

Bridging the Physical – Mental Gap: An Empirical Look at the Impact of Mental Illness Stigma on ADA Outcomes

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INTRODUCTION

On July 26, 1990, President George H. W. Bush signed the Americans with Disabilities Act¹ (“ADA”) into law, offering expansive protection from discrimination for the first time to an estimated forty-three million Americans with disabilities.² Members of a variety of disability-rights organizations were present at the ceremony, representing the collective victory achieved for all people with disabilities.³ Many have credited the group consciousness in evidence that morning as a primary motivating factor in securing passage of the ADA.⁴ From the time of the bill’s conception, disability-rights advocates urged people with disabilities to look beyond their divergent medical conditions toward the collective stigmatization that all group members experience.⁵ They clearly communicated that in the drive to secure legislation,

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1. The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-213 (2000).

2. 42 U.S.C. § 12101(a)(1) (finding that “some 43,000,000 Americans have one or more physical or mental disabilities”).

3. NATIONAL COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: MAKING OF THE AMERICANS WITH DISABILITIES ACT 178 (1997) [hereinafter EQUALITY OF OPPORTUNITY] (noting that approximately 3,000 people with and without disabilities were at the White House ceremony). In his remarks at the ADA’s signing, President Bush thanked the “dedicated organizations for people with disabilities who gave their time and their strength and, perhaps most of all, everyone out there across the breadth of this nation, the 43 million Americans with disabilities. You have made this happen. All of you have made this happen.” *Id.* at 231.

4. *See, e.g., id.* at 183 (“First and foremost, the ADA is a tribute to the growth and organization of the disability rights movement [which] . . . asserted itself and became a political force to be reckoned with”); *cf.* Jean Campbell, *Unintended Consequences in Public Policy: Persons with Psychiatric Disabilities and the Americans with Disabilities Act*, 22 POL’Y STUD. J. 133, 138 (1994) (noting the “united resolve by the entire disability community to continue to sponsor comprehensive coverage of disability protections”).

5. EQUALITY OF OPPORTUNITY *supra* note 3, at 169-171 (“ADA advocates had made a commitment more than a year before that they would stand together: one for all and all for one.”).

“[n]o subgroup of people with any type of physical or mental disability, or perceived disability, no matter how politically impotent or how stigmatized, will be sacrificed.”⁶ Because these disparate constituencies successfully focused on a shared history and contemporaneous experience of external discrimination, they were able to effectively organize a collective body insistent on rights for the whole.

Nevertheless, the disparate nature of group members’ interests can be both problematic and unclear. People with disabilities diverge from each other in material ways that affect both their legal interests and access to political power.⁷ There is a hierarchy of position and social acceptance within the disabled community, and in virtually every meaningful way, individuals with psychiatric disorders⁸ fall at the bottom of the pecking order.⁹ The stigma that continues to adhere to mental illness impedes the recognition of people with disabilities as a collective social minority and encourages individuals with physical impairments to distance themselves from their mentally impaired brethren.¹⁰

6. *From ADA to Empowerment: The Report of the Task Force on the Rights and Empowerment of Americans with Disabilities* 14 (October 12, 1990), quoted in *EQUALITY OF OPPORTUNITY*, *supra* note 3, at 81. This unity was particularly evident during debates over the proposed Chapman Amendment to the ADA, which would have permitted restaurants to remove HIV positive food handlers from their positions. *EQUALITY OF OPPORTUNITY*, *supra* note 3, at 169-171.

7. See Campbell, *supra* note 4, at 134 (“[D]isabled persons are not a homogeneous group with common needs and equal social power . . .”).

8. The terms “psychiatric disorder” and “mental illness” are used synonymously throughout this Article. A broad range of mental and emotional conditions that affect behavior, mood, and cognition are intended by these general terms, including depression, anxiety disorders, and schizophrenia. A distinguishing characteristic of such disorders is that they are predominantly treated through the use of psychotropic medication. See Karin A. Guiduli, *Challenges for the Mentally Ill: The “Threat to Safety” Defense Standard and the Use of Psychotropic Medication under Title I of The Americans with Disabilities Act of 1990*, 144 U. PA. L. REV. 1149, 1151 n.9 (1996) (citing definitions in DEBORAH ZUCKERMAN ET AL., *THE ADA AND PEOPLE WITH MENTAL ILLNESS: A RESOURCE MANUAL FOR EMPLOYERS* 1 (1993)). Significantly, these terms for purposes of this Article do not include disorders arising from organic brain damage, mental retardation, or similar neurological conditions, which nevertheless would fall within the broader definition of mental impairment under the ADA. Although some studies have treated alcoholics and substance abusers as mentally ill, they generally are not included within the scope of this Article except where specifically identified.

9. Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J. L. & HEALTH 15, 20 (1994) (“Even within the disability community, persons with mental illness are often the poor stepchild, and remain the last hidden minority.”); Carol L. Owen, *To Tell or Not to Tell: Disclosure of a Psychiatric Condition in the Workplace* 42 (2004) (unpublished Ph.D. dissertation, Boston University School of Arts and Sciences) (on file with UMI Dissertation Services) (“[P]eople with psychiatric disabilities . . . [are] the most significantly stigmatized group among people with disabilities . . .”).

10. See, e.g., Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L.

Some scholars have argued that this prejudice is reflected in both the legislative history and subsequent application of the ADA.¹¹ Unlike other civil rights laws, each individual seeking protection under the ADA must first make a threshold showing of membership in the protected class.¹² The court will not consider the defendant's allegedly discriminatory actions unless and until the plaintiff first establishes that he or she is a qualified individual with a disability within the meaning of the Act.¹³ There is no question that all plaintiffs have experienced difficulty in making this showing as a result of several Supreme Court decisions narrowing the definition of "disability."¹⁴ Many scholars have argued that courts do not appreciate the social construction of disability and focus too much attention on medical diagnoses and functional limitations rather than the impact of societal attitudes and prejudices.¹⁵ Some scholars have gone further to theorize that individuals alleging mental impairments face even greater challenges than physically-impaired litigants in ADA cases, in large part due to the persistent stigma attached to group members by many Americans, including judges.¹⁶

REFORM 585, 601-02 (2003) (noting that people with mental disabilities "feel that they are discriminated against even within the disability community").

11. See, e.g., *id.* at 652 ("[T]he ADA is being used to continue the current second-class status of mental illness."); Campbell, *supra* note 4, at 134, 137 (arguing that "the subtext of the ADA legislation reveals stereotypes and discrimination" and noting that literature on accommodation focuses on physical, not psychiatric disabilities); Perlin, *supra* note 9, at 19-22 (questioning the ADA's impact on people with mental illness).

12. See, e.g., Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 441-42 (1991) (comparing the class-based structure of the ADA to other civil rights statutes).

13. 42 U.S.C. § 12112 (2000).

14. See, e.g., *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 200-02 (2002) (finding that an employee who was unable to perform repetitive manual tasks on the job was not disabled in part because she was able to perform household tasks); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (holding that courts must take into account all mitigating measures employed by plaintiffs in determining whether plaintiff is disabled within the meaning of the ADA); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999) (relying on *Sutton*). For a general discussion of how these cases have restricted the definition of disability under the statute, see Lisa Eichhorn, *The Chevron Two-Step and the Toyota Sidestep: Dancing Around the EEOC's "Disability" Regulations Under the ADA*, 39 WAKE FOREST L. REV. 177 (2004) and Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321 (2000).

15. See, e.g., Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1044-45 (2004) ("[T]he success of the disability community in infusing the socio-political model of disability into federal law has begun to be eroded by judicial decisions interpreting the ADA that appear to be grounded in – and espousing – the medical model of disability.").

16. See, e.g., Wendy F. Hensel, *Interacting With Others: A Major Life Activity Under The Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139, 1168-75 (concluding that judicial bias may play a role in the higher success rates experienced by litigants with physical impairments in establishing that interacting with others is a major life activity); Korn, *supra*

This Article represents one of the first attempts to ascertain empirically whether mentally-impaired litigants experiencing psychiatric disorders are disadvantaged vis-à-vis those with physical impairments in establishing membership in the protected class under the ADA. Part I provides the background for the study by identifying and discussing the historical stigma and stereotypes associated with mental illness and psychiatric impairments which continue to thrive today. Particular attention is paid to the potential impact such stigma may have in an employment context, and the challenges it creates for impaired employees in the workplace. Part II scrutinizes the legislative history of the ADA to determine whether evidence of such stigma was present during the legislative process, identifying the reluctance of several lawmakers to extend protection to people with psychiatric impairments. Part III reveals the results of an empirical study of all Title I district and circuit court decisions, available in LexisNexis or Westlaw, in three appellate circuits over two discrete two-year time periods, which directly address whether litigants have established class coverage under the ADA. The study compares the success rates of physically and mentally impaired litigants in an attempt to answer whether individuals with psychiatric disorders face systemic challenges that are not shared by physically-impaired litigants. Part IV proposes possible explanations for the surprisingly comparable success rates between the two tested groups, examining subtle sources of continuing stigma that may explain the unexpected results. Part V concludes with proposals for future research and action by advocates to ensure that people with mental illness are able to secure the full and equal protection from discrimination that is the promise of the ADA.

