

Diagnostic Inflation for the People

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I. INTRODUCTION

The concept of compensating a mental injury due to work-related stress may strike most people in the United States as a punch line rather than a subject for serious discussion. It is an assumed bit of shared wisdom that everyone feels “crazy” from work stress; the fact that one person “cannot handle it” is *prima facie* evidence of a character defect—if not malingering, then perhaps some form of cowardice. This lack of sympathy stems from both a general stigma against mental illness, and the curious but common belief that work, the primary social activity in most people’s lives, ought to be miserable.

Despite this apparent folk wisdom, workers’ compensation systems in this country have nevertheless had to grapple with the problem of mental health injuries that “arise out of and in the course of employment,”¹ and to decide whether or not to treat these injuries like other work injuries. In some cases the mental disorder arises from a discrete traumatic event, like when a convenience store clerk is held up at gunpoint and must deal with the resulting post-traumatic stress disorder.² In some cases, so-called “physical-mental claims,” the mental ailment arises as an effect of physical problems, as when chronic back pain makes a person depressed.³ In others, sometimes called “mental-mental” claims, the cause is apart from any physical ailment: exposure to stressful or traumatic conditions in a work environment.⁴

The present essay is an endorsement of recognizing mental health injuries, and in particular mental-mental claims. Psychiatry and psychology are medical disciplines which the law should respect in the same way it respects orthopedics or cardiology. The ailments treated by the former disciplines are as real as—and sometimes more painful—than the problems treated by the latter. Accordingly, such injuries should be governed by the time-honored principles of workers’ compensation: that injured employees should receive compensation for time off work, and that they should receive all necessary medical treatment for their injury, regardless of fault. Unfortunately, some workers’ compensation systems, like California’s and the District of Columbia’s public sector system, refuse to recognize these basic principles.

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¹ This is a generic phrase found in most workers’ compensation systems. *See, e.g.*, ARTHUR LARSON, WORKERS’ COMPENSATION LAW §§ 3-1 - 3-9 (2006).

² California uses the phrase “sudden and extraordinary event,” though some of its case law excludes certain discrete workplace events from this category. *See, e.g.*, State Comp. Ins. Fund v. Workers’ Comp. App. Bd., 204 Cal. App. 4th 766, 772-73 (Cal. Ct. App 2012).

³ These phrases, “physical-mental” and “mental-mental,” are used by the D.C. Court of Appeals. *See, e.g.*, McCamey v. Dist. of Columbia Dept. of Emp. Serv., 947 A.2d 1191, 1201-02 (D.C. 2008).

⁴ *Id.*

If recognition and credence are the foundational principles that should guide the law in addressing mental injuries, it does not follow, however, that the system developed to address physical injuries can simply be transplanted without modification to the domain of the mental. To the contrary, the blurred boundaries of mental wellbeing require law to commit to a particular vision of how happy or miserable—how “sane”—workers ought to be. This is a qualification of mental injuries, however—and not a challenge to their legitimacy.

The argument begins with a case in brief for recognizing mental health workers’ compensation claims. The following section provides background on several workers’ compensation systems’ approaches to mental injuries: California, Washington, D.C.’s current system, Washington, D.C.’s former system, and the Federal Longshore and Harbor Workers’ Compensation Act. I then consider the arguments presented in several of these systems against treating mental injuries like physical injuries, starting with the weakest and most easily dismissed pseudo-justifications, and then moving on to more credible arguments: the need for employer control of the workplace, the need to separate personnel management from “internal” stressors in the workplace, prevention of fraud, and concerns about the validity and objectivity of mental health. I conclude that of these arguments, subjectivity is the only one that presents a credible challenge to the mental-physical analogy. In light of the seemingly flexible boundaries of mental wellness and illness, I then consider the arguments of those, like Thomas Szasz, who oppose mental health as a system. Although I reject Szasz’s extremism in rejecting *mental illness* as a category, the predicament of defining mental illness and mental health is not easily resolved, and necessarily implicates normative judgments about how happy people should expect to be, and how much workplace stress should be considered acceptable. Those normative judgments should be resolved by aiming at greater human happiness, rather than preserving minimally tolerable misery.

As the bulk of arguments used for a double standard against mental injuries fail, the current District of Columbia private sector system, which seeks to apply the same standards to mental injuries that it applies to physical injuries, is the closest to the desirable model. However, D.C. law has not fleshed out the question of the fluid boundaries of mental health, partly due to the relative dearth of litigated cases.⁵

Since the question of mental injuries is bound up with the question of how miserable work should be, I end with a reflection on workplace circumstances that promote or hinder happiness and misery. U.S. popular media and culture are already actively discussing this question in the context of white-collar workplaces like Google, which advertises programs which claim to make its employees’ lives incomparably more pleasant. While the media has celebrated the example of Google, and some have suggested that its mode of promoting employee happiness may serve as a model for other workplaces, few have explained how other workplaces could move to this model.⁶

⁵ A Westlaw search dated January 26, 2016 for “mental-mental” in Washington D.C. found 60 cases since 2010, including orders from the Administrative Hearings Division and the Compensation Review Board (D.C.’s administrative appellate body for workers’ compensation cases), and only two cases from the D.C. Court of Appeals in that same time period.

⁶ See *infra* Part V. See also James B. Stewart, *Looking for a Lesson in Google’s Perks: At Google, a Place to Work and Play*, N.Y. TIMES, March 15, 2013, http://www.nytimes.com/2013/03/16/business/at-google-a-place-to-work-and-play.html?_r=0; Farhad Manjoo, *The Happiness Machine: How Google Became Such a Great Place to Work*, SLATE, Jan. 21, 2013, http://www.slate.com/articles/technology/technology/2013/01/google_people_operations_the_secrets_of_the_world_s_most_scientific_human.single.html; Indo-Asian News Service, *How Google Keeps Its Employees Happy and Productive*, TIMES OF INDIA, March 24, 2014, <http://timesofindia.indiatimes.com/tech/jobs/How-Google-keeps-its-employees-happy-and-productive/articleshow/32590952.cms>; Caitlyn Kelly, O.K., *Google, Take a Deep Breath*,

Fairness demands that proposed models for worker wellbeing be available to workers in other, mostly lower-paying and less glamorous jobs. A fair handling of mental health injuries is a necessary, though by no means sufficient, measure to help our society make steps in this direction.

Curiously, the essay's call for higher standards of mental wellness is akin to the much-derided trend toward "diagnostic inflation" in psychiatry, as embodied in the increasing prescription of psychiatric drugs and the pathologization of previously non-diagnosable problems, like marital infidelity or overeating. However, the approach here is much different. I am not calling for new disorders, but new thresholds for determining when discontent or dysfunction ceases to be "tolerable." Moreover, the goal here is not to promote consumption or drugs or any other product. While raising expectations of happiness may be pernicious in the hands of pill-pushers and the pharmaceutical industry, demanding more for workers is a step forward for society when the remedies are rest, relaxation, recreation, and a friendlier work environment. We need diagnostic inflation, but principally of the non-pharmaceutically driven kind: diagnostic inflation for the people.

This essay is in part an *internal* critical endorsement of mental injuries—an appeal to workers' compensation's founding principles, and a critical examination that concludes that the laws in many jurisdictions fail to follow these principles in cases of mental injury. These systems are failing to adhere to the foundation of worker-employer compromise that lies at the heart of workers' compensation, and their justifications for deviating do not stand up to scrutiny. While the more fluid boundaries of mental wellbeing require more normative judgment than questions of physical wellbeing, the differences between the two kinds of injuries do *not* warrant deviating from the core principles of workers' compensation, such as deference to medical evidence, acceptance of aggravations as injuries, or compensation regardless of fault.

In addition to the above legal agenda, however, I am also attacking the system from an external angle, pointing out that the deviations from traditional legal principles are not mere instances of irrationality, but reflect the legal system's commitment to serving the interests of employers, their control over their workers, and their profits, even at the expense of workers' health. Along with the legal argument, then, there is an argument that fairness and justice argue for a pro-worker approach to mental work injuries.

Finally, I must note that lurking within the various courts' and legislatures' attacks on workplace mental injuries is an assumption that taking workplace mental health seriously would wreck the economy, and that there is no way to achieve the happier society envisioned here under the present system. That is another way of saying that capitalism cannot survive without a disorder-inducing environment for workers—a radical conclusion masquerading as a conservative one. This essay explores the possibility that this contradiction can be reconciled, that workplaces can be made safe for workers' minds and remain profitable. It is, of course, possible that this prospect is chimeric, and that we must choose between profitability and workers' mental well-being. What is to be done if we reach that conclusion is beyond the scope of the present essay.

II. A CASE IN BRIEF FOR MENTAL INJURY WORKERS' COMPENSATION CLAIMS

Workers' compensation is a no-fault system for providing economic and medical benefits to workers with medical problems that arise out of and in the course of their employment.⁷ Although systems vary from one state to another, there are some elements common to virtually all jurisdictions in the United States.⁸

A first core principle is that workers' compensation is a no-fault system. In other words, the worker need not show employer negligence, and indeed, the worker can even be negligent in causing the injury and still recover.⁹ Second, workers' compensation is an exclusive remedy, meaning it cannot be coupled with a lawsuit against the employer.¹⁰ The attractiveness of this system to employers is obvious: recovery under workers' compensation is limited in comparison to a traditional suit for negligence. These two elements are historically linked as a compromise between capital and labor, as the absence of a fault requirement benefits the worker, while the immunity of the employer from negligence suits for injury to employees limits employer exposure to high-level damages.¹¹

A third noteworthy common element of workers' compensation systems is that in general, aggravations constitute new injuries.¹² A worker who had back surgery can have a wholly new injury claim two weeks later if a work incident causes the back to become worse. Some jurisdictions allow awards to be reduced in these circumstances in a variety of ways, but that does not involve denying that the aggravation is a new injury.¹³ In fact, this rule is *not* distinct from the

⁷ Larson, *supra* note 1 AT §§ 1-1 – 1-2 (2006).

⁸ Texas is the exception. See <http://www.tdi.texas.gov/wc/employer/>, the Texas Department of Insurance website, accessed on October 10, 2015 (“In Texas private employers can choose whether or not to carry workers' compensation insurance coverage.”) See also, Texas Dept. of Insurance, A Study of Nonsubscription to the Texas Workers' Compensation System, <http://www.tdi.texas.gov/reports/wcreg/nonsub93.html>. Oklahoma has recently made changes in the direction of abolishing workers' compensation as well. Randy Ellis, *Oklahoma Supreme Court Upholds Nw Workers' Compensation Law*, THE DAILY OKLAHOMAN, Dec. 17, 2013, <http://newsok.com/oklahoma-supreme-court-upholds-new-workers-compensation-law/article/3915151>. ProPublica has reported on how “reforms” in Oklahoma, as well as less fundamental changes in other states, have harmed injured workers. Michael Grabell, *The Fallout of Workers' Comp Reforms*, PROPUBLICA, March 25, 2015, <https://www.propublica.org/article/workers-compensation-injured-workers-share-stories-of-harm>

⁹ Larson, *supra* note 1 at §§1-1 – 1.03.

¹⁰ *Id.* at §§102-1 – 102-2.

¹¹ *Id.* For a more in-depth and critical examination of the “compromise between capital and labor” theory of the birth of workers' compensation, see JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC passim*, esp 128-29 (2006).

¹² See Larson, *supra* note 1 at §12. See also *Pauls Valley Travel Ctr. v. Boucher*, 112 P.3d 1175, 1182 (Okla. 2005) (“From early tort teachings the compensation law has borrowed the notion that an employer takes a worker as it finds him, including all of his bodily flaws”); *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 53 (1st Cir. 2010). (Longshore case) (“At the first stage, the claimant must make out a prima facie case by showing (1) that he suffered physical harm and (2) that a workplace accident or workplace conditions could have caused, aggravated, or accelerated the harm. [citing *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 605 (1st Cir.2004); *Am. Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 64-65 (2^d Cir.2001)]”); *McCamey v. D.C. Dept. of Empl. Serv.*, 947. A.2d at 1197 (D.C. case) (“The aggravation rule is an obvious example of meeting the humanitarian nature of the Act. “It is well-settled that ‘an aggravation of a preexisting condition may [also] constitute a compensable accidental injury under the Act.’ ” [internal citations omitted].

¹³ Larson *supra* note 1 at §§12, 59.20, and 59.30 *et seq.* (2006).

traditional rule in tort law,¹⁴ but the principle it represents is often disregarded in the case of work-related mental-mental injuries, and therefore it is of considerable significance here.

The first point to be made in support of mental health injuries is that they are not, in fact, categorically different from other problems. The mind/body distinction is not valid, so there is no inherent reason to treat “mental” problems as separate from physical.¹⁵ The category of ‘mental’ is itself the product of physical processes and therefore part of the physical frame.¹⁶ Whatever a 17th-century Frenchman in a Bavarian oven meditating on first principles may have concluded,¹⁷ there simply is no scientific basis for supposed mind and body to be separate realms, and it is therefore absurd for modern legal systems to found their rules on such archaic notions.¹⁸

The second point in support of mental injury claims is that psychiatry is an accepted medical discipline, taught in medical schools and practiced by authorized physicians.¹⁹ The law as a whole aims to base its conclusions on well-founded evidence, which in the context of expert evidence requires respect for the scientific method and the evidence it produces.²⁰ If the medical establishment has not found scientific basis to exclude this practice, that is at least a *prima facie* basis for judges and legislators to accord it the same respect as similarly supported medical practices.²¹ Should a judge or legislator decide by fiat that universities and medical boards are all

¹⁴ WILLIAM LLOYD PROSSER AND W. PAGE KEETON, PROSSER AND KEETON ON TORTS 290-92 (5th ed., 2004).

¹⁵ It would be an understatement to say that there is a scholarly consensus that mental processes are physical, or arise from physical processes: more accurately, this notion is a postulate of entire fields, such as neuroscience. The strongest pieces of evidence in support are the well-documented effects of traumatic brain injuries on thoughts and feelings, and the apparent total lack of consciousness on the part of brain-dead or dead people. See, ANTONIO DAMASIO, DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN (1994). Philosophers quarrel about the proper framing of this question, but that is distinct from producing evidence of disembodied mental activity.

