination*, *in* 896 ANNALS N.Y. ACAD. SCI. 173, 183–84 (Nancy E. Adler et al. eds., 1999) (exploring the negative effects of residential segregation, limited health care access, and discrimination-related stress on the health of racial minorities); Kevin Fiscella et al., *Inequality in Quality: Addressing Socioeconomic, Racial, and Ethnic Disparities in Health Care*, 283 JAMA 2579, 2579 (2000) (acknowledging the impact of socioeconomic status and membership in a racial or ethnic minority on health care disparities).

17. For details of this procedure, see Moss et al., *Prevalence and Outcomes*, *supra* note 11, at 303–04.

versus non-psychiatric disabilities. As far as the causes are concerned, we cannot rule out that the stigma of mental illness compromises the fair treatment one would expect in the very process society has provided to redress discrimination.[18] We conclude with recommendations for action to address what we argue is an urgent problem in the implementation of antidiscrimination law.

II. METHODS

A. Study Sample Design

A quasi-random sample of 539 persons who had filed ADA Title I lawsuits was interviewed in a telephone survey. The sampling procedure involved a random selection of sixteen federal court districts stratified by size, thirty-six courts within these districts, three representative time periods for case filings (1993–1995, 1996–1998, and January 1, 1999–March 31, 2001), and 8,777 ADA employment discrimination cases within these periods.[19] The refusal rate for the telephone survey was 32.3%.

The first part of the analysis included two subgroups: (1) 148 persons whose claim of discrimination was based on psychiatric disability associated with having schizophrenia, bipolar disorder, depression, anxiety disorder, post-traumatic stress disorder, or other psychiatric illness; and (2) 222 persons whose claim of discrimination was based on a disability associated with a non-psychiatric condition. Information regarding type of disability was obtained from court records and claimant self-reporting. Only if both sources of information agreed were individuals included in the sample for analysis.

The second part of the analysis included a subset of the first. It was restricted to plaintiffs who were represented by a lawyer and whose cases were decided by a judge rather than through settlement. This population consisted of seventy-one plaintiffs with psychiatric disabilities and eighty-two plaintiffs with non-psychiatric disabilities.

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18. Michael Perlin has coined the term "sanism" to broadly describe the set of attitudes rooted in stigma, stereotypes, and misinformation that drive and legitimate the unfair treatment of people with mental illness. 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).

A finding that mental disability is treated differently than other disabilities would not be new in American legal history. In his exhaustive study of the civil war pension system, Peter Blanck has also found that mental disabilities were seen as more problematic, and compensated less highly, than other forms of war wound. Peter Blanck, *Civil War Pensions and Disability, 62* OHIO ST. L.J. 109, 165–66 (2001).

19. Further details of the sampling methodology are in Moss et al., *Prevalence and Outcomes*, *supra* note 11, at 303–04.

B. Outcomes and Measures

We systematically reviewed court files for the ADA Title I cases in our larger sample to examine outcomes and the proportion of plaintiffs who received a benefit. Judicial files were available for review at the federal district courts. Associated docket sheets for these files were available online. To summarize and systematically record the relevant data, we created the Judicial File Coding Instrument (JUFCI), with a complementary version adapted to abstract the online docket records associated with these cases.

Lawsuit outcomes were classified into six categories: (1) ruling by a judge or jury in favor of the plaintiff (e.g., default judgment, summary judgment, trial victory); (2) settlement between the parties; (3) ruling by a judge or jury in favor of the employer (e.g., summary judgment, trial decision); (4) case dismissed or withdrawn by plaintiff; (5) complaint still under consideration of court; and (6) status of outcome uncertain. The first two outcomes were considered beneficial results for the plaintiff. Outcomes were classified as "settlements" if there was explicit mention of settlement or consent decree in the docket data and all claims were concluded as to all defendants. Cases of voluntary dismissal without explicit settlement references were only classified as settlements if the dismissal was with prejudice and no events were present in the docket to suggest that the plaintiff had unilaterally dropped the suit (such as the withdrawal of an attorney or a motion by the defense for sanctions).

In addition to the features and outcomes of the case, a structured interview was used to examine plaintiffs' attitudes and perceptions regarding the entire process of bringing an employment discrimination lawsuit under the ADA. We relied on procedural justice literature to construct measures of our respondents' satisfaction with experiences in the administrative and judicial phases of their cases. An enormous literature on the positive effects of procedural fairness on litigation participants' satisfaction has emerged in the past twenty years.[20] It

20. *E.g.*, E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); E. Allan Lind et al., . . . *And Justice for All: Ethnicity, Gender, and Preferences for Dispute Resolution Procedures*, 18 LAW & HUM. BEHAV. 269 (1994); E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224 (1993); E. Allan Lind, *The Psychology of Courtroom Procedure*, *in* THE PSYCHOLOGY OF THE COURTROOM 13 (Norbert L. Kerr & Robert M. Bray eds., 1982); E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990) [hereinafter Lind et al., *Voice*]; John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978); Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830 (1989); Tom

finds that individual satisfaction with legal processes is heavily influenced by the way in which decisions are made and conflicts are resolved, even when outcomes are non-beneficial or the process is costly or slow.[21] People care about winning and losing,[22] but they are also influenced in the assessment of their experience by certain key factors: giving "voice" to their story, having an honest and unbiased decisionmaker, being treated with dignity, and having a fair process of decision.[23] As Tom Tyler has put it, "[j]udicial hearings in general are clearly used by people to gain information about their status as members of society."[24] We constructed a series of Likert-scaled items[25]

R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51 (1984); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988); *cf.* Edward N. Muller, *The Psychology of Political Protest and Violence*, *in* HANDBOOK OF POLITICAL CONFLICT 69 (Ted Robert Gurr ed., 1980) (analyzing the relationship between political participation and various psychological variables); Austin Sarat, *Support for the Legal System: An Analysis of Knowledge, Attitudes, and Behavior*, 3 AM. POL. Q. 3 (1975) (examining individual satisfaction with legal processes and institutions).

21. *See, e.g.*, Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, *in* 1 ANN. REV. L. & SOC. SCI. 171, 171–72 (John Hagan et al. eds., 2005) (discussing study finding that terminated employees were less likely to file wrongful termination lawsuits if they believed employers treated them fairly).

22. Winning and losing do matter, such that the effect of fair procedure can apparently vary with outcomes:

> [P]rocedural and distributive judgments have multiplicative, interactive effects on judgments of authorities and organizations. Across 45 different studies, [one review] found that the typical pattern is that procedural justice has stronger effects when outcome ratings are low than when they are high, and outcome ratings have stronger effects when perceived procedural fairness is low than when it is high.

Id. at 185 (citations omitted).

23. *See, e.g.*, Lind et al., *Voice*, *supra* note 20, at 957 (voice); MacCoun, *supra* note 21, at 176 (fair decisionmaker and process); *cf.* Muller, *supra* note 20, at 97 (finding that feelings of fairness were a better predictor of political behavior against the system than assessments of the favorability of outcomes).

The notion that fair process matters is now well-established, but, as Robert MacCoun notes in his recent review, it does not displace a range of other non-relational factors: "People judge procedures and outcomes relative to their beliefs about what will happen, what could happen, and what should happen." MacCoun, *supra* note 21, at 183. Our study does not measure these beliefs, but it is worth keeping them in mind as additional explanatory possibilities.

24. Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 444 (1992).

25. The Likert scale refers to an ordinal scale of fixed responses to attitudinal items on a questionnaire. This type of scale was invented by American educator, psychologist, and statistician Rensis Likert in the early twentieth century. Rensis Likert, *A Technique for the Measurement of Attitudes*, *in* 22 ARCHIVES OF PSYCHOLOGY 140 (R.S. Woodworth ed., 1932). The Likert scale measures a respondent's degree of agreement with a given statement, anchored by favorable and unfavorable responses on both extremes equidistant from a neutral midpoint. A typical Likert-scaled item has possible values ranging from one to five or seven; the mid-point of the scale indicates an undecided position. For example, respon-

probing the strength of the respondents' agreement or disagreement with statements characterizing the experience of the initial administrative charge process, the fairness of decisionmakers and process in their litigation experience and relationship with their lawyer (*fairness*), whether they were treated with respect (*dignity*), and the opportunity to tell their stories (*voice*). We also included in our analysis measures of complaint processing time.[26]

C. Statistical Analysis

We conducted exploratory factor analysis[27] to determine which of the Likert-scaled attitudinal variables grouped reliably together as indicators of various underlying aspects of the claim and litigation experience.

We used logistic regression analysis[28] to examine the net effect of psychiatric disability status on receiving a benefit from filing an em-

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dents are presented with a questionnaire statement and are asked whether they "strongly agree," "agree," "disagree," "strongly disagree," or are "undecided." ALLEN RUBIN & EARL BABBIE, RESEARCH METHODS FOR SOCIAL WORK 179 (1989). The specific value of Likert scaling is the "unambiguous ordinality of response categories." *Id.* at 179–80 (emphasis omitted).

26. Plaintiffs in this analysis had their cases decided by a judge, but may not have had any personal interaction with the judge or participated in any formal proceedings, as the vast majority of these cases were decided on summary judgment or other dispositive motion. Other actors in the system, from file clerks to lawyers, are in most instances proxies for the judge in a plaintiff's assessment of voice, fairness, and other markers of procedural justice. This should be considered when comparing our results to studies of individuals who went through a complete judicial process, such as trials or mediation. It is possible that many of our respondents of all disability types were dissatisfied by their experience because they had expected a trial. As one put it, "*I feel that I was denied my right to a jury trial. I never went to trial to present my case and have my side told too.*"

27. Exploratory Factor Analysis (EFA) is a statistical procedure that may be used to identify an underlying pattern of relationships between a set of variables. *See* BRUCE THOMPSON, EXPLORATORY AND CONFIRMATORY FACTOR ANALYSIS 4–5 (2004). EFA may also be used for practical purposes to reduce the number of variables that need to be entered in a statistical model. *Id.* at 10. Specifically, this technique examines whether, and how, a set of observed variables may be linked as indicators of one or more common, unobserved (unmeasured or latent) factors. EFA is commonly used when a dataset contains a relatively large set of variables of potential interest and the researcher does not make *a priori* theoretical assumptions about the number of possible factors, their substantive nature, or about which measured variables might be indicators of which latent factors. *See id.* at 5–6, 27.

28. Logistic regression is a statistical technique for examining the joint effects of multiple predictors on a dichotomous dependent variable. *See* DAVID W. HOSMER & STANLEY LEMESHOW, APPLIED LOGISTIC REGRESSION 1 (2d ed. 2000). Logistic regression equations produce odds ratios, which estimate the average proportional change in the odds of a predicted event (e.g., a favorable outcome in a lawsuit) associated with a particular value on an independent variable (e.g., having a psychiatric versus a non-psychiatric disability), holding constant the joint effects of other independent variables in the model. *See id.* at 1, 49–50. For independent variables measured on a continuous or ordinal scale, the odds

ployment discrimination lawsuit, controlling for demographic and socioeconomic characteristics of the plaintiff and certain features of the lawsuit. Three intermediate domain models—corresponding to (1) disability and health status, (2) demographics and socioeconomic characteristics of the plaintiff, and (3) lawsuit features—were estimated using stepwise selection with retention of variables at $p<0.20$. A final model was then specified with only the variables retained from the domain models.

We used linear multiple regression analysis to examine predictors of overall satisfaction with the claim and litigation process.[29] We entered blocks of independent predictor variables—disability status, receiving a benefit, and appraisal of fairness and voice in the process—in stages to examine the significance of potential mediating effects. The constructs identified in the initial factor analysis were scored and entered as independent variables predicting satisfaction in these models.