I. STIGMA AND STEREOTYPES: PERCEPTIONS OF INDIVIDUALS WITH MENTAL ILLNESS

It is no secret that individuals labeled mentally ill by society have been stigmatized and subjected to discriminatory treatment throughout history. Although individuals with physical impairments have also been the subject of disparaging public opinion, the animus directed at psychiatric impairments is

note 10, at 588-89, 642 (stating that people with mental disabilities are “in an even worse position” in establishing a protected disability than those with physical disabilities, “due, in large part, to the stereotypes surrounding mental illness”); Susan Stefan, “*You’d Have to be Crazy to Work Here*”: *Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 *LOY. L.A. L. REV.* 795, 805 (1998) (contending that “judicial assumptions about the nature of psychiatric disabilities and essential employment functions have resulted in the near-total failure of the ADA to protect individuals with psychiatric disabilities from employment discrimination”); Michelle Parikh, Note, *Burning the Candle at Both Ends, and There is Nothing Left for Proof: The Americans with Disabilities Act’s Disservice to Persons with Mental Illness*, 89 *CORNELL L. REV.* 721, 759 (2004) (“Courts show a great discomfort in dealing with these [mental illness] cases, and apparently intuit that mentally ill individuals should not recover for employment discrimination.”).

proportionately greater and more pervasive.¹⁷ Individuals with psychiatric disorders repeatedly experience restricted access to social interactions with others and to fundamental goods and services, like employment and housing.¹⁸ Society's growing acceptance of psychology and the law's current protection of at least some group members have not greatly altered this unpromising landscape.¹⁹ One study recently concluded that individuals today may be more likely to hold stigmatizing attitudes toward the mentally ill than their counterparts nearly five decades ago.²⁰ The unemployment rate of individuals with mental illness continues to be "three to five times higher than among those with no psychiatric disorder,"²¹ reportedly the "worst level of employment of any group of people with disabilities."²² Repeated studies have also shown that landlords are less likely to lease to this group, making it difficult to secure adequate housing.²³ Significantly, these effects exist

17. See Patrick W. Corrigan & David L. Penn, *Lessons from Social Psychology on Discrediting Psychiatric Stigma*, 54 AM. PSYCHOLOGIST 765, 766 (1999) ("[T]he general public seems to disapprove of persons with severe mental illness significantly more than of persons with physical disabilities like Alzheimer's disease, blindness, or paraplegia."); Korn, *supra* note 10, at 586-87 ("Whatever stigma attaches to a physical disability, however, most scholars agree that people with mental disabilities are more feared, more stigmatized, discriminated against more often, and are seen as more likely to commit acts of violence than are people with physical disabilities.").

18. See SUSAN STEFAN, UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 4-25 (2001) (detailing the pervasive effects of discrimination against people with psychiatric disabilities); Patrick W. Corrigan & Petra Kleinlein, *The Impact of Mental Illness Stigma*, in ON THE STIGMA OF MENTAL ILLNESS: PRACTICAL STRATEGIES FOR RESEARCH AND SOCIAL CHANGE 11, 18-20 (Patrick W. Corrigan ed., 2005) (detailing challenges faced by individuals labeled as mentally ill).

19. Jack K. Martin et al., *Of Fear and Loathing: The Role of 'Disturbing Behavior,' Labels, and Causal Attributions in Shaping Public Attitudes Toward People with Mental Illness*, 41 J. HEALTH & SOC. BEHAV. 208, 219 (2000) (noting that the results of the authors' study "do not support the contention that the consequences associated with mental health problems have dissipated.").

20. Jo C. Phelan et al., *Public Conceptions of Mental Illness in 1950 and 1996: What is Mental Illness and is it to be Feared?*, 41 J. HEALTH & SOC. BEHAV. 188, 197-98 (June 2000).

21. Corrigan & Kleinlein, *supra* note 18, at 18 (citing study by Roland Sturm et al., *Labor Force Participation by Persons with Mental Illness*, 50 PSYCHIATRIC SERVICES 1407 (1999)). The unemployment rate for people with severe mental illness is generally estimated at 85%. *Id.*; see also SUSAN STEFAN, HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES 12 (2002).

22. Patrick J. Kennedy, *Why We Must End Insurance Discrimination Against Mental Health Care*, 41 HARV. J. ON LEGIS. 363, 372 (2004) (quoting PRESIDENTS'S NEW FREEDOM COMM'N ON MENTAL HEALTH, INTERIM REPORT TO THE PRESIDENT 11, (Oct. 29, 2002)). The President appointed the Commission "to examine barriers to mental health care and to make recommendations for improvements." *Id.*

23. See Patrick W. Corrigan et al., *From Whence Comes Mental Illness Stigma?*, 49 INT'L

whether or not the individual labeled as mentally ill has exhibited psychiatric symptoms or engaged in stigmatizing behavior.²⁴

In the following subsections, this Article explores the most common negative stereotypes that society has attached to individuals with mental illness. This contextual history sheds light on the challenges faced by individuals seeking protection for psychiatric disorders under the ADA.

A. *Dangerousness and Unpredictability*

Perhaps no stereotype is more embedded in the American psyche than that of the dangerously unpredictable mental patient.²⁵ Concerns with dangerousness vary to some extent depending on the type of psychiatric disorder alleged.²⁶ Studies have demonstrated, however, that society's overall concern with the potential for violence is high regardless of the mental impairment in question,²⁷ and actually has increased over the last 40 years.²⁸ Such concerns are both mirrored in and fueled by news coverage of mental health matters, which is consistently dominated by discussions of violence and crime committed by the mentally ill.²⁹ The vast majority of entertainment productions featuring the mentally ill reflect these results. One study found that 72.1% of all characters in primetime television who were portrayed as

J. OF SOC. PSYCHIATRY 142, 144 (2003) (citing studies to this effect).

24. *Id.* (“[A] growing body of experiential and empirical data [exists] that impl[ies] people with mental illness will experience discrimination regardless of their behavior.”).

25. *Cf.* Bernice A. Pescosolido et al., *The Public's View of the Competence, Dangerousness, and Need for Legal Coercion of Persons with Mental Health Problems*, 89 AM. J. PUB. HEALTH 1339, 1339 (1999) (explaining that one of the three core assumptions underlying “[m]odern public health laws dealing with mental disorders is that mental disorders may place a person at increased risk of physically harming himself or herself or others”).

26. Martin et al., *supra* note 19, at 215. The study found that society is most afraid of individuals with substance abuse problems. *See id.*

27. Pescosolido, *supra* note 25, at 1341. The study asked a sample of individuals to consider a variety of vignettes involving individuals with mental health problems and answer questions about how likely it was that the individual would “do something violent toward others.” *Id.* The authors reported that “[a]lmost 17% of the sample indicated that even the ‘troubled person’ was either very or somewhat likely to do something violent toward others. That percentage rose to 33.3% for the depression vignette and to more than 60% for the schizophrenia vignette.” *Id.*; *see also* Martin et al., *supra* note 19, at 220 (concluding that data gathered in the authors’ study reflected “a continuing widespread concern that people with mental health problems are likely to be dangerous to others”).

28. Phelan, *supra* note 20, at 197-98.

29. *See* Otto F. Wahl, *News Media Portrayal of Mental Illness: Implications for Public Policy*, 46 AM. BEHAV. SCIENTIST 1594, 1595-96 (2003) (detailing the results of several media studies). This is true despite the fact that a relatively small percentage of crime is committed by the mentally ill. *See* Korn, *supra* note 10, at 586 (“[M]ore than 95% of violent acts in our society are committed by people who are *not* mentally ill.”).

mentally ill either hurt or killed others.³⁰ Children's programming is no exception, with one study finding that Walt Disney animated films often portray the mentally ill as "objects of . . . fear."³¹ This cultural vision persists despite several studies indicating that the association between mental disorders and the risk of violence is, at best, "weak" or "modest."³²

Perceptions of dangerousness lead many to fear those with psychiatric disorders, which in turn drives their desire to increase social distance from group members.³³ Such fears can be a significant impediment to those seeking to enter the workforce or to maintain employment once secured.³⁴ Almost 60% of people surveyed in a recent study expressed their unwillingness to work alongside someone who suffers from a substance abuse problem, schizophrenia, or depression.³⁵ Employers reflect the same uncertainties and are reluctant to employ any individual perceived as posing a threat to co-workers.³⁶ Aside from concerns about violence in the workplace, employers worry about the potential for open-ended liability if an incident does occur, and the charge that they negligently failed to stop what is perceived as "preventable and predictable" violence.³⁷ Even an individual's solid work history and impressive credentials are unlikely to outweigh these concerns for most employers.³⁸ Despite efforts by public interest campaigns and mental health advocates to combat perceptions of dangerousness, these images remain deeply entrenched, even among many mental health professionals.³⁹

30. Donald L. Diefenbach, *The Portrayal of Mental Illness on Prime-Time Television*, 25 J. COMMUNITY PSYCHOL. 289, 290 (1997), citing Nancy Signorielli, *The Stigma of Mental Illness on Television*, 33 J. BROADCASTING & ELECTRONIC MEDIA 325, 327-28 (1989).

31. See Andrea Lawson & Gregory Fouts, *Mental Illness in Disney Animated Films*, 49 CAN. J. PSYCHIATRY 310, 313 (2004).

32. See Ann Hubbard, *The ADA, the Workplace, and the Myth of the "Dangerous Mentally Ill"*, 34 U.C. DAVIS L. REV. 849, 852, 867-73 (2001) (discussing several studies on the relationship between violence and mental illness).

33. Phelan, *supra* note 20, at 202 (citing a study by Bruce G. Link et al., *The Social Rejection of Former Mental Patients: Understanding Why Labels Matter*, 92 AM. J. SOC. 1461 (1987)).

34. See Martin et al., *supra* note 19, at 216.

35. *Id.*

36. See Wahl, *supra* note 29, at 1596.

37. Korn, *supra* note 10, at 613-14.

38. See generally Wahl, *supra* note 29, at 1596.

39. See Corrigan & Penn, *supra* note 17, at 766 (describing studies finding that even "well-trained professionals from most mental health disciplines subscribe to stereotypes about mental illness").

B. Incompetence

Another pervasive negative stereotype associated with mental illness is that of the incompetent who engages in childlike behavior.⁴⁰ Others believe that they may justifiably make life decisions for individuals with psychiatric disorders without taking their wishes into consideration because group members are irresponsible and unable to care adequately for themselves.⁴¹ Although this model does not inspire the same need for social distance as the images of dangerousness discussed above, its paternalistic benevolence is equally demoralizing to group members who can never aspire to the role of equal or peer with others, let alone expect to be treated as a friend.⁴²

This imagery is understandably problematic in a workplace setting, where hiring and advancement depend upon an employer's confidence in the abilities of an employee. Such confidence may be radically undermined or eliminated altogether once an employee is labeled mentally ill, either through an official diagnosis or through the office grapevine.⁴³ One recent study supports this conclusion, finding that over 70% of employees believed that their employers treated them as "less competent" following the disclosure of a mental impairment in the workplace.⁴⁴ Far from protecting group members, such imagery is seriously detrimental to their ability to function adequately in society.

