Diagnostic Inflation for the People

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I. INTRODUCTION

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

Despite this apparent folk wisdom, workers’ compensation systems in this country have nevertheless had to grapple with the problem of mental health injuries that “arise out of and in the course of employment,” and to decide whether or not to treat these injuries like other work injuries. In some cases the mental disorder arises from a discrete traumatic event, like when a convenience store clerk is held up at gunpoint and must deal with the resulting post-traumatic stress disorder. In others, sometimes called ‘pure stress’ claims, the cause is cumulative: repeated exposure to stressful or traumatic conditions in a work environment.

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1 Associate Attorney, Ashcraft & Gerel, , Washington D.C.; Duke University School of Law, J.D. 2010; Duke University, M.A. in Philosophy, 2010; University of Texas at Austin, B.A. 2006. This Article reflects the views of the author alone and not necessarily those of his employer. I thank Eugénie Montague and Sandeep Vaheesan for their helpful comments.
2 This is a generic phrase found in most workers’ compensation systems. See, e.g., 1 A. Larson, Arthur, §§ 3-1 through 3-9 (2006).
The present essay is an endorsement of mental health injuries, and in particular of pure stress claims. Psychiatry and psychology are medical disciplines which should be accorded the same respect as orthopedics or cardiology. “Injury to the mind” is as real as—and sometimes more painful—than “injury to the body.” Accordingly, such injuries should be governed by the time-honored principles of workers’ compensation: that injured employees should receive compensation for time off work, and that they should receive all necessary medical treatment for their injury, regardless of fault.

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

Since the question of mental injuries is bound up with the question of how miserable
work should be, I end with a reflection on workplace circumstances that promote or hinder
happiness and misery. U.S. popular media and culture are already actively discussing this
question in the context of white-collar workplaces like Google, which advertises programs which
claim to make its employees’ lives incomparably more pleasant. Fairness demands that proposed
models for worker wellbeing be available to workers in lower tier jobs. A fair handling of mental
health injuries will help our society make steps in this direction.

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

This essay is in part a call for change “from within the temple”—an appeal to workers’
compensation’s founding principles, and a critical examination that concludes that the laws in
many jurisdictions fail to follow these principles in cases of mental injury. These systems are failing to adhere to the foundation of worker-employer compromise that lies at the heart of workers’ compensation, and their justifications for deviating do not stand up to scrutiny.

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

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

II. A CASE IN BRIEF FOR MENTAL INJURY WORKERS’ COMPENSATION CLAIMS
Workers’ compensation is a no-fault system for providing economic and medical benefits to workers with medical problems that arise out of and in the course of their employment. Although systems vary from one state to another, there are some elements common to virtually all jurisdictions in the United States.4

A first core principle is that workers’ compensation is a no-fault system. In other words, the worker need not show employer negligence, and indeed, the worker can herself be negligent in causing the injury and still recover.5 Second, workers’ compensation is an exclusive remedy, meaning it cannot be coupled with a lawsuit against the employer. The attractiveness of this system to employers is obvious: the benefits of workers’ compensation are restricted in ways that limit recovery considerably in comparison to a traditional suit for negligence. These two elements are historically linked as a compromise between capital and labor, as the absence of a fault requirement benefits the worker, while the immunity of the employer from negligence suits for injury to employees limits employer exposure to high-level damages.

A third noteworthy common element of the workers’ compensation systems discussed here is that in general, aggravations constitute new injuries.7 Even a worker who had back

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4 In this, as in its love of executions and its groundless chauvinism, Texas is exceptional. See Texas Department of Insurance website, accessed on October 10, 2015 (“In Texas private employers can choose whether or not to carry workers' compensation insurance coverage.”) See also: http://www.tdi.texas.gov/reports/wcreg/nonsub93.html. Oklahoma has recently made changes in the direction of abolishing workers’ compensation as well. Ellis, Randy, Oklahoma Supreme Court upholds new workers' compensation law, The Daily Oklahoman, Dec. 17, 2013, accessed on October 10, 2015 at http://newsok.com/oklahoma-supreme-court-upholds-new-workers-compensation-law/article/3915151. ProPublica has reported on how “reforms” in Oklahoma, as well as less fundamental changes in other states, have harmed injured workers: https://www.propublica.org/article/workers-compensation-injured-workers-share-stories-of-harm


7 See, e.g., Bath Iron Works Corp. v Fields, 599 F.3d 47, 53 (1st Cir. 2010). (Longshore case) (“At the first stage, the claimant must make out a prima facie case by showing (1) that he suffered physical harm and (2) that a workplace accident or workplace conditions could have caused, aggravated, or accelerated the harm. [citing Bath Iron Works Corp. v. Preston, 380 F.3d 597, 605 (1st Cir. 2004); Am. Stevedoring Ltd. v. Marinelli, 248 F.3d 54, 64-65 (2d Cir.2001)]”); McCamey v. DOES, 947 A.2d at 1197 (D.C. case) (“The aggravation rule is an obvious example of meeting the humanitarian nature of the Act. “It is well-settled that ‘an aggravation of a preexisting condition may
surgery two weeks before can have a wholly new injury claim if a work incident causes the back to become worse. Some jurisdictions allow awards to be reduced in these circumstances in a variety of ways, but the predominant rule is at least to accept that the aggravation is an injury. In fact, this rule is *not* distinct from the traditional rule in tort law, but the principle it represents is often disregarded in the case of work-related mental-mental injuries, and therefore it is of considerable significance here.

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

The second point in support of mental injury claims is that psychiatry is an accepted medical discipline, taught in medical schools and practiced by authorized physicians. If the

[also] constitute a compensable accidental injury under the Act.”” King, supra, 742 A.2d at 468 (quoting Ferreira, supra, 531 A.2d at 660)”) (internal quotation omitted).


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


13 Of course, psychologists are *not* medical doctors as such, but their evidence is still expert testimony on effectively the same subject matter. Their evidence is generally treated analogously. For instance, California’s Qualified Medical Evaluator panels offer either discipline as a possible “physician” specialty. D.C.’s seminal *Ramey* case, described a change
medical establishment has not found scientific basis to exclude this practice, it would ill suit judges and legislators to do so. How could a judge or legislator decide by fiat that universities and medical boards are all in error in recognizing and giving degrees and accreditations in the realm of mental health? This is particularly absurd when the literature on the results of treatment suggests that psychiatry has a respectable record in addressing a number of problems it is intended to treat—comparable to many other, supposedly less controversial fields of medicine. \(^{14}\) 

The third point to emphasize in introducing work-related mental injuries is that the concept is intuitive. \(^{15}\) That is, even if some portion of “common sense” sneers at work stress as a sign of personal failing, it is also true that people regularly speak of social causes’ giving rise to “craziness” or “breaking people.” While there is an obvious bias in favor of crediting these causes when they are “serious,” like torture, as opposed to “frivolous,” like getting yelled at, this dividing line is not written in stone. Moreover, it is hard to argue that certain events do not impact some people more than others. In sum, the fictitious but useful “reasonable man” to

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\(^{14}\) Leucht, Stefan. *Putting the Efficacy of Psychiatric and General Medicine Medication into Perspective: Review of Meta-Analyses*, British J. of Psychiatry 200: 97-106; DOI: 10.1192/bjp.bp.111.096594. Available at [http://bjp.rcpsych.org/content/200/2/97](http://bjp.rcpsych.org/content/200/2/97). This is a meta-study comparing psychiatric drugs’ overall success in numerous studies to the results yielded by other drugs in other fields. Naturally, any test for “successful treatment” presupposes the validity of the initial diagnosis, the criteria for recognizing a condition, and the methods of distinguishing the condition’s presence from its absence. But the fact that patients wind up reporting fewer clinical signs after treatment cannot be easily gainsaid as evidence of at least some form of success. If anything, one who was skeptical of the validity of the initial diagnosis should predict a lack of “successful treatment”—yet the studies suggest otherwise. See below, Sec. III.A. The Subjectivity of Mental Illness, for a further discussion.

\(^{15}\) “Of course, some philosophers think that something’s having intuitive content is very inconclusive evidence in favor of it. I think it is very heavy evidence in favor of anything, myself. I really don’t know, in a way, what more conclusive evidence one can have about anything, ultimately speaking.” Kripke, Saul, *Naming and Necessity*, p. 42 (Harvard University Press, 1980).
whom law so regularly appeals has little trouble understanding the concept of a mental stress work injury: to cite one example, just as a construction worker may tear her rotator cuff lifting a board, so too a clerical worker may suffer trauma with resulting depression and post-traumatic stress from supervisor sexual harassment. This is not an esoteric idea.