¹⁶ Many philosophers who do not subscribe to atavistic notions of mind/body dualism will nevertheless reject the above phrasing, preferring to say that the mental is merely another angle on the physical or some other such formulation. The point here is, however one phrases it, mind and body are not fundamentally separate and should not be treated as though they are.

¹⁷ See, RENÉ DESCARTES, FIRST MEDITATIONS (Desmond Clarke, trans., Penguin Classics 1999) (1641).

¹⁸ Arthur Larson, *Mental and Nervous Injury in Workmen’s Compensation*, 23 VAND. L. REV. 1243, 1253 (1970).

¹⁹ Of course, psychologists are *not* medical doctors as such, but their evidence is still expert testimony on effectively the same subject matter. Their evidence is generally treated analogously. For instance, California’s Qualified Medical Evaluator panels offer either discipline as a possible “physician” specialty. <http://www.dir.ca.gov/dwc/FORMS/QMEForms/QMEForm106.pdf>. D.C.’s seminal *Ramey* case, described a change in laws in a case in which Claimant relied on psychological treatment without ever distinguishing its weight from the opinion of a psychiatrist. *Ramey v. D.C. Dept. of Empl. Serv.*, 997 A.2d 694, 696 (D.C. 2010). The present essay will view psychologists and psychiatrists as standing in a comparable position as medical experts and treatment providers. Another preliminary matter concerns the phrase “mental illness,” which some deem old-fashioned and inaccurate, preferring “psychiatric illness,” grounding the practice in harder medical science. Edward Shorter, *Still Tilting at Windmills: Commentary on The Myth of Mental Illness*, 35 THE PSYCHIATRIST 183-84 (2011), available at <http://pb.rcpsych.org/content/35/5/183.full>. As will be made clear from the essay below, the abandonment of the term “mental illness” strikes me as premature and a bit arrogant, given the rudimentary stage of our physical explanations of mental phenomena. Even if we do have physical explanations for *some* of these problems, there are many others for which we do not.

²⁰ *Daubert v Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589-91 (1993).

²¹ It is true that law and medicine have separate aims, and the normative elements of law will figure prominently in the present essay. Nevertheless, the lack of a scientific basis for distinguishing the two is a strong case against the

in error in recognizing and giving degrees and accreditations in the realm of mental health? This is particularly absurd when the literature on the *results* of treatment suggests that psychiatry has a respectable record in addressing a number of problems it is intended to treat—comparable to many other, supposedly less controversial fields of medicine.²²

The third point to emphasize in introducing work-related mental injuries is that the concept is intuitive.²³ That is, even if some portion of “common sense” sneers at work stress as a sign of personal failing, it is also true that people regularly speak of social causes’ giving rise to “craziness” or “breaking people.” While there may be a bias, among judges or among the general public, in favor of crediting these causes when they are “serious,” like torture, as opposed to “frivolous,” like getting yelled at, this dividing line is not written in stone. Moreover, it is hard to argue that certain events do not impact some people more than others. In sum, the fictitious but useful “reasonable man” to whom law so regularly appeals has little trouble understanding the concept of a mental stress work injury: to cite one example, just as a construction worker may tear her rotator cuff lifting a board, so too a clerical worker may suffer trauma with resulting depression and post-traumatic stress from an aggressive and overweening supervisor. This is not an esoteric idea.

Although neuroscientific research, mental health treatment, and duly reflective social wisdom concur, legal systems in a number of jurisdictions nevertheless persist in treating mental injuries with much greater skepticism. I examine several of the arguments for the differential recognition below, and find them wanting.

III. A SAMPLE OF WORKERS’ COMPENSATION SYSTEMS AND THEIR APPROACHES TO MENTAL INJURIES

Throughout this article, I will point to various approaches to the problem of mental work injury, some of them now defunct, others still in operation. Rather than lay out the particulars of each system one after another, treatise-style, I will use particular examples from each system to illustrate the various points that arise in the article. Nevertheless, by way of introduction it will be helpful to give an overview. The four systems discussed fall on a range, with California’s presenting the most obstacles to stress claims, D.C.’s current system treating mental health in a manner analogous to physical health, and the Longshore Act and old D.C. system’s falling in an intermediate place.

distinction, particularly when the arguments for the double standard openly rest on empirical claims, like the supposed prevalence of fraud.

²² Stefan Leucht, *Putting the Efficacy of Psychiatric and General Medicine Medication into Perspective: Review of Meta-Analyses*, *British J. of Psychiatry* 200: 97-106 (2012). Available at <http://bjp.rcpsych.org/content/200/2/97>. This is a meta-study comparing psychiatric drugs’ overall success in numerous studies to the results yielded by other drugs in other fields. Naturally, any test for “successful treatment” presupposes the validity of the initial diagnosis, the criteria for recognizing a condition, and the methods of distinguishing the condition’s presence from its absence. But the fact that patients wind up reporting fewer clinical signs after treatment cannot be easily gainsaid as evidence of at least some form of success. If anything, one who was skeptical of the validity of the initial diagnosis should predict a lack of “successful treatment”—yet the studies suggest otherwise. See *infra* Part IV.E. The Subjectivity of Mental Illness, for a further discussion.

²³ “Of course, some philosophers think that something’s having intuitive content is very inconclusive evidence in favor of it. I think it is very heavy evidence in favor of anything, myself. I really don’t know, in a way, what more conclusive evidence one can have about anything, ultimately speaking.” SAUL KRIPKE, *NAMING AND NECESSITY*, 42 (1980).

A. California's Restrictive System

Of the systems discussed in this essay, California's is the one that is most hostile to mental work injuries as distinct from physical injuries.²⁴ After a time period in which California acquired a reputation—whether deserved or not—of being a hotbed of bogus stress claims, the legislature adopted a series of intense restrictions in the early 1990's on mental health work injuries.²⁵ An injured worker must show that the “actual events of employment” were the *predominant* cause of the condition.²⁶ In this context, “actual events” is a term of art, which excludes things that in conventional understanding would be both actual and events—for instance, things that occur due to a worker's fault.²⁷ For instance, in the 2008 *Verga* case, the California Court of Appeals approvingly quoted the lower court administrative judge's conclusion that disdain shown toward a worker—which, by all counts, took place *in the workplace*—was not “an actual event of employment” when the worker “brought [it] upon herself.”²⁸ The employer also can challenge a claim by demonstrating that “legitimate personnel decisions” caused at least 35-40% of the injury.²⁹ Additionally, absent a “sudden and extraordinary event” (like a gas explosion, for instance), a claimant cannot file a mental health claim in the first six months of employment.³⁰

These obstacles are striking to anyone familiar with workers' compensation, insofar as they erode old protections by establishing a fault criterion, and by disqualifying an undisputed workplace injury when it is suffered by a worker who has had the misfortune of previously having suffered a similar harm outside of work. Equally striking, however, is the brazenness of the official reasons for these restrictions: among the usual justifications, the authorities simply state that their goal is to save employers money. This is not supposed to happen in law, which relies on the ritual of stating generally applicable justifications for its conclusions. The critical legal theorist Roberto Unger has a memorable passage in which he discusses the *ne plus ultra* of legal realist interpretation of “legislative intent”: “[I]f a particular statute represented a [legislative] victory of sheep-herders over cattlemen, it would be applied, strategically, [by courts] to advance the shepherders' aims and to confirm the cattlemen's defeat.”³¹ He was, of course, engaged in philosophical inquiry and fantasy, entertaining the possibility that a liberal interpreter of laws could dispense entirely with the notion that law embodies an objective system reflecting moral

²⁴ The bulk of the rules are codified at Cal. Lab. Code §3208.3 (West 2011).

²⁵ *Sakotas v Workers' Comp. App. Bd.*, 80 Cal. App. 4th 262, 272-73 (Cal. Ct. App. 2000).

²⁶ Cal. Lab. Code §3208.3(b)(1) (West, 2011): “In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury.”

²⁷ The best articulation that an event that is an employee's fault is not an “actual event of employment” is found at *Verga v. Workers' Comp. Appeals Bd.*, 159 Cal.App.4th 174, 188 (Cal. Ct. App. 2008) (“... workers' compensation benefits are not available where an employee engages in harassing and demeaning behavior in the workplace, causing others to respond in a way the employee subjectively finds offensive and psychologically injurious”).

²⁸ 159 Cal.App.4th at 181-82.

²⁹ Cal. Lab. Code §3208.3(h) (West 2011); *Travelers Prop Casualty Co. v. Workers' Comp. App. Bd.* (Mahmoudi), 80 Cal. Comp. Cases 1495 (Cal. App. 2 Dist.); *Rolda v Pitney Bowes, Inc.*, 66 Cal. Comp. Cases 241 ((Cal. Workers' Comp. App. Bd. 2001)(en banc).

³⁰ Cal. Lab. Code §3208.3(d) (West 2011); *State Comp. Ins. Fund v. Workers' Comp. App. Bd.* (Garcia), 204 Cal. App. 4th 766, 771-72 (Cal. Ct. App. 2012).

³¹ ROBERTO UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 3 (1986). Available at <http://www.law.harvard.edu/faculty/unger/english/pdfs/movemnt1.pdf>

order by simply interpreting laws in light of the actual interests behind them.³² And yet, in the case of California work stress, we find a judge approximating this vision of values-free hyperrealist adjudication, saying that the legislature enacted section 3208.3(b)(1) not only to fight against fraudulent stress claims, but additionally to “reduce the costs of workers’ compensation coverage.”³³ The case goes on to quote then-Governor Wilson, who in addition to denouncing alleged fraud, stated that the legal reform would save money for California businesses.³⁴

B. The District of Columbia’s Current Private Sector System

The second system that will be considered here is the private sector workers’ compensation of the District of Columbia, which lies on the other end of the spectrum from California.³⁵ It officially treats mental-mental injuries the same as physical injuries, without consideration of fault or predisposition.³⁶ Even if a person is predisposed to mental illness, the law cannot discriminate

³² Some law and economics scholars and judges sometimes approach this amoral ideal, but even in these instances they usually appeal to some universal-sounding ideal, like “utility,” albeit on the understanding that not every citizen, let alone every “person,” has the same number of utiles to gain or lose.

³³ *Sakotas v Workers' Comp. Appeals Bd.*, 80 Cal. App. 4th 262, 272-73 (Cal. Ct. App. 2000). The opinion does (to its credit?) go on to blend the two factors indiscriminately, stating: “Certainly, reducing the costs of workers’ compensation coverage by eliminating the number of successful fraudulent claims is a legitimate purpose.” But the earlier passage recognizes the obvious fact that fighting fraud and saving money are conceptually distinct, even if the latter may flow from the former. In contrast to this peculiar judicial solicitude for business, sometimes offered without any attempt at justification, the California courts since the reform have regularly shown an equanimity worthy of Pontius Pilate in addressing workers’ suffering. See, for example, *Lockheed Martin v. Workers' Comp. Appeals Bd.*, 96 Cal. App. 4th 1237, 1248 (Cal. Ct. App. 2002): “Finally, the fact that the statute may have a “devastating effect” on some honest claimants does not show the Legislature did not mean what it said.” This despite the fact that “[i]n general, the Legislature has directed us to construe workers’ compensation laws ‘liberally ... with the purpose of extending their benefits for the protection of persons injured in the course of their employment.’” *Id.* at 1242, citing Cal. Lab. Code § 3202 (West 2011). Some would argue that it is wrong to fault the judges for interpreting the law according to the legislature’s intent—which is their duty. My aim is to condemn the laws, and not the judges as individuals—at any rate, not to condemn them more than the other citizens who allow these injustices to persist: that is, all of us.

³⁴ *Sakotas v Workers' Comp. Appeals Bd.*, 80 Cal. App. 4th 262, 272-73 (Cal. Ct. App. 2000).

³⁵ D.C. has separate systems for private employers and the District government. See D.C. Code §1-623 et seq. (public sector) and D.C. Code §32-1501 et seq. (private sector). The change in laws initially applied to both public and private, *Ramey v D.C. Dept. of Empl. Serv.*, 950 A.2d 33, 34 fn.2 (D.C. 2008), but the public sector laws since abolished mental injury entirely. See 2012 District of Columbia Laws 18-223 (Act 18-462), codified at D.C. Code §1-623.02(b): “(b) No claim shall be allowed under this chapter for mental stress or an emotional condition or disease resulting from a reaction to the work environment or to an action taken or proposed by the employing agency involving the following:

- (1) Employee's work performance, assignments, or duties;
- (2) Promotion or denial of promotion;
- (3) Adverse personnel action;
- (4) Transfer;
- (5) Retrenchment or dismissal; or
- (6) Provision of employment benefits.”

³⁶ *Ramey v D.C. Dept. of Empl. Serv.*, 950 A.2d 33 (D.C. 2008); *Ramey v D.C. Dept. of Empl. Serv.*, 997 A.2d 694 (D.C. 2010); *McCamey v D.C. Dept. of Empl. Serv.*, 947 A.2d 1191 (D.C. 2008).

against her on that account.³⁷ If the “events” of employment were imaginary or hallucinatory, of course, there would be no claim—the same as in physical injuries.³⁸ However, the law, in mental as in physical cases, does not inquire into the fault of the claimant, the magnitude of the catalyst, or the legitimacy of any underlying policy.

Two seminal cases in the development of the new D.C. standard illustrate its scope: the *Ramey* case and the *Muhammad* case.³⁹ In *Ramey*, the injured worker claimed a work injury from the humiliation he said he endured when he was forced by his employer to undergo a breathalyzer test at work, which came back positive.⁴⁰ His account of events was that he was denied food, water, and bathroom access, and that he urinated on himself en route to the test, and that the workers in the car with him mocked him and humiliated him.⁴¹ While his case was initially decided on the grounds that an objective worker would not be traumatized psychologically by this sort of incident, the law changed while his case was in litigation.⁴² Ultimately, the administrative court found, and the appellate bodies affirmed denial of his case—on grounds that the evidence, when weighed, favored the employer’s view that the traumatizing event did not even take place; that the claimant’s coworkers denied having been aware of the claimant’s urinating on himself and claimed that they did not mock him.⁴³ That is to say, the alleged work-related sources of his psychological trauma were chimerae or fictions and thus not “actual events of employment”—in the literal sense of *actual events*: the judge found that that the mockery that allegedly caused the trauma did not, in fact, take place.⁴⁴ The basis for denial was akin to a basis that would apply in a physical injury—for instance, if a claimant said she hurt her leg when a board fell on it, while his coworkers testified that the board fell on the ground without hitting her leg.