C. Defective Character

Throughout history, society has viewed mental illness as internally generated and the product of poor character.⁴⁵ This negative imagery does not extend to people with physical impairments, who are largely viewed as possessing involuntary and uncontrollable disorders.⁴⁶ This internal attribution of blame can be devastating because the level of stigma that society attaches

40. *See id.*; Pescosolido et al., *supra* note 25, at 1339 (concluding that regardless of the severity of the identified disorder, the public views individuals with a mental illness as less competent).

41. Corrigan and Penn, *supra* note 17, at 766.

42. *Id.* at 766-67.

43. *See* Bruce Link, *Mental Patient Status, Work, and Income: An Examination of the Effects of a Psychiatric Label*, 47 AM. SOC. REV. 202, 210 (1982) ("Other things equal, including psychiatric condition, the acquisition of the status of mental patient appears to have a negative impact on a person's chances of getting and keeping a job.").

44. Otto Wahl, *MEDIA MADNESS: PUBLIC IMAGES OF MENTAL ILLNESS* (Rutgers University Press 1995), *as reported in* Martin et al., *supra* note 19, at 210.

45. Historically, individuals with mental illness were viewed as being "demon-possessed" and without "sufficient moral backbone to hold off Lucifer." Patrick W. Corrigan & Alicia K. Matthews, *Stigma and Disclosure: Implications for Coming Out of the Closet*, 12 J. MENTAL HEALTH 235, 238 (2003).

46. *See* Corrigan & Penn, *supra* note 17, at 766.

to a group is directly linked to society's beliefs about the causes of the undesired behavior or traits associated with group members.⁴⁷ Society is most tolerant of negative characteristics caused by factors beyond an individual's control, such as genetics, educational disadvantage, or the environment.⁴⁸ On the other hand, characteristics perceived to be within the individual's control are equivalent to character flaws that intensify stigma and the desire for social distance.⁴⁹ Because the characteristic is controlled by the individual, society views the failure to conform to its standards as the product of unwillingness, rather than inability.⁵⁰ If the individual would only choose to try harder, all problems would disappear.⁵¹ Rather than viewing group members with pity, an emotion often associated with physical disabilities, society instead views them with anger and irritation.⁵² The desire to offer assistance in any respect is seriously diminished because the need only arises as a result of the individual's failure to help himself.⁵³

Some evidence suggests that more Americans today believe there are biological causes underlying mental illness, a view supported in part by the increasingly public disclosures of mental illness by prominent Americans and public awareness campaigns.⁵⁴ This perspective, however, is not universal.⁵⁵ As one poll reported, almost 50% "of Americans think that depression is caused by the weak character of the sufferer" rather than by any external factors.⁵⁶ Unless and until such perceptions change, individuals with psychiatric disorders will be deemed the cause of their own problems.

D. Malingerers

Perhaps the flip side to the image of the mentally ill as poor in character is that of the active deceiver, who in an employment context creates or exaggerates the effect of a mental disorder to secure favorable workplace accommodations or to avoid discipline. Mental impairments are neither easily

47. Martin et al., *supra* note 19, at 211, 218.

48. *Id.* at 218.

49. *Id.* Cf. Ladonna L. Rush, *Affective Reactions to Multiple Social Stigmas*, 138 J. SOC. PSYCHOL. 421, 427 (1998) (finding in a controlled study that participants' views of various stigmatized groups were influenced by the perceived controllability of their stigmatized characteristics).

50. Stefan, *supra* note 18, at 9-10.

51. *Id.* at 10.

52. *See id.* at 9; Corrigan & Penn, *supra* note 17, at 766.

53. Patrick W. Corrigan et al., *Challenging Two Mental Illness Stigmas: Personal Responsibility and Dangerousness*, 28 SCHIZOPHRENIA BULL. 293,293-94 (2002).

54. *See, e.g.*, Julie Solomon & Claudia Kalb, *Breaking the Silence*, NEWSWEEK, May 20, 1996, at 20 (discussing revelations by politicians, actors, and other high profile Americans about mental illness that either they or someone in their families have experienced).

55. Martin et al., *supra* note 19, at 216-17.

56. Stefan, *supra* note 18, at 9.

identified by the average person nor, in most cases, static and permanent. Society, however, “is most comfortable with disabilities that are permanent and chronic; either one is disabled or is not.”⁵⁷ This is reflected in the international symbol of disability – an individual in a wheelchair. The untrained layperson feels confident that he understands the nature of such limitations, which appear both real and obvious in his eyes. In contrast, because mental illness is largely diagnosed on the basis of patients’ subjective reports and doctors’ observations, society questions the legitimacy of such claims, especially when the individual stands to benefit.⁵⁸

Compounding the problem of intangibility is the reality that most people do not experience mental illness as a constant, but instead as episodes of crises alternating with long periods of productive functioning and achievement.⁵⁹ These periods of well-being are not viewed as evidence of progress, however, but as concrete proof that no disability existed in the first place. Employees seeking accommodation are viewed with heavy skepticism and may be regarded by employers as malingerers seeking to avoid work or the consequences of their own actions.⁶⁰ The widespread nature of this caricature is confirmed by its appearance both in the popular press⁶¹ and in works by law professors.⁶²

II. LEGISLATIVE HISTORY OF THE ADA

The pervasiveness of the stigma attached to mental illness is reflected in the legislative debates surrounding the passage of the ADA. Although much has been written about the ADA’s journey through Congress from concept to

57. *Id.* at 10.

58. *See* Korn, *supra* note 10, at 595.

59. Stefan, *supra* note 18, at 58.

60. Teresa L. Scheid, *Employment of Individuals with Mental Disabilities: Business Response to the ADA’s Challenge*, 17 BEHAV. SCI. L. 73, 75 (1999).

61. Wahl, *supra* note 29, at 1596. Wahl describes a newspaper cartoon that appeared shortly after the EEOC issued guidelines about the ADA’s application to people with mental disabilities as follows:

The cartoon showed a man with a briefcase labeled EEOC speaking to an employer. He is telling the employer, “No you may not ask a job applicant about a history of mental disabilities. That’s discrimination.” The prospective employee standing next to the EEOC representative is wearing a hockey mask and holding a raised axe.

Id.; *see also* Richard L. Leshner, *Disabilities Act is a Failed Experiment*, 51 HUMAN EVENTS 17-18 (1995) (noting that very few cases brought under the ADA “involve plaintiffs afflicted with legitimate *disabilities* as most of us understand [them],” and as a result, “it is clear the ADA has become yet another weapon in the hands of disgruntled employees with personal axes to grind and little inclination to accept personal responsibility for their own condition”).

62. *See, e.g.*, Stefan, *supra* note 18, at 12 (discussing Alan Dershowitz, *THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITIES* (Little Brown 1994)).

reality, less attention has focused on the reluctance expressed by some members of Congress to provide employment protection to individuals suffering from psychiatric disorders. Because courts use legislative history to guide and inform their interpretations of statutory law, understanding these concerns may shed light on the subsequent approach taken by judges in interpreting the meaning of disability and the prima facie case under the ADA.

The first draft of the ADA was introduced to the 100th Congress in late April 1988, when few expected it to pass.⁶³ Ironically, President Reagan inadvertently fueled the growing demand for disability discrimination legislation in the early stages of the debate by characterizing the Democratic nominee for President, Michael Dukakis, as mentally ill.⁶⁴ When asked to comment on rumors that Dukakis had “sought psychological help [for depression],” Reagan smiled and stated that he was “not going to pick on an invalid.”⁶⁵ His remark was immediately criticized by the media as well as members of Congress, who denounced “the callous attitude exhibited by the Reagan-Bush administration toward those with disabilities, of which this remark is symptomatic.”⁶⁶ Despite protests over the unfairness and inaccuracy of Reagan’s comments, Dukakis quickly dropped in the polls, reflecting the difficulties often experienced by political candidates tied to mental illness, real or otherwise.⁶⁷ Shortly after the controversy made headlines, however, then-candidate George H. W. Bush announced his support for the ADA, and once elected directed his staff to work with Congress to aid its enactment.⁶⁸ At least one scholar has credited the pressure generated from Reagan’s comments

63. See H.R. 4498, 100th Cong. (1988). Senator Lowell Weicker (R-CT) introduced the first version of the ADA (S. 2345) on April 28, 1988. EQUALITY OF OPPORTUNITY, *supra* note 3, at 207.

64. Jacob V. Lamar, *Reagan: Part Fixer, Part Hatchet Man*, TIME MAGAZINE, Aug. 15, 1988, at 16.

65. *Id.*

66. *Id.*; 134 CONG. REC. 21,425 (1988) (statement of Rep. Coelho (D-CA)).

67. One study conducted by the Depression and Bipolar Support Alliance found that, in a race for national office where all other factors were equal, nearly one in four (24%) would vote against a candidate who had been diagnosed with clinical depression, while another 24% said they “might not” vote for them. It also found that nearly one in three (31%) believe that people with mood disorders are not stable enough to hold positions of authority in fields like law enforcement and government, while half (51%) feel that people should publicly disclose such diagnoses if they seek office.

Depression and Bipolar Support Alliance, *Thirty Years After Eagleton Controversy, Mental Health Stigma Still Haunts Political Arena*, <http://www.dbsalliance.org/media/newsreleases/Stigma%20Release.html> (last visited Feb. 3, 2006).

68. See RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 31, 67-68 (2005) (noting that the ADA gained momentum from “President Reagan’s insensitive comments” because they “helped spur presidential candidate Bush to endorse the concept of the ADA, and later, to instruct his attorney general to seek its passage in Congress”).

as facilitating Bush's political support of the statute.⁶⁹

The bill was re-introduced to the 101st Congress in a modified form after consideration by numerous House and Senate committees.⁷⁰ The Senate floor debate reflected the concern of several members that the legislative definition of disability was "extremely loose" and covered too many people.⁷¹ Although Senators most often objected to the Act's real or imagined coverage of alcoholics, drug users, and homosexuals, some members specifically identified concerns with including the mentally ill within the Act's protection.⁷² A common theme in such comments was the distinction between physical and mental impairments, and the morally problematic character of the latter.