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

III. BACKGROUND ON DIFFERENT WORKERS’ COMPENSATION SYSTEMS AND THEIR APPROACHES TO MENTAL INJURIES

Throughout this article, I will point to various approaches to the problem of mental work injury, some of them now defunct, others still in operation. Rather than lay out the particulars of each system one after another, treatise-style, I will use particular examples from each system to illustrate the various points that arise in the article. Nevertheless, by way of introduction it will be helpful to give an overview. The four systems discussed fall on a range, with California’s presenting the most obstacles to stress claims, D.C.’s current system treating mental health in a
manner analogous to physical health, and the Longshore Act and old D.C. system’s falling in an intermediate place.\textsuperscript{16}

\textbf{A. CALIFORNIA}

Of the systems discussed in this essay, California’s is the one that is most hostile to mental-mental work injuries as distinct from physical injuries. After a time period in which California acquired a reputation—whether deserved or not—of being a hotbed of bogus stress claims, the legislature adopted a series of intense restrictions in the early 1990s on mental health work injuries. An injured worker must show that the “actual events of employment” were the \textit{predominant} cause of the condition. In this context, “actual events” is a term of art, which excludes things that in conventional understanding would be both actual and events—for instance, things that occur due to a worker’s error. The worker must also demonstrate that “legitimate personnel decisions” caused no more than 35-40\% of the injury. Additionally, absent a “sudden and extraordinary event” (like a shooting at the workplace, for instance), a claimant cannot file a mental health claim in the first six months of employment.\textsuperscript{17}

These obstacles are striking to anyone familiar with workers’ compensation, insofar as they erode old protections by establishing a fault criterion, and by disqualifying an undisputed workplace injury when it is suffered by a worker who has had the misfortune of previously having suffered a similar harm outside of work. Equally striking, however, is the brazenness of

\textsuperscript{16} These systems were also chosen because I am familiar with them. Nevertheless, the criteria they present are also found in other jurisdictions; they represent broader trends. See, e.g., Larson, Arthur, \textit{Mental and Nervous Injury in Workmen’s Compensation}, Vand. L. Rev. Vol. 23, No. 6 (Nov. 1970), \textit{passim}.

\textsuperscript{17} The sources of these rules are varied, and the best articulation that an event that is an employee’s fault is not an “actual event of employment” is found at \textit{Verga v. Workers’ Comp. Appeals Bd.}, 159 Cal.App.4th 174 (Cal. Ct. App. 3\textsuperscript{rd} Dist. 2008). The bulk of the rules are codified at Cal. Labor Code Sec. 3208.3, which is quoted in full at the end of this essay, Appendix A.
the official reasons for these restrictions: among the usual justifications, the authorities simply state that their goal is to save employers money. Traditionally, this is not supposed to happen in law, which relies on the ritual of stating generally applicable justifications for its conclusions.

The critical legal theorist Roberto Unger has a memorable passage in which he discusses the \textit{ne plus ultra} of legal realist interpretation of “legislative intent”: “[I]f a particular statute represented a [legislative] victory of sheep-herders over cattlemen, it would be applied, strategically, [by courts] to advance the shepherders’ aims and to confirm the cattlemen’s defeat.”\footnote{Roberto Unger, \textit{The Critical Legal Studies Movement}, p. 3. Cambridge, MA, 1986. Available at http://www.law.harvard.edu/faculty/unger/english/pdfs/movemnt1.pdf} He was, of course, engaged in philosophical inquiry and fantasy, entertaining the possibility that a liberal interpreter of laws could dispense entirely with the notion that law embodies an objective system reflecting moral order by simply interpreting laws in light of the actual interests behind them.\footnote{Some law and economics scholars and judges sometimes approach this amoral ideal, but even in these instances they usually appeal to some universal-sounding ideal, like “utility,” albeit on the understanding that not every citizen, let alone every “person,” has the same number of utiles to gain or lose.} And yet, in the case of California work stress, we find a judge approximating this vision of values-free hyperrealist adjudication, saying that the legislature enacted Sec. 3208.3(b)(1) not only to fight against fraudulent stress claims, but additionally to “reduce the costs of workers’ compensation coverage.”\footnote{Sakotas \textit{v} WCAB, 80 Cal. App. 4th 262, 272-73 (Cal. Ct. App. 2000). The opinion does (to its credit?) go on to blend the two factors indiscriminately, stating: “Certainly, reducing the costs of workers’ compensation coverage by eliminating the number of successful fraudulent claims is a legitimate purpose.” But the earlier passage recognizes the obvious fact that fighting fraud and saving money are conceptually distinct, even if the latter may flow from the former.}

The case goes on to quote then-

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\item In contrast to this peculiar judicial solicitude for business, sometimes offered without any attempt at justification, the California courts since the reform have regularly shown an equanimity worthy of Pontius Pilate in addressing workers’ suffering. See, for example, \textit{Lockheed Martin v. WCAB}, 96 Cal. App. 4th 1237, 1248 (Cal. App. 1 Dist., 2002): “Finally, the fact that the statute may have a “devastating effect” on some honest claimants does not show the Legislature did not mean what it said.” This despite the fact that “[i]n general, the Legislature has directed us to construe workers’ compensation laws ‘liberally ... with the purpose of extending their benefits for the protection of persons injured in the course of their employment.’” \textit{Id.} at 1237, citing Cal. Labor Code § 3202.
\item Some would argue that it is wrong to fault the judges for interpreting the law according to the legislature’s intent—which is their duty. My aim is to condemn the laws, and not the judges as individuals—at any rate, not to condemn them more than the other citizens who allow these injustices to persist: that is, all of us.
\end{itemize}
Governor Wilson, who in addition to denouncing alleged fraud, stated that the legal reform would save money for California businesses.

**B. DISTRICT OF COLUMBIA PRIVATE SECTOR WORKERS’ COMPENSATION**

The second system that will be considered here is the private sector workers’ compensation of the District of Columbia, which lies on the other end of the spectrum from California. It officially treats mental-mental injuries the same as physical injuries, without consideration of fault or predisposition. Even if a person is predisposed to mental illness, the law cannot discriminate against her on that account. If the “events” of employment were imaginary or hallucinatory, of course, there would be no claim—the same as in physical injuries. However, the law, in mental as in physical cases, does not inquire into the fault of the claimant, the magnitude of the catalyst, or the legitimacy of any underlying policy.

The former private sector system of the District of Columbia represented a middle ground between the generosity of current D.C. private sector system and the miserliness of California. The guiding principle was the “objective standard” for evaluating workplace stressors. While this objective standard is defunct, the case law elaborating it presents some errors that illustrate the

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22 D.C. has separate systems for private employers and the District government. See D.C. Code Sec. 1-623 et seq (public sector) and D.C. Code Sec. 32-1501 et seq. (private sector). The change in laws initially applied to both public and private, *Ramey v DOES*, 950 A.2d 33 (D.C. 2008), but the public sector laws since abolished mental injury entirely. See 2012 District of Columbia Laws 19-168 (Act 19-385), codified at D.C. Code Sec. 1-623.02(b): “(b) No claim shall be allowed under this chapter for mental stress or an emotional condition or disease resulting from a reaction to the work environment or to an action taken or proposed by the employing agency involving the following: (1) Employee's work performance, assignments, or duties; (2) Promotion or denial of promotion; (3) Adverse personnel action; (4) Transfer; (5) Retrenchment or dismissal; or (6) Provision of employment benefits.”

problems with treating mental injuries differently.  \(^{25}\) Somewhat confusingly, this objective standard states that “the claimant must show that actual conditions of employment, as determined by an objective standard and not merely the claimant’s subjective perception of his working conditions, were the cause of his emotional injury”—and then clarifies, by redefining “objective” as something completely different: “The objective standard is satisfied where the claimant shows that the actual working conditions could have caused similar emotional injury in a person who was not significantly predisposed to such injury.”  \(^{26}\) This last element is the central feature: a fragile person does not get compensated for mental illness unless the catalyst was something that would induce mental illness in a “normal” person. This is true no matter how real the catalyst is. It is as though a five-foot tall, 100-pound worker could not get compensated for a lifting injury to her back unless she were lifting something “objectively heavy” that would also have harmed a larger person’s back.