In the *Muhammad* case, by contrast, the claim was ultimately accepted – but here, too, the question was not ultimately one of the claimant’s fault or lack of fault, or of any comparison to a “reasonable” or psychologically ideal worker, but rather to the fact that the source of the disabling mental condition was in fact work-related.⁴⁵ Muhammad had an accepted physical injury for which he had received worker’s compensation.⁴⁶ As a result of the injury, he developed conditions (depression and adjustment disorder, according to two doctors) from an aversion to participating

³⁷ *Ramey*, 997 A.2d 694 (D.C. 2010); See also 42 U.S.C. §12112(a); 42 U.S.C. §12102(1)(A) (noting the inclusion of mental impairments); D.C. Code §§2-1401.02(5A), 2-1401.01.

³⁸ *Ramey*, 997 A.2d 694, 700-01 (D.C. 2010);

³⁹ *Ramey*, 950 A.2d 33 (D.C. 2008); *Ramey*, 997 A.2d 694 (D.C. 2010) ; *Muhammad v D.C. Dept. of Empl. Serv.* 34 A.3d 488 (D.C. 2012). Citations to *Ramey* in this section will mostly be from the second time it was before the D.C. Court of Appeals, in 2010.

⁴⁰ *Ramey*, 997 A.2d at 700-701.

⁴¹ *Ramey*, 997 A.2d at 700-701.

⁴² *Ramey*, 950 A.2d at 34-35.

⁴³ 997 A.2d at 700. The ALJ also credited Employer’s medical expert’s opinion that post-traumatic stress disorder did not arise out of an in the course of employment on the date of injury. *Ibid.*

⁴⁴ 997 A.2d at 700.

⁴⁵ *Muhammad v Georgetown Univ.*, D.C. Comp. Rev. Bd.No. 09-132(R) 5-6 (May 18, 2012) (on remand from the D.C. Court of Appeals).

⁴⁶ 34 A.3d at 489.

in the compulsory vocational rehabilitation process related to the physical injury.⁴⁷ The court determined that the mental conditions, insofar as they were related to his stress from participating in vocational rehabilitation, would count as compensable under the D.C. Workers' Compensation Act.⁴⁸

The common point illustrated by the jurisprudence of the two cases, *Ramey* and *Muhammad*, is that the D.C. private sector rule, more than the others discussed here, emphasizes the same points that arise in physical injury cases: whether the causal event took place, whether it caused the disability in question, and related matters.⁴⁹ The cases do not address the nature of employer control over employees, or the fault or frailty of the worker—even in two cases where a judge may easily find fault, in being intoxicated at work⁵⁰ and in failing to comply with a mandatory vocational rehabilitation program. To the contrary, the understanding is that the already restricted benefits of the no-fault workers' compensation system will be available to those who have the misfortune of suffering mental work-related injuries, as long as the facts and medical evidence support their portrayal of events and their theories of medical causation.

C. The District of Columbia's Former and More Restrictive System

The old standard in the (private and public⁵¹) sector system of the District of Columbia represented a middle ground between the generosity of current D.C. private sector system and the miserliness of California. The guiding principle was the "objective standard" for evaluating workplace stressors.⁵² While this objective standard is defunct, the case law elaborating it presents some errors that illustrate the problems with treating mental injuries differently.⁵³ Somewhat confusingly, this objective standard states that "the claimant must show that actual conditions of employment, as determined by an objective standard and not merely the claimant's subjective perception of his working conditions, were the cause of his emotional injury"—and then clarifies, by redefining "objective" as something completely different: "The objective standard is satisfied where the claimant shows that the actual working conditions could have caused similar emotional

⁴⁷ 34 A.3d at 488-91. Vocational rehabilitation is a program to return injured workers to the work force; while ostensibly for workers' benefit, employers may cut benefits in response to failure to cooperate. See D.C. Code §32-1507(c); *Epstein, Becker, and Green v. D.C. Dept. of Empl. Serv. S (Ethel Johnson)*, 850 A.2d 1140 (D.C. 2004); *Celane Darden v D.C. Dept. of Empl. Serv.*, 911 A.2d 410 (D.C. 2006).

⁴⁸ 34 A.3d at 496-97.

⁴⁹ For examples, see *Logan v. D.C. Dept. of Empl. Serv.*, 805 A.2d 237 (D.C. 2002); *Reyes v D.C. Dept. of Empl. Serv.*, 48 A3d 159 (D.C. 2012).

⁵⁰ In D.C., for intoxication to bar a claim, it must be the sole cause of the injury. D.C. Code §32-1503(d).

⁵¹ Although D.C. has different public and private sector workers' compensation systems, the "objective standard" applied to both. See *McCamey v. D.C. Public Schools*, D.C. Off. of Hearings & Adjudication No. PBL 02-031 (April 22, 2003), available at 2003 WL 21346986; *Spartin v D.C. Dept. of Empl. Serv.*, 584 A2d 564 (D.C. 1990).

⁵² The system was more charitable with regard to traumatic event-based mental injuries, somewhat akin to California's "sudden and extraordinary event" standard, discussed above—but generally applied the above-discussed "objective" standard. See *Hulett v. Chemonic*, Admin. Hearings Div. No. 00-179B (2004), available at 2004 WL 3606411 ("While this jurisdiction has adopted the application of a special standard in psychological and emotional injury cases, the *Dailey* test, see *Dailey v. 3M Company*, Hearings and Adjudication Staff No. 85-259 (Director's Final Compensation Order, May 19, 1988); *Spartin v. D.C. Dept. of Empl. Serv.*, 584 A.2d 564 (D.C. 1990), it has also been recognized that this test is not applicable in cases of traumatically caused mental injury. *Id.*, 584 A2d at 569, accord, *McKinley v. D.C. Dept. of Empl. Serv.*, 696 A.2d 1377, 1385 n. 8 (D.C. 1997)." [citation omitted]).

⁵³The failings are not unique to this system, either. See *Larson*, *supra* note 18 at 1248-49, 1254-55.

injury in a person who was not significantly predisposed to such injury.”⁵⁴ This last element is the central feature: a fragile person does not get compensated for mental illness unless the catalyst was something that would induce mental illness in a “normal” person. This is true no matter how real the catalyst is, regardless of whether there are non-work-related causes of the mental disorder.⁵⁵

The *Ramey* case, noted above, in which the Claimant alleged that he was mocked by his co-workers for urinating on himself while being driven to receive a sobriety test at work, was initially denied because the ALJ “concluded that petitioner was not entitled to benefits because the events of August 30, 2003, would not have caused emotional injury to a person not predisposed to such injury,” and the Claimant’s alleged incident of mockery did not rise to this level.⁵⁶ Similarly, in the *Porter* case, the courts found a lack of such objective traumatic quality in a nurse’s being hit by a gurney at work, which she claimed was experienced as traumatic.⁵⁷

Although the case law sometimes blends the question of whether something *would have caused* similar such injury, and whether it *did* cause injury to the Claimant,⁵⁸ the central tenet of the objective standard that reveals its harshness for workers—and its deviation from the traditional workers’ compensation principle that an employer takes the worker as she finds her. It is as though a five-foot tall, 100-pound worker could not get compensated for a lifting injury to her back unless she were lifting something “objectively heavy” that would also have harmed a larger person’s back.

D. Longshore and Harbor Workers’ Compensation Act

Finally, I will note in passing some cases discussing mental injuries under the federal Longshore and Harbor Workers’ Compensation Act, which acted as a model for many states’ workers’ compensation systems. These cases outline a position on mental injuries that stands between the extremes of the new D.C. standard and California, with some barriers that extend beyond the old D.C. standard.⁵⁹ While these barriers are less systemic than those in California, they nevertheless obstruct a worker’s right to recover in stating that “legitimate” personnel actions and “general workplace conditions” cannot give rise to claims.⁶⁰ Remarkably, the 9th Circuit held in the *Pedroza* case of 2009-10 that “the distinction . . . between ‘legitimate’ or ‘illegitimate’ personnel actions is not about fault” but rather “about whether the employer’s actions created an environment of poor working conditions to trigger psychological injuries.”⁶¹ It is unclear what that means, but it is evidently an attempt to maintain that this rule does not affect the Longshore

⁵⁴ *Spartin v D.C. Dept. of Empl. Serv.*, 584 A2d 564, 568 (DC 1990) (quoting *Dailey v. 3M Co. and Northwest Nat'l Ins. Co.*, Hearings and Adjudication Staff No. 85-259 (May 19, 1988)). The standard is sometimes referred to as “the Dailey standard,” after this administrative appellate case, but citations in the present article are from subsequent opinions, mainly from the D.C. Court of Appeals, which reviews the administrative decisions.

⁵⁵ *Spartin* at 570 (D.C. 1990) (“Under *Dailey*, an employee predisposed to psychic injury could recover if he is exposed to work conditions so stressful that a normal employee might have suffered similar injury”).

⁵⁶ Described in *Ramey v D.C. Dept. of Empl. Serv.*, 997 at 697 (D.C. 2010).

⁵⁷ *Porter v D.C. Dept. of Empl. Serv.*, 625 A.2d 886, 888-91 (D.C. 1993).

⁵⁸ See *Porter*, 625 at 889-90.

⁵⁹ 33 U.S.C. §901 *et seq.*, initially passed on March 4, 1927.

⁶⁰ *Pedroza v Benefits Rev. Bd. (National Steel)*, 624 F.3d 926 (9th Cir. 2009 [amended 2010]); *Marino v Navy Exchange*, 20 Ben. Rev. Board Service 166 (Dept. of Labor Ben. Rev. Bd. 1988); *Dir., Office of Workers’ Comp. Programs v. Pepco*, 607 F.2d 1378 (D.C. Cir. 1978).

⁶¹ *Pedroza v Benefits Rev. Bd. (National Steel)*, 624 F.3d 926, 933 (9th Cir. 2009 [amended 2010]).

workers' compensation system's status as a no-fault remedy, notwithstanding the use of the normative term "legitimate." The cases are quite solicitous of employer's right to make decisions without falling into the trap of paying stress injuries⁶²—without any similar concern for the worker who falls into a diagnosable mental illness. The *Pedroza* case presents in its clearest form the challenge to employer control that allowing claims for workplace stress presents.

IV. THE PROBLEMS WITH TREATING MENTAL HEALTH INJURIES DIFFERENTLY THAN OTHER INJURIES

As noted above, in Section II, this essay starts from the default assumption that the workers' compensation systems should treat mental injuries as they treat physical injuries, and should respect the science and medicine behind mental health. The various ways the California rule, the old D.C. rule, and the Longshore rule create special obstacles for mental injuries are deviations from established rules. The current section explores some of the prominent arguments for this different treatment, and finds them wanting.

A. *A Preliminary Note on the Weakest Arguments Against Accepting Mental Injuries*

Before considering the stronger arguments for a differential treatment of mental health injuries, it is worth noting that some of the supposed arguments resemble conclusory declarations more than reasoned deliberations. These should be flagged and dismissed rather than debated, for they contain little with which to engage.

For instance, as noted above, according to the conventions of legal reasoning, the fact that a rule benefits one group of people is not really a *reason* for adopting it. If California legislators and judges are opposed to stress claims simply because denying them saves employers money, they are being perfectly logical, and it is hard to see what might change their minds.⁶³ Denying claims does usually save money. To illustrate from the other side, I would not bother arguing for expanding psychiatric claims simply because it would help workers and hurt capital, and if I did, no one would be able to refute me.⁶⁴ None of this is to say that business expenses are not part of the calculation, but rather that, in and of themselves, these concerns are not *reasons* for reform. If the goal were simply saving businesses money one could achieve that by abolishing workers' compensation entirely, or by establishing TARP-style subsidies for all failing companies. And if helping business really were the goal, there would be no argument for opposing such corporate welfare measures.

Two other arguments that come up in the case law, though slightly less brazen, are also worthy of dismissing out of hand. The first is the allegation that applying equal standards for mental injuries would lead to a proliferation of claims.⁶⁵ While this would certainly be an issue if

⁶² *McGray Constr. Co. v Dir., Office of Workers' Comp. Programs*, 181 F.3d 1008, 1016 (9th Cir. 1999).

⁶³ As Brazil's former Secretary of the Environment José Lutzenberger wrote to U.S. economist Larry Summers about the latter's economic argument for dumping waste in poorer countries: "Your reasoning is perfectly logical but totally insane. . . ." (quoted in FRANK ACKERMAN, *POISONED FOR PENNIES: THE ECONOMICS OF TOXICS AND PRECAUTION* 21 (2008)).

⁶⁴ As a personal aside, let it be noted that I *would* in fact support such a proposal for this very reason, but I would not bother *arguing* for it, as it would not persuade anyone who was not already persuaded.