III. RESULTS

Exploratory factor analysis of attitudinal items regarding the claim process produced a four-factor solution, with selected item coefficients (or "loadings") all above 0.60.[30] The items are listed below by strength of factor loading in descending order. Negatively worded

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ratio indicates the change in event likelihood per unit change in the predictor variable. *See id.* at 49–50.

29. Multiple regression analysis is a statistical procedure that is used to examine whether one or more of a set of independent variables are significant linear predictors of a measured outcome or dependent variable. *See* DOUGLAS C. MONTGOMERY ET AL., INTRODUCTION TO LINEAR REGRESSION ANALYSIS xiii (4th ed. 2006). A linear association means that a unit of change on the independent variable X produces a corresponding unit of change on the dependent variable Y. *See id.* at 2–3. For example, if education is a linear predictor of annual income, then each additional year of education predicts, on average, a certain additional amount of annual income. Multiple predictor variables, however, may share some association with each other. *See id.* at 64–65. Thus, education level and occupation, which both predict income, are analyzed using a multiple regression equation. This equation specifies the net association between each predictor and the outcome, holding constant or "controlling for" the joint effects of other predictors. For example, the effect of educational level on income is partly due to or is mediated by the effect of occupational level, which covaries with education. Multiple regression, in this example, would specify the *net* linear effect of education on income (if any), controlling for occupational level. *See id.* at 63–64. Finally, multiple regression yields a coefficient R^2, which expresses the total proportion of variation in the dependent variable that is accounted for, or explained by, the entire set of predictor variables in the equation or model. *See id.* at 35.

30. As a rule of thumb, factors should have at least four or more items with loadings greater than 0.60 or better to be considered stable and valid. *See* Thompson, *supra* note 27, at 24. On that basis, Factor 4 should not be considered a "factor," strictly speaking, because it was reduced to a single item. As a single item, however, it contains face validity.

items were reverse-coded. The items were summed to create a single score for each factor. Each of the scales corresponding to the first three factors demonstrated good reliability, with Cronbach's alpha levels above 0.70, as indicated. The fourth factor consisted of a single item—the only variable with a loading above 0.60 on that factor.

Factor 1. EEOC (or FEPA) charge experience: fair procedures, voice, dignity, fair decisionmakers

(*Alpha* = 0.86)

1. Agency personnel listened to my views.
2. Agency personnel responded to my concerns.
3. Agency personnel appeared to favor the other side.
4. I didn't have an opportunity to tell my side of the story to the people making decisions in my case.
5. I was not treated with respect in the agency process.
6. The system was really in favor of the employer.
7. Overall, I feel the outcome I received was fair.
8. Agency personnel didn't try to investigate what happened to me.
9. Agency personnel kept me informed about what was happening in the process.
10. Overall, I am satisfied with my experience with filing an ADA complaint.

Factor 2. Lawyer engagement in the case

(*Alpha* = 0.85)

1. My lawyer listened to my views.
2. My lawyer responded to my concerns.
3. My lawyer didn't appear to fully investigate my complaint.
4. My lawyer was not available to talk to me about the progress of my case.

Factor 3. Lawsuit experience: fair procedures, voice, dignity, fair decisionmakers

(*Alpha* = 0.79)

1. I was treated with respect in the court system.
2. The whole system was really set up in favor of the employer.
3. I didn't have an opportunity to tell my side of the story to the people making decisions in my case.
4. The judge was fair to both sides.

Factor 4. Delay in processing complaint

1. The complaint was handled quickly, without too much delay.

A. Comparison of Plaintiffs with Psychiatric and Non-Psychiatric Disabilities

Table 1 presents a comparative profile of the two sample groups with respect to personal characteristics, reason for bringing a lawsuit, perceptions of the litigation experience and legal assistance, and outcomes. Plaintiffs with psychiatric disabilities (n=148) were predominantly young to middle-aged adults (56% were under age fifty), white (82%), and well-educated (80% attended college). Forty-six percent of these respondents were women. Over half had household incomes above $35,000 and 86% had health insurance. However, many of the respondents were struggling financially—only 56% had earned income in the past year, 38% were unemployed, and 37% had received disability income. Only 62% rated their health status as "good" or better.

By comparison, plaintiffs with non-psychiatric disabilities (n=222) were more racially diverse (30% non-white) and less well-educated (68% attended college). A significantly smaller percentage (21%) was currently unemployed, while a significantly greater percentage (80%) reported their health status as "good" to "excellent."

The two sample groups were similar in the proportions reporting various reasons for filing an employment discrimination lawsuit, except that job termination was somewhat more common among those with psychiatric disabilities (60%) than among those with non-psychiatric disabilities (51%). This difference approaches statistical significance at p<0.10.

In their subjective appraisal of how they were treated by the legal system, plaintiffs as a group were quite unhappy. Plaintiffs with psychiatric disabilities were distinctly less happy than their counterparts with non-psychiatric disabilities. In particular, they were significantly less likely to feel that they were "treated with respect" by the court (39% vs. 52%, p<0.05); significantly less likely to feel that the judge was "fair to both sides" (19% vs. 31%, p<0.05); and only half as likely to feel satisfied overall with their experience of filing a lawsuit (19% vs. 36%, p<0.001).[31]

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31. Selected comments from an open-ended item on the survey give a flavor of the respondents' views:

> "*The time process was too lengthy; it took two-and-a-half years.*" Plaintiff with a non-psychiatric disability who received a settlement of $175,000.
>
> "*My issues did not get addressed. My employer said I never told her I had a disability and they believed her.*" Plaintiff with a non-psychiatric disability who did not benefit from the lawsuit.

These differences in perception correspond to actual differences in outcomes of lawsuits filed by the two groups of plaintiffs. Of those with non-psychiatric disabilities, almost half (49%) received a settlement from the defendant or a favorable court decision, compared to only 37% of people with psychiatric disabilities ($p<0.05$). Those with non-psychiatric disabilities were also significantly more likely to receive a monetary award (37% vs. 25%, $p<0.05$). Among plaintiffs who received monetary awards, however, the amounts did not differ significantly on average between those with non-psychiatric disabilities (median award, $19,500) and those with psychiatric disabilities (median award, $27,500).[32]

TABLE 1. COMPARISON OF ADA TITLE I PLAINTIFFS WITH NON-PSYCHIATRIC AND PSYCHIATRIC DISABILITIES

Characteristics of sampled individuals	Non-psychiatric disabilities (n=222)	Psychiatric disabilities (n=148)	
	Percent with characteristic		
Demographic, socioeconomic, and health characteristics			
Age over 49 years	50.5	43.9	
Female	38.5	45.9	
White	70.3	82.4	**
Black	17.6	10.8	
Other race	12.2	6.8	
Attended college	67.7	79.5	*
Unemployed	21.2	37.8	***
Any earned income in past 12 months	64.4	55.8	†
Household income above $35,000	54.1	52.0	
Any disability income	26.2	37.4	*
Has health insurance	90.5	85.6	
Health status rated good to excellent	80.0	61.5	***
Reason for lawsuit: Type of discrimination claimed			
Applying for a job	7.2	4.8	
Requesting accommodations at the position held	26.1	27.2	
Denied promotion	6.3	6.1	
Demoted to another position	7.2	5.4	
Fired from job	50.9	59.9	†
Other reason	20.3	18.4	

Statistical significance: † p<0.10 (trend); * p<0.05; ** p<0.01; *** p<0.001

"*I spent too much money, didn't get enough money. The process was too slow. It takes at least two years.*" Plaintiff with a psychiatric disability who received a settlement of $3,500.

"

Table 1. (continued)

Characteristics of sampled individuals	Non-psychiatric disabilities (n=222)	Psychiatric disabilities (n=148)	
	Percent with characteristic		
Features and perceptions of lawsuit process ["agree, or agree strongly"]			
"I was treated with respect in the court system."	52.1	38.6	*
"The whole system was really set up in favor of the employer."	66.8	76.3	†
"I understand why my case turned out the way it did."	58.1	48.2	†
"I didn't have an opportunity to tell my side of the story to the people making decisions in my case."	52.7	57.9	
"The judge was fair to both sides."	30.8	19.1	*
"Overall, I'm satisfied with my experience with filing a lawsuit."	35.6	18.7	***
"My lawyer listened to my views."	88.5	86.4	
"My lawyer responded to my concerns."	73.2	75.0	
"My lawyer didn't appear to fully investigate my complaint."	32.6	41.5	
"My lawer was not available to talk to me about the progress of my case."	17.5	25.6	†
"Overall, I was satisfied with the process [entire experience with claim of employment discrimination.]"	23.7	15.0	*
"Overall, I experienced very few problems during the process."	22.4	19.1	
Had lawyer	84.0	87.6	
Outcome of lawsuit			
Settlement or court decision for plaintiff	49.1	36.5	*
Perceived a benefit from lawsuit	52.9	38.5	**
Type of benefit:			
Money	36.8	25.2	*
Something else	4.6	4.1	
Both money and something else	6.8	5.4	
High award (above $20,000)	12.2	8.1	

Statistical significance: † p<0.10 (trend); * p<0.05; ** p<0.01; *** p<0.001
Note: Percentages are based on the number who answered each question.

B. Predictors of Benefit

Table 2 presents the results of multivariate logistic regression analysis examining the net effects of psychiatric disability status on receiving a beneficial outcome from a lawsuit, controlling for other significant predictors of benefit. The dependent variable was a dichotomous outcome coded positive if two criteria were met: (1) plaintiff received a settlement or favorable court decision, and (2) plaintiff reported receiving a benefit from filing the lawsuit. The first column of the table displays unadjusted odds ratios expressing the bi-

to estimate whether plaintiffs with psychiatric disabilities received higher or lower monetary awards, on average, than those with non-psychiatric disabilities. Professor Kotkin has persuasively argued the anti-social effects of settlement confidentiality as a routine practice. *See* Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 970–71 (2006) (arguing that confidential settlements skew public opinion of the utility of employment discrimination and civil rights laws).

variate associations between this outcome and predictor variables in three domains: disability and health status; demographic and socioeconomic status; and lawsuit features.

With respect to bivariate associations, then, we found that benefit from litigation was negatively associated with psychiatric disability and positively associated with self-rated health status. Benefit was also positively correlated with higher education and employment status. Plaintiffs who were presently unemployed were only about half as likely to have received a benefit from filing a lawsuit. We caution, however, that these bivariate associations do not by themselves establish direct causality. For example, it could be that being unemployed and having poor health are outcomes that followed after losing the ADA lawsuit. Among lawsuit features, plaintiffs who claimed discrimination involving promotion denials were significantly less likely to receive beneficial outcomes compared to those who claimed other kinds of harm, such as getting fired.

In the second stage of the logistic regression analysis, we specified separate multivariate models for each domain, using stepwise selection at $p<0.20$ as a variable reduction strategy.[33] The third stage involved specifying a final model, which included only those variables selected in the previous stage. The final model (Table 2, column 3) shows that plaintiffs with psychiatric disabilities were significantly less likely to receive a benefit from filing a lawsuit ($OR=0.56$, $p<0.05$), controlling (in the final, reduced model) for health status, education, employment, reason for lawsuit (denied promotion vs. all other reasons), and assistance from a lawyer. The strongest predictor of any benefit was having a lawyer ($OR=3.05$, $p<0.05$). Education—having attended college—also remained a significant predictor of benefit in the final model ($OR=1.37$, $p<0.05$). Figure 1 graphically displays the cumulative effects of two key selected predictors—legal assistance and education level—from the final model.