**C. LONGSHORE AND HARBOR WORKERS’ COMPENSATION ACT**

Finally, I will note in passing the most recent standard found under the federal Longshore and Harbor Workers’ Compensation Act, which acted as a model for many states’ workers’ compensation systems, and which has a position on mental injuries that stands between the extremes of D.C. and California.  \(^{27}\) While the Longshore system has a less systemic collection of barriers than California, it has nevertheless obstructed a worker’s right to recover, stating that “legitimate” personnel actions and “general workplace conditions” cannot give rise to claims.  \(^{28}\) Remarkably, case law has held that “the distinction . . . between ‘legitimate’ or ‘illegitimate’

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\(^{26}\) *Spartin v DOES*, 584 A2d 564, 568 (DC 1990) (quoting *Dailey v. 3M Co. and Northwest Nat’l Ins. Co.*, H & AS No. 85-259 (Final Compensation Order May 19, 1988)). The standard is sometimes referred to as “the Dailey standard.”

\(^{27}\) 33 U.S.C. Sec. 901 et seq.

\(^{28}\) *Marino*, 20 BRBS 166 (1988); *Dir, OWCP v Pepco*, 607 F.2d 1378 (D.C. Cir. 1978).
personnel actions is not about fault” but rather “about whether the employer’s actions created an environment of poor working conditions to trigger psychological injuries.”

It is unclear what that means, but it is evidently an attempt to maintain that this rule does not affect the Longshore workers’ compensation system’s status as a no-fault remedy, notwithstanding the use of the normative term “legitimate.” The cases are quite solicitous of employer’s right to make decisions without falling into the trap of paying stress injuries—without any similar concern for the worker who falls into a diagnosable mental illness. The Longshore system presents in its clearest form the challenge to employer control that allowing claims for workplace stress presents.

IV. THE ARGUMENTS FOR A DOUBLE STANDARD

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

A. A PRELIMINARY NOTE ON THE WEAKEST ARGUMENTS AGAINST ACCEPTING MENTAL INJURIES

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

29 Pedroza v BRB (National Steel), 624 F.3d 926 (9th Cir. 2009 [amended 2010])
30 McGray Constr. Co. v Dir., OWCP, 181 F.3d 1008 (9th Cir. 1999).
For instance, as noted above, according to the conventions of legal reasoning, the fact that a rule benefits one group of people is not really a reason for adopting it. If California legislators and judges are opposed to stress claims simply because denying them saves employers money, they are being perfectly logical, and it is hard to see what might change their minds.\(^{31}\) Denying claims does usually save money. To illustrate from the other side, I would not bother arguing for expanding psychiatric claims simply because it would help workers and hurt capital, and if I did, no one would be able to refute me.\(^{32}\) None of this is to say that business expenses are not part of the calculation, but rather that, in and of themselves, these concerns are not reasons for reform. If the goal were simply saving businesses money one could achieve that by abolishing workers’ compensation entirely, or by establishing TARP-style subsidies for all failing companies. And if helping business really were the goal, there would be no argument for opposing such corporate welfare measures.

Two other arguments that come up in the case law, though slightly less brazen, are also worthy of dismissing out of hand. The first is the allegation that liberal standards for mental injuries would lead to a proliferation of claims.\(^{33}\) While this would certainly be an issue if the claims were fraudulent or not meritorious—which ideas are discussed below—the simple fact that they are numerous is not a reason to discount them. One might, with similar logic, argue that

\(^{31}\) As Brazil’s former Secretary of the Environment José Lutzenberger wrote to U.S. economist Larry Summers about the latter’s economic argument for dumping waste in poorer countries: “Your reasoning is perfectly logical but totally insane. . . .” (quoted in Ackerman, Frank, Poisoned for Pennies: The Economics of Toxics and Precaution, p. 21 (Washington: Island Press, 2008)).

\(^{32}\) As a personal aside, let it be noted that I would in fact support such a proposal for this very reason, but I would not bother arguing for it, as it would not persuade anyone who was not already persuaded.

\(^{33}\) See, e.g., Pac. Gas & Electric v WCAB, 8 Cal. Rptr.3d 467, 473 (Cal. First Distr. Ct. App. 2004) (“The Legislature made quite clear that it intended to limit claims for psychiatric benefits due to their proliferation and their potential for fraud and abuse” [emphasis in original]). The proliferation here is seen as distinct from potential for fraud and abuse, and to be a legitimate reason for limitation in its own right.
lumberjacks should be denied death benefits because they die on the job more frequently than other professions.\textsuperscript{34}

A second argument worth dismissing also comes from California’s \textit{Sakotas} case, as well several others, such as \textit{Hansen v. WCAB}.\textsuperscript{35} California defends its denial of psychiatric injuries to workers who have been employed under six months on the grounds that workers’ compensation is not a “fundamental right.”\textsuperscript{36} These decision are remarkable in that the California courts justify these restrictions by noting that workers’ compensation’s exclusive remedy provision—the prohibition on suing one’s employer—is not, \textit{in general}, a violation of fundamental rights: it is not a violation of your rights that you cannot sue your employer for a workplace injury, as you can direct your concerns through the workers’ compensation system.\textsuperscript{37} However, the courts apply the six-month bar on mental injury claims \textit{even in the context} in which personal injury remedies are not allowed.\textsuperscript{38} In effect, this ruling makes recently employed workers experiencing mental injury a special class of people with no right to pursue \textit{any kind} of remedy against their employers—neither workers’ compensation nor traditional tort. The restriction of workers’ compensation rights in a context where workers \textit{are} allowed to sue their employers is an intriguing prospect beyond the scope of the present essay—but California wants to take away \textit{both} routes for remedy. What is certain here is that the \textit{Sakotas} and \textit{Hansen} cases’ justification for this special exclusion of mental injury claims leans on a bruised reed and merits little serious consideration.

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\footnote{35} 18 Cal.App.4th 1179 (Cal Ct. App. 1\textsuperscript{st} Distr. 1993).
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A. EMPLOYER CONTROL

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

A legitimate personnel action or termination is not the type of activity intended to give rise to a worker's compensation claim. To hold otherwise would unfairly hinder employer in making legitimate personnel decisions and in conducting its business. Employer must be able to make decisions regarding layoffs without the concern that it will involve workmen's compensation remedies.39

The case also notes the prospect that allowing such a ‘penalty’ on employers for disciplining their workers may lead them to terminate, rather than manage, their employees—though it does not explain why such more drastic action would not result in more compensation claims, inasmuch as being fired is likely to be more stressful than being disciplined.

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

immunity for employers in the realm of stress- or trauma-inducing personnel decisions. There is little pretense that this is anything other than a boon to the employer at the employees’ expense.

One may question the analogous character of the employer’s right to order workers to lift heavy things and the employer’s right to fire workers for misdeeds. Termination, in addition to being universally stressful, by definition takes away a worker’s source of revenue and breaks any allegiance to the old employer that might encourage fair dealing. To allow a worker to claim a work injury in these circumstances when every incentive favors fraud does, indeed, “set a trap for the unwary employer.”

There are several responses to the argument that stress claims are creating a “trap” for employers. The first response to this is that there are means to test for fraud in the case of any worker injury, and they are comparable in mental and physical injuries: employers are not free of remedies. This is discussed below, in Sec. IV.C. Second, any system of benefits provides incentives for fraud; this fact does not justify an across-the-board ban on claims. And third, providing health and welfare benefits to the fired worker would erode much of the incentive to commit fraud.

This problem of bad incentives is not much different from the situation with regard to physical injuries: consider a low-wage worker without sick leave or short-term disability benefits who tears her rotator cuff playing basketball in her free time. If she successfully commits fraud and states the injury happened at work, she can get her medical bills paid, 2/3 of her wages for her time off work, and possibly a permanent partial disability award. If not, she and whoever depends on her may have to live in penury for at least several weeks simply because of an
accident. The incentive to commit fraud is clear, but the solution of paid medical leave is equally clear in counteracting this incentive.

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

When examined more carefully, however, the “essential functions” argument—and the analogy to the ADA—is specious. For one, workers’ compensation establishes blanket rules for all employers; it is not, like the ADA, a case-specific question about adaptations. A blanket rule would effectively declare the requisite level of mental stability to be an essential function of all jobs, rendering anti-discrimination principles wholly nugatory. For some jobs a particularly high level of emotional fortitude might be an essential function—like a firefighter or emergency room

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40 42 U.S.C. 12111(8).
41 Of course, some states have “second injury funds” which seek to relieve the burden on an employer for an injury suffered by an applicant with a previous disability—in part to encourage employers to hire previously injured applicants. See, e.g., Dierks v Kraft Foods, 2015 WL 4240732 (Miss. Ct. App. West. Dist 2015) (“Section 287.220.1 sets out the law governing when the second injury fund is liable.” Tombaugh v. Treasurer of State, 347 S.W.3d 670, 674 (Mo.App.W.D.2011) (internal quotation omitted). “Where the statute applies, the employer is liable only for the amount of disability caused by the current injury, and the fund is liable in the amount of the increase in disability caused by the synergistic effect of the two injuries.” Id.). There is no good reason these funds could not apply in mental injuries.
42 42 U.S.C. Sec. 12111(8).
doctor, for instance—but those are special cases. Just as importantly, compensation is not a system that creates general rules like the ADA; rather, it is a remedy that arises when certain kinds of injuries occur. Some of these injuries may be foreseeable, but many are not.