⁶⁵ See, e.g., *Pac. Gas & Electric v Workers' Comp. Appeals Bd.*, 8 Cal. Rptr.3d 467, 473 (Cal. Ct. App. 2004) ("The Legislature made quite clear that it intended to *limit* claims for psychiatric benefits due to their proliferation and their potential for fraud and abuse" [emphasis in original]). The proliferation here is seen as distinct from potential for fraud and abuse, and to be a legitimate reason for limitation in its own right.

the claims were fraudulent or not meritorious—which ideas are discussed below—the simple fact that they are numerous is not a reason to discount them. One might, with similar logic, argue that lumberjacks should be denied death benefits because they die on the job more frequently than other professions.⁶⁶

A second argument worth dismissing comes from several California cases, notably *Sakotas* and *Hansen*.⁶⁷ In *Hansen*, the California appellate court upheld the denial of psychiatric injuries to workers who have been employed under six months on the grounds that workers' compensation is not a "fundamental right."⁶⁸ In *Sakotas*, the appellate court used similar reasoning to justify requiring that even if a worker suffers work-related mental injury, it is not compensable if work was not the "predominant cause"—there is no constitutional protection, because workers' compensation is not a "fundamental right" and workers are not a "suspect class."⁶⁹ These decisions are remarkable in that the California courts justify these restrictions by noting that workers' compensation's exclusive remedy provision—the prohibition on suing one's employer—is not, *in general*, a violation of fundamental rights: it is not a violation of your rights that you cannot sue your employer for a workplace injury, as you can direct your concerns through the workers' compensation system.⁷⁰ However, the courts apply the six-month bar on mental injury claims *even in the context* in which personal injury remedies are not allowed.⁷¹ In effect, the *Hansen* ruling makes recently employed workers experiencing mental injury a special class of people with no right to pursue *any kind* of remedy against their employers—neither workers' compensation nor traditional tort. The restriction of workers' compensation rights in a context where workers *are* allowed to sue their employers is an intriguing prospect beyond the scope of the present essay—but California wants to take away *both* routes for remedy. What is certain here is that the *Sakotas* and *Hansen* cases' justification for this special exclusion of mental injury claims leans on a bruised reed and merits little serious consideration.

While the above arguments present the weakest case against recognition of mental injuries, other ideas presented in the case law present more serious and illuminating, if ultimately unconvincing challenges. The following sections address these arguments in turn.

B. Employer Ability to Make Employment Decisions

Central to the Longshore Act's restriction of psychological injuries is a dedication to preserving employer control over employment decisions, without concern for paying compensation for the stress that personnel decisions may cause. As the Department of Labor's Benefits Review Board stated in a 1988 case:

A legitimate personnel action or termination is not the type of activity intended to give rise to a worker's compensation claim. To hold otherwise would unfairly hinder employer in making legitimate personnel decisions and in conducting its

⁶⁶ BUREAU OF LABOR STATISTICS, CENSUS OF FATAL OCCUPATIONAL INJURIES SUMMARY (2014), *available at* <http://www.bls.gov/news.release/cfoi.nr0.htm>

⁶⁷ *Sakotas v Workers' Comp. Appeals Bd.*, 80 Cal. App. 4th 262, 269-74 (Cal. Ct. App. 2000); *Hansen v Workers' Comp. App. Bd.*, 18 Cal.App.4th 1179, 1182-85 (Cal Ct. App. 1st Distr. 1993).

⁶⁸ 18 Cal.App.4th 1179, 1182-85 (Cal Ct. App. 1st Distr. 1993).

⁶⁹ 80 Cal. App. 4th at 269-74.

⁷⁰ *Sakotas*, 80 Cal. App. 4th at 269-74; *Hansen v Workers' Comp. Appeals Bd.*, 18 Cal.App.4th 1179, 1182-85 (Cal Ct. App. 1st Distr. 1993).

⁷¹ 18 Cal.App.4th 1179, 1182-85 (Cal Ct. App. 1st Distr. 1993).

business. Employer must be able to make decisions regarding layoffs without the concern that it will involve workmen's compensation remedies.⁷²

While this principle may have some intuitive resonance, particularly among those who believe in the ideal of “employer control,” applying it to the physical realm shows how radical this rule is. Consider a construction company: in addition to making legitimate personnel decisions, such an employer also regularly engages in its primary role of directing its employees to do physically demanding and risky activities: lifting, drilling, hammering, and climbing, among other things. While laws ensuring compensation for injured workers may “hinder” such an employer’s operations, society has long deemed this hindrance to be legitimate, particularly in the context of the compensation bargain in which the worker also sacrifices the right to sue her employer. In effect, the Longshore system is allowing this argument, rejected in every other context, to justify a special immunity for employers in the realm of stress- or trauma-inducing personnel decisions. There is little pretense that this is anything other than a boon to the employer at the employees’ expense.

One may question the analogous character of the employer’s right to order workers to lift heavy things and the employer’s right to fire workers for misdeeds. Termination, in addition to being universally stressful, by definition takes away a worker’s source of revenue and breaks any allegiance to the old employer that might encourage fair dealing. To allow a worker to claim a work injury in these circumstances, the argument goes, gives an incentive to commit fraud, as the worker with a successful workers’ compensation claim could get paid notwithstanding termination. This would, in the Ninth Circuit’s phrase, “create a trap for the unwary employer.”⁷³

There are several responses to the argument that stress claims are creating a “trap” for employers. The first response to this is that there are means to test for fraud in the case of any worker injury, and they are comparable in mental and physical injuries: employers are not free of remedies.⁷⁴ Second, any system of benefits provides incentives for fraud⁷⁵; this fact does not justify an across-the-board ban on claims. And third, providing health and welfare benefits to the fired worker would erode much of the incentive to commit fraud, inasmuch as individuals receiving no benefits—and in more dire need—are more likely to try to pursue them at any cost.⁷⁶

This problem of bad incentives is not much different from the situation with regard to physical injuries: consider a low-wage worker without sick leave or short-term disability benefits

⁷² *Marino v Navy Exchange*, 20 Ben. Rev. Bd. Service 166, 2, 1988 WL 232802 (Dept. of Labor Ben. Rev. Bd. 1988) (per curiam).

⁷³ *McGray Constr. Co. v. Dir., Office of Work. Comp. Programs*, 181 F.3d 1008, 1016 (9th Cir. 1999).

⁷⁴ See *infra* Part IV.D.

⁷⁵ As merely one of myriad examples, one can note that in June of 2015, the Department of Justice indicted 243 individuals for Medicare fraud in the amount of \$712,000,000. While disturbing, even confirmation of every charge would hardly constitute an argument for abolishing Medicare. DEP’T OF JUSTICE, NATIONAL MEDICARE FRAUD TAKEDOWN RESULTS IN CHARGES AGAINST 243 INDIVIDUALS FOR APPROXIMATELY \$712 MILLION IN FALSE BILLING (June 18, 2015), available at <https://www.fbi.gov/news/pressrel/press-releases/national-medicare-fraud-takedown-results-in-charges-against-243-individuals-for-approximately-712-million-in-false-billing> (accessed on March 27, 2016)

⁷⁶ This is necessarily conjecture, in large measure because we cannot know how much fraud goes undetected. However, indicators from other fields show similar trends, in terms of desperation driving antisocial self-serving behavior: a decline in work opportunities for unskilled men predicts crime rates, for instance. See Gould, Eric D., Bruce A. Weinberg & David B. Mustard, *Crimes Rates and Local Labor Market Opportunities in the United States: 1979-1997*, 84(1) *Review of Economics and Statistics* 45-61 (2002).

who tears her rotator cuff playing basketball in her free time. If she successfully commits fraud and states the injury happened at work, she can get her medical bills paid, 2/3 of her wages for her time off work, and possibly a permanent partial disability award. If not, she and whoever depends on her may have to live in penury for at least several weeks simply because of an accident. The incentive to commit fraud is clear, but the solution of paid medical leave is equally clear in counteracting this incentive.

In addition to the above, a supporter of employer control may argue that there is no double standard here, inasmuch as personnel decisions are part of an ordinary workplace and *should not* cause diagnosable mental problems. To use the language of the Americans with Disabilities Act, the ability to deal with the emotional weight of ordinary workplace conflicts and tension is an *essential function* of most jobs.⁷⁷ As such, the required accommodation for this level of emotional sensitivity is not reasonable in a normal workplace setting. Rather, forcing companies to accommodate someone who suffers diagnosable and debilitating post-traumatic stress from ordinary disciplining measures is akin to forcing a construction company to accept someone who cannot lift more than fifteen pounds.⁷⁸ In the apt language of the ADA, such an accommodation is not “reasonable.”⁷⁹

When examined more carefully, however, the “essential functions” argument—and the analogy to the ADA—is specious. For one, workers’ compensation establishes blanket rules for all employers; it is not, like the ADA, a case-specific question about adaptations. A blanket rule would effectively declare the requisite level of mental stability to be an essential function of *all* jobs, rendering anti-discrimination principles wholly nugatory. For some jobs a particularly high level of emotional fortitude might be an essential function—like a firefighter or emergency room doctor, for instance—but those are special cases. Just as importantly, compensation is *not* a system that creates general rules about appropriate workplace accommodations like the ADA; rather, it is a remedy that arises when certain kinds of injuries occur. Some of these injuries may be foreseeable, but many are not.

Employers are far from powerless in this realm, even with the broadest possible workers’ compensation law of stress claims. Just as the ADA allows employers to discriminate against disabled people when their disabilities limit their capacity to perform essential job functions, employers can do the same with persons known to be too mentally unstable to perform essential functions of their jobs. As a construction company need not hire a wheelchair-bound worker to perform a job with extensive walking and climbing, they also would not be bound to hire a clinically agoraphobic spokesperson or a claustrophobic plumber. This is the core of the “essential functions” accommodation, and it applies to mental disabilities as it does to physical disabilities.⁸⁰

⁷⁷ 42 U.S.C. 12111(8).

⁷⁸ Of course, some states have “second injury funds” which seek to relieve the burden on an employer for an injury suffered by an applicant with a previous disability—in part to encourage employers to hire previously injured applicants. *See, e.g.,* Dierks v Kraft Foods, 471 S.W.3d 726, 736 (Mo. Ct. App. 2015) (“Section 287.220.1 sets out the law governing when the second injury fund is liable. . . . Where the statute applies, the employer is liable only for the amount of disability caused by the current injury, and the fund is liable in the amount of the increase in disability caused by the synergistic effect of the two injuries” “(internal quotation and citation omitted). There is no good reason these funds could not apply in mental injuries.

⁷⁹ 42 U.S.C. §12111(8).

⁸⁰ *See, e.g.,* DEP’T OF LABOR, MAXIMIZING PRODUCTIVITY: ACCOMMODATIONS FOR EMPLOYEES WITH PSYCHIATRIC DISABILITIES, available at <http://www.dol.gov/odep/pubs/fact/psychiatric.htm> (accessed on March 27, 2016).

However, none of the above accommodations remove the employer's responsibility to pay compensation if an injury does occur—even if it occurs to someone who was so frail, mentally or physically, that they should not have been doing the job in the first place.

While appeals to employer control do not provide a good *justification* for treating mental injuries differently, the fact that courts interpreting the Longshore Act⁸¹ have used this argument is telling. The mental injury presents a challenge to dominant assumptions behind workplace power relations in a way that a physical injury does not, because the social process of defining appropriate mental health necessarily enters into normative questions in a way that defining physical health does not. This complex and intriguing subject is discussed below, in Sections IV.E and V.

C. *The “Actual Events of Employment” Versus the Actual Events of Employment*

In the laws of California, any mental injury has to be caused by the “actual events of employment,” with the phrase “actual events” operating as a term of art that excludes things that in plain English would be “actual events of employment,” and not fictions or chimerae. The excluding events include things for which the employee is to blame⁸² and general social trends that affect the workplace.⁸³

Some of these exclusions have a clear relationship with the question of employer control.⁸⁴ In this sense, the use of the terms of art merely obfuscates that other issues are at play, such as the preservation of employer control. For whatever reason, some judges appear to be less comfortable appealing to such principles of employer control than they do making transparently false declarations, like the claim that co-workers' disdain for a particular worker—which the targeted worker supposedly “brought upon herself”—“is not an actual event of employment.”⁸⁵

Nevertheless, there is a substantive argument present in the notion that *general social events* that impact the workplace are not “actual events of employment.” California's *PG&E* case⁸⁶ is instructive. In that case, the applicant was stressed about a slew of things, some of them uncontroversially not work-related, like his father's death, and others which he claimed were actual events of employment, including the transfer of his position to telephone duties, dealing with angry customers, and the prospect of losing his job due to company downsizing.⁸⁷ The court held that while dealing with angry customers on the telephone and being transferred within the company were “actual events of employment,” the fear of future downsizing was not, because it was part of a larger social phenomenon, the financial hardship of his employer, which was not distinctly part of his workplace experience.⁸⁸

The resulting principles of this reading of the *PG&E* case are somewhat nebulous: if one reads in a newspaper that one's employer will downsize, it is not work-related, whereas hearing

⁸¹ *Marino v Navy Exchange*, 20 Ben. Review Board Service 166 (Dept. of Labor Ben. Rev. Bd. 1988), *McGray Constr. Co. v. Dir., Office of Work. Comp. Programs*, 181 F3d 1008, 1016 (9th. Cir. 1999).

⁸² *Verga*, *supra* note 27 at 178.

⁸³ *PG&E v Workers' Comp. App. Bd.*, 8 Cal. Rptr.3d 467 (Cal. Ct. App. 2004).

⁸⁴ See, *supra* Part IV.B and *infra* Parts IV.E and IVF.

⁸⁵ *Verga*, *supra* note 27 at 178. One might suppose anything an applicant “brought upon herself” at work would by definition have to be actual, of employment, and an event.

⁸⁶ *PG&E*, *supra* note 84 at 467.

⁸⁷ *Id.* at 470-71.

⁸⁸ *Id.* at 473-74.

the same news from a co-worker or supervisor may be, because the latter took place in the course of work, even though the stress and its cause are similar in both scenarios. The trauma from a co-worker's death may give rise to a work injury if it occurs at work, or even if the claimant hears about it at work, but would not do so if the claimant were impacted in the same degree by hearing of it in her free time.

The above reading is only one possible interpretation; one could also argue that *PG&E* stands for broader prohibitions on finding work injuries from stress that arise out of any "general social condition," wherever the worker hears about the condition. If one does adopt this interpretation, however, the rule would at least have the virtue of being consistent with prevailing rules on physical injuries. Under the current D.C. private sector standard and California law, for instance, suffering a physical injury from coworkers' horseplay or violence whose cause is related to employment does give rise to a compensable claim, while suffering from violence at work motivated by other factors does not.⁸⁹ "Actual events," when used to mean *actual events*, and not as a term of art, may be a good or a bad standard, but it is effectively the same standard for physical or mental ailments, in situations where line-drawing is difficult.