33. *See* HOSMER & LEMESHOW, *supra* note 28, at 116–18.

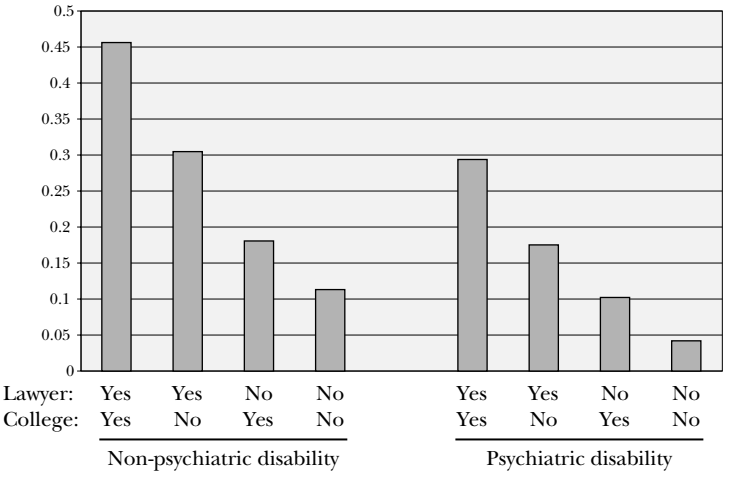
TABLE 2. EFFECTS OF PSYCHIATRIC DISABILITY STATUS ON BENEFICIAL OUTCOME OF ADA TITLE I LAWSUITS, CONTROLLING FOR OTHER PREDICTORS

	Unadjusted Odds			Adjusted Domain Models			Adjusted Final Model		
	Odds Ratio	95% Confidence Interval		Odds Ratio	95% Confidence Interval		Odds Ratio	95% Confidence Interval	
Disability and health status									
Psychiatric disability	0.57	(0.36 - 0.91)	*	0.62	(0.38 - 0.99)	*	0.56	(0.34 - 0.92)	*
Health status rated good to excellent	1.95	(1.14 - 3.33)	*	1.77	(1.02 - 3.05)	*	1.53	(0.87 - 2.71)	
Demographic and socioeconomic status									
Age over 49 years	0.88	(0.57 - 1.37)							
Female	0.86	(0.55 - 1.34)							
White vs. other race	1.32	(0.76 - 2.29)							
Attended college	1.34	(1.03 - 1.75)	*	1.32	(1.01 - 1.72)	*	1.37	(1.04 - 1.81)	*
Unemployed	0.54	(0.32 - 0.91)	*	0.56	(0.32 - 0.96)	*	0.71	(0.41 - 1.25)	
Any earned income in past 12 months	0.65	(0.41 - 1.03)	+						
Household income above $35,000	1.52	(0.97 - 2.38)	+						
Any disability income	1.45	(0.88 - 2.38)							
Has health insurance	0.99	(0.50 - 1.99)							
Lawsuit features									
Reason for lawsuit: Type of discrimination claimed									
Applying for a job	0.76	(0.29 - 1.97)							
Requesting accommodations at the position held	1.01	(0.62 - 1.66)							
Denied promotion	0.19	(0.05 - 0.84)	*	0.24	(0.05 - 1.04)	+	0.26	(0.06 - 1.19)	+
Demoted to another position	1.10	(0.46 - 2.64)							
Fired from job	0.99	(0.64 - 1.54)							
Other reason	1.11	(0.64 - 1.93)							
Number of discrimination complaints	0.96	(0.87 - 1.06)							
Had lawyer	3.55	(1.55 - 8.12)	**	3.39	(1.48 - 7.80)	**	3.05	(1.30 - 7.14)	*

Statistical significance: + p<0.10 (trend); * p<0.05; ** p<0.01

Final model statistics:
N observations = 358
Likelihood Ratio
Chi-Square = 33.14
with 6 DF, p<0.0001

FIGURE 1. PROBABILITY OF BENEFICIAL OUTCOME OF ADA TITLE I LAWSUIT BY TYPE OF DISABILITY, PLAINTIFF'S LEVEL OF EDUCATION AND SERVICES OF LAWYER



Note: Predicted probabilities are adjusted estimates derived from logistic regression model shown in Table 2.

C. Predictors of Satisfaction

Table 3 presents the results of a multivariate analysis of the predictors of overall satisfaction with the experience of bringing a claim of employment discrimination, from the EEOC or FEPA charge process through the lawsuit. The unadjusted bivariate correlations demonstrate that overall satisfaction with the ADA experience was negatively associated with psychiatric disability and delay in processing the initial claim, but positively associated with receiving a benefit, subjectively appraising procedural justice in the charge process and litigation, and lawyer engagement.

Nested models 1, 2, and 3 sequentially examine the net effects of three salient domains of variables on overall satisfaction with the claim experience: (1) psychiatric versus non-psychiatric disability status; (2) actual (monetary or other) benefit received; and (3) subjective procedural justice, lawyer engagement, and delay in processing the initial complaint.

The association of satisfaction with psychiatric disability status seen in Model 1 was rendered nonsignificant when controlling for the benefit variables entered in Model 2; thus, the negative effect of psychiatric disability status on satisfaction was mediated by a worse actual outcome for these plaintiffs. In turn, the effects of the "benefit" variables shown in Model 2 were rendered nonsignificant when controlling for the "procedural" variables entered in Model 3. Thus, the

TABLE 3. PREDICTORS OF OVERALL SATISFACTION WITH EMPLOYMENT DISCRIMINATION CLAIM EXPERIENCE

	Unadjusted correlations	Standardized beta coefficients		
		Model 1.	Model 2.	Model 3.
Type of disability				
Psychiatric vs. non-psychiatric disability	-0.16*	-0.16*	-0.07	-0.01
Benefit received				
Settlement or favorable decision for plaintiff	0.42***		0.33***	0.10
Total money received	0.32***		0.18*	0.07
Subjective procedural factors				
Factor 1. EEOC charge experience (fairness, voice, procedural justice)	0.40***			0.18**
Factor 2. Lawsuit experience (fairness, voice, procedural justice)	0.65***			0.49***
Factor 3. Lawyer engagement	0.31***			0.13*
Factor 4. Delay in processing complaint	-0.22**			-0.06
		R^2 = 0.02 Obs=154 DF=1 F=4.21 p<0.041	R^2 = 0.21 Obs=154 DF=3 F=13.17 p<0.001 Model fit improvement: p<0.001	R^2 = 0.51 Obs=154 DF=7 F=22.01 p<0.001 Model fit improvement: p<0.001

effects of benefit on satisfaction were mediated by attitudinal variables such as fairness and procedural justice. Models 1, 2, and 3 each sequentially provided better data correlation, explaining, respectively, 2%, 21%, and 51% of the variance in overall satisfaction with the claim process. Regression diagnostics indicated no substantial problems with multicollinearity in these models.

D. Comparing Predictors of Satisfaction Among Plaintiffs with Psychiatric vs. Non-Psychiatric Disabilities

Table 4 presents a stratified multivariate analysis comparing plaintiffs with psychiatric and non-psychiatric disabilities on predictors of overall satisfaction with the claim experience. A positive appraisal of the lawsuit process significantly predicted overall satisfaction for both groups of plaintiffs. For those with non-psychiatric disabilities, this variable was the only predictor with net significance; actual benefit was rendered nonsignificant in the presence of procedural justice in the lawsuit experience. In contrast, for plaintiffs with psychiatric disabilities, actually receiving a benefit from the lawsuit, as well as positive appraisal of the initial EEOC or FEPA charge process, remained significant net predictors of overall satisfaction.

Finally, to address the question of discrimination more directly, we conducted an analysis of the net effect of psychiatric disability status on perceived procedural justice in federal court (Factor 3), controlling for whether the plaintiff "won" or "lost" the case (i.e., obtained a beneficial outcome), as well as perceptions of procedural justice at the EEOC or FEPA level, lawyer engagement, and case processing delays (Factors 1, 2 & 4).[34] Without considering type of disability, roughly half of the "winners" and 20% of the "losers" indicated that they had received a high degree of procedural justice. Logistic regression analysis, however, showed that psychiatric disability status significantly lowered the odds of perceiving procedural justice (OR=0.50, CI 0.28–0.92, p<0.05), controlling for whether the plaintiff won or lost the case and two other predictors selected by the model (college attendance and legal representation). Figure 2 graphically summarizes the results of this analysis.

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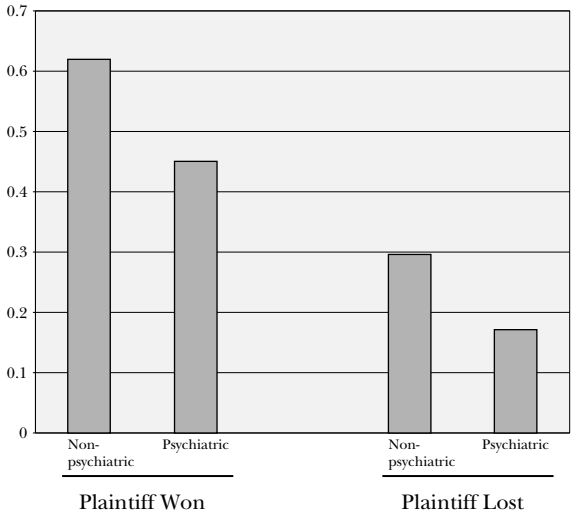
34. For this analysis, we measured procedural justice with four Likert-scaled questions regarding whether: (1) the judge was "fair to both sides"; (2) the plaintiff was "treated with respect" by the court; (3) the plaintiff had the "opportunity to tell [his or her] side of the story to decisionmakers in the case"; and (4) whether the system was "really set up in favor of the employer." Specifically, procedural justice was coded positive if the plaintiff gave an average response in the range of "agree" to "agree strongly" across these four items (two were reverse-coded).

TABLE 4. PREDICTORS OF OVERALL SATISFACTION WITH EMPLOYMENT DISCRIMINATION CLAIM EXPERIENCE, BY TYPE OF DISABILITY

	Non-psychiatric disabilities (n=82)		Psychiatric disabilities (n=71)	
	Unadjusted correlations	Standardized beta coefficients	Unadjusted correlations	Standardized beta coefficients
Benefit received				
Received a benefit from lawsuit	0.39***	0.04	0.41***	0.21*
Total money received	0.32**	0.06	0.30*	0.17
Subjective procedural factors				
Factor 1. EEOC charge experience (fairness, voice, procedural justice)	0.39***	0.12	0.37**	0.29**
Factor 2. Lawsuit experience (fairness, voice, procedural justice)	0.71***	0.59***	0.53	0.29*
Factor 3. Lawyer engagement	0.33**	0.13	0.29*	0.14
Factor 4. Delay in processing complaint	-0.25*	-0.08	-0.19	-0.04
		R^2 = 0.56		R^2 = 0.45
		Obs=82		Obs=71
		DF=6		DF=6
		F=16.27		F=8.67
		p<0.001		p<0.001

FIGURE 2. PROBABILITY OF HIGH RANK ON PROCEDURAL JUSTICE IN ADA TITLE I LITIGATION BY OUTCOME OF LAWSUIT AND TYPE OF DISABILITY



Note: Predicted probability estimates were produced by a logistic regression model controlling for lawsuit outcome and selected predictors of procedural justice.

Notably, even among those who "won" their case, procedural justice was substantially less likely to be reported in the group with psychiatric disabilities than in those with non-psychiatric disabilities (predicted probability, 0.47 vs. 0.62). Among those who "lost," procedural justice was reported by a substantial minority (30%) of those with non-psychiatric disabilities but reported by only 16% of losing plaintiffs with psychiatric disabilities.