Employers are far from powerless in this realm, even with the broadest possible workers’ compensation law of stress claims. Just as the ADA allows employers to discriminate against disabled people when their disabilities limit their capacity to perform essential job functions, employers can do the same with persons known to be too mentally unstable to perform essential functions of their jobs. As a construction company need not hire a wheelchair-bound worker to perform a job with extensive walking and climbing, they also would not be bound to hire a clinically agoraphobic spokesperson or a claustrophobic plumber. This is the core of the “essential functions” accommodation, and it applies to mental disabilities as it does to physical disabilities. However, none of the above accommodations remove the employer’s responsibility to pay compensation if an injury does occur—even if it occurs to someone who was so frail, mentally or physically, that they should not have been doing the job in the first place.

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

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43 See, e.g., Department of Labor’s statement on ADA accommodations for mental disabilities: http://www.dol.gov/odep/pubs/fact/psychiatric.htm
B. THE “ACTUAL EVENTS OF EMPLOYMENT” VERSUS THE ACTUAL EVENTS OF EMPLOYMENT

In the laws of California, any mental injury has to be caused by the “actual events of employment,” with the phrase “actual events” operating as a term of art that excludes things that in plain English would be “actual events of employment,” and not fictions or chimerae. The Longshore Act has a similar category of “general working conditions,” which functions similarly as a term of art, excluding things that to a layperson would surely appear to be part of a worker’s general working conditions. The excluded categories include events for which the employee is to blame, personnel decisions, and general social trends that affect the workplace.

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

Nevertheless, there is a substantive argument present in the notion that general social events that impact the workplace are not “actual events of employment.” California’s PG&E case is instructive. In that case, the applicant was stressed about a slew of things, some of them uncontroversially not work-related, like his father’s death, and others which he claimed were

45 Pedroza v BRB, 624 F.3d 926 (9th Cir. 2009).
46 PG&E v WCAB, 8 Cal. Rptr.3d 467 (Cal. 1st Dist. Ct. App. 2004).
47 Verga, 159 Cal.App.4th at 172. One might suppose anything an applicant “brought upon herself” at work would have to be actual, of employment, and an event.
48 PG&E v WCAB, 8 Cal. Rptr.3d 467 (Cal. 1st Dist. Ct. App. 2004).
actual events of employment, including the transfer of his position to telephone duties, dealing with angry customers, and the prospect of losing his job due to company downsizing.\textsuperscript{49} The court held that while dealing with angry customers on the telephone and being transferred within the company were “actual events of employment,” the fear of future downsizing was not, because it was part of a larger social phenomenon, the financial hardship of his employer, which was not distinctly part of his workplace experience.\textsuperscript{50}

The resulting principles of this reading of the \textit{PG&E} case are somewhat nebulous: if one reads in a newspaper that one’s employer will downsize, it is not work-related, whereas hearing the same news from a co-worker or supervisor may be, because the latter took place in the course of work, even though the stress and its cause are similar in both scenarios. The trauma from a co-worker’s death may give rise to a work injury if it occurs at work, or even if the claimant hears about it at work, but would not do so if the claimant were impacted in the same degree by hearing of it in her free time.

The above reading is only one possible interpretation; one could also argue that \textit{PG&E} stands for broader prohibitions on finding work injuries from stress that arises out of any “general social condition,” wherever the worker hears about the condition. If one does adopt this interpretation, however, the rule would at least have the virtue of being consistent with prevailing rules on physical injuries. In D.C. and California law, for instance, suffering a physical injury from horseplay or violence whose cause is related to employment does give rise to a compensable claim, while suffering from violence at work motivated by other factors does not.\textsuperscript{51} “Actual

\textsuperscript{49} \textit{PG&E v WCAB}, 8 Cal. Rptr.3d 467, 470-71 (Cal. 1\textsuperscript{st} Dist. Ct. App. 2004).
\textsuperscript{50} \textit{PG&E v WCAB}, 8 Cal. Rptr.3d 467, 473-74 (Cal. 1\textsuperscript{st} Dist. Ct. App. 2004).
\textsuperscript{51} \textit{Hodges v WCAB}, 82 Cal. App.3d 894, 900 (Cal. 4\textsuperscript{th} Dist. Ct. App. 1978) (“Injury to a nonparticipating employee resulting from the horseplay of fellow employees is generally compensable”); \textit{Joyner v Sibley Mem. Hosp}, 826 A.2d
events,” when used to mean actual events, and not as a term of art, may be a good or a bad standard, but it is effectively the same standard for physical or mental ailments, in situations where line-drawing is difficult.

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

C. THE LIKELIHOOD OF FRAUD

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

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

One searches the cases and statutes largely in vain for evidence to support this claim of likelihood of fraud. Indeed, the sentence just quoted cites no peer-reviewed psychiatry article,
not even an employer-funded study or medical expert, but rather, another judicial opinion, which itself does not cite any medical study, but only more legislative and judicial declarations on the truthiness of the fact at hand.\textsuperscript{53}

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

Given the sums involved in compensation and litigation, as well as medical expenses more generally, it is unsurprising that some researchers have sought methods to detect fraud. A quick review of the literature finds that efforts to detect fraud in mental illness as opposed to physical illness have more similarities than differences.\textsuperscript{54}

\textsuperscript{53} \textit{Wal-Mart v WCAB (Garcia)}, 112 Cal. App.4\textsuperscript{th} 1435 (Cal. Ct. App. 4\textsuperscript{th} Cir. 2003), citing \textit{Lockheed Martin v. WCAB}, 96 Cal. App. 4\textsuperscript{th} 1237, 1248 (Cal. App. 1 Dist., 2002)

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

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

That is to say, these tests do not unlock some secret of the body that sheds light on possible malingering—as polygraphs, for example, purport to do—but rather rely on survey results, as interpreted by mental health specialists. There are more objective devices to detect

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A curious puzzle that this situation presents is that if we could detect fraud more effectively in one domain or the other, it would still not be clear what the normative import might be. In theory, if we had solid studies showing higher levels of fraud in mental injuries than physical injuries, we might want to raise the bar. On the other hand, the superior ability to detect fraud would warrant lowering the bar, since we would not need to rely on a blanket presumption to weed out fraud: we could get the evidence firsthand. At any rate, I think the indeterminacy of the literature does not strongly support the superiority of one fraud-detection mechanism over the other, so we need not try to resolve this intriguing ethical quandary, at least for the time being.


As an aside, cultural variation presents additional complications (a point noted in DSM-IV, pp. 897-903), particularly in heterogeneous places like D.C. or California. This presents particular problems for the Rogers et al. study, which uses, for reasons unclear, a sample population that is over 98% white. Rogers et al. at 215.
faking in interviews—for instance, a patient who answers questions at a much lower frequency than random must be somewhat aware of the right answer to choose the wrong answer with more than random consistency. These tests are, in that sense, more objective (though even they do not prove conscious deception). However, there is nothing about these statistical analyses of surveys that limits them to mental problems as opposed to physical ones.