In sum, what may be worth salvaging from the *PG&E* case would not mark a deviation from the general principles of workers' compensation—that would be a requirement that the "actual events of employment" actually mean *the actual events of employment*. In the main, however, "actual events of employment" is a term of art which prohibits workers with work-related diagnosable conditions from recovering. One 2008 case, *Verga v. WCAB*, illustrates the point quite clearly: the employee was unsympathetic, so the court said that the sources of her stress were not "actual events."⁹⁰ The ends of this "actual events" requirement appear to be expansion of managerial control and containment of employer costs, but masquerading under a disingenuous heading that suggests continuity with other principles of workers' compensation.

D. The Likelihood of Fraudulent Claims

Among California's key justifications for treating stress claims distinctly is that they are allegedly more likely to be fraudulent than physical injuries.⁹¹ One California case stated that:

[a]lthough it is true that a claim for psychiatric injury which rests on an objective physical injury may be somewhat less likely to be fraudulent than one based on "stress," there remains a substantial potential for the fraudulent inflation of a claim by adding alleged psychic injuries; thus, including such claims to meet the six-month standard is by no means unreasonable.⁹²

One searches the cases and statutes largely in vain for evidence to support this claim of likelihood of fraud. Indeed, the sentence just quoted cites no peer-reviewed psychiatry article, not even an employer-funded study or medical expert, but rather, another judicial opinion, which itself

⁸⁹ *Hodges v Workers' Comp. App. Bd.*, 82 Cal. App.3d 894, 900 (Cal. Ct. App. 1978) ("Injury to a nonparticipating employee resulting from the horseplay of fellow employees is generally compensable"); *Joyner v Sibley Mem. Hosp.*, 826 A.2d 362, 374 n.13 (D.C. 2003) ("[A]n injury suffered from an assault *may* arise out of employment within the meaning of the [Workers' Compensation Act] if the reason for the assault is a quarrel having its origin in work" (quotation omitted)).

⁹⁰ *Verga*, *supra* note 27 at 181-82.

⁹¹ *See, e.g., Wal-Mart v Workers' Comp. Appeals Bd (Garcia)*, 112 Cal. App.4th 1435 (Cal. Ct. App. 2003)

⁹² *Id.* at 1441.

does not cite any medical study, but only more legislative and judicial declarations on the truthiness of the fact at hand.⁹³

Of course, there is a bit of a catch-22 present: the only way to know the level of fraud would require some reliable method of discerning fraud, which method would presumably be capable of weeding out fraudulent claims and thus obviating the need for any general rule aimed at fraud prevention. However, that paradoxical result cuts the other way as well: workers cannot decisively show that fraud is *less* likely in stress claims. Given that the anti-stress claim advocates are the ones supporting a double standard for these sorts of injuries, norms of both fairness and skepticism should place the burden of proof on them, rather than on those advocating equal deference to different fields of medicine and different kinds of injuries. In addition, since the above-cited California judges are accusing thousands of workers of criminal acts, it would also seem a minimal requirement that they present at least some shred of evidence in support of their accusation.

Given the sums involved in compensation and litigation, as well as medical expenses more generally, it is unsurprising that some researchers have sought methods to detect fraud. A quick review of the literature finds that efforts to detect fraud in mental illness as opposed to physical illness have more similarities than differences.⁹⁴

Psychiatrists, psychologists, and neuropsychologists have developed numerous devices for detecting malingering.⁹⁵ These include the Structured Interview of Reported Symptoms (SIRS) and the Minnesota Multi-Phase Personality Inventory (MMPI).⁹⁶ Some scholars claim that these devices should be used, or at least act as complements for other methods, in detecting fraud in compensation cases.⁹⁷ However, these tests rely on survey results, as interpreted by mental health specialists. One comment on a study of SIRS' efficacy notes that it seeks evidence of unlikely symptoms and amplified symptoms:

Primary scales in the unlikely category include rare symptoms (RS), symptom combinations (SC), improbable and absurd symptoms (IA), and reported versus observed symptoms (RO). Those in the amplified category consist of blatant

⁹³ *Id.*, citing *Lockheed Martin v. Workers' Comp. Appeals Bd.*, 96 Cal. App. 4th 1237, 1248 (Cal. App 2002). See also *Hansen v Workers' Comp. App. Bd.*, 18 Cal.App.4th 1179, 1183-84 (Cal Ct. App. 1st Distr. 1993).

⁹⁴ See, e.g., Richard Rogers, *et al.*, *Use of the SIRS in Workers' Compensation Cases: An Examination of its Validity and Generalizability*, 33 LAW & HUM. BEHAV. 213 (2009). (describing various modes of detecting malingering or fraud in psychiatric studies); Samuel D. Hodge and Nicole Marie Saitta, *What Does It Mean When a Physician Reports that a Patient Exhibits Waddell's Signs?*, 16 MICH. ST. U. J. MED. & L. 143 (Winter 2012) (describing, with some skepticism, one method used to detect fraud in back pain claims); Friedland, Steven, *Law, Science & Malingering*, 30 ARIZ. ST. L.J. 337 (1998) (expressing skepticism about any way of detecting malingering). A curious puzzle that this situation presents is that if we could detect fraud more effectively in one domain or the other, it would still not be clear what the normative import might be. In theory, if we had solid studies showing higher levels of fraud in mental injuries than physical injuries, we might want to raise the bar. On the other hand, the superior ability to detect fraud would warrant *lowering* the bar, since we would not need to rely on a blanket presumption to weed out fraud: we could get the evidence firsthand. At any rate, I think the indeterminacy of the literature does not strongly support the superiority of one fraud-detection mechanism over the other, so we need not try to resolve this intriguing ethical quandary, at least for the time being.

⁹⁵ Rogers, *supra* note 94 at 213.

⁹⁶ *Id.* at 216 (2009).

⁹⁷ *Id.* at 222-23 (2009).

symptoms (BL), subtle symptoms (SU), selectivity of symptoms (SEL), and severity of symptoms (SEV).⁹⁸

That is to say, these tests do not unlock some secret of the body that sheds light on possible malingering—as polygraphs, for example, purport to do—but rather rely on survey results, as interpreted by mental health specialists.⁹⁹ There are more objective devices to detect faking in interviews—for instance, a patient who answers multiple-choice questions at a much lower frequency than random must be somewhat aware of the right answer to choose the wrong answer with more than random consistency.¹⁰⁰ These tests are, in that sense, more objective (though even they do not prove *conscious* deception). However, there is nothing about these statistical analyses of surveys that limits them to mental problems as opposed to physical ones.

Turning to “fraud detection” in the case of physical injuries shows a similar lack of reliable mechanisms. Among the most famous devices for detecting fraud in the case of physical injuries is the set of “Waddell’s signs,” which seek to find false claims to back pain.¹⁰¹ To some extent, they have more objective criteria to work with, as physical reflexes are fairly well understood: a patient who reports an intensification of low back pain when a doctor pushes on the top of her head is presenting something physically implausible, and therefore not related to an actual back condition.¹⁰² By contrast, it is dubious there is any test of the brain that could be related with such certainty. However, this contrast has limited value, as Waddell’s set of signs are not all so firmly rooted in understanding of the body. One of them, for instance, is called *overreacting*, and is exactly as it sounds. In other words, it simply substitutes the subjective judgment of the doctor about what is an appropriate reaction for the subjective judgment of the patient on the exact same question.¹⁰³ Others involve observing apparent differences in a patient’s when distracted, as opposed to when the patient is knowingly being subject to testing.¹⁰⁴ While this is somewhat more grounded than speculation about “overreacting,” is nevertheless ultimately rooted in the doctor’s perception.

The similarity of problems faced by fraud detection in both kinds of injuries—which may surprise some—makes more sense when one considers that doctors seeking to detect fraud are

⁹⁸ *Id.* at 216 (2009).

⁹⁹ Rogers, *supra* note 94. As an aside, cultural variation presents additional complications (a point noted in DSM-IV Appendix I, 897-903 (Am. Psychiatric Ass’n 2000), particularly in heterogeneous places like D.C. or California. This presents particular problems for the Rogers et al. study, which uses, for reasons unclear, a sample population that is over 98% white.

¹⁰⁰ To illustrate, consider a twenty question test with four possible answers for each question. There is a $\frac{3}{4}$ likelihood that someone choosing randomly will get the question wrong. To get two consecutive questions wrong, however, the odds shrink to $\frac{9}{16}$, not far above 50%. By the twentieth question, there is only around a 0.3% chance that an ignorant guesser would have gotten every question wrong, and it is a fair assumption that the person knows at least some of the answers.

¹⁰¹ For a brief but useful summary of Waddell’s signs, see Laura Jensen, *Nonorganic Findings—What Are They?* 51 BRITISH COLUMBIA MEDICAL JOURNAL, 106 (2009), available at <http://www.bcmj.org/icbc/nonorganic-findings%E2%80%94what-are-they> (accessed on March 27, 2016).

¹⁰² Again, the implausibility does *not* indicate any attempt at conscious deception. Somewhat bizarrely, the common term for these allegedly implausible complaints is “nonorganic findings,” which seems to suggest that the human brain is made of silicon.

¹⁰³ Jensen *supra* note 101 at 106.

¹⁰⁴ *Id.*

actually engaged in an inquiry into the *psyche* of the patient, and *not* into her physical condition. That is, the question of *fraud* is whether or not the patient is *lying*, and *not* whether her related symptoms correlate with what the doctor would expect based on other investigations. Such discrepancies can have many explanations, including psychosomatization or medical ignorance.¹⁰⁵ The question of deliberate misrepresentation, however, is one in which an orthopedist's view is no better than that of any other amateur observer of human conduct.¹⁰⁶

A further complication of the fraud detection business is that parties speaking of fraud often include *symptom magnification* or *exaggeration* as a genus of fraud alongside the purer notion of fraud as complete fabrication.¹⁰⁷ The very concept of *exaggeration*, however, presupposes that there is some objectively appropriate level of complaining, which is doubtful. Rather, the right degree of complaining is entirely context-specific, and likely to vary according to individual and cultural climate.¹⁰⁸ To illustrate: it may be inappropriate to complain to strangers on a city bus

¹⁰⁵ The undersigned has seen doctors dismiss complaints based on lack of objective study. There may be debate about inferring the absence of radiculopathy from negative MRIs of the spine, but the inference that one has no headache problems from a negative MRI of the brain is not on a particularly strong scientific footing. See, e.g., Ayse Lee-Robinson & Aaron Taylor Lee, *Clinical and Diagnostic Findings in Patients with Lumbar Radiculopathy and Polyneuropathy*, 7 AM. J. OF CLIN. MED., no. 2, at 80-85 (2010); G. Sandrini et al., *Neurophysiological Tests and Neuroimaging Procedures in Non-Acute Headache* 18 EUROPEAN JOURNAL OF NEUROLOGY 373-81 (2011), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-1331.2010.03212.x/full>; Brian C. Callaghan, et al., *Headaches and Neuroimaging: High Utilization and Costs Despite Guidelines*, 174 JOURNAL OF THE AM. MED. ASS'N. INTERNAL MED. 819-21 (2014), available at <https://archinte.jamanetwork.com/article.aspx?articleid=1835347#ild140004r4>. At any rate, neither negative study suffices to show *deliberate* misrepresentation.

¹⁰⁶ The jury system presupposes that amateur observers are decent judges of credibility, based on instincts and observation. One wonders how reliable this “common sense” approach is. The present author has discussed this issue with one professor of U.S. evidence law who argued that consistency and simplicity were the hallmark of dishonesty, because “truth is messy”—and claimed that this view was “common sense.” By contrast, many observers, expert and otherwise, seem to believe the very opposite, that contradictions and convolutions indicate likely dishonesty. See Friedland, *supra* note 94 at 350-52. One could, of course, use a psychologist or psychiatrist specialist in detecting malingering even in a case alleging orthopedic injury. Given courts' skepticism about polygraphs, there are reasons to doubt such evidence would be admissible under the *Daubert* standard. See Friedland *supra* note 94 at 357-61 and 382: “Noted one court, “[t]here is no proof of special validity of credibility judgments made by psychiatrists” (citing *Lester v. Bowen*, 1987 WL 28265, at *2 (N.D. Ill. 1987)).

¹⁰⁷ Rogers *supra* note 94 (references throughout and in citations to conflation of exaggeration with fraud); Friedland, *supra* note 94 at 350-52.

¹⁰⁸ This paragraph is based on the author's subjective impressions of social propriety and custom. While others' specific intuitions about propriety may vary, it seems doubtful that anyone could negate the basic point that the nature and place of an interaction will affect *how* and *to what extent* a person discusses their pain, and accordingly conversations about back pain (or constipation, or impotence) will be different in the examining room than they are in the waiting room or the bus. The law in other areas, such as evidence, has deemed the power of context as adequate to justify treating statements differently depending on the interlocutor and situation. See, e.g., FED. R. EVID. 804 advisory committee's note, discussing the hearsay exception for utterances to doctors:

Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. McCormick § 266, p. 563. The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend.

about your back pain (though it is sometimes done). By contrast, back pain is something you might mention to co-workers, and you might complain about it regularly when talking to your spouse. Talking to a treating doctor—or a workers' compensation lawyer, as the case may be—invites still further delving into the character of the pain, its frequency, its location, its intensity, and so on, that may go even further than the complaints voiced to one's spouse.

While these various situations suffice to illustrate that “appropriate” presentation is context-specific, it is also worth emphasizing that being examined by a *non-treating*, evaluating doctor, as often occurs in workers' compensation cases, is a new and unfamiliar context for many people. What is appropriate in such circumstances? If the insurance company's hired medical expert tells you explicitly that he is not going to treat you, and you know for whom he is working and where his interests or biases lie, *how* should you describe your back pain? I would contend that not only is there no right answer in general, but that the concept of “getting it right” actually sounds particularly nonsensical when dealing with such a contrived and unfamiliar situation.

There is no “right” amount to relate one's pain; the nature of presentation of symptoms is context-specific. Where on this spectrum would an evaluating doctor lie—that is, how much complaining is appropriate when one is being evaluated rather than treated? What is 6/10 pain as opposed to 8/10 pain? Absent answers to these questions speculation about “symptom magnification” is fraught with intractable complications.