Senator Jesse Helms (R-NC) acknowledged that the ADA's protection of "people in a wheelchair or those who have been injured in the war . . . is one thing," but questioned whether it also covered manic depressives and schizophrenics.⁷³ He indicated that "an employer's own moral standards [should] enable him to make a judgment about any or all of the [potentially protected] employees."⁷⁴ Senator Rudy Boschwitz (R-MN) likewise sought assurances from the bill's sponsors that in cases involving applicants with "mental handicaps" and "infirm[ities]," employers would still be permitted to make "subjective judgments" about whether the individual had the ability to do the work.⁷⁵ Although Senator Tom Harkin (D-IA) reminded his colleagues that Congress needed to extend protection beyond those in wheelchairs because "[p]eople can be mentally handicapped as well,"⁷⁶ Senator Gordon Humphrey (R-NH) later reiterated Helms' concern about the bill's coverage.⁷⁷ He noted that "we are not simply talking about the blind, the deaf, or persons confined to wheelchairs," but a bill "so broad" that it covers "schizophrenics, manic depressives, and persons with extremely low IQ's."⁷⁸

69. *Id.*

70. Senator Tom Harkin (D-IA) and Representative Tony Coelho jointly introduced the revised version of the bill (S. 933 and H.R. 2273) on May 9, 1989. EQUALITY OF OPPORTUNITY, *supra* note 3, at 207.

71. 135 CONG. REC. 19,840-41 (1989) (statement of Sen. Pryor (R-AK)) (arguing that the definition of disability, potentially a "lawyer's mecca," would "be the subject of literally countless issues of litigation in the courts across this country").

72. *See, e.g., Id.* at 19,864 (statement of Sen. Helms).

73. *Id.* at 19,864, 19,866. (statement of Sen. Helms). In addition to objecting to including certain mental impairments under the ADA, Senator Helms was particularly virulent in insisting that the ADA exclude homosexuals and those infected with HIV from its protection. *Id.* at 19,866 (statement of Sen. Helms).

74. *Id.* at 19,864 (statement of Sen. Helms).

75. *Id.* at 19,850 (statement of Sen. Boschwitz). Interestingly enough, Senator Edward Kennedy (D-MA) immediately confirmed that Senator Boschwitz's understanding was "correct." *Id.*

76. *Id.* at 19,866 (statement of Sen. Harkin).

77. *Id.* at 19,882 (statement of Sen. Humphrey).

78. *Id.*

Senator William Armstrong (R-CO) was perhaps the most specific in his concerns about the coverage of mental impairments. He agreed that the bill was welcome to the extent it would “help[] . . . people in wheelchairs or who have some kind of a physical disability or handicap of some sort,” but was concerned that the term “disability might include some things which by any ordinary definition we would not expect to be included,” like “[m]ental disorders, such as alcohol withdrawal, delirium, hallucinosis, dementia with alcoholism, marijuana, delusional disorder, cocaine intoxication, cocaine delirium, [and] disillusional disorder.”⁷⁹ He was particularly troubled that the ADA would provide protection to someone with disorders that “have a moral content to them or which in the opinion of some people have a moral content.”⁸⁰ He sought specific assurances that a host of psychiatric disorders were not covered under the bill, including “impulse control disorders” and “disruptive behavior disorder,” and offered an amendment to clarify the record if there was “any doubt” they would be covered.⁸¹ Arguing that the bill was simply “far too broad,” he also used the *Diagnostic and Statistical Manual of Mental Disorders* published by the American Psychiatric Association to demonstrate that the definition would include voyeurism if the Senators did not specifically “take it out.”⁸²

Even one of the ADA’s co-sponsors expressed reservations about covering mental impairments.⁸³ After announcing on the Senate floor that he was pleased to cosponsor the bill, Senator Warren Rudman (R-NH) stated his concerns with coverage as follows:

[W]hile our knowledge of psychiatry has greatly improved in recent years, the fact remains that a diagnosis of certain types of mental illness is frequently made on the basis of a pattern of socially unacceptable behavior and lacks any physiological basis. In short, we are talking about behavior that is immoral, improper, or illegal and which individuals are engaging in of their own volition, admittedly for reasons we do not fully understand. . . .

In principle, I agree with the concept that the mentally ill should be protected from infidious [sic] discrimination just as the physically handicapped should be. However, people must bear some responsibility for the consequences of their own actions.⁸⁴

In contrast to the discussion in the Senate, there was little floor debate in

79. *Id.* at 19,852-53 (statement of Sen. Armstrong).

80. *Id.* at 19,853 (statement of Sen. Armstrong).

81. *Id.* Senator Armstrong was concerned that the bill covered the following disorders: “homosexuality and bisexuality . . . exhibitionism, pedophilia, voyeurism, . . . compulsive kleptomania or other impulse control disorders . . . conduct disorder, [and] any other disruptive behavior disorder.” *Id.*

82. *Id.* at 19,871 (statement of Sen. Armstrong).

83. *Id.* at 19,895-96 (statement of Sen. Rudman).

84. *Id.*

the House of Representatives about the coverage of mental impairments under the ADA. One of the only comments in this regard was made by Representative Robert Walker (R-PA), who objected to the House's failure to consider an amendment to "make certain that the psychological disorder section of the bill did not include the necessity to hire psychopaths in police departments."⁸⁵ Mirroring the Senate's concern with its potential protection of homosexuals and drug addicts, the majority of comments related to the expansiveness of the definition of disability.⁸⁶

The lack of floor debate, however, did not necessarily reflect the House's endorsement of the inclusion of mental impairments under the ADA. The correspondence of at least one Representative during the relevant time period indicated that the ADA's protection of the mentally ill was misplaced because of the danger such individuals posed to the public. Congressman Chuck Douglas (R-NH) distributed a memo to House members with a picture of a man pointing a gun at the reader.⁸⁷ Under the caption "Berserkers: Time Bombs in the Workplace," Douglas asked: "How can we protect ourselves from an apparently growing menace?"⁸⁸ His solution was to defeat "the Americans with Disabilities Act in its present form" because it "protects people who do not have physical disabilities."⁸⁹ Because of his belief that people with psychiatric disorders could be violent towards others, Douglas advocated that the ADA exclude the mentally ill from its coverage.⁹⁰

In the midst of such negative imagery, however, one Senator stepped forward to directly advocate for the inclusion of individuals with psychiatric disorders within the protection of the ADA. Senator Pete Domenici (R-NM) spoke eloquently about the need to eliminate the stigma of mental illness, noting that both Winston Churchill and Abraham Lincoln may have experienced manic-depressive episodes.⁹¹ He argued that "the time has come when [those with mental impairments] deserve an unbiased evaluation of their capability" rather than exclusion from the workforce based on subjective bias.⁹² Ultimately, Senator Domenici's position won the day. The images of dangerousness and moral defect resurrected during the debates were not sufficient to sway supporters of an inclusive definition of disability. The final version of the ADA, signed into law in July 1990, included individuals with

85. 136 Cong. Rec. 10,841 (statement of Rep. Walker). Representative Charles Douglas (R-NH) had proposed the amendment. *Id.*

86. *See, e.g., id.* at 11,457 (statement of Ronald Lindsey, introduced into the Congressional Record by Representative Tom Delay (R-TX), that "[t]here are over a thousand different impairments that could render a person disabled, and, therefore, protected for purposes of the ADA.").

87. EQUALITY OF OPPORTUNITY, *supra* note 3, at 133.

88. *Id.*; Campbell, *supra* note 4, at 137.

89. Campbell, *supra* note 4, at 137.

90. EQUALITY OF OPPORTUNITY, *supra* note 3, at 133.

91. 135 CONG. REC. 19,878-79 (1989) (statement of Sen. Domenici).

92. *Id.*

mental impairments within the protected class.⁹³

III. THE AMERICANS WITH DISABILITIES ACT: AN EMPIRICAL LOOK AT THE SUCCESS RATES OF INDIVIDUALS WITH MENTAL IMPAIRMENTS

The question of who is disabled within meaning of the ADA was at the center of the legislative debate. This question remains critical because the ADA, unlike other civil rights legislation, requires all litigants seeking its protection to establish coverage under the Act as a threshold requirement.⁹⁴ The Act's prohibition on discrimination and mandate of reasonable accommodation are limited to "qualified individual[s] with a disability."⁹⁵ Identifying which individuals fall within the scope of this definition has caused much confusion and debate in both courts and academia. Some scholars argue that the stigma which continues to attach to mental illness, reflected both in studies and in the legislative debate, has led courts to scrutinize claims brought by mentally-impaired individuals more closely than those brought by their physically-impaired counterparts.⁹⁶ They argue that because litigants with mental impairments have more difficulty establishing class membership, less attention is paid to defendants' potentially discriminatory actions in these cases.⁹⁷

The following subsections reveal the surprising and counter-intuitive results of one of the first empirical tests evaluating this theory. Details of these findings follow a brief discussion of the legal requirements necessary to establish coverage in the class protected by the ADA.

A. Establishing Coverage under the ADA

In order to state a claim under the ADA, litigants must first demonstrate that they have an actual disability within the meaning of the statute, "a record of such an impairment," or that they are "regarded as having such an impairment."⁹⁸ All three approaches require evidence of a physical or mental

93. 42 U.S.C. § 12102 (2000) (including "physical or mental impairment" in the definition of disability); 42 U.S.C. § 12112 (2000) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual . . .").

94. 42 U.S.C. § 12112.

95. 42 U.S.C. § 12112(a).

96. *See, e.g.*, Korn, *supra* note 10, at 641-42.

97. *Cf.* Jane Bryant Korn, *Cancer and the ADA: Rethinking Disability*, 74 S. CAL. L. REV. 399, 416 (2001) ("If a plaintiff cannot prove membership in the protected class, the case is dismissed; the actions of the defendant are irrelevant.")