Turning to “fraud detection” in the case of physical injuries shows a similar lack of reliable mechanisms. Among the most famous devices for detecting fraud in the case of physical injuries is the set of ‘Waddell’s signs,’ which seek to find false claims to back pain.\(^6\) To some extent, they have more objective criteria to work with, as physical reflexes are fairly well understood: a patient who reports an intensification of low back pain when a doctor pushes on the top of her head is presenting something physically implausible, and therefore not related to an actual back condition.\(^7\) By contrast, it is dubious there is any test of the brain that could be related with such certainty. However, this contrast has limited value, as Waddell’s set of signs are not all so firmly rooted in understanding of the body. One of them, for instance, is called overreacting, and is exactly as it sounds. In other words, it simply substitutes the subjective judgment of the doctor about what is an appropriate reaction for the subjective judgment of the patient on the exact same question.\(^8\) Others involve observation of a patient’s behaving differently when distracted than when knowingly being subject to testing, which while somewhat


\(^7\) Again, the implausibility does not indicate any attempt at conscious deception. Somewhat bizarrely, the common term for these implausible complaints is “nonorganic findings,” which seems to suggest that the human brain is made of silicon.

more grounded than speculation about ‘overreacting,’ is nevertheless ultimately rooted in the
doctor’s perception.63

The similarity of problems faced by fraud detection in both kinds of injuries—which may
surprise some—makes more sense when one considers that doctors seeking to detect fraud are
actually engaged in an inquiry into the psyche of the patient, and not into her physical condition.
That is, the question of fraud is whether or not the patient is lying, and not whether her related
symptoms correlate with what the doctor would expect based on other investigations. Such
discrepancies can have many explanations, including psychosomaticization or medical
ignorance.64 The question of deliberate misrepresentation, however, is one in which an
orthopedist’s view is no better than that of any other amateur observer of human conduct.65

A further complication of the fraud detection business is that parties speaking of fraud
often include symptom magnification or exaggeration as a genus of fraud alongside the purer

63 Jensen, Laura, MD, Nonorganic findings—What are they? British Columbia Medical Journal, Vol. 51, No. 3,
April 2009, page(s) 106 ICBC. Accessed on February 15, 2015 at http://www.bcmj.org/icbc/nonorganic-
findings%E2%80%94what-are-they.

64 The undersigned has seen doctors dismiss complaints based on lack of objective study. There may be debate about
inferring the absence of radiculopathy from negative MRIs of the spine, but the inference that one has no headache
problems from a negative MRI of the brain is not on a particularly strong scientific footing. See, e.g., Lee-Robinson,
Ayse and Aaron Taylor Lee, Clinical and Diagnostic Findings in Patients with Lumbar Radiculopathy and
and Neuroimaging Procedures in Non-Acute Headache (2nd ed.), European Journal of Neurology (Vol. 18, Iss. 3,
Callaghan, Brian C., et al., Headaches and Neuroimaging: High Utilization and Costs Despite Guidelines, JAMA
athttps://archinte.jamanetwork.com/article.aspx?articleid=1835347#ild140004r4. At any rate, neither negative study
suffices to show deliberate misrepresentation.

65 The jury system presupposes that amateur observers are decent judges of credibility, based on instincts and
observation. One wonders how reliable this “common sense” approach is. The present author has discussed this
issue with one professor of U.S. evidence law who argued that consistency and simplicity were the hallmark of
dishonesty, because “truth is messy”—and claimed that this view was “common sense.” By contrast, many
observers, expert and otherwise, seem to believe the very opposite, that contradictions and convolutions indicate

One could, of course, use a psychologist or psychiatrist specialist in detecting malingering even in a case
alleging orthopedic injury. Given courts’ skepticism about polygraphs, there are reasons to doubt such evidence
would admissible under the Daubert standard. See Friedland at 357-61 and 382: “Noted one court, “[t]here is no
proof of special validity of credibility judgments made by psychiatrists””(citing Lester v. Bowen, M.D., 1987 WL
28265, at *2 (N.D. Ill. 1987)).
notion of fraud as complete fabrication. The very concept of *exaggeration*, however, presupposes that there is some objectively appropriate level of complaining, which is doubtful. Rather, the right degree of complaining is entirely context-specific. To illustrate: it is inappropriate to complain to strangers on a city bus about your back pain (though it is sometimes done). By contrast, back pain is something you might mention to co-workers, and you might complain about it regularly when talking to your spouse. Talking to a treating doctor—or a workers’ compensation lawyer, as the case may be—invites still further delving into the character of the pain, its frequency, its location, its intensity, and so on, that may go even further than the complaints voiced to one’s spouse.

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

There is no “right” amount to relate one’s pain; the nature of presentation of symptoms is context-specific. Where on this spectrum would an evaluating doctor lie—that is, how much complaining is appropriate when one is being evaluated rather than treated? What is 6/10 pain as

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opposed to 8/10 pain? Absent answers to these questions speculation about “symptom magnification” is fraught with intractable complications.

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

D. THE SUBJECTIVITY OF MENTAL ILLNESS

Distinct from the rather accusatory allegation of widespread fraud is the more charitable view that while workers may or may not be more likely to lie about suffering mental troubles, the question of mental illness is nevertheless fundamentally more subjective than that of physical

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67 Though this is a contentious question. See U.S. v. Piccinonna, 885 F.2d 1529, 1535 (11th Cir. 1989) (stating that although polygraphs are scientific enough to admit as evidence, it remains the case that "polygraphy is a developing and inexact science, and we continue to believe it inappropriate to allow the admission of polygraph evidence in all situations in which more proven types of expert testimony are allowed"); See also U.S. v Henderson, 409 F.3d 1293, 1301-02 (11th Cir. 2005) (affirming this status for the polygraph).
ailment. Larson, though sympathetic to mental injuries as a core part of workers’ compensation, readily concedes that this problem of line-drawing is a distinct challenge in mental injuries.\textsuperscript{68}

On its face, the argument about subjectivity does not appear to make much of a case against mental injuries as such: the claim that line-drawing is difficult does not provide a reason to refrain from trying. Some physical ailments are more objectively discernible than others, of course: a herniated disc causing nerve impingement may be detected by MRI, while complex regional pain syndrome is not subject to any similar such test.\textsuperscript{69} Nevertheless, this ability to prove is not taken as dispositive in the case of physical injuries, and it is not a very good argument for categorically excluding less from consideration—after all, there was a time not long ago when there were no MRIs, but disc damage was no less real as a result. Nevertheless, some qualitative difference in how one draws the line in the two different domains may provide some justification for treating them differently.

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

Two of the most prominent critical perspectives on mental health as an institution come from points of view as diametrically opposed as can be imagined: Thomas Szasz, who presents an analytic philosophy-inspired tirade against mental health as a negation of individual autonomy, and Michel Foucault, who presents a more obliquely and poetically expressed


\textsuperscript{69}http://www.ninds.nih.gov/disorders/reflex_sympathetic_dystrophy/detail_reflex_sympathetic_dystrophy.htm
institutional-intellectual genealogy of mental health as social category and institution. As both of these thinkers represent serious challenges to mental health, and as they represent outer intellectual reaches that courts and legislatures, due to conservative tendencies, lack of curiosity, and lack of time, would not explore, it is worth including a brief discussion of the basic ideas they presented and why the potential challenges contained therein do not warrant abandonment or radical revision of mental health as expertise.

Thomas Szasz emphasizes that underlying mechanisms of most mental illnesses are not understood in the way that, say, we know a common cold is caused by particular viruses, or impingement on nerve roots in the low back can cause radiculopathy in the legs. By contrast, even the most extreme examples of mental illness, like schizophrenia, are not understood in terms of their mechanism: for all we know, the category “schizophrenia” may not map consistently into any particular brain pattern at all: it would not be surprising if, fifty years from now, “schizophrenia” has been entirely abandoned as a concept and replaced by numerous different classifications. In light of this dearth of evidence, the argument goes, there is no objective basis for the notion that a collection of eccentric or unpleasant behaviors could be understood as qualitatively distinct from other behaviors to a degree sufficient to mark them off as “illnesses,” analogous to physical ailments.


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

72 Szasz, The Myth of Mental Illness, pp. 1-12, 32-37, 49, passim.

73 Szasz, passim; American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 4th Ed. (Washington, D: American Psychiatric Association, 2000), pp. 297-311, esp. 301 (noting the absence of any decisive diagnostic criteria for schizophrenia and describing the clinical signs that are used for diagnosis).
Szasz developed a counter-narrative of these eccentric behaviors that have been classified as illnesses: to the contrary, these are deviant or troubled forms of negotiating ordinary human relations.74 For instance, a desperate individual who had never had her concerns taken seriously except when ill might play at being ill when faced with great psychic stress—and thus would be labeled “hysterical.”75 Whether sympathetic or not, the “somaticization” of unhappiness in such a person would not be the product of some infection of the brain, or even of delusion, properly understood, but rather a performative behavior of the combination of a familiar experience (obtaining consolation when ill) with a familiar desire (desperately wanting consolation).

At day’s end, Szasz’s attack on the concept of mental illness can only be taken as an illuminating philosophical musing on the boundaries of the categories we employ (albeit a musing that holds many pernicious implications if taken as seriously as its author intended76).