One could argue that just as lie detectors are not scientifically strong enough to allow their usage without certain safeguards,¹⁰⁹ so too fraud detection tests have not reached a level to justify much reliance on them in detecting workers' compensation fraud. However, I need not make that argument in the present essay: my point is that whatever the overall validity of fraud detection devices or tests, they are not fundamentally different or more reliable than the devices or tests used to detect fraud in cases of physical injuries. Whatever one concludes about the efficacy of fraud detection, the scientific literature does not support treating the prospect of fraud differently in the case of the psyche as opposed to the body. One kind of fraud is not more easily detected than the other; nor is there any good reason to suppose that one kind of compensation claim is more often fraudulent. As such, there is no reason to treat the two kinds of injuries differently in the name of fighting fraud.

E. The Subjectivity of Mental Illness

Distinct from the rather accusatory allegation of widespread fraud is the more charitable view that while workers may or may not be more likely to lie about suffering mental troubles, the question of mental illness is nevertheless fundamentally more subjective than that of physical ailment. Larson, though sympathetic to mental injuries as a core part of workers' compensation, readily concedes that this problem of line-drawing is a distinct challenge in mental injuries.¹¹⁰

The medical exception to the hearsay exclusion is the most closely related to the above discussion; however, the other hearsay exceptions, and the hearsay rule itself, also rest on similar presuppositions about how context impacts people's speech.

¹⁰⁹ Though this is a contentious question. See *U.S. v. Piccinonna*, 885 F.2d 1529, 1535 (11th Cir. 1989) (stating that although polygraphs are scientific enough to admit as evidence, it remains the case that “polygraphy is a developing and inexact science, and we continue to believe it inappropriate to allow the admission of polygraph evidence in all situations in which more proven types of expert testimony are allowed”); See also *U.S. v. Henderson*, 409 F.3d 1293, 1301-02 (11th Cir. 2005) (affirming this status for the polygraph).

¹¹⁰ Larson, *supra* note 18 at 1258.

On its face, the argument about subjectivity does not appear to make much of a case against mental injuries *as such*: the claim that line-drawing is difficult does not provide a reason to refrain from trying. Some physical ailments are more objectively discernible than others, of course: a herniated disc causing nerve impingement may be detected by MRI, while complex regional pain syndrome is not subject to any similar such test.¹¹¹ Nevertheless, this ability to prove is not taken as dispositive in the case of physical injuries, and it is not a very good argument for categorically excluding less from consideration—after all, there was a time not long ago when there were no MRIs, but disc damage was no less real as a result. Nevertheless, some qualitative difference in *how* one draws the line in the two different domains may provide some justification for treating them differently.

Some commentators have gone from the precarious scientific-medical status of mental health to a full-on attack on the discipline as a whole. Though this essay does not endorse any of these arguments, some consideration of them will help shed light on what is peculiar and subjective about mental illness, which in turn can help with the line-drawing predicament noted above.

Two of the most prominent critical perspectives on mental health as an institution come from points of view as diametrically opposed as can be imagined: Thomas Szasz, who presents an analytic philosophy-inspired tirade against mental health as a negation of individual autonomy, and Michel Foucault, who presents a more obliquely and poetically expressed institutional-intellectual genealogy of mental health as social category and institution.¹¹² As both of these thinkers represent serious challenges to mental health, and as they represent outer intellectual reaches that courts and legislatures, due to conservative tendencies, lack of curiosity, and lack of time, would not explore, it is worth including a brief discussion of the basic ideas they presented and why the potential challenges contained therein do not warrant abandonment or radical revision of mental health as expertise.¹¹³

Thomas Szasz emphasizes that underlying mechanisms of most mental illnesses are not understood in the way that, say, we know a common cold is caused by particular viruses, or impingement on nerve roots in the low back can cause radiculopathy in the legs.¹¹⁴ By contrast, even the most extreme examples of mental illness, like schizophrenia, are not understood in terms of their mechanism: for all we know, the category “schizophrenia” may not map consistently into any particular brain pattern at all: it would not be surprising if, fifty years from now, “schizophrenia” has been entirely abandoned as a concept and replaced by numerous different

¹¹¹NATIONAL INSTITUTE OF HEALTH, NATIONAL INSTITUTE OF NEUROLOGICAL DISORDERS AND STROKE, COMPLEX REGIONAL PAIN SYNDROME FACT SHEET (November 3, 2015), *available at* http://www.ninds.nih.gov/disorders/reflex_sympathetic_dystrophy/detail_reflex_sympathetic_dystrophy.htm (accessed on March 27, 2016).

¹¹² THOMAS SZASZ, *THE MYTH OF MENTAL ILLNESS* (1974); MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (Richard Howard, trans., 1973).

¹¹³ A fuller inquiry into the ideas these two writers present would be matters for many dissertations or tomes. Obviously, underlying notions will be simplified for this brief exegesis. In addition, while Szasz wears his prescriptive ideas on his sleeve, so to speak, I am wary of suggesting any particular prescriptive position to Foucault in the present debate. In particular, he does not seem like someone who would have been particularly determined to root out malingering.

¹¹⁴ Szasz, *supra* note 112 at 1-12, 32-37, 49 *passim*.

classifications.¹¹⁵ In light of this dearth of evidence, the argument goes, there is no objective basis for the notion that a collection of eccentric or unpleasant behaviors could be understood as qualitatively distinct from other behaviors to a degree sufficient to mark them off as “illnesses,” analogous to physical ailments.

Szasz developed a counter-narrative of these eccentric behaviors that have been classified as illnesses: to the contrary, these are deviant or troubled forms of negotiating ordinary human relations.¹¹⁶ For instance, a desperate individual who had never had her concerns taken seriously except when ill might play at being ill when faced with great psychic stress—and thus would be labeled “hysterical.”¹¹⁷ Whether sympathetic or not, the “somaticization” of unhappiness in such a person would not be the product of some infection of the brain, or even of delusion, properly understood, but rather a performative behavior rooted in a familiar experience (obtaining consolation when ill) and a familiar desire (desperately wanting consolation).

At day’s end, Szasz’s attack on the concept of mental illness can only be taken as an illuminating philosophical musing on the boundaries of the categories we employ (albeit a musing that holds many pernicious implications if taken as seriously as its author intended¹¹⁸). Whatever the validity of his contrast between mental and physical health, it does not hold up today. As a primary matter, the notion that all non-mental illnesses or ailments are understood as mechanisms is not true: for instance, migraines and torticollis are diagnosed by clinical signs and not underlying

¹¹⁵ *Id. passim*; DSM-IV 297-311, esp. 301 (Am. Psychiatric Ass’n (2000). (noting the absence of any decisive diagnostic criteria for schizophrenia and describing the clinical signs that are used for diagnosis).

¹¹⁶ Szasz, *supra* note 112 at 126-47.

¹¹⁷ *Id.* The heavily gendered example of “hysteria” figures prominently in *The Myth of Mental Illness*. While this might be seen as a distraction from the point at hand, it in fact illustrates two points in defense of Szasz: first, that yesterday’s “illnesses” can easily become today’s jokes, and second, that pathologization can be actively disempowering—and in the case of the “treatment” of “hysterical” women, was deliberately so. Szasz 190-91 (discussing Freud’s misogyny).

¹¹⁸ Shorter, *supra* note 19 at 183-84 (“This is so ironic. If you ask the producers of the movie *One Flew Over the Cuckoo’s Nest* how many suicides they are responsible for, they would be nonplussed, even though the answer is many. If you ask the anti-psychiatry gurus how many suicides their storming against neuroscience has caused, they would be at a loss - and respond perhaps with a gibe against Prozac. But the answer is many. Books such as Szasz’s delegitimised psychiatry in the eyes of much of the population, and drove desperately ill individuals away from such treatments as electroconvulsive therapy that could have been life saving”); A more charitable view: “It is hard to doubt the reality of mental illness, especially when the suffering of affected individuals is so complete and the impairment so extreme, when psyche and identity are crippled almost beyond repair. But it is also remarkable how much of modern psychiatry is still theoretical rather than empirical, and how many of the supposed mental illnesses that appear (and multiply) in the *Diagnostic and Statistical Manual of Mental Disorders* have no known biological underpinnings or explanations. Although Szasz’s critique often became a caricature, his intuition about the limits and deformations of modern psychiatry cannot be ignored. Many sick people have surely benefited from psychiatric treatment, both “talk therapy” and pharmacotherapy. But psychiatry’s long history of error — from snake pits to ice baths to spinning chairs to electroshock to lobotomy — should give us pause. Skepticism is not backwardness, even if Szasz often took his skepticism to rhetorical extremes.” Jeffrey Oliver, *The Myth of Thomas Szasz*, 13 THE NEW ATLANTIS 68-84 (2006), available at

<http://www.thenewatlantis.com/publications/the-myth-of-thomas-szasz> (accessed on March 27, 2016). It also bears repeating that psychiatry does, in fact, help many people improve. Stefan Leucht, *Putting the Efficacy of Psychiatric and General Medicine Medication into Perspective: Review of Meta-Analyses*, 200 BRITISH J. OF PSYCHIATRY 97-106, available at <http://bjp.rcpsych.org/content/200/2/97>

mechanism.¹¹⁹ Indeed, the common cold would not have qualified as sickness until the age of modern medicine by a strict application of this standard of identifying illness.¹²⁰ Moreover, while our understanding of the brain is still weaker than of other organs, there are physiological indicators of conditions like Alzheimer's and even the more ambiguous case of depression.¹²¹ Third, whatever one concludes about Szasz's challenging thoughts on, say, "hysteria" or depression—which can be seen as extreme manifestations of ordinary behavior or moods, the "play-acting" understanding of schizophrenia seems like something of a stretch. "Performing" this "role" has little utility for the performer, little relationship to the sentiments or understandings of ordinary people, and appears to be rooted in a clearly deluded understanding of the surrounding world. Occam's razor would suggest that schizophrenics—from whatever cause—are in fact suffering from some distortion of understanding beyond their control.

Szasz's own words are perhaps the best indictment of his proposed "abolition" of mental health:

In English and American law, of course, a person accused of a crime is considered innocent until proven guilty. As humane and rational physicians and patients, we should assume a similar posture vis-à-vis illness: we should assume that a person who complains that he is ill, or about whom others complain that he is ill, is healthy until it is proven---if not beyond a shadow of a doubt, at least to a degree of reasonable likelihood---that he is ill.¹²²

Perhaps he means that just as courts pretend to trust the accused but in fact seek convictions at all costs, so too would an ostensible hostility toward patients result in greater kindness and deference—but somehow I doubt this. Rather, in the name of his particular vision of freedom—and his hatred for the psychiatric establishment—Szasz was prepared to propose that physicians approach their patients with anti-Hippocratic skepticism and hostility. Moreover, by his own reasoning, Alzheimer's would today be recognized as a valid illness thanks to modern neuroscience, but would previously have been good grounds for "doctors" to level accusations of performative forgetfulness against the elderly.

In contrast to the very activist orientation of Szasz, Foucault's work can be better understood as critique, rather than criticism, with normative implications but no clear prescriptions. It also approaches the problem from a historical and social perspective, a macro-view, rather than from the extreme individualist angle adopted by Szasz. *Madness and Civilization* is an (abridged¹²³) genealogical history of the concept of madness in the West, and the "mad" individual's various manifestations through time, performing roles as diverse as bearer of enchantment, grotesque aberration to be displayed, sinner, and threat in need of confinement. The modern concept of mental health, he argues, developed during the Enlightenment, but owed its

¹¹⁹ R.E. Kendell, *The Myth of Mental Illness*, in SZASZ AND HIS CRITICS: THE PSYCHIATRIC ABOLITIONIST FACES HIS CRITICS 32-33 (Jeffrey A. Schaler, ed., 2004), available at <https://books.google.com.au/books?id=Ts6cxoiO-o4C&lpg=PP1&pg=PA29&hl=en#v=onepage&q&f=false> (accessed on March 27, 2016).

¹²⁰ Scientists had no knowledge of what viruses were until the late nineteenth century. See H. Lecoq, *Discovery of the First Virus, the Tobacco Mosaic Virus: 1892 or 1898?*, 324 *COMPTES RENDUS DE L'ACADÉMIE DES SCIENCES III* 929-33 (2001), abstract available at <http://www.ncbi.nlm.nih.gov/pubmed/11570281>.

¹²¹ Shorter, *supra* note 19 at 183-84.

¹²² Szasz, *supra* note 112 at 83. For the opposite view, see Larson, *supra* note 18 at 1258 (arguing that a "heavy burden should be upon the party that alleges malingering").

¹²³ Foucault, *supra* note 112.

character less to reason and more to historical repressive structures, concepts, and practices, from the quarantining of lepers to the Christian dread of the damned. The practice of “treating” this mental illness is rooted in discipline, confinement, and control, rather than a disinterested pursuit of scientific truth or the Hippocratic ideal of promoting well-being. Although not a Szaszian anti-psychiatry polemic, *Madness and Civilization* does contain passages that suggest such conclusions, stating, for instance, that “it is in the realm of the fantastic and not within the rigor of medical thought that unreason joins illness and draws closer to it.”¹²⁴

Foucault’s charting of the concept of madness as it evolved in conjunction with new forms of repression and isolation of outsiders should keep us cognizant of potential ways mental health can be used to effect repression.¹²⁵ However, it does not follow that abandoning mental health is a solution. For one, Foucauldian analysis of a Szaszian “free will”-based paradigm could expose equal or more horrific modes of social control as any mode originating in the dichotomy of reason vs. madness. Whatever the provenance of Foucault’s “draw[ing] close” of unreason and illness, there is good sense in analogizing the two categories in at least some contexts: some forms of unreason are in fact understood as physical defects and treated with some success as a result.¹²⁶ Even if we are deploying the concepts of past eras—or perhaps more accurately, they are deploying us—that does not mean, and Foucault did not argue, that we can discard these concepts at will. A simple denial of the notion of mental illness would not resolve the predicament. Moreover, discussion of performative factors or structural origins should not obscure the evidence of human suffering, and the need for remedies.