98. 42 U.S.C. § 12102(2)(A)-© (2000); 29 C.F.R. § 1630.2(g)(1)-(3) (2004). It is worth noting that the Supreme Court has questioned the EEOC's authority to interpret the meaning of "disability" because it is defined in the general provisions of the ADA rather than in Title I. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 194 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479 (1999). For an excellent discussion of the level of deference

impairment “that substantially limits . . . [a] major life activit[y].”⁹⁹ The regulations define impairments to include “[a]ny physiological disorder, . . . condition, cosmetic disfigurement, or anatomical loss affecting one” of the described biological “systems,” as well as “[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”¹⁰⁰ The statute only defines major life activities by example, including “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.”¹⁰¹ The Supreme Court has clarified that activities in this category must be “of central importance to daily life”¹⁰² and “significan[t].”¹⁰³

For a major life activity to be deemed “substantially limited,” the plaintiff must come forward with evidence demonstrating that he or she is either unable to perform the activity or is “[s]ignificantly restricted as to the condition, manner or duration under which” the activity is performed.¹⁰⁴ In *Sutton v. United Air Lines, Inc.*,¹⁰⁵ the Supreme Court clarified that in evaluating whether this standard is satisfied, courts must consider all mitigating measures taken by plaintiffs to alleviate the effects of their impairments.¹⁰⁶ If the use of medication controls or corrects an individual’s disorder, he or she generally will not be protected under the Act absent a showing of substantially limiting effects from the medication.¹⁰⁷ If the major life activity asserted is work, additional hurdles arise. Plaintiffs in this category must show that they are significantly restricted in performing “a class of jobs or a broad range of jobs”

courts have given to the regulations in the wake of such questioning, *see* Eichhorn, *supra* note 14, at 209 (surveying cases and concluding that courts squarely presented with the issue of the regulations’ validity are likely to conclude they are “valid legislative rules” or “interpretive rules that are entitled to a high degree of deference”).

99. 42 U.S.C. § 12102(2)(A). Some plaintiffs in “regarded as” cases initially argued that they only had to demonstrate that employers regarded them as having an impairment rather than an impairment which substantially limits a major life activity. The Supreme Court has since clarified that all litigants, including those alleging a “regarded as” claim, must satisfy all three prongs of the disability definition in order to survive summary judgment. *See Sutton*, 527 U.S. at 489 (“[A] covered entity . . . must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.”).

100. 29 C.F.R. § 1630.2(h)(1)-(2) (2004).

101. 29 C.F.R. § 1630.2(I) (2004).

102. *Toyota*, 534 U.S. at 197.

103. *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) (“[T]he touchstone of determining an activity’s inclusion under the statutory rubric [of a major life activity] is its significance.”) (quoting *Bragdon v. Abbott*, 107 F. 3d 934, 940 (1st Cir. 1997)).

104. 29 C.F.R. § 1630.2(j)(1)(i)-(ii) (2004).

105. 527 U.S. 471 (1999).

106. *Id.* at 482.

107. *Id.* at 482-83.

compared to similarly situated individuals, which is a significant challenge for most litigants.¹⁰⁸

Establishing a protected disability, although necessary, is not sufficient in itself to gain coverage under the Act. The ADA only protects those individuals who also are considered “qualified” within the meaning of the statute.¹⁰⁹ To satisfy this requirement, plaintiffs must first show that they satisfy the prerequisites for the employment position, such as education or practical experience.¹¹⁰ Next, plaintiffs must establish that they are able to perform the essential functions of the position “with or without reasonable accommodation.”¹¹¹ In evaluating which functions are essential, courts examine “the fundamental job duties of the employment position,”¹¹² giving due consideration to the employer’s judgment as to which functions fall within this definition.¹¹³ If the plaintiff is unable to perform an essential job function, the court must also inquire whether a reasonable accommodation exists that would permit the employee to perform the function, such as job-restructuring or modification, the use of adaptive technology, or alterations to facilitate accessibility.¹¹⁴ If such an accommodation is available, then the plaintiff is deemed a “qualified individual with a disability” within the meaning of the statute.¹¹⁵

B. Empirical Analysis

In the following section, this Article describes the results of empirical analysis undertaken to ascertain whether litigants with physical and mental impairments experience different success rates in establishing coverage under the ADA. Section II.B.1 describes the method of case selection and the process used to construct the sample. Section II.B.2 examines specific hypotheses that constitute the background of the study, as well as the methodology employed to test these hypotheses. Results are then presented in section II.B.3, followed by additional observations gleaned from the data in section II.B.4.

108. 29 C.F.R. § 1630.2(j)(3)(I) (2004) (“The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.”).

109. 42 U.S.C. § 12111(8) (2000).

110. 29 C.F.R. § 1630.2(m) (2004).

111. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

112. 29 C.F.R. § 1630.2(n) (2004).

113. 42 U.S.C. § 12111(8).

114. 42 U.S.C. § 12111(9) (2000).

115. 42 U.S.C. § 12111(8)-(9).

1. Data Summary

The study compiled a stratified sample of all Title I district and circuit court cases from the Third, Ninth, and Eleventh Circuit courts that were decided during the periods of 1994-1995 and 2002-2003 and that were available on Westlaw or LexisNexis. The three circuits were chosen because of their anecdotal reputations as “moderate,” “liberal,” and “conservative” jurisdictions respectively. Time periods before and after the *Sutton* decision were selected to evaluate whether this opinion influenced the success rates of plaintiffs in either or both groups. Following a review of all cases identified, the sample was limited to those cases in which the court explicitly discussed the “disabled” or “qualified” requirements, however briefly. The sample excluded cases in which the court assumed the existence of these elements or in which the parties did not dispute that they were satisfied. The study likewise excluded 12(b)(6) motions to dismiss and pre-trial motions that were not potentially dispositive. The resulting 131 claims were coded to indicate whether the alleged impairment was physical or mental,¹¹⁶ whether the plaintiff successfully established a cognizable disability, and whether the plaintiff was deemed qualified for the employment position in question.¹¹⁷ Information about the specific impairment alleged and the major life activity affected, as well as the type of disability claim, was likewise compiled.

2. Hypotheses & Methodology

As detailed earlier in this article, the study was motivated by the conventional wisdom that plaintiffs alleging mental impairments in Title I claims have more difficulty establishing coverage in the protected class than do plaintiffs alleging physical impairments. A chi-square test for equality of distributions was employed to test the validity of the primary statistical hypothesis that the rate at which mentally-impaired claimants establish class membership is equal to the rate at which physically-impaired claimants establish class membership.¹¹⁸ The same test was used to evaluate whether

116. A small number of cases alleging mental disability were excluded (four cases involving only alcohol or drug addiction and one case involving a learning disability) to isolate psychiatric disorders that may provoke the stigmatization described *supra* Part I. Further, the unit of analysis employed was a particular claim as opposed to a case. Therefore, in a small number of cases where the court analyzed both mental and physical claims, these claims constitute independent records in the database. As a result, depending on what particular hypothesis is being tested, the sample size varies to some extent.

117. A list of the cases encompassing the 131 claims and their key attributes is on file with Tennessee Law Review.

118. The chi-square test provides the likelihood that a *difference* in proportions found in two or more groups could be found by chance when taking repeated samples. A small likelihood is an indication that there is some systematic difference between the groups. See GEORGE W. SNEDECOR & WILLIAM G. COCHRAN, STATISTICAL METHODS 76-79 (8th ed. 1989).

there are statistically significant differences in the ways these groups fail at class membership, i.e., due to failure to demonstrate a disability or due to a lack of qualification.

The sheer variability of the data concerning the specific impairments and major life activities alleged in each case, relative to the sample size, defies meaningful statistical analysis. However, some anecdotal observations related to these elements are offered below to shed additional light on the relationship between these requirements and plaintiffs' success rates in establishing class membership.

3. Results

Plaintiffs alleging mental impairments are only slightly less likely to establish coverage in the class protected by the ADA than those alleging physical impairments, and this difference is not statistically significant.¹¹⁹ The sample reflected far more physical disability claims (103) than mental disability claims (28). Within the context of this sample, the mentally impaired plaintiffs prevailed in establishing class membership about 25% of the time, whereas the physically impaired plaintiffs prevailed about 29% of the time. For all practical purposes, these numbers reflect a statistical dead heat. See Table One.

			Established		Total
			No	Yes	
Type	Mental	Count	21	7	28
		% within Type	75.0%	25.0%	100.0%
		% within Established	22.3%	18.9%	21.4%
		% of Total	16.0%	5.3%	21.4%
	Physical	Count	73	30	103
		% within Type	70.9%	29.1%	100.0%
		% within Established	77.7%	81.1%	78.6%
		% of Total	55.7%	22.9%	78.6%
Total		Count	94	37	131
		% within Type	71.8%	28.2%	100.0%
		% within Established	100.0%	100.0%	100.0%
		% of Total	71.8%	28.2%	100.0%

Table One – Establishing Threshold Requirements, Mental vs. Physical Disabilities

119. Table One, *Chi-Square* (1, N = 131) = .185, $p = .667$. This indicates that the difference in the two outcomes would be seen purely by chance approximately two-thirds of the time in repeated sampling.

There is a more meaningful difference, however, in the reasons courts identify for each group's failure to establish coverage in the protected class.¹²⁰ Whereas mentally-impaired plaintiffs lose most often because they are deemed unqualified by the court, physically impaired litigants lose most often because they do not establish that they are disabled within the meaning of the statute. See Table Two.

			Outcome			Total
			Not Disabled	Not Qualified	Survives Summary Judgment	
Type	Mental	Count	10	11	7	28
		% within Type	35.7%	39.3%	25.0%	100.0%
		% within Outcome	17.2%	30.6%	18.9%	21.4%
		% of Total	7.6%	8.4%	5.3%	21.4%
	Physical	Count	48	25	30	103
		% within Type	46.6%	24.3%	29.1%	100.0%
		% within Outcome	82.8%	69.4%	81.1%	78.6%
		% of Total	36.6%	19.1%	22.9%	78.6%
Total		Count	58	36	37	131
		% within Type	44.3%	27.5%	28.2%	100.0%
		% within Outcome	100.0%	100.0%	100.0%	100.0%
		% of Total	44.3%	27.5%	28.2%	100.0%

Table Two – Specific Outcomes, Mental vs. Physical Disabilities

In fact, focusing the analysis exclusively on those claims that fail to meet the threshold requirements exposes a difference between the two types of claims that achieves a moderate level of statistical significance.¹²¹ Roughly two-thirds of mental impairment claims that fail to establish membership in the protected class do so because the plaintiff is found to be unqualified. Physical disability claims, on the other hand, fail to establish class membership roughly two-thirds of the time due to a failure to establish a protected disability. See Table Three.