Whatever the validity of his contrast between mental and physical health, it does not hold up

74 Szasz, 126-47.
75 Szasz, 126-47. The heavily gendered example of “hysteria” figures prominently in The Myth of Mental Illness. While this might be seen as a distraction from the point at hand, it in fact illustrates two points in defense of Szasz: first, that yesterday’s “illnesses” can easily become today’s jokes, and second, that pathologization can be actively disempowering—and in the case of the “treatment” of “hysterical” women, was deliberately so. Szasz, 190-91 (discussing Freud’s misogyny).
76 Edward Shorter, Still tilting at windmills: Commentary on The myth of mental illness, The Psychiatrist Apr 2011, 35 (5) 183-184; DOI: 10.1192/ph.bp.111.034108 (“This is so ironic. If you ask the producers of the movie One Flew Over the Cuckoo’s Nest how many suicides they are responsible for, they would be nonplussed, even though the answer is many. If you ask the anti-psychiatry gurus how many suicides their storming against neuroscience has caused, they would be at a loss - and respond perhaps with a gibe against Prozac. But the answer is many. Books such as Szasz’s delegitimised psychiatry in the eyes of much of the population, and drove desperately ill individuals away from such treatments as electroconvulsive therapy that could have been life saving”); A more charitable view: “It is hard to doubt the reality of mental illness, especially when the suffering of affected individuals is so complete and the impairment so extreme, when psyche and identity are crippled almost beyond repair. But it is also remarkable how much of modern psychiatry is still theoretical rather than empirical, and how many of the supposed mental illnesses that appear (and multiply) in the Diagnostic and Statistical Manual of Mental Disorders have no known biological underpinnings or explanations. Although Szasz’s critique often became a caricature, his intuition about the limits and deformations of modern psychiatry cannot be ignored. Many sick people have surely benefited from psychiatric treatment, both “talk therapy” and pharmacotherapy. But psychiatry’s long history of error — from snake pits to ice baths to spinning chairs to electroshock to lobotomy — should give us pause. Skepticism is not backwardness, even if Szasz often took his skepticism to rhetorical extremes.”


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today. As a primary matter, the notion that all non-mental illnesses or ailments are understood as mechanisms is not true: for instance, migraines and torticollis are diagnosed by clinical signs and not underlying mechanism. Indeed, the common cold would not have qualified as sickness until the age of modern medicine by a strict application of this standard of identifying illness. Moreover, while our understanding of the brain is still weaker than of other organs, there are physiological indicators of conditions like Alzheimer’s and even the more ambiguous case of depression.

Third, whatever one concludes about Szasz’s challenging thoughts on, say, hysteria or depression—which can be seen as extreme manifestations of ordinary behavior or moods, the “play-acting” understanding of schizophrenia seems like something of a stretch. “Performing” this “role” has little utility for the performer, little relationship to the sentiments or understandings of ordinary people, and appears to be rooted in a straightforward deluded understanding of the surrounding world. Ockham’s razor would suggest that schizophrenics—from whatever cause—are in fact suffering from some distortion of understanding beyond their control.

Szasz’s own words are perhaps the best indictment of his proposed “abolition” of mental health:

"In English and American law, of course, a person accused of a crime is considered innocent until proven guilty. As humane and rational physicians and patients, we should assume a similar posture vis-à-vis illness: we should assume that a person who complains that he is ill, or about whom others complain that he

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78 Edward Shorter, Still tilting at windmills: Commentary on The myth of mental illness, The Psychiatrist Apr 2011, 35 (5) 183-184; DOI: 10.1192/pb.bp.111.034108
is ill, is healthy until it is proven---if not beyond a shadow of a doubt, at least to a degree of reasonable likelihood---that he is ill."\textsuperscript{79}

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

In contrast to the very activist orientation of Szasz, Foucault’s work can be understood more concretely as critique, rather than criticism, with normative implications but no clear prescriptions. It also approaches the problem from a historical and social perspective, a macro-view, rather than from the extreme individualist angle adopted by Szasz. \textit{Madness and Civilization} is an (abridged\textsuperscript{80}) genealogical history of the concept of madness in the West, and the “mad” individual’s various manifestations through time, performing roles as diverse as bearer of enchantment, grotesque aberration to be displayed, sinner, and threat in need of confinement. The modern concept of mental health, he argues, developed during the Enlightenment, but owed its character less to reason and more to historical repressive structures, concepts, and practices, from the quarantining of lepers to the Christian dread of the damned.

\textsuperscript{79} Szasz, p. 83. For the opposite view, see Larson, Arthur, \textit{Mental and Nervous Injury in Workmen’s Compensation}, Vand. L. Rev. Vol. 23, No. 6 (Nov. 1970), p. 1258 (arguing that a “heavy burden should be upon the party that alleges malingering”).

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

Foucault’s charting of the concept of madness as it evolved in conjunction with new forms of repression and isolation of outsiders should keep us cognizant of potential ways mental health can be used to effect repression. However, it does not follow that abandoning mental health is a solution. For one, Foucauldian analysis of a Szaszian “free will”-based paradigm could expose equal or more horrific modes of social control as any mode originating in the dichotomy of reason vs. madness. Whatever the provenance of Foucault’s “draw[ing] close” of unreason and illness, there is good sense in analogizing the two categories in at least some contexts: some forms of unreason are in fact understood as physical defects and treated with some success as a

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

82 An example that comes to mind (and which would certainly please Szasz) is the occasional tendency of criminal defense lawyers in high-stakes, usually high-profile cases, to defy their clients wishes and seek to plea insanity. Two illustrative examples would be Valerie Solanas and Theodore Kaczynski, neither of whom comes across as less capable than a normal person of understanding the act of murder or attempted murder, but both of whom clearly held ideas the bulk of society find offensive. Their ideas, while perhaps disagreeable to the mainstream, were not incoherent—indeed, if anything, Solanas’s ideology is much *more* coherent than that of the average person. Valerie Solanas, *The Scum Manifesto* (San Francisco: AK Press, 1997); Fahs, Breane, *The Radical Possibilities of Valerie Solanas, Feminist Studies*, Vol. 34, No. 3 (Fall 2008), p. 601, available at [http://www.breannefahs.com/uploads/1/0/6/7/10679051/2008_feminist_studies_fahs.pdf](http://www.breannefahs.com/uploads/1/0/6/7/10679051/2008_feminist_studies_fahs.pdf); Booth, William, *Kaczynski Resists the Insanity Defense* Washington Post, Friday, Dec. 26, 1997, p. A01, available at [http://www.washingtonpost.com/wp-srv/local/longterm/aron/kaczynski122697.htm](http://www.washingtonpost.com/wp-srv/local/longterm/aron/kaczynski122697.htm)
result.\textsuperscript{84} Even if we are deploying the concepts of past eras—or perhaps more accurately, they are deploying us—that does not mean, and Foucault did not argue, that we can discard these concepts at will. A simple denial of the notion of mental illness would not resolve the predicament. Moreover, discussion of performative factors or structural origins should not obscure the evidence of human suffering, and the need for remedies.

V. MENTAL HEALTH AND BOUNDARIES

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

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

\textsuperscript{84} Edward Shorter, \textit{Still tilting at windmills: Commentary on The myth of mental illness}, The Psychiatrist Apr 2011, 35 (5) 183-184; DOI: 10.1192/pb.bp.111.034108.
Within the field of mental health, many experts have raised alarms about “diagnostic inflation,” the expansion in the number of diagnoses, their prevalence, and the use of medication in treating them. There are a plethora of books on the subject, including one notable attack on DSM-V by Allen Frances, the former Chair of the Task Force that created DSM-IV. If Szasz gained media notoriety in part by using official psychiatric credentials to attack psychiatry, Frances has an unimpeachable case to be making his case “from within the temple,” and concedes more than enough to the established elements of psychiatry to make his criticism credible to an insider community.

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

\[\text{\textsuperscript{85} To cite just a few examples, see Whitaker, Robert, }\textbf{Anatomy of an Epidemic: Magic Bullets, Psychiatric Drugs, and the Astonishing Rise of Mental Illness in America} \text{(New York: Broadway Books, 2011); Kirsch, Irving, }\textbf{The Emperor’s New Drugs: Exploding the Antidepressant Myth} \text{(New York: Basic Books, 2011); Greenberg, Gary, }\textbf{The Book of Woe: The DSM and the Unmaking of Psychiatry} \text{(New York: Plume, 2014).}\]

\[\text{\textsuperscript{86} Frances, Allen, }\textbf{Saving Normal}. \text{(New York: Harper Collins, 2013).}\]

\[\text{\textsuperscript{87} Frances, Allen, pp. 18-22, passim.}\]

\[\text{\textsuperscript{88} It is beyond the scope of this essay to explore whether that degree of happiness would not itself merit diagnosis and treatment.}\]
risk of over-diagnosis is much greater than it would be with disorders that cause testable symptoms like fevers.