IV. DISCUSSION

The ramifications of employment discrimination are enormous. The ability to find and maintain a job is essential to full inclusion in everyday life.[35] 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

35. *See, e.g.*, Leonard S. Rubenstein, *Mental Disorder and the ADA*, *in* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 209, 209–10 (Lawrence O. Gostin & Henry A. Beyer eds., 1993) (discussing the barriers that persons with mental disorders face in order to be included as members of society); Jay Buckley et al., *Developing and Implementing Support Strategies*, *in* SUPPORTED EMPLOYMENT: MODELS, METHODS, AND ISSUES 131, 131–32 (Frank R. Rusch ed., 1990) (discussing the integrative effect of supported employment on work opportunities for disabled persons).

participation in society.[36] Being unemployed often means having to depend on the public welfare system or assistance from family to meet one's basic needs.[37] Being unemployed also frequently brings social marginalization.[38] It follows then that low labor force participation rates among groups of individuals, like the disabled, need to be viewed with urgency.

Although individuals with psychiatric disabilities seek work, they are unemployed at a rate three to five times greater than the general adult population.[39] It is in this light that we consider the remedial system for people who have suffered discrimination on the basis of psychiatric disability. It protects crucial rights. It is not just a method for resolving legal disputes, but also a service system that can and should be operated within the broader ethic of care that is captured in the concept of therapeutic jurisprudence.[40] Our findings indicate that this system may be itself infected with the illness it is designed to cure—plaintiffs with psychiatric disabilities are significantly less likely than their counterparts with non-psychiatric disabilities to receive a beneficial outcome from filing a Title I lawsuit, controlling for other significant predictors of litigation outcome including health status, education, reasons for the lawsuit, and assistance by a lawyer.

Our findings amplify studies limited to published case outcomes. A series of annual reviews prepared by the staff of the American Bar Association's (ABA) *Mental and Physical Disability Law Reporter* has high-

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36. John S. Strauss & Larry Davidson, *Mental Disorders, Work, and Choice, in* MENTAL DISORDER, WORK DISABILITY, AND THE LAW 105, 105 (Richard J. Bonnie & John Monahan eds., 1997).

37. Susan S. Suter, *Foreword* to SUPPORTED EMPLOYMENT, *supra* note 35, at xiii.

38. *See* Rubenstein, *supra* note 35, at 210, 213 (describing the social prejudice against mentally disabled persons).

39. Judith A. Cook et al., *Integration of Psychiatric and Vocational Services: A Multisite Randomized, Controlled Trial of Supported Employment*, 162 AM. J. PSYCHIATRY 1948, 1948 (2005). As we have noted in past work, however, it is important to assess the ADA's impact on employment rights in light of the limited reach of the statute: whatever the language of its preamble might suggest, the terms of Title I only extend to the proportion of people with disabilities who are able to work with minimal or no accommodation. Title I cannot be said to be anything like an affirmative action mandate to substantially improve the labor force participation of people with disabilities. *See* Burris & Moss, *supra* note 4, at 31 (stating that the ADA was not intended to assure equal opportunity employment "by itself" (emphasis omitted)).

40. *See* Deborah A. Dorfman, *Effectively Implementing Title I of the Americans With Disabilities Act for Mentally Disabled Persons: A Therapeutic Jurisprudence Analysis*, 8 J.L. & HEALTH 105, 113–14 (1993–1994) (noting that the employment rights guaranteed by Title I of the ADA increase the self-worth and self-esteem of those with mental disabilities); David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27, 32 (1992) ("Therapeutic jurisprudence assumes that, *other things being equal*, the law should be restructured to better accomplish therapeutic values.").

lighted the extremely high win rate for defendants in published ADA decisions.[41] These surveys have also consistently found that people with psychiatric disabilities fare worse than people with other disabilities. In 2001, for example, plaintiffs overall won 4.3% of cases in the sample, compared to only 1.4% of people claiming mental illness.[42] In 2002, the win rate was 5.5% for all disabilities and only 2.7% for people with mental illness.[43] In 2003, the overall win rate fell to 2.7%, but there were not any victorious plaintiffs with a mental illness.[44] In 2004, the overall win rate increased to 3%, but again none of the plaintiffs with mental illness recovered.[45]

People can "lose" lawsuits and still feel satisfied with the process, so we also examined the perception of procedural justice as an outcome. Regrettably, a substantial proportion of all the ADA litigants we

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41. Amy L. Allbright, *2004 Employment Decisions Under the ADA Title I—Survey Update*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 513 (2005) [hereinafter *ADA Survey 2004*]; Amy L. Allbright, *2003 Employment Decisions Under the ADA Title I—Survey Update*, 28 MENTAL & PHYSICAL DISABILITY L. REP. 319 (2004) [hereinafter *ADA Survey 2003*]; Amy L. Allbright, *2002 Employment Decisions Under the ADA Title I—Survey Update*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 387 (2003) [hereinafter *ADA Survey 2002*]; Amy L. Allbright, *2001 Employment Decisions Under the ADA Title I—Survey Update*, 26 MENTAL & PHYSICAL DISABILITY L. REP. 394 (2002) [hereinafter *ADA Survey 2001*]; Amy L. Allbright, *2000 Employment Decisions Under the ADA Title I—Survey Update*, 25 MENTAL & PHYSICAL DISABILITY L. REP. 508 (2001) [hereinafter *ADA Survey 2000*]; John W. Parry, *Highlights & Trends: 1999 Employment Decisions Under the ADA Title I—Survey Update*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 348 (2000); John W. Parry, *Trend: Employment Decisions Under ADA Title I—Survey Update*, 23 MENTAL & PHYSICAL DISABILITY L. REP. 294 (1999); *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403 (1998) [hereinafter *ADA Study 1998*]. The *ADA Surveys* are based on cases decided with an available judicial opinion, and so are subject to some biases. *See ADA Survey 2004*, *supra*, at 513 (describing methodology). For example, they will undercount trial outcomes that are not appealed.

ADA plaintiffs do not fare as well as other civil rights litigants. *See* MARIKA F. X. LITRAS, BUREAU OF JUSTICE STATISTICS, CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990–98, at 9 (2000) (analyzing federal district court outcomes between 1990 and 1998); David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 545 (2003) (finding that disability discrimination cases had lower plaintiff win rates than employment discrimination cases generally in California courts). And there is an extensive literature seeking to explain why. *See generally* Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409 (1997) (discussing how courts have misconstrued and restricted the ADA definition of disability, making it more difficult for ADA plaintiffs to win their claims); Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223 (2000) (cataloguing negative stereotypes amplified in media reports on ADA trials).

42. *ADA Survey 2001*, *supra* note 41, at 397–98.

43. *ADA Survey 2002*, *supra* note 41, at 389.

44. *ADA Survey 2003*, *supra* note 41, at 322–23.

45. *ADA Survey 2004*, *supra* note 41, at 515–16.

interviewed (and on some measures a substantial majority) were unhappy with the fairness of the procedures they experienced, but plaintiffs with psychiatric disabilities were significantly less satisfied than plaintiffs with non-psychiatric disabilities. People with psychiatric disabilities were significantly less likely than people with other disabilities to feel that they had a chance to tell their stories, that they were treated with dignity, or that decisionmakers were fair. While poor outcome appears to be the root cause of dissatisfaction in the process for people with psychiatric disabilities, the perception of procedural unfairness adds insult to injury.

Has therapeutic jurisprudence somehow become iatrogenic litigation? It is a serious charge, and so we consider a range of possible explanations. Most obviously, a pattern of different outcomes is not the same thing as a disparity in the sense we use that term—psychiatric disability claims may as a whole be legally or factually weaker than other disability claims, in which case systematically poorer outcomes do not suggest a disparity in the day-to-day *administration* of the ADA.[46] We will also consider whether the difference in outcomes may be explained by defendant or lawyer behavior rather than the behavior of judges and administrative personnel. Finally, we will consider whether we can trust what people with psychiatric disabilities tell us about their unhappy experiences.

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46. We write of the "administration" of the ADA because the governing case law, as shaped by both trial and appellate courts, may reflect myths, stereotypes, and prejudices concerning the mentally disabled, but the lawyers and judges working on a particular case are nonetheless bound by those decisions. Judges could apply unfair principles fairly and lawyers might lower their estimate of a case's chances, even if they themselves were free of bias.

It is here that the analogy to health disparities breaks down. One might phrase a specific disparity question in health this way: two similar patients (alike in job, income, and education), but different in race, have blood pressures of 190/110, a score that indicates a need for anti-hypertension treatment. They receive different treatment. Hypertension has a reasonably objective clinical definition—one either meets it or does not. If the two patients are treated differently, we have a disparity and the inquiry shifts to the origins of this disparity. In law, however, every claim of discrimination is unique, and the claim is evaluated by standards that themselves are in steady evolution and may reflect bias or stereotyping. Even if it were shown that the case law on disability was substantially less favorable to plaintiffs with mental disabilities, or that it was harder to prove such cases because of greater diagnostic uncertainty (for example), we would only get to the question of whether the case law itself reflected biases or stereotypes of judges regarding people with mental disabilities.

A. Is There a Justice Disparity or Can Different Outcomes Be Explained by Differences in the Validity of the Cases?

The simplest explanation for a different pattern of outcomes like this would be that losing claims have less intrinsic legal validity. If cases brought by people with psychiatric disabilities are weaker than those brought by people with other disabilities, then a properly functioning court system would steer those cases to poorer outcomes. At the outset, we must reject this as a justification for poorer perceptions of procedural justice. All litigants should be treated fairly, and litigation can be therapeutic if it provides a fair opportunity for people to find out that their perceptions of discrimination were incorrect. Our findings reveal that for people with psychiatric disabilities, a sense of procedural justice was a distinct and independent factor in satisfaction, so that even those who won felt badly treated from a procedural fairness point of view.

Nonetheless, it is important to consider whether some proportion of the difference we find can be explained by neutral factors. Defining "legal validity" for this purpose is not difficult—it means a case that is well-founded in the law and well-supported by the facts. Unfortunately, we have no external measure of legal validity at either the administrative or the court level. For our purposes, a valid case is a winning case. We therefore cannot rule out the possibility that cases brought by people with psychiatric disabilities tend, as a group, to have poorer factual support.[47] As far as legal strength of these claims go, we can use case law analysis and empirical data from the EEOC to narrow the bounds of uncertainty.

1. ADA Case Law on Psychiatric Disability

As far as the law on the books is concerned, the story of the ADA is the narrowing definition of who is protected by the statute at all, that is, whether the plaintiff is a "qualified individual with a disability."[48] The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life

47. Some observers have criticized the ADA and other employment discrimination laws for encouraging frivolous lawsuits by disgruntled employees. *E.g.*, WALTER OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE (1997); G.E. Zuriff, *Medicalizing Character*, 123 PUB. INT. 94, 96 (1996) ("What were in earlier times considered to be faults of mind and flaws of character are today regarded as 'psychological disorders,' which are, moreover, covered by the ADA."). Whatever the merits of these arguments, they offer no basis for assuming that frivolous lawsuits are brought in disproportionate numbers by people with psychiatric disabilities.

48. 29 C.F.R. § 1630.2(m) (2006). This "means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the

activities."[49] The analysis requires first that the plaintiff demonstrate that her condition is an "impairment,"[50] and that the impairment substantially limits a major life activity without at the same time rendering the plaintiff unable to do the job with no more than a reasonable accommodation.[51] These determinations must be made on a case-by-case basis.[52] A *person* is found to be disabled; conditions are not categorically disabilities.