120. These differences are still statistically insignificant. Table Two, *Chi-Square* (2, N = 131) = 2.528, $p = .283$. This indicates that the difference in the two outcomes would be seen purely by chance approximately 28% of the time in repeated sampling.

121. Table Three, *Chi-Square* (1, N = 79) = 3.668, $p = .055$. This indicates that the difference in the two outcomes would be seen purely by chance approximately 5% of the time in repeated sampling.

			Outcome		Total
			Not Disabled	Not Qualified	
Type	Mental	Count	5	8	13
		% within Type	38.5%	61.5%	100.0%
		% within Outcome	10.2%	26.7%	16.5%
	% of Total	6.3%	10.1%	16.5%	
	Physical	Count	44	22	66
		% within Type	66.7%	33.3%	100.0%
		% within Outcome	89.8%	73.3%	83.5%
	% of Total	55.7%	27.8%	83.5%	
Total		Count	49	30	79
		% within Type	62.0%	38.0%	100.0%
		% within Outcome	100.0%	100.0%	100.0%
		% of Total	62.0%	38.0%	100.0%

Table Three – Outcomes for Cases that Failed Threshold Requirements, Mental vs. Physical Disabilities

Restricting the sample to those cases where the disability threshold is clearly determinative exposes a highly significant difference in meeting the disability requirement prior to *Sutton* (1994-1995 in the sample) and after *Sutton* (2002-2003 in the sample).¹²² While more than 60% of cases in the sample established a protected disability in 1994-1995,¹²³ only 28% were successful in 2002-2003. See Table Four. While the sample sizes in the current study are insufficient to analyze the effect of *Sutton* on mental cases and physical cases separately, purely descriptive statistics suggest that *Sutton* did not have a significant impact on the ability of plaintiffs alleging a mental impairment to establish class membership.¹²⁴ On the other hand, the impact on plaintiffs alleging physical impairments seems to be dramatic, with roughly 3 in 4 cases establishing class membership pre-*Sutton* and only 1 in 4 cases doing so post-*Sutton*. See Table Four.

122. Table Four, *Chi-Square* (1, N = 72) = 8.164, $p = .004$. This indicates that the difference in the two outcomes would be seen purely by chance less than 0.5% of the time in repeated sampling.

123. This closely corresponds to what has been reported elsewhere pre-*Sutton*. See, e.g., Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999) (reviewing ABA trial court data).

124. "Descriptive statistics are typically distinguished from inferential statistics. With descriptive statistics you are simply describing what is or what the data shows. With inferential statistics you are trying to reach conclusions that extend beyond the immediate data alone." William, M. K. Trochim, *Descriptive Statistics*, <http://www.socialresearchmethods.net/kb/statdesc.htm> (last visited Feb. 3, 2006).

			Established		Total
			Yes	No	
Date Group	1994-1995	Count	14	8	22
		% within Date Group	63.6%	36.4%	100.0%
		% within Established	50.0%	18.2%	30.6%
		% of Total	19.4%	11.1%	30.6%
	2002-2003	Count	14	36	50
		% within Date Group	28.0%	72.0%	100.0%
		% within Established	50.0%	81.8%	69.4%
		% of Total	19.4%	50.0%	69.4%
Total		Count	28	44	72
		% within Date Group	38.9%	61.1%	100.0%
		% within Established	100.0%	100.0%	100.0%
		% of Total	38.9%	61.1%	100.0%

Table Four – Establishing Disability Pre-Sutton (1994-1995) and Post-Sutton (2002-2003)

Overall, there is no statistical difference in these outcomes by circuit.¹²⁵ See Table Five.

			Established		Total
			No	Yes	
Circuit	11	Count	34	11	45
		% within Circuit	75.6%	24.4%	100.0%
		% within Established	39.5%	33.3%	37.8%
		% of Total	28.6%	9.2%	37.8%
	3	Count	42	17	59
		% within Circuit	71.2%	28.8%	100.0%
		% within Established	48.8%	51.5%	49.6%
		% of Total	35.3%	14.3%	49.6%
	9	Count	10	5	15
		% within Circuit	66.7%	33.3%	100.0%
		% within Established	11.6%	15.2%	12.6%
		% of Total	8.4%	4.2%	12.6%
Total		Count	86	33	119
		% within Circuit	72.3%	27.7%	100.0%
		% within Established	100.0%	100.0%	100.0%
		% of Total	72.3%	27.7%	100.0%

Table Five – Establishing Threshold Requirements, by Circuit

125. Table Five, *Chi-Square* (2, N = 119) = .512, p = .774. This indicates that the difference in the two outcomes would be seen purely by chance approximately three-fourths of the time in repeated sampling.

4. Other Observations

The cases in the sample demonstrated a great deal of diversity in the types and combinations of impairments identified, the types and combinations of major life activities asserted, and the disability prong employed to allege these elements. While this complexity makes meaningful statistical analysis practically impossible, some aggregation and classification of cases, admittedly not always exact, nevertheless reveals some interesting descriptive statistics.

The cases in the aggregate sample were evenly split between plaintiffs alleging an actual disability (33%) and those alleging that they were regarded as disabled by their employers (33%). Those plaintiffs in the former category were more successful at establishing a protected disability (60%) than those in the latter category (40%). Hybrid strategies alleging both types of disability were alleged in 33% of the cases but were successful only 25% of the time.

Plaintiffs in a surprising number of mental impairment cases alleged that they suffered from depression, either alone or in combination with other disorders. About 25% of the psychiatric cases in the sample identified depression as the exclusive impairment, while another 25% of these cases alleged depression in combination with other disorders, such as post-traumatic stress or anxiety. The success rate of plaintiffs in establishing a disability on the basis of depression (50%) exceeded that of plaintiffs alleging other mental impairments (29%). Those plaintiffs who alleged depression in combination with other impairments, however, were the most successful in establishing a cognizable disability (75%).

Despite the Supreme Court's skepticism over the viability of work as a major life activity,¹²⁶ a significant number of plaintiffs in the sample (40%) alleged it as the exclusive major life activity for consideration, while another 33% alleged work in combination with some other activity. The remaining 27% of the sample identified a wide variety of non-work-related activities. Despite the prevalence of claims alleging work as a major life activity, they were rarely successful. Cases alleging work as the exclusive activity successfully established a disability only 17% of the time, while cases alleging work in combination with some other activity were slightly more successful, with 40% establishing a protected disability. These results are consistent with scholarly works indicating that alleging work alone is rarely a winning

126. *See Toyota Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 200 (2002) (“Because of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much, and we need not decide this difficult question today.”); *Sutton v. United Airlines, Inc.*, 527 U.S. 472, 492 (1991) (questioning whether work is an appropriate major life activity and “[a]ssuming without deciding that working is a major life activity”).

strategy for any plaintiff.¹²⁷

IV. ANALYSIS

The empirical study discussed above did not reveal the anticipated results. Contrary to the weight of scholarly opinion, individuals alleging psychiatric impairments did not experience heightened difficulty in establishing either a protected disability or membership in the protected class. The question thus becomes what may account for the discrepancy between the widely held belief and these findings. It is plausible that the results would be different if the sample were expanded, and this would prove a fruitful area for future research and inquiry. Alternatively, the results may reflect society's growing acceptance of individuals with mental illness as a result of public interest campaigns and expanding knowledge about the causes of psychiatric disorders. This conclusion seems unlikely, however, given the numerous indicators reflecting that stigma remains widespread discussed earlier in this Article.¹²⁸ It may be that the results actually reflect the continuing presence of mental illness stigma, although in more subtle and indirect ways than anticipated. The remainder of this section discusses two potential explanations for the unexpected results and proposes areas for future research.

A. The Problem of Disclosure: A Cost-Benefit Calculus

The success of those with mental impairments in establishing protected disabilities and coverage in the class protected by the ADA may perversely reflect the high degree of risk that attaches to self-identification of this type of disability in the workplace. The stereotypes associated with mental illness are significantly more negative and more pervasive than those associated with physical disabilities.¹²⁹ As a result, there are very real disincentives to disclosure of a psychiatric disorder at the time of hire or during the employment relationship. It is plausible that only those with the highest need for accommodation, who correspondingly experience the most severe disorders, will risk identification to seek assistance. These same individuals are most likely to establish an impairment which substantially limits a major life activity in litigation.

The costs of disclosure when applying for a job are readily apparent. Numerous studies have identified employers' reluctance to associate with

127. See, e.g., Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 135 (1997) (“[C]laims in which plaintiffs have only alleged a substantial limitation in the major life activity of working have been almost universally rejected.”).

128. See *supra* Part I.

129. See *supra* Part I.

those they consider mentally ill.¹³⁰ One study concluded that employers prefer to hire an individual who has spent time in prison over an individual with mental instability.¹³¹ Yet another revealed that 60% of personnel directors “would never choose an individual with mental illness for an executive job,” compared with just 3% who would not hire an individual with diabetes.¹³² Employers are uneasy about the behavior individuals with psychiatric disorders may display on the job if hired and the subsequent disruption in the workplace.¹³³ Such findings are mirrored by the 31% of applicants in a recent study who reported that they had been turned down for a job they were qualified for after revealing a mental illness.¹³⁴ Some vocational rehabilitation counselors, to avoid such concerns, actually encourage their clients to hide prior hospitalizations or to devise strategies for covering gaps in employment caused by mental illness.¹³⁵

The ADA’s prohibition on employers asking medical questions during the pre-hire stage recognizes this bias and provides some protection during the initial interview phase.¹³⁶ Because psychiatric disorders are often difficult to detect by third parties, interviewees with mental impairments, as opposed to many of their physically impaired counterparts, can more readily keep their disabilities hidden until a job offer is extended. Once hired, however, employees are unable to assert their rights under the ADA and secure assistance in the workplace without disclosing the nature of the underlying impairment.¹³⁷ The costs of disclosure, even after establishing a successful

130. See Campbell, *supra* note 4, at 137 (describing various studies).

131. *Id.* (citing James N. Colbert et al., *Two Psychological Portals of Entry for Disadvantaged Groups*, 34 REHABILITATION LITERATURE 194, 199 (1973)).