Though Frances does not precisely endorse this theory of the difference between mental and physical illness, I want to make the case that at least for present purposes the distinction can best be understood from the opposite direction: from the two categories’ respective notions of healthy. Physical health is unambiguous in both its positive and negative forms. On the side of health, it is fair to say that a healthy liver functions as a liver should; a healthy elbow bends and does not ache. Similarly, physical illness is relatively clear, and familiar to most people in both its mild and extreme variants, from the common cold to terminal brain cancer. By contrast, mental illness may manifest clearly in its extreme negative form—a person with a Global Assessment of Functioning score of around 13 is likely to engage in acts like smearing feces, which is unambiguously bad from many angles—but there simply is no ideal model on the positive end of the spectrum: even the most well-adjusted person experiences disquiet, awkwardness, anxiety, sorrow, and fear. How to cope with these things is culturally specific (and the Western example par excellence of poor adjustment, suicide, is considered commendable or even obligatory in some circumstances in some cultures). If there is a correct answer to the question, How much elbow pain should a physically healthy person feel when lifting a notebook?—namely, none—there is no right answer to, How much anxiety should a mentally healthy person feel at a business social gathering?—and one can even argue that one who feels no anxiety in this situation is not normal.

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80 See, e.g., Fusé, Toyomasa, Suicide and Culture in Japan: A Study of Seppuku as an Institutionalized Form of Suicide, Social Psychiatry: Vol. 15, Issue 2, pp. 57-63 (1980).
Frances titled his polemic *Reclaiming Normal* to address what he views as a form of over-ambition in the psychiatric community, one that might be said to seek a mind as free of pain as a healthy elbow, and which accordingly pathologizes “normal” human failings, like overuse of smart phones, or overeating, or impatience. While Frances believes that attempts to rid society of these ills will fill, it is closer to his central point that he does not think purging these ills is even a desirable goal, as it will lead to other complications, and will create vulnerable and maladapted individuals who lean too heavily on psychiatric care. The name of his book underscores that the index for his vision of health lies in the lay concept of ‘normalcy,’ and accordingly is largely *ad hoc* and without clear lines. Most importantly, mental health is *normative* in a way that physical health is not. The point is not merely that attempts at perfect mental health are doomed to fail, though that may be true, but that there is something wrong with even setting such purity as a goal.

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

> One theory says that rates of mental illness are rising because we live under extreme pressures from a speeded-up, stressful society. Perhaps it is hard to be normal because our modern world is driving us crazy. This suggestion is difficult to disprove, but I find it completely unconvincing. Among the hundreds of thousands of generations of our ancestors who have ever walked this earth, we are undoubtedly the luckiest—extraordinarily privileged to live now and to live here [in the “developed world”-BED]. Previous generations (as well as people currently living in less favored parts of our crowded globe) suffer daily catastrophes that are unimaginable to most of us. Life has always been, and will always be, enormously stressful in one or another way. Indeed, our mental

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91 Frances, esp. 182-86.
discomforts can preoccupy us as much as they do only because most of us don’t have to worry about our next meal or the threat of being eaten by a passing tiger.\textsuperscript{92}

When we move away from cavemen and medieval peasants, however, and look to the recent past in the United States, we see that there are a number of indicators our current society might produce more misery than the society of our recent past. More people are killing themselves than used to, which is a warning sign.\textsuperscript{93} In addition, there are reasons for people to be less happy than previous generations, many of them intimately related to the workplace. Money makes people happier\textsuperscript{94} and ordinary workers in the U.S. have less of it than they did a generation ago, particularly in relation to the cost of certain basic needs like shelter.\textsuperscript{95} In addition, people are more likely to face consequences of an economically precarious life in other ways. They are more likely to lose their homes.\textsuperscript{96} “Sharing economy” services like Airbandb and Uber commercialize spaces like cars and homes that for many were previously private refuges from commercial values.

In addition, people enjoy the feeling of being useful, and the portion of our economic output that relates to the production of unambiguously useful things has decreased considerably: while about 41\% of the U.S. workforce was involved in farming in 1900, by 2000 this was below

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\item \textsuperscript{92} Frances, Allen, p. 81.
\item \textsuperscript{93} Center for Disease Control, \textit{Suicide Among Adults Aged 35-64 Years, United States, 1999-2010} 62(17); 321-25 (May 3, 2013), available at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6217a1.htm?s_cid=mm6217a1_w
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other forms of labor, like manufacturing, have also declined considerably. This wisdom about the mentally edifying value of being valuable was a commonplace in past ages—as illustrated by jailers punished even supposedly anti-social criminals by forcing them to do useless tasks, like breaking rocks. The view expressed by Frances ignores, however, that the shift from production of needs to production of advertisements, images, and services is bound to take a mental toll. This is particularly true when workers are made to feel pressure to produce with an urgency that belies this apparent purposelessness.

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

IV. CONTENTMENT AND THE WORKPLACE


Perhaps the best description of the absurdity of the modern Western workplace comes from Hannah Horvath, the protagonist of the television series *Girls*, who characterizes her advertising position as working in “a sweatshop factory for puns.” See *Girls*, Season 3, Episode 11.
The above analysis leads us to at least one solid challenge when analogizing between mental and physical injuries in the workers’ compensation setting: the boundaries of mental illness are more *fluid* and more *normative* than those of physical health, and accordingly, we cannot neutrally adapt the standards developed primarily in one field and simply apply them to the other. However, this point of disconnect between mental and physical health does not itself indicate whether we should treat mental injuries with *more or less* skepticism. Rather, the point clarifies that our treatment of mental health requires a deliberation on our standard of normalcy, and by implication, a judgment about the society in which we would like to live. Defining a healthy mind is more complex than defining a healthy body. Moreover, defining a healthy mind is a political question: that is, a question about social values, allocation of resources, what we deem desirable, what we deem acceptable, and whether the standards of desirability and acceptability are applied across society or only to select groups.

In the past couple of decades, some psychologists have developed a sub-school of mental health that emphasizes this positive side of mental well-being, rather than looking at pathology first as, in the manner of past schools.\(^\text{101}\) Called, appropriately enough, “positive psychology,” this sub-school has produced a number of best-selling works.\(^\text{102}\) Most intriguing for the present essay is that some employers have sought to implement the findings of positive psychological research to improve their employees’ well-being (and, presumably, to enhance their employees’ impression of their employer). The most famous example is Google, the supposed exemplar of the new technological, advanced economy.

\(^{102}\) For basic background, see the Positive Psychology Center at the University of Pennsylvania, available at [http://www.positivepsychology.org/](http://www.positivepsychology.org/).
The New York Times writes that employees at Google’s East Coast headquarters in lower Manhattan have a veritable play place of a work area, with vintage street-car-designed areas in which to converse, free snacks, bright colors, free yoga classes, author talks, and back massages (and depending on the source, either reasonable hours or insufferably long hours made sufferable through these various “perks”).\(^{103}\) Slate gushes in a similar vein, characterizing Google’s employee perks as both “swank” and “legendary in the corporate world,” and argues that its model may revolutionize other workplaces in the future.\(^{104}\)

There is something of corporate brainwashing about this happiness campaign: learning the mindfulness secret to being happy while working eighty-hour weeks seems needlessly complicated in comparison to simply reducing workers’ hours.\(^{105}\) And there is no question that fawning articles like the above help market Google as an entity that, per its slogan, “does no evil,” and loves its workers (some collusion with rivals to suppress salaries notwithstanding\(^{106}\)). The New York Times’ “article” on this subject reads almost like sponsored content. Nevertheless, it would be remiss to dismiss the entire operation as a sham: there is real research behind the happiness benefits of many of the measures offered, from sunshine to healthy foods, and the fact that back massages function as an industry is proof enough that they are widely deemed desirable.


\(^{105}\) See for instance, Kelly, Caitlyn, O.K., Google, Take a Deep Breath: Google Course Asks Employees to Take a Deep Breath (April 28, 2012). This is another fawning piece about Google’s practices but describes the goal as maintaining internal sanity for Google’s employees, rather than making their environment more conducive to mental wellbeing.

(if proof were necessary). Moreover, Google’s “perks” include benefits, like maternity leave, which have been major demands of workers’ movements for ages. The happy workplace may be brainwashing, but it is not just brainwashing; Google is indeed a better place to work than many in this country.