In matters of psychiatric disability, the EEOC and courts have relied on professional diagnosis and the American Psychiatric Association's (APA) *Diagnostic and Statistical Manual* in determining whether specific conditions constitute impairments within the meaning of the ADA.[53] Diagnoses included in the APA manual and recognized by the courts as at least potentially disabling include major psychiatric diseases such as schizophrenia, bipolar disorder, and depression, as well as most of the anxiety disorders such as panic disorder, post-traumatic stress disorder, claustrophobia, and agoraphobia. Other recognized disabling conditions include attention deficit hyperactivity disorder and learning disorder.[54] Courts have generally not recognized as im-

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employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." *Id.*

49. 42 U.S.C. § 12102(2)(A) (2000).

50. "Impairment" means a physical or mental impairment. 29 C.F.R. § 1630.2(h). It is defined as:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Id. § 1630.2(h)(1)–(2).

51. The text of the ADA provides that "reasonable accommodation may include":

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9).

52. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999).

53. Karl A. Menninger, II, *Employment Discrimination on the Basis of Mental Disability Under the Americans With Disabilities Act*, 48 AM. JUR. 3D *Proof of Facts* § 3 (1998); *see* Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 143 (1st Cir. 1998) (relying on the APA manual for definition of attention deficit hyperactivity disorder).

54. *E.g.*, EEOC, *Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities*, *in* EMPLOYMENT DISCRIMINATION COORDINATOR § 4:6 (2006); Menninger, *supra* note 53, § 3; *see also* Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999)

pairments such conditions as intermittent explosive disorder, compulsive gambling, kleptomania, pyromania, sexual behavior disorders, and psychiatric conditions resulting solely from current illegal drug use.[55]

A person with an impairment is not disabled within the meaning of the ADA unless the impairment substantially limits a major life activity.[56] These include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[57] As interpreted by the EEOC, an impairment "substantially limits" a major life activity only if the person in question is "[u]nable to perform a major life activity that the average person in the general population can perform" or is "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."[58] There is a certain Catch-22 in the way courts have interpreted the ADA's definition of disability, if not in the definition itself—the plaintiff is put to the task of showing both that an impairment is serious enough to substantially limit a major life activity and that it is not so serious as to render the individual unable to do the job. This effect has been heightened for a broad range of treatable disabilities, like depression or bipolar disorder, by the Supreme Court of the United States's ruling that mitigating measures—treatment—should be considered in determining the effect of an impairment on a major life activity.[59]

Reported decisions in psychiatric disability cases illustrate the difficulties that have developed for plaintiffs under the present interpretation of the statute. Courts have found that depression did not significantly impair major life activities because medication had allowed the plaintiff to maintain a seemingly normal family life and ca-

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(bipolar disorder); Whalley v. Reliance Group Holdings, Inc., No. 97 Civ. 4018(VM), 2001 WL 55726, at *4 (S.D.N.Y. Jan. 22, 2001) (bipolar disorder); Horwitz v. L & J.G. Stickley, Inc., 122 F. Supp. 2d 350, 354 (N.D.N.Y. 2000) (same); Evans v. Magna Group, No. 98–3125, 1999 WL 402401, at *2 (7th Cir. June 11, 1999) (obsessive compulsive disorder); Rio v. Runyon, 972 F. Supp. 1446, 1455 (S.D. Fla. 1997) (agoraphobia); Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 626 (6th Cir. 2000) (learning disorder); Bartlett v. N.Y. State Bd. of Law Exam'rs, 156 F.3d 321, 329 (2d Cir. 1998) (learning and reading impairment).

55. 29 C.F.R. § 1630.3(d) (2006); Menninger, *supra* note 53, § 3.

56. 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.2(g)(1).

57. 29 C.F.R. § 1630.2(i).

58. *Id.* § 1630.2(j)(1)(i)–(ii).

59. Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999).

reer for a period of years.[60] A person with bipolar disorder failed to prove her impairment substantially limited a major life activity in part because her most recent episode of severe anxiety had lasted only six months and had not prevented her from doing most of her daily tasks with the help of her husband.[61] People with alcoholism, obsessive compulsive disorder, post-traumatic stress syndrome, stuttering, and Tourette's syndrome have all in individual cases failed to convince the court that their impairments substantially limited their major life activities.[62] Reviewing the cases, at least some commentators have concluded that the ADA has done little to enable people with psychiatric disabilities to fight discrimination in the workplace.[63]

The operative question for this Article, however, is whether people with psychiatric disabilities have *a harder time than others* proving disability—whether there is anything in the case law that would explain a pattern of poorer litigation outcomes for people with psychiatric compared to other disabilities. Casual perusal of case decisions reveals no such pattern. People with other disabilities face similar Catch-22 issues and such specific hurdles as the consideration of mitigating measures.[64]

A more systematic analysis of case decisions also casts doubt on the suggestion that people with psychiatric disabilities lose more frequently because their cases are legally weaker. Professor Ruth Colker used multivariate regression techniques to identify case factors pre-

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60. *E.g.*, Swanson v. Univ. of Cincinnati, 268 F.3d 307, 316 (6th Cir. 2001) (finding that evidence showed the plaintiff "was impaired in his sleep and communication by his depression but not substantially limited. His own statements and actions show that when he was on Paxil and Prozac, the quality of his sleep improved and he recovered his communication abilities."); Cooper v. Olin Corp., Winchester Div., 246 F.3d 1083, 1088–89 (8th Cir. 2001) (determining that a plaintiff who had battled depression for over thirty years was not substantially limited in her life activities because she worked, raised a family, spoke with friends, and cared for animals).

61. Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 158–59 (E.D.N.Y. 2002), *aff'd in part, vacated in part*, 386 F.3d 192, 204–05 (2d Cir. 2004).

62. *See* Bailey v. Georgia-Pacific Corp., 306 F.3d 1162, 1168–69 (1st Cir. 2002) (alcoholism); Steele v. Thiokol Corp., 241 F.3d 1248, 1255 (10th Cir. 2001) (obsessive compulsive disorder); Marschand v. Norfolk & W. Ry. Co., 876 F. Supp. 1528, 1539–40 (N.D. Ind. 1995) (post-traumatic stress syndrome); Preacely v. Schulte Roth & Zabel, 17 F. App'x 57, 59 (2d Cir. 2001) (stuttering); Ray v. Kroger Co., 264 F. Supp. 2d 1221, 1225–26 (S.D. Ga. 2003) (Tourette's Syndrome).

63. *See* SUSAN STEFAN, HOLLOW PROMISES, at xiv (2002) (equating the current workplace environment for those with mental disabilities to "don't ask, don't tell").

64. *E.g.*, Roush v. Weastec, Inc., 96 F.3d 840, 844 (6th Cir. 1996) (finding that effectively treated kidney disease was not a disability); *see also* Eliza Kaiser, *The Americans with Disabilities Act: An Unfulfilled Promise for Employment Discrimination Plaintiffs*, 6 U. PA. J. LAB. & EMP. L. 735, 736 (2004) (arguing that the ADA's "heart has been cut out" by narrow judicial interpretations of ADA provisions (internal quotation marks omitted)).

dicting outcomes of published ADA appellate opinions.[65] She found that only two of thirteen categories of disability (impairments of extremities and diabetes) were significant predictors of a beneficial plaintiff outcome.[66] What she categorized as psychological impairments were actually positively correlated with a pro-plaintiff decision, though the relationship was not statistically significant.[67] In short, at the appellate level, the evidence does not support the view that people with psychiatric disabilities have weaker cases than other plaintiffs, and may even slightly support the proposition that their cases are stronger.

Prevailing in an ADA case has been difficult for all plaintiffs. The rulings that have narrowly interpreted the law have applied generally to all kinds of disabilities. People with psychiatric disabilities have fared worse than others in the published decisions surveyed by the ABA, but more rigorous statistical analysis does not find that psychiatric disability predicts a poorer outcome. Because published decisions constitute the case law applied to future cases, the available evidence suggests that differences in the outcomes of cases based on psychiatric versus other types of disability cannot easily be explained by doctrinal factors.

2. EEOC Ratings and Outcomes

The EEOC maintains a system to rate the strength of cases. After the intake interview, investigative staffers assign an "A" to cases that appear meritorious, a "C" to cases that appear clearly unmeritorious (typically because of a jurisdictional problem like an employer or an impairment not covered by the law), and a "B" to cases that require further investigation to assess.[68] Our studies of the ADA administrative charge process consistently found that people with psychiatric disabilities fared worse than people with other forms of disability. The overall benefit rate for people with psychiatric disabilities was 10.3%, compared with 12.7% for persons with other disabilities. Among the 149,123 charges that had been closed as of September 30, 2000, the overall benefit rates for depression, schizophrenia, and other psychiatric cases were 9.8%, 9.1%, and 10.9%, respectively, whereas the overall benefit rates for HIV, kidney, and hearing impairment cases were

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65. Ruth Colker, *Winning and Losing under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 243, 266 (2001).

66. *Id.* at 266, 268, 273.

67. *Id.* at 266, 268. She treated substance abuse as a separate category and found it to be negatively but non-significantly correlated with plaintiff success. *Id.*

68. Moss et al., *Unfunded Mandate*, *supra* note 11, at 22.

16.6%, 15.9%, and 15.6%, respectively.[69] Much of this difference appeared in multivariate analysis to be mediated through the initial case categorization decision made by staffers at or shortly after intake. Psychiatric disabilities were much less likely than others to be rated "A": 54.2% of HIV cases received an "A" categorization, but only 12.7% of schizophrenia cases and 13.0% of depression received "A" ratings.[70] In multivariate analysis, psychiatric disability accounted for almost a quarter of the variance in case categorization.

Again, however, these data are hard to interpret. Is it evidence that the cases are weaker or that the decisions within the system are infected with biased decisionmaking against or misinformation about people with psychiatric disabilities? As we have explained elsewhere, the accuracy of this rating system has not been evaluated, and there are reasons to believe it is poor.[71] Further, it is not clear that a true pattern of weaker cases at the administrative level would be reproduced in a sample of cases that reached court: anyone can file a claim with the EEOC, at low cost and without legal assistance, whereas to proceed to court with a reasonable hope of winning requires a lawyer.[72] Lawyers can be seen as agents of quality control for the court system, because they have an incentive to take the strongest cases. If the psychiatric disability cases in our sample were weaker than others, we would expect that significantly more of them would be brought without a lawyer, but this was not so.[73] Thus, even if the EEOC charge pool tended to have a disproportionate number of weak psychiatric disability cases, the willingness of lawyers to take psychiatric cases to federal court at the same general rate as cases involving other disabilities would support the conclusion that the federal claim pool is made up of cases of comparable quality.

3. Weaker Facts

It is possible that mental disability cases are in some way weaker on the facts. Some may think that mental disability ADA cases may be

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69. *Id.* at 92–93.

70. *Id.* at 94.

71. *See id.* at 94–95 (explaining that the categorization system is subject to a number of biases).

72. *See* Moss et al., *Prevalence and Outcomes*, *supra* note 11, at 307 (finding that pro se plaintiffs were almost three times less likely than represented parties to obtain benefit from the legal process).

73. It is possible that lawyers reject a higher proportion of potential ADA clients with psychiatric disabilities compared to potential clients with other disabilities. But if this were true, it would undermine, rather than support, the hypothesis that disability claims reaching court are generally weaker than claims involving other disabilities.

more likely to involve "acting out" at work—behavior arising from the disability that constitutes misconduct rather than behavior that may derogate in some other way from the employer's preferred course of events. It is one thing to accommodate an employee by changing the layout of the work station or adjusting hours, and quite another to ask employees or customers to tolerate verbal abuse or even assault. There are cases where an employee tried to defend verbal abuse or insubordination by invoking the ADA,[74] and such cases have figured into the political iconography of the ADA as a boondoggle for the lazy, cunning, or unfit.[75] The broader argument is that it might be systematically harder to deal with people with mental disabilities or they might bring cases with substantially thornier fact patterns.[76] It would not take that much more complexity to produce the outcome difference we see in ADA data.