132. Otto F. Wahl, TELLING IS RISKY BUSINESS: MENTAL HEALTH CONSUMERS CONFRONT STIGMA 84-85 (1999).

133. See Edward Diksa & E. Sally Rogers, *Employer Concerns About Hiring Persons with Psychiatric Disability: Results of the Employer Attitude Questionnaire*, 40 REHABILITATION COUNSELING BULL. 31, 42 (1996).

134. Wahl, *supra* note 132, at 80.

135. See Beth Angell et al., First-Person Accounts of Stigma, in ON THE STIGMA OF MENTAL ILLNESS 73 (Patrick W. Corrigan, ed., 2005) (noting studies suggest that individuals with histories of mental illness “may creatively construct a work history that conceals gaps in their employment record.”); Campbell, *supra* note 4, at 140.

136. See, e.g., 42 U.S.C. § 12112(d)(2) (2004); 29 C.F.R. § 1630.13 (2004).

137. See Angell, *supra* note 135, at 74 (discussing the “double-edged sword” faced by mentally ill employees who fail to disclose their impairments but need accommodations in the workplace). Employers need only make “reasonable accommodations to the known . . . limitations of an otherwise qualified individual with a disability.” 42 U.S.C. § 12112(b)(5)(A) (2000). Employees experiencing disparate treatment, moreover, must ultimately show in litigation that the employer discriminated “because of” a disability. 42 U.S.C. § 12112(a) (2000). This standard is hard to meet in the absence of clear evidence that the employer knew or should have known of the disability. Cf. Ann C. Hodges, *The Americans with Disabilities Act in the Unionized Workplace*, 48 U. MIAMI L. REV. 567, 611 (1994) (“[E]stablishing discrimination [by a union] will be extraordinarily difficult if the individual cannot prove the

work history for an employer, are again potentially steep. Despite the law's anti-discrimination mandate, individuals with mental illness continue to report that they are demoted or even fired once a psychiatric diagnosis becomes common knowledge in the workplace.¹³⁸ Those who retain their positions are likely to be adversely impacted in other ways. Individuals labeled as mentally ill on the job are more likely to earn less income and be underemployed than similarly situated impaired individuals who have not yet been labeled.¹³⁹ In one study, employers who were asked to rate employees for promotion purposes viewed employees with depression as "less worthy of a salary increase, less productive, and less dependable," less confident, less able to be accepted by co-workers, and more negatively responsive to criticism than equally qualified non-disabled peers.¹⁴⁰ The study concluded that the perceived cause of the employee's disability was directly linked to the diminished recommendation for promotion.¹⁴¹ Because of the persistent link between character defects and mental illness discussed earlier, it is likely that the study's findings extend beyond depression to encompass all psychiatric disorders.¹⁴²

Disclosure likewise may damage relationships with co-workers and supervisors. The revelation of a diagnosis may lead to harassment, teasing, and isolation even in a formerly comfortable workplace.¹⁴³ Fears of dangerousness, unpredictability, and poor behavior by the labeled employee are common. Employees who secure a requested accommodation may face even more hostility, as coworkers respond with "ambient jealousy" to what they regard as special treatment for malingerers.¹⁴⁴ Such reactions are especially problematic in light of the heightened difficulties employees with psychiatric disabilities often have establishing interpersonal relationships with coworkers in the first instance.¹⁴⁵

Faced with the prospect of either not securing employment or limiting advancement opportunities upon disclosure, only those individuals most in

union's knowledge of the disability."). Self-disclosure most readily establishes such knowledge. *Id.*

138. Wahl, *supra* note 132, at 84-85.

139. See Link, *supra* note 43, at 202, 209-10.

140. James E. Bordieri et al., *Work Life for Employees With Disabilities: Recommendations for Promotion*, 40 REHABILITATION COUNSELING BULL. 181, 186 (1997).

141. *Id.* at 188-89 ("Specifically, candidates seen as personally responsible for their disabilities were given lower promotion recommendations than were candidates whose disabilities were attributed to external factors.").

142. See *supra* notes 41-50 and accompanying text.

143. For a revealing discussion of first-hand stories in this regard, see Wahl, *supra* note 132, at 85-87.

144. Owen, *supra* note 9, at 94, 118.

145. David E. Drehmer & James E. Bordieri, *Hiring Decisions for Disabled Workers: The Hidden Bias*, 30 REHABILITATION PSYCHOL. 157, 158 (1985) (discussing the results of studies by several authors).

need of the ADA's protection are likely to judge disclosure worth the risk. Employees and applicants must weigh the advantage of securing protection against both the animus toward mental illness and the increasing uncertainty of whether disclosure will bring legal protection or assistance. Employees may understand that the promise of protection will be illusory if a judge deems their impairment insufficient for protection under the ADA.¹⁴⁶ Those who weigh the calculus in favor of disclosure, therefore, may be those with the more severe impairments who have the greatest likelihood of making the requisite legal showing of a protected disability in litigation. If correct, this theory directly counters the popular image of the ADA plaintiff, who is often portrayed as an unimpaired malingerer who asserts frivolous problems in order to lighten workloads and secure favorable treatment in the workplace.¹⁴⁷

This theory, although helpful in explaining the results of the study, has its limitations. It best describes those cases involving an employer's failure to accommodate an actual disability, where the severity of the need to disclose may correlate most closely to the severity of the impairment, and may be less helpful in explaining class coverage in disparate treatment and "regarded as" cases.¹⁴⁸ It is worth noting, moreover, that psychiatric disability claims are the second largest category of EEOC complaints, which may indicate that disclosure occurs more frequently than the low levels of litigated claims suggest.¹⁴⁹ Further research, therefore, is necessary to test the accuracy and

146. Owen, *supra* note 9, at 121-22. Discussing the results of her small study, Owen concludes that "the ADA seems to be regarded by the workers in this study as intriguing and sometimes relevant to their circumstances, but risky to embrace in today's political economy." *Id.* at 169.

147. See, e.g., Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223, 227 (2000)

[T]hose with hidden disabilities who did not reveal their conditions in the past but choose to do so when they invoke the ADA are regarded with strong suspicion, and the media coverage often suggests or implies that the only plausible explanation for this is fraud, [sic] and a desire to avoid work.

Id. Cf. Parikh, *supra* note 16, at 743 ("The lack of outward warning signs make the [mental] illness inherently more suspect, as many believe it could easily, and conveniently, be faked.")

148. In disparate treatment cases, the need to disclose may be more dependent on the egregiousness of the employer's behavior than the severity of the plaintiff's impairment. In "regarded as" cases, there may be no impairment, severe or otherwise, to disclose. See *supra* note 99.

149. Owen, *supra* note 9, at 173. At least one national survey suggests that 86.6% of the professionals and managers with psychiatric conditions disclose their conditions while employed. Marsha Langer Ellison et al., *Patterns and Correlates of Workplace Disclosure Among Professionals and Managers with Psychiatric Conditions*, 18 J. VOCATIONAL REHABILITATION 3, 7 (2003). One small qualitative study, however, recently found lower rates of disclosure among people with psychiatric disorders generally. See Susan G. Goldberg et al., *The Disclosure Conundrum: How People With Psychiatric Disabilities Navigate Employment*, 11 PSYCHOL. PUB. POL'Y & L. 463, 488 (2005) ("The high rate of disclosure [in Ellison et. al's

strength of this theory.

B. *The Problem of Selection*

An alternate explanation for the study's results may lie in the source from which the sample was constructed. As detailed above, the sample consists of published and unpublished decisions that were decided during the selected time periods and were available in Westlaw and LexisNexis. Significant evidence suggests, however, that litigated claims do not reflect a representative sample of the entire body of disputes; the vast majority of disputes are settled before ever going to trial.¹⁵⁰ It may be that the study's reliance on litigated claims inadvertently masks the increased difficulty plaintiffs with psychiatric impairments actually experience in establishing coverage under the ADA.

Building upon economic theories of suit and settlement,¹⁵¹ Priest and Klein have proposed that claims with quality that deviate much from the decision standard, above or below, will naturally settle.¹⁵² Generally counsel will accurately assess the value of very weak and very strong claims, which are dropped or directed towards non-judicial resolution. The remaining litigated claims would be only the close calls; so close, in fact, that judgments would be about evenly split between the two sides, and the likelihood of success would tend towards 50%.¹⁵³

study] may be due to the higher proportion of participants in [that] study who worked in the field of mental health (40%) and for whom disclosure may have been a necessity.”)

150. See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1-6 (1984).

Virtually all systematic knowledge of the legal system derives from studies of appellate cases. Appellate cases, of course, provide the most direct view of doctrinal developments in the law. . . . But this doctrinal information discloses very little about how legal rules affect the behavior of those subject to them or affect the generation of legal disputes themselves.

Id. at 1. Trial occurs only if $P_p - P_d > (C - S) / J$ where P_p is the plaintiff's estimated probability of success, P_d is the defendant's estimated probability of success, C is the parties' collective trial costs, S is the parties' collective settlement costs, and J is the prospective judgment upon success. Joel Waldfogel, *Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation*, 41 J.L. & ECON. 451, 453-55 (1998).

151. See generally, John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

152. See Priest & Klein, *supra* note 150, at 4-5.

153. *Id.* (“[W]here the gains or losses from litigation are equal to the parties, the individual maximizing decisions of the parties will create a strong bias toward a rate of success for plaintiffs at trial or appellants at appeal of 50 percent regardless of the substantive standard of law.”); Waldfogel, *supra* note 157, at 454.