The principal problem in the media buzz over Google is not the glorification of one company, but rather the media’s total indifference to workers outside of the chic white collar world of “tech.” The media, ever-obsessed with Chipotle franchises when they are visited by presidential candidates, has next to nothing to say about how Chipotle’s workers or how they might benefit from Google’s lessons. Yet if one workplace has given us important clues to greater worker contentment, it seems natural to ask how we can use these clues for the rest of the work force.

The NYT and Slate articles do leave at least an implication that Google’s lessons are likely to be implemented in other workplaces because they increase productivity and hence inure to the owners’ benefit. One could argue that it follows that other employers would find these measures to be desirable. This assumption conveniently suggests that worker happiness does not challenge employer control, and will be voluntarily adopted. It also reflects liberal economic dogma about the “invisible hand” and ignores other reasons why employers might not pursue policies, even productivity-enhancing policies, that empower workers. (Indeed, Google’s tech cousin Amazon appears to be less than solicitous about its workers’ well-being.107) This argument also assumes that all workers are in an analogous situation with regard to these

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productivity gains—which is doubtful. White collar work (or some forms of it, anyway\textsuperscript{108}) may benefit from workers who feel free and energized in ways that assembling burritos or putting boxes of cereal on shelves may not. Even if the purchasers of labor were prudent and open to pro-worker measures that enhance productivity, they still may not get much benefit from employee happiness. This is particularly true for low-paid workers, for whom the costs of happiness promotion will surely be a higher proportion of their overall value to the company.

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

Workers’ compensation stress claims offer one path forward. Workers who lack the Googlean perks\textsuperscript{109} praised by positive psychology are not \textit{okay} simply because they manage to make it through each day without breaking down. Indeed, it is many of these people, whose jobs


\textsuperscript{109} I say Googlean, because I have no desire to present Google as such as a success model. The point is that what is good for well-paid software engineers is likely good for the rest of society.
seem purposeless or who feel the demands on them are incommensurate with the significance of their actions, who are already turning to mental health professionals for treatment of their problems—albeit in a manner that assumes that they are the problem, rather than their circumstances, which uses chemical modification instead of situation transformation, and which puts the costs on the state or private insurance, rather than on their employer.

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

Encouraging workers’ compensation stress claims puts the cost of workplace misery precisely where it belongs. The arguments against mental injuries that were rejected above ignore this basic point, and seem to take workplace misery as a given, albeit one to be borne by workers and by the rest of society. Indeed, one of the justifications, fear of the proliferation of claims, can be read almost confessionally: it is, indeed, a real possibility that a fair application of compensation principles to mental injuries will lead to more claims and higher costs. If the goal is, as the California 4th District Court of Appeal put it, to “reduce the costs of workers’

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

111 Actually, the U.S. is a rare country (one of only two in the world, according to the ILO) without official maternity leave, but this is misleading, as many poor countries do not have widespread implementation of labor benefits. See, e.g., Maternity and Paternity at Work, International Labor Organization publication, 2014, pp. 16, 21, available at http://www.ilo.org/wcmsp5/groups/public/----dgreports/---dcomm/---publ/documents/publication/wcms_242615.pdf
compensation coverage,\footnote{Sakotas v WCAB, 80 Cal. App. 4th 262 (Cal. Ct. App. 2000).} then restricting access to benefits is a perfectly sensible way of achieving that end. But to those who strive for at least a pretense of fairness, such “arguments” will not do. If the workplace is causing people to suffer depression or diagnosable anxiety, the solution is not to deprive workers of recourse but to make the workplace less miserable—just as one would hopefully tell an owner of a dangerous factory complaining of high costs for workers’ compensation physical injuries to consider making the place safer. Google offers some clue as to measures that can help toward this end, if its champions cared to consider most of society worthy of such beneficial measures. Decent pay\footnote{Cohen, Patricia, \textit{One Company’s New Minimum Wage: $70,000}, \textit{The New York Times}, April 13, 2015, available at \url{http://www.nytimes.com/2015/04/14/business/owner-of-gravity-payments-a-credit-card-processor-is-setting-a-new-minimum-wage-70000-a-year.html}.} and benefits—already the obvious rallying cries at most workers’ protests—would also go a long way toward making workplaces less prone to causing mental disorder.

Workers’ compensation stress claims are only one piece of the puzzle, of course. The evidence indicates that merely “putting the cost on employer” does not suffice to incentivize proper concern for worker health, so OSHA regulations should consider mental safety as well as physical—and should study the ways the two are intertwined.\footnote{Sidney A. Shapiro, \textit{The Necessity of OSHA}, 8-SPG Kan. J. L. & Pub. Pol’y 22 (1999)} In addition, the fight for better wages and pay will go on as goals independent of workplace stress claims; if they succeed, they will alleviate the employer liability of a miserable workforce the old-fashioned way: by making the workforce less miserable.

\section*{IV. CONCLUSION}

Workers’ compensation is a grand bargain between labor and management: employers have limited exposure for work-related medical problems if they cover certain wage loss and

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medical expenses without concern for fault, while workers have some protection from the vagaries of harmful events that are certain to befall at least some of them. This contract is under attack from management’s side on many fronts, but one of the clearest is the attack on mental health stress claims. There is no scientific justification for this assault: whatever the failings of mental health, it has actually improved in this time period, and lay judges and legislators are not in much of a position to discount these medical disciplines. Indeed, the arguments for treating mental injuries differently from physical injuries, as many jurisdictions do, fall flat. The reality is that the double standard is a political attack, designed not to fight fraudulent claims but to preserve the right of employers to run their workplace without concern for the misery it causes.

Mental health is distinct from physical health principally in the ways its positive angle is defined normatively; the most plausible way to fight against mental health claims while remaining faithful to the core principles of workers’ compensation is to argue that the threshold for diagnosable ailment ought to be high, and that people ought to suffer a good deal before they get any help. A turn to mental health from the standpoint of wellbeing—as defined by what the privileged classes themselves seek in a workplace—shows that respect for workers and their need for mental wellbeing should lead to more deference to compensation claims for work-related stress, not for the sake of pills but for the sake of improved conditions: diagnostic inflation for the people. And if the present system cannot accommodate this demand, that is a charge against our economy, and not against the pursuit of happiness.

Appendix A: California Labor Code Sec. 3208.3
3208.3. (a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.

(b) (1) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury.

(2) Notwithstanding paragraph (1), in the case of employees whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury.

(3) For the purposes of this section, "substantial cause" means at least 35 to 40 percent of the causation from all sources combined.

(c) It is the intent of the Legislature in enacting this section to establish a new and higher threshold of compensability for psychiatric injury under this division.

(d) Notwithstanding any other provision of this division, no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous. This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition. Nothing in this subdivision shall be construed to authorize an employee, or his or her dependents, to bring an action at law or equity for damages against the employer for a psychiatric injury, where those rights would not exist pursuant to the exclusive remedy doctrine set forth in Section 3602 in the absence of the amendment of this section by the act adding this subdivision.

(e) Where the claim for compensation is filed after notice of termination of employment or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury and one or more of the following conditions exist:

(1) Sudden and extraordinary events of employment were the cause of the injury.

(2) The employer has notice of the psychiatric injury under Chapter 2 (commencing with Section 5400) prior to the notice of termination or layoff.

(3) The employee's medical records existing prior to notice of termination or layoff contain evidence of treatment of the psychiatric injury.

(4) Upon a finding of sexual or racial harassment by any trier of fact, whether contractual, administrative, regulatory, or judicial.

(5) Evidence that the date of injury, as specified in Section 5411 or 5412, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.

(f) For purposes of this section, an employee provided notice
pursuant to Sections 44948.5, 44949, 44951, 44955, 44955.6, 72411, 87740, and 87743 of the
Education Code shall be considered to have been provided a notice of termination or layoff only
upon a district’s final decision not to reemploy that person.

(g) A notice of termination or layoff that is not followed within 60 days by that termination or
layoff shall not be subject to the provisions of this subdivision, and this subdivision shall not
apply until receipt of a later notice of termination or layoff. The issuance of frequent notices of
termination or layoff to an employee shall be considered a bad faith personnel action and shall
make this subdivision inapplicable to the employee.

(h) No compensation under this division shall be paid by an employer for a psychiatric injury if
the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action.
The burden of proof shall rest with the party asserting the issue.

(i) When a psychiatric injury claim is filed against an employer, and an application for
adjudication of claim is filed by an employer or employee, the division shall provide the
employer with information concerning psychiatric injury prevention programs.

(j) An employee who is an inmate, as defined in subdivision (e) of Section 3351, or his or her
family on behalf of an inmate, shall not be entitled to compensation for a psychiatric injury
except as provided in subdivision (d) of Section 3370.