F. *The Ambiguity of Mental Health Boundaries*

If extreme attacks on mental health as such are illuminating intellectual exercises with conclusions that cannot be taken seriously, the boundaries of mental health are nevertheless ambiguous. When does unhappiness spill over into clinical depression? What is obsessive-compulsive disorder if most people display its symptoms to some degree or another? How can a disorder be a qualitatively different phenomenon from a normal state when the diagnosis rests on a mere checklist of clinical signs? And perhaps most difficult, if we concede that there is a difference between, say, depression and unhappiness, where do we draw the line?

¹²⁴ Foucault, *supra* note 112 at 205. Another noteworthy passage notes madness’s becoming “entirely enclosed in pathology,” which he calls: “A transformation which later periods have received as a positive acquisition, the accession, if not of a truth, at least of what would make the recognition of truth possible; but which in the eyes of history must appear as what it was: that is, the reduction of the classical experience of unreason to a strictly moral perception of madness, which would secretly serve as a nucleus for all the concepts that the nineteenth century would subsequently vindicate as scientific, positive, and moral.” *Id.* at 197.

¹²⁵ An example that comes to mind (and which would certainly please Szasz) is the occasional tendency of criminal defense lawyers in high-stakes, usually high-profile cases, to defy their clients wishes and seek to plea insanity. Two illustrative examples would be Valerie Solanas and Theodore Kaczynski, neither of whom comes across as less capable than a normal person of understanding the act of murder or attempted murder, but both of whom clearly held ideas the bulk of society find offensive. Their ideas, while perhaps disagreeable to the mainstream, were not incoherent—indeed, if anything, Solanas’s ideology is much *more* coherent than that of the average person. VALERIE SOLANAS, *THE SCUM MANIFESTO* (1997); Breane Fahs, *The Radical Possibilities of Valerie Solanas*, 34 FEMINIST STUDIES 601 (2008), available at http://www.breanefahs.com/uploads/1/0/6/7/10679051/2008_feminist_studies_fahs.pdf; William Booth, *Kaczynski Resists the Insanity Defense*, WASHINGTON POST, Dec. 26, 1997, at A01, available at <http://www.washingtonpost.com/wp-srv/local/longterm/aron/kaczynski122697.htm>

¹²⁶ Shorter, *supra* note 19.

The difficulty of drawing lines presents the first good argument for treating mental injuries differently from physical injuries. If judges and legislators cannot justify the double standard by appealing to employers' profits, or to workplace control, or to widespread fraud, or to some criterion that debunks psychiatry and psychology as a whole, they can nevertheless point to the thinness of the line between normal and abnormal in the realm of mental health. The question of the appropriate threshold for diagnosing mental disorder is therefore at the core of the question of work stress injuries.

Within the field of mental health, many experts have raised alarms about "diagnostic inflation," the expansion in the number of diagnoses, their prevalence, and the use of medication in treating them. There are a plethora of books on the subject,¹²⁷ including one notable attack on the Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) by Allen Frances, the former Chair of the Task Force that created its predecessor, DSM-IV.¹²⁸ If Szasz gained media notoriety in part by using official psychiatric credentials to attack psychiatry, Frances has an unimpeachable case to be making his case "from within the temple," and concedes more than enough to the established elements of psychiatry to make his criticism credible to an insider community.

Frances' criticism of current trends in diagnostic inflation is modest; he is very adamant in defending psychiatry as a discipline from its detractors, Szaszian, Foucauldian, or otherwise.¹²⁹ Nevertheless, he argues that the field has lost its way, and that under the sway of pharmaceutical industry power and unrealistic U.S. expectations of a blemish-free existence psychiatrists have started "diagnosing" and medicating abnormalities or personality features that should not be seen as pathological.¹³⁰ DSM-V, the latest edition of the authoritative guide for psychiatrists and psychologists, incorporates these unrealistic expectations into a guide that ensures diagnosable problems for virtually any human being who is not contented from day to day. Since, as noted above, mental health treatment generally relies on clinical signs rather than observation of underlying causes, the complaints themselves reliably give rise to the diagnosis. Accordingly, the risk of over-diagnosis is much greater than it would be with disorders that cause testable symptoms like fevers.

Though Frances does not precisely endorse this theory of the difference between mental and physical illness, I want to make the case that at least for present purposes the distinction can best be understood from the opposite direction: from the two categories' respective notions of *healthy*. Physical health is unambiguous in both its positive and negative forms. On the side of health, it is fair to say that a healthy liver functions *as a liver should*; a healthy elbow bends and does not ache. Similarly, physical illness is relatively clear, and recognizable to most people in both its mild and extreme variants, from the common cold to terminal brain cancer. By contrast, mental illness may manifest clearly in its extreme negative form—a person with a Global Assessment of Functioning score of around 13 is likely to engage in acts like smearing feces, which

¹²⁷ To cite just a few examples, see ROBERT WHITAKER, *ANATOMY OF AN EPIDEMIC: MAGIC BULLETS, PSYCHIATRIC DRUGS, AND THE ASTONISHING RISE OF MENTAL ILLNESS IN AMERICA* (2011); IRVING KIRSCH, *THE EMPEROR'S NEW DRUGS: EXPLODING THE ANTIDEPRESSANT MYTH* (2011); GARY GREENBERG, *THE BOOK OF WOE: THE DSM AND THE UNMAKING OF PSYCHIATRY* (2014).

¹²⁸ ALLEN FRANCES, *SAVING NORMAL* (2013).

¹²⁹ *Id.* at 18-22 *passim*.

¹³⁰ *Id.*

is unambiguously bad from many angles¹³¹—but there simply *is* no ideal model on the positive end of the spectrum: even the most well-adjusted person experiences disquiet, awkwardness, anxiety, sorrow, and fear. How to cope with these things is culturally specific (and the Western example *par excellence* of poor adjustment, suicide, is considered commendable or even obligatory in some circumstances in some cultures¹³²). If there is a correct answer to the question, *How much elbow pain should a physically healthy person feel when lifting a notebook?*—namely, *none*—there is no right answer to, *How much anxiety should a mentally healthy person feel at a business social gathering?*—and one can even argue that one who feels no anxiety in this situation is *not* normal.

Frances titled his polemic *Reclaiming Normal* to address what he views as a form of over-ambition in the psychiatric community, one that might be said to seek a mind as free of pain as a healthy elbow, and which accordingly pathologizes “normal” human failings, like overuse of smart phones, or overeating, or impatience.¹³³ While Frances believes that attempts to rid society of these ills will fail, it is closer to his central point that he does not think purging these ills is even a desirable goal, as it will lead to other complications, and will create vulnerable and maladapted individuals who lean too heavily on psychiatric care. The name of his book underscores that the index for his vision of health lies in the lay concept of “normalcy,” and accordingly is largely *ad hoc* and without clear lines. Most importantly, mental health is *normative* in a way that physical health is not. The point is not merely that attempts at perfect mental health are doomed to fail, though that may be true, but that there is something wrong with even setting such purity as a goal.

While it may be true that people in the U.S. overmedicate because they expect to be bathed in bliss like the beach-walking couples they see in pharmaceutical commercials, Frances’ analysis gives relatively short shrift to the notion that the spike in diagnoses has any relationship to any changes in happiness or misery. He writes:

One theory says that rates of mental illness are rising because we live under extreme pressures from a speeded-up, stressful society. Perhaps it is hard to be normal because our modern world is driving us crazy. This suggestion is difficult to disprove, but I find it completely unconvincing. Among the hundreds of thousands of generations of our ancestors who have ever walked this earth, we are undoubtedly the luckiest—extraordinarily privileged to live now and to live here [in the “developed world”-BED]. Previous generations (as well as people currently living in less favored parts of our crowded globe) suffer daily catastrophes that are unimaginable to most of us. Life has always been, and will always be, enormously stressful in one or another way. Indeed, our mental discomforts can preoccupy us as much as they do only because most of us don’t have to worry about our next meal or the threat of being eaten by a passing tiger.¹³⁴

When we move away from cavemen and medieval peasants, however, and look to the recent past in the United States, we see that there are a number of indicators our current society might produce more misery than the society of our recent past. More people are killing themselves

¹³¹THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS [hereinafter DSM-IV] 34 (Am. Psychiatric Ass’n 2000).

¹³² See, e.g., Toyomasa Fusé, *Suicide and Culture in Japan: A Study of Seppuku as an Institutionalized Form of Suicide*, 15 SOCIAL PSYCHIATRY 57-63 (1980).

¹³³ Frances, *supra* note 128 *passim*, especially at 182-86.

¹³⁴ *Id.* at 81.

than used to, which is a warning sign.¹³⁵ In addition, there are reasons for people to be less happy than previous generations, many of them intimately related to the workplace. Money makes people happier¹³⁶ and ordinary workers in the U.S. have less of it than they did a generation ago, particularly in relation to the cost of certain basic needs like shelter.¹³⁷ In addition, people are more likely to face consequences of an economically precarious life in other ways. They are more likely to lose their homes.¹³⁸ “Sharing economy” services like Airbnb and Uber commercialize spaces like cars and homes that for many were previously private refuges from commercial values.¹³⁹

In addition, people enjoy the feeling of being useful, and the portion of our economic output that relates to the production of unambiguously useful things has decreased considerably: while about 41% of the U.S. workforce was involved in farming in 1900, by 2000 this was below 2%;¹⁴⁰ other forms of labor, like manufacturing, have also declined considerably.¹⁴¹ This wisdom about the mentally edifying value of being valuable was a commonplace in past ages—as illustrated by jailers punished even supposedly anti-social criminals by forcing them to do useless tasks, like breaking rocks. The view expressed by Frances ignores, however, that the shift from production of needs to production of advertisements, images, and services is bound to take a mental toll.¹⁴²

¹³⁵ CENTERS FOR DISEASE CONTROL AND PREVENTION, SUICIDE AMONG ADULTS AGED 35-64 YEARS, UNITED STATES, 1999-2010 (2013), available at

http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6217a1.htm?s_cid=mm6217a1_w

¹³⁶ Betsy Stevenson and Justin Wolfers, *Subjective Well-Being and Income: Is There Any Evidence of Satiation?* Brookings Institute Working Paper, April 16, 2013, available at <http://www.brookings.edu/~media/research/files/papers/2013/04/subjective%20well%20being%20income/subjective%20well%20being%20income.pdf> (accessed on March 27, 2016).

¹³⁷ Elina Bravve, et al., *Out of Reach*, National Low Income Housing Coalition Report, 2012, available at <http://nlihc.org/or/2012> (accessed on March 27, 2016).

¹³⁸ Garriga, Carlos and Don Schlagenhauf, *Home Equity, Foreclosures, and Bailouts*, Oct. 24, 2008, available at <https://economics.missouri.edu/seminars/files/2008/121108.pdf> (accessed on March 27, 2016).

¹³⁹ Tom Slee, *Sharing and Caring*, JACOBIN, available at <https://www.jacobinmag.com/2014/01/sharing-and-caring/> (accessed on March 27, 2016); Michelle Chen, *This is How Bad the Sharing Economy is for Workers*, THE NATION, September 14, 2015, available at <http://www.thenation.com/article/this-is-how-bad-the-sharing-economy-is-for-workers/> (accessed on March 27, 2016).

¹⁴⁰ United States Department of Agriculture Economic Research Service, *The 20th Century Transformation of U.S. Agriculture and Farm Policy* 5 (2005), available at http://www.ers.usda.gov/media/259572/eib3_1.pdf (accessed on March 27, 2016).

¹⁴¹ Wyatt, Ian D. and Daniel E. Hecker, *Occupational Changes During the 20th Century*, Bureau of Labor Statistics Monthly Labor Review, March 2006, available at <http://www.bls.gov/mlr/2006/03/art3full.pdf> (accessed on March 27, 2016).

¹⁴² David Graeber memorably described these positions as “bullshit jobs.” David Graeber, *On the Phenomenon of Bullshit Jobs*, STRIKE!, August 17, 2013, available at <http://strikemag.org/bullshit-jobs/> http://www.salon.com/2014/06/01/help_us_thomas_piketty_the_1s_sick_and_twisted_new_scheme/?source=newsletter (accessed on March 27, 2016); Thomas Frank & David Graeber, *Spotlight on the Financial Sector Did Make Apparent Just How Bizarrely Skewed Our Economy is in Terms of Who Gets Rewarded*, SALON, June 1, 2014, available at http://www.salon.com/2014/06/01/help_us_thomas_piketty_the_1s_sick_and_twisted_new_scheme/?source=newsletter (accessed on March 27, 2016). Graeber emphasizes that his category is referring to workers’ self-perceptions about what they do; he is not defining anyone’s sense of purpose or purposelessness for them. For further analysis of the psychological impact of this transition from functional to performative economies, see SUSAN FALUDI, STIFFED: THE BETRAYAL OF THE AMERICAN MAN (2000); CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM (1979).

This is particularly true when workers are made to feel pressure to produce with an urgency that belies this apparent purposelessness.

Modern misery has many causes. Although the pharmaceutical industry and its impact on medicine are huge factors in the increasing diagnosis of psychiatric disorders, we cannot ignore the evidence that there is more going on, and that much of it has to do with people's work environments. Given this reality, defining the boundary between health and disorder is a question of pressing political significance.

V. CONTENTMENT AND THE WORKPLACE

The above analysis leads us to at least one solid challenge when analogizing between mental and physical injuries in the workers' compensation setting: the boundaries of mental illness are more *fluid* and more *normative* than those of physical health, and accordingly, we cannot neutrally adapt the standards developed primarily in one field and simply apply them to the other. However, this point of disconnect between mental and physical health does not itself indicate whether we should treat mental injuries with *more* or *less* skepticism. Rather, the point clarifies that our treatment of mental health requires a deliberation on our standard of normalcy, and by implication, a judgment about the society in which we would like to live. Defining a healthy mind is more complex than defining a healthy body. Moreover, defining a healthy mind is a *political* question: that is, a question about social values, allocation of resources, what we deem desirable, what we deem acceptable, and whether the standards of desirability and acceptability are applied across society or only to select groups.