In this model, settlement acts as a two-sided filter on the population of filed cases. If a case has true quality far above or below the decision standard, it is unlikely that the parties

Clearly, the predicted 50% split is not ordinarily observed in empirical analysis of litigation, nor is it the result found in this Article. Scholars have offered a number of explanations for this divergence, including differences in stakes between the parties¹⁵⁴ and asymmetric information,¹⁵⁵ both of which could predict plaintiff success rates less than 50%. The key point, however, is that holding costs and prospective judgments constant,¹⁵⁶ cases would be expected to converge to the same likelihood of success even if the decision

will disagree sharply about the plaintiff's prospects at trial. The cases most likely to go to trial are those with true quality near the decision standard, giving rise to the tendency toward 50% plaintiff victories at trial. As the degree of error in parties' case quality estimates declines, or if the relative gains from trade . . . rise, the trial filter becomes finer. With more accurate estimates of case quality, higher trial costs, or smaller judgments, only cases closer to the decision standard go to trial, and the ensuing plaintiff win rates at trial converge to 50%.

Id.

154. Priest & Klein, *supra* note 150, at 26. When there are differences in stakes, as in the case when the defendant has greater precedential stake than does the plaintiff, differences in likelihoods of success at trial may result. "As a consequence, relatively more disputes with likely plaintiff [outcomes] will be settled and relatively more disputes with likely defendant [outcomes] will be litigated. Observing only litigated cases, defendant verdicts will be greater than 50%." *Id.*

155. Information asymmetry is based on the idea that one party has more information (e.g., knows more about what actually happened, has more experience with this type of litigation, or has more experienced counsel) about the likely outcome of the trial. See generally Robert H. Gertner, *Asymmetric Information, Uncertainty, and Selection Bias in Litigation*, 1993 U. CHI. L. SCH. ROUNDTABLE 75; Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187 (1993); Waldfogal, *supra* note 150 at 452.

In the [asymmetric information] theory one party knows the probability that the plaintiff will win at trial, while the other party knows only the distribution of plaintiff victory probabilities. When the defendant is better informed, the (uninformed) plaintiff makes a settlement offer, and it is accepted by informed defendants who face a relatively high expected liability at trial. The defendants proceeding to trial, on the other hand, are those who correctly expect to win. The selection of cases for trial is thus one-sided, and the plaintiff win rate at trial is systematically below the fraction of plaintiff winners in the filed pool.

Id.

156. The decision to bring a case depends on the relationship of the predicted likelihood of success to costs and prospective judgments. For the plaintiff,

$$E(C) = P_p(J_p - C_p) + (1 - P_p)(-C_p)$$

where $E(C)$ is the expected value of litigating the case, P_p is the predicted likelihood of success, J_p is the prospective judgment, and C_p is litigation costs. Setting $E(C)$ to zero assuming that the plaintiff will litigate any case with a positive expected value,

$$P = C_p / J_p .$$

standards were not the same.¹⁵⁷ Thus, even if judges apply a more difficult threshold to claims alleging mental impairments, such heightened scrutiny may have no effect at all on the claims' likelihood of success.

An analogy familiar to law professors may help to illuminate this hypothesis. Suppose that, facing one hundred exams to grade, the goal is simply to sort them into two groups: those that earn a B or above and those that earn a C or below. Most papers will clearly belong in one group without much consideration. These papers are analogous to the cases that settle. Only a handful of papers close to the dividing line between the two grades will need more exacting scrutiny. These papers, analogous to litigated cases, are likely to be very close to the professor's dividing line between grades, or in law and economics parlance, the decision standard. It is plausible to assume that of this close group, roughly half the papers will earn B's and half C's.

Assume now, however, that the professor wishes to divide the papers between those that earn A's and those that earn B's and below, thus applying a heightened decision standard. The process is largely the same in that there are clear A's, clear "not-A's," and a small group of papers that need more attention to decide. These papers similarly cluster around the new standard. If close enough, approximately one-half of these will successfully earn A's and the other half will end up in the less desirable stack. Moving the decision standard higher for this group of papers should have no effect on the likelihood that a paper from the close scrutiny group will end up in the top stack as opposed to the lower stack.

Applying these theories to the current research findings, it would be reasonable to expect that in cases when the issue of disability or qualification is clear, these issues may not be disputed (a result occasionally seen when constructing the sample) and this fact may impact the appraisal of the overall value of the case. Given that the defendant either had a larger stake in the outcome, which might be the case when precedent is established in a particular workplace, or enjoyed an informational advantage, which would be a reasonable expectation given that many defendants are ADA repeat players,¹⁵⁸ the success rate for plaintiffs would converge on something less than half, such as the roughly 25% found here.

157. Priest & Klein, *supra* note 150, at 17 ("[D]isputes lying close to the decision standard are more likely to be litigated than disputes lying far from the decision standard. . . . the proportion of plaintiff victories in litigated disputes will approach 50 percent regardless of the position of the decision standard with respect to the underlying distribution of disputes.").

158. Indeed, the low success rate among ADA plaintiffs maybe attributed to a defense bar that significantly out-lawyers the plaintiff bar. See generally Jefferey A. Van Detta & Dan R. Gallipeau, *Judges and Juries: Why are so Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. LITIG. 505 (2000) (arguing that many ADA plaintiffs do not survive summary judgment due to poor lawyering); Wendy Wilkinson, *Judicially Crafted Barriers to Bringing Suit Under the Americans with Disabilities Act*, 38 S. TEX. L. REV. 907 (1997) (arguing that many ADA cases that do not survive summary judgment have been poorly pleaded).

Most importantly, assuming that the cost of litigating a mental disability case is approximately equal to the cost of litigating a physical disability case, and assuming that the prospective judgments in the two cases are roughly the same, which is reasonable given that damages in both case types would be based primarily on similar employment-related factors, the fact that a mental disability case may have a decision standard that is more arduous than that of a physical disability case would not affect the likelihood of success.¹⁵⁹ The difference in decision standards would affect the number of each type of case litigated. Given a more difficult decision standard for establishing disability and qualification in mental disability cases, plaintiffs and their counsel would bring higher quality cases as compared to physical disability case in order to meet this elevated standard. Returning to the exam analogy, while the success rates in the close scrutiny group related to the A's/not-A's standard may be quite similar to the close scrutiny group related to the B's-and-above/C's-and-below standard, one ordinarily would find that there are significantly fewer A's/not-A's close calls as compared to B's-and-above/C's-and-below close calls precisely because the standard is higher. Similarly, fewer mental disability cases would be brought than physical disability cases if the standard were higher. That is exactly what is found in this study.¹⁶⁰

This theory also suggests some opportunities for further research. Three factors require further investigation to be confident that selection bias explains the results of the study. Validating the equivalence of the selection models requires showing that the costs of litigating a mental disability case are approximately the same as those for a physical disability case, and that the prospective judgments in the two types of cases are roughly equal. In addition, it would be helpful to find some evidence that the nature and prevalence of the discrimination that is the source of the disputes and the distribution of potential cases is comparable for the two types of cases.

V. BRIDGING THE GAP: ALLEVIATING THE STIGMA OF MENTAL ILLNESS

The continuing impact of mental illness stigma on a plaintiff's ability to establish threshold coverage under the ADA is unclear in this study. The comparatively similar success rates between plaintiffs with physical impairments and those with mental impairments may suggest that stigma plays less of a role in judicial decisionmaking than hypothesized by scholars. Alternatively, it may reflect the high degree of risk attached to the disclosure

159. What influences the particular outcomes of litigated cases is not the decision standard, but the difference in the plaintiff's and defendant's estimation of the quality of a given case vis-à-vis the decision standard. *See supra* note 150 and accompanying text. Those cases close to the higher mental disability decision standard would be influenced in the same way by divergent expectations and asymmetrical information as those case close to the lower physical disability decision standard; they would converge on the same success rate.

160. Of 131 claims considered, only 28 claimed a mental disability.

of psychiatric disorders in the workplace, bias in the sample tested, or some other subtle form of stigma. As identified throughout this Article, further research is necessary to test which conclusion is likely to best explain what is actually happening in the litigation process.

More immediate insight is gained from the disparate rationales offered by courts in denying class membership to physically and mentally impaired plaintiffs. The ability of plaintiffs with psychiatric disorders to establish a protected disability at least as readily as, if not more readily than, plaintiffs with physical impairments suggests that judges do not routinely endorse the stereotype that mental illness is easily faked, and that most who pursue such claims are malingerers. The relatively high number of plaintiffs with psychiatric disorders in the sample who failed to establish that they are qualified, however, seems to reflect the continuing belief that mental illness automatically renders individuals incompetent and incapable of performing in the workplace. Whether these failure rates also reflect continuing concerns with the dangerousness of group members or beliefs about their morally-defective character remains uncertain.

In either case, such results suggest that mental health advocates may be well advised to direct public education efforts toward changing attitudes about the “normalcy” and competence of group members rather than toward establishing mental illness as a legitimate health problem. The implications for litigants may be more complicated. One could argue that advocates for individuals with psychiatric disorders would do well to focus proportionately more attention on the high threshold applied to the qualified requirement than on the difficulty of establishing a cognizable disability under the statute. The inter-relatedness between these two elements, however, belies this approach. As scholars have noted, plaintiffs seeking the ADA’s protection are given the herculean task of establishing a substantially-limiting impairment while at the same time demonstrating sufficient qualifications for the employment position.¹⁶¹ This catch-22 has become more profound as a result of Supreme Court decisions raising the bar on the definition of disability.¹⁶² It may be that the only effective way to resolve this tension is to change the statutory definition of disability altogether.¹⁶³ Given the lack of Congressional reaction

161. See, e.g., Hensel, *supra* note 16, at 1188.

162. See, e.g., Sutton, 527 U.S. at 482.

163. See, e.g., Chai Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 162 (2000) (proposing legislative changes to the ADA, including “amend[ing] the definition of disability to mean a physical or mental impairment.”).

to the Supreme Court decisions, however, such action seems unlikely at best for the foreseeable future.

In the final analysis, more empirical research is needed to understand the ways in which mental illness stigma may influence litigation outcomes under the ADA. Armed with such information, plaintiffs with psychiatric disorders will more readily secure the full and equal protection that the ADA was intended to offer to all people with disabilities.