However plausible the suggestion, we are aware of no empirical data supporting the assertion that psychiatric disability claims are substantially more likely to present difficult factual scenarios. In our study, the fact that lawyers were as willing to take psychiatric as non-

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74. *See, e.g.*, *Carrozza v. Howard County*, 847 F. Supp. 365, 367–68 (D. Md. 1994) (finding that the employer was justified in taking adverse employment action because of misconduct despite acknowledging that the misconduct may have been caused in part by employee's bipolar disorder), aff'd, 45 F.3d 425 (4th Cir. 1995) (per curiam); *Hogarth v. Thornburgh*, 833 F. Supp. 1077, 1086–87 (S.D.N.Y. 1993) (finding that employee was not "otherwise qualified" for his position because misconduct stemming from bipolar disorder was likely to reoccur); *Mancini v. Gen. Elec. Co.*, 820 F. Supp. 141, 147 (D. Vt. 1993) (finding that employee was not "otherwise qualified" because of insubordination caused by an emotional condition).

75. "One case, for example, involved a man who brought a loaded gun to work and claimed he was protected by a psychiatric disability." LaCheen, *supra* note 41, at 228; *see id.* at 227–28 (describing content of an *ABC News Special: The Blame Game*). A well-known political pundit wrote:

> Compassionate government has recently rained new rights and entitlements so rapidly that you may have missed this beauty: You have a right to be a colossally obnoxious jerk on the job.
>
> If you are just slightly offensive, your right will not kick in. But if you are seriously insufferable to colleagues at work, you have a right not to be fired, and you are entitled to have your employer make reasonable accommodations for your "disability." That is how the Americans with Disabilities Act of 1990 (ADA) is being construed.

George F. Will, Op-Ed., *Protection for the Personality-Impaired*, WASH. POST, Apr. 4, 1996, at A31. Peter Blanck has argued that these sorts of negative media portrayals promote negative public attitudes about mental disabilities that spill over into the implementation of remedial programs like the Civil War pension system and the ADA. *See* Blanck, *supra* note 18, at 202–08.

76. Such views have been reported among lawyers. *See Disabilities: Mental Disabilities Pose Challenge For Litigants Under ADA, Attorneys Agree*, 178 Daily Lab. Rep. (BNA) No. 8, at C-1 (Jan. 12, 2006) (noting that attorneys at a recent conference agreed that federal courts construe the ADA narrowly in cases involving mental disabilities).

psychiatric cases tends to negate this hypothesis.[77] We would also expect, if cases involving people with mental disabilities were substantially more likely to involve workplace misconduct, that more cases would be brought for discharge. In our sample, people with psychiatric disabilities were slightly more likely than people with other disabilities to bring cases based on discharge, but none of the differences in basis of suit were statistically significant.

Of course, it may be argued that the very findings we take as evidence of a disparity—the lower settlement rate for psychiatric disability cases, the significantly lower rate of monetary settlements, and the lower absolute amount of monetary settlement—could just as well be taken as proof that psychiatric cases are, as a group, weaker than other disability cases. If the settlement market accurately prices cases based on their likelihood of winning, then what we have taken as possible evidence of a disparity is better understood as evidence of a smoothly functioning system. We cannot rule this out, but it would mean that lawyers were consistently wrong about case quality or were more willing to take risks on psychiatric disability cases. Further, the lower-quality theory does not fully explain the procedural justice gap. Because winning is somewhat correlated with the perception of procedural justice, lower case quality might explain why people with mental disabilities as a group are less satisfied than people with other disabilities—they win less often. It would not explain, however, why *winners* with mental disabilities are less satisfied than winners with other disabilities or why *losers* with mental disabilities are less satisfied with the procedural justice they received than other losers.[78]

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77. *See supra* note 73 and accompanying text. *But see infra* note 78 (suggesting that analysis of outcome by perceptibility of diagnosis suggests that psychiatric disability cases are more difficult to win than non-psychiatric cases).

78. Some early readers of this Article also wondered whether the difference in outcomes we found comparing psychiatric and non-psychiatric cases might also be explained on some broader basis through some characteristic common to a number of disabilities that makes these cases harder to win. If psychiatric disabilities share such a characteristic, they are not unique and the outcome differences are therefore not uniquely linked to mental disability cases. This suggestion is implausible, however, given the robust and repeated finding that psychiatric cases have poorer outcomes on multiple measures compared to other cases. *See* Moss et al., *Unfunded Mandate*, *supra* note 11, at 91–95. Nonetheless, in this study we considered one such characteristic, the perceptibility or obviousness of the disability. We analyzed the interaction effect of two variables on benefit: disability type and perceived social labeling of one's disability. We found that the social label works in opposite ways for physical versus psychiatric disabilities. For people with physical disabilities, obviousness of the disability is associated with a higher probability of benefit, whereas for people with mental disabilities, obviousness is associated with lower chances of a benefit.

This difference in the effect of obviousness would, however, support the suggestion that psychiatric cases are, as a class, harder to win on the facts than other types of cases.

In the end, we cannot rule out the possibility that, for a variety of reasons, the cases brought by people with psychiatric disabilities have more weaknesses than those brought by others. The available data, however, do not strongly support this explanation. Rather, the available evidence makes out a prima facie case of justice disparity. We now turn to a second possible response to our data: whether the behavior that causes the disparity between psychiatric and non-psychiatric cases is not attributable to the administrative or court systems.

B. Are Defendants or Lawyers to Blame?

There is no doubt that plaintiffs with psychiatric disabilities fare worse than those with non-psychiatric impairments, and that this is true at both the administrative and federal district court levels. This does not mean that the courts or administrative agencies are the cause. The reason is that most of these "benefit" outcomes are settlements, which carries two important implications. First, settled cases may have afforded little or no opportunity for respondents to interact with court or administrative personnel. Second, a settlement requires willing employers. If the employer is discriminating—refusing to settle cases that would otherwise settle but for the claimant's disability—then we might see lower benefit rates for plaintiffs with psychiatric disabilities even without active discrimination by judges or administrative personnel.

First, consider discrimination by the employer. There is some support for this in the EEOC charge data. One of the EEOC's more successful innovations in the 1990s was the introduction of a voluntary mediation track for "B" cases. Mediation earned generally high levels of satisfaction from litigants and resolved cases efficiently.[79] We found, however, that people with psychiatric disabilities fared worse than people with other kinds of disabilities at some stages of the medi-

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Proving that one satisfies the definition of "qualified person with a disability" is the great hurdle ADA plaintiffs face. Non-obviousness could make it legitimately more difficult to prove impairment in physical disability cases like back pain, whereas obviousness could well make it more difficult to prove job performance qualifications in psychiatric disability cases. If having an obvious disability—usually an advantage—is a disadvantage for people with psychiatric disabilities, we would expect them to lose more often than others.

This explanation raises broader concerns of stigma. If a person reveals a hidden back problem, others will not reject, fear, blame, or ridicule the person (assuming the claim is not deemed a lie). But others may tolerate a mental illness far less well, regardless of one's behavior. Stigma may rain down on people with all kinds of disabilities, but it may fall harder on those with mental disabilities in the ADA process, because they are blamed for hijacking the ADA from its original noble purpose: protecting people with "real" disabilities. *See supra* note 75 and accompanying text.

79. Moss et al., *Unfunded Mandate*, *supra* note 11, at 36–37.

ation process.[80] Employers were significantly less willing to mediate with claimants who had psychiatric disabilities than with those who had other kinds of disabilities, though it was not just employers who seemed to discriminate: EEOC staff were slightly but significantly less likely to refer individuals with psychiatric disabilities than people with other disabilities to its mediation program.[81]

An employer might discriminate in settlement situations for at least two reasons. First, employers might have stronger negative attitudes toward people with psychiatric disabilities, and simply be more averse to employing or advancing the person. Studies show that employers view people with psychiatric disabilities with more prejudice than people with other disabilities.[82] Second, employers might calculate that they are more likely to win in court against a claim from a stigmatized mentally ill employee than a physically disabled employee, and so might be less inclined to settle with such a litigant. The problem for present purposes is that neither of these explanations actually exonerates the legal system from responsibility, if only for a failure to remediate. If settlement systematically works to the disadvantage of people with psychiatric disabilities, whether because employer animus is greater or employers believe they have a better chance of winning in court, then a system that depends on settlement is passively allowing unfair practices to persist. As Owen Fiss famously opined, civil settlement can be seen as "the civil analogue of plea bargaining," a problematic concession to the conditions of mass society.[83] The argument that our outcome disparity is the result of employer behavior may relieve judges and administrators of blame, but does not remove their responsibility to act.[84]

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80. Moss et al., *Mediation*, *supra* note 11, at 991–92.

81. *Id.* at 992.

82. *See* Gary L. Albrecht et al., *Social Distance from the Stigmatized: A Test of Two Theories*, 16 SOC. SCI. & MED. 1319, 1323–24 (1982) (finding that mental illness stigmatizes an employee more than other selected physical disabilities based on data collected from professionals and managers); John L. Tringo, *The Hierarchy of Preference Toward Disability Groups*, 4 J. SPECIAL EDUC. 295, 299–300 (1970) (finding that students separated into several control groups were overall less accepting of mental illness than other tested disabilities). These studies are discussed in Marjorie L. Baldwin, *Can the ADA Achieve Its Employment Goals?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 44 (1997).

83. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

84. As we will discuss *infra*, settlement presents a challenge from the procedural justice standpoint—a challenge that goes both to the quality of the legal process and the use of a procedural justice framework in assessing that quality. Where most cases settle, litigants cannot reasonably react to the procedure because they have little or no experience with the legal process. Reinforcing Fiss's observation, we would be seeing a trade-off between resolving cases and offering people the benefits of procedures that feel fair. As Tom Tyler observed, the Supreme Court's conception of "due process" has been sensitive to the psy-

What if the lawyer is to blame? After all, most parties experience the legal system through the lawyer. Their perceptions of voice, fairness, or dignified treatment may be shaped by what their lawyer tells them or how their lawyer treats them. Likewise, a lawyer's confidence in the client and her story is presumably quite important in the lawyer's approach to settlement and valuation of the case.[85] As shown in Table 3, what we called "lawyer engagement" was a significant predictor of satisfaction for plaintiffs generally. As might be expected, people were more satisfied with their litigation experience if their lawyers listened to their concerns, investigated the facts, and kept them informed of the progress of the case. But, as Table 4 shows, this was equally true regardless of disability type. The behavior of one's lawyer accounts for some part of satisfaction or dissatisfaction with litigation, but it does not let the courts or agencies off the hook, nor does it account for any satisfaction disparity between people with psychiatric disabilities versus other types of disabilities.

C. Is the Satisfaction Disparity an Artifact of the Disability Itself?

A skeptic could point out that we rely on plaintiffs' subjective appraisal and self-report of procedural justice, and that people with psychiatric illnesses may have impaired judgment about these things. In particular, depressive illness can affect cognition and distort reality, making things seem much worse than they would appear to a nondepressed observer.[86] Plaintiffs with depression might tend to give a gloomier appraisal—because of their mood symptoms—of whether they were treated fairly and respectfully and were given an adequate chance to tell their story. This is relevant because depression is the most common illness in our sample of people with psychiatric disabilities.