The above discussion of the conflicting workers' compensation systems argued, in a sense, in favor of something like the D.C. private sector system's approach, which views mental injuries as analogous to physical injuries, and applies the same standards to both kinds of ailments.¹⁴³ However, no system, including D.C.'s, has tackled this crucial question of defining the boundaries of mental health. In part, I want to argue that this vagueness stems from the absence of litigation to flesh out the principles at work, particularly in the relatively liberal jurisdiction of D.C. The relative paucity of case law (and its vagueness on defining mental health) may arise from any of a number of causes: judicial economy, judicial aversion to meddling in specialized fields, the inability of workers to cope with denied claims, intrusive and stressful litigation, and periods of time off work without pay, the aversion of busy claimants' lawyers to dealing with psychologically distressed and needy clients, mental health professionals' fear of taking on denied claims that take lengthy periods of time to make any money.¹⁴⁴ Lawyers, judges, and mental health professionals can all take the lead in remedying this problem. At any rate, regardless of the source of the fleshing out, what this section argues for is that law's direction lies in a new relationship to the practice and

Perhaps the best description of the absurdity of the modern Western workplace comes from Hannah Horvath, the protagonist of the television series *Girls*, who characterizes her advertising job as working in "a sweatshop factory for puns." See *Girls: I Saw You* (HBO television broadcast Mar. 16, 2014).

¹⁴³ See, *supra* Part III.B., *Ramey v D.C. Dept. of Empl. Serv.*, 950 A.2d 33 (D.C. 2008), *Ramey v D.C. Dept. of Empl. Serv.*, 997 A.2d 694 (D.C. 2010), *McCamey v. D.C. Dept. of Empl. Serv.*, 947 A.2d 1191 (D.C. 2008).

¹⁴⁴ Anecdotally, the author has all of these factors to play roles in discouraging mental health injury claims, both in Washington, D.C. and California. Further research is certainly warranted, even if it is more ethnographic than statistically sound. Statutes could clarify the question at hand, but given the particularity of its contours and the utility of specific examples, case law is better suited for the task.

theory of mental health. Much of this direction can come from currently extant examples of wellbeing-oriented psychological research, and its application to the workplace.

In the past couple of decades, some psychologists have developed a sub-school of mental health that focuses on attaining the positive goal of well-being, rather than merely treating psychopathology.¹⁴⁵ Called, appropriately enough, “positive psychology,” this sub-school has produced a number of best-selling works.¹⁴⁶ Most intriguing for the present essay is that some employers have sought to implement the findings of positive psychological research to improve their employees’ well-being (and, presumably, to enhance their employees’ impression of their employer). The most famous example is Google, the supposed exemplar of the new technological, advanced economy.

The New York Times writes that employees at Google’s East Coast headquarters in lower Manhattan have a veritable play place of a work area, with vintage street-car-designed areas in which to converse, free snacks, bright colors, free yoga classes, author talks, and back massages (and depending on the source, either reasonable hours or insufferably long hours made sufferable through these various “perks”).¹⁴⁷ *Slate* magazine gushes in a similar vein, characterizing Google’s employee perks as both “swank” and “legendary in the corporate world,” and argues that its model may revolutionize other workplaces in the future.¹⁴⁸

There is something of corporate brainwashing about this happiness campaign: learning the mindfulness secret to being happy while working eighty-hour weeks seems needlessly complicated in comparison to simply reducing workers’ hours.¹⁴⁹ And there is no question that fawning articles like the above help market Google as an entity that, per its slogan, “does no evil,” and loves its workers (some collusion with rivals to suppress salaries notwithstanding¹⁵⁰). *The New York Times*’ “article” on this subject reads almost like sponsored content. Nevertheless, it would be remiss to dismiss the entire operation as a sham: there is real research behind the happiness benefits of many of the measures offered, from sunshine to healthy foods, and the fact that back massages function as an industry is proof enough that they are widely deemed desirable (if proof were necessary). Moreover, Google’s “perks” include benefits, like maternity leave, which have been major demands of workers’ movements for ages. The happy workplace may be brainwashing, but it is not *just* brainwashing; Google is indeed a better place to work than many in this country.

¹⁴⁵ Freud once defined success in a test case as “turning [the patient’s] hysterical misery into common unhappiness.” SIGMUND FREUD, *STUDIES IN HYSTERIA* 342 (Nicola Luckhurst, trans., 2004).

¹⁴⁶ For basic background, see the Positive Psychology Center at the University of Pennsylvania, available at <http://www.positivepsychology.org/>.

¹⁴⁷ James B. Stewart, *Looking for a Lesson in Google’s Perks: At Google, a Place to Work and Play*, N.Y. TIMES, March 15, 2013 available at http://www.nytimes.com/2013/03/16/business/at-google-a-place-to-work-and-play.html?_r=0.

¹⁴⁸ Manjoo, *supra* note 6. See also, IANS, *How Google Keeps Its Employees Happy and Productive*, TIMES OF INDIA, March 24, 2014, available at <http://timesofindia.indiatimes.com/tech/jobs/How-Google-keeps-its-employees-happy-and-productive/articleshow/32590952.cms>.

¹⁴⁹ See, e.g., Kelly, *supra* note 6. This is another fawning piece about Google’s practices but describes the goal as maintaining internal sanity for Google’s employees, rather than making their environment more conducive to mental wellbeing.

¹⁵⁰ David Streitfeld, *Engineers Allege Hiring Collusion in Silicon Valley*, N. Y. TIMES, Feb. 28, 2014, available at <http://www.nytimes.com/2014/03/01/technology/engineers-allege-hiring-collusion-in-silicon-valley.html>

The principal problem in the media buzz over Google is not the glorification of one company, but rather the media's total indifference to workers outside of the chic white collar world of "tech." The media has next to nothing to say about how McDonald's workers might benefit from Google's lessons. Yet if one workplace has given us important clues to greater worker contentment, it seems natural to ask how we can use these clues for the rest of the work force.

The *NYT* and *Slate* articles do leave at least an implication that Google's lessons are likely to be implemented in other workplaces because they increase productivity and hence inure to the owners' benefit. One could argue that it follows that other employers would find these measures to be desirable. This assumption conveniently suggests that worker happiness does not challenge employer control, and will be voluntarily adopted. It also reflects liberal economic dogma about the "invisible hand" and ignores other reasons why employers might not pursue policies, even productivity-enhancing policies, which empower workers. (Indeed, Google's tech cousin Amazon appears to be less than solicitous about its workers' well-being.¹⁵¹) This argument also assumes that all workers are in an analogous situation with regard to these productivity gains—which is doubtful. White collar work (or some forms of it, anyway¹⁵²) may benefit from workers who feel free and energized in ways that assembling burritos or putting boxes of cereal on shelves may not. Even if the purchasers of labor were prudent and open to pro-worker measures that enhance productivity, they still may not get much benefit from employee happiness. This is particularly true for low-paid workers, for whom the costs of happiness promotion will surely be a higher proportion of their overall value to the company.

The more likely reason the chattering classes focus less on the lower rungs of the workforce is a belief that they deserve less: a friendly workplace is a luxury, a great thing to have but by no means necessary. This distinction can be rationalized as consistent with progressive values by saying that all workers deserve a *tolerable* environment, but that a *pleasant* environment is a privilege and not a right. However, "tolerable" is a normative term—people can *survive* even absolute horrors like torture and rape, and in that sense they *can* tolerate these things, but we do not on that account call them "tolerable." Mental health attempts to make a more scientific standard—"mere stress" is tolerable, but stress to the point that it causes general anxiety disorder is not—but as we saw before, that threshold is itself a normative one, rather than one fixed by scientific necessity.

Workers' compensation stress claims offer one path forward. This is particularly true in a jurisdiction like D.C. private sector workers' compensation, which has the ingredients for taking mental wellbeing seriously, should those within the system choose to reframe their focus on achieving mentally healthy workplaces, rather than merely preventing intolerable conditions. Workers who lack the Googlean perks¹⁵³ praised by positive psychology are not *okay* simply

¹⁵¹ Jody Kantor & David Streitfeld, *Inside Amazon: Wrestling Big Ideas in a Bruising Workplace*, N. Y. TIMES, available at http://www.nytimes.com/2015/08/16/technology/inside-amazon-wrestling-big-ideas-in-a-bruising-workplace.html?_r=0 (accessed on October 11, 2015).

¹⁵² Many of Graeber's "bullshit jobs" are quite white collar. David Graeber, *On the Phenomenon of Bullshit Jobs*, STRIKE!, August 17, 2013, available at <http://strikemag.org/bullshit-jobs/> (accessed on March 27, 2016); Thomas Frank and David Graeber, *Spotlight on the Financial Sector Did Make Apparent Just How Bizarrely Skewed Our Economy is in Terms of Who Gets Rewarded*, SALON, June 1, 2014, available at http://www.salon.com/2014/06/01/help_us_thomas_piketty_the_1s_sick_and_twisted_new_scheme/?source=newsletter (accessed on March 27, 2016).

¹⁵³ I say Googlean, because I have no desire to present Google as such as a success model. The point is that what is good for well-paid software engineers is likely good for the rest of society.

because they manage to make it through each day without breaking down. Indeed, it is many of these people, whose jobs seem purposeless or who feel the demands on them are incommensurate with the significance of their actions, who are already turning to mental health professionals for treatment of their problems—albeit in a manner that assumes that *they* are the problem, rather than their circumstances, which uses chemical modification instead of situation transformation, and which puts the costs on the state or private insurance, rather than on their employer.

The example of maternity¹⁵⁴ leave illustrates the point. It is taken for granted in other developed countries¹⁵⁵ that this is a right, but it is not so in the U.S.; indeed, it is one of the “perks” of working at Google. A sane society might look at this “perk” and its near-universal acceptance around the world and conclude that it should be defined as a basic social necessity, rather than a luxury. Absent such a general application of principles, the misery caused by its absence will likely lead to diagnosable malfunctioning and discontent.

Encouraging workers’ compensation stress claims puts the cost of workplace misery precisely where it belongs. The arguments against mental injuries that were rejected above ignore this basic point, and seem to take workplace misery as a given, albeit one to be borne by workers and by the rest of society. Indeed, one of the justifications, fear of the proliferation of claims, can be read almost confessionally: it is, indeed, a *real* possibility that a fair application of compensation principles to mental injuries will lead to more claims and higher costs. If the goal is, as one California court put it, to “reduce the costs of workers’ compensation coverage,”¹⁵⁶ then restricting access to benefits is a perfectly sensible way of achieving that end. But to those who strive for at least a pretense of fairness, such “arguments” will not do. If the workplace is causing people to suffer depression or diagnosable anxiety, the solution is not to deprive workers of recourse but to make the workplace less miserable—just as one would hopefully tell an owner of a dangerous factory complaining of high costs for workers’ compensation physical injuries to consider making the place safer. Google offers some clue as to measures that can help toward this end, if its champions cared to consider most of society worthy of such beneficial measures. Decent pay¹⁵⁷ and benefits—already the obvious rallying cries at most workers’ protests—would also go a long way toward making workplaces less prone to causing mental disorder.

Workers’ compensation stress claims are only one piece of the puzzle, of course. Just as OSHA regulations are needed to achieve a safe physical environment, in concert with workers’ compensation claims, it follows that if we are to take mental health seriously, OSHA should consider mental safety as well as physical safety, and should study the ways the two are intertwined.¹⁵⁸ In addition, struggles for better workplaces—for better hours, for better pay, against

¹⁵⁴ Unfortunately, at present in the U.S. paternal leave is not even being discussed, so this essay will work within this sexist framework of assuming that maternity leave is the sole parental leave goal.

¹⁵⁵ Actually, the U.S. is a rare country (one of only two in the world, according to the ILO) without official maternity leave, but this is misleading, as many poor countries do not have widespread implementation of labor benefits. See, e.g., Int’l Labor Org’n [ILO], MATERNITY AND PATERNITY AT WORK, at 16, 21 (2014), available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_242615.pdf

¹⁵⁶ 80 Cal. App. 4th at 272-73.

¹⁵⁷ Patricia Cohen, *One Company’s New Minimum Wage: \$70,000*, N.Y. TIMES., April 13, 2015, available at <http://www.nytimes.com/2015/04/14/business/owner-of-gravity-payments-a-credit-card-processor-is-setting-a-new-minimum-wage-70000-a-year.html>.

¹⁵⁸ See, e.g., Tosh Anderson, *Overwork Robs Workers’ Health: Interpreting OSHA’s General Duty Clause to Prohibit Long Work Hours*, 7 N.Y. CITY L. REV. 85 (2004).

workplace racism and sexism—will go on independent of workplace stress claims; if they succeed, they will alleviate the employer liability of a miserable workforce the old-fashioned way: by making the workforce less miserable. All of these are areas ripe for further study, and further struggle.

VI. CONCLUSION

Workers' compensation is a grand bargain between labor and management: employers have limited exposure for work-related medical problems if they cover certain wage loss and medical expenses without concern for fault, while workers have some protection from the vagaries of harmful events that are certain to befall at least some of them. This contract is under attack from management's side on many fronts, but one of the clearest is the attack on mental health stress claims. There is no scientific justification for this assault: whatever the failings of mental health, it has actually improved in this time period, and lay judges and legislators are not in much of a position to discount these medical disciplines. Indeed, the arguments for disregarding the normal principles of workers' compensation in the case of mental injuries fall flat. The reality is that the double standard is a political attack, designed not to fight fraudulent claims but to preserve the right of employers to run their workplace without concern for the misery it causes. Mental health is distinct from physical health principally in the ways its positive angle is defined *normatively*; the most plausible way to fight against mental health claims while remaining faithful to the core principles of workers' compensation is to argue that the threshold for diagnosable ailment ought to be high, and that people ought to suffer a good deal before they get any help. A turn to mental health from the standpoint of wellbeing—as defined by what the privileged classes themselves seek in a workplace—shows that respect for workers and their need for mental wellbeing should lead to more deference to compensation claims for work-related stress, not for the sake of pills but for the sake of improved conditions: diagnostic inflation for the people. And if the present system cannot accommodate this demand, that is a charge against our economy, and not against the pursuit of happiness.