One thing that tends to rule out this explanation is that people with psychiatric disabilities have an objective reason for dissatisfaction.

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chological impact of court proceedings: "[w]hen conceptualized this way, due process involves giving people judicial procedures that they will perceive as fair." Tyler, *supra* note 24, at 434–35.

85. *See* Michael L. Perlin, *"You Have Discussed Lepers and Crooks": Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 684 (2003) (arguing that a lawyer's negative attitudes towards people with psychiatric disabilities could impair advocacy efforts).

86. *E.g.*, DAVID A. CLARK ET AL., SCIENTIFIC FOUNDATIONS OF COGNITIVE THEORY AND THERAPY OF DEPRESSION 115 (1999); James C. Coyne & Ian H. Gotlib, *The Role of Cognition in Depression: A Critical Appraisal*, 94 PSYCHOL. BULL. 472, 472–73 (1983); Susan Krantz & Constance Hammen, *Assessment of Cognitive Bias in Depression*, 88 J. ABNORMAL PSYCHOL. 611, 611 (1979); Rachel M. Msetfi et al., *Depressive Realism and Outcome Density Bias in Contingency Judgments: The Effect of the Context and Intertrial Interval*, 134 J. EXPERIMENTAL PSYCHOL: GEN. 10, 10 (2005).

They really do get worse results in their ADA cases—fewer settlements, fewer decisions in their favor—than people with other disabilities. In our data, there is a strong and significant negative association between psychiatric disability and beneficial outcome in the court record, which does not depend on any perception or report from the plaintiff. A successful outcome, in turn, is highly correlated with the perception of procedural justice.

We also evaluated whether a plaintiff's mood affected our data: interviewers' ratings of the quality of the responses were to be marked down specifically if the respondent seemed depressed. There was no significant relationship between psychiatric disabilities versus other disabilities and the interviewers' ratings of the quality of responses. We then ran the model for comparing predictors of overall satisfaction between psychiatric and non-psychiatric disabilities, controlling for: (1) interviewers' rating of the quality of responses; (2) self-rated health status (which tends to be worse for people with depression); and (3) whether the respondent thought others viewed him or her as disabled.[87] The net negative association between psychiatric disability status and procedural justice remained statistically significant.

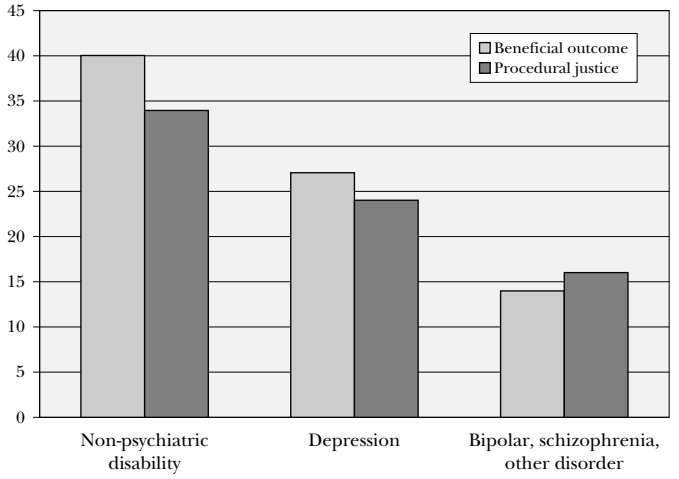
To address the possibility that the analysis might be misleading because we combined depression with other psychiatric disabilities, we divided the respondents with psychiatric disabilities into two groups: depression and other (for example, schizophrenia and bipolar illness). It turns out that outcomes and perceptions of procedural justice are even worse for plaintiffs who did not have depression but some other psychiatric disorder.[88] However, the association between objective outcomes in the lawsuit and perceived procedural justice is uniformly strong, irrespective of the type of disability claimed by the plaintiff. These analyses together convincingly rule out the suggestion that the disparity in satisfaction is all in the plaintiffs' minds.

Having canvassed a variety of explanations, we hold the evidence to support the theory that the differences in benefits and perceptions of procedural fairness uncovered by our data are disparities—problematic variations that cannot be explained by legitimate differences between psychiatric and non-psychiatric disability cases. Case law does not explain the variance. We cannot reject the possibility that psychiatric cases are weaker, but the evidence does not support this proposition. We cannot rule out the related suggestion that employer activity is to blame, but blaming employers does not really let the court system

87. *See supra* p. 115 tbl.4.

88. *See infra* p. 132 fig.3.

FIGURE 3. PERCENT OF PLAINTIFFS RECEIVING A BENEFICIAL OUTCOME AND HIGH RATING OF PROCEDURAL JUSTICE FROM ADA TITLE I LAWSUIT, BY PSYCHIATRIC DIAGNOSIS



off the hook. Similarly, lawyers do not appear, from our data, to be blameworthy either. Finally, we do not see evidence in our study that the disparity in procedural justice is an artifact of the disability itself, a mood effect, though this is possible. At this point, then, we have a plausible finding of disparities in the application of the ADA to people with psychiatric disabilities.

D. Causes of the Disparities: "Clinical Uncertainty," Stereotype, or Prejudice?

Michael Perlin has coined the term "sanism" to name a cultural bias against people with psychiatric disabilities.

> I define "sanism" as "an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry." It infects both our jurisprudence and our lawyering practices. Sanism is largely invisible, and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition, and deindividualization. It is sustained and perpetuated by our use of alleged "ordinary common sense" . . . and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.[89]

89. Perlin, *supra* note 18, at 536 (footnotes omitted). Perlin's rhetoric is at the dramatic end of the spectrum, but other commentators agree that "basic concepts about the

Perlin and others have argued that the sanist stigma pervades the legal system for addressing issues related to psychiatric disabilities, particularly in the civil commitment area.[90] In an article published soon after the ADA was passed, Perlin warned of the danger that sanist attitudes among judges and others would affect the implementation of the ADA and undermine its potential "to make any true headway in restructuring the way that citizens with mental disabilities are dealt with by society."[91]

The notion of sanism is useful in the way it points to culture as a source of continuing unfair treatment of people with mental illness. As an analytic tool for explaining our data, however, sanism is rather fuzzy. Fortunately, the causes of health disparities have been examined with considerable care and subtlety. Drawing upon that work, we may distinguish three reasons why actors in the ADA enforcement system might treat people with mental disabilities worse than other plaintiffs: prejudice, stereotypical thinking, and professional uncertainty.[92] These explanations are not mutually exclusive at either the individual or the population level. All could be playing some role in creating disparities. They do, however, require different responses.

Prejudice is a simple explanation for poor treatment. It is possible that EEOC investigators, lawyers, court personnel, and judges consciously harbor hostile or stigmatized views of people with mental illness, and act accordingly. Our findings point to the distinct possibility that people with psychiatric disabilities may encounter more prejudice in the ADA Title I enforcement process than those with other disabilities. Research has consistently shown that people with psychiatric disabilities are among the most stigmatized groups in society and that they are harmed in their daily life activities by myths,

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nature of mental illness, shared across cultural, legal, and policy domains, have a pervasive effect on law and social policy." William Spaulding et al., *Applications of Therapeutic Jurisprudence in Rehabilitation for People with Severe and Disabling Mental Illness*, 17 T.M. COOLEY L. REV. 135, 135–36 (2000). Misinformation persists, and it influences both individual case outcomes and evolving social and professional attitudes.

90. *See, e.g.*, Pamela R. Champine, *A Sanist Will?*, 46 N.Y.L. SCH. L. REV. 547 (2003) (discussing the prejudicial attitudes towards those suffering from mental illness in the law of wills); Claire B. Steinberger, *Therapeutic Jurisprudence: The "Sanist" Factor—An Interdisciplinary Approach*, 46 N.Y.L. SCH. L. REV. 573 (2003) (discussing the application of the sanist perspective within therapeutic jurisprudence).

91. Michael L. Perlin, *The ADA and Persons With Mental Disabilities: Can Sanist Attitudes be Undone?*, 8 J.L. & HEALTH 15, 22 (1993–1994) (emphasis omitted).

92. The typology here is taken from Balsa & McGuire, *supra* note 15, at 90. *See also* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1173 (1995) (using similar approach focused on stereotyping in Title VII discrimination analysis).

stereotypes, and stigmas associated with their impairments.[93] Furthermore, socio-legal research and theory alike consistently hold that actors in the legal system do not shed their socialization at the courthouse door, but rather bring with them the same attitudes and prejudices found in the population at large.[94] It seems possible then that negative attitudes about individuals with psychiatric and other types of impairments have a pervasive influence on behaviors within the legal system, and influenced our actual outcome and satisfaction data. If prejudice is causing discrimination, the civil justice system faces a challenge that may not be amenable to education strategies, but at the same time will be difficult to police by rules—after all, the discrimination would be arising among the very officials charged with enforcing antidiscrimination laws.

A second and more psychologically nuanced possibility is that although they are not motivated by conscious ill-feeling, actors in the ADA enforcement system hold, and act on, stereotypes about the mentally disabled that, while not motivated by conscious ill-feeling, tend to produce different and second-class treatment. This view is more consistent with the general trend in academic theory about discrimination, which places it more and more in the realm of cultural or "structural" phenomena.[95] Stereotypes are ubiquitous, a common

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93. *E.g.*, Bruce G. Link et al., *The Consequences of Stigma for the Self-Esteem of People With Mental Illnesses*, 52 PSYCHIATRIC SERVS. 1621, 1624–25 (2001); Richard A. Van Dorn et al., *A Comparison of Stigmatizing Attitudes Toward Persons with Schizophrenia in Four Stakeholder Groups: Perceived Likelihood of Violence and Desire for Social Distance*, 68 PSYCHIATRY: INTERPERSONAL & BIOLOGICAL PROCESSES 152, 152–54 (2005); *see also* Albrecht et al., *supra* note 82, at 1323–24; Tringo, *supra* note 82, at 295.

94. *See, e.g.*, Kathryn Moss, *Institutional Reform through Litigation*, 58 SOC. SERV. REV. 421, 428–29 (1984) (discussing how staff views negatively impact implementation of federal court mandates to reform mental institutions); Perlin, *supra* note 91, at 30–31 (arguing that judges are not immune from stereotypical attitudes pervading society about those with mental disabilities).

95. Professor Samuel Bagenstos reviews this "structural turn" in antidiscrimination law in Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006). He points to two major elements of this school of analysis:

> First, relying on the findings of social scientists (particularly social psychologists), many scholars contend that modern-day employment discrimination is characterized less by overt, intentional discrimination than by unconscious or subtle biases. Second, a number of scholars observe that changes in the nature and organization of work over the past few decades have made employment discrimination less a problem of discrete, harmful management decisions and more a problem arising from workplace interactions among workers at all levels of an occupational hierarchy.

Id. at 4–5; *see also* Krieger, *supra* note 92, at 1214 (arguing that research in psychology undermines the view that conscious intent or motive drive discriminatory behavior); Perlin, *supra* note 85, at 684 (arguing that unconscious stereotypes about people with mental illness influence decisionmaking throughout the legal system).

part of an individual's cognitive repertoire; people use stereotypes to "simplify and organize social information."[96] Mental illness is complex, and few lawyers and judges ever formally study it. Confronted with a client to help or a case to decide, the uninformed actor fills in the gaps with whatever information is at hand. The well-intentioned attorney might have a hard time understanding the situation of a client with depression and resort to generalizations to plug the information gap. Plaintiffs' attorneys may believe that people with depression will make poorer witnesses, and settle for a lower amount; or defendants and their attorneys may believe that manic-depressive illness is less controllable than other conditions, and be less willing to accept a settlement involving reinstatement; or judges may believe that mental illness is harder to diagnose than other conditions and doubt that a plaintiff actually has an impairment covered by the law.[97] If this sort of behavior is contributing to justice disparities, the primary prescription would be to educate civil justice professionals about mental illness and their sub-optimal reasoning in psychiatric disability cases.

A third explanation for disparate treatment is that legal actors face greater uncertainty in assessing cases involving mental disability and treat these cases differently. This is analogous to the problem of "clinical uncertainty" in health care disparities, which turns on the fact that there may be real differences based on race or gender, such that the outcome disparity arises not from stereotyping or bias but from responding sub-optimally to a real difference.[98] If psychiatric disability cases are somehow different from other cases, the clinical uncertainty problem goes to whether actors in the legal system are responding effectively to these differences in order to produce outcomes for people with psychiatric disabilities that are as satisfactory as the outcomes for others. Here we would not be considering legal or factual differences that would justify a different outcome, but differences that might require different "treatment." For example, a client with a psychiatric disability might have a harder time explaining a case that is as meritorious on both the facts and the law as a case brought by a person with a non-psychiatric disability. Disparities could arise if lawyers or judges are unable to deal effectively with this difference in case presentation. Like the problem of stereotyping, information and

96. Balsa & McGuire, *supra* note 15, at 103 (citation omitted).

97. Perlin contends that lawyers who deploy stereotypical thinking about mental illness: "(1) distrust their mentally disabled clients, (2) trivialize their complaints, (3) fail to forge authentic attorney-client relationships . . . and reject their clients' potential contributions to case-strategizing, and (4) take less seriously case outcomes that are adverse to their clients." Perlin, *supra* note 85, at 695.

98. *See* Balsa & McGuire, *supra* note 15, at 96.

educational strategies are a sensible response, with a particular emphasis on skills building for dealing effectively with real differences in psychiatric disability cases.

Our study neither demonstrates beyond a reasonable doubt that any of these mechanisms are at work in the ADA enforcement system, nor points to any particular actors as perpetrators. Disparity is not necessarily the result of bias or conscious discrimination. It is possible that the sense of unfair treatment we found among people with psychiatric disabilities rests on some sort of misperception or misunderstanding. We cannot resolve this uncertainty, but that is hardly the point. What our study shows is a robust pattern of outcome and satisfaction disparity to which attention must be paid.

E. What Is to Be Done?

Just as the problem of health disparities has animated a substantial amount of inquiry into our health care system, the legal system cannot morally ignore justice disparities. The reasons for justice disparities are likely to be many and complex, and will continue to exert their influence until they are understood and addressed in a comparably thorough way by bar associations, court administrators, and the elected and appointed officials responsible for the operation of the system.[99]

Sadly, a justice disparity for people with psychiatric disabilities would not be unique. For twenty years or more, courts and bar associations have sought to understand and deal with persistent perceptions of racial, ethnic, and gender bias in the administration of justice.[100] Their work has charted a responsible course of action.

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99. Perlin predicts the need for what he aptly called "hearts and minds" strategies in the implementation of the ADA:

> The simple official repudiation of discriminatory practices is not enough to significantly alter the distorted cognitive processes that still frequently dominate our thinking and decision-making. There have been no attempts, so far, to answer the question that has bedeviled civil rights activists since the 1950's: how to capture "the hearts and minds" of the American public so as to best insure that statutorily and judicially articulated rights are incorporated—freely and willingly—into the day-to-day fabric and psyche of society. Unless advocates turn their attention to these attitudinal questions, the ADA may—in "real life"—turn out to be little more than the last in a long (and depressing) series of "paper victories" for mentally ill individuals.

Perlin, *supra* note 91, at 22–23 (footnotes omitted).

100. In a frequently cited study, the National Center for State Courts found that nonwhites (especially African Americans) had a poorer opinion of the court system on virtually all dimensions, from satisfaction with court performance to perceived fair treatment by court personnel. NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 7–8 (1999). More than twenty states have organized task

First, we need more information. There is no question that people with mental disabilities do worse. But there are many questions whether this constitutes a disparity or why it occurs. As far as we can determine, major surveys and task force reports on justice disparities have not encompassed inquiries into the views or experiences of people with disabilities.[101]

Action need not await further research. The efforts to deal with race and gender bias have provided a sensible list of measures that are equally applicable to disability disparities.[102] Both stereotyping and uncertainty can be dealt with through efforts to educate the bench, the bar, and the civil justice workforce, though education is hardly a panacea.[103] Generally, trial verdicts can be improved by eliminating barriers to jury service for people with disabilities and in particular for mental disabilities. Complaints or satisfaction surveys can provide useful feedback, and may be facilitated by user-friendly procedures or the use of an ombudsman. As in the race and gender areas, it is reasonable to assume that diversity in the workforce makes a difference. Those who appoint judges, and hire lawyers, court staff, and law professors, can fight stigma and stereotyping directly by endeavoring to exclude these factors from their decisions. The ability of people who have experienced mental illness to be as open about their conditions as those who have other diseases will be the best measure of the legal system's success in fighting structural discrimination. Finally, legislatures can contribute by funding efforts to deal with disparities, monitoring results, and considering the positive or negative effects of new legislation on justice disparities.

Our findings have broader implications for employment rights enforcement generally. We found that dissatisfaction with the experience of bringing a claim was rife across all disabilities. The procedural justice literature shows that people value fair procedures, but in a real sense, most people who bring an ADA or other employment dis-

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forces or committees to study gender, racial, or ethnic bias, and to propose remedies. *See* Nat'l Ctr. for State Courts, Race & Ethnic Fairness Initiative, http://www.ncsconline.org/Projects_Initiatives/REFI/SearchState.asp (last visited Oct. 3, 2006) (containing links to state task force reports). For a compendium of recommendations for change, see ABA COALITION FOR JUSTICE, AM. BAR ASS'N, ATTACKING BIAS IN THE JUSTICE SYSTEM: A COMPENDIUM OF PROGRAM ALTERNATIVES (2000), *available at* http://www.abanet.org/justice/judicialbias/home.html; MADELYNN HERMAN, NAT'L CTR. FOR STATE COURTS, ACHIEVING FAIRNESS THROUGH BIAS-FREE BEHAVIOR: A POCKET GUIDE FOR THE COURTS (2005).

101. *See, e.g.*, NAT'L CTR. FOR STATE COURTS, *supra* note 100, at 37 (collecting data on perceptions of equal treatment by wealth, race or ethnicity, and gender, but not disability).

102. *E.g.*, ABA COALITION FOR JUSTICE, *supra* note 100.

103. *See* Perlin, *supra* note 85, at 689–90 (arguing that "[m]erely educating lawyers" without addressing underlying attitudes will fail to produce behavior change).

crimination claim do not experience much procedure at all. An ADA, Title VII, or Age Discrimination in Employment Act (ADEA) plaintiff who files a claim with the EEOC may never have direct contact with an investigator after the intake interview or a chance to give voice to her claim. If a case is filed in federal court, chances are it will be settled or dismissed with no more than a deposition and an interview or two with the lawyer. If people consistently value the chance to tell their stories independently of outcome, as the procedural justice literature seems to establish,[104] we have a chronic trade-off between the way cases have traditionally been resolved by the EEOC or federal courts—on motion or through settlement—and satisfaction. The EEOC mediation program can be seen as an outstandingly successful effort to avoid this trade-off, and the wider use of such alternative dispute resolution methods has been recommended for Title I mental disability cases by experts in therapeutic jurisprudence.[105] More use of alternative dispute resolution devices could improve matters in federal court, but it seems unlikely that courts will ever be capable of giving employment discrimination litigants a satisfactory level of procedural justice. Most complaints involve complicated facts and small stakes, so the costs of individualized attention by lawyers and judges are just too high. Thus, our findings demonstrate yet again the urgent need for Congress to give the EEOC the resources it reasonably requires to provide real dispute resolution services to the employers and employees whose cases come before it.[106]

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104. *See* MacCoun, *supra* note 21, at 172 ("[T]he most popular motivation cited by litigants was to 'tell my side of the story.'"); *see also* Tyler, *supra* note 24, at 436–37 (noting that satisfaction in the legal process is related to the way decisions are reached, not the ultimate outcome).

105. *See* Dorfman, *supra* note 40, at 117–20. The therapeutic benefits of litigating include interpreting and shaping the ADA, deterring noncompliant employers that are likely to be held responsible for Title I violations, making the statement that the mentally disabled person's grievance is worthy of litigation, and providing the mentally disabled with the opportunity to be heard in a formal setting with the procedural protections and dignity of the court. *Id.* at 115–16. The therapeutic benefits of ADR include the opportunity for the mentally disabled to have complaints heard but without the cost and stress of formal courtroom proceedings, an increased likelihood of finding a competent advocate because attorney representation is not required, the flexibility of multiple types of ADR, and greater control over the proceedings by the mentally disabled person, such as choice over the selection of facilitator or arbitrator. *Id.* at 118–19. Professor Dorfman concludes that the benefits of ADR, along with the fact that the mentally disabled person retains the right to go to court if not satisfied with the result, are persuasive reasons for recommending ADR as the more therapeutic means of enforcing implementation of Title I. *Id.* at 120.

106. We discussed this point in length in Moss et al., *Unfunded Mandate*, *supra* note 11, at 104–07.

V. CONCLUSIONS

The ADA contains strong enforcement provisions. Two of its four purposes were "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities" and "to ensure that the Federal Government plays a central role in enforcing the standards established in this [Act] on behalf of individuals with disabilities."[107] While much attention has rightfully been paid to the considerable limitations placed upon this landmark law in decisions of the Supreme Court of the United States,[108] much less attention has been paid to ADA enforcement.[109] Indeed, this is the first empirical study that we know of examining the experiences of people with disabilities who are personally familiar with the ADA Title I enforcement process.

Our study is evidence of problematic justice disparities. Complainants with psychiatric disabilities believe that they fare worse than complainants with non-psychiatric disabilities, and complainants with psychiatric disabilities *actually do* fare worse than complainants with non-psychiatric disabilities in the ADA Title I enforcement process. These disparities are not easily explained by differences in the law, the behavior of employers or lawyers, or the effects of psychiatric illness on perception. Nor does the lower rate of actual success explain the lower rate of satisfaction. As has been found in other procedural justice studies, losing tends to reduce satisfaction, but even losers can find satisfaction if given a fair hearing, a chance to articulate their concerns, and dignified treatment. Even accounting for the influence of outcome, people with psychiatric disabilities experienced less procedural justice than others.

The disparities are clear. The causes are not. We do not attribute the disparities to bigotry, nor could we from our data. Both the disparities themselves and their causes remain, to some degree, uncertain. What should not be doubted is the need for a vigorous response to these findings that will dig into causation and produce action to ensure that the system that protects people from discrimination does not discriminate.

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107. 42 U.S.C. § 12101(b)(2)–(3) (2000).

108. *E.g.*, Ronald Turner, *The Americans with Disabilities Act and the Workplace: A Study of the Supreme Court's Disabling Choices and Decisions*, 60 N.Y.U. ANN. SURV. AM. L. 379 (2004); Shaina Walter, *ADA: Supreme Court Disallows Disparate Impact Analysis of Facially Valid Employment Procedures*, 32 J.L., MED. & ETHICS 373 (2004); Andrea Kloehn Naef, Note, Toyota Motor Manufacturing v. Williams: *A Case of Carpal Tunnel Syndrome Weakens the Grip of the Americans with Disabilities Act*, 31 PEPP. L. REV. 575 (2004).

109. For an exception, see Moss et al., *Prevalence and Outcomes*, *supra* note 11.